ANGOLA NEWSLEXTTER

GLA GABINETE LEGAL ANGOLA ADVOGADOS

PLMJ SOCIEDADE DE ADVOGADOS, RL

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Global Experience, Local Expertise

May 2011

INVESTING IN ANGOLA TODAY

THE USEFULNESS OF A DOUBLE TAXATION AGREEMENT

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I. INVESTING EM ANGOLA TODAY: INTERNATIONAL TAX MANAGEMENT

At times the interest Portuguese companies have in the Angolan market has lived alongside the fear that there are factors that discourage investment in the country. In contact with businesspeople linked to a wide variety of sectors, we have been able to witness on the one hand, demonstrations of high levels of motivation and, on the other hand, signs of scepticism as to what the virtues of investing in Angola may be.

Up to this point, there is nothing particularly unusual in this. As in life in general, one man's meat is another man's poison. It is normal that issues related to risk in investment resulting precisely from a certain level of immaturity that is to be expected in emerging economies, might be viewed as positive in terms of competition but, at the same time, seen by others, this immaturity could be viewed with scepticism and even take away the desire to invest.

The analysis of the tax component associated with investments by Portuguese companies in Angola must take into consideration issues such as the absence, to date, of a double taxation agreement (DTT) between Angola and Portugal, the levels of taxation in Angola and also, whether Portugal - as a country of residence for companies that are internationalising and an emigrant workforce – has the conditions to provide an incentive or, at least, not provide a disincentive to the internationalisation of Portuguese companies, in particular to Angola.

The experience with foreign investment in Angola, including the Portuguese experience confirms, however, that the tax component is one of growing relevance. But, ultimately, the reason why the lack of a DTT is not strictly and in certain areas a disincentive to investment, is related to the fact that the Republic of Angola has a level of taxation that is governed by some moderation in light of the fact that it is a country that receives investment and also has precarious levels of development in a number of areas.

The need for income, especially income over and above what comes from oil, could easily lead to a temptation to "inflate", for example, nominal tax rates. However, this is not what we see for the main types of income such as, for example, dividends, interest, royalties, payments for services and works, or even the general rate of tax on profits. The moderation in levels of taxation that can be seen in Angola has to be seen alongside the efforts of Portugal not to unduly burden companies with subsidiaries in Angola. This means that the absence of a DTT, in taxation of income and dividends, may turn out to be compensated in one way or another.

II. DIVIDENDS DISTRIBUTED BY SUBSIDIARIES IN ANGOLA

In Angola dividends are taxed as IAC (tax on the application of capital) at 10% upon leaving Angola, when they are distributed to shareholders. Upon arrival in Portugal these same dividends will also be taxed there as IRC (corporate income tax) as income of a shareholder resident in Portugal, and this generates double taxation. In an attempt to reduce a possible disincentive to internationalisation, Portugal introduced, under the General State Budget Law of 2007, a mechanism that brought the system for dividends coming from East Timor and the PALOP countries (Portuguese-speaking Africa) into line with the system for internal dividends distributed between companies resident in Portugal. This equating of the two systems makes sense because it has the merit of eliminating double taxation on dividends paid by subsidiaries based in Angola to companies resident in Portugal. Once certain conditions have been met, when these dividends are repatriated to Portugal, they are excluded from the shareholder's taxable income and property. The conditions for the application of the rule are as follows: the beneficiary of the profits is subject to and not exempt from IRC and the subsidiary is subject to and not exempt from an income tax that is analogous to IRC (the equivalence of Angolan Industrial Tax and IAC to Portuguese IRC is beyond question); the beneficiary must directly have held a minimum stake of 25% of the capital in the subsidiary for a period of not less than two years; the dividends must come from profits of the subsidiary that have been taxed at a rate of not less than 10%; and not result from activities that generate passive income including royalties, capital gains and other income from securities (as an example).

Putting the IAC rate of 10% on the dividends in Angola together with the possibility of exemption from IRC in Portugal we could draw the conclusion that the rules for taxation of dividends ends up being similar to what would have resulted from a DTT. That it because the OECD's DTT model recommends that the tax rate to be imposed by the source state falls precisely between 15% and 5% depending on whether or not the shareholder has a holding of up to or more than 25%. As can be seen, Angola's tax rate for IAC is 10% regardless of the size of the stake. This means that the taxation rate in Angola in this area is in line with the level recommended by the OECD and, in normal circumstances, with what would result form a DTT if such a thing existed.

III. INCENTIVES TO PRIVATE INVESTIMENT AND DOUBLE TAXATION MECHANISMS

The Republic of Angola has a legal framework that includes a set of laws that regulate private investment. In addition to the Base Law on Private Investment there is also a law on Tax and Customs Incentives to Private Investment (neither applies to the oil, diamond and financial sectors) although as of today the approval process for the future Investment Law is almost at an end. The granting of tax and customs incentives depends on meeting a number of conditions, more specifically, from falling into one or more sectors deemed to be priority sectors to the location of the investment to consideration of the amount of the investment involved. However, it must be pointed out that, in the event of the granting of such tax benefits in Angola (usually in respect of IAC and Industrial Tax equivalent to IRC), the possibility of applying the mechanism described above that excludes the taxable base in Portugal of the dividends coming from Angola will be jeopardised. If, on the one hand, they would not be taxed in Angola because of the exemption, they would, on the other hand, be taxed in Portugal at the normal IRC rate. In this respect in particular the DTT to be made with the Portugal could help.

IV. INCOME FROM SERVICES AND WORKS CONTRACTS CARRIED OUT BY NON-RESIDENTS IN ANGOLA

In the case of contracts for works and/or services carried out in Angola by non-resident undertakings, the conclusion is that, despite the fact there is no DTT, this could be compensated in certain circumstances. When such services or works are supplied by Portuguese companies deemed to be non-resident in Angola, their taxation in Angola could be considered moderate as, in Angola, works and/or services are taxed under a specific system for taxation of works contracts and services. This system introduced deduction at source for income from works contracts and services paid for by companies resident in Angola, regardless of whether or not their accounting is done in Angola, or whether the companies doing the work are resident (or non-resident) or even of whether or not the work is sporadic or continuous in nature. In the case of services, the absence of a DTT would be compensated by being subject to a rate of tax of only 3.5% or 5.25%. This results from the application of the normal rate of Industrial Tax (35%) to "only" 10% or 15% of the value of the contract, depending on whether the contract is for construction, rehabilitation, repair or conservation of real estate assets. The type of work determines whether the rate is 3.5% or 5.25%. This amount is withheld and paid in full discharge when the service provider is non-resident. Faced with being subject to taxes of between 3.5% and 5.25% in Angola, Portuguese tax law provides a general economic double taxation credit mechanism for IRC which provides that when income subject to IRC includes income earned abroad, the lower of the following amounts can be deducted from the taxable income (but only until they coincide): Income tax paid abroad (between 3.5% and 5.25% on the value of the contract); fraction of the IRC, calculated before the deduction, corresponding to the income that, in the country in question, can be taxed, net of costs or losses, directly or indirectly incurred in earning the said income.

Having said this, it must be considered as a positive point that the taxation that occurs in Angola for which allowances are to be made in Portugal is only between 3.5% and 5.25% of the value of the contract. As this taxation, in principle, would be lower that the amount of IRC indicated above, we can conclude that in Portugal it is possible, on the basis of the mechanism established for IRC, to fully eliminate the tax charged in Angola on the services or works.

V. TAXATION OF WORKERS' INCOME

Among the issues to appear in the future DTT will certainly be the taxation of employees' income. This is indeed an issue of great significance due to the many thousands of Portuguese workers who are residents of Portugal but are currently doing salaried work in Angola.

In accordance with the provisions of the CIRS (the individual income tax code), among other criteria, persons who have

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been in Portugal for more than 183 days (in a row or separately) are considered to be resident there as are persons that have stayed for less time but have, on 31 December of this year, a place of residence in conditions that suggest an intention to maintain and occupy it as their habitual residence.

Now, the vicissitudes inherent to the granting of visas, to the family circumstances of expatriate workers, together with the perspectives for staying temporarily in Angola, could in many cases lead to meeting the criteria referred to above and giving rise to a double taxation situation. Effectively, individuals who meet the said requirements should be taxed there on the whole of their income, including any income earned outside the country, specifically in Angola.

This means that in the absence of a DTT, this income is subject to double taxation – that arising from the withholding tax in arising from the IRS taxation in Portugal. In fact, at the moment, a double taxation situation can only be alleviated by the application of the unilateral mechanism for elimination of international double taxation established in the CIRS, in identical terms as for IRC.

VI. CLOSING COMMENTS: THE USEFULNESS OF A DTT

A DTT between Portugal and Angola would, without a shadow of a doubt, be an extremely useful tool to establish closer cooperation and bring order to the tax system for investment between Portugal and Angola, given the typical scope of such an agreement. However, in light of the innumerable investments that have taken place over the years between the two countries, it is important to remember that the current system exists against a background of the absence of a DTT and of some mechanisms to eliminate or alleviate double taxation in respect of certain types of income, as is the case with dividends and profits from services and works contracts.

While in the case of dividends and services paid from Angola destined for Portugal the situation is not one of the occurrence of classic double taxation, there are other areas subject to greater exposure including the cases of income from salaried employment and other types of income such as, for example, interest, capital gains, pensions and the income of company directors.

This newsletter was prepared by a multidisciplinary team made up of Angolan lawyers from GLA – Gabinete Legal Angola and Portuguese lawyers from PLMJ. This team was brought together under an agreement for international cooperation and membership of PLMJ International Legal Network, in strict compliance with applicable rules of professional ethics.