

NEWS

TAX

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SIMPLIFIED MERGERS AND DEMERGERS

New steps towards efficiency

Rita Magalhães and Francisco Matos

The analysis of the legal impact (such as the tax issues) arising from any intended transaction in the field of corporate restructuring is a matter of considerable relevance in all processes therein. In fact, when one bears in mind the complexity of the required formalities and bureaucracy, corporate restructuring can sometimes prove to be an inefficient option, such as whenever tax benefits are not applicable.

In view of this, the new legislative measures concerning the simplification of both corporate mergers and demergers are well worthy of careful analysis, as they may bring a heightened degree of efficiency to the afore-mentioned restructuring transactions.

According to information published by the Government, the approved measures aim, firstly, to speed up the process of corporate mergers and demergers, secondly, to eliminate dispensable formalities, thirdly, to reduce the direct costs of such restructuring transactions and, lastly, to promote the rapid application of the relevant tax benefits.

✓ **Simplification of procedures**

The Government's aim is to reduce the timeframe of corporate merger - and demerger - processes from six/eight months to a maximum of four (or even, in some cases, to one month, provided that no tax benefits are requested by the restructuring companies). For that purpose, the new legal regime comprises only four stages – the registry of the merger/demerger project, the announcement to creditors, the appointment of the General Shareholders meeting and the request for the application of tax benefits – which may be executed online. As a matter of fact, templates of merger/demerger projects will be made available online (in www.empresonline.pt and www.portaldaempresa.pt).

Moreover, the scope of the “simplified merger” regime should also comprise parent companies, which hold at least 90% of the subsidiaries (to be merged) – instead of the previous 100% shareholding. This modification does not preclude the rights of minority shareholders.

Besides simplifying the applicable procedures, costs should also be reduced to a maximum of € 115 (assuming the merger/demerger process will essentially be carried out online). Furthermore, this amount will include all of the necessary registry costs, such as land, vehicle and industrial property registry.

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Application of tax benefits

Pursuant to current Portuguese provisions, the application of tax benefits regarding mergers and demergers requires the participation of several entities (which will give their green light opinion on certain aspects of the merger/demerger). Bearing in mind the slowness and complexity of such procedures, the Government has decided to reduce the number of public entities

participating in the merger/demerger process. Additionally, although the simplified merger/demerger regime still requires the go-ahead from the relevant Ministry (according to the business purpose of the merging/demerging companies), this opinion will be made public within 10 days. Failure to comply with this deadline will be deemed as a tacit acceptance of the taxpayer's request.

Moreover, the request of tax benefits can be made online together with the request of the registry of the merger or demerger project.

Along with these measures, relevant tax benefits may also be taken into account in order to achieve higher tax efficiency, such as tax incentives to companies intending to hire staff and to companies investing abroad.

SECONDMENT OF EMPLOYEES IN A COMPANY INTERNATIONALIZATION CONTEXT

Tiago Marreiros Moreira and João Riscado Rapoula

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Due to the present economic crisis, many Portuguese companies are being impelled towards foreign jurisdictions, seeking new markets and business opportunities. A typical decision faced by internationalized or internationalizing companies is the secondment of Portuguese resident employees to foreign countries. Our intention is to address two particular issues arising from this secondment: (i) the change of the seconded employees' tax residence; and (ii) the social security rules applicable in these cases.

Under normal circumstances, the seconded employees cease to qualify as resident for tax purposes in Portugal, as they typically spend more than 183 days in a given calendar year in a foreign jurisdiction. However, if the seconded employees do not inform the Portuguese tax authorities of their absence from the Portuguese territory in accordance with article 130 of the Personal Income Tax Code, they may be at risk of being deemed resident in Portugal by the afore-mentioned tax authorities, thus being subject to taxation in this territory for their worldwide income, i.e. for Portuguese and foreign source income, and liable to comply with the remaining tax obligations applicable to tax residents in Portugal.

The seconded employees who cease to comply with the requirements to be qualified as residents in the Portuguese territory must therefore report that fact to the Portuguese tax authorities and appoint a tax representative in Portugal. We underline that Portuguese superior courts have consistently upheld that the burden of proof of the absence from the Portuguese territory for more than 183 days shall fall upon the seconded employee who did not inform the tax authorities of his or her absence, fact which

clearly demonstrates the importance of such statement.

Another key worry concerns seconded employees who maintain their household/family in Portugal. Although absent for more than 183 days from the Portuguese territory, a taxpayer may be deemed resident in Portugal for tax purposes by a presumption of law, which states that if the spouse stays in Portugal they should both be considered residents in this jurisdiction. Even though this presumption may be rebutted – as long as the employee is able to prove that his/her economic activities are not closely connected to the Portuguese territory – the truth is that the Portuguese law clarifies neither the procedures to be adopted in these circumstances nor the proof that has to be established to rebut this presumption. From the perspective of the employee who is about to be sent abroad, these clarifications are quite important, given that the ability to rebut the presumption of law will determine that the Portuguese tax will only be triggered on his/her Portuguese source income, and not on his/her worldwide income. From the perspective of the employer, these clarifications are also significant due to its obligations as a withholding agent.

Bearing in mind that secondment is likely to increase significantly in the current context, it would be advisable for the Tax Administration to clarify these issues soon.

As far as Social Security is concerned, the employee will, as a general rule, pay social security contributions in the country in which the activity is performed. However, according to EU law, if the secondment takes place within the EU the employee may maintain

his/her contributive career in Portugal for a maximum period of 5 years, as long as he or she proves to the social security authorities of the country in which the activity is performed that social contributions are still being paid in Portugal.

On the other hand, if the secondment occurs outside the EU, two scenarios should be taken into account: (i) if the destination country has entered into a Social Security agreement with Portugal, the applicable rules will, in principle, be similar to those foreseen in EC law, i.e., as long as the employee proves that social contributions are being paid in Portugal, he or she are exempt from those contributions in the destination country for a five-year period; or (ii) if the destination country has not entered into a Social Security agreement with Portugal, the employee will have to pay social security contributions in the destination country and will also be liable to inform the Portuguese Social Security services of the secondment in order to suspend the payment of social security contributions in Portugal.

The afore-mentioned aspects constitute only small examples of the problems that may arise from a company's internationalization.

In concrete terms, they relate to inefficiencies that may discourage an employee's secondment, given that they enclose bureaucratic obligations and tax and social security consequences, which must be taken into consideration by companies and employees when the decision to operate in other markets is measured. Nevertheless, a careful case by case analysis must be made, in order to assure that secondment occurs with neither disruptions nor inefficiencies.



VAT REFUNDS: WINDS OF CHANGE

Conceição Gamito and Catarina Belim

The VAT refund request is a regular procedure adopted by many economic agents, viewed as having significant importance as it allows companies to achieve greater liquidity.

Given its importance, the VAT refund procedure has been subject to a forceful public debate which has produced major changes at EU and national level. From an **EU perspective**, the Council of the European Union has already acknowledged that considerable problems are posed both for the administrative authorities and for businesses by the rules of VAT refunds to taxable persons not established in the Member State of refund but established in another Member State. The need to amend such rules lead to Council Directive 2008/9/EC of February 12, 2008, which lays down that VAT refunds should be paid within 4 months (contrarily to the current 6 months) and that VAT refund requests will be submitted electronically, as a simplification and modernization measure. Amendments will enter into force as from **January 1, 2010**.

From a **national perspective**, the VAT refund procedure is also subject to a number of negative reviews: (i) in any VAT refund request exceeding € 1,000, the VAT Authorities can request, on a discretionary basis, the presentation of a bank guarantee or other guarantee; (ii) despite the fact that the law states that VAT refund

payments should occur before or at the end of the third month following the one in which the VAT refund was requested, this deadline is often exceeded. The negative reviews also extended to the significant financial cost of guarantees: (i) the obligation to present a bank guarantee/other guarantee when the taxable person was filing its first or last VAT refund request or ceased a VAT special regime and (ii) the obligation to keep the bank guarantee for the minimum period of one year. The national legislator took notice of the public discontent towards the national VAT refund procedures and acknowledged the need to adopt simplification measures in this area. One of the first measures adopted in June 2008 establishes that VAT refunds should be paid within 30 days, when made by taxable persons with a VAT credit superior to € 10,000 and which perform, in the period the VAT request refers to, at least 75% of VAT exempt and/or non-subject operations which grant right to deduct input VAT. This 30-day VAT refund payment rule only applies to first VAT refund requests as from June 2009. However, in order to benefit from it, the taxable person must present a bank guarantee/other guarantee. If, on one hand, this measure makes a favourable impression as it speeds up the VAT refund procedure, on the other hand, it falls short on the number of taxpayers it applies to: exporters and taxable persons which mainly

perform operations subject to the reverse charge rules. In June 2009, the Portuguese legislator adopted two additional simplification measures in the VAT refunds area: (i) elimination of the obligation to present a bank guarantee/other guarantee for the first and last VAT refunds, as well as ceasing of VAT special regimes and (ii) reduction of the period in which the bank guarantee/other guarantee should be kept from 12 to 6 months, in cases where the taxable person opts to present a bank guarantee or where the guarantee is demanded by the VAT Authorities.

The measures named above have an undisputed positive effect on the majority of the Portuguese VAT taxable persons. However, this positive effect will depend on and might be offset by how the VAT Services make use of their legal faculty to request the presentation of a bank guarantee/other guarantee from taxpayers with VAT refunds exceeding € 10,000. At the end, and despite the numerous changes still to be made in respect of VAT refund requests, namely concerning the payment of the requests within the legal deadline, the measures announced so far provide evidence of the will of the Portuguese legislator, anchored in EU law, to simplify and speed up the VAT refund procedures. Let us, therefore, wait for the new winds of change.

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15 April

Supreme Administrative Court reassures taxpayer's defences against abuses

A recent judgment of the Supreme Administrative Court (SAC), dated April 15, 2009, issued in case 262/09, highlights that the tax authorities violate the constitutional principles of equality and access to effective judicial protection when they compensate alleged taxpayer's debts against his or her tax credits before the deadline for the taxpayer to oppose the existence of such debt elapses. This judgment reassures taxpayer's defences, following a consistent jurisprudential line of argument against tax authorities' abuse.

Insurance intermediation fees

Portuguese tax authorities have issued Circular 7/2009, in which they clarify that fees charged by insurance institutions to credit institutions for insurance intermediation services are subject to Stamp Tax, as the exemption foreseen in the Stamp Tax Code for "financial activities" does not comprise insurance intermediation.

23 April

Eligibility of Trusts and Investment Funds to DTT

Portuguese tax authorities consider that foreign trusts are not eligible for the application of Double Tax Treaties (DTT) executed by Portugal. Such understanding was made public in Circular 4/2009, which also comprises tax authorities' position regarding investment and pension funds.

In respect of these funds, tax authorities accept the application of DTT in general terms (with an exception to those DTT that exclude these funds from their scope, such as the DTT with the United States of America and the DTT with Canada), provided that the fund (i) qualifies as a "person" for the purpose of the DTT; (ii) is subject to income tax and does not benefit from a tax transparency regime; and (iii) is the ultimate beneficiary of the income paid.

27 April

Corporate Income Tax amended in line with International Accounting Standards

Although awaiting publication in the Portuguese official gazette ("Diário da República"), the Council of Ministers has already approved the Decree-law that amends the Portuguese Corporate Income Tax Code in line with International Accounting Standards, as approved by the European Union, on the assessment of companies' taxable income. According to the information provided so far, the amendments will enter into force in January 1, 2010.

25 May

Simplified Registration Front Office

Ministerial Order 547/2009, dated May 25, creates a Front Office for "special registry transactions". The purpose of this Front Office is to simplify several transactions that require multiple registration with public services (Land Registry,

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Companies' Registry, Vehicles Registry), such as those entered into by real estate investment funds, venture capital investments, transactions with an amount exceeding € 5M, among others.

26 May Special Taxpayers' list

The list of "special taxpayers" which should be subject to a tax inspection was recently made public the Secretary of State for Tax Affairs.

3 June Special tax identification number attributed to temporary workers (non-resident)

Through a binding ruling issued in process number 3961/2008, the Tax Authorities have clarified that the attribution of a special tax identification number is meant for non-resident taxable persons who obtain Portuguese source income subject to final withholding tax.

The special tax identification number may also be attributed to foreign employees who stay in Portuguese territory for less than 180 days ("temporary workers"). The liability to request that identification number impends upon employers.

5 June Exemption from annual declaration of tax and accounting information

According to the Decree Law 136-A/2009, of June 5, personal income taxpayers outside the organized accounting regime – i.e. under simplified accounting regime – are exempted from the obligation to file the annual declaration of tax and accounting information ("Informação Empresarial Simplificada Declaração Anual de Informação Contabilística e Fiscal"), as well as from filing VAT recapitulative

statement regarding 2008 and previous years.

The Ministry of Finance has ordered the cancellation of all the administrative offence proceedings based on these taxpayers' failure to comply with this obligation, as well as the reimbursement of the amounts paid on account of penalties, in terms to be established.

12 June New Social Security Code on the verge of being approved

The new Social Security Code has been submitted to the Portuguese Parliament and is expected to be approved within weeks.

This Code is particularly relevant given its purpose to providing systematic and harmonized rules applicable to Social Security contributions, so far dispersed through several laws. The new Code also entails very significant amendments, such as the broadening of the Social Security base, the principle that social contribution rates must be determined according to the type of employment contract entered into between the employer and the employee (i.e., short term or permanent employment contract) and the obligation impeding upon employers to share social security contributions with their independent workers.

15 June Carry forward of tax losses in case of share capital transfer

The tax authorities made public their position on the scope of the limit to carry forward tax losses after a significant change in the ownership of a company's share capital, pursuant to which the purpose of that limit is to avoid the acquisition of companies with eligible tax losses for the sole purpose of applying the carry forward.

Accordingly, this limit will not apply to changes within an economic group, i.e., in case a direct dominant position changes to an indirect dominant position or vice-versa.

Tax Calendars

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JULY 2009

Day	Tax	Obligation
10	VAT	Monthly Regime - submission of May 2009 VAT return (and its annexes) and payment of tax due
15	Social Security	Payment of the previous month contributions
20	PIT/CIT	Payment of tax withheld in the previous month
	Stamp Duty	Payment of tax withheld in the previous month
31	CIT	Submission of tax form 30 (via internet) by entities who are liable for payments made to non-resident
		First payment on account of 2009 CIT by resident entities whose main activity is commercial, industrial or agricultural in nature/non-resident with permanent establishment in the Portuguese territory
	PIT	Submission of tax form 30 (via internet) by entities who are liable for payments made to non-resident
		Submission of tax form 31 (via internet) by entities who are exempt/not subject to PIT or subject to a reduced tax rate
		Submission of tax form 33 (via internet) by securities depository entities
		Submission of tax form 34 (via internet) by entities issuers of securities registered or held in custody within Portuguese territory
	Annual Circulation Tax	Payment of tax for vehicles registered in the month of July

AUGUST 2009

Day	Tax	Obligation
10	VAT	Monthly Regime - submission of June 2009 VAT return (and its annexes) and payment of tax due
17	Social Security	Payment of the previous month contributions
	VAT	Quarterly VAT returns - submission of 2009's 2nd Quarter VAT return (and its annexes) and payment of tax due
20	PIT/CIT	Payment of tax withheld in the previous month
	Stamp Duty	Payment of tax withheld in the previous month
	VAT	Submission of tax form P2 or model 1074, by retailers subject to the regime foreseen in article 60 of VAT Code
	Annual Circulation Tax	Payment of tax for vehicles registered in the month of August

SEPTEMBER 2009

Day	Tax	Obligation
10	VAT	Monthly Regime - submission of July 2009 VAT return (and its annexes) and payment of tax due
15	Social Security	Payment of the previous month contributions
21	PIT/CIT	Payment of tax withheld in the previous month
	PIT	Second payment on account of 2009 PIT by independent workers
	Stamp Duty	Payment of tax withheld in the previous month
31	CIT	Second payment on account of 2009 CIT by resident entities whose main activity is commercial, industrial or agricultural in nature/non-resident with permanent establishment in the Portuguese territory
	Municipal Tax on Immovable Property	Payment of the second installment
	Annual Circulation Tax	Payment of tax for vehicles registered in the month of September

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