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VIEIRA DE ALMEIDA & Associados Sociedade de Advogados, R L

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EDITORIAL

This is the first number of the VdA Tax Practice Area Newsletter that, from now on, and on a monthly basis, will attempt to share the most significant experiences, legislative, doctrinal and case law news, both national and international, within the scope of our tax law practice, as well as to convey our opinions and the most relevant developments on tax matters.

The consolidated integration of tax counselling and tax litigation within VdA's continuous or transactional global legal counselling is our tax practice's most imposing trait. This consolidation is mainly a consequence of market evolution, which has urged lawyers to take a key role in this area, in view of their particular characteristics and specific competences in this field.

The differentiation factor of VdA's Tax Practice Area in the context of the general law market is, in all likelihood, its organizational model, based on cores of excellence, assuring diversified tax counselling for the financial and real estate sectors, company restructuring, international tax planning and transfer pricing, as well as tax litigation, and also addressing the specific treatment of certain taxes, such as VAT, stamp tax and fees, which, in conjunction, allows VdA to provide its clients with a fast, complete and valuable service.

VdA's Tax Practice Area has experienced solid growth, counting today on a team of eleven lawyers dedicated thereto, governed by the highest quality and standards of excellence and qualified to provide practical and wide-ranging counselling in every tax law domain, either autonomously or integrated with other practice areas.

In the context of intense legislative, case law and doctrinal labour, at domestic and international levels, as well as the growing complexity and sophistication of the market, its agents and transactions, we believe this to be a good moment to grasp the challenge of producing a monthly Tax Newsletter, mainly aimed at providing our clients with a useful tool to keep up with the most relevant tax developments, both in domestic and international contexts.

Tiago Marreiros Moreira, Conceição Gamito, Joana Domingues, Rita Magalhães, Joaquim Pedro Lampreia, Ricardo Seabra Moura, Catarina Belim, André Gonçalves, Pedro Manuel, Francisco Matos and João Riscado Rapoula.

VAT

Exemption waiver certificate – a scarce asset

Conceição Gamito and Catarina Belim

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With the introduction of a new scheme for VAT on real estate transactions, in January 2007, the legislator has converted the exemption waiver certificate into the *ex-libris* of a process which, with one or two rare exceptions, is expensive and will involve the renegotiation and re-planning of settled structures, as well as of the economic agents' modus operandi, causing, at the most, real estate market paralysation.

Several obstacles have to be overcome until the Certificate is obtained:

- ✓ The legal requirement of a minimum annual rent of 1/15 of the immovable property construction or acquisition value is excessive and it is far off current market prices. The new scheme does not encompass a rule concerning the proper moment to determine the annual rent amount: is it the moment when the agreement is entered into/the year in which the certificate is obtained? Or should this rule also apply to subsequent years?
- ✓ Recovering VAT incurred on construction is now dependant on the execution of the sale and purchase or letting agreement. The burden to search for solutions to overcome the obstacles – most of them caused by Public Administration's delays (utilization licenses, horizontal property certifications) – to the execution of sale and purchase or letting agreements, without paralyzing the activity, now falls on economic agents.
- ✓ The blind exclusion of the VAT exemption waiver for subletting agreements clearly shows that the new scheme's impact on financial lettors was not properly measured.
- ✓ The new legal requirement allowing the exemption waiver only for transactions referring to the entire property or to an entire fraction thereof is compelling the economic agents, who have recovered VAT on construction and envisage new lettings or transfers, to submit their properties to the horizontal property regime.
- ✓ Restricting the right to waive the exemption to economic agents whose global VAT deduction apportionment exceeds 80% – unconnected to property used on taxable activities – precludes this prerogative to a large number of financial and insurance sectors' agents.

These and other limits, restrictions, procedures and requirements are discussed on a daily basis among taxpayers and tax authorities and they transform the Certificate, much like saffron, cashmere, gold and diamonds, into a scarce asset, despite the fact that it is only an electronic request away.

Recovering VAT incurred on construction is now dependant on the execution of the sale and purchase or letting agreement

MADEIRA FREE TRADE ZONE

Extension of the special taxation regime until 2020

Rita Magalhães

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On 9th August the Portuguese Government approved a Law proposal for the extension of the Madeira Free Trade Zone (MFTZ) special taxation regime until 2020.

The new regime applicable to companies willing to set up their head offices in this region between 1 January 2007 and 31 December 2013 establishes a group of tax exemptions such as a reduced corporate tax rate of 3% in 2007-2009, 4% in 2010-2012 and 5% in 2013-2020 and withholding tax exemption on the distribution and payment of dividends and royalties, as well as a Stamp Tax exemption on capital increases.

The tax benefits will depend on the jobs created per company and will be limited by a ceiling placed on the taxable base per company, which ranges from € 2 million (where less than three new jobs are created) to € 150 million (where more than 100 new jobs are created).

The companies involved will have to start business within a fixed time limit (6 months, in the case of international services, and 1 year, in the case of industrial or shipping activities), beyond which they will lose their licences.

Admission to the MFTZ is also restricted to the activities included in a list drawn up by the Portuguese authorities, on the basis of the statistical classification of economic activities in the EU.

As in the previous regime (stated in Decree-Law 163/2003, from 24 July) applicable to companies licensed to carry out business in MFTZ between 1 January 2003 and 31 December 2006, financial and insurance intermediary activities, including ancillary activities and "intra-group services" (coordination, accounting and distribution centres) are explicitly excluded.

With regard to the entities already licensed in the MFTZ, the new regime is expected to be applicable from 1 January 2012 onwards.

The new regime establishes a reduced corporate tax rate of 3% in 2007-2009, 4% in 2010-2012 and 5% in 2013-2020

DEROGATION OF BANK SECRECY

What Ever Happened to Bank Secrecy?

Tiago Marreiros Moreira

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As expected, the Constitutional Court (CC) announced its decision to consider the project-regime unconstitutional because of several measures concerning the softening of bank secrecy in Portugal. The purpose of such measures, said the Government, was to avoid tax fraud and evasion. After the CC's decision, the President of the Republic rejected this regime, using his presidential veto.

This document, dating from last July, was related to the conclusions of the Tax Evasion and Fraud Avoidance Report, from January 2006, and was aimed at widening the Tax Authorities' powers, allowing access to the taxpayer's bank documents, without his/her previous consent:

(i) Once an administrative or judicial claim is filed against a Tax Authorities' decision;

(ii) If, after being notified, the taxpayer does not present his tax return so that the Tax Authorities may determine, evaluate or approve the taxable income declared.

Besides this, it was also foreseen that each time the Tax Authorities noticed that a taxpayer had external signs of wealth beyond his declared income amounts and, as a result, decided to challenge its tax income, the information should be reported to the Office of the Public Prosecutor. If the taxpayer is a public servant officer, that information should also be reported to his employer. This document also determined that financial and credit institutions were obliged to report to the Tax Directorate-General, no later than July of each year, any cross-border transfers to offshore territories, if not related to income payments already covered by existing tax accessory obligations or the operations carried out by legal public entities. Failure to comply with this obligation would be punished by a € 500 to € 25 000 penalty.

The CC stated that in some matters the project-regime was powerless to achieve its goals, making clear that bank secrecy is a part of the taxpayer's own privacy, therefore the reduction of that privacy would restrain the right to file an administrative or judicial claim.

We agree with the CC's decision, as it has prevented the Government from carrying out its intention to create a law based on the use of intimidation by the Tax Authorities towards taxpayers, by justifying the derogation of bank secrecy without previous consent as an effect of the taxpayer's legitimate right to defend himself, discouraging him to instigate litigation before this menace to his privacy.

After the CC's decision and consequent presidential veto, the Government, somewhat surprisingly, hurried to announce that it will persist with the idea of creating a new rule to widen the derogation of bank secrecy, possibly making good use of some non-unconstitutional aspects of the censured project-regime – which we consider residual. We will be interested to see the affect of this new initiative, with the expectation that it will leave a different heading concerning the derogation of (already reduced) bank secrecy.

STAMP TAX

Stamp tax illegally charged on share capital increases

Ricardo Seabra Moura

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This judgement may lead to refunds of the Stamp Tax illegally charged

The Court of Justice of the European Communities (ECJ) in its judgement dated 21 June 2007, referring to the process C-366/05, Optimus – Telecomunicações SA versus Portuguese Tax Authorities, ruled that Directive 69/355/EEC, concerning indirect taxes on the raising of capital, prohibits the introduction, after 1 January 1986, of a Stamp Tax on any share capital increase falling within the scope of that directive, which, on 1 July 1984, was exempt from that tax.

Put concisely, the ECJ ruled that the EC Law was disregarded, since the Portuguese Republic made no provision in the Act of Accession to the European Communities allowing a change to the Stamp Tax regime of share capital increases. Therefore, the rules provided under Directive 69/335/EEC (amended by Directive 85/303/EEC) prohibit Portugal from charging stamp tax, under Decree-law 322-B/2001, dated 14 December, to a capital company, as defined in these Directives, in the event of capital raising through contributions in cash, which, on 1 July 1984, although subject to tax, was exempted, under a Decree-law from 1984.

In our opinion, this judgement will lead (i) to amendments to the Stamp Tax Code (i) through either the exemption on the raising of capital through contributions in cash or the suppression of the liability to the tax on the raising of capital (pursuant to European Community recommendations), as well as (ii) to refunds of the Stamp Tax illegally charged on share capital increases. To this end, taxpayers must claim the stamp tax refund, through adequate legal channels, within 4 years of the assessment date. The first requests for the refund of Stamp Tax have now been filed and many taxpayers are expected to follow this example.

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August 1 – Waving of communication of money donations

Decree-law 277/2007 amends the Stamp Tax Code waving the beneficiaries of exempted donations from communicating to tax authorities the donations in cash or other currency.

31 August – Goals, priorities and guidelines to criminal policy for 2007-2009

Enactment of Law 51/2007 which defines as goals, priorities and guidelines to criminal policy for the period of 2007-2009 the following:

a) The primary prevention of tax swindle, smuggling, fraudulent release for consumption, tax fraud, tax embezzlement, social security fraud and embezzlement;
b) The primary investigation of tax swindle, fraudulent release for consumption, tax fraud, tax embezzlement, qualified social security fraud and embezzlement and computer crime.

9 September – Amendments to the Personal Income Tax Code

The Council of Ministers approved a Cabinet Order, which introduces amendments to the Personal Income Tax Code and improves accessory obligations linked to the periodic tax return pre-filling, in line with the Court of Justice of the European Communities decision, which has taken into account the requirement that obliged capital gains to be reinvested on immovable property located in Portuguese territory in order to obtain the a.m. tax exclusion benefit, incompatible with EC law. In view of the above, the law will also allow the tax exclusion to apply where the immovable property is located in any Member State territory or in the European Economic Area.

12 September - Tax Cooperation EU-Switzerland

The government recently endorsed a project-resolution, which approves the Cooperation Agreement between the EU and Switzerland in order to prevent fraud and any other illegal activities damaging to their financial interests.

12 September - Tax incentives to invest in periphery areas

The Finance Ministry announced the reinforcement of tax incentives to investments taking place in any area which fulfils some requirements, including population density, revenue and production level, and purchase power level.

19 September - Mortgage value for tax purposes

Publishing of administrative guideline related to the taxation of mortgages granted simultaneously with loan deeds, when the first is an indemnity to the other (previous or future) liabilities. It is established that accessory mortgages effectively constituted simultaneously with the secured bond are excluded from stamp tax. Mortgages shall be considered accessory if related directly to the bond (it may not be either previous to the bond or effective after its dismissal) and simultaneous if granted on the same date as the loan. The lack of any of these requirements determines the separation of the two contracts and respective autonomous stamp tax taxation.

20 September – Update of Model 1 Property Tax return

Enactment of Ministerial Order 1213/2007 which updated the Model 1 and Appendix II of the Property Tax return in accordance to the modifications determined by the State Budget for 2007, as per the evaluation process of the urban property, in particular defining new quality and comfort coefficients which distinguish between more and less environmentally efficient buildings.

21 September - New Tax Authorities' General Director

The Finance Minister announced that José Azevedo Pereira is the new Tax Authorities' General Director, replacing Paulo Macedo.

24 September – Changes to the Notary's statute

With the new statute, notaries became private entities, therefore being considered self-employed workers. This change may cause companies with organised accounting records to bear the obligation to withhold tax on notary's fees. If so, for each supply of service these companies shall have to withhold 20% of the amount paid and they will have the burden of declaring and paying the assessed values. Even though this may appear to be an unjust solution, it seems to be the result of the law as it now stands.

25 September – Changes to Lisbon's Property Tax

The Lisbon Municipality recovery plan provides modifications to the Property Tax regime. This tax will be increased from 0,7% to 0,8% on non-transferred buildings since 2004. The progressive tax increase programme will also cease next year.

26 September – Head of VdA's Tax Group distinguished in Iberian Lawyer's Forty Under Forty Awards

Tiago Marreiros Moreira was one of the seven Portuguese lawyers honoured in the Forty Under Forty Awards gala ceremony organised by Iberian Lawyer to elect the 40 best lawyers under 40 years old working in Iberia. VdA was the only Portuguese Law firm to have two lawyers distinguished in this way.

Tax Calendar - October 2007

Day	Tax	Obligation
10	VAT	Submission of monthly VAT return and its annexs (if applicable) referent to August 2007
15	Social Security	Payment of the contributions due regarding the previous month
22	Individual Income Tax Corporate Income Tax	Payment of the tax witheld in the previous month
22	Stamp Tax	Payment of the tax assessed for transactions performed in previous month
31	Corporate Income Tax	Payment of the 2nd instalment of the special payment on account, if applicable

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