Practical Law

Transfer pricing in Portugal: overview

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A Q&A guide to transfer pricing in Portugal.

This Q&A provides a high level overview of the key practical issues in transfer pricing, including: international and local legislation, transfer pricing policy, pricing methodologies, regulatory practice and procedure, courts and dispute resolution, case law and revenue authority decisions, pricing adjustments, anti-avoidance, penalties, and proposed reform.

The Q&A is part of the global guide to transfer pricing.

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Resource Type
Country Q&A

Jurisdiction
Portugal

Transfer pricing: general overview

1. What are the main characteristics of transfer pricing law and policy in your jurisdiction?

For tax years starting on or after 1 January 2002, Portugal has implemented detailed transfer pricing legislation that broadly follows the guidelines of the Organisation for Economic Co-operation and Development (OECD).

Under the Portuguese transfer pricing rules, the terms and conditions of inter-company transactions must be at arm's length, and the Portuguese tax authorities have wide-ranging powers to adjust declared income if they consider that market conditions were not respected.

Special relations are deemed to exist between two entities where one of them has the power to exercise, directly or indirectly, a significant influence on the management decisions of the other entity.

Under Portuguese law, special relations are deemed to exist between, for example:

- A company and its capital holders (or their spouses, ascendants or descendants), or between two or more companies and their capital owners (or their spouses, ascendants or descendants), holding in both cases a direct or indirect participation equal to or exceeding 20% of the companies' capital or voting power.
- Entities whose legal relationship allows that one entity constrains the management decisions of the other, based on facts or circumstances unrelated to the business or professional relationship.
- A resident or non-resident entity with a permanent establishment in Portuguese territory and a non-resident company domiciled in a blacklisted territory (as defined by a ministerial order approved by the Minister of Finance).
- Entities connected by a subordination contract, same-level group contract or other contract of equivalent effect.
- Entities that are within a control or group relationship (as defined in the Portuguese Companies Code).

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2. What have been the main developments of significance for transfer pricing law and practice in your jurisdiction in the past 12 months?

It is not possible to cover transfer pricing matters over the last 12 to 18 months without mentioning the work of the OECD. The recent OECD Secretary-General Report to the G20 leaders on concerns over base erosion and profit shifting (BEPS) and on the development and implementation of the BEPS Action Plan covers matters such as the:

- Review of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010 (OECD Transfer Pricing Guidelines) on intangible assets.
- Release of a white paper on transfer pricing documentation requirements.
- Review of section E in chapter IV of the OECD Transfer Pricing Guidelines on the use of safe harbour provisions.
- New guidelines on tax administrations' risk assessment approaches before conducting transfer pricing audits.

The aim of the BEPS Action Plan is to trigger several modifications to the transfer pricing regime through both:

- Domestic legal provisions.
- Multilateral legal instruments between OECD member countries.

Both the tax administrations and taxpayers will need to consider these changes when looking at transfer pricing matters. For example, Portugal has implemented Action 13 of the BEPS Action Plan under the Budget State Law for 2016. As a result, multinational groups must now submit to the Portuguese tax authorities country-specific declarations disclosing detailed financial and tax-related information (country-by-country reporting).

Transfer pricing legislation

Federal or national legislation

3. **What is the main federal (national) legislation regulating transfer pricing in your jurisdiction?**

Primary legislation

Transfer pricing is primarily governed by Articles 63 and 138 of the Corporate Income Tax Code, approved by Decree-Law No 442-B/88 of 30 November 1988. These provisions contain the mains rules and principles related to transfer pricing and advance pricing agreements.

Secondary legislation

Secondary legislation regulating transfer pricing includes:

- Ministerial Order No 1446-C/2001 of 21 December 2001, which contains, for example, detailed rules on:
  - the arm's length principle;
  - transfer pricing methodologies;
  - cost contribution and intra-group services arrangements; and
  - ancillary obligations.
- Ministerial Order No 620-A/2008 of 16 July 2008, which contains rules on the conclusion of advance pricing agreements.

- Article 77 of the General Tax Law, approved by Decree-Law No 398/98 of 17 December 1998, which provides that, to be justified, all transfer pricing adjustments made by the Portuguese tax authorities must comply with certain requirements.

State or local transfer pricing legislation

4. What additional regional (local state) legislation and revenue authorities are relevant to transfer pricing in your jurisdiction?

Not applicable.

International transfer pricing treaties and agreements

5. What are the main international treaties and agreements that apply in your jurisdiction?

Portugal has concluded 77 double tax treaties (DTTs), of which 68 are currently in force.

Portugal has also concluded automatic exchange of information agreements with 15 countries (Andorra, Antigua and Barbuda, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Guernsey, Gibraltar, Isle of Man, Jersey, Liberia, Saint Kitts and Nevis, Saint Lucia and Turks and Caicos) and mutual administrative assistance agreements with three countries (Brazil, Cape Verde and Mozambique), under which a contracting state must automatically exchange information regarding source income obtained by the residents of the other contracting state.

Portugal is also a signatory of the Common Reporting Standard (CRS), which defines a global standard for the automatic exchange of information on financial accounts between tax authorities from different countries, under the auspices of the OECD.

In addition, Portugal has entered into a separate agreement on the automatic exchange of information on financial accounts with the US (which was signed on 6 August 2015 and entered into force on 10 August 2016) in accordance with the US Foreign Account Tax Compliance Act.

6. What impact do international treaties and agreements have in your jurisdiction?

Double tax treaties (DTTs) have had (and continue to have) a significant impact in Portugal, as they allow the elimination/mitigation of international double taxation and encourage foreign direct investment.

The main tax benefits of DTTs include:

- The application of reduced withholding tax rates on investment income (for example, dividends, interest and royalties).
- In certain cases, exemptions from capital gains tax on the disposal of companies' shares.

DTTs allow the resolution of double residency conflicts that can arise where a person is deemed to be simultaneously resident in both contracting states.

The majority of DTTs concluded by Portugal follow the OECD Model Convention on Income and on Capital 2014. Therefore, they contain specific provisions on the ability of tax authorities to make transfer pricing adjustments to profits when transactions between associated enterprises (that is, a parent and subsidiary companies and companies under common control) do not comply with the arm's length principle. DTTs entered into by Portugal since 1990 generally provide that Portugal and the other contracting state must perform symmetric adjustments to avoid potential double taxation.

In addition, some of the DTTs signed by Portugal contain provisions that allow the conclusion of mutual procedure agreements between contracting states, to resolve difficulties arising from both:

- The interpretation or application of a given DTT.
- Situations where taxpayers are subjected to taxation in violation of a DTT.

To prevent tax fraud and tax evasion, the most recent DTTs set up some exchange of information procedures.

Transfer pricing policy

7. What is the overall national transfer pricing policy in your jurisdiction?

The most recent public report regarding the Strategic Plan for 2015-2017 to combat fraud and tax evasion (published by Portugal's Tax Affairs Office) stated that the Portuguese tax authorities are developing measures to (among other things):

- Enhance the use of advance pricing agreements, to increase the predictability of the tax treatment of transactions between connected entities.
- Intensify the use of instruments of international co-operation (such as automatic exchange of information mechanisms), to detect cross-border tax fraud and tax evasion.
- Improve the control of national and international financial transactions between related parties, to detect situations of abusive tax planning, tax fraud and tax evasion.

In 2011, Portugal set up a Large Taxpayers Unit that is responsible for dealing exclusively with monitoring, assisting and auditing major taxpayer companies and groups. This reflects a trend observed in the majority of OECD member countries. As large taxpayers are usually part of a group of companies with local and international exposure, tax inspectors appointed to monitor large taxpayers examine transfer pricing matters.

Additionally, the transfer pricing policies of multinational entities with a presence in Portugal have been questioned more often by the tax authorities.

8. What are the main transfer pricing methodologies that are used to determine an arm's length price in your jurisdiction?

As Portugal applies the OECD Transfer Pricing Guidelines for Multinational Enterprises and Administrations 2010, the methods that must be adopted to determine an arm's length price (that is, the price that would normally be agreed upon, accepted and applied between independent entities) are as follows:

- Comparable uncontrolled price method.
- Resale price method.
- Cost plus method.
- Profit split method (on a subsidiary basis).
- Transactional profit method (on a subsidiary basis).
- Other methods duly applicable in the circumstances (on a subsidiary basis).

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9. To what extent, if any, does your jurisdiction follow the OECD transfer pricing guidelines?

Portugal has established a transfer pricing regime that broadly follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Administrations 2010 (OECD Transfer Pricing Guidelines) with regard to the:

- Arm's length principle.
- Use of traditional transfer pricing methods.
- Requirement to prepare a transfer pricing file.

Portuguese law makes a general reference to the OECD Transfer Pricing Guidelines, which have therefore generally been used to interpret and supplement the provisions of Portuguese law.

10. Is it possible to obtain any clearances or advance pricing agreements from the revenue authorities in respect of transactions?

Clearances

The Portuguese tax authorities do not provide any clearances in respect of transactions or series of transactions with regard to transfer pricing methodologies or compliance with the arm's length principle. These matters are specifically addressed through the advance pricing agreement procedure (*see below, Advanced pricing agreements (APAs)*).

Advance pricing agreements (APAs)

The Portuguese legislation follows the OECD guidelines in respect of the taxpayers' ability to request the tax authorities to enter into unilateral, bilateral or multilateral APAs. Bilateral or multilateral APAs can only be concluded with countries with which Portugal has entered into a double tax treaty (*see Question 5 and 6*).

APAs confer legal certainty to taxpayers when conducting transactions with related entities (including parent companies, subsidiaries, branches and permanent establishments). Provided that a taxpayer complies with the terms and conditions of APAs, these agreements provide guarantees relating to:

- The tax treatment of transactions with related parties.
- How the Portuguese tax authorities will analyse these transactions for a certain period of time.

To conclude an APA, the parties must follow an administrative procedure. For example, in the case of bilateral or multilateral APAs, the procedure can take 360 days from the date of formal acceptance of the proposal by the Portuguese tax administration. The average negotiation period takes less than 12 months, which is close to the international benchmark average.

The APA procedure requires taxpayers to disclose to the Portuguese tax authorities a wide range of information on transactions with related entities. Taxpayers applying for an APA cannot refuse to provide documents or information on the ground that they are confidential. Therefore, in practice, the information required may be more detailed than that required in the course of a tax inspection.

The conclusion of an APA requires payment of administrative fees, which can vary between EUR3,152 and EUR34,915. Fees must be paid within 30 days from the date of formal acceptance of the proposal by the Portuguese tax administration.

11. Where the revenue authorities make a transfer pricing adjustment, what is the effect of that adjustment on other party to the transaction?

Under the Portuguese transfer pricing regime, when the Portuguese tax authorities make a transfer pricing adjustment for one party to the transaction, a symmetric adjustment must be made at the level of the other party. This is relevant for transactions between Portuguese resident related parties.

At the international level, double tax treaties entered into by Portugal since 1990 generally provide a mechanism under which transfer pricing adjustments made by the tax authorities in one state trigger a symmetric adjustment in the other party's state of residence, to avoid any potential double taxation.

12. What are the reporting and other administrative obligations that apply to help the authorities evaluate transfer prices?

Companies whose turnover in the previous tax year exceeds EUR3 million must prepare a transfer pricing file that must include (among other information):

- An analysis of all transactions with related parties.
- A selection of the best method to assess market conditions.
- A benchmarking of comparable companies.

Additionally, all companies that enter into transactions with related entities, even if not obliged to prepare a transfer pricing file, must fill out additional declarations as part of their annual tax reporting obligations and annual tax return.

Transfer pricing courts and dispute resolution

National courts and transfer pricing dispute resolution

13. What are the relevant national courts and what dispute resolution mechanisms exist for transfer pricing issues in your jurisdiction?

Transfer pricing matters can be heard before either the:

- Judicial courts, without limitations as to the value of the dispute.
- Tax arbitration courts, provided that the value of the dispute does not exceed EUR10 million.

Both dispute resolution mechanisms are aimed at annulling tax assessment notes issued by the Portuguese tax authorities, and are not designed to determine the actual transfer price of transactions. The judicial and arbitration courts tend to focus on the legality and consistency of the transfer pricing methodology used by the Portuguese tax authorities and on the completeness of evidence provided to support a transfer pricing adjustment (the burden of proof rests with the Portuguese tax authorities), rather than on the amount of the adjustment.

In the authors' experience and based on the analysis of existing case law, it is generally recommended to seek resolution of transfer pricing disputes before the tax arbitration courts. This is because tax arbitrators tend to be technically better prepared to deal with complex tax issues than judges from the lower judicial tax courts. In addition, the average duration of tax arbitral proceedings is about six months, while the duration of judicial tax proceedings usually exceeds five years.

International courts and transfer pricing dispute resolution

14. What international dispute resolution methods are available in your jurisdiction, and which are preferred for transfer pricing issues?

There are two main international dispute mechanisms potentially available to associated enterprises resident in different jurisdictions in respect of transfer pricing issues:

- The EU Arbitration Convention, which applies between EU member states.
- The mutual agreement procedure (MAP), which applies to countries with which Portugal has entered into double tax treaties (DTTs).

These international dispute mechanisms may apply whenever a tax authority make an upward transfer pricing adjustment at the level of one of the associated enterprises, giving rise to potential double taxation issues.

The EU Arbitration Convention applies to situations of potential double taxation deriving from transfer pricing adjustments when the associated enterprises are both resident in EU member states. Its application must be initiated by any of the associated enterprises. Under the EU Arbitration Convention, the competent tax authorities must first try to reach an agreement on the transfer pricing adjustments and the double taxation issues. If the tax authorities fail to reach an agreement, the competent tax authorities must appoint an advisory commission that will decide on how double taxation will be tackled.

The MAP apply to situations of potential double taxation deriving from transfer pricing adjustments when one of the associated enterprises is resident in Portugal and the other is resident in a country with which Portugal has entered into a DTT, provided that the DTT includes a MAP clause. The MAP must be initiated by any of the associated enterprises. However, the MAP only provides that the competent tax authorities should reach an agreement on the transfer pricing adjustments and the double taxation issues. If the tax authorities fail to reach an agreement, there is no other mechanism available to deal with the double taxation issues..

Transfer pricing case law

15. What are the most significant case law developments on transfer pricing in your jurisdiction?

In the past 12 to 18 months, transfer pricing court disputes between the Portuguese tax authorities and taxpayers have mainly focused on the analysis, under the arm's length principle, of the terms and conditions of financing transactions between related parties.

This can be regarded as a sign that Portugal-based companies that face difficulties in obtaining credit from financing institutions have turned to their group counterparts to address treasury problems. Although most of the courts held that the tax adjustments made by the Portuguese tax authorities were illegal and consequently annulled them, companies consider it increasingly important to establish arm's length conditions in financing transactions with related parties, and to maintain proper documented evidence.

Transfer pricing adjustments

Adjustments and penalties

16. **Where the revenue authorities make and adjustment of the transfer prices for tax purposes, can any other penalties also be imposed in addition to that adjustment?**

If a transfer pricing adjustment leads to additional tax liability, a Portuguese resident associated enterprise must pay compensatory interest to the Portuguese tax authorities at a rate of 4% per year.

Additionally, companies that fail to submit documents on their transfer pricing policy within the time frame imposed by the tax authorities face a penalty between EUR1,000 and EUR20,000. However, there is no penalty in addition to the adjustment itself.

Transfer pricing development and reform

17. **Are there any current trends, developments or reform proposals that have or will affect the area of transfer pricing in your jurisdiction?**

The most recent public report on the Strategic Plan for 2015-2017 to combat fraud and tax evasion includes several actions to implement regarding transfer pricing matters (*see Question 7*). However, while there is a real move for the application of transfer pricing rules and increased training of tax inspectors on transfer pricing issues, there has been no sensible change in practice. For example, the recourse to advance pricing agreements has been very limited.

Action 13 of the OECD Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan) has been implemented through the State Budget Law for 2016. Under this law, multinational enterprises with an annual turnover of EUR750 million or more must submit to the Portuguese tax authorities a declaration disclosing detailed financial and tax-related information per country (country-by-country reporting).

The implementation of Actions 8 to 10 of the BEPS Action Plan is conditional on the issuance by the OECD of the final version of several ancillary discussion papers and of the final update of the OECD Transfer Pricing Guidelines.

Tax avoidance: general overview

18. **What have been the main national and international trends affecting tax enforcement and anti-avoidance practice in your jurisdiction in the past 12 months?**

Portugal has recently tightened its anti-avoidance framework through the:

- Reform of the Corporate Income Tax Code, which entered into force in 2014.
- Transposition into domestic law of Directive 2015/121/EU amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) (which contains a specific anti-abuse rule that limits the benefits available under the Parent-Subsidiary Directive).

Therefore, no substantial amendments will be required (except for certain details, such as the calculation of controlled foreign companies' income) for the transposition of Directive 2016/1164/EU laying down rules against tax avoidance practices that directly affect the functioning of the internal market..

19. How does your jurisdiction make the distinction between abusive tax avoidance and legitimate tax planning?

While the Portuguese legal framework does not define the concept of "abusive tax avoidance", scholars define it as a concept covering situations that go beyond the boundaries of legitimate tax planning under the provisions of general, sectoral or special anti-abuse rules.

Conversely, legitimate tax planning should be defined as a taxpayer's act or sequence of acts aimed at the achievement of tax advantages that are not contrary to anti-abuse rules.

The distinction between abusive tax avoidance and legitimate tax planning is nuanced and must be made on a case-by-case basis.

According to the majority of the judicial and arbitral courts as well as the prevailing opinion among scholars and tax consultants, the Portuguese tax authorities must demonstrate that the following four conditions are met to establish abusive tax avoidance:

- Tax advantages deriving from certain acts or a sequence of acts.
- The acts or sequence of acts must qualify as artificial.
- The essential purpose of the acts or sequence of acts is to obtain the tax advantages.
- The result achieved by the acts or sequence of acts is contrary to the structural principles of the legal system (*fraus legis*).

Each condition must not be subject to a separate analysis, but to a dynamic and interdependent analysis. This means that determining the existence of abusive tax avoidance depends much more on judgement than measurement.

20. Do the revenue authorities in your jurisdiction offer any guidance on the distinction between legitimate tax planning mechanisms and abusive or aggressive tax avoidance?

The Portuguese tax authorities have not issued official guidance regarding the distinction between legitimate tax planning mechanisms and abusive or aggressive tax avoidance.

However, the Portuguese tax authorities have issued a list of 13 transactions that qualify as abusive, which can be consulted at: *https://info.portaldasfinancas.gov.pt/NR/rdonlyres/BC481FC3-FD05-4960-BB58-D7D2D96790DC/0/DivulgacaoDL_2908PFA.pdf*.

Tax anti-avoidance provisions

21. Can you identify any direct or indirect impact in your jurisdiction of the OECD or other recent international initiatives to combat abusive tax avoidance?

The current emphasis on tax avoidance matters both in the OECD and the EU has increased the awareness of the Portuguese tax authorities and of all economic players. As a result, the enforcement of the GAAR by the Portuguese tax authorities has sensibly increased, leading to a surge in anti-avoidance related disputes and to a wealth of literature in that respect.

22. **Does your jurisdiction have GAAR designed to prevent or reduce abusive tax avoidance?**

Portugal has introduced a modern GAAR in 1999 under Article 39 of the General Taxation Law. Under the GAAR, any acts or legal transactions are ineffective for tax purposes if they are essentially or mainly aimed at using artificial or fraudulent means and at abusing the legal forms to:

- Reduce, eliminate or delay the assessment or payment of taxes that would normally be due as a result of facts, acts or legal transactions with an identical economic purpose.
- Obtain any tax advantages that would not be obtained, in whole or in part, without using those means.

In the above cases, the Portuguese tax authorities will consider the artificial or fraudulent means as ineffective. The income that arises from the use of these means will be taxed in accordance with the rules that would apply in their absence, so that they do not produce the intended tax advantages.

23. **What are the legislative provisions that are designed to reinforce GAAR and any other abusive tax avoidance provisions?**

Besides the GAAR, the Portuguese tax legislation contains several other specific anti-abusive provisions, including:

- Limitations on the deductibility of interest (which have replaced the previous thin capitalisation rules).
- Limitations to the application of benefits available under:
  - Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States;
  - Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states.
- Controlled foreign companies rules.
- Transfer pricing rules.
- Anti-abusive rules on blacklisted jurisdictions.

The legislation also requires taxpayers to disclose any tax abusive planning schemes, subject significant penalties for non-compliance (*see Question 25*).

24. **Identify and discuss any case law of interest concerning GAAR and any other cases dealing with abusive tax avoidance in your jurisdiction.**

Despite initial incorrect applications of the GAAR on various accounts (which led to several judicial decisions ordering the annulment of additional tax assessments), the Portuguese tax authorities have made significant improvements in applying the GAAR, particularly in respect of providing grounds to support its application. As a result, while the Portuguese tax authorities used to lose all judicial and arbitral disputes relating to the application of the GAAR, they are now successful in certain cases.

Typically, the application of the GAAR has been discussed by the judicial and arbitral courts in three categories of cases.

The first category of cases concerns the use of the Madeira Free Trade Zone (MFTZ) combined with the application of the participation exemption on dividends. In these cases, a parent company resident in continental Portugal (X) would incorporate a company (K) in the MFTZ and finance K using supplementary capital contributions that would subsequently be forwarded to group companies in The Netherlands and the Channel Islands. The interest income derived by K would be exempt from tax in the MFTZ and subsequently distributed to X as dividends, which would also be exempt from tax at the level of X under the participation exemption regime. In this line of cases, the courts held that the application of the GAAR was valid, and dividends distributed to X were recharacterised as interest.

The second category of cases concerns the use of shareholders loans by a holding company (HoldCo) to purchase the shares (capital participations) of a profitable company limited by shares (*sociedade anónima*) (YCo) with underlying undistributed reserves. In these cases, the share capital of both companies was held by the same shareholders. On transfer of YCo's shares to HoldCo, capital gains deriving from the sale at the level of the original shareholders was exempt from tax, provided that shares in YCo had been held for at least one year. Payment of the sale and purchase price from HoldCo to the shareholders would be recorded as an account payable at the level of HoldCo. During the operation, YCo would distribute dividends to HoldCo, which would be exempt from tax under the participation exemption regime and, in turn, HoldCo would reimburse the original shareholders, reducing or cancelling the account payable record. Decisions in these cases have so far been divided. However, cases lost by the Portuguese tax authorities are frequently the result of procedural irregularities, based on the fact that the Portuguese tax authorities had issued additional tax assessment notes to HoldCos, when the notes should have been issued to the true beneficiaries (that is, the shareholders).

The third category of cases relates to the transformation of a company limited by quotas (*sociedades por quotas*) into a company limited by shares, and to the subsequent sale of the shares in the company limited by shares. In these cases, the capital gains derived by shareholders was exempt from tax (under the tax regime in force at the time of the taxable event), provided that the shares had been held for at least one year (the exemption was only available for the sale of shares, not the sale of quotas). In this line of cases, the majority of decisions denied the application of the GAAR. However, in a minority of cases, the arbitral courts decided that the application of the GAAR was valid. In these cases, the arbitral courts disregarded the *fraus legis* requirement (*see Question 19*) and did not take into account the fact that the legislator appeared to promote (or, at least, was lenient to) companies limited by shares..

Tax avoidance penalties

Civil and administrative penalties for abusive tax avoidance

25. **What civil and administrative penalties can be imposed in abusive tax avoidance cases in your jurisdiction?**

As a general rule, a taxpayer must pay compensatory interest to the Portuguese tax authorities at a rate of 4% per year in the case of under-assessment of tax.

There are no specific penalties applicable in abusive tax avoidance cases. However, there is a wide range of general administrative penalties applicable to tax infringements, including the following:

- Failure to pay the tax due on time (in some specific cases): from 30% to 100% of the tax due.
- Failure to file or late filing of tax returns: from EUR300 to EUR3,750.
- Errors in the data reported in tax returns (when tax is due): from EUR750 to EUR22,500.
- Errors in the data reported in tax returns and annexes (when no tax is due): from EUR187.50 to EUR5,625.
- Forging, tampering or altering tax-related documents (when these behaviours do not qualify as criminal tax fraud): from EUR750 to three times the amount of the missing tax, up to a maximum of EUR37,500.
- Failure to keep accounting records or tax-related books: from EUR450 to EUR22,500.
- Failure to issue or late issuing of invoices: from EUR300 to EUR 3,750.

- Acquisition or use of non-certified invoicing software: from EUR7,500 to EUR37,500.
- Failure to use certified invoicing software: from EUR3,000 to EUR18,750.

The penalties above apply to legal entities in the case of negligence, except for penalties related to forging, tampering or altering tax documents (which require intentional conduct). Other tax penalty ranges apply to taxpayers acting with intent and to natural persons.

The General Regime for Tax Infringements also sets the maximum penalty that can be imposed, which are EUR165,000 in cases of intentional conduct and EUR45,000 in cases of negligence.

A taxpayer that discloses its mistake voluntarily may benefit from reductions in monetary penalties. These reductions range from 12.5% to 75% of the minimum legal penalty. If no tax is due, a waiver of penalties may be granted.

Additionally, a taxpayer's failure to disclose tax abusive planning schemes may result in a penalty between EUR5,000 and EUR10,000.

Criminal penalties for abusive tax avoidance

> 26. **What criminal penalties can be imposed in abusive tax avoidance cases in your jurisdiction?**

In addition to administrative penalties, criminal penalties can be imposed in cases of criminal infringements.

Fraud is liable to imprisonment for up to three years or to daily fines for up to 360 days (each day of fine corresponds to an amount between EUR5 and EUR5,000 for legal entities, and between EUR1 and EUR500 for individuals).

Tax fraud is defined as any illegitimate conduct under the law that is aimed at:

- Avoiding the assessment, delivery or payment of any tax due.
- Enjoying undue tax benefits, reimbursements or other patrimonial advantages that may cause a decrease in tax revenues, provided that the tax advantage is at least EUR15,000.

The prison sentence and fines can be significantly increased (up to eight years and 1,920 days, respectively) in cases of severe fraud (for example, in the case of forgery or destruction of mandatory tax documents that give rise to a tax advantage of at least EUR200,000).

Tax avoidance developments and reform

> 27. **Are there any current trends, developments or reform proposals that have or will affect the area of tax avoidance in your jurisdiction?**

While the public authorities have not issued any formal communication, the authors believe that the most significant trend in the area of anti-tax avoidance is the significant increase in the application of the GAAR by the Portuguese tax authorities. The authors anticipate that the GAAR will be in the spotlight in the foreseeable future, a trend that has been expressly acknowledged in the report on the Strategic Plan for 2015-2017 to combat fraud and tax evasion (published by Portugal's Tax Affairs Office).

In addition, the authors anticipate a significant increase in the application of the controlled foreign companies rules due to the combined effect of the automatic exchange of financial information under the:

- Common Reporting Standard.

- US Foreign Account Tax Compliance Act.
- Directive 2016/1164/EU laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

The regulatory authority

Tax and Customs Authority (Autoridade Tributária e Aduaneira)

T 217 206 707

W *www.portaldasfinancas.gov.pt/at/html/index.html*

Outline structure. *http://info.portaldasfinancas.gov.pt/NR/rdonlyres/4E4188C9-9032-42DF-87A7-63F6601980A9/0/ORGANOGRAMA_AT.pdf*

Responsibilities. The Tax and Customs Authority is exclusively responsible for managing all taxes, excises, customs duties and tariffs (except social security contribution), including all transfer pricing and anti-abuse related matters.

Procedure for obtaining documents. A written request can be made to the Portuguese tax authorities or sent through the personal area of the Portuguese tax authorities' website.

Online resources

Arbitration courts

W *https://caad.org.pt/tributario/decisoes*

Description. This official website provides access to all the decisions issued by the arbitration courts (in Portuguese only). It is maintained by the Centre for Administrative and Tax Arbitration and is up to date.

Judicial courts

W *www.dgsi.pt*

Description. This official website provides access to all the decisions issued by the judicial courts (in Portuguese only). It is maintained by the Portuguese Government and is up to date.

Contributor profiles

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Areas of practice. Tax.

Recent transactions

- Advising on domestic and international transactions relating to the financing, acquisition and restructuring of national and multinational economic groups and corporations.
- Domestic and international tax planning for major corporations.
- Assisting groups in the definition of transfer pricing policies and documentation.
- Resolving tax disputes with revenue authorities.
- Providing advice in securitisation transactions.
- Estate planning.
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- Involved in tax disputes and litigation in the national and international courts.

Languages. Portuguese, English

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- Advising on corporate restructurings, transfer pricing analysis, banking and finance, international tax planning and tax litigation.
- Providing tax and legal assistance in numerous private wealth transactions and private client tax planning.

Vieira de Almeida & Associados have recently acted as Brisal – KBC Finance Ireland's lawyers in an application before the European Court of Justice (ECJ) regarding the Portuguese withholding tax on interest. This application gave rise to the ECJ judgment in case C 18/15 (available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=181601&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=196040), where it was decided that Article 49 of the Treaty establishing the European Community precludes national legislations to tax non-resident financial institutions on interest income received within an EU member state without giving them the opportunity to deduct business expenses directly related to the financing activity, when such opportunity is given to resident financial institutions.