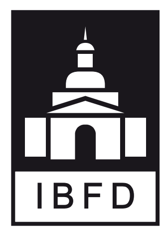

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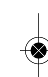

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Conceição Gamito* and Frederico Antas**

Relief from Double Taxation of Distributed Profits and the "Effective Taxation" Requirement

This note focuses on the domestic economic double taxation relief mechanism for dividends distributed to a Portuguese parent company, in particular, the requirement that the dividends be effectively taxed in order to benefit from such tax relief, which was given a wider scope of application and became significantly more relevant following the 2011 State Budget Law.

1. Introduction

1.1. Economic double taxation of profits phenomenon

The economic double taxation[1] of profits phenomenon occurs when a subsidiary[2] distributes dividends to its parent company,[3] where corporate earnings are taxed first at the level of the subsidiary (a distribution is thus made out of the subsidiary's after-tax profits) and subsequently at the level of the parent company, through the levying of a withholding tax on the dividend distribution and/or the inclusion of the dividends distributed in the taxable income of the parent company.

This phenomenon may arise purely at the domestic level, where both companies are within the same country, as well as in cross-border situations, if the parent company and the subsidiary are located in different countries.

1.2. Double taxation relief

Mitigation of the negative impact of economic double taxation of profits is commonly sought through the implementation of relief mechanisms, either at the level of the (distributing) subsidiary or at the level of the (recipient) parent company, such as the exemption method[4] or the credit method.[5]

Relief mechanisms are generally subject to certain conditions, namely that the parent company hold a certain percentage of the subsidiary's share capital (i.e. a minimum holding requirement, which may be replaced by other requirements, such as a voting rights requirement or a minimum acquisition cost requirement) for a given uninterrupted period (i.e. a minimum holding period, which may be completed after distribution).

1.3. Main features of the domestic economic double taxation relief mechanism

This article focuses on the domestic[6] relief mechanism for dividends distributed to a Portuguese parent company. The option chosen by the Portuguese legislator in this respect is clear: the exemption method applies at the level of the parent company. This implies that, provided that the following conditions are met, dividends are excluded from the taxable income of the parent company.

1.3.1. Relief mechanism at a purely domestic level – Portuguese distributing subsidiaries

Portuguese recipient parent companies (that are not subject to the tax transparency regime) may exclude from their taxable income dividends received from their Portuguese subsidiaries that are subject to Portuguese corporate income tax (CIT), provided their head office or place of effective management is in Portugal, if, namely, the following conditions[7] are met:

(1) The Portuguese resident recipient company holds no less than a 10% direct shareholding in the share capital of the subsidiary;

(2) The shareholding has been, uninterruptedly, held for one entire year preceding the date of distribution of the profits (if the profit distribution occurs before the expiry of the one-year holding period, it may also qualify for tax relief, provided the holding period is subsequently completed); and

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1. Or multiple taxation of profits, in regard to multiple tiers of participations in the profit distribution chain (cascading profit distributions).
2. The reasoning applies both to a first-tier subsidiary (directly held subsidiary) and to any lower-tier subsidiaries (indirectly held subsidiaries).
3. For the purpose of simplifying the analysis and given the purpose of this note, which is to analyse the requirement for effective taxation under the Portuguese economic double taxation relief for profits, profit distributions to permanent establishments are not considered.
4. Under the exemption method, the profits are altogether exempted from corporate income tax, through a withholding exemption on dividend distributions and/or through an exclusion from taxable income in the hands of the parent company.
5. Under the credit method, the profits are subject to corporate income tax in the hands of the parent company but a credit for the amount of corporate income tax paid by the subsidiary is granted against the parent company's corporate income tax.
6. This article does not cover relief mechanisms contained in Portugal's tax treaty network, focusing only on the domestic relief mechanism extended in Portugal to dividends distributed to a Portuguese parent company.
7. These conditions are set forth in PT: Corporate Income Tax Code (CITC), art. 51(1), National Legislation IBFD.

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(3) The distributed profits have been subject to "effective taxation".[8,9]

1.3.2. Relief mechanism in cross-border situations – EU Member States' subsidiaries

The relief mechanism[10] was designed to cover not only strictly domestic situations (i.e. circumstances where both the subsidiary company and its parent company are resident for tax purposes in Portugal) but also cross-border[11] situations (situations involving multinational structures with subsidiaries located abroad).

Taking into account the implementation of the Parent-Subsidiary Directive into the Portuguese tax system, dividends paid by subsidiaries of another Member State to resident recipient companies should also benefit from such tax relief, provided the conditions set forth in that Directive – in addition to the above-referenced requirements (the shareholding threshold, the minimum holding period and the "effective taxation"[12] requirement) – are met by both companies.[13]

1.3.3. Special relief mechanism in cross-border situations – PALOPs and East Timor subsidiaries

Due to historical reasons and in order to promote Portugal as a relevant hub for investments in Portuguese Speaking African Countries (PALOPs) and in East Timor, the Portuguese legislator has also extended the said tax relief to profits distributed by subsidiaries resident in those countries, provided the following conditions[14] are met:

(1) The recipient company is subject to and not exempt from CIT;

(2) The subsidiary resident in the PALOPs or in East Timor is subject to and not exempt from a tax similar to CIT;

(3) The recipient company holds directly, at least, a 25% shareholding for an uninterrupted period of two years; and

(4) Dividends distributed by the subsidiary have been taxed at a rate of at least 10% and do not derive from passive income (i.e. the requirement for effective taxation).[15]

1.4. The 2011 State Budget Law and the "effective taxation of distributed profits" rule

Being cognizant of the need to accelerate fiscal consolidation and reduce the government deficit, the government introduced, in the 2011 State Budget Law,[16] several tax measures with the express intent of reinforcing equity in the Portuguese tax system, namely by broadening the CIT tax base and fighting tax evasion.

Among the tax law changes included in the 2011 State Budget Law, some had a direct and significant impact on the application of double taxation relief with regard to distributed profits.

On the one hand, the legislator eliminated the possibility of applying the said relief to a shareholding the acquisition cost of which was at least EUR 20,000,000 when it was below the 10% shareholding threshold. Therefore, this tax relief is now always subject to the 10% minimum holding in the share capital of the subsidiary requirement, regardless of its acquisition cost.

On the other hand, significant changes have been made to the rule that the distributed profits should be subject to "effective taxation" in order to qualify for tax relief. Until 2011, if the profits distributed by a subsidiary to its Portuguese operational parent company did not meet the "effective taxation" requirement, the parent was only entitled to an exemption on 50% of distributed profits (meaning that the other 50% would be included in taxable income and taxed in the hands of the parent company). The only exception to this rule was applicable when the parent company was not an operational company, but a Portuguese pure holding company (*Sociedade Gestora de*

8. This requirement was first introduced by PT: Law 55-B/2004 of 30 Dec. 2004. Due to protests from several parties and economic agents, amendments to this requirement were introduced in PT: Law 53-A/2006 of 29 Dec. 2006. With the entry into force of this law the "effective taxation" requirement became applicable to all recipient parent companies, except for Portuguese pure holding companies (*Sociedade Gestora de Participações Sociais*).
9. For further details concerning the adoption and regulation of the "effective taxation" requirement, please refer to sections 1.4. and 2.
10. This relief was introduced by way of the approval and entry into force, on 1 Jan. 1989, of the CITC, which expressly took into consideration the Proposed Parent-Subsidiary Directive: Commission Proposal for a Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states. From that date onwards, the relief mechanism has been subject to several amendments, namely with a view to adapting it to the provisions of the EU Parent-Subsidiary Directive (1990): Council Directive 90/435/EEC of 23 July 1990 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, as amended by Council Directive 2003/123/EC of 22 Dec. 2003 and by Council Directive 2006/98/EC of 20 Nov. 2006, OJ L 225 (1990), EU Law IBFD. The Parent-Subsidiary Directive (1990) has been recently repealed by Council Directive 2011/96/EU of 30 Nov. 2011 OJ L 345 (2011), EU Law IBFD (hereinafter "Parent Subsidiary Directive (2011)"). We note that the amendments introduced by this recast Directive have no relevant impact on this article.
11. With regard to cross-border situations, it should be noted, however, that Portugal extends this relief mechanism only to dividends distributed to a Portuguese parent company by a subsidiary in (1) an EU Member State, (2) an EEA state, (3) a Portuguese Speaking African Country or (4) the Democratic Republic of East Timor (in regard to these two last cases, see the comments in section 1.3.3.).
12. Regarding the application of the requirement for "effective taxation" to distributing subsidiaries that are within the scope of the Parent-Subsidiary Directive, see the comments in section 2.12.
13. From a formal perspective, the recipient company must hold a declaration issued and duly authenticated by the relevant tax authorities of the Member State of the subsidiary stating that the latter meets the conditions set forth in art. 2 Parent-Subsidiary Directive (2011/96).
14. These conditions are set forth in PT: Tax Benefits Code (TBC), 1989, art. 42(1). This specific tax relief, applicable to profits distributed by subsidiaries located in the PALOPs and in East Timor, should not be confused with the general economic double taxation relief mechanism foreseen in the art. 51(1) CITC.
15. This taxation threshold applicable to the profits distributed by subsidiaries located in the PALOPs and in East Timor (set forth in art. 42(1) TBC) was not foreseen in art. 51(1) CITC. Additionally, in this case, the recipient company must also have documentary evidence proving that the conditions have been met.
16. PT: 2011 State Budget Law.

Participações Sociais – SGPS), in which case the requirement of "effective taxation" was waived.

Considering that Portuguese corporate structures typically include SGPS as the parent company, up to 2011, the requirement for "effective taxation" was not of particular concern to investors, even in cross-border situations.[17]

Pursuant to the 2011 State Budget Law, the 50% exemption for operational parent companies and the waiver of the requirement for "effective taxation" for SGPS were both repealed. As a result, Portuguese parent companies (both operational and SGPS) are now always subject to the requirement for "effective taxation" of the distributed profits in order to qualify for the economic double taxation relief. These amendments, therefore, amounted to a significant restriction on the domestic economic double taxation relief mechanism.

2. Background and Clarifications Introduced by Administrative Circular 24/2011

2.1. Introductory comments

The requirement for "effective taxation" of distributed profits, namely in the context of groups of companies and, in particular, where holding companies are involved, gave rise to several questions on how this requirement would apply in practice. The uncertainty deriving from the expression "effective taxation" and its effects on relief from double taxation of distributed profits was a cause of concern among investors and major corporate groups, bringing into discussion the spectre of capital flight to other, friendlier, jurisdictions.

Following a formal request for clarification of these concerns,[18] the Portuguese tax authorities recently released a Circular[19] regarding the interpretation of the expression "effective taxation" of distributed profits.

The Circular attempts to disclose the main impact that the requirement for "effective taxation" will have on resident recipient companies benefiting from relief from economic double taxation on distributed profits and – although far from eradicating it – it has reduced some uncertainty surrounding this subject. The main topics covered in the Circular are discussed in sections 2.2. to 2.13.

2.2. The concept of "effective taxation"

The expression "effective taxation" should be interpreted as meaning that the profits must have been subject to final CIT (or a similar or analogous corporation tax) and may not have been either exempt or excluded from such tax, at the level of the subsidiary.

17. In practical terms, the requirement for "effective taxation" was only relevant to profits distributed to operational parent companies (and less relevant than it currently is, since a 50% exemption applied up to 2011).
18. This formal request for clarification was submitted by Vieira de Almeida & Associados to the Director General of Taxes.
19. PT: Administrative Circular 24/2011, 11 Nov. 2011 (Circular).

2.3. Cascading profit distributions

The requirement for "effective taxation" on distributed profits can be met at any level of the profits distribution chain, i.e. at the level of a subsidiary or at the level of any sub-affiliated companies that contributed to the generation of those profits. It is expressly acknowledged that a different approach would be in breach of the Parent-Subsidiary Directive.

The burden of proof concerning verification of this requirement lies on the recipient company that applies for relief from double taxation of distributed profits.

2.4. Objective and subjective exemptions and exclusions from taxation

The requirement for "effective taxation" on distributed profits presupposes that the subsidiary that generated the profits has not benefited from a subjective CIT exemption, and that such profits derive from income that did not benefit from an objective CIT exemption or was disregarded for the purposes of the assessment of the CIT amount payable.

2.5. SGPS – Capital gains not subject to tax

Under article 32(2) of the Tax Benefits Code,[20] an SGPS may exclude from its taxable income capital gains derived from the disposal of share capital participations held for at least a one-year period.

To the extent that a parent company derives profits distributed by a lower-tier SGPS, resulting exclusively from capital gains that have not been subject to tax at the level of the latter pursuant to article 32(2) of the Tax Benefits Code, the requirement for "effective taxation" is considered not to have been met.

2.6. Tax losses, deductions and temporary differences

The requirement for "effective taxation" is considered to be met even in the absence of any CIT burden, to the extent that there are tax losses carried forward, deductions from CIT payable or temporary differences between the taxable income and the net accounting result.

In these circumstances, profits are deemed to have been effectively taxed, since they derive from income that was included in the tax base.

2.7. Payments on account and flat rate taxation

In order to assess whether the requirement for "*effective taxation*" has been met, regard must be had to the final CIT due. Provisional payments, such as provisional withholding tax payments and payments on account of the final CIT assessment (including the special payment on account), as well as flat rate taxation (or autonomous taxation), do not qualify for the requirement of "effective taxation".

20. Art. 32(2) TBC.

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2.8. Special taxation regime for groups of companies

When a subsidiary is subject to tax under the special regime for the taxation of group companies, CIT assessed by the dominant parent company is deemed to have been borne by all companies belonging to the same group.

Thus, the requirement for "effective taxation" is considered to be met in respect of each company that contributed to the generation of the group's taxable profit.

2.9. Relevant tax period of the distributed profits

The requirement for "effective taxation" is assessed with reference to the tax period in which the profits to be distributed were generated. In order to match distributed profits to the period in which they are derived, the relevant profit distribution resolution should be taken into account. If such resolution does not specify the tax period in which the distributed profits were generated, such period should be determined on the basis of a systematic method, such as the "first in, first out" (FIFO) method.

2.10. Unitary profit

For the purposes of assessing whether or not the requirement for "effective taxation" has been met, profits of a given tax period are considered in their totality and in an aggregated manner. This unitary approach is applied due to the fact that CIT provisions do not allow for the application of an apportionment system ("pro rata") or for the calculation of a partial deduction of distributed and effectively taxed profits and these mechanisms cannot be introduced through an administrative ruling.

2.11. Minimum threshold of taxation

Similarly, the requirement for a minimum threshold of taxation of the distributed profits is expressly left out on the grounds that, as CIT provisions do not foresee a minimum threshold, such a requirement cannot be introduced through an administrative ruling.

2.12. Parent-Subsidiary Directive

Relief from double taxation is always subject to the requirement for "effective taxation" of distributed profits. However, bearing in mind that the Parent-Subsidiary Directive precludes Member States from imposing conditions in addition to those already foreseen in that Directive, the Circular clarifies that the requirement for "effective taxation" is considered to be met provided that the subsidiary:

(1) Is resident in another Member State;

(2) Takes one of the forms listed in Annex I, Part A to the Parent-Subsidiary Directive; and

(3) Is subject to one of the taxes listed in Annex I, Part B to the Parent-Subsidiary Directive, without the possibility of an option or of being exempt.

2.13. General anti-avoidance rule

The Circular notes that the general anti-avoidance rule can be applied in relation to profits distributed either by Portuguese subsidiaries or by subsidiaries of another Member State. The application of this anti-avoidance rule causes the economic double taxation relief deduction in regard to distributed profits to be disregarded on a case-by-case basis, whenever the tax authorities determine that the case is abusive or fraudulent. The following circumstances may lead to the deduction being denied:

(1) Creation of a chain of share capital participations by artificially interposing companies for the purpose of (or one of the main purposes of which is) benefiting from the double taxation relief deduction in regard to distributed profits;

(2) Schemes involving abusive tax planning aimed, exclusively or predominantly, at obtaining advantages through that deduction; or

(3) Artificial schemes where the income subject to and not exempt from tax is negligible in comparison to the total profits of a certain tax period or where the income subject to the tax does not result from a real economic activity of the company.

3. Critical Overview

Although the Circular sheds light on many of the questions raised by taxpayers and other interested parties, a number of relevant questions remain unanswered and new doubts have arisen in regard to the guidelines in the Circular.

Among these, the authors highlight the discrimination against Portuguese SGPSs. In fact, whereas these companies may not benefit from economic double taxation relief on distributed profits that are solely composed of capital gains that have not been subject to tax, since the "effective taxation" is not considered to be met, profits distributed by other Member State holding companies that benefit from participation exemption regimes (which include the exclusion or exemption of capital gains from the corporate income tax base) will still be able to benefit, in any event, from such relief at the level of the resident recipient company. This discriminatory treatment may have a negative impact on the country's capacity to retain and attract capital, hampering the attractiveness of the Portuguese SGPS. Thus, the Circular does not succeed in bringing to a close the discussion on the spectre of capital flight to other European jurisdictions, such as the Netherlands, Luxembourg or Malta.

Another point of concern is the impact of the use of methods such as FIFO, which have the potential to affect the tax treatment of profits generated in years preceding the entry into force of the requirement for "effective taxation". In fact, the use of the FIFO method in determining the tax period in which the profits to be distributed were generated (which may apply when the profit distribution resolution does not specify that tax period), will possibly create a bias against profit retention at the level of the sub-

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sidiaries and encourage fast and immediate profit distributions. This may well contribute to the intensification of some of the main problems facing the corporate sector, such as poor retained earnings to stockholder's equity ratios and low business reinvestment rates.

Additionally, this retroactive effect may specifically impact profit distributions for an SGPS, where those profits are exclusively composed of capital gains that have not been taxed at the SGPS's level, particularly if they were obtained in a tax period preceding the entry into force of the requirement for "effective taxation". Such impact is, however, in most cases mitigated by the unitary profit approach, which implies that, when other revenues (for example, management fees charged by the SPGS to its subsidiaries) are included in the taxable profit together with those untaxed capital gains, the requirement for "effective taxation" will be met.

Another issue that should be highlighted is the failure to exclude certain forms of CIT payments, such as withholding taxes and payments on account of the final CIT due, in assessing the "effective taxation" requirement in regard to distributed profits. Both these forms of payments may or may not be final, depending not only on the amount of the final tax to be borne by the taxpayer, but also on the way the assessment and payment of tax has been designed by the legislator. The Circular thus raises new doubts that will remain unanswered, such as the following: if account payments or withholding tax are made in excess of the amounts due and the taxpayer does not claim a refund of the amount paid in excess, should this excess qualify for the requirement for "effective taxation"? If the withholding tax is final (for example, this tax charge was triggered in another jurisdiction where certain income was earned), should such a tax payment be considered for the purpose of assessing if the requirement for "effective taxation" has been met?

The questions and issues listed above constitute some examples that illustrate that there is plenty of room for improvement and clarification left by the guidelines in the Circular in order to effectively remove the inconsistencies surrounding the requirement for "effective taxation" on distributed profits.

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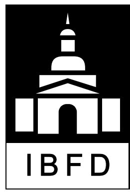

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