REVISTA DE FINANÇAS PÚBLICAS E DIREITO FISCAL

4 ANO III 01 11

ARTIGOS, COMENTÁRIOS DE JURISPRUDÊNCIA, RECENSÕES, CRÓNICA DE ACTUALIDADE.

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Retroactivity and Tax Legislation in Portugal: some considerations

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RESUMO

Este artigo analisa algumas questões relativas ao sentido e alcance do princípio da irretroactividade dos impostos inscrito explicitamente na Constituição Portuguesa depois da revisão de 1997. Particular atenção é dada à distinção entre retroactividade em sentido próprio e em sentido impróprio (retrospectividade) e ao controlo da constitucionalidade de leis com efeitos retroactivos.

Palavras-chave:
Retroactividade
Retrospectividade
Controlo da constitucionalidade
Princípio da confiança legítima

ABSTRACT

This article addresses several aspects concerning the definition and the scope of the principle of non-retroactivity in taxation explicitly enshrined in the Portuguese Constitution following the aftermath of the 1997 constitutional review. A particular emphasis is given to the distinction between proper retroactivity and "improper" retroactivity" (retrospectivity) and the control of constitutionality of retroactive laws.

Key words:
Retroactivity
Retrospectivity
Control of constitutionality
Principle of legitimate expectations

1. Historical evolution of the principle of non-retroactivity on taxation

The idea of retroactivity is a legal fiction and prescribes that laws cannot produce effects at a date previous to their entry into rule. In Portugal, constitutional, tax and civil law only refers the word 'retroactivity'. 'Retrospectivity' is a term used by the doctrine and tax literature who also name it 'inappropriate retroactivity'[1].

The Portuguese Civil Code ("CC" – *Código Civil*) on its Article 12 (1) establishes the general rule of time application of laws (*tempus regit actum*), but does not forbid the retroactive nature of the law or the retroactive application of the law in general[2].

The Portuguese Constitution ("CRP" – *Constituição da República Portuguesa*) deals nowadays with the principle of prohibition of retroactivity in three articles: Article 18 (3) – prohibition of retroactivity of the

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(*) In 2009, Professor Hans Gribnau sent a questionnaire to members of various countries of the EATLP addressing the subject matter of *Retroactivity in Tax Law*. Professor Glória Teixeira and I proposed to jointly answer this questionnaire, being that I would essentially concentrate my efforts on the initial questions. The general conclusions and pertaining to each country's questionnaire were presented at the EATLP Congress that took place in Leuven in May 2010. In accordance with the traditional methodology, the answers to the questionnaires (accessible via EATLP's official website) should have been submitted until the end of August so as to subsequently culminate in the publication of a *country report* (derived from a previously predetermined orientation) and, to that effect, I concluded my draft, having chiefly focused on the recent evolution of the Constitutional Court's rulings. However, due to differences of opinion as to the content of the text itself, the partnership between Professor Glória Teixeira and I was discontinued. As a consequence of this disagreement, we decided by mutual consent that Professor Glória Teixeira would submit her own version of the country report for the consideration of the EATLP and henceforth I would be free to publish my own version of the text in a publication of my choice. I am very grateful to IDEFF for the opportunity of publishing my text in this current edition.

[1] Using the concept "retrospectivity" (*retrospectividade*), Canotilho, J. Gomes, *Direito Constitucional e Teoria da Constituição*, Coimbra: Almedina, 2003, p. 262.

[2] Article 12º of the Civil Code expressly states that the law only applies to future circumstances, after its publication and entry into force. Both facts and their effects, that occurred under the duration of the 'old law', cannot be subject to the new regime or, in other words, retroactivity of the new law does not apply either to past facts or their effects even if the later are postponed or extended under this new law.

laws restricting rights, freedoms and guarantees (including the rights and guarantees of taxpayers); Article 29 (4) related with criminal law (including criminal tax law) and Article 103 (3) which prohibits retroactive taxation[3]. Only after the constitutional review of 1997, had this special principle a noteworthy expression in the formal Constitution and gained autonomy in face of others principles (namely, certainty), with repercussions on the doctrine and court practice[4].

Furthermore, the General Tax Law, ("LGT" – *Lei Geral Tributária*, 1998) refers to the prohibition of the creation of retroactive taxes in its Article 12 (1)[5].

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[3] Paragraph 3 of 103.º of CRP: *"No one shall be obliged to pay taxes that are not created in accordance with this Constitution, are retroactive in nature, or are not charged or collected as laid down by law."*. Paragraph 2 of the same provision prescribes that not only taxes but also the essentials elements of taxes are created by law: *"Taxes shall be created by law, which shall determine their applicability and rate, fiscal benefits and such guarantees as may accrue to taxpayers."* Nowadays to authorize a general principle of retroactivity on tax matters, a review of the Constitution would be needed (see articles 284 and ff. of CRP) and this revision should take in account the material limit established in article 288, d), concerning rights, freedoms and guarantees of the citizens.

[4] This formal introduction of the principle was very criticized by certain part of the doctrine and applauded by another part. At that time, there were some opinions for and against it. Those who were against it thought that the problem was already solved with the principles in place and they defended that there was no need to define it expressly. They also argued that this introduction of the principle did not solve all the problems and there were many questions left unsolved. At the time, even the Minister of Finance showed strong reservations concerning the formal introduction of the principle of non-retroactivity in Constitution. Those in favour of the principle argued that this was the only way to stop abuse by the legislative bodies.They also argued that the rules of interpretation could still be implemented without jeopardizing the principle of retroactivity because the interpretation rules have to be always enacted in the spirit of the Law and not create a new law. See, among others, Morais, Rui "A revisão da constituição fiscal", in "*Jures e de Jure*" colectânea comemorativa dos 20 anos da Universidade Católica; Costa, J. M. Cardoso da "O enquadramento constitucional do direito dos impostos em Portugal: a jurisprudência do Tribunal Constitucional" in *Perspectivas constitucionais nos 20 anos da Constituição portuguesa* e Sanches, J. L. Saldanha, *Manuel de Direito Fiscal*, Coimbra Editora: Coimbra, 2007, pp.189-193.

[5] Article 12.º (1) LGT: "Tax rules are applied to the facts that occur after their entry into force, being therefore forbidden to create any retroactive taxes." See: Campos, Diogo Leite de/ Rodrigues, B. Silva/ Sousa, J. Lopes, *Lei Geral Tributária – Coment-*

The general principle of non-retroactivity of law demonstrates the respect for, *inter alia*, the principles of certainty and proportionality, being part of the notion of *Rechtsstaat (État de droit)*, or in trust of the rule of law according to the constancy of the law through time (*Gezetzeskonstanz*). On tax matters, this system reflected also some European ideas. During the formation of the modern tax State in Europe, taxation has been an attribute of representative democracy with the limits of "*no taxation without representation*" (or consent)[6].

Before 1997, the Portuguese Constitutional Court (*Tribunal Constitucional*) had already accepted the principle of non-retroactivity on tax matters as a valid one. However, the Court defended that only the cases of inadmissible, intolerable, arbitrary retroactivity were strictly forbidden because of the principle of law security and trust (Article 2 of the Constitution) which implies a minimum of certainty of the law and respect for previously created expectations of citizens[7].

At the basis of this position, is the fact that neither a right not to frustrate legitimate expectations nor a right to maintain a legal regimen concerning relations with an extended duration or complex facts already partially occurred (principle of the self-revision of the law)[8].

The constitutional review of 1997 argues in favour of the thesis that the retroactivity would make the law uncertain and might bring about situations of injustice.

However a question remains: what does retroactivity really mean? What is the real extension of this principle? In theory, one can see, at least, three different positions: 1) a radical approach advocating that, with the Constitutional review, nothing has changed: this approach means the continuity of the above mentioned interpretation of the Constitutional

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ada e Anotada, Lisboa: Vislis, 1999, p. 60; GUERREIRO, António, *Lei Geral Tributária – Anotada*, Lisboa: Rei dos Livros, 2001, pp. 89-94.

[6] Generally, the courts defend an interpretation of fundamental law based on principles and general criteria (*e.g.*, Constitutional Court Rulings – Proc. n.º 772/2007; Proc. n.º 382/01; Proc. n.º 365/91).

[7] See Constitucional Court, ruling 365/91, of 27.09.91: "No regulation is permissible that affects, in an inadmissible, intolerable, arbitrary or disproportionately onerous way, those minimums standards of security that the people, the community and the law must respect".

[8] Constitutional Court, ruling 287/90, of 30 October.

Court; 2) another radical approach, but in a contrary sense: it means that the distinction between retroactivity and retrospectivity on tax matters has no sense, both are now forbidden; 3) an intermediate position, trying to clarify what has actually changed with the formal introduction of the principle of prohibition of retroactivity in CRP.

2. Distinction between retroactivity and retrospectivity: conceptual variations

The term 'retroactivity' can be used with various meanings. The doctrine and tax literature tend to try to define it more precisely and make a distinction between 'proper retroactivity' and 'inappropriate retroactivity' (the so-called 'retrospectivity').

The doctrine and tax literature tend to divide 'retroactivity' into three levels[9]. This 'inappropriate retroactivity' ('retrospectivity') is what they call the third level, the less harmful level of retroactivity.

The principle of 'retroactivity' prescribes that laws cannot produce effects at a date previous to their entrance into rule. 'Retroactivity' *stricto sensu* means that a new legal provision regulates a situation that was previous to the law's entry into force. It makes a connection between the effects of a new legal provision and factual situations that happened before the law's entry into force. It is associated to *ex tunc* force (to the past).

The concept of 'retrospectivity' (or inappropriate retroactivity) has not a clear and generally accepted definition. Normally, it implies that the new legal disposition has application to already existent situations, although the new discipline has future, *ex nunc*, effects. There is a separation of meanings between the 'proper' and 'improper' retroactivity owing to its impact on the effects thereof. 'Retrospectivity' means that a new provision applies to new facts, but there was a previous context to the fact occurrence which surely created legal or legitimate expectations.

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[9] On the levels of retroactivity, see Xavier, Alberto, *Manual de Direito Fiscal*, vol. I, Lisboa: FDL, 1974, p. 197-202.

On this issue, sometimes certain tax literature refers the case of *ultra-activity* of laws.[10] This ultra-activity implies that in certain cases it is not reasonable to extinguish certain situations constituted and legally expected as a result from the previous law. To solve this, the legislator sometimes also prescribes dispositions of 'transitory law'.

Those distinctions are not only important to the doctrine and tax literature but also to courts in order to help judges to balance constitutionally protected interests.

The legislative tax process involves different phases: creation, implementation, levying and collection, and frequently a new law comes into effect and affects citizens' expectations or their rights and obligations. In this context, tax literature discusses whether Article 103 CRP establishes two types of limitations regarding retroactivity of tax laws, the first being the interdiction to create or change taxes with retroactive effect and the second also concerning the retroactive effect on tax rules on payment and collection of taxes.

The interpretation of this provision has been less than unequivocal in tax literature.

There is a general consensus that the introduction of new taxes and changes in the tax bases or tax rates shall not apply retroactively, but the question of the distinction between retroactivity and retrospectivity remains[11].

The opinions diverge when applying the *second* limitation concerning the retroactivity of tax provisions regulating assessment, payment and collection of taxes. Several authors[12] admit that the principle of non-retroactivity can be overridden in the field of payment or collection of

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[10] Sá Gomes, Nuno, *Manual de Direito Fiscal*, volume II, DGCI, Cadernos de Ciência e Técnica Fiscal, nº 174.

[11] An express prohibition is also included in the Brazilian Constitution of 1988 (article 150º) and Constitutions of other Portuguese speaking countries. For further developments see Miranda, Jorge and Medeiros, Rui, *Constituição Portuguesa Anotada*, Tomo II, Coimbra Editora, 2006.

[12] See, e.g., Pereira, M. H. Freitas, *Fiscalidade*, 3.ª edição, Almedina, 2009; Teixeira, Glória, *Manual de Direito Fiscal*, Almedina, 2.ª edição 2010.

taxes because, frequently, those provisions aim to enhance efficiency and security in the process of tax assessment, payment and collection[13].

There is also a different level of discussion in the domestic and comparative tax literature relating to the *first* limitation or the acceptable types of retroactivity when introducing new taxes and changes in tax bases or tax rates.

The principle of non-retroactivity has different economic and legal impacts on the tax system, depending on the structure or type of tax. In the case of consumption taxes (VAT or excise duties), usually, the gap between taxable facts and the occurrence of their effects is reduced or even nil and consequently the application of the principle does not raise particular problems. However, it is quite a different situation in what concerns income or property taxes or so-called 'periodic' (recurrent) taxes whose facts or theirs effects are spread out, generally, through the calendar year and any legal changes during this period may give raise to problems of retroactivity. Fortunately, in recent Portuguese experiences, tax changes that have been made during the taxable period have been favorable to the taxpayer and, as a result, litigation was not triggered. However, the problem still persists if tax changes move to *penalize* the taxpayers, as it is happening now in Portugal, under current difficult public finance conditions. From a strictly legal point of view, it can be defended that the final solution should be the same for both circumstances, because there is no tax provision that expressly imposes the application of the more favorable regime as enshrined in regard to criminal law.

In Portugal, tax changes shall be approved by the Parliament (articles 165 (1) (b), 227 (1), (a) and 238 (3) CRP), in practice, normally at the time of the approval of the financial budget ('Financial Budget Law'). The doctrine mostly defends that tax changes during the financial year (year N) shall be exceptional if not forbidden at all[14]. In this respect, tax literature is not unanimous. Some authors would accept retrospectivity in tax law (since the first January of the year N), others would support apportionment rules to allocate to the respective time period the

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[13] They are not essential elements of taxes (*see* Article 103.º of CRP and Article 8 (1) of LGT).

[14] See *Manifest of 66 of 26 April 2010* against the application of a new law on taxation of capital gains as from 1st January 2010 (in *Jornal de Negócios on line*)

applicable law or regime (*pro rata temporis*, in line with the article 12 (2) of LGT)[15], others defend that the applicable law at the beginning of the financial or calendar year (since the first January of the year N+1) shall prevail[16].

1.3. The position of Constitutional Court

1.3.1. *The issue of periodic (recurrent) taxes*

The Constitutional Court tries to clarify these issues, after the Constitutional review of 1997, adopting a more strict approach than before.

This question can be discussed regarding, at least, three issues: 1) As we said, concerning direct taxation, a tax that it is imposed in certain periods of time (normally, on a yearly basis), the new law published in the middle of the year 'N' can only be applied in the year 'N+1' or other solutions are also possible (e.g. a *pro rata temporis* solution in the year 'N' or even its application to the first of January of year 'N')?; 2) The issue of the interpretative statutes (see next point); 3) Is retroactivity in tax matters forbidden even if the new law is in favour of taxpayers? (see point 1.5)

Concerning the first question, until the present moment, normally the Constitutional Court distinguishes between retroactivity and retrospectivity, in order to declare that the principle of prohibition of retroactivity (laid down in article 103 (3) of CRP) only forbids authentic retroactivity and does not concern retrospectivity[17].

This prohibition means a more strict approach concerning *retroactivity*. According to the Court, the mere retroactive nature of a disadvan-

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[15] Xavier, A.lberto, *Manual de Direito Fiscal*, *op. cit.*, p. 201; Gomes, N. Sá, *Manual de Direito Fiscal, op. cit.*, vol. II, p. 417.

[16] Campos, D. Leite de/Campos, Mónica, Direito Tributário, 2.ªed., Coimbra, 2003; Ferreira, E. Paz, in Miranda, Jorge/ Medeiros (org..), Rui, *Constituição da República Portuguesa Anotada*, Tomo II, Coimbra, 2006, p. 223.

[17] Seee: Nabais, J. Casalta Nabais, *Direito Fiscal*, 4.ª. ed., Coimbra. 2006, p. 148; Fonseca, R.Guerra da, in Otero, P. (coord.), *Comentário à Constituição Portuguesa*, II vol, Coimbra, 2008, pp. 872 e ff.

tageous tax law applicable to private citizens (or taxpayers) is forbidden by the Constitution on an automatic way, despite the tax administration's or the taxpayer's behaviour in concrete. In other words: the unconstitutional judgment results only from the mere analysis of the normative data, not depending in any moment of the ascertainment (examination) of any circumstantial elements relating to the status, in concrete, of a certain legal tax relationship[18].

If, following the Constitutional Court, the prohibition of retroactivity does not enclose the retrospectivity (the weakest level or the third level of retroactivity), which constitutional framework will be applicable in this case?

Concerning *retrospectivity*, the Constitutional Court defends that its prohibition will only occur in cases where we have a clear breach of the principles of trust and legal certainty (see Article 2 of CRP). Thus, on this point, the doctrine defended by this Court before 1997 remains valid. Therefore, in order to obtain this protection, we need to congregate two essential conditions: 1) the unfavourable breach of expectations will be inadmissible when it constitutes a change in legal order which could not be reasonably foreseen by taxpayers, and 2) when such change is not determined by the necessity of safeguarding other constitutionally protected rights or interests considered as prevalent.

As a matter of fact, we are dealing here with the application of the principle of proportionality enshrined in Article 18 (2) of CRP.

1.3.2. *Interpretative statutes and validation statutes*

In legal matters, in general, according to the Civil Code (see article 13 (1)) retroactivity is the normal solution in case of an authentic interpretative laws or statutes. It means that retroactivity is accepted in these cases insofar as they do not exceed the scope and substance of the

[18] See: Constitucional Court, rulings 128/09 of 12 March 2009 (review 772/2007) and 85/2010, of 3 March 2010 (review 653/09).

interpreted law and also safeguarding the cases of settled case law or concluded agreements.[19]

Therefore, before the constitutional review of 1997, we encounter a lot of cases concerning the application of interpretative statutes on tax matters. Even if one part of the doctrine criticized this situation, there is no case of negative court decisions. Nevertheless we must distinguish the cases of true interpretative statutes from those of false interpretative statutes, with new legal solutions not legitimated by the criterions of interpretation of law provided for by the Civil Code[20].

After 1997, the position of the Constitutional Court has changed, adopting a more strict approach. The main example concerning the prohibition of interpretative law in taxation is the ruling nr 172/2000, of 22.03.

According to this Court ruling, the explicit constitutional prohibition of the retroactivity on tax matters cannot be interpreted in similar terms as previous jurisprudence of the Court, as if the text of the constitutional law had not been modified and as if the non-retroactivity principle were only the result of the general principles. The express prohibition of the retroactivity represents a strong guarantee of objectivity and self-binding of the State by the rule of law.

We must also underline, that our juridical experience does not recognize the so-called "validation statutes" as something different of interpretative statutes. We can frequently see changes in tax legislation in order to correct certain rulings adverse to tax administration, but without retroactivity effects.

1.3.3. *Favourable retroactivity*

Until this moment, the Constitutional Court did not take any position on this issue. Having in mind the criminal doctrine, the most part of the doctrine defends that this kind of retroactivity is acceptable. Howe-

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[19] See Pires de Lima and Antunes Varela, *Código Civil Anotado*, volume I, 3.ª edição, Coimbra Editora, 1982.

[20] See article 9 of Civil Code. Today these criteria are specifically foreseen in article 11 of LGT.

ver the minority position defends that constitutional law does not accept any type of retroactivity. According, for instance, Menezes Cordeiro, the retroactive effect is not allowed, even when tax statutes are favourable to taxpayers[21].

In any circumstances, we cannot ignore the principle of the equality of treatment between taxpayers and this point can arise some problems.

1.4. Examination methods

As we have seen, before 1997, Portuguese courts usually tested the compatibility with the Constitution and with general legal principles such as the principle of legal certainty. They considered as 'unconstitutional' laws, 'retroactive' provisions that contravene the principles of security and predictability and reasonable expectations, in an anomalous way.

With the constitutional review of 1997, the specific prohibition of 'retroactive taxes' (in *stricto sensu*) was formally established and the position of the Constitutional Courts has begun to change in a more strict way [22].

Therefore, today, the issue of examination methods concerns essentially the question of retrospectivity. The Constitutional Court has created material criteria to fix the limits of 'retrospectivity'. This limitation depends on the consequences of the 'retrospective statute' as far as the expectations of citizens are concerned.

Concerning the legal and constitutional protection of the trust principle in order to set aside any retrospective application of the law, the Court defined four tests based on the two criteria already indicated (see point 1.3): 1) the State's action_(in particular of the legislator) must be able to create in the taxpayer some expectations of continuity; 2) these expectations must be legitimate, justified and established on reasonable grounds; 3) the taxpayer would have made some plans bearing in mind the continuity of the States action/ conduct; 4) and, finally, it is necessary

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[21] Cordeiro, Menezes, "Problemas de Aplicação da Lei no Tempo, Disposições Transitórias" *in A Feitura das Leis*, vol. II, 1986, p. 374.

[22] See ruling n.º 172/2000, of 22.03.2000 concerning interpretative statutes and ruling n.º 604/2005, of 02.11 in the case of special contributions.

that a more important public reason or public interest (which can justify the behaviour of the State) than the taxpayer expectations do not exist.

As a result, only a very strong expectation of the taxpayer can prevent the legal tax dispositive from a retrospective application. Therefore, only a more important interest could justify a retrospective application of a given provision, and not always.

1.5. A pending case in Constitutional Court

The issue of the distinction between retroactivity and retrospectivity on tax law was recently brought up by the President of the Republic who required the subsequent review of the constitutionality of the Laws n.º 11/2010, of 15 June and n.º 12-A/2010, of 30 June, to the Constitutional Court (see point 3). The first law has established a new marginal rate of 45% of income tax (IRS), a periodic tax of successive formation, applicable to taxable incomes above 150 000 euro, in such terms that it seems to apply to incomes obtained in 2010, before its entry into force (16.6.2010). The second law has increased the rates of IRS in all brackets to enter into force in 1 July 2010.

The approval of those laws triggered a strong political and legal debate. From a political point of view, this discussion could (and should) be avoided with a technically well-designed law. From a legal point of view, those cases offer to the Court the opportunity to clarify the distinction between retroactivity and retrospectivity and to define, as the case may be, the criteria that allow invoking the principles of certainty (security) and legitimate trust (confidence).

So far (31.8.2010) the Court decision is not known. Nonetheless, bearing in mind the rulings taken in the past, it is probable that the Court decides to qualify the situation as a case of retrospectivity rather than retroactivity. Particularly interesting will be to analyze the extent to which the Court will take into consideration the provision of Article 12 (2) of LGT, which provides that "if the taxable event is of successive formation, the new law shall only applies to the elapsed period of time following its entry into force" (principle *pro rata temporis*), or if the Court denies the application of this legal principle on the grounds of its alleged non-practicability.

1.6. Distinction between substantive and procedural statutes

According to an almost widely accepted definition, substantive rules are those that prescribe rights, duties, obligations, conditions and certain definitions related with facts or a tax situation. In accordance to the CRP (Article 103), the main substantive rules concerns tax incidence, tax rates, tax basis and tax benefits.

Procedural rules assure that the substantive rules are put in practice, establishing what has to be done to make substantive laws effective. Procedural rules are the ones essentially stipulated by the Tax Procedure and Tax Proceedings Code ("CPPT" – *Código de Procedimento e de Processo Tributário*), by the LGT and, in some cases, by the tax statutes (*Códigos fiscais*) .

Those dispositions include the regulation of subject matters such as reasonable time span regarding specific procedures; recitals and legal causes to be invoked; briefs to be presented along with requirements of all kinds; rules of stay of proceedings; rules of limitation and dismissal; appeals; dispositions about preliminary orders and also dispositions concerning tax execution process, to name just a few.

There is also the Complementary Statute of Tax Inspection Procedure ("RCPIT" – *Regime Complementar do Procedimento de Inspecção Tributária*) containing several procedural rules, as well[23]. This inspection statute establishes the procedure applicable in case of tax inspections, namely rights and obligations of the taxpayers, in accordance with the contradictory principle, and rules of procedure applicable to the tax administration, such as the right of access to the taxpayers' premises, the right of access to data and computer facilities, etc..

One of the most important procedural issues concerns the *burden of proof*. Article 74 (1) of LGT enshrines the general principle that the burden of proof falls on the entity (Tax Administration or taxpayer) that invokes a constitutive fact of a right or, in other words, on the party who has the obligation to shift the assumed conclusion away from an oppositional opinion. Nevertheless, we have a lot of special provisions. So, the burden of proof is a subject dealt with in several tax statutes along

[23] See Decree-Law n.º 413/98, of 31.12.98.

with the regulation of some institutes. Some examples are the provisions of Article 89-A (3) and (4) of the LGT; article 59 (1) *in fine* of the Corporate Income Tax Code (CIRC) as well as Article 61 (6) and (7) of the same statute. These rules stipulate that sometimes in order to avert a legal consequence, taxpayers have to prove the contrary of what is sometimes object of a legal presumption.

The Portuguese courts accept that the 'non-retroactivity' principle of tax law shall be adjusted as far as procedural rules are concerned. Firstly, the Constitution does not forbid procedural rules to have 'retroactive' effect, even when dealing with taxpayers' rights and warrantees, except in cases forbidden by Article 18 (3) of CRP. Secondly, new procedural dispositions have an immediate application even in pending procedures (see Article 12 (3) of LGT). Legal proceedings are ruled by article 12 (3) of LGT. According to this provision, new rules have an immediate effect and new proceedings are regulated in accordance with the new law.

The opposite to the 'ultra-activity' (described above) takes place here in the context of procedural statutes. The legislator opted for an immediate application of the new provisions not only for the future but also to pending situations.

However, a careful analysis has to be done in order to respect the 'minimal contents' of taxpayer's rights and consequently to avoid abuse or disregard for the law security and legitimate expectations principle.

2. *Ex ante* evaluation of retroactivity

2.1. *Constitutional preventive mechanism*

In Portugal there is an *ex ante* evaluation of retroactivity. This evaluation can be done with the control *a priori* of the constitutionality of tax statutes.

Accordingly, all main tax policies are discussed and approved under the rules of the Portuguese Constitution (article 165 (1) (i) of CRP). Taxation is subject to the rule of reserve of law (*reserva relativa*) and it is a competence of the Portuguese Parliament (*Assembleia da República*). The Government can only legislate with express authorization of the Parliament and within the limits of this authorization. The legal form

of tax legislation by delegation of the Parliament is a law of authorization laid down in article 165 (1) and (2) of the CRP.

All along the legislative process, judges and the judicial power do not intervene. The courts cannot influence the current activity of Parliament because the judicial and legislative powers are separate[24]. Only the Supreme Court's decisions have some informal influence and can constitute jurisprudence guidelines. The judicial and executive powers cannot take formal part in legislative activity, jointly[25].

The CRP imposes today, as we know, a limitation by a general principle rule of non-retroactivity in taxation. The CRP knows several mechanisms to grant the constitutionality of legislative production, *inter alia*, an *ex ante* evaluation of retroactivity made by Constitutional Court. This *a priori* evaluation is a preventive mechanism to avoid the violation of every kind of unconstitutionally (organic, formal, material) of all kind of statutes, including tax statutes. In accordance to article 278 of the CRP, the President of the Republic (or, in certain cases, depending on the type of legislation or statute in appreciation, the Prime Minister or the fifth part of the members of Parliament), may submit to the Constitutional Court a petition concerning the analysis of the constitutionally of all norms before their entry into force.

If the Court declares the unconstitutionality of a norm, the President of the Republic must block, with his veto, the statute containing this norm. This statute (law, decree-law) will return to the institution (Parliament, Government) that has approved it to eliminate the norm declared unconstitutional. However, the Parliament, by a qualified majority (2/3), can confirm the law without eliminating that norm.

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[24] See: Santos, A. Carlos dos/ Costa, Paulo Nogueira da, "Portugal (Country report)" in Dourado, Ana Paula (ed,), *Separation of Powers in Tax Law*, 2009 EATLP Congress, EATLP, 2010, pp. 181-188.

[25] Nevertheless, there is a great influence of tax administration in preparation of tax law, sometimes including an informal initiative to promote changes.

2.2. *Transitional policy and ex ante control by an independent body*

The Portuguese experience does not know a truly transition policy. We don't have either governmental or administrative guidelines (*soft law*) concerning the application of the principle of non-retroactivity. Our public administration has been considering and studying this question, namely the *ex ante* evaluation of retroactivity, by means of some special departments in Ministry of Finance Public Administration and in Ministry of Justice, but without defining a truly transitional policy. Tax administration scrutinizes *ex ante* evaluation of retroactivity under the supervision of the Ministry of Finance and its special department Centre for Studies on Taxation (*Centro de Estudos Fiscais*).

We must underline that normally the statute itself defines the day of its entry into force of this statute. Where a legal text doesn't present a date, the normal legal period of *vacatio legis* would apply after the publication of the statute.

However, sometimes, concerning certain problems of time application of law, the statute itself foresees *transitional provisions*, including grandfather's clauses, to avoid the uncertainty of a non-official interpretation, but these provisions must be in accordance with constitutional principles. These transitional provisions are frequently aimed to deal with situations where taxes are formed successively, being therefore affected by the date on which a new statute enters into force.

From a political and a legal point of view, we can consider these provisions a good practice, although they are not mandatory.

Finally, the Portuguese Constitution enshrines a department called Council of State (*Conselho de Estado*) (articles 141 to 146) and according to its article 165, this Council has no mandate to legislate or make legislative proposals. It functions as a political consultative body of the Republic's President and only provides a formed opinion at the President's request.

This body has no permission to legislate or make legislative proposals. The subject of retroactivity is not submitted as a matter of discussion because retroactivity is not a political issue. Retroactivity is a legal matter to be ruled by appropriate legislative assembly or courts because of the special knowledge required, involving a precise and sophisticated monitoring.

Since the end of the Tax National Council (*Conselho Nacional de Fiscalidade*) and also of the Taxpayer Defender (*Defensor do Contribuinte*), we do not have an *ex ante* control by a specific independent body. However our Ombudsman (*Provedor de Justiça*) can take a position about unconstitutionality of tax legislation (article 23 of CRP).

The trend in the near future could be a contribution to deal with retroactivity of non-conventional litigation or extra-judicial litigation as arbitrage.

2.3. *Legislating by press release*

The instrument of "legislating by press release" is not used in the Portuguese tax system.

The instrument of "*legislating by press release*" is not used by the Portuguese legislator.

We can only think of a similar instrument, because the "Council of Ministers" can communicate to the general public the guidelines of their tax policies and the approved statutes before their publication. However, this is not something corresponding to the instrument used in the Netherlands.

However, there is a case in the Portuguese experience that evokes the experience of Netherlands. Some years ago, the Parliament approved in mid-December, after a public discussion, the Financial Budget for next year, but the public entity responsible for publishing the General Budget Law could only ensure its publication by the end of the first week of January. At the time, the publication of this law before the 1st January was made by the internet. The Government argued that the public discussion and approval of the Budget, its publication in internet and in the media, the press release and, the last but not the least, the constitutional principle of annual validity of the Budget were enough to ensure the same effects of the official publication. It was, in fact, a kind of false retroactivity.

In conclusion, we can say that, on one hand, "legislating by press release" is not used in Portugal, and on the other hand, its hypothetical use, according to the constitutional principle of "non-retroactivity" on

tax matters, would appear very difficult to be implemented. Furthermore, there is no "retroactivity period" during which the new provisions can regulate already existing facts, previous to their entry into force. The reason is quite simple: "non conformity with the Constitution".

3. *Ex post* evaluation of retroactivity (successive control)

3.1. *Abstract review*

In Portugal, there are two types of *ex post* evaluation of retroactivity. The first one (article 281 of CRP) is the mechanism of *abstract review* of constitutionality, under request forwarded by several institutions (President, Prime Minister, Ombudsman, General Prosecutor, etc.).

We have two types of *ex post* evaluation of retroactivity. The first one (Article 281 of CRP) is the mechanism of *abstract review* of constitutionality, upon request by several institutions (the President of the Republic, the Prime Minister, the Ombudsman, the General Prosecutor, etc.).

In this type of review *a posterior*, the Constitutional Court may consider and declare generally binding the constitutionality of any rules. This declaration produces effect from the entry into force of the rule declared unconstitutional and determines to reinstate rules that may have been revoked. However, the Constitutional Court may fix the effects of unconstitutionality with a narrower scope than the above referred to when reasons of legal certainty, equity or public interest of exceptional importance demand a solution of this nature[26].

3.2. *Concrete (specific) review*

The second one is the so-called mechanism of *concrete* (*specific*) *review* (article 280 of CRP): in a judicial case concerning tax matters,

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[26] See Article 262 (1) CRP. According to Article 282 (2) of the CRP, where unconstitutionality results from infringement to a subsequent constitutional rule, the statement takes effect only since the entry into force of the latter.

taxpayers can present an allegation to the Courts regarding the incompatibility of a tax statute (or of some of its provisions) with the principle of non-retroactivity or with other general constitutional principles (legal certainty, etc.). If, *inter alia*, a Court refuses to apply a tax provision (established by international convention, law or regulation decree (*decreto regulamentar*) on the basis of unconstitutionality, the decision of this Court should be submitted to the Constitutional Court by the Public Prosecutor; if a Court applies a tax provision, allegedly unconstitutional, that has been brought before the Court during a judicial procedure, only the party who has invoked the unconstitutionality could submit the review to the Constitutional Court.[27]

Whenever the Constitutional Court deems any provision unconstitutional in three concrete cases, it must declare the unconstitutionality as generally binding.

3.3. *Testing against article 1 of the first protocol ECHR*

As a result of the supremacy of international law (see Article 8 of the CRP), it is possible and acceptable for our courts to test retroactivity against international statutes or conventions.

However, considering the constitutional prohibition of retroactivity, this possibility is more theoretical than effective. So, Portuguese Courts do not directly test the retroactivity of a tax statute against Article 1 ('protection of property') of the First Protocol to the European Convention of Human Rights (ECHR). Portuguese Courts use other types of procedures such as the material criteria referred to above, testing the results and their consequences on citizens' rights and comparing those results with the basic principles of the Constitution, one of them being the protection of property rights (Articles 62 and 17 of CRP).

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[27] See Article 280 of CRP and 70 and 71 of Constitutional Court Statute – *Lei do Tribunal Constitucional*.

4. Retroactivity of case law

In Portugal, case law is not a source of law. Accordingly, the decisions of the Supreme Court do not constitute legal and binding rulings.

However, case law is growing in importance and there is also a tendency of the lower courts to follow the decisions of higher courts. If a lower court comes to a contradicting court decision, it must clearly demonstrate the underlying reasoning for such a decision.

Therefore, it is possible to state that the decisions of Supreme Court should be taken into account and cannot be disregarded, particularly in what concerns interpretation. This is not considered to be a breach to the principle of non-retroactivity as long as the interpretation given was predictable and was in the spirit of the rule.

It is also possible that an interpretative ruling laid down by the Supreme Court would be adopted as tax statute enacted by legislative bodies, but without retroactive effects.

Sometimes the Constitutional Court provides a transition rule to limit the effect of their rulings.

5. Views in literature about law and economics in taxation

In Portugal the discussion about retroactivity is much more legal in nature than economic. The approach of *law and economics* begins to be developed in academic circles, namely in the Faculty of Law of the University of Lisbon, concerning many subjects (contracts, accidents, liability, trials, etc.), but, to this day, there are only a few theoretical articles concerning tax matters[28]. Thus, the issue of the tax retroactivity is not discussed, neither in doctrine, neither in Courts, under this approach.

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[28] *See*: Castela, M. Jorge, "Impostos e Justiça Social: Um Ensaio de Análise Económica do Direito (Fiscal)" *in Sub Judice, Justiça e Sociedade*, Revista trimestral, n.º 34, 2006, pp. 49-116; Carvalho, Cristiano, "A solidariedade social na tributação" in *Revista de Finanças Públicas e Direito Fiscal*, n.º 2, ano III, 2010, pp. 79-103.

In addition, the economic interpretation of the tax norms is not, in Portugal, accepted, as a rule. However, the economic argument may be relevant, in particular when invoking the principle of practicability. Moreover, the LGT itself (Article 11 (3)) stipulates that in case of doubt arising in reference to the meaning of norms of tax incidence, the economic substance of taxable events must be taken into consideration.