Tax Mediation in Portuguese Legal Ordinance: *De Iure Condendo(?)*

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Abstract

Mediation is an ADR which falls within the category of means of self-determination and which presupposes the intervention of a third party a mediator whose function is to bring the parties together in a dispute in order to conclude an agreement between them. In the Portuguese legal system, it is not possible to mediate disputes between taxable persons and the Tax Administration. There are several obstacles to the mediatability of litigation in tax matters. In particular, we are thinking about the principles of legality, the unavailability of the tax credit, and equality. In this paper, it is sought to ascertain if these obstacles are absolute, not allowing any openness to the legality of legal-tax disputes, or if, on the contrary, they are not absolute, making feasible the thinking of creating a relation between Law Taxation and mediation. Adopting a method based essentially on dogmatic analysis, it is believed that it is possible to recognize the legality of legal-tax disputes, albeit within certain limits. The mediation will allow a closer approximation between the parties - taxable person and the Tax Administration - thus contributing to the creation of a greater ethical-tax awareness and, in this way, to the reduction of litigation.

Keywords: *litigation, mediation, legality, unavailability, equality.*

***JEL Classification*:** K34; K41.

1. Introductory note

The present text is entitled "Tax mediation in the Portuguese legal system: *de iure condendo* (?)" and we will focus on the possible mediation of litigation in legal and tax matters. Indeed, it is believed that mediation as a means of settling disputes may, on the one hand, to allow faster resolution of disputes involving the Tax Authorities and taxable persons and, on the other hand, to promote a closer approximation of the parties. To this extent, because it reconciles the parties, mediation can exercise a preventive function of new tax disputes.

Our investigation presupposes, essentially, a dogmatic analysis. In this context, we will identify and reflect on some of the positions of the doctrine, not only at the national level (Portuguese legal system), but also at the international level. Based on these positions, we will reflect on the possible mediation of litigation in tax matters. Reality, that does not exist in Portugal.

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Let us divide the present work into two fundamental parts. A first part will be called “Mediation in tax matters: what future for the Portuguese legal system?”. This part, in turn, is subdivided into four sub-parts: the first subpart will have as study object the "Notion of mediation: in particular, the distinction of related figures" and in it we will present a notion of mediation and distinguish it from others means of settling disputes such as conciliation and arbitration and the second subpart will have as its sub-theme “Obstacles to the mediatability of tax disputes and their overrun”, and we will now present the main obstacles to the mediatability of tax disputes and the respective way of overcoming. This second subpart will be divided into three sections, which take the following name: “The principle of legality”; “The principle of the unavailability of the tax credit”; “The principle of equality”. The third subpart is entitled "The constitutional requirement of the mediation of legal and tax litigation" and it seeks to assess the constitutional requirement of tax mediation. Finally, the fourth subpart has as its object "The process of mediation: a proposal *iure condendo*" and here is a proposal for a possible process of tax mediation. The second part of this paper will be titled "Tax mediation from a comparative law perspective: the American and Italian case - a brief reference" and a brief study of comparative law will be made. In the end, we will present the main conclusions of the present study.

2. Mediation in tax matters: which future for the Portuguese legal system?

2.1. Notion of mediation: the distinction of related figures

Mediation is an alternative means of settling disputes [2] (MARL/ADR), together with conciliation and arbitration, among others [3]. As to its classification

[2] The expression alternative dispute resolution mechanism was born in the USA in 1976 to mean a set of means of resolving litigation alternative to traditional means, such as recourse to State Courts (on the historical evolution of alternative means of dispute resolution , among others, can be seen Jerome T Barrett and Joseph P Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (Jossey-Bass: San Francisco, 2004); Carrie Menkel-Meadow, *Roots and Inspirations - A Brief History of the Foundations of Dispute Resolution,* in "The Handbook of Dispute Resolution", ed. by Michael L. Moffitt and Robert C. Bordone (Jossey-Bass: San Francisco, 2005), pp. 13 a 32 (p. 13 a 32). Em especial, no ordenamento jurídico português, entre outros, pode ver-se Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios* (Almedina: Coimbra, 2014), em especial pp. 34 e 35.

[3] With regard to mediation, conciliation and arbitration, it can be said that alternative dispute resolution means are the traditional means of alternative dispute resolution. However, there are others that have been implemented in various legal systems and which sometimes result in a perfect marriage between two of the traditional means of alternative dispute resolution. By way of example, the following alternative means of dispute resolution: o *mini trial*, o *private trial*, o *court annexed arbitration*, o *summary jury trial*, o *neutral listener*, o *neutral expert factfinding*, *med-arb* or *arb-med* (for further developments on these newer alternative dispute resolution means, it can be seen,

as an alternative means of settling disputes, there are no doubts. In fact, it is commonly accepted that mediation is a MARL. Less consensual, however, is what must be considered by true mediation, because in this respect there are several understandings of specialist doctrine, particularly when one seeks to distinguish between mediation and conciliation. Let us look, therefore, some positions of the thinkers of Law.

ÁNGELES DE PALMA DEL TESO[4] defines mediation as a technique whereby a third party, mediator, seeks to approximate the position of the parties by promoting the exchange of different points of view and the composition of interests, exercising an active role in resolving the dispute, insofar as it can propose to the parties the content of an agreement which satisfies both parties. In an approximate sense, RAFAEL FERNÁNDEZ MONTALVO/PILAR TESO GAMELLA/ÁNGEL AROZAMENA LASO[5], argue that mediation is a procedure by virtue of which a third-party, a mediator contributes to the settlement of a dispute between parties, seeking their approximation, through the composition of interests, and may even make proposals for agreement. EDUARD VINYAMATA[6], in turn, defines mediation as a process of communication between the parties that requires the help of an impartial mediator who seeks the parties themselves to reach an agreement. Finally, RICARDO CASTILHO argues that mediation is based "on the art of language"[7], with a view to re-establishing communication between the interveners in a given case. The mediation involves a third mediator, whose aim is to "help the parties to reach a consensus, using psychological methods, so that both conclude that they have somehow been successful at the end"[8], but without being able to make compromise proposals.

The main difference found in the notions above proposed by the doctrine lies in the power of intervention of the third mediator. For some authors, the mediator plays a more active role and may even make proposals for agreement (thesis defended, among others, by ÁNGELES DE PALMA DEL TESO) for other authors, but in mediation the third mediator can only seek to bring the parties

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inter alia Zulema D. Wilde and Luis M. Gaibrois, *O Que É a Mediação?*, ed. by (Trad.) Soares Franco (Agora Publicações, Lda.: Lisboa, 2003), pp. 21 a 24.

[4] Ángeles de Palma del Teso, *Las Técnicas Convencionales En Los Procedimentos Administrativos,* in "Alternativas Convencionales En El Derecho Tributario: XX Jornada Anual de Estudio de La Fundación «A. Lancuentra»" (Marcial Pons: Madrid, 2003), p. 15 a 47 (p. 38).

[5] Rafel Fernández Montalvo, Pilar Teso Gamella and Ángel Arozamena Laso, *El Arbitraje: Ensayo de Alternativa Limitada Al Recurso Contencioso-Administrativo* (Consejo General del Poder Judicial Madrid, 2004), pp. 31 e 32.

[6] Eduard Vinyamata, *Aprender Mediación* (Paidós: Barcelona, 2003), p. 17.

[7] Ricardo Castilho, *Mediação E Conciliação E a Efetividade Dos Direitos Fundamentais*, in "La Solución Extrajudicial de Conflictos (ADR) - Estudios Para La Formación En Técnicas Negociadoras", ed. by Patricia Blanco Díez (Aranzadi: Navarra, 2011), pp. 37 a 44 (p. 42).

[8] Ricardo Castilho, *Mediação E Conciliação E a Efetividade Dos Direitos Fundamentais*, in "La Solución Extrajudicial de Conflictos (ADR) - Estudios Para La Formación En Técnicas Negociadoras", ed. by Patricia Blanco Díez (Aranzadi: Navarra, 2011), pp. 47 a 44 (p. 42).

together without having any power, regarding the proposed agreements (argued, among others by RICARDO CASTILHO).

In fact, the main difficulty lies, as mentioned above, in the distinction between mediation and conciliation. The two concepts are sometimes confused. Indeed, some authors consider mediation what other authors consider conciliation. The main complaint lies precisely in the power of intervention of the third mediator or conciliator. As a rule, those authors who defend a greater power of intervention by the mediator, defend a lesser power of intervention of the conciliator and those who defend a greater power of intervention of the conciliator, advocate a lesser power of intervention of the mediator.

Thus, there can be no unanimous concept of mediation, since there is no unanimity in the doctrine, nor in the legislation itself, which is often confused in this respect. The law of Portuguese mediation (LMP)[9], for example, defines mediation as an "alternative form of dispute resolution, conducted by public or private entities, whereby two or more parties to a dispute voluntarily seek agreement with the assistance of a conflict mediator" [10], the mediator being "a third party, impartial and independent, deprived of powers of imposition on the media, assisting them in the attempt to construct a final agreement on the subject-matter of the dispute"[11]. Already in the law of the Spanish mediation (LME)[12], mediation has been conceptualized as being "aquel medio de solución de controversias, cualquiera que sea su denominación, en que dos o más partes intentan voluntariamente alcanzar por sí mismas un acuerdo con la intervención de un mediador"[13].

The notion of mediation and mediation, provided for in the Portuguese legal system, seems to us to admit a greater power of intervention by the mediator, although it does not impose it, than the notion provided for in the Spanish legal order, which reinforces the idea that the parties must catch up "por sí mismas" an agreement. It seems to me, therefore, that the criterion of the power of intervention of the third party is not sufficient to distinguish between mediation of conciliation and thus to establish a less equivocal concept of mediation.

Regardless of the considerations *above* mentioned, we share the understanding of CÁTIA MARQUES CEBOLA[14] when she refers the distinction between mediation and conciliation, that the difference between the two figures should not be confined to purely methodological or scientific questions. This is because, given the flexible nature of both litigation instruments, it can not be *ab initio* to describe with exactness and certainty what kind of methodologies or

[9] Approved by law no 29/2013 april 19.
[10] Article (2) al. a), of LMP.
[11] Article (2), al. b), of LMP.
[12] Approved by Spannish Law no 5/2012, july 6.
[13] Article (1) by LME.
[14] Cátia Marques Cebola, *La Mediación* (Marcial Pons: Madrid, 2013), p. 163.

techniques the mediator, or conciliator, will adopt in the context of the process of mediation, or conciliation.

Mediation must be distinguished from conciliation in that it has a procedural nature as opposed to the first. In fact, like MARIANA FRANÇA GOUVEIA[15], we believe that conciliation, unlike mediation, is conducted by those who have the power to adjudicate, that is, by the judge, or arbitrator of the case. Mediation, unlike conciliation, is therefore presided over by a third party who, frustrated with obtaining the agreement, has no further contact with the process.

In this way, mediation can be defined as an alternative means of settling disputes involving a neutral, impartial third party whose purpose is to bring the parties together in order to reach an agreement and to suggest agreements, but that, when mediation is unsuccessful, has no contracting authority over the case. Thus, the concept of mediation is carved moving away, in our understanding, by the reasons given from the concept of conciliation In the Portuguese legal system, it seems, even in most cases, that the legislator distances the mediation of the process, bringing it closer to conciliation. In fact, the attempt to conciliate normally takes place in a judicial procedure[16].

The mediation is not confused, therefore, also, with the concept of arbitration. In fact, arbitration is an alternative means of settling disputes that requires the intervention of a third party to decide, with force of res judicata, the dispute between the parties. The arbitrators therefore exercise, like the Judge of the Court of State, a true and proper judicial function[17]. Contrary to mediation, whose possibility of consecration in the legal-tax system is equated in this paper, arbitration is already a reality in the Portuguese legal system. Arbitration in tax matters was

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[15] Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios* (Almedina: Coimbra, 2014), p. 23.

[16]See Article 594 (3) of the Code of Civil Procedure (CPC), which does not say that the conciliation attempt is presided over by the judge. The same is for administrative proceedings, Article 87c (3) of the Code of Procedure in the Administrative Courts. Also in the arbitration jurisdiction, the Regulation of the Information, Mediation and Arbitration Center of the Notaries' Order (available in http://www.notarios.pt/NR/rdonlyres/0F966738-9F4E-4627-92FC-55FC4F63E553/3963/RegulamentoArbitragem1.pdf, with final access on 10/18/2017) enshrines in Article 28, the possibility for the parties to grant conciliatory powers to the Arbitral Tribunal.

[17] Portuguese constitutional jurisprudence has been directed in the sense that the arbitrators exercise a jurisdictional function. In fact, the arbitrators exercise a judicial function insofar as they declare the law of the case, that is, the 'arbitrator' carries out a legal function by which it declares the law (jurisdiction), although it can not execute it, rather than what happens with the 'Judge-employee'. Since 'this evident absence of' potestas' on the part of the arbitrator, while not representing or embodies the legal-political organization of the State, is compensated with the 'auctoritas' (...) The decisions of the arbitrator are true and own jurisdictional decisions, with authority "(citation of Judgment of the Constitutional Court no. 52/92 of 03/14/1992, available online at www.tribunalconstitucional.pt last accessed 10/18/2017). Also in Judgment 62/91 of 03/22/1991, the Spanish Constitutional Court held that arbitration constitutes “un equivalente jurisidiccional, mediante el cual las partes pueden obtener los mismos objetivos que com la jurisdicción civil” (citation of the judgment available at www.tribunalconstitucional.es, last accessed 10/18/2017).

instituted in Portugal by Decree-Law No. 10/2011, of January 20[18], targeting the legislator, with the consecration of this regime, three main objectives: i) to print a greater speed in the resolution of disputes that oppose the Tax Administration to the taxable person; ii) reduce the number of cases pending before administrative and tax courts; and, finally, iii) reinforce the Fundamental Right of access to the Law and the Courts.

In legislative terms, the only reference to mediation in tax matters known is contained in Article 124 (4) (o) of Law No 3-B / 2010 of 28 April authorized the consecration of a legal regime of arbitration in tax matters in our legal system and in which reference was made to a possible appointment of mediators or conciliators in the regime of tax arbitration centers[19].

2.2. Obstacles to the mediatability of tax disputes and their overruns

As it was mentioned in relation to the concept of mediation, this is a means of settling disputes aimed at reaching an agreement, or more specifically, a transaction [20] which, in the sands in which we move, must be established between the Tax Administration and the taxable persons. In this context, it can be

[18] About the legal regime of tax arbitration we have already had the opportunity to look at other works. Among others, see Cláudia Sofia Melo Figueiras, A*rbitragem: A Descoberta de Um Novo Paradigma de Justiça Tributária?*, in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.ª edição (Almedina: Coimbra, 2013), p. 81 a 102; Cláudia Sofia Melo Figueiras, *Arbitragem Em Matéria Tributária: O Modelo Português*, in "Derecho, Filosofía Y Sociedad: Una Perspetiva Multidisciplinar", ed. by José Luis Castro Fírvida and Maria Victoria Álvarez Buján (Andavira: Santiago de Compostela, 2015), p. 303 a 317. In addition to our work, many other authors have been studying the subject in our legal system. See, among others, Jorge Lopes de Sousa, *Algumas Notas Sobre O Regime Da Arbitragem Tributária*, in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.ª edn (Almedina: Coimbra, 2013), pp. 227 a 242; Tânia Carvalhais Pereira, *Aspetos Práticos, i*n "Guia Da Arbitragem Tributária", ed. by Nuno de Villa-Lobos and Mónica Brito Vieira (Almedina: Comibra, 2013), pp. 63 a 87; Nuno Villa-Lobos and Tânia Carvalhais, *Arbitragem Tributária: Breves Notas,* in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.ª edn (Almedina: Coimbra 2013), p. 375 a 388.

[19] In addition, in 2009, the Superior Council of the Administrative and Tax Courts and the Center for Administrative Arbitration signed a memorandum of understanding with the purpose of promoting the alternative resolution of tax disputes through the creation of a structured network of commissions conciliation, mediation and consultation, agreeing to propose to the Ministry of Justice legislative and regulatory changes for this network to be created.

[20]According to Luiz Dias Martins Filho/Luís Inácio Lucena the transaction is an agreement which is based on mutual concessions by the parties in order to reach a point of common interest which allows them to put an end to a conflict of interests or a dispute (Luiz Dias Martins Filho and Luís Inácio Lucena Adams, *A Transação No Código Tributario Nacional (CTN) E as Novas Propostas Normativas de Lei Autorizadora*, in "Transação E Arbitragem No Âmbito Tributário - Homenagem Ao Jurista Carlos Mário Da Silva Velloso", ed. by Oswaldo Othon de Pontes Saraiva Filho and Vasco Branco Guimarães (Editora Fórum: Belo Horizonte, 2008), p. 15 a 42 (p. 18)). In this case, the transaction is intended to end a litigation between the Tax Administration and taxable persons.

said that the agreements, in this case in particular the transaction, are real tax contracts, or in a broader sense, contracts in tax matters[21].

Since mediation is aimed at establishing an agreement between those subjects, the establishment of mediation in tax matters in our legal system is not seen very favorably First, because the General Tax Law (LGT) in article 36, paragraph 2, states that "The essential elements of the tax legal relationship can not be changed by the will of the parties" and in paragraph 3, of the same article, which "The tax administration can not grant moratoria in the payment of tax obligations".

In fact, there are several obstacles that can arise to the mediability of legal-tax disputes. It is enough to think of three fundamental principles that are part of our legal-tax system, ie the principle of legality, the principle of equality and the principle of the unavailability of tax credit[22].

Thus, the main obstacles to mediation in tax matters are of a principological nature. However, as will be seen, such obstacles in the field of principology do not and can not constitute an impediment at all to the mediatability of tax disputes. Furthermore, it seems to me that the Constitution of the Portuguese Republic (CRP) itself does not prohibit, but rather requires the existence of alternative means of dispute resolution in tax matters, such as mediation.

2.2.1. The principle of legality

The principle of tax legality implies that the essential elements of taxes, as well as the general regime of taxes, are governed by the law of the Assembly of the Republic or authorized government decree law. Law to which the Tax Administration is bound by virtue of the principle of legality of the performance of Public Administration. A rigid understanding of this principle seems to remove, at the outset, any margin of consensus of the Tax Law.

However, it is not possible today to understand the principle of tax legality and the performance of the Administration in an absolutely rigid way and that prevents any margin of consensus between the Tax Administration and the taxpayer. Thus, it is understood that the principle of tax legality will be respected provided that the act constituting the use of means of achieve consensus , such as mediation, in the context of tax matters, derives from a law of the Assembly of

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[21] Regarding the tax contracts,is recommended José Casalta Nabais, *Contratos Fiscais - Reflexões Acerca Da Sua Admissibilidade* (Coimbra Editora: Coimbra, 1994).

[22] How sustains José Juan Ferreiro Lapatza, when defending the introduction of consensual means in the scope of the Tax Law, soon arise several voices that ferociously defend the legality, the equality and the general interest (José Juan Ferreiro Lapatza, *Terminación Convencional de Los Procedimientos Inspectores,* in "Alternativas Convencionales En El Derecho Tributario: XX Jornada Anual de Estudio de La Fundación «A.Lancuentra»" (Marcial Pons: Madrid, 2003), pp. 315 a 325 (p. 324)).

the Republic or a decree-law of the duly authorized Government, which must consecrate the object of mediation; the requirements and impediments to the exercise of the function of mediator; the rules of the mediation process; principles applicable to the process; the costs of mediation; and, finally, the legal effects of the transaction obtained in mediation.

We believe, moreover, as some doctrine maintains, that "[if] the tax legality arose, historically, as a way of guaranteeing the participation of citizens in the definition of the taxes that would be required of them, in modern representative democracies, agreements between the Tax Authorities and the taxpayer translate, in some way, the resumption of citizens' consent to taxation no more generally, but in relation to each concrete situation"[23]. In this sense, the agreement may be considered, along with the principle of tax law, as a way of providing consent for taxation. The agreement thus emerges as an ally of the principle of tax legality because it reinforces it as a guarantee of the people's consent to taxation.

Therefore, with mediation and the possibility of entering into an agreement in this context, there is no risk, in our understanding, of a collision with the principle of tax legality, as there is no risk of collision with the principle of legality of the Administration's performance , because if the mediation is provided for by a law of the Assembly of the Republic or an authorized government decree-law, in accepting to submit a dispute to a mediator, the Tax Administration is exactly in compliance with the regulations to which it is expressly bound.

2.2.2. The principle of the unavailability of the tax credit

The principle of the unavailability of the tax credit, which is a manifestation of the principle of tax legality, prohibits any margin forming the object of the tax legal relationship, meaning that the tax obligation is an *ex legge* obligation, the object of which is unavailable, and is subject to the will of the law and not of the parts that intervene in it. A rigid understanding of this principle also removes the admissibility of mediation from the scope of Tax Law. Nevertheless, this principle can not be[24].

First of all, because in our legal system, legal regulation itself has shown some flexibility in this principle. In fact, it is the law itself that, given the need to adapt legal-tax legislation to the practical-factual reality, has established legal solutions that give some elasticity to the principle under analysis. It is enough that we think of article 36, paragraph 5, as well as of article 37, both of LGT, which

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[23] Onofre Alves Batista Junior, *Transações Administrativas - Un Contributo Ao Estudo Do Contrato Administrativo Como Mecanismo de Prevenção E Terminação de Litígios E Como Alternativa À Atuação Administrativa Autoritária, No Contexto de Uma Administração Pública Mais Democrática* (Editora Quartier Latin do Brasil: São Paulo, 2007), p. 412.

[24] In this sense, see Joaquim Freitas da Rocha, *Lições de Procedimento E Processo Tributário*, 5.ª edn (Coimbra Editora: Coimbra, 2014), p. 433.

design the contract institute, in particular the tax contracts, for our legal-tax system. Accordingly, the abovementioned provisions, in particular Article 37 (2) of the LGT, open the possibility for the Administration to conclude agreements, provided that the principles of legality, equality, good faith and credit unavailability are safeguarded tributary.

It should be noted, moreover, that it is the law itself that has admitted in our legal system spaces for achieve consensus. It is enough to think about the contractualisation of the concession of fiscal benefits in the scope of investment projects; agreements on transfer pricing; and, more recently, in the approval by Decree-Law no. 151-A / 2013, of October 31, of a set of exceptional measures of recovery of debts to the Tax Administration, allowing the waiver or reduction of payment of interest on arrears, compensatory interest and costs of the enforcement proceedings in cases of total or partial payment of capital debt, as well as mitigation of the payment of fines associated with non-compliance with the duty to pay taxes.

However, even if it is understood that the principle of unavailability of the tax credit constitutes an insurmountable impediment to the consensus in the Tax Law, it can always be said that when entering into agreements, through mediation, with the taxable person, the Tax Administration does not have to dispose of the tax credit. In fact, the conclusion of the agreement may focus on several other aspects that form the legal tax relationship. We are thinking, for example, of the more open moments of the Tax Administration, that is, when it acts under a greater power of conformation, as well as in the area of ancillary obligations, both fertile fields, in our understanding, in terms of consensualisation.

2.2.3. The principle of equality

The principle of tax equality, which has as its result the principle of taxable capacity, in the field of taxes, has an underlying idea of generality and universality, according to which all citizens are bound to the Fundamental Duty to pay taxes, but based on their ability to pay. In addition, the principle of equality of taxation has as a result, in the scope of fees and other contributions, the principle of equivalence, according to which the value of taxes should be adjusted to the costs that the taxable person generates in the Administration, or benefits provided by the Administration.

The principle of equal treatment by the Administration requires that the Administration treat taxpayers in a similar situation and in an unequal situation as those who are in a different situation. It has been thought that admitting to consensus in the Tax Law is a risk to ensure compliance with the principle of tax equality and equality of action of the Tax Administration.

In fact, there will be no risk to the principle of equality if transparency in the whole process of mediation is ensured, in particular through publicity. In fact,

any process of mediation in tax matters should be shaped by the principle of publicity, in particular the agreement between the Tax Administration and the taxable person. In addition, the consensualisation allows a greater exchange of information between the taxable person and the Tax Administration, thus favoring a taxation more in accordance with their economic situation, or with the benefit obtained from the action of the Administration [25].

2.3. The constitutional requirement of the mediation of legal-tax disputes

In short, for the reasons set out above, the three principles analyzed above do not represent an impediment at all to the mediatability of legal-tax disputes. It seems to me, moreover, that a very careful reading of the Constitution of the Portuguese Republic, which does not deny consensualisation in tax matters, seems to even admit it. It is enough that we pay attention, in a coordinated way, to the Right to Participate, on the one hand, and the objectives of our tax system, on the other hand, as well as the Fundamental Right of Access to Law and Courts, provided for in Article 20., of our Constitution.

In effect, Article 267 (1) of the CRP states that the Public Administration, the Tax Administration, has the duty to "ensure the participation of the interested parties in their effective management". A careful reading of the legal incisive refers us to the admissibility of consensual instruments, such as mediation, not only in Administrative Law, but also in Tax Law. The participation of those interested in the exercise of the administrative function is a fundamental legal requirement, which obliges administrative bodies not only to prevent or limit the right to participate, but also to promote their fulfillment in the legal system. Applied to jus-tax relations, the Right of Participation should have as a consequence the participation of citizens in the realization of the public interest in tax matters.

In turn, Article 103 (1) of the CRP enshrines the fundamental objectives of the tax system, which are essentially geared to meeting the financial needs of the State and other public entities and a fair distribution of income and wealth. From a joint reading of Article 103 (1) with the abovementioned Article 267 (1) of the CRP, it seems that citizens' participation is a fundamental precondition for financial needs of the State and other public entities, as well as to make a fair distribution of the income and wealth that exist in our legal system. The achievement of the fundamental objectives of the tax system implies the right of citizens to participate in this same achievement. First of all, because they are directly interested parties and because the Constitution assures them of this participation. It

[25] Luís María Romero Flor, *Las Actas Con Acuerdo En La Ley General Tributaria Y En El Derecho Comparado* (Universidad de Castilla-la Mancha, 2010), p. 84, disponível em <https://ruidera.uclm.es/xmlui/bitstream/handle/10578/1444/LAS ACTAS CON ACUERDO EN LA LEY GENERAL TRIBUTARIA Y EN EL DERECHO COMPARADO.pdf?sequence=1>, last acess in 18/10/2017.

is therefore assumed as a fundamental task of the State to guarantee this participation, creating the necessary conditions for a good relationship between the Tax Administration and taxable persons. In this way, it is the State, in the exercise of the legislative function, to enable the effective participation of citizens in the pursuit of the public interest in tax matters. Participation is also a fundamental condition for a taxation that is more in line with the taxpayer's ability to pay, or with the benefit that the taxpayer derives from the Administration's actions, which seems to promote a greater tax justice[26].

But not only the Right of Participation is a constitutional requirement of consecration of mediation in the legal-tax system. It is enough to think of the Fundamental Right of access to the Law and to the Courts, provided for in article 20, of the CRP, and it should be interpreted as a current one. It has been stated that the Fundamental Right of access to the Law and the Courts has two fundamental dimensions, namely the Right of access to the Right and the Right of access to the Courts.

The first dimension of this Fundamental Right, that is to say, access to the Law, includes all means of access, or practice of law, that are not jurisdictional. We consider, in fact, that Article 20 of the CRP can not be interpreted as consecrating a totally judicial State, that is, as a State in which the Law is realized only through access to the Courts. In fact, access to law goes much further than this. The guarantee of access to the law can and should be done in several ways. It is our understanding, given the plurality of means that today allow access to the law, that a current interpretation of this dimension of the Fundamental Right of access to the Law and to the Courts must be made. On the basis of this current interpretation, of course, in the material content of access to the law, all the instruments for settling disputes do not necessarily imply a judicial decision in a Court, such as mediation. In fact, mediation ensures the realization of justice and law, but without the need for recourse to judicial decision within a Court, thus incorporating and ensuring the realization of this fundamental dimension of the Fundamental Right of access to the Law and the Courts. Thus, in our opinion, it may be stated that from a current interpretation of the dimension of access to the Law of this Fundamental Right, the constitutional requirement of the establishment of means of dispute resolution, such as mediation, namely in tax matters, is guaranteed. its realization.

It should be noted that there are several advantages which, from the point of view of access to the law, derive from the use of mediation. First of all, mediation is a means of resolving disputes, as a rule, faster than recourse to contracting

[26] As is refered by João Taborda Da Gama, "the procedural participation of those managed in the tax procedure, constitutionally foreseen and legally regulated, leads to clarifying doubts between the two, approaching positions and reducing friction" (João Taborda da Gama, *Contrato de Transacção Do Direito Administrativo E Fiscal,* in "Estudos Em Homenagem Ao Professor Doutor Inocêncio Galvão Telles - Volume V" -, ed. by António Menezes Cordeiro, Luís Menezes Leitão, and Januário da Costa Gomes (Almedina: Coimbra, 2003), pp. 607 a 694 (p. 670)).

authorities, such as State Courts and arbitral tribunals. In addition, mediation may even prevent the future existence of litigation, in that it contributes to a closer approximation of the parties, in this case, the Tax Administration and the taxable person. In fact, mediation allows a dialogue between the active subject and the liability of the tax legal relationship that the contracting authorities do not allow.

To this extent, mediation, as an instrument of consensus between the parties, can contribute to the creation of a greater ethical-tax consciousness. In fact, the lack of ethical-tax awareness has generated, in the Portuguese legal system, several problems, including problems of a normative nature and problems of a procedural and judicial nature. These problems, in turn, have generated high levels of litigation, which must be tackled.

The tax court will be formed by the Fundamental Right of access to the Law and the Courts if it allows, within the scope of consensualisation is admissible, a quick consensual of the disputes, through means of dispute resolution such as mediation, which can, including contributing to greater prevention of disputes.

It should be noted, however, that in spite of the constitutional requirement that alternative means of settling tax litigation for consensualisation, such as mediation, be established, this does not mean that these instruments can be replaced by the Courts, in particular the State Courts. In fact, not all disputes can be subtracted from public jurisdiction[27], nor can the State fail to ensure the realization of justice, through its Courts and the *ius puniendi* of the judges who integrate them.

2.4. The mediation process: a proposal *iure condendo*

The process of mediation in tax matters should be shaped by a set of principles, including the principles of voluntarism, equality, impartiality, independence, flexibility, enforceability and publicity of agreements. Among this set of principles, the principle of the publicity of the agreements deserves special attention, since this derogates from the rule of confidentiality that is usually associated with mediation.

Taxation mediation can only be thought of in the transparency framework. The publication of all agreements concluded between the tax authorities and the taxable person must be guaranteed. The approval of the agreement by the

[27] This is if mediation is private. There are, however, systems of mediation that are public. For example, our system of family mediation, created by order no. 18 778/2007, of July 13, published in the Diário da República, Series II, dated August 22, and started operating on July 16, 2007 ; our system of labor mediation was created through a Protocol signed on May 5, 2006 between the Ministry of Justice and the Confederation of Portuguese Industry (CIP), Confederation of Commerce and Services of Portugal (CCP), Confederation of Portuguese Tourism (CTP), Confederation of Portuguese Farmers (CAP), General Confederation of Portuguese Workers - Intersindical Nacional (CGTP - IN) and General Union of Workers (UGT); and finally, our system of criminal mediation, instituted in our legal system by law no. 21/2007, of June 12. Thus, one can also think of the creation of a public system of tax mediation.

State Courts, which is required, will ensure that it becomes as public as any other judicial decision. The agreement should be published on a possible electronic platform so that anyone wishing to do so can consult it. In this context, it seems to us that the proposal for a FERNANDO MARTÍN DIZ[28] which involves the implementation of a Public Registry of Mediation, within which it will be mandatory to deposit the agreements obtained through mediation, making them accessible to the public, in particular via electronic media.

The process of mediation, although endowed with some flexibility, should not mean informality. The mediator must not conduct the mediation process in a completely arbitrary or discretionary manner. In spite of the flexibility that should be recognized in mediation, the mediator's actions must correspond to a certain sequence of acts and formalities that, at least minimally, must be regulated by the legislator. This requirement of regulation is all the greater when we are in the domain of matters that have a special interest in the public interest, as in the case of Tax Law.

Thus, there are a set of phases that, in our understanding, should be part of any process of mediation on tax matters. In a first stage, which we call the preliminary stage, the parties must express their willingness to submit the dispute to a mediation process and the taxable person has the initiative. In a second phase, which we call the preparatory phase, the mediator must meet with the parties and their lawyers, informing them about what mediation is, what their advantages and disadvantages are, and what rules the mediation process. Once the interested party has been duly clarified and the purpose of continuing the mediation is maintained, the parties, the lawyers who represent them and the mediator must sign a mediation protocol. In a third phase, we find the conciliatory phase in which the mediator performs the various mediation sessions, seeking to help the parties reach an agreement. If they reach an agreement, it should be reduced to writing and signed by the parties. Finally, in a fourth phase, which we call the homologation and publicity phase, the agreement obtained must be approved by a State Court and subsequently published.

3. Tax mediation in a comparative law perspective: the North American and Italian case - brief reference

In the U.S., mediation in tax matters was introduced in the *Internal Revenue Code* pelo *Internal Revenue Service Restructuring and Reform Act of 1998.* Currently, the *Internal Revenue Service*, through the *Office of Appeals*, offers taxpayers essentially three mediation programs. These three mediation programs

[28] Fernando Martín diz, *Retos de La Mediación Como Complemento Al Proceso Judicial En Una Sociedad,* in "Los Retos Del Poder Judicial Ante La Sociedad Globalizada. Actas Del IV Congreso Gallego de Derecho Procesal (I Internacional)" (Universiadade da Coruña: Coruña, 2012), p. 131 a 146.

are intended for different types of taxable persons and for different stages of the tax procedure, and include, in particular, the *Fast Track Settlement*, *o Fast Track Mediation* and the *Post Appeals Mediation*.

The *Fast Track Settlement* offers taxable persons (*large Business and International, Small Business/Self-Employed* e *Government Entities*) the possibility of resolving their disputes, as soon as possible, still in the phase of *examination process*. The purpose is to resolve the dispute within 60 or 120 days, depending on the type of taxable person and from the moment the request is made. For this purpose, a mediator is chosen that integrates the *Office of Appeals* do *Internal Revenue Service,* which is to assist the taxable person and the *Internal Revenue Service* to reach an agreement. In this context, the *Office of Appeals* can define the rules and terms of the mediation process; may meet together or separately with the parties; and finally, it can make proposals for agreements, which may or may not be accepted by the parties[29].

The *Fast Track Mediation*, contrary to the *Fast Track Settlement* is intended only for *Small Business/Self-Employed,* whose litigation arises during the collection process. From the moment the request is made, the mediation process must be completed within 40 days. In procedural terms, the *Fast Track Mediation* is very similar to *Fast Track Settlement*.

In *Post Appeals Mediation*, the taxable persons can only access it after the traditional appeal procedure has been exhausted. Currently, the use of *Post Appeals Mediation* is not restricted to certain taxable persons and can be used, *Fast Track Settlement*, by *large Business and International, Small Business/Self-Employed* and *Government Entities*, is not limited to matters of value over 1 million or to purely factual matters, but may also concern questions of law. The resolution of the dispute must be concluded within 60 to 90 days. In the same way as the other mediation programs mentioned above, the mediator will also be an employee of the *Office Appeals* do *Internal Revenue Service*. However, it is possible for the taxable person to indicate a co-mediator who is not part of the *Office Appeals*, in which case the costs will be entirely at his expense [30].

In Italy, the *mediazione tributaria* is a recent instrument and has been established therein by Article 39 (9) of the *decreto-legge di 6 de luglio*, de 2011, que adicionou ao *decreto legislativo n.º 546/92, di 31 di dicembre* o artigo 17.º Bis, entitled "*Il reclamo e la mediazione*" (emphasis added).

According to the above-mentioned diploma, a taxable person who intends to take legal action against an act of *Agenzia*, should, in matters of less than €

[29] The rules that should be obeyed by the *Fast Track Settlement* are listed in Revenue *Procedure 2003-40*, available in http://www.irs.gov/ last access in 10/09/2017. In doctrine, for more information on this program see, among others, *David Parsly, The Internal Revenue Service and Alternative Dispute Resolution: Moving From Infancy to Legitimacy*, "Cardozo Journal of Conflict Resolution", Vol. 8 (2007), 677 a 715 (p. 691 a 695).

[30] The rules to be followed by the Post Appeals Mediation are currently included in the Revenue Procedure 2014-63, available in http://www.irs.gov/ last access in 10/09/2017.

20,000, file a claim in advance. It is within the scope of that complaint, which is mandatory, that the taxable person may or may not submit a *mediazione tributaria*. This proposed *mediazione tributária* must be duly reasoned and well founded, and the taxable person should not confine himself to requesting the total or partial annulment of the act. The complaint, with the proposal for mediation, is presented at the *Direzione provinciale* or the *Direzione regionale* on which the agency that has practiced the act depends, and this should proceed to its re-routing to an independent legal department located there. These departments review the proposal submitted and may accept it, even if partially, reject it, or submit a counter-proposal of *mediazione*, taking into account the principle of economical administrative action. The agreement is concluded through the assent of *l'Ufficio* and of the taxable person who is required to sign it and takes the form of payment by the taxable person of the agreed amount. Furthermore, the taxable person has the benefit of a 60% reduction in the administrative penalty.

This procedure of tributary *mediazione*, in fact, takes on some peculiarities that make us reject its classification as a true mediation. First of all, because we are not, in this procedure, before a real mediator, insofar as he is confused with one of the parties (l'*Ufficio*).

4. Conclusions

From all of the above, it turns out that the concept of mediation, as an alternative means of settling disputes, and when conceived for Tax Law, is exactly the same concept of mediation that exists for the resolution of disputes in private law matters (for example, Labor Law[31] and Family Law[32]) and other branches of Public Law (such as Criminal Law [33] and Administrative Law [34]). That is, the concept of mediation and mediator, provided for in the Portuguese Mediation Law, can be applied to tax mediation. This does not mean that this law should apply to tax mediation. In fact, to think about tax mediation is to create a

[31] The Portuguese labor mediation system was created through a Protocol signed on May 5, 2006 between several entities, namely the Ministry of Justice and the Confederation of Portuguese Industry (CIP), the Confederation of Commerce and Services of Portugal (CCP), the Portuguese Confederation of Portuguese Tourism (CTP), the Confederation of Portuguese Farmers (CAP), the General Confederation of Portuguese Workers - Intersindical Nacional (CGTP - IN) and the General Union of Workers (UGT))

[32] The Portuguese family mediation system was created through Order no. 18 778/2007, of July 13.

[33] Criminal mediation was introduced into the Portuguese legal system by law no. 21/2007, of June 12.

[34] In fact, according to Article 87c (1) of the Code of Procedure in Administrative Courts (CPTA) - this article was added by Decree-Law no. 214-G / 2015, of October 2 - when the case falls within the power of the parties' disposition, may at any stage of the proceedings take place at an attempt to mediate, provided that the parties so request, jointly, or the court deems it appropriate. Administrative mediation is carried out under the terms of the law, which, in the absence of another, is the Mediation Law.

Tax Mediation Law, similar to what happens in the arbitration with the Legal Regime of Tax Arbitration.

In fact, taxation mediation, as we have considered it, should contain some specificities, namely in terms of the confidentiality of the agreements. In fact, the confidentiality of mediation, foreseen as a general principle of mediation, in Article 5 of our Mediation Law, goes wrong with the required and necessary transparency in the resolution of disputes, in the context of matters of interest public and that, therefore, to all (public purse) concern.

To think mediation for the Portuguese tax-legal system seems to us to make all the sense today. First of all, because, as we have seen above, the main obstacles to tax mediation are not absolute. That is, it is not impossible to envisage a future relationship between mediation and Tax Law.

In fact, the use of alternative means of dispute resolution in Portugal is becoming more and more significant. Effectively, in the various jurisdictions, we find rules that elect ADRs as preferential means of settling disputes, to the detriment of the traditional recourse to State Courts. We take a positive look at the progress in the search for other forms of dispute resolution, insofar as they allow, as mentioned above, a further strengthening of the Fundamental Law of access to the Law and the Courts.

Contrary to what, for a long time, would be expected, the Tax Law has not been an exception to the rule. In fact, the acceptance of alternative solutions to the decision of the State Court, for the resolution of disputes arising from legal-tax relations, is no longer a new reality in Portugal. In fact, as mentioned above, in 2011, Decree-Law No. 10/2011, of January 20, was approved, which established, in a clearly innovative way, a Legal Regime of Tax Arbitration. Despite some dissonant voices, the Portuguese legislator decided to proceed with the consecration of tax arbitration and, in fact, many have been those, mostly companies, who have preferred the resolution of their disputes with the Tax Administration, by the Arbitral Tribunal, to the detriment of of the State Court. The main reason for this preference is essentially the speed of disputes which the Arbitral Tribunal, as compared with the State Court, offers.

Faced with this, and despite the discordant voices that may arise, it seems to us that the natural way will be the one that allows the use of mediation also in matters of Tax Law. Although this should be a trend of acceptance, the truth is that the reception of this instrument of dispute resolution, in tax matters, should always be guided by the existence of some limits.

In our opinion, mediation can never be substituted, or compete, in an absolute way, with the Courts, be they the arbitral ones, or the state ones. In fact, there is a core of issues that can not, by their very nature, be mediated. In addition, it is incumbent, constitutionally appreciating, to the Courts the administration of justice in the name of the people[35], so it would not make sense to accept that

[35] Cf. Article 202 (1) of the CRP.

instruments such as mediation, notwithstanding the recognizable advantages, could be replaced, in an absolute way, by the Courts in the administration of justice.

The latter are the organs of sovereignty that are responsible for the exercise of the judicial function, that is, who is ultimately responsible for dictating the law. Thus, even if it is admitted that the means of self-composition, such as mediation, can be offered by public systems integrated in the State itself, similar to what happens with our systems of family, labor and criminal mediation, this does not mean that mediation may wish to reduce very little the exercise of the judicial function by the Courts, first of all because there are matters in which the possibilities of agreement are, from the outset, forbidden. The path one desires is one that promotes and prefers consensualisation when it is possible. Where this is not the case, in particular where there are no negotiating areas, recourse to the Court and the decision of the court should be unavoidable.

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