PORTUGAL

Vieira de Almeida & Associados

Samuel Fernandes de Almeida and Miguel Gonzalez Amado

Discrimination and breach of EU law: recent trends in Portugal

Samuel Fernandes de Almeida and Miguel Gonzalez Amado of Vieira de Almeida discuss relevant cases of discrimination in Portugal.

Recent rulings from the European Court of Justice (CJEU) and national courts brought some further clarity on tax discrimination cases and how EU law is being enforced and interpreted by the Portuguese courts.

These rulings included one from the Arbitration Centre in Lisbon, which offers a unique and flexible means of resolving tax disputes within the EU, including the opportunity to refer any cases relating to EU law to the CJEU.

The *Allianz AEVN* case

In the dispute between *Allianz AEVN* and the Portuguese tax authority (C-545/19), the company was represented by Vieira de Almeida's tax team and practitioners. In this case, the CJEU ruled that the withholding tax (WHT) imposed in Portugal on dividends paid to non-resident collective investment undertakings (CIUs) is in breach of the principle of free movement of capital.

This decision opened the door for subsequent refund claims to be lodged in Portugal regarding any unlawful tax withheld over the past four years.

The tax regime of CIUs was amended back in 2015, shifting from an "entry-taxation" model to an "exit-taxation" model, in which investors rather than the CIU would be taxed on income distributions. Under the Portuguese corporate income tax (CIT) code, dividends paid by resident companies are subject to WHT at 25%. An exemption is available provided that the paying entity is deemed resident in Portugal.

However, the WHT on dividends paid to non-resident entities is final, although the income may be eligible for an exemption, which generally does not apply to CIUs.

As such, CIUs set up and operating under Portuguese law are generally not subject to CIT on investment income (such as dividends and interest). Yet dividends paid to a foreign CIU would fall under the scope of CIT (subject to any reduction of the withholding tax rate under an applicable double tax treaty).

The proceedings were launched with the Tax Arbitration Court in Lisbon, which referred the case to the CJEU, due to the plaintiff's claim of a breach of EU law. This was despite the Advocate General's opinion, which stated that different tax treatment was permitted under EU law because Portugal used a different tax method for resident CIUs.

Despite this, the CJEU ruled that the Portuguese special regime applicable to foreign CIUs breaches Article 63 of the Treaty on the Functioning of the European Union (TFEU) and the principle of the free movement of capital. In line with settled case law, the CJEU pointed out that, if an EU member state, either unilaterally or through a convention, taxes not only resident, but also non-resident, recipients on dividends paid by resident companies, the non-resident's situation is comparable to that of the resident, which occurred in the case in hand. Moreover, given that the CIU's residence was the relevant criterion under Portuguese domestic provisions, the comparability analysis should be carried out at the level of the CIU.

This landmark decision – which is aligned with similar cases for interest paid to financial institutions, such as the Brisal case (C-18/15) and a case on dividends paid to EU pension funds (C-493/09) – may be replicated in other EU jurisdictions with similar regimes. It also opens the door for EU and third-country CIUs lodging further refund claims in Portugal, on WTH imposed over dividends, but also on interest obtained from a Portuguese source.

Capital gains obtained in Portugal by natural persons residing in jurisdictions listed as tax havens

There is another quite singular ruling from the Tax Arbitration Centre, which may lead to further tax proceedings with regard to the compatibility of automatic anti-abuse provisions and EU law. In this case, the controversy arose regarding the aggravated 35% rate applicable to non-resident taxpayers with domicile in an EU tax-blacklisted jurisdiction. This is as per a Portugese Ministerial Order, 309-A/2020, of December 31, which includes several countries with double tax treaties (DTTs) with Portugal. The most relevant case is the United Arab Emirates (UAE).

Regardless of any evidence of tax evasion or reduction of the taxable basis for the purpose of assessing the taxable capital gains deriving from the disposal of real estate located in Portugal, the Portuguese personal income tax (PIT) Code foresees the application of an aggravated 35% rate on net capital gains obtained by taxpayers domiciled in jurisdictions listed as tax havens. This is in opposition to the 28% generally applicable to other non-resident investors.

The claimants won their case by arguing that this increased tax scheme is at odds with EU law, namely the principle of the free movement of capital, and that it is discriminatory. The claimants also argued that the aggravated tax deters residents in blacklisted countries from investing in Portuguese real estate. This is in line with CJEU case law, according to which the free movement of capital principle includes real estate transactions and applies between EU member states as well as between member states and third countries such as the Lebanon, the claimant's country of residence and nationality.

The residency and nationality of the plaintiff was a key criterion for the Centre, since there was no transfer of residency or any evidence of tax abuse or evasion in order to reduce the tax due over the real estate investment made in Portugal. In fact, the plaintiff was a national from, and resident in, Lebanon and, as such, the Centre deemed the imposition of an aggravated PIT rate to be contrary to EU law.

This decision could be a turning point as regards the application of automatic anti-abuse rules and their alignment with EU law. Given the profusion of automatic anti-abuse provisions – with no assessment of risk and substance – one may anticipate further cases and a potential referral to the CJEU from national courts.

Other recent rulings have also challenged the Portuguese rules and duties applicable on the importation of EU used cars, as well as the application of the General Anti-Abuse Rule (GAAR) to the Madeira Free Zone.

Samuel Fernandes de Almeida
Partner, Vieira de Almeida
E: sfa@vda.pt

Miguel Gonzalez Amado
Managing Associate, Vieira de Almeida
E: mgam@vda.pt

Vieira de Almeida & Associados

More articles from Vieira de Almeida