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Expert Analysis Chapter

Q&A Chapters

Portugal

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

Portugal has an extensive network of income tax treaties with 80 jurisdictions (to become 79, as Sweden has renounced the income tax treaty with Portugal with effect from 1 January 2022). Seventy-eight of these treaties are currently in force.

1.2 Do they generally follow the OECD Model Convention or another model?

As a general rule, Portugal follows the OECD Model Tax Convention on Income and on Capital. However, in specific treaties, Portugal has incorporated features of the UN Model Convention.

1.3 Has your jurisdiction signed the tax treaty MLI and deposited its instrument of ratification with the OECD?

Portugal signed the MLI on 7 June 2017 and deposited the instrument of ratification on 28 February 2020.

1.4 Do they generally incorporate anti-abuse rules?

Double taxation treaties ("DTTs") entered into by Portugal generally provide for anti-abuse rules that restrict treaty benefits; for example, limitation on benefits and anti-treaty shopping provisions.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Under the Portuguese Constitution and pursuant to Portuguese case law, international treaties override ordinary non-constitutional domestic laws. Therefore, the provisions contained in tax treaties prevail over previous domestic laws and cannot be overridden by subsequent domestic provisions.

1.6 What is the test in domestic law for determining the residence of a company? Has the application of the test been modified in response to COVID-19?

To qualify as a resident, a company must have its legal seat or its place of effective management in Portugal. The place of effective management is mainly understood as the place where the key management and commercial decisions necessary for the conduct of the company's business are made.

The tax measures implemented in the context of the COVID-19 pandemic have not changed these provisions.

1.7 Is your jurisdiction's tax authority expected to revisit the status of dual resident companies in cases where the MLI changes the treaty "tiebreaker"?

Portugal reserves the right for the entirety of Article 4 not to apply to the tax agreements it covers.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

Stamp Duty is levied, at percentage or lump-sum rates, on events listed in the general stamp tax table which are deemed to occur in Portugal and are not subject to VAT, such as: (i) acquisition of real estate assets; (ii) financing operations; (iii) guarantees; and (iv) other taxable events listed in the general stamp tax table.

2.2 Do you have Value Added Tax (VAT), or a similar tax? If so, at what rate or rates? Please note any rate reduction in response to COVID-19.

Portugal has VAT in line with the model set out in the EU VAT Directive. The VAT rates in mainland Portugal are the standard rate of 23%, the intermediate rate of 13% and the reduced rate of 6%. The reduced rate applies to basic necessities listed in Appendix 1 of the VAT Code.

The VAT rates in the Azores are the standard rate of 16%, the intermediate rate of 9% and the reduced rate of 4%. The VAT rates in Madeira are the standard rate of 22%, the intermediate rate of 12% and the reduced rate of 5%.

Following the implementation of tax-related measures in the context of the COVID-19 pandemic, the reduced VAT rate now applies to respiratory protective masks and skin disinfectant gel.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

In general terms, VAT is charged on all transfers of goods and supplies of services deemed located in Portugal.

However, the VAT Code provides for two types of exemptions: (i) exemptions with a right to deduct input VAT; and (ii) exemptions without the right of deduction.

The exemption with deduction for input tax (total exemption) applies to zero-rated transactions. These include, subject to certain conditions:

- exports of goods;
- intra-EU supplies of goods;
- provisions of services consisting of work on movable assets returned to a third country;
- transport of goods and services directly related to import and export of goods;
- the importation and supply of certain ships and aircraft;
- the chartering of certain ships and aircraft; and
- services connected with the transport of persons across the Portuguese border.

Exemption without deduction (partial exemption) applies to non-taxable transactions. The most relevant exemptions include:

- finance and insurance transactions;
- activities relating to shares, bonds and other securities not representing merchandise;
- management of mutual funds; and
- immovable property transactions.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Under the Portuguese VAT Code, specific input VAT relating to certain taxable operations, such as meals, beverages, fuel, accommodation, entertainment, etc., will not be deductible, even if those operations are connected with VATable transactions.

Moreover, the input VAT directly linked to output supplies of goods and services exempt from VAT is not deductible. However, input VAT partly linked to VATable transactions may be deductible under the *pro rata* or direct allocation methods.

2.5 Does your jurisdiction permit VAT grouping? If so, how does this apply where a company in one jurisdiction has an establishment in another?

The Portuguese VAT Code does not provide for a VAT group regime.

2.6 Are there any other noteworthy transaction taxes or indirect taxes that are payable by companies?

The acquisition of immovable property located in Portugal is subject to Real Estate Transfer Tax ("RETT"). Other transactions involving real estate may also trigger RETT, such as the acquisition of 75% or more of the share capital of limited liability companies owning real estate, under certain conditions.

Rates vary between 5% and 7.5%, calculated on the declared value of the sale, or the property's tax value, whichever is higher. A 10% rate applies if the purchaser, or the entity that directly or indirectly controls the purchaser, is resident in a blacklisted jurisdiction.

2.7 Are there any other indirect taxes of which we should be aware?

Excise duties are levied on ethyl alcohol and alcoholic drinks, soft drinks, manufactured tobacco, petrol and petrol products.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Dividends paid to non-residents without a permanent establishment in Portugal are subject to a 25% withholding tax. Reduced rates may apply depending on the specific DTT.

A withholding tax exemption may apply pursuant to Council Directive 2011/96/EU (the Parent/Subsidiary Directive).

The rate is 35% if the dividends are paid or made available to the accounts of one or more taxpayers held on behalf of unidentified third parties or if they are obtained by entities which are resident in a blacklisted jurisdiction.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalty payments to non-residents without a permanent establishment in Portugal are subject to a final withholding tax at the rate of 25%. Reduced rates may apply depending on the specific DTT.

A withholding tax exemption may apply pursuant to Council Directive 2003/49/CE (the Interest & Royalties Directive).

The withholding tax rate is 35% if the royalties are paid or made available to the accounts of one or more taxpayers held on behalf of unidentified third parties or if they are obtained by entities resident in a blacklisted jurisdiction.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Interest payments to non-residents without a permanent establishment in Portugal are normally subject to a final withholding tax at the rate of 25%. Reduced rates may apply depending on the specific DTT.

The withholding tax rate is 35% if the interest is paid or made available to the accounts of one or more taxpayers held on behalf of unidentified third parties or obtained by entities resident in a blacklisted jurisdiction.

A withholding tax exemption may apply pursuant to the Interest & Royalties Directive.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Portuguese legislation does not have thin capitalisation rules, but it does limit the deductibility of financing expenses.

The earning stripping rule limits the deductibility of net financial expenses to the higher of the following amounts: (i) €1 million; or (ii) 30% of EBITDA.

If these thresholds are exceeded, the expenses considered as excessive may be deductible in the following five tax years.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Please refer to question 3.4.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The limitations mentioned in question 3.4 apply to debt advanced by both related and unrelated parties.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Interest on shareholder loans and other compensation regarding contributions made to the company are not deductible if the applicable rate exceeds the combined interest rate of the Euribor 12-month reference rate on the day of issuing of the debt, rounded up with a spread of 2% (or 6% if the borrower qualifies as a small or medium-sized company).

Furthermore, rules designed to neutralise the effects of hybrid mismatches may limit the deductibility of interest payments.

3.8 Is there any withholding tax on property rental payments made to non-residents?

Property rental payments will be subject to withholding tax at the rate of 25%.

3.9 Does your jurisdiction have transfer pricing rules?

Yes. Companies with an annual turnover exceeding €10 million in the preceding year are required to prepare transfer pricing documentation that must be organised by the 15th day of the 7th month after the closing of the tax year to which the transactions relate.

Notwithstanding, this reporting obligation will not cover transactions between related parties whose value in the relevant tax year did not exceed, per counterparty, €100,000 and, as a whole, €500,000 (considering the respective price market).

3.10 Can companies in your jurisdiction obtain unilateral, bilateral or multilateral advance pricing agreements?

Companies may request the signing of an agreement before the Portuguese Tax Authority with the purpose of determining their future transfer pricing policy.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

The general Corporate Income Tax ("CIT") rate is 21%. Municipalities may also impose a surtax capped at the rate of 1.5%.

In addition, a state surtax may be applicable at the rates of: 3% for the part of taxable profits comprised between €1.5 million and €7.5 million; 5% for the part of taxable profits between €7.5 million and €35 million; and 9% for taxable profits exceeding €35 million.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

The tax base accounting profit may be subject to negative and positive adjustments to calculate the taxable profit.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments are for non-deductible expenses, such as CIT and other taxes levied on profits, including autonomous taxation, undocumented expenses, unaccepted depreciation and impairment losses, among others.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Special rules to determine the taxable base of a group have been in effect since 2001. These rules provide that that the profits of the parent company are calculated on the basis of the sum of the taxable profits and tax losses as determined in the returns of each Portuguese-based subsidiaries belonging to the group. The controlling company must hold at least 75% of the subsidiaries' share capital, provided that it confers more than 50% of the voting rights and that the holding is maintained for more than one year with reference to the date at which the tax grouping rules start to apply.

4.5 Do tax losses survive a change of ownership?

Tax losses ascertained in a given tax year are deducted from the taxable profit of one or more of the five subsequent years (up to 12 years for small and medium-sized companies).

However, this deduction will no longer apply if, by the end of the tax year in which the deduction is to be made, a change in ownership of more than 50% of the share capital or majority of the voting rights occurs (with reference to the tax year to which the tax losses relate) – some exceptions may be applicable.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No, the general CIT rate of 21% will still be applicable.

In any case, special tax rules for small and medium-sized companies provide that retained profits (capped at 10%) may be deducted from the CIT due if they are reinvested within four years of the end of the tax year in which they were obtained, in the acquisition of specific assets, up to a maximum annual deduction of 25%.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

The holding of plots or buildings (ownership or enjoyment of property) located in Portugal by a company is subject to municipal property tax ("IMI").

IMI is levied on the property's fiscal value, as follows:

- for agricultural land and holdings ("rural properties"), at the rate of 0.8%;
- for non-agricultural land and holdings ("urban properties"), the rate can vary between 0.3% and 0.45% (municipalities decide the rate applicable for each year); and
- for urban and rural properties held by residents of a listed tax haven or by entities dominated or controlled, directly or indirectly, by entities subject to a more favourable tax regime, as listed in Ministerial Order 150/2004, the rate is 7.5%.

Furthermore, a surcharge on the municipal property tax is levied on the sum of the official tax value of the properties held by a company (ownership or enjoyment of property).

After applying the relevant deductions, when applicable, a rate of 0.4% for corporate persons and 0.7% for individuals and undivided inheritances will be applied to the taxable amount determined.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

There is no special set of rules for taxing capital gains or losses in Portugal. Worldwide capital gains are generally included in ordinary income of resident companies and subject to the general CIT rate.

Capital gains are calculated based on the difference between the selling price (after deducting inherent costs associated with the sale) and the adjusted acquisition value, which is calculated by applying a monetary devaluation indexation coefficient for the year of acquisition, less any write-down deduction for impairment losses, depreciation and amortisation.

5.2 Is there a participation exemption for capital gains?

Capital gains derived by a Portuguese resident company on the sale of shares are exempt provided the following conditions are met: (i) the taxpayer directly or indirectly holds at least 10% of the share capital or voting rights in the entity from which the shares are transferred; (ii) the shares are held for a consecutive period of at least one year; (iii) the entity is not covered by the tax transparency rules (i.e., the imputation of profits occurs either to individual or corporate shareholders); (iv) the entity from which the shares are transferred is not resident in a blacklisted jurisdiction; (v) the assets of the entity from which the shares are transferred are not directly or indirectly comprised more than 50% by real estate located in Portugal; and (vi) the taxpayer is subject to and not exempt from a tax comparable to the Portuguese CIT at a rate not falling below 60% of the Portuguese CIT rate (12.6%).

5.3 Is there any special relief for reinvestment?

Under the reinvestment relief mechanism, 50% of the positive difference between capital gains and capital losses that arise from fixed tangible assets, investment properties and non-consumable biological assets, held for a period of at least one year, can be excluded from taxation provided the total amount of the sale proceeds is reinvested either in the year preceding the disposal, in the year of disposal or within a two-year period following the year of disposal, in the acquisition, production or construction of similar business assets (excluding second-hand assets acquired from related parties that are held for at least one year from the final period of the tax period in which the reinvestment was made).

If only part of the consideration is reinvested, only the corresponding part of the gain qualifies for the relief.

According to Law 21/2021, of 20 April, the reinvestment period mentioned above has been suspended during FY2020 and FY2021.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Capital gains earned in Portugal by non-resident corporate entities are subject to a 25% flat tax rate.

Capital gains derived from the disposal of shares or other corporate rights and securities may benefit from a domestic tax exemption provided they are derived by a non-resident without a permanent establishment in Portugal, if the following requirements are met: (i) the seller is not owned, directly or indirectly, more than 25% by a Portuguese resident company/individual or the seller is not a resident in a blacklisted jurisdiction; and (ii) the gains derived do not relate to shares or corporate rights in resident companies whose assets are directly or indirectly comprised more than 50% by real estate located in Portugal.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

No tax would be imposed upon the incorporation of a subsidiary of a non-resident company in Portugal.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

The profits of a Portuguese branch or subsidiary are taxed on the same basis as corporate profits.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

In general, a domestic branch's profits are taxed under the same taxation rules applicable to companies with their head office or place of effective management in Portugal.

The taxable profits of a permanent establishment ("PE") in Portugal of a non-resident company also includes income derived from the sale of goods and services made by that company to natural or legal persons that are tax residents in Portugal, provided the goods and services in question are allocated to the permanent establishment.

6.4 Would a branch benefit from double tax relief in its jurisdiction?

Taxes paid abroad can be offset against the corresponding Portuguese tax capped at the lower of (i) the tax liability corresponding to the foreign income, net foreign costs directly or indirectly incurred, or (ii) the foreign tax paid. The calculation of the amount of the tax credit is assessed individually in relation to income obtained by foreign PEs.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Income remitted by a Portuguese branch to the foreign head office is not subject to taxation in Portugal.

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Portugal taxes profits earned in overseas branches as CIT levied on worldwide income. There is an optional regime to exclude from taxation the profits and losses of foreign PE provided (i) the profit allocated to that PE is subject to and not exempt from a tax provided for in Article 2 of the EU Parent/Subsidiary

Directive (Council Directive 2011/96/EU), or a tax similar to the Portuguese CIT where the legal rate is at least 60% of the standard CIT rate, and (ii) the PE is not located in a blacklisted jurisdiction.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Inbound dividends are subject to the standard CIT rates. An exemption may be available under the participation exemption regime provided the following requirements are met: (i) the Portuguese shareholder holds, directly or indirectly, a minimum of 10% of the capital or voting rights of the distributing subsidiary; (ii) this participation has been held uninterruptedly during the year preceding the distribution or, if it has been held for a shorter period, is maintained for the time necessary to complete that period; (iii) the Portuguese shareholder is not taxed under the tax transparency rules; (iv) the distributing subsidiary is subject to and not exempt from CIT or, if an EU resident, from a tax mentioned under Article 2 of the EU Parent/Subsidiary Directive or, if resident outside the EU, from a tax similar to the CIT and the rate applicable is not below 60% of the Portuguese CIT (i.e., 12.6%); and (v) the distributing company is not resident in a blacklisted jurisdiction.

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Pursuant to the Portuguese CFC rules, undistributed profits or income derived by a controlled company (i.e., an entity resident in a blacklisted jurisdiction or in a jurisdiction where it is subject to an effective taxation below 50% of the taxation that would have been applied if it was resident for tax purposes in Portugal) will be attributed to the Portuguese shareholder in the tax period in which the tax year of the controlled company ends provided it holds, directly or indirectly, at least 25% of the share capital, voting rights or rights on income or assets of that entity. Upon distribution of the profits, a deduction is available for previously imputed income.

CFC rules do not apply if the CFC is resident in another EU country or in an EEA Member State (bound by administrative cooperation in tax matters) provided there are valid economic reasons underlying the incorporation and running of the company and it engages in agricultural, commercial, industrial or services activities.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Non-residents are taxed on the transfer for consideration of real estate located in Portugal. The municipal property transfer tax ("IMT") is owed by the acquirer of the real estate and is levied at rates varying from 5% to 7.5% (or 10% if the acquirer is resident in a blacklisted jurisdiction or is directly or indirectly owned by an entity domiciled in a blacklisted jurisdiction) on the official tax value or the price agreed upon by the contracting parties, whichever is higher.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

The acquisition of shares in collective, limited partnership or limited liability companies (*sociedade por quotas* and *sociedades anónimas*) is included in the concept of transfer of immovable property and is therefore subject to property transfer tax provided the following requirements are all met: (i) the asset value of the entity from which the shares are transferred is directly or indirectly constituted of more than 50% of real estate located in Portugal, either taking into consideration the balance sheet value or the official tax value, whichever is higher; (ii) the real estate is not directly connected to an activity of an agricultural, industrial or commercial nature, excluding the purchase and sale of real estate; and (iii) by that acquisition, by amortisation or any other facts, one of the partners becomes the owner of at least 75% of the share capital of such company.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

Portuguese REITs ("SIGIs" – *sociedades de investimento e gestão imobiliária*) are joint-stock companies with a minimum share capital of €5 million. SIGIs are subject to a 21% CIT rate as a general rule. However, investment income, rental income and capital gains are not subject to CIT. Income from profit distributions is subject to withholding tax at a final 10% rate for non-resident investors and 25% and 28% for resident entities and resident individuals, respectively. Income or gains arising from distributions, share redemption and sale and purchase of shares are deemed to derive from immovable property located in Portugal, so Portugal may retain its taxing rights under the relevant DTTs.

Portuguese REITs will also be subject to Stamp Duty on a quarterly basis at a rate of 0.0125% applicable on the net asset value.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

A general anti-avoidance rule ("GAAR") is in force and, under this rule, the Portuguese Tax Authority may disregard an arrangement or series of arrangements which, having been put in place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, is not genuine or has been carried out with abuse of legal forms, having regard to all relevant facts or circumstances. As a result of the application of the GAAR, such arrangements or series of arrangements would be taxed in accordance with the rules applicable to transactions or acts that correspond to the substance or economic reality, without producing the tax advantages sought by the taxpayer with the structure implemented.

9.2 Is there a requirement to make special disclosure of avoidance schemes or transactions that meet hallmarks associated with cross-border tax planning?

Council Directive 2018/822 of 25 May 2018, amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation ("DAC 6"), has been incorporated into Portuguese law. This introduced an obligation to communicate to the Portuguese Tax Authority certain transactions with tax relevance in purely domestic or cross-border situations. DAC 6 introduced the mandatory disclosure rules which require intermediaries or taxpayers to disclose information in relation to reportable arrangements (domestic and cross-border) containing one or more of a prescribed list "hallmarks".

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

Please refer to the answer to question 9.2.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

No, this is not encouraged in Portugal.

9.5 Are there rules requiring special disclosure where a company is taking a position on a tax issue that is uncertain (open to dispute from a technical perspective)?

There are no such rules requiring special disclosure.

10 BEPS, Tax Competition and the Digital Economy

10.1 Has your jurisdiction implemented the OECD's recommendations that came out of the BEPS project?

Portugal implemented the following BEPS Actions: 1, 3, 4, 5, 6, 7, 8–10, 12, 13, 14 and 15.

Portugal only partially implemented Action 2 regarding hybrids pursuant to the implementation of ATAD I and II as the rules on reverse hybrids will only be applicable as from 1 January 2022.

10.2 Has your jurisdiction adopted any legislation to tackle BEPS which goes beyond the OECD's recommendations?

In general, no legislation has been adopted by Portugal which goes beyond the BEPS recommendations. However, the Portuguese Budget Law for 2021 included a form of Services PE which deviates from the OECD standard and follows the United Nations Model Tax Convention. Furthermore, the Agency PE definition was also changed to include a person who is acting in Portugal on behalf of a foreign enterprise which plays a role leading to the conclusion of contracts therefore dismissing the "principal role" provided for in BEPS Action 7.

Moreover, a new patent box incentive was recently implemented, following the BEPS Action 5 "modified nexus" approach but including measures that went beyond the BEPS Action 5 recommendations.

10.3 Does your jurisdiction support information obtained under Country-by-Country Reporting (CBCR) being made available to the public?

On 25 February 2021, the Portuguese EU Council Presidency achieved political consensus on an informal videoconference call attended by Internal Market and Industry Ministers to propose a public CBCR.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

The patent box provides for a partial exemption (50%) of CIT on the profits derived from both the licensing and sale of companies exploiting patented inventions and other innovations such as models and industrial designs protected by intellectual property rights acquired after 1 January 2014.

Other preferential tax arrangements exist, such as the tax incentives system for entrepreneurial research development ("SIFIDE"), the tax regime for investment support ("RFAI"), contractual tax incentives, the rules applicable to Portuguese investment funds and the rules on conventional remuneration of share capital.

10.5 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

No unilateral actions were taken by Portugal to tax digital activities or to capture digital presence.

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