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Deferred tax assets special regime

The law n.º 61/2014 of 26th of August 2014, which has entered into force today, approves the special regime applicable to deferred tax assets (“DTA”) arising from the non deduction of expenses and negative asset variations regarding impairment losses and post-employment benefits or long term benefits (DTA special regime).

Framework

This regime follows the entry into force of the Regulation (EU) n.º 575/2013, from the European Parliament and the Council, dated of June 26 of 2013 – in the implementation of “Basel III” – and is related to the reinforcements of the prudential requirements for credit institutions and investment companies.

In this context, from January 1 2014 the DTA are generally deducted from the Tier 1 capital of credit institutions, with negative implications on their capital levels.

This special regime is applicable to all companies and not only to credit institutions.

How and when to join

The tax payers who intend to join the DTA special regime should state their intent through communication addressed to the member of the Government responsible for the finance area and submit the document before the Tax Authority until the 10th day after the publication of this law (which means September 5). Additionally, the adherence to this regime depends on the approval of such intention in a general meeting.

After joining the regime, the tax payers may terminate the application of the regime until the end of the tax period preceding the one in which the termination should produce effects.

Such procedure must be performed through communication addressed to the member of the Government responsible for the finance area and submitted before the Tax Authority. For the credit institutions the resignation should be previously approved by the Bank of Portugal.

Application in time

The DTA regime is applicable to expenses and negative asset variations accounted in tax periods that begin in, or after, January 1 of 2015, and to DTA registered in the tax payer annual accounts of the last tax period of 2014.

What constitutes the regime?

This regime is applicable to expenses and negative asset variations regarding:

- (i) Credit impairment losses;
- (ii) Liabilities with post-employment or long term employees benefits.

Among others, the special regime does not apply to credits that are overdue for more than six months and to credits regarding related entities as defined in transfer pricing rules.

Under this regime, the above referred expenses and negative asset variations which have caused a non-deductibility event in the assessment of the taxable income of the period in which they were incurred and thus resulted in the recognition of DTA in the financial statements, can be deducted in the tax period if the requirements foreseen in the Corporate Income Tax Code and in other legal provisions applicable to retirement plan and post-employment benefits are met. This deduction is limited by the taxable income of such period calculated before the expenses and negative asset variations.

Conversion into tax credit

The DTA referred are converted into a tax credit when the tax payer:

- (i) Has registered a negative net result in the tax period;
- (ii) Has entered into voluntary liquidation, insolvency enacted by court decision or, when applicable, the authorization is revoked by the competent supervisory authority.

When a negative net result is registered, the amount of DTA to convert into tax credit corresponds to the proportion between the negative net result from the period and the entire equity of the tax payer.

The tax credit can be used to offset tax debts, including the debts related to state taxes on income and property, which shall be borne by the tax payer, whenever the taxable event does not occur after the date of the conversion into a tax credit. The amount in excess which has not been offset with tax debts will be refunded to the tax payer.

In cases when the conversion into tax credit occurs due to the registry of a negative net result in the period, the tax payer will book and set up a special reserve which implies conversion rights held by the Portuguese State.

In this regard, it should be noted that the conversions rights are securities that entitle the holder the right to demand the tax payer the correspondent capital increase through the incorporation of the special reserve amount and the issuance of ordinary shares that represent the tax payer's share capital.

However, at the date the conversion rights are allocated to the State, the shareholders have the right to acquire these rights in the proportion of their participation in the tax payer share capital.

In case the rights to conversion are exercised, the share capital of the tax payer should be increased to correspond to the issuance of the relevant ordinary shares, which are allocated for free to the holder of the conversion right.

At last, several provisions in this law (such as the acquisition by the shareholders of the rights allocated to the State) depend on future regulations that will be issued by the member of the Government responsible for the finance area.

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