
# ICLG

The International Comparative Legal Guide to:

# Corporate Tax 2018

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A practical cross-border insight into corporate tax work

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## General Chapters:



## Country Question and Answer Chapters:



**Continued Overleaf** →



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## Country Question and Answer Chapters:

# Portugal

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## 1 Tax Treaties and Residence

### 1.1 How many income tax treaties are currently in force in your jurisdiction?

Portugal has concluded 79 double tax treaties ("DTTs"), 74 of which are currently in force.

### 1.2 Do they generally follow the OECD Model Convention or another model?

The OECD Model is broadly followed by the Portuguese Tax System. However, some DTTs – the older ones – have provisions that depart from such model, following the features of other models such as the UN Model or US Model.

### 1.3 Do treaties have to be incorporated into domestic law before they take effect?

No, international treaties prevail over domestic legislation. Nonetheless, DTTs require formal approval by the Parliament and ratification by the President of the Republic before entering into force.

### 1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

Although not all treaties signed by Portugal include limitation of benefits clauses ("LOBs"), some of the latest treaties entered into by Portugal are particularly focused on preventing treaty shopping.

### 1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

No. From a constitutional perspective, DTTs cannot be overridden by domestic law.

### 1.6 What is the test in domestic law for determining the residence of a company?

A company is deemed to be resident for tax purposes if the head office or the effective place of management is located in Portugal.

## 2 Transaction Taxes

### 2.1 Are there any documentary taxes in your jurisdiction?

Yes. Stamp Duty ("SD") is a tax levied on acts, contracts, agreements, financing operations, guarantees, leases, documents and other taxable events foreseen in the SD Table, signed or entered into in Portugal or submitted herein for any legal purpose.

Loans and guarantees will always be subject to SD in Portugal, regardless of the place where the contract is signed or entered into, provided that the borrower or the beneficiary of the guarantee is a resident entity in Portugal.

### 2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Yes. VAT rates may vary from the 23% standard rate, or the 6% reduced rate applicable to some essential goods. On the islands of Azores and Madeira, the rates are lower and vary, respectively, from 4% to 18%, and from 5% to 22%.

### 2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

VAT is generally levied on the supply of goods, provision of services, intra-community acquisitions and imports. However, there are transactions specifically excluded from VAT and some other relevant exemptions, such as financial and insurance services, leases and some non-profitable activities.

### 2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

VAT is generally fully recoverable provided that it is borne in connection with a fully taxable activity. If the company carries out both taxable and non-taxable operations, VAT will be partially recoverable either through a direct allocation method or according to a *pro rata* formula. There are some limitations on certain expenses, and as such, VAT cannot be recovered on entertainment, accommodation, food, drinks and travel expenses.

### 2.5 Does your jurisdiction permit "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

No, this is not permitted in Portugal.

### 2.6 Are there any other transaction taxes payable by companies?

Transfer of real estate in Portugal is subject to Property Transfer Tax ("IMT"). Rates vary between 5% and 6.5%, calculated over the declared value of the sale, or the property's tax value, whichever is higher.

### 2.7 Are there any other indirect taxes of which we should be aware?

Yes. Excise Duties are applicable, such as tax on alcohol and alcoholic beverages, oil and energy products ("ISP"), tobacco products and vehicle taxes.

## 3 Cross-border Payments

### 3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

The statutory withholding tax rate on dividends paid to non-resident shareholders is 25%. The outbound Participation Exemption Regime grants an exemption from withholding tax if the following criteria are met:

(i) The company:
- is subject to and not exempt from CIT; and
- is not considered a transparent corporate entity.

(ii) The shareholder of the company is resident in (i) an EU or EEA Member State, or (ii) a tax treaty jurisdiction which permits the exchange of information on tax matters.

(iii) The shares in the company have been held continuously for at least 12 months.

(iv) The shareholder:
- holds, directly or indirectly, at least 10% of the capital or voting rights of the company; and
- is subject, and not exempt from, an income tax listed in the EU Parent-Subsidiary Directive or an income tax rate which is not lower than 60% of the Portuguese CIT rate.

In case the above requirements are not met, DTTs may also limit the withholding tax rate.

### 3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

The statutory withholding tax rate in Portugal on royalty payments to non-resident companies is 25%. No withholding tax is due if the recipient is eligible for the benefits set forth in the EU Interest and Royalties Directive. To this end, the following conditions should be complied with:

(i) either the payor or the recipient hold a direct minimum stake of 25% in each other's share capital, or a third company has a direct minimum holding of 25% in the capital of both companies; and

(ii) the shareholding is kept for a minimum holding period of two years.

According to the DTTs entered into by Portugal, the withholding tax rate may also be reduced.

### 3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

The statutory withholding tax rate in Portugal on interest payments to non-resident companies is 25%. No withholding tax is due provided that the requirements set forth in the EU Interest and Royalties Directive are met, as described in question 3.2 above.

The withholding tax rate may also be reduced under a DTT.

### 3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

No. However, there is an overall limitation on deduction of net interest exceeding the greatest of the following limits: (i) €1 million; or (ii) 30% of EBITDA, as defined for tax purposes. Interest not deducted for the reason of having exceeded one of the above thresholds may be carried forward for the following five years, provided that the aforementioned limits are respected.

### 3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Please refer to question 3.4 above.

### 3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

Limitations on deduction of interest as mentioned in question 3.4 above apply to both related and unrelated party debt.

### 3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Interest paid in connection with shareholder loans (i.e. the excess) is not deductible if the interest rate exceeds the Euribor 12-month reference rate, accrued at a 2% spread (or 6% spread if the borrower qualifies as a small or medium-sized company).

### 3.8 Is there any withholding tax on property rental payments made to non-residents?

All tenants required to keep organised accounting records (e.g. companies resident or with a permanent establishment in Portugal), have to withhold CIT on rent paid to non-resident landlords (25% withholding tax rate).

### 3.9 Does your jurisdiction have transfer pricing rules?

Portugal has implemented detailed transfer pricing legislation applicable to commercial transactions concluded between specially related entities (the general criterion is the existence of a participation threshold of 20%). The Portuguese transfer pricing rules broadly follow the guidelines of the OECD and the country has adopted transfer pricing documentation requirements applicable to any corporate taxpayers with an annual turnover above €3,000,000.

## 4 Tax on Business Operations: General

### 4.1 What is the headline rate of tax on corporate profits?

The CIT rate in Portugal is 21%, plus a Municipal Surtax – rates vary between municipalities and the maximum rate is 1.5%.

A State Surtax may also be applicable: (i) 3% for profits exceeding €1,500,000, up to €7,500,000; (ii) 5% for profits exceeding €7,500,000, up to €35,000,000; and (iii) 7% for profits exceeding €35,000,000.

A 17% reduced CIT rate applies to profits up to €15,000 for small and medium companies.

### 4.2 Is the tax base accounting profit subject to adjustments, or something else?

Yes. Accounting profit or loss is subject to adjustments in accordance with tax adjustments foreseen in the CIT Code. For accounting purposes, Portugal has adopted the International Financial Reporting Standards.

### 4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments are as follows:

(i) Transfer pricing.
(ii) Limitation on deduction of interest and financing costs.
(iii) Depreciation of fixed and certain intangible assets.
(iv) Net worth positive and negative variations.
(v) Participation exemption regime applicable to dividends and capital gains and losses.
(vi) Provisions.
(vii) Suspended capital gains obtained in prior tax years.
(viii) Carry forward of tax losses.
(ix) Neutrality regime applicable to mergers and de-mergers.
(x) Adjustments to the declared value of real estate properties.
(xi) CFC rules.
(xii) Recognition of bad debt and irrecoverable credits.
(xiii) Payments made to low-tax jurisdictions.
(xiv) Patent box.

Costs specifically listed and unrelated to the company's business activities are also disallowed, a few examples of which follow:

(i) Improperly documented costs.
(ii) Fines and penalties.
(iii) Corporate tax and certain special contributions charged over certain sectors (pharmaceutical, banking and energy).
(iv) Indemnities for which events are insurable.
(v) Certain expenses incurred in connection with travel expenses, diesel and daily allowances above certain thresholds.
(vi) Capital losses covered by the participation exemption regime and capital losses of certain assets (aircraft and yachts).

### 4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Yes. Pursuant to the CIT Code, tax grouping is allowed, provided that the parent company holds, directly or indirectly, at least 75% of the capital and more than 50% of the voting rights of the subsidiaries (the capital may be held either through Portuguese entities who meet the conditions to be included in the group or through entities resident in another EU Member State or in the EEA, provided that these non-resident companies are held, directly or indirectly, by the dominant company – having at least 75% of the share capital).

### 4.5 Do tax losses survive a change of ownership?

Carry-forward is not applicable in case of a change of more than 50% of the share capital or the voting rights of a company, except when: (i) there is a change from direct to indirect ownership (and *vice versa*); (ii) the special tax neutrality regime is applicable to the transaction; (iii) the change of ownership occurs upon the death of the previous shareholder; (iv) the acquirer holds directly or indirectly 20% of the share capital or the majority of voting rights, at least from the beginning of the tax year in which the tax losses were incurred; or (v) the acquirer is an employee or a board member of the acquired company, provided that such person holds that position, at least from the beginning of the tax year in which the tax losses were incurred.

### 4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Small and medium companies are entitled to a CIT deduction of 10% of the retained and reinvested earnings (up to a maximum of €5,000,000 per year) used in the acquisition of qualifying assets. The reinvestment should be made within two years and the annual deduction is capped at 25% of the CIT due.

### 4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

Yes. Real estate ownership triggers Municipal Real Estate Tax ("IMI"), charged on an annual basis. The applicable rates vary from 0.3% up to 0.45% (urban property) and 0.8% (rural property). If the owner of the real estate is an entity located in a blacklisted jurisdiction, the applicable rate is 7.5%. The Budget State Law for 2017 introduced a new additional tax on real estate holdings above €600,000, at a 0.4% rate (for legal entities).

## 5 Capital Gains

### 5.1 Is there a special set of rules for taxing capital gains and losses?

There is no special set of rules for taxing capital gains and losses in Portugal.

### 5.2 Is there a participation exemption for capital gains?

Yes, provided that the following requirements are met:

(i) the parent company holds, directly or indirectly, at least 10% of the capital or voting rights of the other company;
(ii) the shares have been held continuously for at least 12 months;
(iii) the shareholder is not considered a transparent entity;
(iv) the entity that distributes dividends is not resident in a blacklisted jurisdiction; and

(v) it is subject to, and not exempt from, an income tax listed in the EU Parent-Subsidiary Directive or an income tax rate not lower than 60% of the Portuguese CIT rate (i.e. 12.6%, given the standard rate of 21%).

The above regime is not applicable to corporations whose assets are comprised of more than 50% of real estate located in Portugal (except if allocated to an agricultural, industrial or commercial activity).

### 5.3 Is there any special relief for reinvestment?

Yes. Capital gains arising from the disposal of tangible fixed assets, and intangible and biological assets held for at least one year may benefit from a deduction of CIT of 50% if those capital gains are reinvested in acquisitions, production or construction regarding the same assets within a certain period.

### 5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

No. However, the State Budget proposal for 2018 included a provision wherein the disposal of shares in a non-resident entity holding more than 50% of its assets in real estate located in Portugal will become subject to tax.

## 6 Local Branch or Subsidiary?

### 6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

No taxes are due on the incorporation of a subsidiary in Portugal.

### 6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

There are no relevant differences between the taxation of a branch and a subsidiary.

### 6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

A domestic branch's profits are taxed according to the same taxation rules applicable to a company with its head office or place of effective management in Portugal.

### 6.4 Would a branch benefit from double tax relief in its jurisdiction?

The non-discrimination clauses of the DTTs signed by Portugal foresee that a branch cannot be treated differently from a resident company. Additionally, the participation exemption regime is applicable to Portuguese branches of entities resident in an EU or EEA Member State or in a tax treaty jurisdiction which foresees an exchange of information on tax matters.

### 6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Withholding tax would not be imposed as a result of a remittance of profits by a branch in Portugal.

## 7 Overseas Profits

### 7.1 Does your jurisdiction tax profits earned in overseas branches?

Yes. Resident companies are taxed on their worldwide income, so overseas branches profits will be included in the annual profit, subject to CIT. There is an optional regime allowing resident entities to exclude profits obtained by overseas branches, provided that some requirements are met.

### 7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Under the participation exemption regime, inbound dividends may be excluded from CIT, provided that:

(i) the parent company holds, directly or directly, at least 10% of the capital or voting rights of the other company;

(ii) the shares have been held continuously for at least 12 months;

(iii) the shareholder is not a transparent entity;

(iv) the entity that distributes dividends is not resident in a blacklisted jurisdiction; and

(v) it is subject, and not exempt from, an income tax listed in the EU Parent-Subsidiary Directive or an income tax rate not lower than 60% of the Portuguese CIT rate.

Dividends from non-qualifying participations will be subject to tax, but a tax credit may be available.

### 7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Yes. Profits obtained by a non-resident company located in a low-tax jurisdiction are attributable to the resident shareholder, provided that the latter holds, directly or indirectly, a minimum stake of 25%. Such threshold is reduced to 10% if at least 50% of the share capital or voting rights are held by Portuguese resident individuals or corporations.

This regime is not applicable if the foreign company is resident in an EU or EEA Member State, as long as that state has in force mutual administrative cooperation procedures and provided that (i) the non-resident company carries out a commercial, industrial or agricultural activity, and (ii) the Portuguese resident shareholder is able to evidence that the incorporation of the company was grounded on solid commercial reasons.

## 8 Taxation of Commercial Real Estate

### 8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Capital gains obtained by a non-resident from the sale of real estate in Portugal are subject to 25% CIT.

### 8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

Capital gains obtained by non-resident shareholders upon disposal of shares in Portuguese companies whose assets comprise more than 50% immovable property located in Portugal are subject to CIT. Such taxation may be eliminated under a DTT if certain formalities are met. Taxation will also include, as from 2018, the disposal of shares in a non-resident entity that holds more than 50% of its assets in real estate located in Portugal.

### 8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

A special regime for Collective Investment Undertakings ("UCIs") was introduced in 2015. Under this regime, a UCI is subject to 21% CIT; being, however, exempted from IMI and State Surtax. Capital income, lease and capital gains shall not be included in the tax base for CIT purposes.

## 9 Anti-avoidance and Compliance

### 9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Yes. The GAAR provision allows for disregarding for taxation purposes a given operation which was not grounded on valid economic reasons, is abusive in form or substance and whose main purpose was obtaining a tax advantage that otherwise would not be achieved, totally or partially, without the use of those artificial or fraudulent means.

### 9.2 Is there a requirement to make special disclosure of avoidance schemes?

Yes. Decree-Law No. 29/2008, of 25 February, foresees disclosure obligations to prevent and combat abusive tax planning, including any schemes, strategies, acts and transactions that are wholly or mainly aimed at the reduction, elimination or deferral of taxes that would otherwise be due. Such disclosure obligations apply to schemes linked to tax advantages expected to be obtained, by any means, regarding corporate and personal income tax, property tax and real estate transfer tax, Value Added Tax and Stamp Duty.

### 9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

Yes. Under the disclosure obligations set forth in Decree-Law No. 29/2008, of 25 February, the Portuguese Tax Authorities may request clarifications from the promoters (credit and other financial institutions, auditors, accountants, chartered accountants, lawyers and solicitors) regarding the relevant tax planning schemes. If the promoter is a non-resident entity, such obligation relies on the beneficiary of the tax planning scheme.

### 9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

This is not applicable in Portugal.

## 10 BEPS and Tax Competition

### 10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

Yes. Portugal has progressively implemented the BEPS recommendations (e.g. Action 3 – CFC legislation, Action 4 – rules to limit interest deductibility based on EBITDA levels and Action 5 – a revised Patent Box Regime incorporating the nexus approach). Further legislative developments are expected to be enacted in the future.

### 10.2 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond what is recommended in the OECD's BEPS reports?

Yes. For example, Decree-Law No. 47/2016, of 22 August, introduced the new patent box incentive regime, following the BEPS Action 5 "modified nexus" approach, which measures ended up going beyond the Action 5 report's recommendations.

### 10.3 Does your jurisdiction support public Country-by-Country Reporting (CBCR)?

Yes. Following the BEPS Action 13 report, the Portuguese Budget Law for 2016 introduced amendments to the CIT Code concerning reporting obligations. As such, after January 2016, entities resident in Portugal that directly or indirectly hold or control one or more entities in another jurisdiction, with an annual group turnover larger than €750,000,000, are required to submit a CBC report.

### 10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Yes. In 2014, Portugal introduced a Patent Box Regime allowing for a 50% deduction of the gross income derived from the assignment or temporary use of patents and industrial models or designs, and of any indemnities resulting from the infringement of such IP rights, provided certain conditions are met. To prevent any abusive planning, income derived from an assignee resident in a blacklisted territory will not benefit from this tax relief. Also, there is a tax credit for qualifying R&D expenses (designated as a system of tax incentives for corporate R&D – or "SIFIDE II") available from 1 January 2014 until 31 December 2020.

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Samuel is a tax arbitrator at the Administrative Arbitration Centre.

Samuel has also advised relevant Portuguese and international business groups in terms of restructuring, mergers and acquisitions, tax audits, transfer pricing, securities and real estate funds, and tax issues related to regulated industries, such as telecommunications and insurance. Alongside this, Samuel has broad experience in tax consulting and international tax planning, particularly in Angola, Mozambique and Cape Verde, having actively advised oil & gas sector companies, particularly on LNG projects, submission of foreign investment projects, multijurisdictional tax structuring investments, elimination of double taxation and structuring remuneration packages for expatriates.

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He is the author of various books on tax and articles in specialised journals, namely:

- 'Portugal – Law & Practice', in *Chambers and Partners*, 2016;
- 'Breves notas introdutórias sobre a reforma do IRC', in *A Reforma do IRC*, Vida Económica, October 2014;
- 'Breve Enquadramento do Regime de Preços de Transferência nos Países de Língua Oficial Portuguesa', in *Cadernos Preços de Transferência 2013*, Almedina, 2013;
- 'Primeiras Reflexões sobre a Lei de Arbitragem em Matéria Tributária', in *Estudos em Memória do Prof. Doutor J. L. Saldanha Sanches*, Vol. V, Coimbra Editora, 2011;
- 'A eliminação da dupla tributação económica dos dividendos e o Imposto Sucessório por avença no Orçamento do Estado para 2002', in *Fiscalidade n. 11*, July 2002; and
- 'Portugal: New Transfer Pricing Regime', co-authored by Paulino Brilhante Santos, in *Tax Planning International Transfer Pricing*, Volume 3, Number 2, BNA International, February 2002.

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Bárbara Miragaia joined VdA's tax practice in 2015 together with the team of lawyers coming from Miranda Law Firm. As such, Bárbara has been greatly involved in developing the oil & gas area within VdA's tax practice, having actively advised companies within the industry in relation to indirect tax planning and business optimisation in Angola, Mozambique and other African jurisdictions. In addition, she has been assisting multinational companies with import/export procedures in Portugal, Angola, Mozambique and Cape Verde. Bárbara has experience in handling litigation involving CIT, VAT and Stamp Duty disputes with the tax authorities and judicial litigation proceedings, including: technically complex VAT disputes in the telecoms sector, such as litigation on the right to VAT deduction on the acquisition of UMTS licences for a major telecoms operator; disputes with the tax authorities and judicial litigation within the healthcare sector, regarding the reduced VAT rate applicable to medical equipment; representing a major Portuguese insurance group before the Portuguese tax courts regarding its income tax with respect to so-called unit-linked insurance plans; and representing Dutch pension funds in tax litigation proceedings for the recovery of tax paid on dividends obtained in Portugal.

Bárbara is currently attending the Taxation Postgraduate Course at the Catholic University of Portugal – Lisbon School of Law.

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