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THE PHENOMENON OF TAX AVOIDANCE AND ANTI-ABUSE MEASURE

Abstract: This article deals with the problem of tax avoidance and anti-abuse measures. Starting with the distinction between the concepts of tax planning, tax avoidance and tax evasion, the authors focus their attention on the tax avoidance phenomenon, that is, situations in which the taxpayer succeeds in avoiding some or all of the tax by using mechanisms, which were drawn up by the legislator for entirely different purposes, in an anomalous and abusive way. In tax avoidance, tax liability never arises.

This is followed by an analysis of the increasing internationalisation and integration of economies, characterised by the ever-easier movement of people and capital and the development of multinational companies and, consequently, the development of abusive practices. This scenario means it is now clear that tax avoidance is no longer a domestic affair, but rather must be discussed on an international level. The authors then take a brief look at the two areas which have the greatest impact on international tax avoidance: one related to the contravention of domestic legislation – so-called "tax havens" – and the other defined by the contravention of international rules – the abuse of double taxation conventions, known as "treaty shopping".

Lastly, the authors present the Portuguese legal system's framework of measures to counteract tax avoidance, offering a brief analysis of the presumptions and legal fictions, tax law interpretation theories and specific anti-abuse rules (such as the reversal of the burden of proof provisions; controlled foreign company type provisions; thin-capitalisation resulting from special relationships with non-residents; the exclusion of the application of the taxation system for mergers, divisions, transfers of assets and exchanges of shares; the prevalence of substance over form in derivative financial instruments and transfer pricing). Special attention is given to the general anti-abuse clause and its assumptions, consequences and procedure.

2.– *Tax planning*

The first part of our analysis covers acts and transactions aimed at saving tax which are lawful, arising as they do from the exercise of contractual and individual freedom.

As we have said, there is no legal sanction against a taxpayer who seeks to reduce his or her tax burden legally. In fact, such an approach is expressly or implicitly encouraged by the State itself[1] in establishing and regulating tax relief.

According to Sá Gomes[2], "the rationality of management of business activities assumes that, in principle, those in businesses must minimise the commercial, industrial, financial and tax costs of their activity. This being the case, sound tax management obviously requires the minimisation of tax costs, which doctrine calls tax economy or tax savings, without prejudice to strict compliance with taxation laws by economic operators". In line with this, Marcus de Sousa[3] claims that "it is the duty of every director to maximise losses. For this reason, tax planning is as necessary to business management as any other planning, whether marketing, sales, staff training, external trade, etc. (...). Without good tax planning, it will be very difficult to compete in a globalised market and to ensure good return on invested capital".

So we are dealing here with taxpayers' actions, such as the setting up of a business in the provinces instead of a large metropolitan area to obtain a lower rate of corporate income tax (IRC)[4]; the building or upkeep of childcare facilities in companies to obtain a 140%[5] deduction in their costs or the channelling of capital into real estate investment funds. The main characteristics of these funds are the sharing of risk and professional asset management and they are rewarded by the State with tax exemptions in respect of Municipal Real Estate Tax (IMI) and Tax on Transfers for Value of Real Estate (IMT)[6].

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[1] Amongst many examples of this approach are the incentives granted to businesses that establish themselves outside the major metropolitan areas, to patronage, to small and medium-sized companies or for urban renewal.

[2] N. De Sá Gomes, *Evasão Fiscal, Infracção Fiscal e Processo Penal Fisca* l, Lisbon, 2000, 22-23.

[3] M.V. G. De Souza, *Elisão e evasão fiscal*, in *Boletim Jurídico*, Uberaba/MG, Year 3, 127 (available at: http://www.boletimjuridico.com.br/doutrina/texto.asp?id=636).

[4] Cf. art. 43 of Portuguese Tax Benefits Statute (EBF).

[5] Cf. art. 43 of Portuguese IRC Code (CIRC).

[6] Cf. art. 49 of EBF.

legislation which amounts to a crime[8] and is punishable under criminal tax law by a fine or imprisonment, or as an administrative offence punishable by a fine[9].

In tax planning taxpayers' acts are supported by the State and in tax fraud they are punished by the legal system. Therefore, we must conclude that the fight against abusive practices and the development of anti-avoidance measures only makes sense in the area of tax avoidance (or so-called lawful tax evasion).

Accordingly, insofar as it relates to tax avoidance and its prevention, our analysis will focus on the behaviour of taxpayers which is characterised by the following elements:

a) the use of legal procedures that, even though lawful, appear to be inappropriate or unusual for the achievement of the intended economic result;
b) the use of those legal procedures is intended to harm the Treasury (if the economic choice is made for other reasons, there is no tax avoidance); and
c) the achievement, through the use of the said anomalous legal procedures, of an economic result which is the same as or more beneficial than would have been achieved through normal legal means, if such use is not taxed or is taxed at a lower rate[10].

Having defined the concept of tax evasion in the broad sense (tax avoidance and tax fraud), it now falls to us to distinguish this concept from and compare it with some most common concepts of current legal systems so as to clear up any doubts that might complicate the following.

5.– *Sham transactions*

A sham transaction is one in which the real and the stated intentions of the parties are different as a result of a conspiracy between them intended to deceive third parties. In many case the aggrieved third party is the State which loses tax revenue.

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[8] The crime of tax fraud is punished by the legal system in light of the reduction in tax revenue or the achievement of unjustified tax benefits thereby protecting, in particular, the Public Treasury.

[9] See, in this context, *Regime Geral das Infracções Tributárias Português* (RGIT), in particular articles 103 to 105 and 113 ff.

[10] Here we closely follow the system proposed by L.M. T de Menezes Leitão, *A Evasão e a Fraude Fiscais face à Teoria da Interpretação da Lei Fiscal*, in *Estudos de Direito Fiscal*, Coimbra 1999, 28.

103 of RGIT), and cases of lawful tax evasion (tax avoidance). In fact, in this latter case, the transactions are actually intended by the parties even if they are an instrument and a precondition for achieving a result that normally does not correspond to its typical structure so, in this case, we cannot speak of a sham transaction.

6. – *Abuse of rights*

Article 334 of the Portuguese Civil Code provides that "the exercise of a right is unlawful when the holder manifestly exceeds the limits set by good faith, public policy and the social or economic objective of the right". According to Menezes Cordeiro[13], the principle of abuse of rights is a safety valve for the value of justice, a remedy to safeguard the prevalence of the legal system over the legislator's misadventures and the skilfulness of the parties. Accordingly, the concept of abuse of right should only be used in exceptional circumstances where there is a clear breach of fundamental values. Otherwise it may amount to a threat to the essential value of legal certainty[14].

Some authors such as Trigo de Negreiros[15] or Bacelar Gouveia[16] have, for different reasons, claimed that the phenomenon of abuse of right covers tax avoidance, on the grounds that the taxpayer would be abusing the freedom to choose the type of transaction granted to him by the legal system, by using that freedom to escape tax. However, that theory seems inapplicable and distinct from tax avoidance. In fact, as already mentioned,

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[13] A. Menezes Cordeiro, *Tratado de Direito Civil Portuguesa*, Parte Geral, Tomo I, Coimbra, 1999, 191 ff.

[14] In support of this idea, see J.N. Calvão da Silva, *Elisão Fiscal e Clausula Geral Anti-abuso*, in *Revista da Ordem dos Advogados*, Ano 66, vol. II, September 2006, 791 ff, to the fact that today case law has made the use of this principle quite common. Therefore, instead of having resource to it only in serious circumstances justifying a solution contrary to the *ius strictum*, we have been confronted with a true case law by emotion which is seriously harmful in terms of both legal certainty and foreseeability. In the tax area, see in this respect the annotation to the judgement of 21 June 1995 of the Portuguese Supreme Administrative Court produced by J.L: Saldanha Sanches, *A Interpretação da Lei Fiscal e o Abuso de Direito*, in *Revista Fisco*, 74/75, 99 ff., and by the same author, *Abuso de direito e abuso da jurisprudência*, in *Revista Fiscalidade*, 4, 2000, 53 ff.

[15] M.F. Trigo de Negreiros, *A "evasão" legítima e o abuso do direito no sistema jurídico português, in Revista Ciência e Técnica Fiscal*, 151, 1971.

[16] J. Bacelar Gouveia, *A evasão fiscal na interpretação e integração da lei fiscal*, in *Revista Ciência e Técnica Fiscal*, 373, 1994, 41.

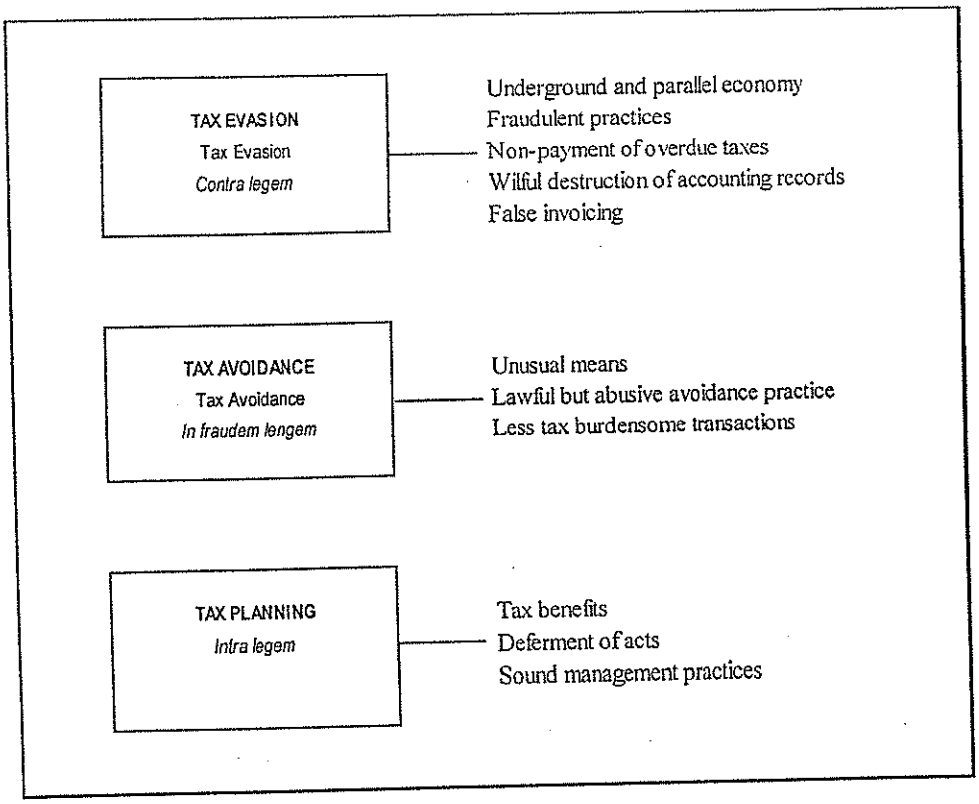
Acts in *fraudem legem* (...) are done in an attempt to circumvent a legal prohibition, trying to reach the same result by means other than those specifically addressed and prohibited by law – their aim is to defeat the law". The former is an act, which is against the letter of the law and the latter, against the spirit of the law where the illegality arises not from the means used, which are legal, but from the result obtained which is not.

As we consider that the taxpayer is avoiding tax whenever he does something under a specific rule and achieves results the same as those provided for under a different rule and this choice is determined by the desire to avoid the application of that other rule (and the consequent tax), we must conclude that these are acts that circumvent the law as acting against the spirit of a tax law is no more than a case of offending the general spirit of the law.

9. – *Conclusions*

The points set out above are summarised in this table:

TABLE 1



Accordingly, tax avoidance must be debated and fought on an international level.

In fact, as this phenomenon is one in which capital mobility is essentially the result of the adoption by a number of States of (harmful) tax competition measures, it is clear that joint cohesive action by the various States plays a role of the utmost importance in the fight against the existence of preferential tax systems, which are a distorting factor in any context of economic integration[20].

Therefore, in this study we draw attention to the significant role of the OECD, with particular reference to the 1998 Report "Harmful Tax Competition: An Emerging Global Issue", which is an important instrument of analysis and reaction to the problem of harmful international tax competition. The same applies to the work carried out by the European Union[21], with special reference to the approval by the Council of the European Union and by the Ministers of Finances of the Member States of the Code of Conduct on Business Taxation[22] on 1 December 1997.

We will now take a brief look at the two areas which have the greatest impact on international tax avoidance: one related to the contravention of domestic legislation –so-called "tax havens" – and the other defined by the contravention of international rules – the abuse of double taxation conventions, known as "treaty shopping".

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[20] Note, as doctrine has warned (L.M.T. de Menezes Leitão, *O controle e combate às práticas tributárias nocivas*, in *Estudos de Direito Fiscal*, Vol. II, Coimbra 2007, 87 ff.), it cannot be said definitely that any differentiated taxation level, in a comparison between the different States, is harmful in itself. In fact, there may be a number of reasons for such phenomenon, such as the intention to create incentives for certain activities or even a different operation of the tax system. It is therefore important to make a distinction between these two situations and those cases where the States are trying to attract in an aggressive way capital flows and income without there being any connection whatsoever with that State, encouraging tax fraud ("poaching", to use the Anglo-Saxon term).

[21] See, in this respect, A. C. dos Santos, and C. Celorico Palma, *A regulação internacional da concorrência fiscal prejudicial*, in *Ciência e Técnica Fiscal*, 395, July-September 1999, 9-36.

[22] Besides this Code of Conduct, it is important to stress other Commission initiatives, such as the Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee of 23 October 2001, published in *Revista Ciência e Técnica Fiscal* 404, October-December 2001, 151-225 – "Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities".

If not, States may introduce measures which are anti-international competition rather than anti-avoidance for the wrong reasons. For this reason, the above-mentioned 1998 OECD Report recommends the identification of tax havens on the basis of the following factors:

a) No taxation or merely nominal taxation, creating a system that is particularly attractive to non-residents for abusive purposes;
b) Existing laws or administrative practices that obstruct or even prevent the exchange of information on such non-resident taxpayers with other States;
c) Limited transparency at the domestic operational level which enables the establishment of illegal practices such as money laundering or tax evasion; and
d) The lack of requirement for permanent establishment and economic substance, thereby encouraging movement of money solely for taxation reasons[28].

It has been observed in comparative law that to deal with this situation, as a general rule different States choose one of three solutions when they introduce this concept in their legal systems: (i) a definition based on factors of comparison with their own tax system, (ii) an absolute concept of tax havens, or (iii) a case-by-case listing (the so-called "blacklists"). However, all three options are to some extent insufficient.

As far as the ways of fighting this phenomenon used by the different States are concerned, it should be noted first of all that this will be an internal fight as tax jurisdiction is an integral part of sovereignty.

With this in mind, we should consider the measures usually used by States in order to try to prevent the use of tax havens: general anti-avoidance provisions, the establishment of foreign exchange control and mandatory withholding of tax on transfers abroad, the creation of provisions against base companies, specifically by attributing income earned by such companies to the resident partners who control them, as well as the

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intentional element, that is, the deliberate wish to receive in a deceitful way capital flows and income proceeding from other States with which there is an effective connection.

[28] For another proposal on what determines the existence of a tax haven, see R. Gordon, *Tax havens and their use by United States Taxpayers – An overview* 1981. The Author believes that tax havens may be identified according to the following characteristics: a globally favourable tax system, legislation and administrative practices safeguard the businesses and property of non-residents and secrecy for their business activities, protection of banking and trade secrecy, an extremely liberal foreign exchange policy favouring the easy recycling of capital, disproportionate importance of the banking sector and promotion and advertising actions by the States as off-shore financial centres.

To begin with, it is important to point out that there are three typical strategies for "treaty shopping": the direct conduit scheme, the stepping stone conduit scheme and bilateral relations[31].

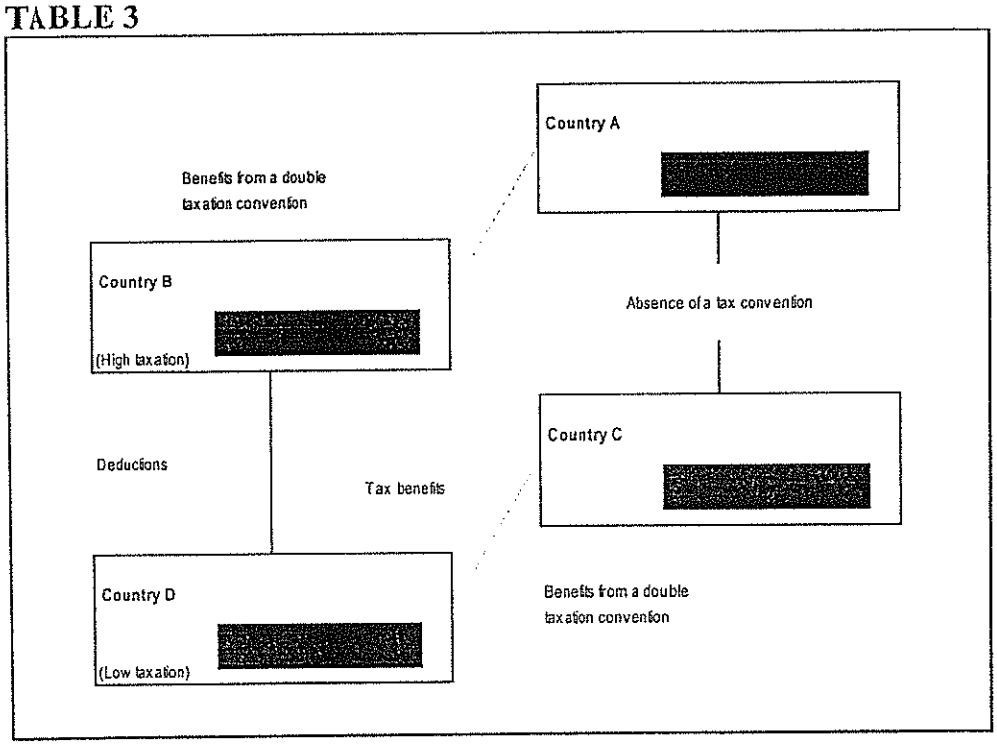
2.3.1. – *Direct conduit scheme*

A typical example of the direct conduit scheme is the case where there is a tax convention between countries A and B that grants an exemption from withholding at source for income earned in A to both individuals and companies resident in B. Then, in the absence of any convention with country C, a resident of country C establishes a company in country B and transfers assets and rights giving rise to dividends, interest or royalties in A to the new company and payments to it escape withholding. Then, having taking advantage of tax benefits, the company may transfer its income back to company C.

[31] See, for other examples of schemes used to take advantage of DTC benefits, M. Teixeira de Abreu, *Os preços de transferência no quadro da evasão fiscal internacional*, in *Ciência e Técnica Fiscal*, 358 (April-June 1990), 132 ff. To be noted that the Author bases his analysis on the schemes already studied by the OECD in a 1987 publication, *"International Tax Avoidance and Evasion: Four related studies" – OECD – Issues in International Taxation, n. 1.*

however, subject to very low taxation. In turn, this company transfers this income to a resident in C, taking advantage of the benefits of another treaty made between C and D.

TABLE 3



23.3. – *Bilateral relations*

Finally, we look at an example of the practice of international tax avoidance between residents of States that have entered into a DTC but where those residents abuse the treaty that exists.

In looking at this situation, Menezes Leitão refers to two typical cases: the case of a holding in the same State and the case of quintet structures.

In the first case, it is significant that certain treaties require a minimum percentage for the holding by a resident of a State in the companies resident in the other State. Accordingly, to eliminate economic double taxation on distributed profits, a resident of a State who does not have that percentage in his holdings in the other State, may establish a 100% holding in that other State to which he transfers his holding. By doing this he complies with the treaty preconditions for the elimination of economic double taxation.

In the case of a quintet structure, the author understands that this is only known in Germany, since treaties entered into by this country often contain a

measures give rise to problems related to the prevalence of public international law over national law and, the other, under the treaties themselves.

In the latter case many States have chosen to include special provisions designed to counteract this practice in their DTCs through recourse to the legal concept of beneficial owner. On this theme, we refer to the OECD Model Convention, which requires that benefits in connection with the taxation of dividends and interest are allowed on condition that the recipient of the dividend or interest is the beneficial owner of such income[34]. Similarly, we refer to the clause contained in the United States Model Convention on "limitation of benefits" which seeks to prevent the application of the agreement to artificial residents in any State, which is party to the Agreement[35].

III. – *Measures to avoid or reduce tax avoidance*

3.1. – *Preliminary considerations*

After defining the concept of tax avoidance and analysing the increasing number of cases at the international level, we now move on to discuss anti-abuse measures.

We must draw attention to the fact that that this issue is particularly sensitive because it leads to a confrontation between distinct structural principles of the rule of law. This means that while, on the one hand, we have the principles of certainty of law and legality of tax (and its corollaries of closed typicity, limitation and exclusivity) imposing relevant restrictions on the adoption of anti-abuse measures as well as requiring special care in safeguarding the rights and legitimate expectations of individuals, on the other hand, we find such principles as equity, taxpaying capacity and the (effective) fight against tax fraud and tax avoidance.

In light of the above, it is clear that this is an issue that finds in comparative law it solution in different theories – the doctrine of the

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[34] See, in this respect, the criticism by J.L. Saldanha Sanches, *Os limites do planeamento fiscal*, Coimbra, 2006, 411 and 412, where the author holds that the option for the concept of "beneficial owner" instead of the notion of "fraudulent transaction", with a view to a greater clearness is illusory to the extent that the former is also a *de facto* concept and not a legal concept.

[35] See, as an example, art. 17 of the Convention between Portugal and the United States, where besides the concept of "beneficial owner" there is a long list of those cases in which there is, or is not, the right to benefit from the convention benefits.

through the interpretation and application of tax laws. However, according to the LGT, the problem and the solution are not so linear and tax laws must be interpreted like any others. They should not be subject to special rules of interpretation, with the prohibition on their analogical application standing out only for reasons arising from the principle of legality[39].

Thus, the principle *in dubio pro fisco* must be rejected as an interpretative principle. Under this principle, tax laws should be interpreted in favour of the taxation authorities because of the general interest of the State prevail over those of private individuals. According to Sá Gomes[40] this idea is based on the incorrect assumption that collective interests override those of private individuals.

We must also set aside the functional interpretation theory under which the reason for or purpose of the tax should be taken into account. This theory seems to have had the merit of attesting to the importance of the teleological aspect of the interpretation of the law. However, it incorporates an element that is common to the interpretation of law in general, meaning it has no independent relevance.

Also rejected is the theory of economic consideration, which establishes that the effective economic basis – a real assumption of taxpaying capacity, subject of the tax rule – prevails over external legal forms. According to Menezes Leitão[41], "the rule that the sole aim of taxation is the economic result and never any legal transaction does not result directly from tax law". In this way, the author establishes a distinction between functional types, which are essentially determined by the economic result, and structural types in which the legislator seeks to observe a specific typical legal structure as this is the usual way to achieve this economic result, in which case this theory will not apply.

Finally, we also reject the theory of teleological interpretation as a means of fighting tax avoidance. This theory is defended in Portugal by Pamplona Corte-Real[42], for whom *fraudem legem* – in the sense of achieving the same economic result by a distinct legal procedure – would always go against the spirit of tax law through the respect of its letter. In fact, if the

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[39] Cf. art. 11 (4) of LGT.

[40] N. De Sá Gomes, *A interpretação das leis fiscais*, in *Ciência e Técnica Fiscal*, 79 (1965), 7 ff.

[41] L.M.T. de Menezes Leitão, *A Evasão e a Fraude Fiscais face à Teoria da Interpretação da Lei Fiscal*, in *Estudos de Direito Fiscal*, Coimbra 1999, 9 ff.

[42] Cf. C. Pamplona Corte-Real, *A interpretação extensiva como meio de reprimir a fraudem legem no Direito Fiscal português*, Paper presented in *IV Jornadas Luso-Hispano-Americanas de Estudos Tributários*, Lisbon, offprint of *Ciência e Técnica Fiscal*, 1972.

The first of these measures was introduced into the Portuguese legal system on the basis of inspiration from similar provisions in the Belgian and French systems. This measure does not allow amounts paid or due to residents outside Portuguese territory, where they are subject to a clearly more favourable tax system, to be considered as deductible charges for the purpose of determining taxable profit. It should be noted that this provision is not absolute, as the legislator provided for the possibility for the taxpayer to produce evidence that such expenses correspond to operations effectively carried out and that such operations are not of an unusual character or excessive amount, but that it is a balanced agreement (based on the real importance of the benefits conferred and fair remuneration for the same in light of market prices). In order to prove this situation, all means permitted by law may be used (the system of free evidence)[46]. Doctrine[47] holds this measure to be proportionate and correct as experience shows, as a general rule, that these operations are structured with a view to simulation and tax avoidance. Therefore, there is no justification for requiring a case-by-case inspection by the tax authorities. This means the burden of proving the facts moves to the private individual who is the subject of the relationship that benefits from more favourable conditions[48].

We now turn to CFC-type provisions[49]. These are rules that apply when profits are earned by base companies (companies subject to a more favourable tax regime) controlled by partners resident in Portuguese territory. In this situation, the provisions attribute the profits to those partners even when there are no distributed profits[50] (the principle of tax transparency – *piercing the veil*).

In both cases, particular emphasis is placed on the existence of special relationships with companies established in countries where they benefit from more favourable tax regimes – tax havens.

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[46] Cf. Article 65 CIRC.

[47] L.M.T. de Menezes Leitão, *A aplicação de medidas anti-abuso na luta contra a evasão fiscal*, in *Revista Fisco* no. 107/108 (March 2003) 35 ff.

[48] This burden of proof is not discharged simply by exhibiting documents or contracts, which may be forged, or a statement of the amount paid. The actual supply of services, loans granted, etc must be clearly established.

[49] For a historic overview of this principle, see L.M.T. de Menezes Leitão, *A introdução na legislação Portuguesa de medidas destinadas a reprimir a evasão fiscal internacional: o Decreto-Lei no. 37/95, de 14 de Fevereiro*, in *Estudos de Direito Fiscal*, Coimbra 1999, 169 ff.

[50] Cf. Article 66 CIRC. Special attention should be paid to the provisions of paragraph 4, where the legislator excludes those situations that in his opinion are situations with a risk of tax evasion from this regime.

3.4.3. – *Exclusion of the application of the taxation system for mergers, divisions, transfers of assets and exchanges of shares*

At issue here is the tax neutrality system for mergers, divisions, transfers of assets and exchanges of shares which exists in Portuguese legal system as a consequence of the transposition of Directive 90/434/EEC[55]. The Portuguese legislator felt it necessary to create an exception to this regime so that it will not apply when it is clear that the main purpose or one of the main purposes of the operation to which the Directive applies is tax avoidance. Accordingly, and in order to make this rule more precise, the legislator also clarifies that it must be clear that the motives for the operations are tax-based whenever the whole of the income of the companies involved is not subject to the same IRC (company tax) system. The same applies if the operations have not been carried out for economically valid reasons such as restructuring or rationalisation of the business activities of the companies involved.

3.4.4. – *Prevalence of substance over form in derivative financial instruments*

Another specific rule that merits our attention is the one set out in article 49 (10) of the IRC Code which provides that where "in one or more operations the substance differs from the form, the tax administration may re-characterise the point in time, the source and the nature of payments and receipts and costs arising out of the operation".

Some questions do arise in relation to the neglect of form in favour of substance and in relation to respect for the principle of tax legality.

However, in our opinion this solution presents some special features that make its adoption essential. In fact, due regard must be had to the fact that we are dealing with derivative financial instruments. This is a sector, which is highly susceptible to tax avoidance as it is particularly easy for economic agents to manipulate taxable income. As Menezes Leitão warns us[56], "it is recognised that derivative financial instruments may be used to reproduce almost all conventional transactions. This allows the operator an economically neutral or quasi-neutral choice between the conventional transaction and the derivative financial instrument and the basis for this

[55] As modified by Directive 2005/19/EC, of 17 February 2005.

[56] L.M.T. D de Menenzes Leitão, *A aplicação de medidas anti-abuso na luta contra a evasão fiscal*, in *Fisco* 107/108 (March 2003) 35 ff.

3.4.6. – *The general anti-abuse clause*

At this point, it is important to analyse the role played in this context by general anti-abuse clauses whose introduction in the different legal systems has often been the subject of controversy and strong doctrinal criticism. However, these clauses are today enshrined in the legal systems of most States including Portugal – article 38 LGT – and play role in the fight against abusive practices not covered by specific provisions.

We begin with a brief historical review to enable a better understanding of the present wording of this clause.

The general anti-abuse clause was introduced in Portugal for the first time in 1998 in the LGT. Subsequently, after some criticism of the doctrine, it was included in the Code of Tax Procedure. The original wording deemed "any legal acts or operations to be ineffective if it can be established they were solely or mainly carried out with the purpose of reducing or eliminating taxation that would be due for legal acts or operations with an equivalent economic result, in which case taxation will be charged on the latter".

However, the provision was the subject of heavy criticism, with particular emphasis on the questions raised by Leite de Campos[60], who felt the provision resulted in a lack of effect of the legal acts or operations concerned not just in the area of tax but in civil law in general. He also felt it resulted in an obligation on the taxpayer to conclude operations subject to a higher tax. These circumstances would lead to a breach of the taxpayer's freedom of economic initiative and a breach of the principle of legal certainty and reliability. As a result he concluded the provision to be unconstitutional.

After accepting some criticism, that clause was re-drawn to declare – "ineffective in terms of taxation any legal acts or operations essentially or principally aimed, by deceitful or fraudulent means and with abuse of legal processes, at the reduction, elimination or timely deferral of taxes that would be due as a result of legal acts or operations with an identical economic purpose, or aimed at obtaining tax benefits that would not be achievable in whole or in part without recourse to such means. Tax will be charged in

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establishments, including intra-group supplies of services and cost contribution arrangements (CCA).

[59] On this subject, see also Portaria n. 1446-C/2001, of 21 December, in force since 1 January 2002, with the same purpose of fighting against the manipulation of prices of transactions, thereby avoiding the relocation of profits and losses solely and mainly by taxation reasons.

[60] D. Leite de Campos, and M. Leite de Campos, *Direito Tributário*, Coimbra 2000, 178 ff.

such behaviour is also legal in tax law but does not produce the effective results in such law and these results are disregarded.

Therefore, "if there is evidence that the legal acts or operations were performed solely or principally with the aim of excluding or reducing the tax burden, there may be a "disregard of the legal character", a "piercing of the veil", "leading to tax being charged in accordance with the rules applying in the absence of such deceitful acts or operations, with none of the said tax benefits arising"[61].

However, such disregard is dependent on the tax authorities demonstrating the deceitfulness of the operation in question. This task has been regulated in minute detail by the by the legislator in light of the values at issue. According to some authors including Sá Gomes, "we are dealing with genuine and visible operations that are also (...) legal operations, since tax laws do not establish any penalty other than adjustment by the tax authorities of the taxable income declared by taxpayers. No compensatory interest is payable and no administrative offence proceedings for the application fines are issued"[62].

3.4.6.3. – *Procedure*

The much discussed problems that this kind of clause brings about in the areas of legal certainty and reliability, contractual freedom, free will and the principle of legality led the Portuguese legislator to decide to subject the payment of tax based on anti-abuse provisions to a procedure specifically established for that purpose. This procedure is set out in article 63 of the Portuguese Code of Tax Procedure and Process (CPPT). The CPPT specifically provides that the provisions may only be applied after the taxpayer has been heard and with the prior and mandatory authorisation the head of the service responsible for the matter or the officer to whom this duty has been delegated. This authorisation is subject to special duties to provide grounds for the authorisation and which may be appealed in independent proceedings. Furthermore, where the taxpayer requested a binding ruling from the tax authorities on proposed acts and operations and did not receive an answer within 90 days (giving rise to the assumption of a positive outcome), a special three-year period is established after which the

[61] J.N. Calvão da Silva, *Elisão Fiscal e Cláusula Geral Anti-abuso*, in *Revista da Ordem dos Advogados*, Year 66, Vol.II, September 2006, 791 ff.

[62] N. Sá Gomes, *Evasão Fiscal, Infracção Fiscal e Processo Penal Fiscal*, in *Ciência e Técnica Fiscal*, 177, Lisbon, 1997, 74 ff.

imposes some reporting, information and clarification duties on the tax authorities in relation to aggressive tax planning schemes or activities.

In fact, the Seoul Declaration of September 2006, which was the result of a meeting promoted by the OECD between the tax authorities of a number of countries, gave an express warning about the rapid growth of aggressive tax planning schemes. It also warned of the connection between such tax minimisation practices and the involvement of tax intermediaries, in particular tax advisors. Attention was also drawn to the fact that tax consultancy is exercised without any kind of regulation as the line between compliance with tax law and the unlimited exploitation of the law's frailties is a thin one.

As a result, the Portuguese legislator has created a new framework based on the existence of a duty upon those who use or organise operations and transactions aimed exclusively or mainly at obtaining tax benefits to report to the tax authorities. Information must be provided on an anonymous basis. Its main purpose is the creation of a database describing the different forms of abusive planning. This information is to be published at a later date with reference to those schemes deemed to be abusive by the Directorate General of Taxation (DGCI)[64]. This was an attempt to enhance transparency and justice the tax system and to acknowledge the major role played by the assessment and collection of tax revenue in economic and social development, an essential duty of citizenship.

Although the Government fight against tax fraud and avoidance is praiseworthy, we must draw attention to some problems resulting from this law.

There has been a lot of criticism as, although its target is so-called "aggressive" tax planning, the truth is that the objective scope of the law is too broad in its terms. It includes the obligation to report any scheme or activity aimed exclusively or mainly at obtaining a tax benefit, that is to say, all or any economic situations where a solution is chosen that results in a less tax being paid[65].

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[64] The purpose of Decree-Law 29/2008, of 25 February is not merely regulatory but also provides for penalties (fines) in case of a failure compliance with such duties.

[65] Although in practice there are few tax planning schemes not covered by the reporting duty, the legislator tried to restrict the tax planning situations covered by the reporting duty by considering them as situations that (i) imply the participation of an entity subject to a privileged tax regime, being considered as such the entity whose territory of residence is in the list approved by a ministerial order from the Minister of Finance, or if it is not liable there to income tax identical or similar to IRS or IRC, or also if the tax effectively paid is equal to or lower than 60% of the tax that would be due if such entity were considered resident in the Portuguese territory; (ii) imply the

In the light of the above arguments, we believe that ultimately anti-abuse rules will be what the tax authorities and the courts make of them. Saldanha Sanches[67] says of the general anti-avoidance clause, but also with application to all means of fighting abusive tax planning, which could interfere with the individual's right to legal autonomy, "the original sins of its uneasy birth and the drafting errors in its formulation are, however, the least important. The text of the rule is nothing more than a starting point, but an indispensable one all the same. The general anti-avoidance clause is an imperfect instrument even if can be legitimised later through proper application". Therefore, all the criticisms and risks and the advantages and acclaim described above will always be dependent on confirmation through the use and the application made of those rules.

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[67] J.L. Saldanha Sanches, *Os Limites do Planeamento Fiscal*, Coimbra 2006, 233.