

NEWS

TAX

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Bearing in mind the financial market crisis and its consequences on the global economy, the Portuguese government has recurrently emphasised its intent to promote the economic efficiency and competition of domestic companies, with a special concern regarding Small and Medium Enterprises (“SMEs”).

In view of that, some of the recent tax measures, such as the amendment of article 114 of the General Tax Infringements Code (“GTIC”) under the 2009 State Budget come as puzzling surprises.

Pursuant to the referred amendment, GTIC now determines that the failure to pay the tax due shall be subject to a penalty, even in the event the tax was invoiced but not collected by the taxpayer.

Notwithstanding the press release issued by the Finance Ministry stating that the government’s aim was merely to clarify the scope of Article 114 GTIC, it is our understanding that such modification should be seen as a true amendment, which broadens the scope of this provision and constitutes a regrettable step back in the recent achievements in the field of Value Added Tax (“VAT”).

Indeed, the repeal of Article 95 of the VAT Code and subsequent application of Article 114 GTIC to VAT taxable persons determined that any penalties should only be due in the event VAT was effectively paid and not merely assessed and invoiced. We point out that such interpretation is in line with the Supreme Administrative Court case law (see Cases 279/08 and 479/08).

Consequently, we believe that the amendments now in force are the result of a political option to increase and anticipate tax revenues, rather

TAX INFRINGEMENTS

Increase of scope of tax infringement for lack of payment

Tiago Marreiros Moreira and Francisco Matos

than a clarification of existing provisions. Nonetheless, such option will have a considerable impact on VAT taxable persons, who will have to bear a tax that they have never been paid for.

Under the current economic framework, this measure, which is based on a formal concept of “tax infringement”, deserves strong criticism as it will have a negative impact on economic agents that should not be burdened with VAT and not on the taxpayers in default – as the latter will most certainly continue to postpone the payment of VAT due.

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INVESTMENT FUNDS AND COMPANIES

Special Regime for Residential Letting Real Estate Investment Funds and Companies

Tiago Marreiros Moreira and Francisco Matos

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A new Special Regime for Residential Letting Real Estate Investment Funds ("RLREIF") and Residential Letting Real Estate Investment Companies ("RLREIC") was introduced by the 2009 State Budget and is in force since 1 January 2009.

I. RERHIF LEGAL FRAMEWORK

According to the provisions now in force, the RLREIF are closed-end investment funds of public or private placement which assets shall amount to a minimum of € 10.000.000 at the end of the year following their incorporation. Moreover, RLREIF of public subscription are required to have no less than 100 participants, each of them holding a maximum of 20% of fund's assets. Additionally, the RLREIF's portfolio must be composed of a minimum of 75% of real estate located in Portugal and used for residential letting purposes. The Real Estate Investment Funds regime as well as the Portuguese Securities' Code shall apply to any legal issues that are not governed under this Special Regime.

II. RERHIF TAX FRAMEWORK

The main tax benefits foreseen for RERHIF are the following:

- ✓ Corporate Income Tax exemption, until 31 December 2020, on income of any nature derived by RLREIF incorporated between 1 January 2009 and 31 December 2013;
- ✓ Corporate and Personal Income Tax exemption on income derived from the units in the RLREIF, with an exception to capital gains obtained on the disposal of such units;
- ✓ Municipal Real Estate Tax exemption applicable to real estate included in the RERHIF's portfolio, as long as such real estate are allocated to permanent residential letting;
- ✓ Property Transfer Tax and Stamp Tax exemption on the acquisition by the RERHIF of real estate exclusively allocated to permanent residential letting.

We point out that an innovative feature of this Special Regime is the exemption of both Personal Income Tax and Corporate Income Tax on income arising from the fund's units, whereas only a Personal Income Tax exemption applies to income arising from general Real Estate Investment Funds' units. Such exemption, together with the fact that 25% of the RLREIF's portfolio may include real estate allocated to other activities, may enhance RLREIF's tax efficiency on the implementation of real estate projects.

Moreover, pursuant to RLREIF tax framework, no real estate capital gains shall be attributable to such funds. Hence the funds' profitability will most probably rely on an efficient management of the remaining 25% of the assets allocated to other activities.

III. TAX BENEFITS APPLICABLE TO THE PRIOR OWNERS/LESSEES

Tax benefits comprised in this regime also include a Personal Income Tax exemption on real estate capital gains arising from the sale of the immovable property to the RLREIF, as long as the prior owners become lessees of such immovable property. Furthermore, as the prior owners become lessees, such "legal status" modification grants them a repurchase option, which should be exercised no later than 31 December 2020. Property Transfer Tax and Stamp Tax exemptions also apply on the exercise of this option. In this regard, notwithstanding that real estate capital gains obtained by the prior owners on the sale to the Fund are tax exempted, we highlight that, in the event the repurchase option is not exercised or the letting is terminated, such exemption will expire and Personal Income Tax will be assessed and borne by the prior owners/lessees. As a result, we take the view that, regardless of the initial benefit resulting from the exemption on real estate capital gains, prior owners/lessees must take into consideration the above mentioned liability that will remain until the term of the letting.

Additionally, reference should be made to a peculiar provision included in this regime, concerning capital gains taxation. Indeed, as the RLREIF are intended to

An innovative feature of this Special Regime is the exemption of both Personal Income Tax and Corporate Income Tax on income arising from the fund's units

be neutral with regard to real estate market speculation, the new Special Regime provides that real estate capital gains arising from the disposal of RLREIF's assets to third parties will be imputed to prior owners/lessees. However, this unusual provision raises considerable doubts regarding the taxation of such "imputed" capital gains, since no Portuguese tax provision addresses the taxation of capital gains obtained by a lessee. Based on this provision, we could assume that the absence of taxation of the capital gains was intentional and aimed at balancing the potential taxation on capital gains arising from the prior transfer to the fund's portfolio. However, such assumption relies on the premises that exempted and imputed capital gains are symmetrical and that the tax frameworks applicable to such exempted and imputed capital gains are similar. Therefore, not only is that assumption rather theoretical, but also the verification of the premises on which it is grounded is highly unpredictable.

IV. RERHIC TAX FRAMEWORK

Finally, a question arises on how to match the tax framework applicable to the RLREIC with their entrepreneurial logic. Pursuant to the 2009 State Budget, the tax framework set forth for the RLREIF applies to the RLREIC, with the required adjustments. In addition, reference is made to "specific legislation" to be introduced regarding the legal framework of such companies. Although such legislation is still awaited, this investment vehicle should be seriously taken into account, particularly for those investors that are reluctant to transfer their assets to, and implement their real estate projects through, a Real Estate Investment Fund.



CIT – REPRESENTATION EXPENSES

The unconstitutional increase of taxes over representation expenses and other vehicles and motorcycles expenses

Joaquim Pedro Lampreia

Amidst a world-wide crisis, the Portuguese legislator has decided to set higher taxes on corporate entities, raising the autonomous taxation over representation expenses and costs with vehicles and motorcycles. The higher taxes were set by Law 64/2008, of 5 December. This Law amended the Personal Income Tax Code and the Corporate Income Tax Code, setting a higher autonomous taxation (from 5% to 10% over the above mentioned expenses). This Law also raised the autonomous taxation from 15% to 20% over costs with vehicles acquired by more than € 40.000, if supported by entities that reported tax losses on the previous two years.

We will not express our opinion on the political decision to raise taxes during a recession. However, the legislative decision to apply this tax raise to the

2008 tax year deserves our disapproval. Article 5 of the above mentioned Law states that the tax raise is in effect since January 1st, 2008. Considering that this Law entered into force only in December 6th, 2008, the applicability of the higher taxes to costs incurred between January 1st and December 6th means, in our opinion, a retroactive application of the higher taxes, which is prohibited by article 103 paragraph 3 of the Portuguese Constitution.

We therefore consider that there are strong valid arguments to sustain that representation expenses and costs with vehicles and motorcycles incurred between January 1st, 2008 and December 6th, 2008, are not to be subject to the higher taxes on ground of unconstitutionality of Law 64/2008, of 5 December.

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Entities subject to Personal or Corporate Income Tax should consider the best way to declare these expenses and react against this Law, in light of their specific cases.

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21th January

Acquisition of shares

A new implementing order approved a new form to comply with the declaration of acquisition of shares. The declaration is now submitted online on the website instead of being submitted by paper forms with the tax authorities. This new form must be used as of June 1st.

Transfer of shareholder's real estate assets

Pursuant to Portuguese Tax Authorities' Binding Opinion on process 1446/08, provided that a gratuitous transfer occurs from a shareholder to his company, referring to real estate assets, such transfer should be deemed as a positive net worth variation relevant for the assessment of Corporate Income Tax. Moreover, we point out that the acquisition value shall not be in any case lower than the Tax Patrimonial Value of the relevant assets, determined under the provisions of the Real Estate Municipal Tax Code.

28th January

Tax Incentives – Madeira reinvestment regime

Pursuant to Regional Decree-Law no. 2/2009/M, the Government of Madeira Autonomous Region established a tax incentives regime which foresees tax deductions granted to corporate taxpayers resulting from the regional reinvestment of their profits. The special regime is also applicable to the non-resident entities with a permanent establishment in the territory of Madeira Autonomous Region, in line with the provisions of Regulation no. 800/2008, of 6 August.

29th January

Supplementary State Budget

Portuguese Government has presented to Portuguese Parliament a Supplementary State Budget, amending the State Budget for 2009.

The Supplementary State Budget foresees specific tax measures and incentives in order to combat the financial crisis, such as the so-called Investment Tax Regime for 2009. As made public by the Government, the aim of the Supplementary State Budget is of promoting the productive investment, by granting tax benefits on Corporate Income Tax, Property Transfer Tax, Real Estate Municipal Tax and Stamp Tax.

ECJ refers to intra-Community gifts' payments

According to ECJ decision on Case C-318/07, gifts paid to entities established and recognised as charities in another Member State the Member State should benefit from the same tax framework applicable to gifts paid to entities established in the relevant Member State, pursuant to Free Movement of Capital provided in Article 56 of the EC Treaty. Therefore, Member States should grant taxpayers the right to apply for the tax deduction arising from such gift payments. ECJ admits, however, that Member States require the taxpayer to provide evidence that the requirements imposed by the relevant legislation for the grant of such a benefit are satisfied.

5th February

VAT: Commission proposes a review of the VAT rules on invoicing

The European Commission adopted a proposal to change the VAT Directive 2006/112/EC in respect to the invoicing rules, based on a Communication on the technological developments in the field of electronic invoicing. The aim of the proposal is to increase the use of electronic invoicing, reduce burdens on businesses, support small and medium enterprises (SMEs) and help Member States to tackle fraud. The proposal simplifies, modernises and harmonises the VAT invoicing rules. In particular, it eliminates the current barriers to e-invoicing in the VAT Directive by treating paper and electronic invoices equally.

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6th February

VAT – Combat to tax fraud and evasion

Within the combat of tax evasion and tax fraud, the European Commission has adopted two proposals for new Directives aimed at improving mutual assistance between Member States' tax authorities in both the assessment and the recovery of taxes.

According to such proposals, the key elements would rely on a wider cooperation between tax authorities (e.g. on the assessment of taxes) as well as on the fact that Member States would no longer be able to invoke bank secrecy in order to refuse cross border co-operation.

9th February

CIT – Interest and Royalties Directive

Regulation no. 4727/2009 has been recently published, referring to the tax forms to be fulfilled by taxpayers in order to benefit from the reduction of withholding tax rates applicable to the payment of interest or royalties, pursuant to the Interest and Royalties Directive (Directive 2003/49/EC, from 3 July) and to Articles 89-A and 90-A of Corporate Income Tax Code. Tax forms 01DJR and 02DJR have entered into force on February 10th and may be used on the relevant payments made between Associated Companies from different Member States. The new tax forms are also applicable for the partial reimbursement request of tax previously withheld.

12th February

Transfer of Permanent Establishment tax losses to a Subsidiary

According to a recent Binding Opinion made available by Portuguese Tax Authorities (process 1645/2005), if a non resident company for tax purposes decides to transform its Portuguese Permanent Establishment ("PE") into a Subsidiary incorporated under domestic law, such transformation will be eligible to benefit from the neutrality tax regime foreseen in Article 66 of the Portuguese Corporate Income Tax Code ("CITC"). As a result, tax losses assessed by the PE may be transferred to the Subsidiary, as long as the requirements set forth in Article 47 (8) of the CITC are complied with (i.e. identity of the company's scope and economic activity).

TAX CALENDARS

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APRIL 2009

Day	Tax	Obligation
13	VAT	Monthly VAT returns - submission of March 2009 VAT return (and its annexes) and payment of tax due
15	Social Security	Payment of the previous months's contributions
	PIT	Submission of tax form 3, via internet, regarding employment and pension income
20	PIT/CIT	Payment of tax withheld in the previous month
	Stamp Duty	Payment of tax withheld in the previous month
30	PIT	Submission of tax form 3 (in paper) by taxpayers regarding income under Category A, B, E, F, G and H
	Property Transfer Tax	Assessment of Property Transfer Tax related to 2008 and payment in full if tax due if of up to € 250 or of the first installment if in excess to that amount

13th February

Solar Panels – Special Tax Benefits

The Portuguese government has decided to increase tax incentives to the use of alternative energies. Thus, a special package is now foreseen which provides tax benefits up to 30% of the solar panels' acquisition price, accrued on the pre-existent Personal Income Tax deductions.

20th February

PIT – Non-residents

The European Commission decided to refer Portugal to the European Court of Justice, within the infringement procedure regarding the obligation applicable to non-resident taxpayers to designate a Portuguese tax representative in case such non-resident taxpayers obtain any income from Portuguese source. According to the European Commission, this tax obligation is contrary to the Free Movement of Persons and to the Free Movement of Capital, foreseen in articles 18 and 56 of the EC Treaty.

10th March

R&D tax benefits regime

Pursuant to amendments provided in Law 10/2009, of 10 March, the tax incentives regime applicable to R&D will now include a tax deduction on the taxable income of 32,5% of R&D expenses (instead of the previous 20%), accrued of 50% of the increase of such expenses over the average of the two previous tax years up to a maximum of € 1.500.000 (instead of the previous € 750.000).

MAY 2009

Day	Tax	Obligation
11	VAT	Monthly VAT returns - submission of April 2009 VAT return (and its annexes) and payment of tax due
15	Social Security	Payment of the previous months's contributions
	VAT	Quarterly VAT returns - submission of 1st trimester 2009 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
	PIT	Submission of tax form P2 or tax form 1074 by taxpayers under the small companies' VAT regime provided in article 60 of VAT Code
29	CIT	Submission (via internet) of tax form 22 in cases where taxable period matches calendar year

JUNE 2009

Day	Tax	Obligation
12	VAT	Monthly VAT returns - submission of May 2009 VAT return (and its annexes) and payment of tax due
15	Social Security	Payment of the previous months's contributions
22	PIT/CIT	Payment of tax withheld in the previous month
	Stamp Duty	Payment of tax withheld in the previous month
30	PIT/CIT/Stamp Duty	Submission (via internet) of Annual Declaration/Simplified Business Information - "IES" (with its annexes) - in case taxation period matches calendar year. This tax form is mandatory to taxpayers which main activity as a commercial, industrial or agricultural nature
	VAT	Submission before Reimbursement Services of reimbursement requests by non-resident taxpayers, regarding VAT burdened in 2007 (submitted under Decree-Law 408/87, from 31 December)

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