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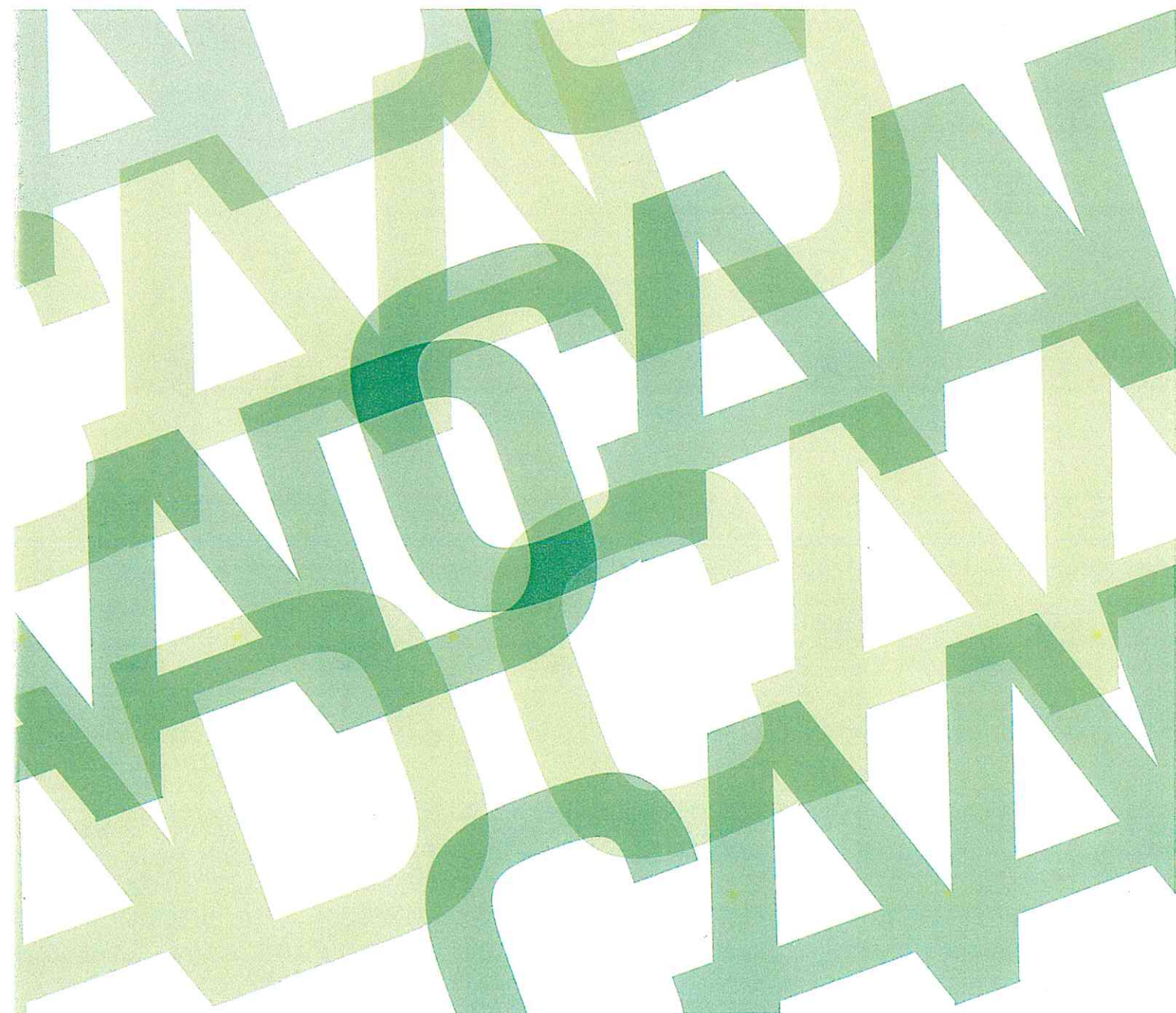
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WHAT CAN WE INFER FROM THE ASCENDI CASE?*



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Advogado

Three years after the entry into force of the Portuguese Tax Arbitration Regime, the European Court of Justice (“the Court”) has, in the *Ascendi* Case (Case 377/13), finally issued a groundbreaking decision regarding the long standing question of whether the Tax Arbitral Court (the “CAAD”) is a true jurisdictional body for the purposes of the preliminary ruling mechanism.

Despite being directly established in the preamble of the Portuguese Tax Arbitration Regime that the Tax Arbitration Court could

present preliminary rulings before the ECJ – within the context of an arbitral tax proceedings – the real matter to be clarified was whether the ECJ would consider itself competent to issue those rulings. That decision relied on whether the Tax Arbitral Court could be considered as a “jurisdictional body” within the meaning of Article 267 TFEU.

In *Ascendi*, following a request for a preliminary ruling on the interpretation of Articles 4, 7 and 10(a) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital brought on by the Portuguese Public Arbitration Centre, the ECJ, as a preliminary matter, established that arbitration tribunals dealing with tax issues should be considered a court or tribunal of a Member State for the purposes of Article 267 TFEU.

The decision was not unforeseen. In fact, it was long time anticipated given the special condition held by the Tax Arbitration Court as well as the existence of previous ECJ case law upholding the possibility of arbitral courts from member states presenting preliminary rulings (in cases such as *Doris Salzmann*). Ultimately, it was the apparent intense similarity between any regular domestic Court and the Tax

Arbitral Court that led the ECJ to conclude that the latter was a real “jurisdictional body”.

In light of the pending case law, the factors that the ECJ took into account when undertaking the assessment were namely, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it is independent and whether it applies rules of law.

The Tax Arbitral Court was deemed to meet all those factors in *Ascendi*, and thus qualified as a “jurisdictional body” for the purposes of the preliminary reference procedure. This decision was the ultimate clarification of an issue that has been unlocked since the Portuguese Tax Arbitration Regime first came out.

Concerning the legal origin of the Tax Arbitration Court, the Court took notice that arbitral tribunals are included in the list of national courts by Article 209 of the Constitution of the Portuguese Republic.

As for the permanent character required, the Court found that even though the composition of arbitral tribunals dealing with taxation is ephemeral and its activity ends once a final ruling has been issued, the Tax

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Arbitration Court, as an element of the judicial system, meets the necessary requirements to be considered of a permanent nature.

The special condition of the Tax Arbitration Court is particularly visible concerning the compulsory jurisdiction requirement. In contrast to contractual arbitration, where the contracting parties are under no obligation, either in law or in fact, of commending their dispute resolution to arbitration,

in tax arbitration if the private entity so wishes the Tax Authority is not allowed to refuse the arbitration and therefore is neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator. In other words, its establishment is not subject to a prior agreement between the parties as to the submission of the dispute to arbitration.

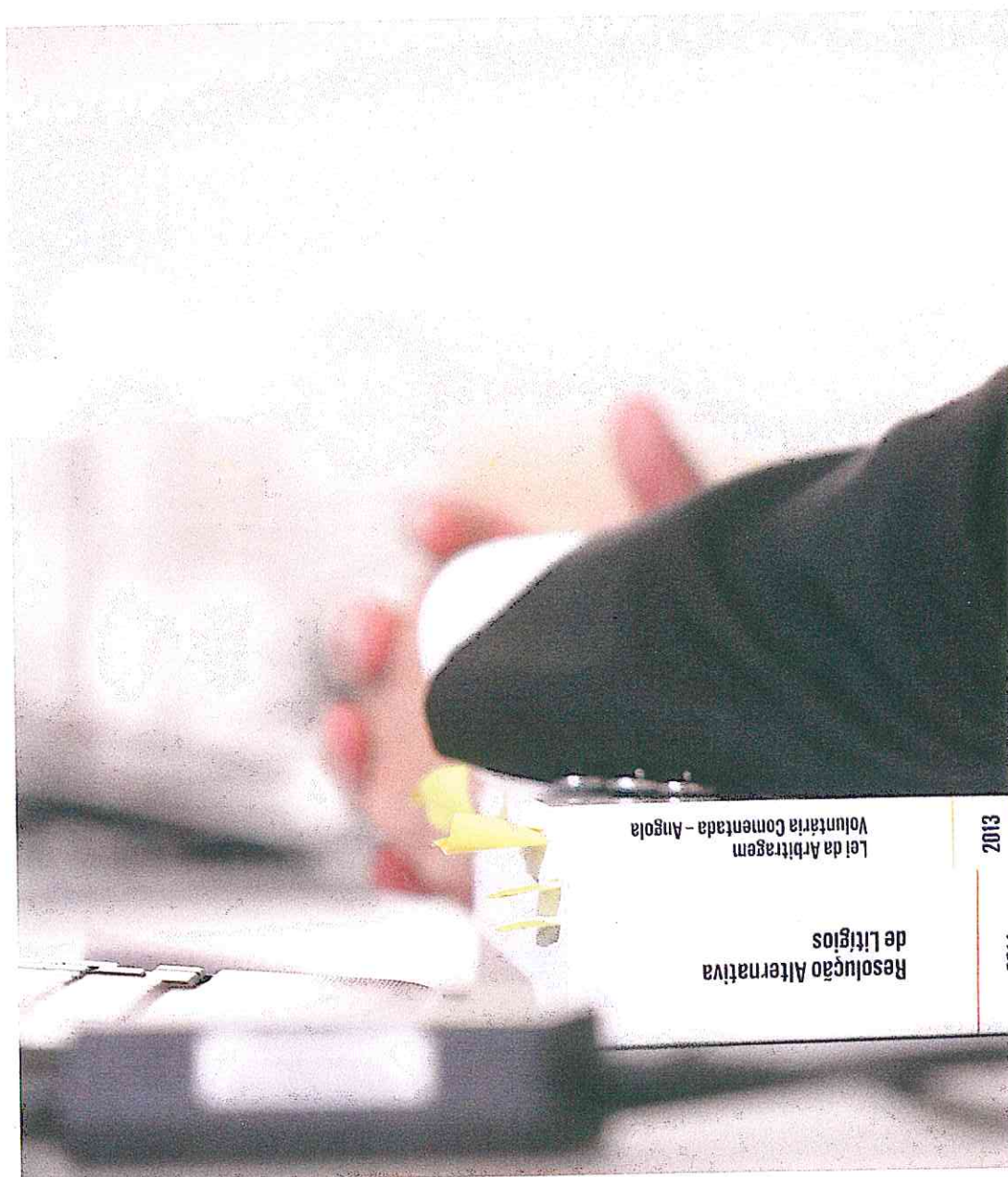
As for the requirement of _inter

partes_ procedure before the arbitral tribunals dealing with taxation, the Court considered that such requirement was also fully met in _Ascendi_, since pursuant to Articles 16 and 28 of Decree-Law No 10/2011 the arbitration proceeding is conducted with respect to the principles of equality between parties and the guarantee of adversarial process. Additionally, in accordance with Article 2(2) of the aforementioned Decree-

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Concerning the independence of the Tax Arbitral Court, the Court noted that, according to the Portuguese Tax Arbitral Regime, the arbitrators comprising the established Tax Arbitration Court are appointed by an independent body – Ethics Board of the Centre for Administrative Arbitration



law and as stated by the Court in Ascendi, the Tax Arbitral Court follows criteria of strict legality, being, in fact, demanded to adjudicate on the basis of statutory law. Furthermore, the recourse to equity is utterly prohibited under the Tax Arbitration Regime.

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are appointed by an independent body – Ethics Board of the Centre for Administrative Arbitration – from a list of potential candidates drawn up by that institution. Besides, according to the above mentioned Decree-Law, arbitrators must respect the principles of impartiality and independence, as well the impediment to the exercise of the function of arbitrator and the existence of any personal or professional relationship between the arbitrator and one of the

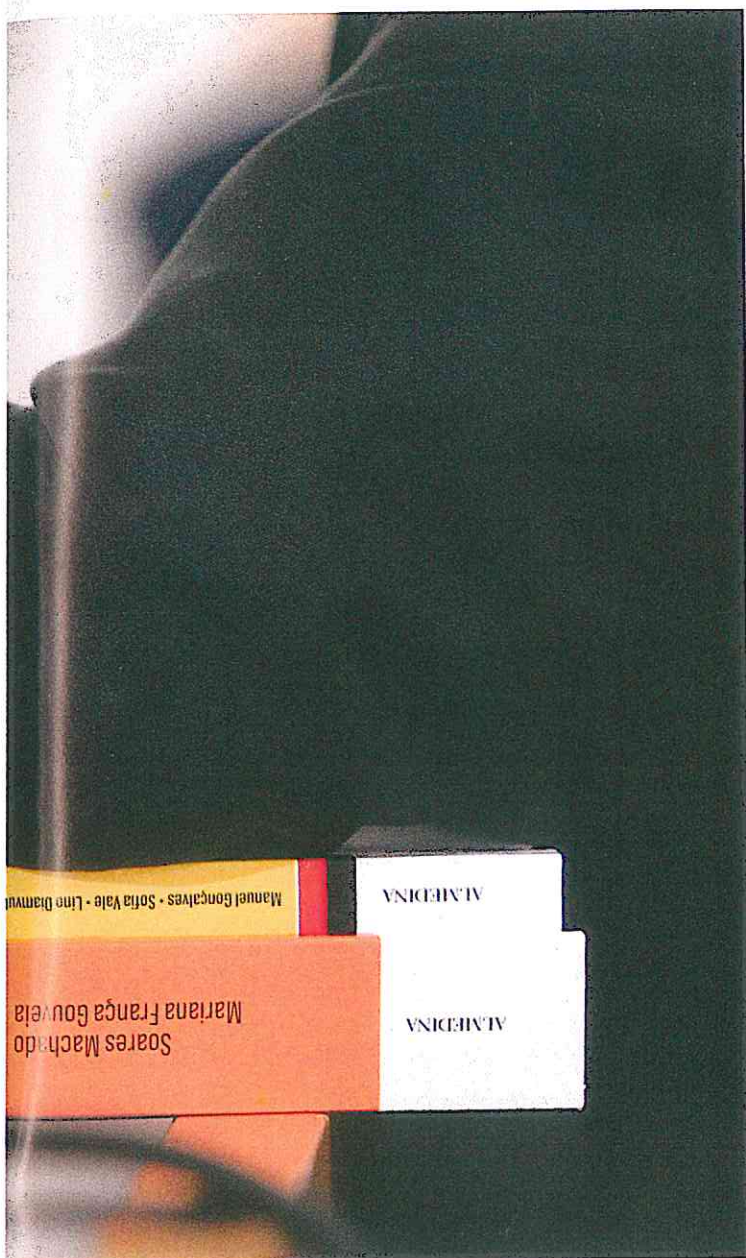
parties to the dispute.

Finally, the binding character of the decisions issued by the Tax Arbitral Court, especially towards the Tax and Customs Authority, was another strong hint in favour of the affirmation of this Court as a real “jurisdictional body”. The ECJ found to be quiet clear that pursuant to Article 1 of the Decree-Law, the arbitration tribunals dealing with tax matters give binding judgments of a jurisdictional nature.

Even though Portuguese tax

scholars have been unanimously sustaining for a long time that the CAAD constitutes a ‘tribunal’ within the meaning of Article 267 TFEU, the recent decision of the Court has the virtue of both erasing any doubts that might still endure regarding the jurisdictional nature of the tax arbitral tribunals and, at the same time, reinforcing the legitimacy of CAAD within the Portuguese jurisdictional system.

There are however some logistic setbacks. The fact is



that arbitration has historically been designed to be a speedy and efficient alternative to dispute resolution implemented through the judicial system. Hence, suspending the domestic proceedings in order to wait for the ECJ to issue a ruling on a given matter may turn arbitration in a more costly and time-consuming recourse. This matter is further aggravated by the fact that the Portuguese Tax Arbitration Regime establishes a maximum mandatory

deadline of one year for the final decision to be issued (initial deadline of six month, extendable for an additional six), which may very well be impossible to meet if the Tax Arbitration Court presents a preliminary ruling before the ECJ. It is still highly uncertain among the Portuguese scholars which legal outcome will result from the breach of the maximum mandatory deadline. It simply never happened. It is probably unlikely that the groundbreaking decision in the

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Ascendi Case will be extended to other types of arbitral tribunals, mostly since the ECJ's decision relied primarily in the fact that contrary to contractual arbitration, where the contracting parties are under no obligation, either in law or in fact, of commending their dispute resolution to arbitration, the tax arbitration – at least the Portuguese Tax Arbitration – is not subject to a prior agreement between the parties as to the submission of the dispute to arbitration, it derives directly from a legal statute that was subscribed by the Portuguese Tax Authority. One can even argue that ECJ's decision in the Ascendi Case has also served the unintended purpose of ruling out any possible chance that other types of arbitral courts will ever be able to resort to the preliminary ruling mechanism.

Lastly, there is one last implication certainly worth mentioning concerning the _Ascendi_ decision. In fact, Portuguese scholars have long wondered whether the decisions issued by the Tax Arbitral Court – found to be in contradiction with a ECJ decision – would be subject to revision by a Portuguese Administrative Court. The decision issued in _Ascendi_ was thus determinant to cease this quarrel (which was recently successfully sustained for the first time before Portuguese Supreme Administrative Court). Truth be told, if the ECJ is indeed competent to issue preliminary rulings brought to it by a Tax Arbitral Court, it is only reasonable to sustain that its final decision should be subject to revision if found to be inconsistent with a decision of the ECJ on EU-law related issues.