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NEWS

TAX

Index

COMBATING TAX EVASION

"Abusive" Tax Planning?

Tiago Marreiros Moreira

After analysing in more detail the Government project Decree Law aimed at combating abusive tax planning, and despite the fact that it was anticipated by many that the President of the Republic may exercise his political veto on this project Decree Law, we would like to hereby make a contribution to the proper analysis and discussion of this significant matter.

In essence the project aims at establishing for those entities providing services of support, consultation, advice or suchlike in the tax area – regarding the analysis of tax status or the fulfilling of tax obligations by clients or third parties, or for the beneficiaries of such services – certain duties of communication, information and clarification to the tax authorities of proposed schemes, recommended strategies, advised acts or the carrying out of operations and transactions whose exclusive or main goal is to obtain tax advantages within the scope of income taxes, VAT, property taxes and Stamp Tax.

For this purpose, a thorough analysis should be carried out of the scope of the legislative authorisation foreseen in the Law that approved the State Budget for 2007 permitting the Government to introduce this type of rule. In fact, such authorisation foresees expressly that the aim is to allow the introduction of preventive rules in respect of aggressive tax planning, referring in our opinion to tax planning that breaks the law and that could lead to tax evasion. Additionally, such authorisation states that the Government should establish such rules in accordance with other countries' recent experiences, which is in all likelihood a reference to the UK Finance Act, since this jurisdiction has already introduced a similar regime to which the Portuguese Government has made much reference when this matter was being discussed. This may, in our opinion, eventually be significant in adequately interpreting this project of law, particularly if its wording remains unchanged.

In analysing the main body of this project, the first article immediately merits careful scrutiny – as it could be one of the most relevant – on the grounds that it defines the Object of the future Decree Law. The article states, clearly and expressly, that the object of this Decree Law is to combat abusive tax planning.

continue page 2

Tiago Marreiros Moreira, Conceição Gamito, Joana Domingues, Rita Magalhães, Joaquim Pedro Lampreia, Ricardo Seabra Moura, Catarina Belim, André Gonçalves, Pedro Manuel, Francisco Matos e João Riscado Rapoula membros da ÁREA FISCAL da Vieira de Almeida & Associados.

Therefore, in our opinion, this Decree Law should only include rules aimed at preventing what is usually called "illicit or illegal tax planning" where there is abuse of the law or tax evasion, omitting the object of this Decree Law, true tax planning, which is where the taxpayer tries, with total legitimacy and, in some cases, even in compliance with the best management practices, to find the most tax efficient legal route to achieve his goals. That said, on analysing the second article of the project of Decree Law (which defines its Scope), we were surprised to find that the legislator has rapidly forgotten the limits that were established within the scope of the legislative authorisation as well as in the Object of this project Decree Law.

In fact, it has been foreseen (in our opinion, probably by mistake and in a manner lacking in attention to detail) within the scope of the operations subject to the duties of communication, information and clarification, not only operations and transactions where illicit or abusive tax planning takes place, but also legal tax planning solutions, namely operations, projects, proposals, advice or instructions which lead or may lead to the obtaining of a tax advantage, being considered as such the reduction, elimination or time deferral of taxes or the obtaining of a tax benefit that would not be achieved without its use. Any operations involving entities subject to tax-privileged regimes and financial or insurance transactions are also considered subject to the above communication duties notwithstanding their motive.

Another aspect which may be considered arguable in this project Decree Law is the intention of establishing an excessively onerous communication duty, both too detailed and too bureaucratic, indicating how eager the tax authorities are to learn, in our view abusively, what the legal, tax efficient solutions are that are being used and paid for by taxpayers, obtaining information swiftly and gratuitously that would otherwise have been very difficult to obtain due to the oft-alleged limited resources of the tax authorities.

Regarding the entities that are subject to communication duties, the legislator has once more opted to adopt a very broad formula, including with the scope of these entities the credit and financial institutions, the statutory auditors and their firms as well as any other entities providing accounting services, lawyers and solicitors and their firms when they act as "promoters of tax planning schemes".

Regarding lawyers, solicitors and their firms, an exclusion of the above-mentioned communication duty is foreseen in situations where the tax planning was known *"within the context of the evaluation of the client's legal situation, the scope of the legal counselling, on the exercise of the mission of defence or representation of the client on a judicial process or in respect of a judicial process, including the advice regarding the way to start or avoid a process, notwithstanding the fact that such obligations are obtained before, during or after a process."*

This rule should be analysed carefully since it seems to establish merely an exclusion of the communication duties for these entities where the tax planning is not proposed by them and they do not act as "promoters of tax planning schemes". If this interpretation is correct, it seems that no favourable treatment is given to these professionals. Eventually, this may even be the interpretation that is most adequate to the Object of the Decree Law (combating aggressive or abusive tax planning) since, as a general rule, only lawyers and solicitors are legally authorised, due to their special professional secrecy duties, not to disclose any entities' operations that may imply abuse of the law or tax evasion by their clients, even in those cases where those situations may imply a crime.

It is also important to note that when the "tax planning scheme" was not prepared, proposed or disclosed by one of the above mentioned promoters, or when the promoter is a non resident entity, the communication duties shall be passed on to the taxpayer benefiting from said scheme. If our interpretation of this project of Decree Law is correct, its own existence may be questionable since it is improbable that the

the communication duty shall not include any nominative or identifying indication of the clients

taxpayers that are involved in abusive tax planning will give notice of those situations to the tax authorities.

We must also stress the importance of the fact that this project Decree Law expressly foresees that the communication duty shall not include any nominative or identifying indication of the clients to which the tax planning schemes were proposed or who have adopted them (which, naturally, only makes sense when such duty is complied with by the promoters and not by the beneficiaries) which may indicate that the tax authorities aim is essentially at obtaining the promoters tax planning know-how and not having as their main concern the to learn who are the beneficiaries of such tax planning.

The non-compliance of the duties established in this project Decree Law will be punished with penalties of a significant amount which, in our opinion, may raise several difficulties in its application to concrete cases, variable between € 1.000 and € 50.000 or € 5.000 and € 100.000 for the lack of communication or late communication, depending whether the entity obliged to said duty is an individual or a company and between € 250 and € 40.000 or € 500 and € 80.000 for the lack of communication or late communication by the client benefiting from the tax planning, depending whether the client is an individual or a company.

In view of the above, we await the development of this matter with equal measures of calmness and curiosity, convinced that the contributions already offered by several entities may help towards the improvement of some aspects referred to above, putting this Decree Law on the right track and avoiding the raising of eventual unconstitutional issues or illegalities derived from the non-compliance of what was established in the legislative authorisation.

VAT

What Paper?

Catarina Belim

Índice

Administrative Rule number 1370/2007 issued on October 19, now allows economic agents to put into practice a process for which they have been waiting for at least the last ten months: the electronic storage of documents relevant for tax purposes. Although a simple concept, it has lacked regulation: all invoices or equivalent documents, sales receipts and other significant tax documents, issued by an economic agent and processed by computer, may now be electronically stored (instead of the traditional bookkeeping in paper form).

The completion of the requirements which must be met in order to issue and maintain electronic files, will allow economic agents to simplify administrative and operational structures, to vacate storage places and reuse them for other company purposes, to reduce the costs inherent to the acquisition of material needed for the issuance of paper form documents and to speed up the invoicing process, thus making it more efficient. Moreover, the Administrative Rule presents a special appeal for economic agents established outside Portugal provided certain requirements are met, they may now store documents electronically, which are relevant for tax purposes outside Portuguese territory (if the storage is intended to take place outside the European Community, a prior authorization by the Portuguese Tax Authorities is necessary).

In conclusion, we believe all the conditions are now in place for a growing number of companies to implement electronic storage procedures. The implementation of this procedure, together with the implementation of electronic invoicing systems, will truly allow a paperless procedure with the ultimate outcome being the replacement of standard paper form by virtual and technologically-stored information.

PERSONAL INCOME TAX (PIT)

Sport and Taxes

Pedro Manuel

Índice

Olympic Games, world and European football championships: what do they all have in common? The answer is simple: Taxes!

From Saltillo to Korea, passing through Lisbon and landing in Austria-Switzerland, for Euro 2008, in all these events questions were asked regarding the award of prizes to Portuguese athletes and the subsequent taxation applied thereto. Even at the beginning of the domestic football season much was discussed and written about the taxation of professional football players and their struggle for "tax free income". Following these events, the budget state proposal for 2008 foresees modifications to article 12 of the Personal Income Tax (PIT) Code, regarding the exclusion of taxation on prizes obtained by handicapped athletes, high performance athletes' allowances and training budgets, with a limit of five minimum monthly salaries.

This budget state proposal follows the enacting of the ground law of physical activity and sports, approved in the beginning of the year, which modified, among other questions, the previous "high competition" concept to a "high performance" concept, which automatically broadens the area of excluded taxation, foreseen in article 12 of the PIT Code, not only to coaches but also to technical staff and referees involved in high performance sport activities, both in domestic and international arenas.

It is important to point out the adaptation of the PIT to high performance athletes, but, nevertheless, a number of questions, from a tax point of view, remain unanswered. For example:

(a) What is the goal the legislator seeks to reach by excluding some income obtained by high performance athletes from taxation? Protection against a particularly short career of great wear and tear? A "reward" for athletes that further the good name and image of Portugal abroad?

If the answer is the former i.e. protection against the wear and tear of a short career, then why not extend these benefits to professional ballet dancers? (or even to lawyers or corporate managers...). On the other hand, if the answer is the latter, a reward for athletes that further the good name and image of Portugal abroad, this "tax benefit" should be extended to architects, musical performers and other musicians that have also furthered the good name of Portugal abroad.

(b) Discrepancies between the tax rules and the ground law of physical activity and sports, which, in its article 48 suggests a special tax regime for sporting agents, due to the very wearing nature of the careers they have undertaken.

Nevertheless, the state budget proposal for 2008 seems to depart from the idea of a special tax regime applicable only to sporting agents.

Why this growing concern regarding the creation of legal rules applicable to sport and sporting agents in general? The answer would also seem to be simple: a study made in 2006 suggested that sport in general generated an added value of 407 billion euros in 2004, accounting for 3.7 of EU GDP, and employment for 15 million people or 5.4% of the labour force (numbers quoted in the White Paper on Sport issued by the Commission of the European Communities last July).

8 October

Arbitration on Tax Process

Aiming to reduce the amount of processes in the tax courts, the Parliament is debating a draft-law that intents to allow the possibility of courts of arbitration to analyse issues regarding tax exemptions on investment with contractual nature. Under this draft-regime, anyone wishing to apply to the court of arbitration may request an arbitration agreement from the tax authorities (that should be ruled in a ministerial order from the Finance Minister within 30 days of the date of the request) which provides a suspension of the legal deadlines to apply for the tax jurisdiction general means.

10 October

Special Payment on Account

Tax authorities issued a Binding Information clarifying that a taxpayer may not execute the special payment on an account related to a tax year in which he terminates his professional activity, until after the deadline for the second instalment (end of October). If the professional activity is not terminated by 31 October, the tax payer must pay the total amount of the special payment on account before the deadline for the second instalment.

11 October

VdA's Tax Practice Area acknowledged

Vieira de Almeida's tax practice has been named one of the best in its practice area and is now included in tier 1 of the International Tax Review's 2008 ranking, one of the most prestigious tax publications in the world.

11 October

Taxation of real estate capital gains earned by non-residents

EJC considers the distinction made between resident and non-resident by the Personal Income Tax Code (PITC), regarding real estate capital gains, as disrespectful to EC law. In fact, article 43 of the PITC states that the amount of real estate capital gains on immovable property transfer earned by residents is considered only on 50% of its value. However, non residents in the same circumstances are subject, according to article 72 of the PITC, to a 25% special rate which is applicable to the entire capital gain amount. EJC believes that this situation is a restriction on the free movement of capital, forbidden by article 56 of EC Treaty.

12 October

Standard Audit File for Tax Purposes – SAFTP-PT

The tax authorities have made the Standard Audit File for Tax Purposes – Portuguese Version available. This is a programme which should be used from January 2008 onwards by CIT taxpayers carrying out mainly commercial activities, thus aiding the gathering of accounting information for the tax authorities' inspection services. The file model now available allows instant access, at any time, to an entire range of accountancy records, available in a predefined file format ("XML"), regardless of the programme or database used.

16 October

2003 Tax Debts

The tax authorities are surveying all those tax debt situations related to the 2003 tax year, which will run out at the end of the present year. Regarding the fact that the statute of limitation may affect debts before their payment, it was determined that from December 17 onwards all notification should be made in person.

17 October

Attachment – new regime anticipation

Tax authorities are applying new procedures regarding the attachment included on the draft State Budget, thus anticipating the approval of this draft regime.

31 October

Tiago Marreiros Moreira participates in the International Association of Lawyers Congress

Tiago Marreiros Moreira participated, in his role as Vice-president of the Tax Law Commission, at the 51st International Association of Lawyers congress that took place in Paris, between 31 October and 4 November 2007.

Account Manager

The Finance Minister has announced the objective of improving the tax authorities-taxpayers relationship, namely by creating a complaints department and specialising the assistance offered to the taxpayer, by the addition to their staff of someone whose role will be similar to an account

Tax Calendar - November 2007

Day	Tax	Obligation
12	VAT	Monthly VAT returns - submission of September 2007 VAT return (and its annexes) and payment of the tax due
15	VAT	Quarterly VAT returns - submission of 3rd Quarter VAT returns (and its annexes) and payment of the tax due
15	Social Security	Payment of previous month's contributions
20	Individual Income Tax Corporate Income Tax	Payment of the tax with held in the previous month
20	Stamp Tax	Payment of the tax assessed for transactions performed in previous month

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