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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

The Portuguese tax system is composed of several taxes including:

- corporate income tax;
- value added tax (VAT);
- stamp tax;
- real estate municipal tax; and
- real estate transfer tax.

Additionally, certain types of income payments (eg, dividends, interest and royalties) may be subject to withholding tax, which may be reduced or waived through the employment of certain domestic or foreign rules under EU tax directives, double tax treaties (DTT) provisions or both.

Our comments (unless specified otherwise) relate only to these generally known tax rules; as such, our responses may not take all of the tax consequences applicable to a particular case into consideration.

From a tax perspective, several differences should be considered when comparing an acquisition of stock in a target company (a stock deal) or an acquisition of business assets and liabilities (an asset deal), and the possible tax implications for both the shareholders and the target company should be evaluated during the planning of any transaction.

In a stock deal, the sale of the shareholders' stocks in the target company may generate the recognition of a capital gain or loss in an amount equal to the difference between the value of the consideration received and the cost of the acquisition accepted for tax purposes (including expenses incurred related to the deal). Generally, any capital gains obtained from such transaction shall be included in the assessment of the shareholders' taxable profit and will be fully taxed under the general terms, with the following exceptions:

- if the shareholder is a non-resident without a permanent establishment in Portugal, no taxation shall arise from the sale of stock provided that (i) not more than 25 per cent of the non-resident is owned, directly or indirectly, by Portuguese tax residents; (ii) the non-resident is not domiciled in a blacklisted territory nor in a country with which there is no DTT or tax information exchange agreement in force with Portugal and (iii) the capital gains obtained by the non-resident do not derive from the direct or indirect (through an SGPS) disposal of shares in a local real estate property company (more than 50 per cent of whose assets are composed in real estate located in Portugal);
- if the shareholder is a Portuguese holding company (an SGPS), a venture capital company or a venture capital investor, capital gains (and losses) are not considered for the assessment of taxable profit, provided that the stock is held for at least one year and that it was not acquired from a related entity, a resident in a blacklisted territory or a resident in Portugal benefiting from a special tax regime; in this scenario, a three-year holding period applies; and
- capital gains obtained from the sale of a 10 per cent shareholding owned for at least one year may be taxed at 50 per cent provided that (among other conditions) the consideration received is reinvested in the acquisition of new stock, fixed tangible assets, non-consumable biological assets or investment properties.

The negative difference between the capital gains and capital losses obtained by shareholders on the sale of stock may be deductible by 50 per cent. However, capital losses are not deductible whenever any of the following circumstances occurs:

- the stock was acquired from a related party or from a resident benefiting from a special tax regime and, in both cases, the participation was held for a period of less than three years;
- the seller has transformed its legal type or the tax regime applicable to such losses in the past three years;
- the stock was sold to a related party or a resident benefiting from a special tax regime;
- the capital loss results from changes to the valuation model relevant for tax purposes or from a reclassification adjustment; or
- the capital losses equal to the amount of the dividends received and taxed under the EU Parent-Subsidiary provisions in the past four years are not deductible for tax purposes either.

Capital losses (as a part of the remaining net operating losses) may be carried forward for up to four years, but this right may be lost if certain circumstances are met, as described below.

Under an asset deal, any capital gains or losses obtained by the target company will be fully included in its taxable profit assessment. The tax may be reduced to 50 per cent if, among other conditions, the consideration received is reinvested in the acquisition of fixed tangible assets, non-consumable biological assets or investment properties.

Potential gains on the disposal of stock or business assets can be deferred if the transaction is established as a tax-free reorganisation, provided that all the conditions that apply to a tax-neutral regime are applicable to the transaction, which may assume the following legal forms:

- a merger (excluding downstream mergers) between the target company and the acquiring company;
- a spin-off, in which the target company may be liquidated or not, and its assets and liabilities are totally or partially transferred to two or more acquiring companies;
- a contribution in kind of a branch of activity or a universal transfer of assets of the target company to the acquiring company; and

- a stock-for-stock exchange between the target company's shareholders and the acquiring company.

Net operating losses (NOL) may be carried forward for up to four years, but this right may be lost if the corporate purpose or the nature of the activity of the company is changed (which may occur following an asset deal) or if 50 per cent of the target company's stock or the majority of the voting rights are transferred to another party (under a stock deal). In order to avoid the loss of such right, the taxpayer must apply for and obtain an authorisation from the minister of finance prior to the occurrence of such modification (if the above-mentioned changes are due to a merger, a spin-off or a contribution in kind, the taxpayer's application may be presented until the end of the month following the operation's registration request). In such application, the taxpayer must demonstrate the valid economic reasons underlying such change.

An asset deal may also be regarded as a transfer of a going concern. If that is the case, stamp tax shall be triggered at a 5 per cent rate over the value of the deal. On the contrary, if the assets included in the deal are separately transferred, then stamp tax will not be triggered, but each individual transaction may fall under the scope of VAT at the applicable rates (currently 23 per cent in the majority of cases).

In an asset deal, if real estate property is transferred then real estate transfer tax and stamp tax will be due at a maximum rate of 6.5 per cent (8 per cent whenever the acquirer is resident for tax purposes in a jurisdiction that is considered as having a privileged tax regime) and 0.8 per cent, respectively, over the real estate's tax value or the value at which the assets were transferred to the acquiring company, whichever is higher.

In a stock deal, the direct acquisition of at least 75 per cent of the stock of a limited liability company and general or limited partnerships that own real estate property may also trigger real estate transfer tax and stamp tax at the rates mentioned above.

Whenever the term of loans transferred to the acquiring company is subject to modifications, this change may be regarded by the tax authorities as a new financing agreement subject to stamp tax at rates that vary from 0.04 per cent per month, or fractions thereof, up to 0.6 per cent (one-off).

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

Under the current Portuguese GAAP, which adapted and transposed the International Financial Reporting Standards regulations into the internal law, the acquiring company may register the business assets purchased at their fair value. Therefore, a step-up (or even a step-down) may occur in the assets' tax basis.

All transferred business assets must be identified and evaluated in the book accounts of the acquiring company.

The purchase price must be allocated considering the fair value of the assets and liabilities received, and any residual amount (if any) will be qualified as goodwill. Goodwill is not depreciable for tax purposes and is subject to impairment tests on at least an annual basis.

For corporate income tax purposes, any losses related to goodwill impairment are not deductible.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

Generally, considering the implementation of a debt pushdown strategy after an acquisition, it is preferable to incorporate a special purpose vehicle (SPV) in Portugal in order to execute such acquisition rather than using a foreign company for such purpose. Nevertheless, if the transaction is structured as tax-neutral, it may be possible to use either a resident company or a company resident in another EU country, provided certain conditions are met.

A further benefit of acquiring a target company using a Portuguese-resident SPV concerns the entitlement (provided that some conditions are met) to file a group tax return, which allows the offset of the taxable losses of one company against the taxable profits of the other.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Both company mergers and stock exchanges are commonly used to acquire target companies. These types of operations (among others) may also be used in order to execute group reorganisation operations.

The corporate income tax law foresees a tax-neutral regime (transposed from the EU Tax Merger Directive to the internal law regulations) for both operations. This regime may be applied provided that the operations are carried out by companies resident in Portugal or in other EU countries.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

No. The benefits of issuing stock as consideration apply at the level of the target company and at the level of its shareholders, since the use of stock as consideration may qualify the transaction as a tax-free reorganisation, as described above.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

Apart from the direct acquisition of at least 75 per cent of the stock of limited liability companies and general or limited partnerships that own real estate property, which triggers real estate transfer tax and stamp tax (see question 1), the acquisition of stock does not trigger any other transaction taxes.

In an asset deal, if the operation is qualified as a transfer of a going concern, stamp tax shall be due at a rate of 5 per cent over the value of the deal. If the operation cannot be regarded as a contribution of a totality of assets, or part thereof, where the acquirer is to be treated as the successor to the transferor, then stamp tax will not be triggered, but each individual item shall be subject to VAT at rates currently varying between 6 per cent to 23 per cent.

Whenever real estate property is transferred, real estate transfer tax and stamp tax are due over the real estate's tax value or the value at which the assets were transferred to the acquiring company (whichever is higher) at the following rates:

- real estate transfer tax: 5 per cent for rural immoveable property; 6.5 per cent for urban immoveable property; and 8 per cent whenever the acquirer is resident for tax purposes in a jurisdiction that is considered as having a privileged tax regime; and
- stamp tax: 0.8 per cent.

Due to the transaction, notarial charges may also be levied.

With regards to coordination and concentration acts such as mergers, Portugal has a tax benefit that allows companies to benefit from some exemptions (real estate transfer tax, stamp tax and notarial charges), provided some requirements are met. Unfortunately, the conditions that need to be met to apply for this tax ben-

efit are very restrictive and the authorisation is dependent on the approval of the minister of finance.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

The right to carry forward NOL may be forfeited if the corporate purpose or the nature of the activity of the company is changed or if 50 per cent of the target company's capital or voting rights are transferred to another party. In order to preserve such rights, an authorisation from the minister of finance must be obtained (see question 1).

In reorganisation operations such as mergers, spin-offs or transfers of permanent establishments, the right to carry forward the NOL of the target entity may also be transferred to the acquiring company provided certain conditions are met (these will depend on the specific circumstances of the operation) and an authorisation is obtained from the minister of finance. Such authorisation depends on successfully demonstrating that the restructuring operation is being carried out for valid economic reasons, such as restructuring or rationalisation of the activities of the entities involved in it, and will have a positive effect on the final structure.

Any deferred tax assets related to NOL shall be forfeited if the right to carry forward is also lost.

Any VAT credits held by the target company shall not be lost in a change of ownership or in the sale of business assets.

In a merger of the target company into the acquiring company, the acquiring company may present an ad hoc request to the Portuguese tax authorities requesting authorisation to carry forward VAT credits previously held by the target company. In this scenario (if applicable), the acquiring company may also request the refund of corporate income tax special payments made on account by the target company within 90 days following the merger.

Note that the tax legislation does not have a specific tax regime applicable to the acquisition of insolvent or bankrupt companies. It may be very difficult to justify the economic reasons underlying such deals, and consequently the tax authorities may not authorise the carry forward of the NOL eventually held by the insolvent or bankrupt target company. Additionally, any operations (eg, mergers, spin-offs) involving these kinds of entities have a higher risk of being subject to anti-avoidance rules if the tax authorities consider that they were solely or mainly implemented for tax purposes.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

As a general rule, interest paid on debt to an independent party is deductible by the borrower provided it is considered as a cost necessary for the borrower's activity. Nevertheless, there are some exceptions and limitations that should be considered.

Whenever the borrower is an SGPS, venture capital company or a venture capital investor, all the financial costs incurred with loans associated with the acquisition of capital participations are not deductible for tax purposes.

If the lender is a foreign-related party resident in a non-EU country, this loan is subject to the thin capitalisation rule, which foresees that interest in respect to excessive debt shall not be deductible for corporate income tax purposes. Excessive debt corresponds, for this purpose, to the part of the debt that exceeds the debt-to-equity ratio of 2:1.This rule may not be applicable as long as the lender is not resident in a blacklisted territory and the borrower proves that, considering its kind of activity, the sector in which it operates, its size and other appropriate criteria, it would be able to obtain a loan in the same or similar terms from a non-related party.

Please note, however, that transfer pricing rules still need to be observed in any scenario and that Portuguese tax authorities may adjust the companies' taxable profit if they understand that, due to a special relationship between the lender and the borrower, they have agreed specific terms that differ from the normal conditions that are usually established between non-related parties.

As a general rule, interest payments made by a resident company are subject to withholding tax at a rate of 21.5 per cent (applicable to both resident and non-resident companies).

These rates may be reduced or waived through the use of certain internal rules (eg, interest paid to financial institutions is not subject to withholding tax), the EU Interest and Royalties Directive (until 30 June 2013, the withholding tax rate is reduced to 5 per cent; from that date onwards, no withholding tax shall be due) or DTT provisions. In order to benefit from these reduced or nil withholding tax rates, substantive and formal requirements must be met.

Investment income (eg, interest) paid or made available to master accounts (opened in name of one or more holders on behalf of unidentified third parties) is subject to a final withholding tax of 30 per cent (unless the beneficiary is disclosed, case in which the abovementioned general rate will apply).

Tax grouping is allowed provided that the parent company holds, directly or indirectly, at least 90 per cent of the capital and more than 50 per cent of the voting rights of the subsidiaries. Other conditions should also be met. Tax grouping allows the group companies to offset losses incurred by one company against profits of another company.

Another alternative that may enable a debt pushdown strategy is through a merger process in order to allow the offset of the financial costs (initially charged to the acquiring company) against the operational profits obtained by the target company.

Note, however, that under the general anti-avoidance rule, any contract or legal act shall be ineffective for tax purposes when it is proven that it was solely or mainly undertaken to reduce, avoid or defer the payment of tax that otherwise would be due under an operation with an identical economic outcome.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

The protections settled by the parties are usually found in the applicable asset or stock purchase agreement. Such protections depend greatly on whether the acquisition is structured as an asset or stock deal and also on the negotiation proceedings.

In order to identify, evaluate and, eventually, eliminate tax contingencies, it is increasingly common during the acquisition process for one or both parties to contract tax advisers to undertake due diligence work in order to disclose any potential or effective liabilities related to the target company or to the business assets. During the negotiation process, the purchaser is keen to ensure that it will, to the greatest extent possible, be free of any pre-closing tax liabilities or at least duly protected from them on a contractual basis. On the purchase agreement, any eventual tax contingencies will be identified and allocated between the seller and the purchaser.

The forms of protection agreed between the parties include tax representations and warranties, gross-up clauses, indemnification

clauses, deed of tax covenants, escrow accounts and dispute resolution clauses.

Any payment eventually received by the acquiring company related to indemnities shall represent a taxable income for the recipient and will be subject to tax under the normal terms. As long as such indemnity does not represent a consideration related to the transaction, no VAT shall be due on such payment (otherwise, a 23 per cent rate may be applied).

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

A post-acquisition restructuring process may assume and include several different kinds of operations, such as mergers, spin-offs, stock-for-stock exchanges or contributions in kind. These kinds of operations may be performed under a tax-neutral regime, as discussed above, provided some formal and substantive requirements are met.

The principal objective of a restructuring process should be mainly related to valid commercial and economic reasons, such as the restructuring or rationalisation of the activities of the companies involved in the restructuring operation. Depending on the circumstances, other secondary objectives (eg, debt pushdown) may also be accomplished from a restructuring process.

Under the general anti-avoidance rule, any contract or legal act shall be ineffective for tax purposes when it is proven that it was solely or mainly undertaken to reduce, avoid or defer the payment of tax that otherwise would be due under an operation with an identical economic outcome.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

It is possible to accomplish a tax free spin-off under the tax-neutral regime provided the following conditions are met:

- the target company must have its head office or place of effective management in Portugal and has to be subject to (and not exempt from) Portuguese corporate income tax;
- the acquiring company has to be resident in an EU country;
- the operation should not have tax fraud or tax evasion as its principal objective or one of its principal objectives;
- the target company's shareholders must receive in exchange new shares from the acquiring company and eventually a cash payment (not exceeding 10 per cent of the nominal value of those shares);
- assets and liabilities transferred must be kept in Portugal and contribute to the tax basis in Portugal. For this purpose, the creation of a Portuguese permanent establishment by the acquiring company, if the later is a non-resident entity, may be required;
- the acquiring company (or its permanent establishment) should keep, for tax purposes only, the assets and liabilities received at the same tax value they had, prior to transaction, in the target company;
- the transferred assets must maintain the depreciation and amortisation regime that was previously adopted by the target company;
- any inventory adjustments, impairment losses and provisions must follow, for tax purposes, the same treatment they previously had in the target company; and
- the assessment of the tax results of the acquiring company (or its permanent establishment) must be performed, concerning the received assets, as if no spin-off had occurred.

Additionally, some accessory obligations need to be fulfilled in order to apply the tax-neutral regime; for example, the acquiring company (or its permanent establishment) has to inform the Portuguese tax authorities about the exercise of the tax-neutral regime in its annual tax return for the fiscal year in which the spin-off has taken place.

In a tax neutral spin-off, the carry forward of the NOL of the target company can be transferred in a proportional basis to the acquiring company (or its permanent establishment) if the target company ceases to exist and an authorisation is obtained from the minister of finance (such authorisation depends on a demonstration that the restructuring operation is being carried out for valid economic reasons and will have a positive effect on the final structure).

The triggering of transfer taxes (property transfer tax and stamp tax) and other legal costs may be avoided in spin-offs if certain conditions are met, thereby allowing the company to apply for the tax benefits provided for in the Portuguese Tax Benefits Code regarding companies' restructurings.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

In general terms, the migration of a resident company to a foreign country shall be subject to corporate income tax in Portugal. For this purpose, the taxable base of that fiscal year will include any unrealised capital gains in respect of the company's assets.

Exceptionally, a tax-free migration of a Portuguese resident company can occur provided the following conditions are met:

- the assets and liabilities of the migrating company are maintained in a Portuguese permanent establishment and keep contributing to the assessment of the tax basis in Portugal;
- the Portuguese permanent establishment must, for tax purposes, keep the transferred assets and liabilities at the same tax value they had in the Portuguese company prior to the migration; and
- the operation may not have tax evasion as its principal objective or one of its principal objectives.

In order to determine the taxable profit of the newly created Portuguese permanent establishment:

- the transferred assets must maintain the depreciation and amortisation regime that was previously adopted by the migrating company;
- any inventory adjustments, impairment losses and provisions must follow, for tax purposes, the same treatment they previously had in the migrating company; and
- the assessment of the permanent establishment tax results has to be performed, concerning the received assets, as if no migration had occurred.

NOL prior to the migration may still be offset against the taxable profit of the Portuguese permanent establishment provided they correspond to the assets and liabilities kept in Portugal and that a request is made to the director of the Tax Administration requesting the carry-forward of the NOL until the end of the following month of the migration, and that such request is subsequently approved.

The shareholders of the migrating company shall be taxed on the income (which may be treated as capital gain or as dividend) that corresponds to the difference between the company's net assets (valued at the time of the transfer at market prices) and the acquisition cost of their participation. This rule shall not be applicable if the change of residence refers to a European company or to a European cooperative society.

Update and trends

As is commonly known, due to financial constraints originating from the sovereign debt crisis, Portugal has requested the assistance of the European Financial Stabilisation Mechanism and of the International Monetary Fund (IMF). For that purpose, Portugal, the European Commission, the European Central Bank and the IMF have signed a memorandum of understanding (MoU) on specific economic policy conditionality, which includes an extensive number of quantitative and qualitative measures that should be adopted by the newly elected (right-wing) government during the next four years.

One of the main objectives referred to in the MoU concerns the maintenance of the fiscal consolidation over the medium term up to a balanced budgetary position. For this purpose, as the government needs to increase the state's tax revenue and reduce the tax expenditure, it is expected that some tax measures will be approved in compliance with the recommendations foreseen in the MoU, such as the reduction of corporate tax deductions and special regimes (eg, abolishing all reduced corporate income tax rates, limiting the deductions of losses in previous years and curbing tax benefits).

At the same time, a recalibration of the tax system should take place with a view to lowering labour costs and boosting competitiveness. For this purpose, the government is currently analysing some fiscal devaluation alternatives that will involve a major reduction of the employers' social security contributions.

Other measures referred in the MoU and relevant to foreign investors concern the ambitious privatisation programme (which includes some of the most relevant companies in the transport, communications, insurance and energy sectors), as well as the improvement of the functioning of the judicial system, aiming at improved effectiveness and efficiency (with special attention on the use of arbitration for the settlement of tax disputes).

Furthermore, it is important to highlight that Portugal has been extending its DTT network. During 2011, DTTs with Croatia, Oman, Saudi Arabia, the Seychelles, and a new treaty with Norway may be signed. Portugal is also currently in negotiations to conclude DTTs with Angola (the first to be signed by this country), Botswana, Cyprus, Egypt, Libya, Qatar and Malaysia.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Under Portuguese domestic tax rules, interest or dividends paid by Portuguese resident companies to non-resident entities are subject to withholding tax at a rate of 21.5 per cent. The tax must be withheld at the time of the payment or the placement of the dividends at the disposal of the shareholders or at the maturity date of the interest.

With respect to interest or dividend payments, the withholding tax can be reduced or eliminated by the application, respectively, of the EU Interest and Royalties Directive and EU Parent-subsidiary Directive.

Under the transitional regime foreseen in the EU Interest and Royalties Directive, a Portuguese company can apply a 5 per cent withholding tax rate to interest payments made until 30 June 2013 (zero per cent from that date onwards). In order to apply this reduced withholding tax rate, the following conditions should be met:

- the paying and beneficiary entities should be subject to corporate tax and included in the list established in the annex of this Directive;
- both entities have to be considered as residents for DTT purposes;
- a direct 25 per cent shareholding must be held by one of the companies in the other's capital, or both are sister companies (ie, both held, in at least 25 per cent, by the same direct shareholder), and in either case the shareholding must be held for at least a two-year period; and
- the entity receiving the interest payment should be its effective beneficiary.

As referred above, investment income paid or made available to master accounts (opened in name of one or more holders on behalf of unidentified third parties) are subject to a final withholding tax of 30 per cent (unless the beneficiary is disclosed, in which case the above-mentioned general rate will apply).

Concerning the dividends paid by a Portuguese subsidiary to an EU parent company, no withholding tax shall arise under the EU Parent-subsidiary Directive, provided the EU company holds a 10 per cent shareholding in the Portuguese company's capital for a minimum one-year period.

As a consequence of over 50 DTTs signed between Portugal and other countries (including EU countries, Brazil, Canada, China, India, Mozambique, Russia and the US), the domestic withholding tax rates foreseen for interests and dividends payments can be reduced from between 5 per cent and 15 per cent.

To apply for the reduced or zero withholding tax rates foreseen in the EU directives or in the DTTs, some formalities must be complied with; for example, certain tax forms duly certified by the recipient's tax authorities should be received by the Portuguese paying company prior to the disposal of the dividends (in order to apply for the EU Parent-subsidiary Directive) or no later than the tax due date (in all the other cases).

The reduced withholding tax rate on interest payments under the EU Interest and Royalties Directive or DTT provisions may not be applicable to the part of the interest that is not compliant with the arm's-length principle or that exceeds the debt-to-equity ratio, under thin capitalisation rules.

For Portuguese resident companies, 100 per cent of dividends distributed by a company resident in Portugal or resident in the EU are excluded from taxable income if they hold a shareholding representing at least 10 per cent of total capital, for at least one year (the requirement of this minimum holding period may be met before or after the distribution). In order to benefit from this tax exclusion, the dividends received by the resident company must also refer to profits subject to effective taxation in the hands of the distributing company.

If the above conditions are not met, Portuguese companies will be fully taxed over the dividends received.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

Aside from interest and dividend payments, under the EU Interest and Royalties Directive provisions, the payment of royalties to other EU entities may benefit from a reduced withholding tax rate of 5 per cent until 30 June 2013 (and zero per cent from that date onwards) provided that the conditions referred to in question 13 are met. It is also possible to benefit from reduced withholding tax rates over royalty payments (ranging from 5 per cent to 15 per cent) through the application of DTTs signed by Portugal.

Other financial flows paid by the target company to its shareholders (for example, the reimbursement of supplementary capital) may benefit from low or zero taxation rates. Nevertheless, this sort of flow should be the object of further analysis according to the particular circumstances of each individual case.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

There is no single answer to this question; any of these methods is possible, depending on the particular interests of the parties involved and on the circumstances of each case.

In order to determine which solution will be chosen for a particular deal, the business structure of the target company or group must be analysed and the relevant perimeter of the transaction determined. Some of the issues that should be evaluated by the parties involved when defining the terms of the deal include:

- whether the buyer is interested in acquiring a branch of activity or the business as a whole;
- whether the seller is interested in selling a branch of activity or the business as a whole;
- whether the buyer is interested in international expansion or not;
- the composition of assets and liabilities of the target company or group; and
- whether the target company or group have any relevant tax credits and contingencies that should be duly considered.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

According to the Portuguese Tax Benefits Code, the capital gains obtained by non-residents on the disposal of stock in a Portuguese company are exempt from taxation in Portugal unless:

- more than 25 per cent of the non-resident company is owned, directly or indirectly, by Portuguese tax residents;
- the non-resident company is domiciled in a blacklisted territory or in a country with which there is no DTT or tax information exchange agreement in force with Portugal; or
- the capital gains obtained by the non-resident refer to the direct or indirect (through an SGPS) disposal of shares in a resident company, more than 50 per cent of whose assets are comprised of real estate property located in Portugal.

Portuguese domestic tax legislation does not have any specific tax regime applicable to energy and natural resource companies for this purpose.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

Any gains on the disposal of stock or business assets can only be deferred if the transaction is made through a tax-free reorganisation, provided that all the conditions to the application of the tax-neutral regime are met.

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