Portugal

Legality of Portugal's stamp duty taxes on EU cross-border loans

Ricardo Seabra Moura and Hugo Pinheiro Ferreira, Vieira de Almeida & Associados

Portugal is one of the few EU countries to have a stamp duty (SD) focused on financial transactions. In such a situation, the use of credit, which is granted by a resident or non-resident entity, is subject to Portuguese SD at a rate between 0.04% and 0.6%. Short-term shareholder loans may benefit from SD exemption provided the following four factors are met:

- The loan is granted for less than one year;
- Funds are exclusively aimed at covering treasury needs;
- A shareholder should have a minimum holding of 10% in the capital of the subsidiary (or a group control relationship should be applicable); and
- Both shareholder and subsidiary should be a resident in Portugal, or the shareholder should have its registered office or place of effective management in another EU member state (or in a state that has entered into a double tax treaty with Portugal and has not previously obtained such funding from financial institutions outside Portuguese territory).

Portuguese tax authorities (PTA) are challenging the application of such a SD exemption based on the grounds that:

- Borrowers must evidence treasury needs on the date funds are granted; and
- Exemption is not applicable when there is an EU member state borrower (other than Portugal), and the lender is a resident in Portugal.

This approach has been subject to several disputes by taxpayers in Portugal, particularly in connection with cash pooling arrangements between entities domiciled in the EU.

Treasury needs

The concept of "treasury needs" is not defined in the law, and the PTA only clarifies in tax ruling no. 3/97 of February 20 1997 that the SD exemption's sole purpose is to exempt transactions that are intended to cover a companies' need for cash to meet short-term commitments (which allows for different interpretations).

Accordingly, borrowers shall provide legal, accounting and financial data to evidence that the funds were exclusively transferred by the lender to face the borrower's short term liquidity needs, and explain the rationale behind the loan request.

Although there are some court decisions not favourable to taxpayers (since they were not able to provide sufficient proof), we believe that future arbitral/court decisions will give some clarity on this matter.

Freedom of establishment and the non-discrimination principle

There are also valid grounds to justify that the freedom of establishment and the non-discrimination principle are breached as non-resident borrowers will never be able to benefit from such SD exemption.

According to Article 49 of the Treaty on the Functioning of the EU (TFEU), member states are prohibited "from setting forth in their national laws conditions for the exercise of the right of establishment that are different for foreign persons or businesses and the member state's nationals".

As stressed by the European Court of Justice's (ECJ) Advocate General Verica Trstenjak in the conclusions of case C-31/11 of July 9 2012 (*Marianne Scheunemann v. Finanzamt Bremerhaven*) such freedom:

> Must be understood to mean the actual pursuit of an economic activity through a fixed establishment in another member state for an indefinite period.

In this sense, "all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment" must be regarded as restrictions on the freedom of establishment (*National Grid Indus*, C371/10, of November 29 2011). Therefore, choosing to incorporate a group entity with a head office, and pursuing its activity in Portugal, is an exercise of the freedom of establishment that shall not be constrained by the tax law.

A breach of the freedom of establishment is also demonstrated in loan grants if the establishment of a subsidiary in Portugal is more advantageous from a tax perspective than its establishment in another member state, without there being an objective reason deemed by the ECJ for it.

European Court of Justice

The ECJ's case law actually establishes that discrimination can only result from applying different rules to similar situations or applying the same rule to different situations (*Schumacker*, C-279/93 of February 14 1995; *Talotta*, C-383/05 of March 22 2007; and *Lakebrink* and *Peters-Lakebrink*, C-182/06 of July 18 2007).

Therefore, we take the view that this provision is not EU compliant (in particular, the imposition of restrictions on the freedom of establishment of companies), since SD exemption should be applicable to any short-term credits between EU entities, irrespective of the residency of the debtor/borrower, as long as the other requirements are met.

Ricardo Seabra Moura (rsm@vda.pt) and
Hugo Pinheiro Ferreira (hpf@vda.pt)
Vieira de Almeida & Associados
Website: www.vda.pt