

**TAX**

Share option plans in start-ups and changes to SIFIDE II

Entry into force of the Law

Following the approval of Law 21/2023, of 25 May, introduced a regulatory framework that fosters the development of companies with a business model that has a strong innovation component and potential for future growth.

Law 21/2023, of 25 May introduces the concepts of start-up and scale-up into the Portuguese legal system, and creates a set of specific investment and tax policies aimed at capitalising and attracting talent to these companies.

Furthermore, a set of significant amendments are introduced to the Tax Incentive System for Business Research and Development (*Sistema de Incentivos Fiscais à Investigação e Desenvolvimento Empresarial*, or 'SIFIDE II'), which are intended to make research and development ('R&D') more attractive.

These are the most important measures:

- Change to the taxation rules for share options and subscription and/or plans to grant shares involving securities in companies qualifying as start-ups, SMEs (including small-mid caps) and companies operating in the innovation sector. Taxation is deferred until the date of disposal of the securities whilst benefiting from an effective 14% tax rate.
- Changes to the SIFIDE II scheme, with the following highlights:
 - i) Making the scheme more competitive by increasing the deduction for expenses incurred in R&D activities and extending the reporting deadline in the context of SIFIDE II;
 - ii) New rules on access to tax benefits;
 - iii) Imposition of reporting duties on participating companies.

Law 21/2023, of 25 May, introduced a regulatory framework that fosters the development of companies with a business model that has a strong innovation component and potential for future growth.

Under this new regime, gains realised by employees will now only be taxed at 50% of their value and will be subject to the special rate of 28% for Personal Income Tax purposes.

Tax rules on share options / share subscription plans

Law 21/2023, of 25 May, introduces special arrangements for the taxation of gains arising from share options, share subscription and/or share allocation plans or equivalent rights attributed by SMEs (including small-mid caps), by entities operating in R&D or by companies recognized as start-ups.

Under this new regime, gains realised by employees will now only be taxed at 50% of their value and will be subject to the special rate of 28% for Personal Income Tax purposes (i.e., an effective rate of 14% will apply). This is subject to the condition that the rights underlying the securities generating the gains or equivalent rights are held for a minimum period of 1 year.

Moreover, the taxation of gains made by employees upon exercising the option, subscription or allocation is deferred to the first of the following dates:

- Disposal of the securities, where the gain is calculated based on the positive difference between the realization value and the strike price of the option or right, plus whatever was paid to acquire that option or right;
- Loss of the status of resident in Portugal, where the gain is calculated based on the difference between the market value and the strike price of the option or right, plus whatever was paid to acquire the option or right;
- Free disposal of the securities or equivalent rights, where the gain is calculated based on the positive difference between the relevant amount for Stamp Tax purposes and the strike price of the option or subscription t, accrued of any amounts paid to acquire the option or right.

For the purposes of the application of these new arrangements, a start-up is considered to be a legal entity that meets all of the following requirements:

- i) Having been operating for less than 10 years;
- ii) Employing fewer than 250 people;
- iii) Having a turnover not exceeding €50,000,000;
- iv) Not being the result of the conversion or demerger of a large company and not having capital formed by any direct or indirect majority holding of a large company;
- v) Having its registered office or permanent representation or at least 25 employees in Portugal.

Besides these requirements, start-ups must meet one of these conditions:

- Be companies meeting the criteria set out by Ministerial Order 195/2018 of 5 July;
- Have their ability to engage in research and development activities recognised by the National Innovation Agency (ANI);
- Have certification of the process of recognition of companies in the technology sector;
- Have concluded at least one round of venture capital financing through an entity qualified to provide venture capital financing and subject to supervision by the CMVM (Portuguese Securities Market Commission), or similar international authority, or by means of the entry of equity or quasi-equity instruments by investors that are not founding shareholders of the company, namely, business angels;
- Have received investment from Banco Português de Fomento, S.A., or from funds managed by it, or from one of its equity or quasi-equity instruments.

The tax allowance for the expenses of R&D activities associated with projects to create projects ecologically goes up from 110% to 120%.

However, members of the corporate bodies and taxpayers who directly or indirectly hold at least 20% of the share capital or voting rights of the entity granting the plan are excluded from access to this tax scheme (unless, in the year prior to the granting of the plan, the company qualified as start-up or a micro or small-sized enterprise).

Changes to SIFIDE II

Measures to make SIFIDE II more competitive

Law 21/2023, of 25 May provides for a set of measures aimed at strengthening the competitiveness of the scheme:

- The tax allowance for the expenses of R&D activities associated with projects to create projects ecologically goes up from 110% to 120%;
- The deadline for carrying forward expenses that have not been deducted due to insufficient tax being assessed is increased from 8 to 12 years; and
- The period of validity of the recognition of the suitability of the entity in terms of research and development is increased from 8 to 12 years.

New rules for access to tax benefits through indirect investment

Following the changes introduced by the State Budget Law for 2021, a set of additional requirements for access to tax benefits were introduced. These include (i) rules intended to prevent situations of double tax benefits in the sphere of the entity that engages in the R&D activity and in the sphere of the investing entity (in R&D institutions or SIFIDE investment funds), and (ii) rules intended to ensure the maintenance of the investment made.

Law 21/2023, of 25 May, thus enacts the following changes to the rules on access to tax benefits:

- The value of expenses relating to shareholdings in the capital of R&D institutions and contributions to investment funds that make investments in companies dedicated to R&D will no longer be deductible for Corporate Income Tax (CIT) purposes whenever operations carried out between entities with special relationships are involved;
- Expenses incurred by R&D companies in research and development activities, when the applications in question are directly or indirectly financed by SIFIDE investment funds, will no longer be deductible for CIT purposes;
- Expenses incurred in taking a stake in the capital of R&D institutions and contributions to SIFIDE investment funds no longer benefit from the incremental rate of 50% for the purposes of an CIT deduction (i.e., the deduction from the taxable amount is limited to the base rate of 32.5%);
- The period for holding the investment fund units is increased from 5 to 10 years. If this period is not respected, the amount deducted from the taxable amount will be added to the CIT for the period in which the disposal took place, in the proportion corresponding to the missing period, plus the corresponding compensatory interest;
- SIFIDE investment funds will now have to make at least 85% of the investment (instead of the current 80%) in R&D companies within 3 years of the date of acquisition of the investment units (as opposed to the current 5 years). If this percentage is not respected, the amount proportional to the unrealised part of the investment which has been deducted from the taxable amount will be added to the CIT for the period in which the deadline is missed;
- Reduction of the period within which R&D companies must invest in R&D activities from 5 to 3 years. If they fail to respect this time limit, the amount proportional to the non-implemented part of the investment deducted from taxable income will be added to the CIT for the period in which the deadline is missed.

SIFIDE investment funds will now have to make at least 85% of the investment (instead of the 80%) in R&D companies within 3 years of the date of acquisition of the investment units (as opposed to the 5 years).

Reporting obligations

Participating entities must inform the institutions dedicated to R&D and management entities of SIFIDE investment funds in which they participate that they benefit from SIFIDE II and the amount in question that is applied. This obligation must be fulfilled by the end of the month following the filing of the Modelo 22 tax return. If this obligation is not met, the participating entities will be unable to deduct the amounts applied and they will be subject to a fine.

Investments in institutions dedicated to R&D and SIFIDE investment funds made before the date of entry into force of the amendments to the SIFIDE rules are still subject to the application of the new rules.

Temporal application of the law

The legislative amendments introduced by Law 21/2023, of 25 May, enter into force on the 26 of May 2023, despite taking effect as from 1 January 2023.

Share options, share subscription and/or share allocation plans approved before 1 January 2023 are subject to the new rules introduced by Law 21/2023, if the entity granting the plan is recognized as a start-up until 26 of may 2024, or, if it can prove it was qualified as such at the time of the approval of the plan.

Amendments to the SIFIDE II will take effect as of 1 January 2024, with the exception of investments made in institutions dedicated to R&D and SIFIDE investment funds prior to 1 January 2021, whose target R&D companies will be required to invest within three-years counting from 1 January 2023. ■