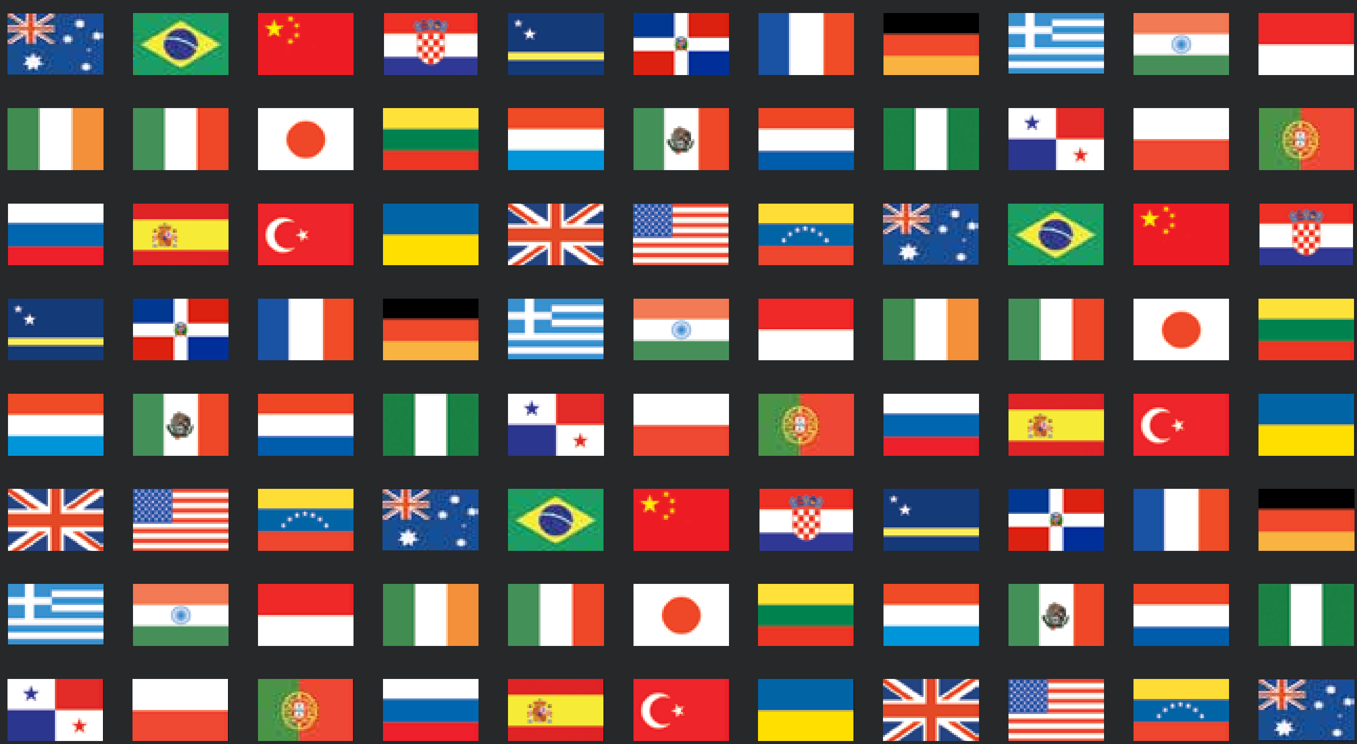
Tax on Inbound Investment

Contributing editors
Peter Maher and Lew Steinberg



2016

GETTING THE DEAL THROUGH

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Tax on Inbound Investment 2016

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2007
Tenth edition
ISSN 1753-108X

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

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

From a buyer's perspective, the main taxes comprised in the Portuguese tax framework which should be considered by a foreign investor prior to the acquisition of a target company are corporate income tax (CIT), value added tax (VAT), stamp tax, real estate transfer tax and the real estate municipal tax.

The tax treatment of the acquisition of the shares of a target company (a stock deal) or the acquisition of a company's business assets and liabilities (an asset deal) entail a number of differences that should be thoroughly analysed both from a shareholders' and a target company's perspective before the execution of the relevant transaction.

Through a stock deal, the sale of the shareholders' participation in the target company may generate a capital gain or capital loss which is generally calculated as the difference between the transfer value, deducted of transfer expenses, and the acquisition value accepted for tax purposes.

Any capital gains obtained from the transfer of shares should be considered as ordinary income in the assessment of the shareholders' taxable income and should be taxed at the standard CIT rate (21 per cent for 2015) and applicable surcharges (of up to 8.5 per cent).

This notwithstanding, there is a participation exemption regime in force to avoid such CIT liability. Accordingly, if the shareholder is a company resident in Portugal for tax purposes, the general rules may not apply, that is the income arising from the transfer of stocks may be exempt from CIT, provided that the following requirements to apply the participation exemption regime are met:

- the shareholder holds, directly or indirectly, at least 5 per cent of the share capital or voting rights of the company whose stocks generated the capital gain;
- the shareholder held the participation for at least an uninterrupted period of 24 months;
- the company whose stocks were transferred is subject to and not exempt from CIT or a similar tax, at a rate not lower than 60 per cent of the applicable CIT rate (ie, 12.6 per cent in 2015). If this subject requirement is not met, the participation exemption regime may also apply if at least 75 per cent of the company's income derives from a commercial, industrial or agricultural activity or from rendering services, as long as such activities are not mainly aimed at the Portuguese market;
- the main activity of the subsidiary does not consist in banking, insurance activities or lease of goods (except with regards to real estate located in its residence jurisdiction); and
- the company whose shares were transferred is not resident or domiciled in a blacklisted country, territory or region as defined in Ministerial Order 150/2004 of 13 February.

Please note that this regime is not applicable to gains or losses arising from the transfer of shareholdings in companies 50 per cent or more of whose assets are represented by real estate located in Portugal, except when the real estate in question is deemed to be used in a commercial, industrial or agricultural activity that does not correspond to the lease or purchase and sale of real estate.

Should the shareholdings fulfil the requirements to qualify for the above-mentioned exemption, any capital losses arising from the transfer of shares should also be excluded from the assessment of the company's taxable income.

Furthermore, capital losses arising from the transfer of shares benefiting from the participation exemption regime applicable to either dividends or capital gains are not accepted as deductible for CIT purposes up to the amount of exempt dividends or capital gains obtained from the transfer of shares in that same company during the past four years.

Through an asset deal, any capital gains or losses arising to the target company should be fully considered in the assessment of its taxable income.

However, capital gains may be subject to 50 per cent tax provided that, inter alia, the amount received as consideration for the transfer is reinvested in the acquisition of fixed tangible assets, intangible assets or non-consumable biological assets.

Additionally, gains obtained by non-resident companies, without a permanent establishment in Portugal to which the gains might be allocated, may be exempt from CIT or personal income tax, provided certain requirements are met.

Non-realised gains on the transfer of shares or business assets may be deferred if the transaction is executed under the special tax-neutral regime applicable to corporate reorganisations, provided that the relevant transaction meets the requirements to apply the tax-neutral regime. A neutral reorganisation may assume the following general forms:

- a merger (upstream, downstream or sister mergers) between the target company and the acquiring company;
- a spin-off, whereby the target company is liquidated or not, and its assets and liabilities are wholly or partially transferred to one or more acquiring companies (which may be a parent, a sister or a subsidiary company);
- a contribution in kind of a branch of activity or a universal transfer of assets of the target company to the acquiring company; and
- an exchange of shares between the target company's shareholders and the acquiring company.

With regard to net operating losses (NOLs), a company resident in Portugal for tax purposes has the right to carry forward the losses to offset its taxable income of the following 12 years. The deduction of NOLs is limited to 70 per cent of the taxable income assessed in the relevant tax year. The right to carry forward such losses may be forfeited if, at the end of a tax year, at least 50 per cent of the relevant company's shares or voting rights (under a stock deal) were transferred, except where:

- the ownership was converted from direct to indirect (and vice versa), as well as when the ownership was converted among companies with the majority of the shareholding or voting rights held, directly or indirectly by the same entity;
- a tax-neutral reorganisation was carried out;
- the change of the ownership results from the death of the previous shareholder;
- the acquirer previously held, directly or indirectly, at least 20 per cent of the share capital or the voting rights, since the beginning of the tax year in which the NOLs were generated;

- the acquirer is an employee or a board member of the relevant company since, at least, the beginning of the tax year in which the NOLs were generated.

Notwithstanding the above, where at least 50 per cent of the share or voting rights of a company are transferred and no exception is applicable, the relevant company may request an authorisation to the Minister of Finance to maintain the NOLs generated in previous tax years. The request should be submitted within 30 days of the change of ownership and should also evidence valid economic reasons underlying the transaction.

As to asset deals, it should be pointed out that such transactions may be qualified as a transfer of a business as a going concern. In this case, stamp tax may be levied at a 5 per cent rate on the value of the deal. Should the assets comprised in the deal be independently transferred, then stamp tax should not be due, since each transfer may be subject to VAT at the applicable rates, which currently range between 6 and 23 per cent.

Through an asset deal, the acquisition of real estate is subject to real estate transfer tax a rate of 6.5 per cent for urban property or 5 per cent for rural land and of 10 per cent if the acquirer is a company resident in a blacklisted country, territory or region as defined in Ministerial Order 150/2004 of 13 February. Stamp tax may also be due at a rate of 0.8 per cent, on the higher of the following amounts: the real estate's tax value or the real estate's transfer value.

Through a stock deal, the acquisition of a shareholding of at least 75 per cent in a limited liability company and general or limited partnership which owns real estate located in Portuguese territory may also trigger real estate transfer tax at the aforementioned rates.

Finally, and taking into consideration that after an acquisition, the acquiring company may assume the target company's loans, it is important to highlight that should an amendment of the term of a loan agreement be carried out, the tax authorities may consider that a new financing subject to stamp tax was granted. The stamp tax rate applicable on loans depends on the term of the loan. Should the term of the loan be less than one year, the tax rate is 0.04 per cent per month, or fractions thereof. If the term of the loan ranges from one to five years, the tax rate is 0.5 per cent, and if the term of the loan is of five years or longer, the tax rate is 0.6 per cent.

However certain loans, such as loans made by shareholders to the company under the terms of the Portuguese Companies Code, are exempt.

2 Step-up in basis

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

According to Portuguese Generally Accepted Accounting Principles, which transposed the International Financial Reporting Standards regulations into the internal law, it is possible for the acquiring company to register the business assets acquired at their fair value. Hence, a step-up (or even a stepdown) may take place in the assets' tax basis.

Every asset transferred must be identified, valued and recorded in the accounting records of the acquiring company. The acquisition value should be allocated considering the fair value of the assets and liabilities obtained, and any residual amount should be qualified as goodwill. Goodwill is not depreciable for tax purposes, unless an authorisation of the tax authorities was granted) and is subject to impairment tests on at least an annual basis.

3 Domicile of acquisition company

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

As a general rule, and in order to carry out a debt pushdown upon an acquisition, a special purpose vehicle (SPV) may be incorporated in Portugal to perform the acquisition and subsequently, provided the requirements are met, apply the tax consolidation regime.

Under the tax consolidation regime, the parent company may file a CIT return for the whole group of companies (ensuring that the NOLs generated in certain companies may offset the taxable income of other companies) and may also assess the limits on the deductibility of net financing expenses taking into consideration the tax group's results.

In any case, provided that the special tax-neutral regime is applicable to the transaction, it may be possible to use either an SPV resident in Portugal for tax purposes or a company resident in another EU member state. Additionally, since 2015 there is also the possibility of opting for the tax consolidation regime and having a company resident in another EU member state as a parent company, provided additional requirements are met. Therefore, the decision on whether to incorporate an SPV or not should be specifically adapted to each transaction.

Furthermore, a foreign corporate investor may also wish to consider whether the incorporation of an SPV in Portugal would be able to be used as an investment gateway to other jurisdictions, such as Brazil, Angola, Mozambique, East Timor or any other country with which Portugal has entered into a double tax treaty (DTT). The company would then be entitled to benefit from the Portuguese participation exemption regime in its shareholdings abroad, provided the necessary requirements are met.

Other features set forth in the Portuguese tax framework may also be considered by foreign corporate investors, such as the share capital remuneration benefit (which, provided certain requirements are met, allows cash contributions made by shareholders after the incorporation or the increase of a company's share capital to be remunerated at a rate of 5 per cent, which is also considered as a tax-deductible expense for this company) and the reinvestment of retained profits benefit (which, provided certain requirements are met, allows for small and medium-sized companies to deduct from their CIT assessment 10 per cent of their retained and reinvested profits used in the acquisition of certain eligible assets used in their business activities, with a ceiling of 25 per cent of the CIT due).

Furthermore, we also highlight the tax regime applicable to companies authorised to operate in the Madeira Free Trade Zone which may be considered one of the most beneficial tax regimes in force within the European Union (a CIT rate of 5 per cent on the taxable income), provided that the taxable income of the company established therein does not refer to transactions carried out with companies established in the Portuguese mainland.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Company mergers and share exchanges are both common operations used either to acquire target companies or to perform group reorganisations.

The CIT Code provides for a tax-neutral regime (as transposed from the EU Tax Merger Directive to domestic law) for both operations. The special tax-neutral regime may be applied to these operations provided that they are executed by companies resident in Portugal or companies resident in another EU member state.

5 Tax benefits in issuing stock

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

Portuguese tax law does not provide benefits to an acquiring company issuing stock as consideration rather than cash. In such a transaction, benefits may arise to the target company or its shareholders, since the use of stock as consideration may enable the application of the tax-neutral reorganisation regime.

6 Transaction taxes

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

A share deal does not trigger stamp tax or any other transaction tax, except for the acquisition of a shareholding of at least 75 per cent in a limited liability company and general or limited partnerships that own real estate (see question 1).

Conversely and as previously mentioned, through an asset deal qualified as a transfer of a going concern, stamp tax may be levied at a rate of 5 per cent on the value of the deal. If the asset deal cannot be considered as a branch of activity, stamp tax should not be triggered, but the transfer of the assets should be subject to VAT at the applicable rates, which currently range between 6 per cent and 23 per cent.

The transfer of real estate is generally subject to real estate transfer tax and stamp tax on the higher of the following amounts: the real estate's tax value or the real estate's transfer value.

Accordingly, real estate transfer tax is levied at 5 per cent for rural land, a maximum rate of 6.5 per cent for urban immoveable properties and a rate of 10 per cent when the acquirer is a company resident in a blacklisted country, territory or region as defined in Ministerial Order 150/2004 of 13 February. Simultaneously, stamp tax is, as a general rule, levied at a rate of 0.8 per cent.

Please note that the transactions may also be subject to notarial charges.

As to corporate reorganisation operations such as mergers, the Portuguese tax framework also provides for certain benefits in the form of exemptions on real estate transfer tax, stamp tax and notarial charges, provided certain requirements are met. In order to benefit from these exemptions, the company has to submit a request to the Minister of Finance, accompanied with certain elements (eg, an economic study on the advantages of the operation) and, in certain cases, may also have to be accompanied by a decision of the Competition Authority.

7 Net operating losses, other tax attributes and insolvency proceedings

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

The right to carry-forwards NOLs may be forfeited if, at the end of a tax year, at least 50 per cent of the target company's shares or voting rights are transferred. In order to avoid said forfeiture, the Minister of Finance has to authorise the maintenance of the NOLs generated in previous tax years, after the target company submits a requirement for this purpose (see question 1).

The tax-neutral regime applicable to corporate reorganisations allows for the maintenance of the NOLs generated in previous tax years, alongside with other tax benefits and the net financial costs thresholds yet to be deducted by the target entity, to be transferred to the acquiring company, provided certain conditions are met. However, if the right to carry forward NOLs is forfeited, any related deferred tax assets should also be lost.

If the target company holds any VAT credits, said credits should not be forfeited upon a change of ownership or the transfer of business assets.

Within a merger of the target company into the acquiring company, a request to the Portuguese tax authorities may be presented in order to carry forward VAT credits previously held by the target company. Should this be the case, the acquiring company is also entitled to pursue a request for the refund of the target company's advanced CIT payments within 90 days following the merger.

8 Interest relief

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

Interest borne by an acquiring company may be considered as tax-deductible for tax purposes provided that said interest refers to a loan incurred that was deemed necessary for obtaining income subject to CIT. However, interest expenses are only deductible up to the highest of the following amounts:

- €1 million; or
- 30 per cent (there is a transitory period whereby the limit in force is 50 per cent for 2015, 40 per cent for 2016 and 30 per cent for 2017 and subsequent years) of the 'tax EBITDA' (ie, the accounting EBITDA minus, inter alia, gains and losses arising from changes in the fair value of assets that are not considered for tax purposes, impairments and investment reversals that cannot be depreciated, income and expenses related to equity that benefited from the participation exemption regime).

These limits are not applicable to entities subject to supervision of the Bank of Portugal and the Portuguese Insurance Institute, and branches of financial, credit or insurance companies whose head office is in another EU member state.

The amount of financial expenses not deductible as a consequence of exceeding the aforementioned limits may be carried forward and deducted in the following five years (within the applicable limits in each year).

Conversely, when the amount of financial expenses does not exceed the same limits referred to above, the amount of the limit that was not deducted may be available in the following year for deduction, according to the first-in first-out method, within the following five years.

The Portuguese transfer pricing rules establish that the interest rates applicable to loans granted between related parties should comply with the arm's-length principle. Otherwise, the Portuguese tax authorities may issue an additional tax assessment.

Interest payments made by a company resident in Portugal for tax purposes either to a resident or a non-resident company are, according to the general rules, subject to withholding tax at a rate of, as a general rule, 25 per cent.

However, said interest payments may benefit from a reduced withholding tax rate of between 5 and 15 per cent, through the application of a DTT entered into between Portugal and the jurisdiction where the beneficiary of the interest payments is established. The interest payments may also be exempt from withholding tax provided that the requirements to apply the EU Interest and Royalties Directive are met. In their cases, the company has to comply with certain ancillary obligations.

As an anti-abuse rule, interest income is subject to a withholding tax rate of 35 per cent if paid or made available in an account opened in the name of one or more holders, on behalf of one or more unidentified third parties, and the beneficial owner is not identified, or when such beneficiary is resident in a blacklisted country, territory or region.

An acquiring corporation may also consider the application of the tax consolidation regime. Among others, the main requirements for the application are that the parent company holds, directly or indirectly, at least 75 per cent of the share capital and more than 50 per cent of the voting rights of the participating companies and all companies are subject to CIT at the highest rate in force (currently 21 per cent). As referred to in question 3, under the tax consolidation regime the parent company will be able to use the NOLs generated in group companies to offset the taxable income of other companies within the same tax group. The 70 per cent limitation on the deduction of NOLs is also applicable to the tax groups' taxable income.

In any case, please be advised that there is a general anti-avoidance clause that qualifies as invalid for tax purposes any act or transaction carried out with the sole purpose of obtaining a reduction, elimination or deferral of the tax which would otherwise be due in respect of similar acts or transactions, or even a tax advantage that would not be obtained using a similar structure. Furthermore, apart from such general anti-avoidance clause, there is also a regime to avoid aggressive special tax planning, under which certain reporting obligations may apply.

9 Protections for acquisitions

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

Either on a stock deal or an asset deal and both from an acquiring and a target company's perspective, the acquisition process usually starts with a due diligence procedure in order to identify, analyse, quantify and, possibly, reduce or exclude any tax contingencies.

Based on the eventual findings, the acquiring company may ensure that the liabilities previously identified will be duly covered with the contractual basis being the protection clauses usually inserted in the asset or share purchase agreement.

It is the market practice to include the tax contingencies within the representations and warranties, gross-up clauses, specific indemnities, deed of tax covenants, escrow accounts and dispute resolution clauses. In the event an indemnity received is regarded as consideration resulting from the acquisition, VAT should be due on said amount at a 23 per cent rate.

Post-acquisition planning

10 Restructuring

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

A post-acquisition restructuring may be carried out through the common corporate reorganisation operations, namely, mergers, spin-offs and exchanges of shares or contributions in kind. As referred to in question 4, these transactions may be executed under the special tax-neutrality regime.

Please note corporate any reorganisation should always be sustained by valid economic reasons and not merely a tax reason.

11 Spin-offs

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

Spin-offs may be executed according to the special tax-neutral regime applicable to corporate reorganisations, provided that the following requirements are met:

- the companies to be subject to a spin-off must be resident in Portugal for tax purposes being subject to and not exempt from CIT, or resident in another EU member state, fulfilling the requirements set forth in article 3 of the EU Mergers Directive;
- the spin-off should evidence valid economic reasons and not be executed having as a main or sole purpose tax reasons;
- whenever the shareholders of the target company receive shares of the acquiring company as consideration for the transaction, and eventually an additional payment in cash, said payment cannot exceed 10 per cent of the nominal shares received;
- the acquiring company should maintain the assets and liabilities transferred in Portugal and at the same tax value registered in the target company;
- the depreciation and amortisation methods, as well as the inventory adjustments, impairment losses and provision regime previously used by the target company should be maintained for tax purposes; and
- the acquiring company's taxable income should be assessed as if no spin-off were executed.

Certain formal requirements should also be met in order to apply the special tax-neutral regime to a spin-off.

A spin-off may also be executed without triggering transfer taxes (real estate transfer tax, stamp tax and notarial charges), provided certain requirements are met. In order to benefit from these exemptions the company has to submit a request to the Minister of Finance, accompanied by certain documents such as an economic study on the advantages of the operation (see question 6).

12 Migration of residence

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

The migration of residence of a Portuguese company should trigger Portuguese CIT liability. The taxable income is assessed in the year in which the company migrates out of Portugal, and includes all positive and negative differences between the market value and the tax value of the company's assets, even if not accounted for.

Should the company opt for the migration to another EU member state or to a country within the EEA (provided said country is subject to exchange of information obligations with Portugal similar to those established in the EU), the CIT assessed by the positive balance of the market value and the tax value of the company's assets may be paid as follows:

- immediately, for the whole amount or through instalments;
- in the year following the one in which the company migrated; or
- in five annual instalments, each corresponding to one-fifth of the tax assessed: payments begin in the year following the migration of residence.

If the company opts for one of the deferred payments possibilities, interest should be due as of the date from which the immediate payment should have been carried out until effective settlement. The tax authorities may request a bank guarantee corresponding to 125 per cent of the tax due.

The above-mentioned regime is not applicable to assets and liabilities kept in Portuguese territory and allocated to a permanent establishment of the migrated company in Portugal. In this regard, it is important to note the following:

- the assets and liabilities maintained should have the same tax value registered in the migrated company before the migration;
- the depreciation and amortisation methods, as well as the inventory adjustments, impairment losses and provision regime previously used by the migrated company should be maintained for tax purposes;
- the permanent establishment's taxable income should be assessed as if there were no migration; and
- the operation has valid economic reasons and its (or one of its) main objective or objectives is not tax evasion.

13 Interest and dividend payments

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

As a general rule, interest and dividend payments made by Portuguese resident companies to non-resident companies without a permanent establishment in Portugal are subject to final withholding tax at a rate of 25 per cent. With reference to dividends, the withholding should be performed either at the moment at which the payment is executed or at the moment at which the dividends are made available to the shareholders. In the case of interest, the withholding should be performed at the moment at which the interest is paid or at the interest maturity date.

Notwithstanding, the withholding tax rates applicable to interest and dividend payments may be reduced through the application of a DTT if, prior to the payment, the non-resident beneficiary of the payments provides the Portuguese company with an official form duly certified by the tax authorities of the beneficiary's residence jurisdiction. The DTT tax treaty rates for interest and dividend payments usually range between 5 and 15 per cent.

In the specific case of interest payments and pursuant to the EU Interest and Royalties Directive, an exemption of withholding tax is applied provided that:

- the non-resident company is subject to and not exempt from one of the taxes on income listed in the Annex to the EU Interest and Royalties Directive;
- the non-resident company takes one of the corporate forms listed in the Annex to the EU Interest and Royalties Directive;
- the non-resident company is considered as resident for tax purposes in another EU member state according to the application of a DTT;
- the non-resident company qualifies as an associated corporation by holding at least 25 per cent of the share capital in the paying company, or by being at least 25 per cent held by the paying company, or by both being at least 25 per cent held by a third company;
- the non-resident company is the beneficial owner of the income; and
- the shareholding is held for a minimum period of two years.

With certain adjustments to these requirements, such exemption may also apply to interest payments made to Swiss entities.

Interest payments made to non-resident companies complying with these requirements, but whose share capital is mostly held, directly or indirectly, by entities resident in non-EU countries should not be exempt from withholding tax, except where evidence is provided that the structure was not designed with the main objective of benefiting from a reduced rate.

If an interest payment does not comply with the arm's-length principle, the excess amount is excluded from the exemption on withholding tax.

Update and trends

Portugal has a Golden Visa regime in force, which grants temporary residence permits to foreign individuals who invest in Portugal. In order to be eligible, a foreign individual would have to invest in Portugal, directly or indirectly (through a company) through the transfer of at least €1 million capital; the creation of at least 10 jobs in Portugal or the acquisition of real estate with a value of at least €500,000.

The investment activities to qualify for a Golden Visa have been enhanced and now also include:

- the acquisition or refurbishment of real estate in Portugal in an amount of at least €350,000 (provided the property is located in an urban rehabilitation area or is at least 30 years old);
- the transfer of at least €350,000 capital to be invested in research activities;
- at least €250,000 to be invested in artistic production, recovery or maintenance of national cultural heritage; and
- €500,000 for the purchase of investment units in venture capital funds used to capitalise small and medium-sized enterprises.

Should the Golden Visa be granted, the individual may also apply for the family reunification visa, allowing family members to benefit from the Golden Visa regime.

Furthermore, the European Union has recently approved the extension of the special tax regime applicable to corporations authorised to operate in the Madeira Free Trade Zone, which has already entered into force.

Accordingly, companies that obtain an authorisation to operate in the Madeira Free Trade Zone between 2015 and 2020 may benefit from the special tax regime until 2027. The newly introduced extension also has new features such as a personal income tax and a corporate income tax exemption granted to shareholders on income arising from dividends to which the 5 per cent CIT rate was applied and income arising from, inter alia, shareholder loans or capital allowances.

Companies authorised to operate in the Madeira Free Trade Zone before 2015 may also benefit from the new tax regime applicable to those authorised as of 2015, provided the requirements to apply the new regime are also met.

In order to benefit from the withholding tax exemption under the EU Interest and Royalties Directive, the non-resident beneficiary of the payments provides the Portuguese company with an official form duly certified by the tax authorities of the beneficiary's residence jurisdiction.

With reference to dividend payments and pursuant to the EU Parent-Subsidiary Directive, dividend payments made by a Portuguese company to a non-resident company may be exempt from withholding tax provided that:

- the non-resident company is resident in another EU member state or an EEA country (provided said country is subject to exchange of information obligations with Portugal similar to those established in the EU) or in a country that has a DTT in force with Portugal that foresees exchange of information procedures;
- the non-resident company holds at least 5 per cent of the Portuguese company for an uninterrupted period of 24 months;
- the non-resident company is subject to and not exempt from one of the taxes on income mentioned in the EU Parent-Subsidiary Directive or, in the case of companies resident in an EEA country or a country with a DTT in force with Portugal, a similar income tax not lower than 60 per cent of the Portuguese CIT rate in force (ie, 12.6 per cent for 2015);
- the non-resident company takes one of the corporate forms listed in the Annex to the EU Interest and Royalties Directive; and
- the non-resident company provides evidence prior to the dividend payments that it qualifies for the application of the EU Parent-Subsidiary Directive through a declaration issued and authenticated by its jurisdiction's tax authorities.

Such exemption of withholding tax may apply to interest payments made to Swiss entities.

Additionally, it is important to highlight the participation exemption regime applicable to dividends paid by non-resident companies to companies resident in Portugal for tax purposes, as referred to in question 1.

Interest and dividend payments are subject to a final withholding tax of 35 per cent whenever paid or made available in an account opened in the name of one or more holders, on behalf of one or more unidentified third parties, and the beneficial owner is not identified, or when the beneficiary is resident in a blacklisted country, territory or region.

14 Tax-efficient extraction of profits

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

In addition to the tax treatment of interest and dividend payments mentioned in question 13, royalties may also be an alternative to extract profits which may benefit from the EU Interest and Royalties Directive or the reduced rates established in the DTTs entered into by Portugal and the relevant jurisdiction.

An acquiring company may also consider, subject to analysis on a case-by-case basis, the reimbursement of supplementary capital contributions, which may be exempt from taxation.

Disposals (from the seller's perspective)

15 Disposals

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

From a seller's perspective, the disposal of a Portuguese target company may be carried out through the disposal of its business assets, the stock in the target company or the stock held in a foreign holding company.

The most appropriate way to carry out a disposal should be analysed on a case-by-case basis, depending largely on the intentions of both the buyer and the seller, as well as on the tax attributes of the assets or stocks to be transferred.

16 Disposals of stock

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

The Portuguese Statute of Tax Benefits establishes that capital gains arising from the sale of stock in a Portuguese company obtained by a non-resident company, without a permanent establishment in Portugal to which the gains may be allocated, are exempt from CIT, except if:

- more than 25 per cent of the share capital of the non-resident entity is held, directly or indirectly, by Portuguese resident entities;
- the non-resident company is not resident or domiciled in a blacklisted country, territory; or
- the capital gains arise from to the sale of stock in a Portuguese company 50 per cent or more of whose assets derive from real estate located in Portugal or from the sale of stock in a Portuguese holding company (SGPS) which controls a Portuguese company 50 per cent or more of whose assets are real estate located in Portugal.

Additionally, please note that most of Portugal's DTTs provide that the capital gains arising from the disposal of shares should be taxed at the jurisdiction where the transferor is resident, with exceptions to the disposal of shares in companies whose assets are mainly composed by real estate in Portugal.

There are no specific tax rules applicable to energy and natural resources companies.

17 Avoiding and deferring tax

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

Gains arising from the disposal of shares in a Portuguese company may be exempt from taxation provided that the requirements to apply the participation exemption regime or the special tax-neutral regime applicable to corporate reorganisations are met. Gains arising to a non-resident company from the disposal of shares in a Portuguese company may also be exempt provided that no exception to the rule set forth in the Portuguese Tax Statute of Tax Benefits applies (see questions 1 and 16).

A deferral of tax on gains arising from the disposal of business assets may also be achieved provided that the reinvestment regime is applicable following the relevant transaction (allowing for the deferral of at least 50 per cent of the gains) or provided that the special tax-neutrality regime is applicable to a corporate reorganisation.

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