

The Taxpayer's Access to Courts in Portugal and the USA



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Introduction

This work focuses on the examination of the access to courts by the taxpayer in Portugal and in the USA. Although these countries are categorized in the same system, the solutions and reasons for each procedure are distinct.

By a general comparative analysis, it is possible to divide the Tax Jurisdictional models in two categories: autonomy models (the Tax Courts constitute a jurisdictional order autonomous in relation to the others) and integration models (Tax Courts are integrated in another jurisdictional order). In the absolute integration models, there are no tax courts with this designation. In the partial integration models (including Portugal and the USA) they exist, but integrated, at the top or apex, in a broader order that includes them. It is also usually distinguishable among the existing systems the effect the Court's powers have on the separation of powers principle (article 3º/1 of the Administrative Courts' Procedure Code and article 1º, section 8, clause 1 of the U.S. Constitution). A star-like system seems to characterize the types of systems where the parliament is the center enacting laws and each power has the competence to apply them. Legal sources in cascade, in contrary, are the types of systems where each power simultaneously interprets and complements the gaps of other legal sources (including the Courts), creating rules. Professor Ana Paula Dourado defends that, even in legal systems where tax laws are exclusively enacted by parliamentary law (where the USA are included), legal sources of taxes are organized in cascade.

In light of the above, this work pretends to compare the guarantees that the administration (point II and VI A and B) and the Courts (point III, IV, VI, VII) provide to the taxpayer, as well as how the judges deal with the lack of proof in the lower Courts and how the Supreme Courts are able to unify the regulations for certain types of cases.

I. History of the USA's Tax Courts and Litigations

Congress has repeatedly expanded taxpayers' rights, often by providing additional opportunities for judicial intervention. In 1924, there were concerns that some taxpayers, who could not afford to pay first, would be harmed if refund litigation was the only means available to challenge individual tax liabilities. As a result, Congress created the Board of Tax Appeals (BTA), an executive agency that exercised semi-judicial power. It was to be established within the Department of the Treasury. About the jurisdiction, it was only provided for the Board to review issues in respect to income, estate, and excess profits taxes. Instead of relying on the administrative record, the BTA conducted a *De Novo* Review¹.

¹ CHIRELSTEIN, Marvin A, DAY, Langdon, OWENS, Elizabeth A., *Taxation in the United States*, in *Harvard Law School, International Program in Taxation*, 1963.

Due to the Revenue Act (1926) the Board was transformed from an independent agency in the executive branch into a Court. Nevertheless, not until 1942 would the Board's name be changed to the Tax Court. Finally, in 1969, the court was established as a legislative court under article I of the Constitution, and its name was changed to the United States Tax Court.

Prior to 1970, the Tax Court would not consider itself bound by decisions of the Court of Appeals. Due to jurisdictional problems, the Tax Court agreed in 1970 in *Golsen v. Commissioner* to follow decisions of the Court of Appeals in the circuit in which the appeal can be filed².

II. The Internal Revenue Service

The Internal Revenue Service (IRS) is a federal agency because it is subject to the jurisdiction of different trial courts, the two most important of which are the United States Tax Court, a specialized court of limited jurisdiction, and the United States District Court, a court of general jurisdiction³.

According to § 551 of the U.S. Code, "Agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. The term under the APA is "agency action", defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

The activities of administrative agencies fall into two categories: rulemaking and adjudication. Under § 551(7), "adjudication means agency process for the formulation of an order". There are "formal adjudications," governed by §§ 554, 556 and 557, which are more like court cases. In formal adjudications, the presiding officer is normally an administrative law judge who generally specializes in the work of that agency and sometimes even has a sub-specialty if the agency enforces several different statutory regimes. Adjudication aims to resolve a dispute either between a federal agency and a private party or between two private parties⁴.

The taxpayer, in case of a notice of deficiency, can negotiate a settlement through the appeals office (due to its competence for formal adjudications)⁵. These settlements are particularly appropriate for disputes of relatively small dollar amounts or where there are a number of disputed items which facilitate a give and take process (mutual concessions between the private party and the IRS). The major disadvantage to a negotiated administrative settlement is that an IRS appeals' officer is likely to be less impartial and objective than a court judge.

²<http://archives.cpajournal.com/old/13808649.htm>

³HOWARD, Robert M., *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of tax decisions*, in *The Justice System Journal*, 2013.

⁴MORRISON, Alan B., *Administrative agencies are just like legislatures and courts, except when they're not*, in *Administrative Law Review* Vol. 59, N° 1, 2007.

⁵<http://archives.cpajournal.com/old/13808649.htm>

III. Tax Jurisdiction

The Tax Court's jurisdiction is prescribed by section 7442 of the Internal Revenue Code. One way to consider the Tax Court's current jurisdiction is to divide it based on the type of inquiry that the court conducts. The first category includes deficiency redeterminations and requires a *De Novo* review.

The second category, the primary inquiry is whether the Service permissibly exercised its discretion. These cases include tax collection cases, such as innocent spouse and collection due process. The authorizing statutes direct the court to determine whether there was an abuse of discretion. To determine whether an agency (IRS) abused its discretion, the courts generally review only the record created during the agency proceeding. When conducting abuse of discretion review, the court usually will not substitute its judgment for that of the agency.

Perhaps because most of its jurisdictional grants require that the Tax Court conduct *De Novo* review, the Tax Court has concluded that it is not bound to law principles (which regulate the rule of the deferential review) even when conducting abuse of discretion review.

A. The Tax Court

Since the New Deal, there have been many proposals to remove adjudicative functions from administrative agencies, vesting these functions instead in specialized courts. Such proposals have been motivated by criticisms of the impartiality of adjudications by agencies that combine rulemaking, adjudicatory, and enforcement functions. In considering the jurisdiction of specialized courts, two variables are relevant: exclusivity and limitation. Specialized courts that decide only cases of a particular type but that decide less than all of the cases of that type. The Tax Court is perhaps the most prominent example of this type of jurisdiction⁶.

The Tax Court is an Article I Court. It's a legislative court that does not have full judicial power. Judicial power is the authority to be the final decider in all questions of Constitutional law, all questions of federal law and to hear claims at the core of *habeas corpus* issues⁷. No prepayment is required to plead. More often than not, tax disputes are held in Tax Court because you can appeal a deficiency (which is the numerical difference between the amount of tax that a taxpayer reports on a tax return and the amount that the (IRS) considers is actually owed) without having to pay the tax liability assessed by the IRS (in contrary to the consequences of a plead in a district court where you pay the tax and sue for a refund)⁸.

⁶ REVESZ, Richard L., *Specialized Courts and the Administrative Law Making System*, in *University of Pennsylvania Law Review*, Vol. 138, 1990.

⁷ <https://www.uscourts.gov/about-federal-courts/court-role-and-structure>

⁸ <https://porter-law.com/practice-areas/tax-controversy/tax-court-litigation/>

Most Tax Court cases are settled prior to trial. It starts with the statutory notice of deficiency, as prescribed by the Internal Revenue Code on § 6212. Having not resolved the case after your IRS audit and subsequent IRS appeal, the IRS formally notifies you that you owe additional income tax. This notice is usually triggered by tax information received from a third party, such as a financial institution, that does not match the information reported by the taxpayer⁹.

If the taxpayer reaches an agreement with the agency, it is entered by the court as a stipulated decision. If there is no agreement, and a decision is rendered at trial, the presiding judge will issue a Division Opinion (which have precedential value) or a Memorandum Opinion (which have no precedential value). The case is closed by an entry of decision stating the amount of deficiency.

Even though the IRS initiates a tax dispute by mailing the tax payer a statutory notice, it is the taxpayer that brings the actual litigation by filing a petition with the tax court. The statutory notice benefits from a “presumption of correctness”. It is not a true presumption, it only shifts the burden. So, the taxpayer has the burden of persuasion¹⁰.

B. Concurrent jurisdiction: Tax Court vs District Courts

If the taxpayer files a petition in the Tax Court based on the notice of deficiency, then the district court or the Court of Federal Claims loses jurisdiction over the case to the extent that the Tax Court acquires jurisdiction.

To sue in district court, the taxpayer must pay the disputed tax and then sue for a refund. Decisions of these courts can be appealed to the court of appeals for the circuit within which the district court is located. The district courts are located within each state. The judges are appointed from that particular state, with district court decision making its subject to regional and political effects. Thus, the district court should be more influenced by the state political and economic climate.

Although some issues appear in both courts, such as what constitutes income and what deductions were proper, the two courts at times deal with different issue areas. The district court, unlike the tax court, confronts issues as to whether income was properly withheld from employees, as the government holds a taxpayer responsible for a company’s failure to withhold taxes properly. The tax court, by contrast, often deals with innocent-spouse issues. This occurs when a spouse signs a joint return but claims lack of knowledge of the contents in order not to be held responsible for penalties and interest.

⁹ <https://www.investopedia.com/terms/n/notice-of-deficiency.asp>

¹⁰ HOWARD, Robert M., *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of tax decisions*, in *The Justice System Journal*, 2013.

The district courts have more experience conducting abuse of discretion review than does the Tax Court.

The Tax Court's failure to consider the rules of administrative law as used by the District Courts in this area has resulted in inconsistent results to similarly situated taxpayers, in contravention of the norms and goals of sound tax policy. In addition, the difference in approach by the district court and the Tax Court could lead to inconsistency within cases of concurrent or overlapping jurisdiction.

IV. Tax Appeals

A. *De Novo* Review (Robinette v. Commissioner)

In most tax collection cases, the question is whether the taxpayer is challenging the service's abuse of discretion or the validity of the tax. If the issue is the abuse of discretion, the case *Magana v. Commissioner* states the Tax Court could consider only arguments, issues, and other matters that were raised at the CDP hearing or brought to the attention of the appeals officer (the record review rule). To avoid this limitation, the Robinette majority defined the issue raised at the CDP hearing broadly, as an issue of compliance with the terms of the OIC.

In the case mentioned above, the issue revolves around the right to judicial review of service, an important taxpayer protection under section 6330(d)¹¹. The intent of section 6330 was to support taxpayers in dealing with the IRS with the same rights they would have against any other creditor, to increase fairness to taxpayers during collection. In the case, the court held that the Service's appeals officer had abused his discretion when he failed to consider whether the taxpayer had materially breached an offer in compromise (OIC) before declaring the OIC agreement in default. The taxpayer argued that a *De Novo* standard of review was appropriate, and that the court could consider evidence not included in the administrative records. Such protection of taxpayers' rights would be particularly necessary in cases like this, where the potential abuse of discretion lies in an appeals officer's refusal to consider evidence which is subsequently excluded from the administrative record.

Notwithstanding the refusal of a majority of the Tax Court to apply the APA and administrative law in collection cases, Judge Halpern of the Tax Court has made a case for the applicability of administrative law to the consideration of actions by the IRS. In the *Robinette v. Commissioner* case, the dissenting Judge explained the approach that should be used by the Tax Court in pre-levy collection due process (CDP) cases, including following the rule of record review.

¹¹ SCHEIBEL, Elisa Mae, *Mixing It Up: The Tax Court Pairs a De Novo Scope of Review with an Abuse of Discretion Standard of Review under Section 6330(d) in Robinette v. Commissioner*, in *The Tax Lawyer*, Vol. 58, No. 4, 2005.

One of his arguments concerning the scope of review was that the majority opinion created a potential inconsistency between the standard applied by the Tax Court and that applied by the federal district courts when reviewing section 6330 decisions.

District Courts apply the record rule when reviewing abuse of discretion cases. This resulted in two different scopes or reviews, depending on the forum.

Moreover, The Internal Revenue Code instructs the Tax Court to “redetermine the correct amount of the deficiency.” The use of the term “redetermine” as opposed to “review” or “determine” takes on added significance when, as discussed below, one considers that Congress used “determine” in other parts of the Internal Revenue Code to define the Tax Court’s judicial review function. The use of the prefix “re-” to modify the word “determine”, suggests that something has been, or must be, done again; a definition in closer harmony with a *De Novo* standard.

There are also two Supreme Court cases restricting judicial review of other administrative agencies to the administrative record: *Fla. Power & Light Co. v. Lorion* (1985) and *United States v. Carlo Bianchi & Co* (1963). In the first case, The Supreme Court stated that when the record before the reviewing court indicates that the agency "has not considered all relevant factors" the appropriate action is a remand to the agency "for additional investigation or explanation". The reviewing court is not generally empowered to conduct a *De Novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

In the second case¹² the respondent, Carlo Bianchi and Company, entered into a contract with the Army Corps of Engineers for the construction of a flood control dam. The contract contained a standard "changed conditions" clause, authorizing the contracting officer to provide for an increase in cost if the contractor encountered subsurface conditions materially different from those indicated in the contract or to be reasonable. The Court decided that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. If the administrative record is defective or inadequate, or reveals the commission of some prejudicial error, the court can only hold an evidentiary hearing and proceed to judgment.

Professor Christopher Walker also defends that we return to principles of administrative law to conclude that the Tax Court, when reviewing federal agency actions, is bound by the APA, just like every other federal court. Unless Congress has directed otherwise by statute, the APA’s default provisions apply to a court’s review of agency action (as stated in § 706 of the APA, reflecting the abuse of discretion standard). The Tax Court is bound to “*review the whole record or those parts of it cited by a party*”. If the Tax Court were not a “court” under the APA, then, by statutory definition, it would be an “agency”; a position that the Tax Court has correctly rejected¹³.

¹² <https://supreme.justia.com/cases/federal/us/373/709/>

¹³ SCHEIBEL, Elisa Mae, *Mixing It Up: The Tax Court Pairs a De Novo Scope of Review with an Abuse of Discretion Standard of Review under Section 6330(d) in Robinette v. Commissioner*, in *The Tax Lawyer*, Vol. 58, No. 4, 2005.

In his initial *Dobson v. Commissioner* case draft, Justice Jackson took the approach that Tax Court matters were essentially unreviewable, leaving the appellate courts with little more than a proofreading function¹⁴.

Before *Dobson*, review of Tax Court decisions was the same as review of district court decisions. Until the *Dobson* decision in 1943, it was assumed by all the courts, including the Supreme Court, that, on appeal from the Tax Court, questions of law were fully reviewable and questions of fact were subject in general to the same sort of limited review that prevails on appeals from the United States district courts (record rule). An important element of the current status of *Dobson* is that the Tax Court is no longer an administrative agency, although it was one both at the time *Dobson* was decided and at the time of the statutory amendment.

B. Court of Appeals

Meaningful Article III appellate review of an Article I court's decisions helps promote the values underlying Article III, such as avoiding politically motivated decision-making. Appellate courts generally defer to trial courts with respect to the facts, not the law. The idea behind that deference is that the trier of fact is better equipped to find the facts because of its observation of the witnesses.

The article 7482(c) of the Code¹⁵ is silent on the details of the standard of review, even as to questions of law. Does the appellate court take a *De Novo* look to determine whether the decision is “not in accordance with law,” or does it apply some other standard? The legislative history of subsection (c) should not be dispositive because that section was enacted in 1926, well before the Board became a court. Section 7482(a)¹⁶ could be viewed as filling the gap as to the standard of review on the matter of law.

An exception to this case might be the cases of abuse of discretion by the lower court (Tax Court). The Tax Court's general power to prescribe its own procedural rules is stated in I.R.C. § 7453.

Given the discretion the Tax Court enjoys under § 7453, a *De Novo* standard of review is not proper when reviewing a Tax Court's interpretation and application of a procedural rule. Taking I.R.C. § 7482 and 7453 together, appellate courts should review the Tax Court's procedural rulings (made discretionary by I.R.C.) under an abuse of discretion standard of review, the same standard applied to discretionary district court decisions (as required by I.R.C. § 7482).

¹⁴ LEDERMAN, Leandra, *(Un) Appealing Deference to the Tax Court*, 2014.

¹⁵ *Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.*

¹⁶ “(...) in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari (...).

C. Supreme Court

Its intervention in this domain is not the rule, only being valid if it is admitted upon a special request in this regard (writ of certiorari) or when binding instructions are required for the purpose of signing decision terms. The word certiorari comes from Law Latin and means "to be more fully informed." A writ of certiorari orders a lower court to deliver its record in a case so that the higher court may review it (§ 1254 of the US Code).

This possibility for tax matters began in the 19th century. It was provided for a certiorari to be issued by the Supreme Court upon the petition of a person assessed, which might allege that the assessment was illegal, or erroneous by reason of over-valuation, or was unequal by reason of the fact that the assessment had been made at a higher proportionate valuation than other real or personal property had been assessed on the same assessment roll by the same officers¹⁷.

In the case *Commissioner v. Stern* it is decided that the reasons for the Supreme Court to guarantee these petitions are: the substantial confusion between the courts of appeals and the importance and reiteration of the issue¹⁸.

V. History of the Portuguese Tributary Procedure

The existence of the administrative and Tax Courts jurisdiction (category) is based on the Constitution (articles 209, § 1, b) and 212). They have their own status, the Administrative and Tax Courts Status, approved by the Law 13/2002, of February 19, 2002. Therefore, there is an administrative and fiscal jurisdictional order autonomous from the common jurisdiction. They are recognized as sovereign bodies with competence to administer justice in the name of the community (article 1^o of the Administrative and Tax Courts Statute)¹⁹. There is a Supreme Administrative Court that, together with the Circle Administrative Courts, forms a judicial system (an ensemble of courts, hierarchized among them headed by a Supreme Court exclusively dedicated to their matters and manned by judges with specific statutory rules and career, as regulated by the article 211, paragraph 1, subparagraph b) of the Constitution).

The Administrative Procedure Code, in 2015, approved by Decree-Law N^o 4/2015, of 7 January, introduced important changes regarding the "general principles of administrative activity". There is a restriction of the forms and terms under which administrative acts may be imposed coercively by the Administration (article 176^o/1).

¹⁷ DAVIES, Julien T., *The Remedy by "Certiorari" in the State of New York for Illegal, Erroneous or Unequal Assessments*, in Columbia Law Review, 1901.

¹⁸ https://www.supremecourt.gov/DocketPDF/19/19-969/130493/20200130155540105_Petition%20for%20Writ%20of%20Certiorari.pdf

¹⁹ NETO, Dulce, ESTEVES, Fernanda, *A jurisdição fiscal - questões de processo, organização e funcionamento dos tribunais tributários*, in *Revista Julgar*, 2019.

It's seen as the end of the executive Administration model.

Recently, in 2019, the first instance Tax Courts (as well as the administrative Courts) began to have specialized sections (article 9º/A and 49º/A of the Administrative and Tax Courts Status). For example, there is a specific section for tax foreclosures which represent about 40% of the pending cases.

VI. Tax Jurisdiction

To determine whether an issue must be judged on the Tax Court's Section or the Administrative Court's Section, it is used by the jurisprudence the term "tax legal relationship". These are not only those disputes that grow within the tax legal relationship, but also those that arise as a result of that previous relationship. The Administrative Supreme Court uses the term "tax matter" to delimit the tax jurisdiction, stating that: *tax matters are those that require the interpretation and application of any rules of substantive or adjective tax law, for the resolution of questions on matters relating to the exercise of the tax function of the Public Administration.*

Also included are those that emerge from the authoritarian resolution that imposes on citizens the payment of any monetary benefit with a view to obtaining revenue for the satisfaction of public charges of the State and other public entities, as well as the set of legal relationships that arise as a result of the exercise of such functions or that are objectively connected with them²⁰. The Courts already decided a case where the legality of the settlement of taxes was not the issue, but rather the questioning of the payment of the contractually accepted and which implies the interpretation, validity and execution of a concession contract, being exclusive to the administrative courts. The appellant considered that the liquidation was illegal since the respective determination of the taxable amount is fixed by the administrative authority and has nothing to do with the actual and effective result of the company's activity. The remaining benefit, although it was established under a contract signed with the concessionaire, is nevertheless authoritarian in nature and constitutes a monetary benefit with a view to obtaining revenue for the satisfaction of public charges of the State and of the Institute of Tourism. The Tax Court is competent (article 49º/1-a-i) Administrative and Tax Courts Status)²¹.

The Portuguese tax jurisdiction system is criticized by having distinct types of litigations that occupy the court, delaying the processes for each legal relationship. Professor Joaquim Freitas da Rocha suggests the following reform: Three distinct circles within the tax courts: scope restricted to taxes (tax jurisdiction); broad scope, to all taxes (taxes, fees and various

²⁰ Judgement of 26/09/2006, process nº 14/06.

²¹ FERREIRA, Ricardo Nogueira das Neves de Matos, *Autonomia e limites da Jurisdição Tributária*, 2012.

contributions: tributary jurisdiction); very wide scope, to all matters of public revenue (taxes, public loans, property income, community funds, financial jurisdiction, etc.)²².

A. Access to the first instance Court

In certain specific circumstances the administrative review procedure is a precondition that needs to be met before taking the dispute to Court. This is generally the case with self-assessments or withholding tax disputes, in which taxpayers can only go directly to court if the dispute does not pertain to a matter of fact and the assessment was made in accordance with assessment guidelines published by the tax authorities. When challenging the lawfulness of tax assessments internally within the tax authorities via the administrative claim procedure, a fair chance of success exists only regarding severe errors of fact or law or if taxpayers can provide new documents or information that was not examined within the audit²³.

In the case of an express or tacit negative decision of the Portuguese Customs and Tax Authority, there is the possibility to lodge an appeal against the decision of the initial claim to the Minister of Finance before moving to Court. The Portuguese Customs and Tax Authority has no specific deadline to decide these initial claims and appeals. However, taxpayers, to avoid waiting indefinitely for an express decision, can presume a negative decision after a certain time period has elapsed. There are two exceptions to this rule (where the taxpayer is able to move directly to courts): where there is taxpayer disagreement with the self assessment; where the withholding is only based on a matter of law and the self-assessment or the withholding was made in accordance with general instructions provided by the tax authorities.

Among the many contesting guarantees for the taxpayer, the gracious claim must be highlighted. It is a non-judicial alternative and it begins in the sequence of another procedure: the tax settlement. The taxpayer believes the tax is illegal or mistaken (article 68º/1 of the Tax Procedure and Process Code). It is the most common case. The taxpayer has to prove the following facts: the mistaken quantification or qualification of the taxes, the lack of competence involved, the absence of the legal justification, or other legal requirements²⁴. If the process value does not exceed the Tax Court's scope (5.000€), the peripheral organ decides immediately after the fact finding stage. If the decision is not positive for the taxpayer, he will receive a notification (including the project of the decision) so he can participate in the hearing (article 60º/1 of the General Tax Law). If the final decision rejects the taxpayer's claim, he can proceed to the judicial claim (article 102º of the Tax Procedure and Process Code).

²² ROCHA, Joaquim Freitas da, *Competência dos tribunais tributários, pós modernidade jurídica e desjurisdicionalização*, 2006.

²³ RIBEIRO, Nuno Cerdeira, *O Controlo Jurisdicional dos Atos da Administração Tributária*, 2014.

²⁴ MARTINS, Jesuino Alcântara, ALVES, José Costa, *Procedimento e Processo Tributário*, 2015.

There is also the option (article 80° of the General Tax Law) of hierarchical appeal (directed to the Minister of Finance) and, if the decision is not favorable, there's the chance of judicial claim (article 97°/d) and p) of the Tax Procedure and Process Code).

According to article 69°/a) of the Tax Procedure and Process Code the gracious claim is simple and relatively quick, since it does not require essential formalities - indent b), as well as limiting the evidentiary means to documentary evidence - indent e). The gracious claim is different from the administrative claim, the first being used for the purpose of assessing the legality of tax acts and the second with respect to administrative tax matters (article 191° of the Administrative Procedure Code). Therefore, the gracious claim may be based on any illegality of the liquidation act or any procedural defect that occurs prior to the final decision. If the competent organ does not decide within four months from the date of entry into the services, it is presumed to be tacitly rejected for the purposes of a hierarchical appeal, litigation appeal or judicial claim (articles 57°/5 of the General Tax Law, as well as articles 76°/1 and 106° of the Tax Procedure and Process Code).

Concerning the access to Courts, regardless of the cases where the administrative claim is mandatory, taxpayers must either pay the disputed tax, or provide collateral (for example, a bank guarantee), before Court proceedings can commence.

For the administration's act to be contested, it has to be harmful (for example, the acts executed during tax foreclosure- article 95°/2-j) of the General Tax Law). The act must include a decision, as stated in the article 60° of the Tax Procedure and Process Code: "*the tax acts practiced by tax authorities are definitive in the fixation of the rights of the taxpayer*". Moreover, it also includes provisional acts, although requiring the contestation to be in the moment of the definitive liquidation.

There are many tax procedural means, as stated by the article 101° of the Tax General Law and article 97° of the Tax Procedure and Process Code. Most of the means are in reaction to an administrative act. The taxpayer's fair access to justice is the main worry in the code, therefore, the major part of the procedural means are at his disposal, instead of the Administration's. Moreover, according to the article 103°/1 of the Constitution, a major focus is the legality and equality, as well as the public interest. There is also a procedural principle of protection of trust to benefit the taxpayer. The main acts relate to: the early and timely recognition of rights, the safeguarding of the effects of jurisdictional decisions and the avoidance of contradictory jurisdictional decisions²⁶. The latter guarantee is granted by the decisions with force of *res judicata*, provided for in article 284° of the Tax Procedure and Process Code.

The article 97°/2 of the Tax Procedure and Process Code refers to the application of the Administrative Courts' Procedure Code, meaning that there is not a general discussion about the Tax Court's submission to these laws in cases where the administrative and tax procedure follow similar rules.

²⁶ ROCHA, Joaquim Freitas da, *Proteção da confiança, procedimento e processo tributários*, 2013.

B. Tax Acts Revision (article 78º of the General Tax Law)

Besides the gracious claim mentioned above, Professor Serena Cabrita Neto and Carla Castelo Trindade mention the possibility of the taxpayer previously resorting to the request for ex officio revision provided for in article 78º of the General Tax Law. This "administrative filtration" is justified "when acts are practiced by the taxpayer and in which the administration has not yet had any intervention"²⁷.

It's important to affirm that, in my investigation, I reached to the conclusion that the most similar case in Portugal with the abovementioned Statutory Notice (the main guarantee of judicial access to the taxpayer in the USA) is the Tax Acts Revision (although the latter case is judicial and this case is administrative).

The request for a review of a tax act, under the terms of article 78º/1 of the General Tax Law, does not correspond to a taxpayer's right, but rather constitutes a mere impulse to trigger a procedure that the Administration can trigger. The term "tax act" corresponds to the tax settlement cases.

The mechanism for reviewing the tax act will have to be based on an error of the administration services by miscalculating the tax (unlike the USA's notice of deficiency, not only the taxpayer but also the administration can plead to amend the error). The administration will have to proceed with the review, by the imposition of the principles of justice and respect for the legitimate rights and interests of citizens, which must guide their activity (articles 266º/2 of the Constitution and 55º of the General Tax Law). In fact, even if it is considered that, in general, the administration does not have the duty to revoke previous illegal acts, after the expiration of the period for its judicial claim based on defects that generate nullability this revocation has to be mandatory when it is imposed by a specific duty to eliminate a situation created by the illegal act. This is what happens in the case of an illegal tax being charged, as the return of the incorrectly paid amount corresponds to a principle of justice.

This revision petition, especially against liquidation acts, is very useful when the taxpayers, by carelessness, allow it to be exceeded for the purpose of gracious claiming or challenging legal deadlines for reacting against acts of liquidation.

The revision by the taxpayer's initiative is distinct from the gracious claim (articles 68º to 77º of the Tax Procedure and Process Code) because it's directed to the author of the act instead of the peripheral administrative organ.

Closer to the USA's judicial access, the articles 95º/1-d) of the General Tax Law and 97º/1-d) of the Tax Procedure and Process Code state that the decisions of the tax administration made after a request for revision made by an interested party are subjected to judicial control²⁸.

²⁷ NETO, Serena Cabrita, TRINDADE, Carla Castelo, *Contencioso Tributário*, 2017.

²⁸ CAMPOS, Diogo Leite de, SOUSA, Jorge Lopes de, RODRIGUES, Benjamin da Silva, *Lei Geral Tributária, Comentada e Anotada*, 2003.

C. Hierarchy of the Courts

According to the article 46º of the Administrative and Tax Courts Status, the Tax Court can decide matters of fact and law. This court will be competent, respecting the hierarchy rules, to know all tax matters, for which the Central Administrative Court or the Administrative Supreme Court are not competent. The analysis in the Central Administrative Courts is deeper, because they have competence to decide about tax issues, as long as practiced by members of the Government (38º/b) Administrative and Tax Courts Status). In general, the Supreme Administrative Court can also acknowledge matters of fact and law, except in the cases where the litigation was previously processed in the first instance courts (article 12º/5 Administrative and Tax Courts Status)²⁹.

First instance court decisions may be appealed to either one of the two central administrative courts (for a review both of facts and law) or to the Supreme Administrative Court (for a review solely on matters of law). Meaning that the decisions of the Tax Courts can be appealed only once: due to the dual degree of jurisdiction. Such appeal may be filed to the Central Administrative Court or to the Supreme Administrative Court (*per saltum* appeal), which happens only when there is exclusively matter of law (article 26º/b) Administrative and Tax Courts Status). It is being discussed the matter of fact when the issues are occurrences or real-life facts brought by the parties to the process, for example: the facts that were considered proved not should be, facts that should have been proven were not considered proven or the evidence produced was insufficient. In contrary, the matter of law will concern the application, interpretation and integration of legal norms. Upon an express or tacit dismissal of the administrative claim, taxpayers may choose to lodge an administrative appeal to the Ministry of Finance or to file a judicial claim before the Judicial Tax Court³⁰.

VII. Tax Appeals

A. Central Administrative Court

This court's powers to revise the Tax Courts' decisions were reviewed in a reform in 2019, as mentioned in the law 118/29 of 17/09, which made its of judgement closer to those in administrative and judicial courts. The judges have the power to re-examine the decisions of the first instance courts if the taxpayer lost the case and if respected the minimum action value (article 280º of the Tax Procedure and Process Code)³¹.

²⁹ FERREIRA, Ricardo Nogueira das Neves de Matos, *Autonomia e limites da Jurisdição Tributária*, 2012.

³⁰ RIBEIRO, Nuno Cerdeira, *O Controlo Jurisdicional dos Atos da Administração Tributária*, 2014.

³¹ RUSSO, Anabela Ferreira Alves e, *A amplitude dos poderes revisivos da segunda instância*, in *Comentários à Legislação Processual Tributária*, 2019.

According to the article 665º of the Civil Procedure Code, the court has the duty to substitute the first instance's decision if, in some specific cases, the examination by this court had been considered jeopardized, which implies a *de novo* review. In most cases, the Central Administrative Court has the final decision and has the power to judge matters of fact and law.

Anabela Alves e Russo, the Vice-President of the Central Administrative Court's Tax Section, defends that, in the matter of fact where the specific methods of proof are not clear, there should be an order to invite the parties to improve the matter of fact as stated in the article 639º/1 and 3 of the Civil Procedure Code.

There are many powers granted to the Central Administrative Court, with regard to the review of facts known at first instance (article 662º of the Civil Procedure Code). This court is able to: confirm the (in fact) appealed decision, dismissing the appeal; revoke this decision and decide in its place; or invalidate the appealed decision and determine the write-off of the case. The appellate judge should not "go looking for a second conviction" or a "second trial", but should rather seek to find an adequate resolution of the dispute. It is absolutely necessary to have a clear demonstration that the matter of fact established at the first instance must be modified, as it does not present adequate evidential support, or because it lacks any reasonable justification³².

According to the article 288º of the Tax Procedure and Process Code, it is a duty³³ of the judge to gather and investigate new information relevant to the decision of the case, especially if the proof examined in the first instance was uncertain (thus avoiding the annulment of the first instance judgment due to lack of proof)³⁴.

B. Administrative Supreme Court

The Administrative Supreme Court is the regulator of the administrative and fiscal justice system and the safety valve of the justice system.

As regulator of the administrative and tax justice system, the Supreme Administrative Court has the function of settling conflicts of jurisdiction between administrative courts and tax courts, as well as between sections of administrative and tax litigation (Articles 24º/1-h), 26º/g) and 29º of the Statute of Administrative and Tax Courts)³⁵.

³² ROCHA, Joaquim Freitas da, *Os fins do processo tributário e os poderes dos juízes do TCA na apreciação da matéria de facto fixada na 1ª instância*, 2018.

³³ FLORA, Cristina, *A Prova no Processo Tributário*, 2017.

³⁴ Judgement from the South Central Administrative Court (27/10/2016), proc. n.º 08554/15.

³⁵ <https://www.stadministrativo.pt/historia/capitulo-8/>

The Decree-Law nº 229/96 allows the appeal "*per saltum*" to the Supreme Administrative Court of decisions of the administrative and tax courts considered qualitatively more important, and the appeal of the decisions of the Central Administrative Court, rendered in the first degree of jurisdiction³⁶.

There is also the possibility, as stated by the article 122º/A of the Tax Procedure and Process Code, of preliminary ruling to the Administrative Supreme Court in order to give its (binding) views about the decision in issue³⁷. For this option to be valid, there must be three preconditions: it must be a new matter of law; be seriously difficult to interpret and decide over its juridical regime; it must be considered a problem that repeats over time. Unfortunately, this option is not usually used in Portugal³⁸.

³⁶ <https://www.stadministrativo.pt/historia/capitulo-7/>

³⁷ RIBEIRO, Nuno Cerdeira, *O Controlo Jurisdicional dos Atos da Administração Tributária*, 2014.

³⁸ RODRIGUES, Nuno Cunha, *Introdução à reforma do contencioso tributário*, 2019.

VIII. Comparative Chart

	USA	Portugal
Administrative Audits	Audit of Internal Revenue Service (§7121 U.S. Code).	Gracious Claim (article 68° of the TPPC) and Tax Acts Revision (article 78° of the GTL).
Judicial Audits	Redetermination of the deficiency (§6213 of the U.S. Code).	Judicial Claim (article 97° TPPC).
First Instance Competent Courts	Concurrent Jurisdiction (Tax Courts or District Courts).	Alternative Jurisdiction. In general, Administrative and Tax Courts (article 44°/1 of the ATCS).
First Instance Cognition Powers	Due to the APA's lack of regulation, the Court is considered able for a <i>De Novo</i> Review.	Free to decide over the acts to be executed by the administration, unless in cases of condemnation where the previous act was discretionary (article 95°/5 of the ACPD).
Cognition Powers in case of appeal	Record Rule (Section 7482(a) of the U.S. Code).	<i>De Novo</i> Review (article 662° of the CPC and 288° of the TPPC).
Supreme Courts	Supreme Court, which is able to recognize the petitions if there is a substantial confusion between the courts of appeals and the importance and reiteration of the issue (Commissioner v. Stern).	Administrative Supreme Court, which can give binding pronouncements to the lower Courts if there is a new issue likely to be repeated over time (article 122°/A of the TPPC).

Conclusion

There are many similar methods and institutions that provide the taxpayer with the guarantees to claim for what it's considered for him the correct tax to be paid, if there's any. Firstly, the nature of each tax assessment authority seems already to be alike in Portugal and the USA. In the latter system, the tax is settled by an agency, a special government organization set up for a specific purpose (tax collection). In Portugal, the Portuguese Customs and Tax Authority is the first entity to be available for the taxpayer to claim (if he chooses the administrative claim), although he has the chance to claim in the hierarchical appeal, because the authority is a part of the Minister of Finance (article 66º TPPC). Even though the similarities noticed above bring both systems together (for example, the resemblance of the administrative and judicial access and their requisites), there are many distinctions.

The discussion over the first instance Court's cognition powers and submission to the Administrative Procedure Code is very complex and has a story of cases and judges who have different opinions in the USA. In the contrary, in Portugal, it seems to be clear that (unless there is a discretionary decision by the administration, where the Court is only able to identify the rules the administration should follow instead of a specific act, as stated by article 95º/5 of the Administrative Courts Procedure Code) the Court is able to determine the behaviour the administration should adopt.

About the jurisdiction of the Court's Tax Section, due to the thin frontier between the tax and administrative jurisdiction in Portugal, the controversy is more problematic than in the USA. In the first system, the Courts tend to judge matters that commence in a tax relationship but develop into matters supposed to be judged in the administrative Courts (such as civil legal liability) not because of the nature of the relationship but due to the list of matters to be decided only in the administrative Courts.

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