Tax on corporate transactions in Portugal: overview

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Country Q&A | Law stated as at 01-May-2020 | Portugal

A Q&A guide to tax on corporate transactions in the Portugal.

This Q&A provides a high level overview of tax in Portugal and looks at key practical issues including, for example, the main taxes, reliefs and structures used in share and asset sales, dividends, mergers, joint ventures, reorganisations, share buybacks, private equity deals and restructuring and insolvency.

To compare answers across multiple jurisdictions, visit the tax on corporate transactions *Country Q&A tool*.

This Q&A is part of the global guide to tax on transactions. For a full list of jurisdictional Q&As visit *global.practicallaw.com/taxontransactions-guide*.

Tax authorities

1. What are the main authorities responsible for enforcing taxes on corporate transactions in your jurisdiction?

The Portuguese Customs and Tax Authority (*Autoridade Tributária e Aduaneira*) (Portuguese Tax Authority) (PTA) (*www.portaldasfinancas.gov.pt/at/html/index.html*) is the authority responsible for all tax matters in Portugal, including the enforcement of taxes concerning national and cross-border corporate transactions.

Pre-completion clearances and guidance

2. Is it possible or necessary to apply for tax clearances or obtain guidance from the tax authorities before completing a corporate transaction?

Taxpayers can request the PTA to issue a ruling to obtain a formal tax clearance and/or guidance regarding the tax treatment of a specific corporate transaction, before the transaction is completed.

A ruling request can be either urgent or non-urgent. A non-urgent ruling request does not require the payment of any fee by the taxpayer. An urgent ruling request is subject to the payment of a fee, fixed on a discretionary basis by the PTA and based on the complexity of the issue under analysis, at an amount between EUR2,500 and EUR25,500.

The PTA will decide on the urgency of the request within 30 days after its submission and, if it accepts that the request is urgent, a fee amount is fixed (which must be paid by the taxpayer within five days after the respective notification). Otherwise, where the fee is not paid within the five-day time limit, the request will be treated as a non-urgent request and no fees will be due. An urgent request that the PTA consider as particularly complex from a technical perspective will still be treated as non-urgent where the fees are not paid in time, and any request that does not meet the requirements necessary to be treated as an urgent request will be treated as a non-urgent request.

An urgent ruling request must contain, along with a detailed description of the factual background, a justification for the urgent nature of the request, and a proposal for the tax treatment of the facts referred to in the request. This proposal will be considered as tacitly approved by the PTA if the PTA does not make any decision within 75 days of the submission of the request. This tacit approval only takes effect with reference to the acts and facts included in the request, and for the tax year referred to in the request. Non-urgent ruling requests must be processed within 150 days of submission, but the rule on tacit approval does not apply if this deadline is not met.

A request cannot refer to facts that are subject to a pending tax inspection procedure, if this procedure has already been notified to the taxpayer.

Tax rulings are published following 30 days after the decision is notified, and the identity of the taxpayer is not disclosed. Tax rulings are binding on the PTA, unless otherwise required by a judicial decision.

Tax rulings cease to apply if their factual or legal assumptions change, and, in any case, within four years of their date of issue, unless the taxpayer requests a renewal of the ruling. Finally, the PTA has the discretion to revoke tax rulings one year after their issuance.

Disclosure of corporate transactions

3. Is it necessary to disclose the existence of any corporate transactions to the tax authorities?

Circumstances where disclosure is required

There are predefined circumstances where taxpayers are required to identify and/or to report to the PTA the existence of corporate transactions, such as:

- Corporate transactions subject to the tax neutrality regime.

- Corporate transactions entered into with related parties.

Portuguese tax law has in force legislation which combats abusive tax planning, under which certain service providers (such as attorneys and consultants) must disclose any tax abusive transactions entered into by companies to which they provide services (although disclosure can be made without revealing the taxpayer's identity).

Portugal is in the process of implementing into national law Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU on mandatory exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6). The directive is not effective until 1 July 2020, but it will impose mandatory reporting of cross-border arrangements in EU member states that fall within one of several "hallmarks" (broad categories that set out characteristics identified as potentially indicative of aggressive tax planning). This concerns not just transactions that are tax-motivated, but also ordinary transactions that may have a "potential tax effect" but are not driven by tax planning motives. The reporting obligations fall on intermediaries or, in some circumstances, the taxpayer itself. More developments are expected soon on DAC 6.

Manner and timing of disclosure

Corporate transactions subject to the tax neutrality regime are required to be identified/reported in the annual tax and accounting return, and the supporting documentation for the transaction, which is required to apply the tax neutrality regime, must be included in the annual tax return.

Corporate transactions with related parties must be reported in the annual tax return whenever they reach or go above a predefined threshold (EUR3 million), and are documented, under certain circumstances, in the relevant transfer pricing file.

Main taxes on corporate transactions

Transfer taxes and notaries' fees

4. What are the main transfer taxes and/or notaries' fees potentially payable on corporate transactions?

Stamp duty

Most corporate transactions (mergers, acquisitions or share capital increases) are not subject to stamp duty in Portugal. However, any official documents (contracts, titles, and so on) that are either finalised in Portugal, or have any legal or economic effects in Portugal, can be subject to stamp duty. Other related events can be subject to stamp duty in Portugal if they are listed in the Annex to the Stamp Duty Code, which may include:

- Financial operations (for example, loans, interest and commissions) are subject to stamp duty at the following rates:
    - loans: depending on the maturity of the loan, the rates of stamp duty range from 0.04% (per month) to up to 0.6%;
    - interest: 4%; and
    - commissions: 3% (for the provision of guarantees) or 4% (for other commissions).
- The provision of guarantees that are not simultaneous and instrumental, from a material perspective, to contracts already subject to stamp duty: depending on the maturity of the guarantee, the rates of stamp duty range from 0.04% (per month) to up to 0.6%.
- Transfers of going concerns are subject to stamp duty at the rate of 5%. The most recent view of the PTA is that only transfers of business units which include immovable property or rights to lease agreements over immovable property are considered as transfers of going concerns.
- Transfers of real estate made without consideration is subject to stamp duty at the rate of 10.8%.

Stamp duty may only be due provided that the events are not subject to, or exempt from, VAT.

Stamp duty is payable by the persons/parties who are involved in the acts, such as notaries, credit and other financial institutions, insurance companies, the lessor, among other parties.

Notaries' fees

Notaries' fees can be payable, and the amount of the fees depends on the type and the value of the transaction.

Municipal real estate transfer tax (MRETT)

MRETT is levied on the transfer of immovable property, or rights attached to immovable property, located in the Portuguese territory, made for consideration (transfers made without consideration are subject to stamp duty). It is calculated on the higher of either:

- The tax value of the real estate (calculated by the PTA).
- The real estate's selling price.

MRETT rates vary between 5% (rural property) to up to 6.5% (commercial or industrial buildings) and is payable by the purchaser of the immovable property or the right attached to immovable property.

Corporate and capital gains taxes

5. What are the main corporate and/or capital gains taxes potentially payable on corporate transactions?

Corporate income tax (CIT)

Key characteristics. CIT is due by companies and other legal persons that have their legal seat or place of effective management in the Portuguese territory (resident entities) as well as by non-resident entities deemed to have a permanent establishment (PE) in Portugal (in general terms, if they have a fixed place of business or a dependent agent in the Portuguese territory).

CIT is levied on an annual basis. There is no specific tax on capital gains in Portugal: capital gains or losses are included in the annual taxable income and subject to the general CIT rules.

Triggering event. Taxable income is based on the taxpayer's accounting profit, subject to specific adjustments contained in the Corporate Income Tax Code (CIT Code). Non-resident entities carrying out their activity through a PE in Portugal are subject to CIT on their taxable profit allocated to the PE in the Portuguese territory, which is taxed under similar rules as those applicable to Portuguese resident entities.

Applicable rates. The current CIT rate is 21% (16.8% in Azores and 20% in Madeira). However, a reduced rate of 17% (13.6% in Azores and 11.9% in Madeira) applies for small or medium-sized companies, over the first EUR25,000 (following the entry into force of the Budget State Law for 2020) of net taxable profits (the standard CIT rate will apply on any net taxable profits above EUR25,000). Due to the entry into force of the Budget State Law for 2020, a reduced rate of 12.5% may also be applicable to micro, small or medium-sized companies engaging directly and mainly in an agricultural, commercial or industrial business or in the provision of services in inland territories over the first EUR25,000 of the respective taxable income.

A municipal surtax, with a maximum rate of 1.5%, is also levied on net taxable profits. In addition, a state surcharge over net taxable profits exceeding EUR1.5 million applies, at a progressive rate, at the following rates:

- Net taxable profits exceeding EUR1.5 million and up to EUR7.5 million: charged at a rate of 3%.
- Net taxable profits exceeding EUR7.5 million and up to EUR35 million: charged at a rate of 5%.
- Net taxable profits exceeding EUR35 million: charged at a rate of 9%.

Capital gains may be exempt from CIT under the participation exemption regime (*see Question 11, Participation exemption*).

Value added and sales taxes

6. What are the main value added and/or sales taxes potentially payable on corporate transactions?

Value added tax (VAT)

Corporate transactions can trigger VAT, but in most circumstances it is not due: for example, transfers of businesses as going concerns are generally excluded from the scope of VAT, provided that:

- The transfer of assets is to be performed in definitive terms.
- Both legal and economic ownership must be effected, and the purchaser must have the intention to operate the business, or part of the undertaking, transferred (and not simply immediately liquidate the activity concerned and sell the business).
- The acquirer is, or will become, a taxable person who performs taxable operations following the acquisition of the assets.
- The transferred assets/business are capable, as a whole, of constituting an independent business unit.
- Following the transfer, the acquirer will continue to undertake an economic activity.

The VAT Code provides exemptions applicable to some transactions (for example, transactions related to financial and insurance services, real estate transfers, and leases). The VAT rates are as follows:

- Standard rate: 23% in the mainland, 22% in Madeira, and 18% in Azores.
- Intermediate rate: 13% in the mainland, 12% in Madeira, and 9% in Azores.
- Reduced rate: 6% in the mainland, 5% in Madeira, and 4% in Azores.

As a rule, a taxpayer can deduct any input VAT paid (although some exceptions apply) on the acquisition of goods or services. A taxpayer that performs both taxable and non-taxable transactions can only deduct input VAT that is attributable to its taxable transactions.

Other taxes on corporate transactions

7. Are any other taxes potentially payable on corporate transactions?

No other taxes are applicable on corporate transactions.

Taxes applicable to foreign companies

8. In what circumstances will the taxes identified in *Questions 4* to *7* be applicable to foreign companies (in other words, what "presence" is required to give rise to tax liability)?

Stamp duty

Stamp duty is levied on certain assets and contracts subject to the tax in the Portuguese territory, where the assets (such as immovable property) are located in Portugal, or the contracts are concluded in Portugal.

Stamp duty is levied in certain events, listed in the Annex to the Stamp Duty Code, where one of the parties is resident in Portugal (for example, in the case of loans or guarantees granted by non-resident companies to resident companies) (*see Question 4, Stamp duty*).

Corporate income tax (CIT)

A foreign company will be liable to Portuguese CIT if it either:

- Has its legal seat or place of effective management in the Portuguese territory.
- Conducts its business through a PE in the Portuguese territory.

Portuguese CIT can also be levied on certain types of income obtained by non-resident taxpayers which qualifies as Portuguese-source income (for example, investment income paid by a resident entity, or capital gains arising from the disposal of real estate located in Portugal).

Value added tax (VAT)

Foreign companies are subject to Portuguese VAT for transactions (sales of goods or the provision of services) that are deemed to have taken place in the Portuguese territory.

Under the VAT provisions currently in force, in general terms, business-to-business transactions are deemed to be located in the country where the head office, fixed establishment or domicile of the recipient of the services is located (and are therefore subject to VAT in that country, under the reverse charge mechanism).

Municipal real estate transfer tax (MRETT)

MRETT is imposed on non-resident companies acquiring property located in Portugal, or performing other similar transactions that are liable to this tax (for example, executing a promissory contract concerning real estate located in Portugal, which is then immediately occupied by the purchaser) (*see Question 4, Municipal real estate transfer tax (MRETT)*).

Dividends

9. Is there a requirement to withhold tax on dividends or other distributions?

Dividends include the distribution of both profits and distributable reserves. Dividends paid by Portuguese companies to resident or non-resident individuals are subject to withholding tax at a 28% flat rate. An exception is made to dividends paid or made available to residents in a double tax treaty country (where reduced rates may apply), and to dividends paid or made available to residents in a "blacklisted" country or unidentified beneficial owners (where an increased withholding tax rate of 35% applies).

However, individuals who are tax resident in Portugal can opt to include dividends in their aggregated taxable income in the annual tax return and be taxed at the personal income tax progressive rates, with a credit given for the tax withheld. If this election is made, a 50% relief should apply (this participation relief is applicable regardless of the percentage of participation and minimum holding period).

Dividends paid by a Portuguese company to a resident company are subject to a 25% withholding tax, which is then included as part of the taxable income subject to CIT and taxed at the standard rate. Withholding tax is treated as a payment on account of the final CIT due. An exemption may be available under the participation exemption regime.

Dividends paid by a Portuguese company to a Portuguese parent company can be exempt from withholding tax and from CIT provided all the following requirements are met:

- The parent company must hold at least 10% of the share capital or voting rights of the distributing entity.
- This shareholding interest must have been held continuously during the 12 months preceding the dividend distribution (or must continue to be held after the distribution until the required holding period is completed).
- The parent company must not qualify as a look-through/transparent entity for CIT purposes.
- The distributing entity should be subject to, and not exempt from, CIT.

Dividends paid by a Portuguese company to a non-resident company are generally subject to a final withholding tax at a rate of 25%. An exception is made to dividends paid or made available to residents in a double tax treaty country (where reduced rates may apply), and to dividends paid or made available to residents in a "blacklisted" country or unidentified beneficial owners (where an increased final withholding tax rate of 35% applies). An exemption may be available under the participation exemption regime.

Dividends paid by Portuguese companies, which are subject to and not exempt from Portuguese CIT, to non-resident corporate shareholders of a non-resident company will be exempt from withholding tax where all the following requirements are met:

- The non-resident company to which the dividends are distributed is resident in an EU member state, an EEA member state (with an exchange of information agreement with Portugal in similar terms as within the

EU) or in a country with which Portugal has entered into a double tax treaty (and that treaty provides an exchange of information clause).

- The non-resident company is subject to, and not exempt from, a corporate income tax referred to in Article 2 of Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States or any tax of a similar nature to Portuguese CIT. In these two cases, the tax rate applicable to the non-resident company must not be less than 60% of the Portuguese CIT rate.
- The non-resident company has held, directly or indirectly, a shareholding interest in the Portuguese distributing company equal to, or higher than, 10% of the Portuguese company's share capital or voting rights, for an uninterrupted period of at least one year before the dividend distribution.

A specific anti-abuse provision has been introduced which clarifies that the above withholding tax exemption on dividends will not apply to an arrangement (or a series of arrangements) which has been put in place with the main purpose (or one of the main purposes) of obtaining a tax advantage. This would defeat the object and purpose of the exemption (which is to eliminate double taxation), and these types of arrangement will not be considered a genuine use of the exemption by the PTA when considering all the relevant facts and circumstances of the arrangement.

Most recently, another specific anti-abuse provision has been introduced which foresees that the above withholding tax exemption on dividends will not apply when the resident paying company has not complied with the declaratory obligations provided for in the legal regime of the ultimate beneficiary owner register and, in addition, in situations where the declared beneficial owner, or any of the beneficial owners declared under that regime, have residence or domicile in a "blacklisted" country, except when the taxable person proves that the company benefiting from such income does not integrate an arrangement (or a series of arrangements) which has been put in place with the main purpose (or one of the main purposes) of obtaining a tax advantage.

Share acquisitions and disposals

Taxes potentially payable

10. What taxes are potentially payable on a share acquisition/share disposal?

Stamp duty

Transfer of shares made without consideration to individuals are generally (unless an exemption is applicable to the case) subject to stamp duty at a rate of 10%.

Corporate income tax (CIT)

The gain or loss derived from the disposal of shares (the positive or negative difference assessed between the consideration received, net of relevant expenses, and the cost of acquisition, with the relevant CIT adjustments) is relevant for CIT purposes. Capital gains are included in the taxable income of the seller and are therefore subject to CIT, while capital losses are deemed deductible under the general rules on the deduction of losses for CIT purposes.

However, deductions are denied for capital losses in an amount equal to the sum of the following types of income in the same tax period or in the previous four tax periods:

- Any dividends received from the same company.
- Any capital gains from the sale of shares in the same company that has benefited from the participation exemption.

Relief for capital losses is also denied under the Portuguese CIT Code rules providing for tax credit to prevent international economic double taxation.

Capital losses derived from the disposal of shares in companies that have residence or domicile in a "blacklisted" country are also not deductible for tax purposes.

If a share acquisition deal is performed between related parties, the arm's length principle must be met, and the transaction amount must reflect the price that an independent entity would be willing to offer in a similar comparable transaction.

Exemptions may be applicable under the participation exemption regime or under the tax neutrality regime (*see Question 11*).

The positive net variation arising from the gratuitous transfer of shares to legal persons must be included for the purposes of the calculation of the applicable CIT.

Value added tax (VAT)

The transfer of shares is not subject to VAT.

Municipal real estate transfer tax (MRETT)

The transfer of shareholding interests in a private limited liability companies (*sociedades por quotas*) that own real estate can trigger MRETT where the transfer results in one of the following:

- Any shareholder increases its shareholding to at least 75%.
- The number of shareholders is reduced to two shareholders, who are joined in marriage or a non-marital partnership.

This tax is not due on transactions of shareholdings in public limited liability companies (*sociedades anónimas*).

Exemptions and reliefs

11. Are any exemptions or reliefs available to the liable party?

Participation exemption

Capital gains and capital losses arising from the disposal of shares are exempt from CIT if the following conditions are cumulatively met:

- Regardless of the percentage of share capital represented by the shares that are being transferred, the transferor holds shares representing at least 10% of the share capital or voting rights of the entity for at least one year before the transaction.
- The transferor is not qualified as a look-through/transparent company for CIT purposes.
- The company whose shares are being transferred is subject to, and is not exempt from, Portuguese CIT, a corporate income tax referred to in Article 2 of Directive 2011/96/EU or any tax of a similar nature to Portuguese CIT. In the last two cases, the tax rate applicable to the non-resident company must not be less than 60% of the Portuguese CIT rate.
- The company whose shares are being transferred is not resident or domiciled in a "blacklisted" country.

The participation exemption regime does not apply if more than 50% of the assets held, directly or indirectly, by the entity whose shares are being transferred, consists of real estate located in Portuguese territory. Notwithstanding, real estate allocated to an agricultural, industrial or commercial activity (except for the sale of real estate) is not relevant for this limitation.

The participation exemption regime is applicable to companies which are resident in Portugal and to the PEs of non-resident companies located in Portugal (resident in the EU, EEA or in a country not deemed as "blacklisted" under the Portuguese tax law with which Portugal has entered into a double tax treaty and that treaty provides an exchange of information clause).

Tax neutrality regime

No CIT is due provided that the shareholdings are transferred under the context of a tax-neutral restructuring (*see Question 21, Tax neutrality regime*).

Tax advantages/disadvantages for the buyer

12. Please set out the tax advantages and disadvantages of a share acquisition for the buyer.

Advantages

The advantages of a share acquisition for the buyer may include the following:

- The buyer is not liable to CIT in share acquisition transactions.
- The acquisition of shares is not subject to VAT.
- Tax losses carried forward by the acquired company are not lost, provided that no more than 50% of its share capital is transferred or if the transaction falls within certain categories (as an example, the acquisition is performed under the tax neutrality regime or the buyers consist of the acquired company's employees or management team). If this is the case, those tax losses may be automatically used and offset against the future CIT taxable income of the acquired company (up to a maximum amount of 70% of the company's taxable profit). If more than 50% of the acquired company's share capital is transferred, a ministerial authorisation is required to maintain the tax losses available for use.
- The shareholding acquired may be included in the buyer's tax group (if certain conditions are fulfilled), which would enable financing costs borne by the buyer (to acquire the shareholding) to be offset against future profits of the acquired company (but limited by the interest deduction limitation rules).
- If it is expected that the acquired company will maintain a tax loss position in the future, the tax grouping may allow the offset of the acquired company's future tax losses against the buyer's (and other companies included in the tax group) taxable profits.

Disadvantages

The disadvantages of a share acquisition for the buyer may include the following:

- If more than 50% of the acquired company's share capital is transferred, and the transaction does not fall within a specific category, any tax losses carried forward by the acquired company still available for use will be lost, unless a ministerial authorisation is obtained.
- The buyer will inherit the tax history of the acquired company (including outstanding claims and possible hidden liabilities), meaning that buyer will be responsible for any pre-acquisition tax liabilities, according to the quota of its shareholding.
- The acquisition of shareholdings does not allow a step-up in the tax basis of the acquired company's assets.
- The amortisation/depreciation of any eventual goodwill arising from the share acquisition will not be deductible for CIT purposes.
- The burden of any MRETT that may be due falls on the buyer (*see Question 10, Municipal real estate transfer tax (MRETT)*).

Tax advantages/disadvantages for the seller

13. Please set out the tax advantages and disadvantages of a share disposal for the seller.

Advantages

The seller may benefit from the participation exemption regime and therefore the eventual capital gain realised will not be subject to CIT (*see Question 11, Participation exemption*).

Disadvantages

The disadvantages of a share sale for the seller may include the following:

- If the participation exemption regime does not apply, the seller will be liable to CIT on any capital gains realised.
- If the participation exemption regime applies and if any capital loss is realised, the seller will not be able to include such loss for the purposes of calculating CIT.
- Although this may depend on the terms and conditions applicable to each transaction, it is common for the seller (under the sale-purchase agreement or under any formal letter signed by both parties) to provide extensive warranties or indemnities to the buyer to offset any of the transferred company's eventual future tax liabilities.
- The management team (appointed by the seller, according to its shareholding) for the transferred company may continue to be held accountable on any unpaid tax or other tax liabilities regarding the period the seller held such shareholding in the company.

Transaction structures to minimise the tax burden

14. What transaction structures (if any) are commonly used to minimise the tax burden?

Structures which enable the application of the participation regime at the level of the seller (as any eventual capital gain realised will not be subject to CIT) and structures which enable the application of the participation regime at the level of the buyer (provided certain requirements are met, dividends and liquidation proceeds paid by the acquired company to the buyer may be exempt from CIT, as well as eventual capital gains realised arising from an eventual disposal of the shareholding) are commonly used.

The tax grouping regime may provide advantages, provided that certain requirements are fulfilled. The tax grouping regime may allow the buyer to offset financing expenses against profits of the acquired company (however, this is limited under the thin capitalisation rules). The tax grouping regime may also allow the offset of the acquired company's future tax losses against the buyer's taxable profits.

Upon the acquisition of the shareholdings, stamp duty exemptions regarding short and long-term shareholder's loans and financing expenses may be applicable, provided certain requirements are fulfilled. As a rule, such exemptions are applicable to specific minimum shareholding participations and/or voting rights, as well as to companies in a dominant or group relationship.

The tax neutrality regime may also be used in certain transactions (*see Question 21, Tax neutrality regime*).

Asset acquisitions and disposals

Taxes potentially payable

15. What taxes are potentially payable on an asset acquisition/asset disposal?

Stamp duty

The transfer of specific assets is subject to stamp duty. For example, a transfer of real estate made with consideration is subject to stamp duty at the general rate of 0.8%. Another example is a transfer of assets (subject to registration or enrolment) made for no consideration to individuals, for which the tax rate is 10%.

Asset acquisitions that qualify as a transfer of going concern may trigger stamp duty at a rate of 5% (*see Question 4, Stamp duty*).

Corporate income tax (CIT)

The gain or loss arising from the disposal of assets (the positive or negative difference assessed between the consideration received, net of relevant expenses, and the cost of acquisition, with the relevant CIT adjustments) is relevant for CIT purposes. Capital gains are included in the taxable income of the seller and are therefore subject to CIT, while capital losses are deemed deductible under the general rules on the deduction of losses.

If the asset acquisition deal is performed between related parties, the arm's length principle must be met, meaning that the transaction amount must reflect the price that an independent entity would be willing to offer in a similar comparable transaction.

Asset acquisition deals cannot benefit from the participation exemption regime or the tax neutrality regime.

The positive net variation arising from the gratuitous transfer of assets to legal persons must be included for the purposes of calculating CIT.

Value added tax (VAT)

The disposal of assets by a VAT taxpayer under its business activity is considered a supply of goods and is generally subject to VAT. Exemptions may be applicable to specific types of assets.

The transfer of a business unit as a going concern is not subject to VAT (*see Question 6*). However, the concept of a business unit for VAT purposes is particularly strict. VAT may be due if only parts of a business unit are transferred, as it could be understood that the recipient/purchaser would be acquiring an activity which is not capable of functioning as a going concern on its own. Transfers of real estate property are usually exempt from VAT.

Municipal real estate transfer tax (MRETT)

MRETT is due on the acquisition of real estate property (*see Question 4, Municipal real estate transfer tax (MRETT)*).

Exemptions and reliefs

16. Are any exemptions or reliefs available to the liable party?

Transfer of business unit as a going concern

The transfer of a business unit as a going concern is not subject to VAT provided that specific conditions are met (*see Question 6*). However, stamp duty may be due (at a rate of 5%) if the transferred business includes immovable property or rights to lease agreements over immovable property.

Reinvestment of the transaction proceeds

Only 50% of the capital gains realised (net of the capital losses) arising from the disposal of tangible, intangible or non-consumable biological assets held for at least one year is subject to CIT, provided that the proceeds arising from their disposal are reinvested in the acquisition, production or building of assets of the same kind, during the year preceding the disposal of assets or up until the end of the second tax year following it. The assets acquired, produced or built with the proceeds must be held for at least one year and must not be acquired by related parties where this reinvestment benefit is used.

Amortisation/depreciation of assets

Acquired assets can be written down in a tax-efficient way, namely if the amortisation/depreciation is performed according to the rules established by the PTA.

Tax advantages/disadvantages for the buyer

17. Please set out the tax advantages and disadvantages of an asset acquisition for the buyer.

Advantages

The advantages of an asset acquisition for the buyer may include the following:

- Asset acquisitions may provide a step-up in the tax basis of the acquired assets, which allows for higher tax amortisation/depreciation.
- The amortisation/depreciation of any eventual goodwill arising from the asset acquisition may be deductible for CIT purposes, provided certain requirements are fulfilled.
- Financing costs borne by the buyer (to acquire the assets) may be deductible for CIT purposes (but these are limited by the interest deduction limitation rules).
- The buyer does not inherit the seller's tax liabilities (with the exception on the transfer of a business unit as a going concern).
- Tax incentives regimes may be available for the acquisition of, or investment in, specific assets.

Disadvantages

The disadvantages of an asset acquisition for the buyer may include the following:

- Available tax losses at the level of the seller cannot be transferred to the buyer.
- MRETT and stamp duty may be due if the assets to be transferred are real estate properties located in Portugal.
- If the assets to be transferred are real estate properties located in Portugal, municipal property tax may be due, after the transaction, on a regular basis, arising from the ownership of such assets.
- The sale of assets by a VAT taxpayer under its business activity is generally subject to VAT, which would increase the price of the transaction (however, the VAT incurred may eventually be deductible at the level of the buyer).
- Asset acquisitions that qualify as a transfer of going concern may trigger the assessment of stamp duty.

Tax advantages/disadvantages for the seller

18. Please set out the tax advantages and disadvantages of an asset disposal for the seller.

Advantages

The advantages of an asset disposal for the seller may include the following:

- The capital losses derived from the disposal of assets are deductible for CIT purposes.
- If the capital gains (arising from the disposal of tangible, intangible or non-consumable biological assets held for at least one year which are subject to CIT) are higher than the capital losses arising from the disposal of assets with the same nature, this positive difference may be subject to taxation at only 50% of its value, provided certain conditions are met.
- The seller may use the available tax losses (at its own level or at the level of the tax group) to offset capital gains arising from the sale of assets.

Disadvantages

The disadvantages of an asset disposal for the seller may include the following:

- The capital gains derived from the disposal of assets are included for the purposes of calculating CIT.
- As the capital gains will be subject to CIT at the level of the seller, if the dividends to be paid to the shareholders (which would include those gains) do not benefit from the participation exemption regime, a double taxation of income will occur.

Transaction structures to minimise the tax burden

19. What transaction structures (if any) are commonly used to minimise the tax burden?

If the assets to be transferred constitute, from an economic standpoint, a feasible business unit, a common approach is to demerge or contribute those assets into an existing or newly incorporated company using the tax neutrality regime. The use of the tax neutrality regime merely constitutes a deferral of taxation (*see Question 21*).

Provided that the seller retains ownership of the existing or newly created company for a period of at least one year, and that all the participation exemption requirements are fulfilled, any capital gains arising from the disposal of the shareholding will not be subject to CIT. Therefore, the gains that would be assessed upon the transfer of assets to the existing or newly created company (and not subject to taxation on that moment under the tax neutrality regime), would not be subject to taxation in final terms. However, the PTA may challenge such a transaction structure, on the grounds that it is not justified by valid economic reasons, or does not have any economic substance, and the main purpose (or one of the main purposes) of the use of that structure was clearly to minimise the tax burden.

Legal mergers

Taxes potentially payable

20. What taxes are potentially payable on a legal merger?

Corporate income tax (CIT)

Mergers can benefit from the tax neutrality regime contained in the Portuguese tax law, provided that certain requirements are met (*see Question 21, Tax neutrality regime*).

Where this regime does not apply, a merger will be treated for CIT purposes under similar rules as a sale of all assets included in the transferred business unit. Therefore, mergers can result in the taxation of any capital gains or losses at the level of the transferring companies, arising from the difference between the market value and the net tax basis of the assets and liabilities transferred.

In the scenario where there is a full (rather than a partial) merger, the elimination of the merged company should be treated, for tax purposes, as a cessation of business activities.

Value added tax (VAT)

VAT is payable if the business is not transferred as a going concern (*see Question 6*).

Stamp duty

A merger, even if benefiting from the tax neutrality regime, may trigger stamp duty if the transferred business unit comprises real estate.

Exemptions are available provided certain requirements are met (*see Question 21, Stamp duty exemption*).

Municipal real estate transfer tax (MRETT)

A merger, even if it benefits from the tax neutrality regime, may trigger MRETT if the transferred business unit comprises real estate (*see Question 4, Municipal real estate transfer tax (MRETT)*).

Exemptions are available provided that certain requirements are met (*see Question 21, Municipal real estate transfer tax (MRETT) exemption*).

Exemptions and reliefs

21. Are any exemptions or reliefs available to the liable party?

Tax neutrality regime

Mergers can qualify for a tax neutrality regime for CIT purposes, provided all the requirements are met. This neutrality regime will only apply if the merger is executed under one of the definitions stated in the CIT Code. The CIT neutrality regime applies automatically.

Regardless of the value attributed to the transferred assets and liabilities for accounting purposes, the merged company must register them at the same tax values as were recorded on the merging company's accounts.

Gains will not be realised due to a roll-over of the book values of the transferred assets and liabilities, which means that the merger will not trigger taxable gains for both merging and merged entities as well as for the shareholders of these entities. However, the tax neutrality regime is not technically an exemption from CIT, but only a deferral of taxation, since any capital gains that are not realised on the neutral transaction will in principle be taxed on a subsequent non-neutral disposal (unless the participation exemption regime on capital gains applies).

Any cash payments received by the shareholders of the merging companies do not benefit from the neutrality regime.

Provided that a merger benefits from the tax neutrality regime for CIT purposes, the merging companies' tax losses and tax benefits are automatically transferred to the merged company (with limitations designed to prevent the double deduction of tax losses).

Under the anti-abuse clause which is provided in the CIT neutrality regime, the regime will not apply where the principal objective (or one of the principal objectives) of the transaction is tax evasion or tax avoidance, which is deemed to occur whenever the transaction is not carried out for valid commercial reasons (such as restructuring or rationalisation of the activities of the companies).

Value added tax (VAT) exemption

Irrespective of whether the CIT neutrality regime applies, VAT should not be due provided that the merged assets and liabilities form a business unit, able to be transferred as a going concern (*see Question 6*).

Stamp duty exemption

The transfer of real estate assets resulting from a merger can benefit from an exemption from stamp duty, with the exception of property for residential purposes (unless directly related to the main activity of the merging entity).

The following documents must be included in the annual tax return:

- A description of the merger transaction.
- An outline of the merger project (where this is necessary for legal purposes).
- A report outlining the economic valid purposes for the merger.
- Approval from the Competition Authority (where this notification is required for legal purposes).

Municipal real estate transfer tax (MRETT) exemption

The transfer of real estate assets resulting from a merger can benefit from an exemption from MRETT, with the exception of property for residential purposes (unless directly related to the main activity of the merging entity). For the documentation requirements, see above, *Stamp duty exemption*.

Notary and registration costs

The transfer of real estate assets resulting from a merger can benefit from an exemption from notary and registration costs, as well as other related legal costs. For the documentation requirements, see above, *Stamp duty exemption*.

Transaction structures to minimise the tax burden

22. What transaction structures (if any) are commonly used to minimise the tax burden?

Generally speaking, the tax neutrality regime is often used to minimise the tax burden (*see Question 21, Tax neutrality regime*).

Joint ventures

Taxes potentially payable

23. What taxes are potentially payable on establishing a joint venture company (JVC)?

Portuguese tax law does not provide a specific tax regime applicable to JVCs. Generally, a JVC is set up as a regular Portuguese company which is subject to CIT (*see Question 5, Corporate income tax (CIT)*).

The establishment of a JVC does not trigger taxation, apart from certain minor registration and notarial fees.

The JVC's share capital can be paid off in cash, which is tax-neutral, or in kind, which may lead to the creation of a capital gain or loss for CIT purposes. If the JVC's share capital is realised in kind, through the contribution of immovable assets, MRETT and stamp duty are levied.

Under certain conditions, the transfer of an individual's business-related assets and liabilities to a company which will continue with the same business activity is exempt for income tax purposes. To benefit from this exemption, the individual must hold at least 50% of the company's share capital.

Exemptions and reliefs

24. Are any exemptions or reliefs available to the liable party?

There are no specific exemptions or reliefs available for JVCs. However, the transaction may be structured as a tax-neutral transfer of assets, which results in an exemption from CIT on any potential capital gains due to a roll-over of the transferred assets' book value (*see Question 21, Tax neutrality regime*).

Transaction structures to minimise the tax burden

25. What transaction structures (if any) are commonly used to minimise the tax burden?

See *Question 24*.

Company reorganisations

Taxes potentially payable

26. What taxes are potentially payable on a company reorganisation?

The tax implications of a company reorganisation are described in the following:

- Share acquisition deals: see *Question 10* to *Question 14*.
- Asset acquisition deals: see *Question 15* to *Question 19*.
- Mergers: see *Question 20* to *Question 22*.

The tax treatment of demergers, transfers of assets (as an economically viable business unit) and exchanges of shares generally follows the tax treatment described for mergers (*see Question 20*). Specific rules may apply: for example, whenever the reorganisation transaction is a demerger and the demerged company is extinguished, the tax losses are transferred to the beneficiary companies in proportion to the market value of the assets transferred for each of these companies.

The migration of a company with its legal seat or place of effective management in Portugal to another jurisdiction gives rise to a taxable gain or loss on the company's underlying assets (correspondent to the difference between their market value and tax value), except for assets that remain effectively connected with a PE located in the Portuguese territory. Exit tax rules applicable to transfers of resident Portuguese companies to other EU/EEA countries provides the following options for the payment of CIT:

- Immediate payment of CIT upon exit.
- An option for payment in five instalments.

The application of options for deferral implies the accrual of interest on a yearly basis, over the amount of tax that would be due, and the migrating company may be required, in some circumstances, to provide a bank guarantee covering 125% of the tax due (to cover tax and interest accruing annually).

Exemptions and reliefs

27. Are any exemptions or reliefs available to the liable party?

See *Question 26*.

The participation exemption regime can apply to capital gains or capital losses arising from some of the company reorganisations described, such as share acquisition deals and the migration of a company with its legal seat or place of effective management in Portugal (*see Question 11, Participation exemption*).

Transaction structures to minimise the tax burden

28. What transaction structures (if any) are commonly used to minimise the tax burden?

See *Question 26* and *Question 27*.

Restructuring and insolvency

29. What are the key tax implications of the business insolvency and restructuring procedures in your jurisdiction?

Companies under insolvency or restructuring procedures remain subject to CIT, although specific rules apply. The reduction of a company's debts under an insolvency or restructuring plan does not trigger CIT taxation. Capital gains resulting from transfers of the insolvent company's assets to its creditors, in lieu of payment or from the assignment of those assets, are exempt from CIT.

Companies placed under liquidation or restructuring procedures automatically cease to be part of a tax group, meaning that their profits cannot be offset against the remaining entities' losses and their losses cannot be offset against the other companies' profits.

Most transactions required by the execution of an insolvency or restructuring plan are exempt from stamp duty. Transfers of real estate included in an insolvency or restructuring plan are often exempt from MRETT, in the event of transfers in lieu of payment or assignments of immovable property to creditors.

For creditors, the amount of reduction of their credits is deductible for CIT purposes. Additionally, unpaid credits can be fully deducted. For VAT purposes, and subject to certain requirements, creditors can also deduct the VAT incurred on unpaid credits when the debtor is placed under an insolvency or restructuring procedure.

If an insolvent company is liquidated, its shareholders have a capital loss equal to the difference between the cost of acquisition of their shares and the amount received on liquidation, if any.

Companies placed in liquidation by their shareholders also remain subject to corporate tax, although specific rules apply. Proceeds arising from the liquidation qualify as a capital gain or loss at the shareholders' level, if higher or lower to the cost of acquisition of the liquidated company's shares and other equity instruments. Capital gains may be tax exempt provided that the requirements for the participation exemption regime are met. Capital losses are usually deductible (subject to certain limitations).

Share buybacks

Taxes potentially payable

30. What taxes are potentially payable on a share buyback? (List them and cross-refer to *Questions 4* to *7* as appropriate.)

Stamp duty

No stamp duty will be due (*see Question 10, Stamp duty*).

Corporate income tax (CIT)

At the level of the company, no gains or losses arising from a share's buyback, if any, will be relevant for tax purposes.

At the level of the shareholders, a share buyback is usually deemed as a sale of shares, meaning that, as a rule, capital gains will be subject to taxation and capital losses will be allowable deductions for tax purposes. Transfer pricing rules will apply, as the shareholders and the company are deemed to be related parties. Eventual limitations on the tax allowance of the capital losses could apply (*see Question 10, Corporate income tax (CIT)*).

Value added tax (VAT)

No VAT will be due (*see Question 10, Value added tax (VAT)*).

Municipal real estate transfer tax (MRETT)

No MRETT will be due, unless specific conditions apply (*see Question 10, Municipal real estate transfer tax (MRETT)*).

Exemptions and reliefs

31. Are any exemptions or reliefs available to the liable party?

The participation exemption regime may apply if the shares are bought back from a company and provided that specific requirements are met (*see Question 11, Participation exemption*).

Transaction structures to minimise the tax burden

32. What transaction structures (if any) are commonly used to minimise the tax burden?

See *Question 14*.

Private equity financed transactions: MBOs

Taxes potentially payable

33. What taxes are potentially payable on a management buyout (MBO)?

As a rule, a management buyout (MBO) may be structured under:

- A share deal: the corresponding tax regime applies (*see Question 10 to Question 14*).
- An asset deal: the corresponding tax regime applies (*see Question 15 to Question 19*).

Exemptions and reliefs

34. Are any exemptions or reliefs available to the liable party?

See *Question 11* and *Question 16*.

Any tax losses assessed by the acquired company and still available to offset against future taxable profits are not lost when the shares are acquired by an employee or a manager of the company, meaning that they remain available for use. This scenario only applies to tax losses incurred in the fiscal years in which the buyer was an employee or a manager of the acquired company.

Transaction structures to minimise the tax burden

35. What transaction structures (if any) are commonly used to minimise the tax burden?

See *Question 11* and *Question 19*.

Reform

36. Please summarise any proposals for reform that will impact on the taxation of corporate transactions.

Although major reforms are not expected, specific aspects of the Portuguese CIT law may continue to be introduced or reviewed to accommodate any relevant findings within the base erosion and profit shifting project (BEPS), undertaken by the Organisation for Economic Co-operation and Development (OECD).

Contributor profile

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Professional qualifications. Lawyer, Portugal

Areas of practice. Advises both domestic and international companies on tax law, in the financial, energy, pharmaceutical, communications, real estate and services sectors.

Recent transactions

- Represents clients in the financing, acquisition and restructuring of cross-sector national and multinational groups and companies.
- Plays a key role in the tax definition of transfer pricing policies for multinationals, as well as in the negotiation and settlement of disputes with tax authorities and in the implementation of financial operations.
- Very active within private wealth, notably advising family offices and domestic and international private clients in the legal and tax structuring of their investments and estates, and succession planning.

Professional associations/memberships.

- Admitted to the Portuguese Bar Association, by whom he was recognised as a specialist lawyer in Tax Law.
- Admitted to the Timor-Leste Bar Association (*Conselho de Gestão e Disciplina*).
- Tax arbitrator certified by the Administrative Arbitration Centre (*Centro de Arbitragem Administrativa*) (CAAD) (Ministry of Justice).
- President of the Management Law Firms of the Union of International Associations and member of Tax Commission.
- Member of the International Fiscal Association, the Portuguese Tax Association and the Portuguese Tax Consultants Association.

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