The Inward Investment and International Taxation Review

Eleventh Edition

Editor
Tim Sanders

The Law Reviews

© 2021 Law Business Research Ltd

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

ELEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Tim Sanders

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Helen Sou

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at January 2021, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-797-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

ADVOKATFIRMAET GRETTE AS

ÆLEX

AFRIDI & ANGELL

ALLENDE BASCUÑÁN & CÍA

ANDERSON MŌRI & TOMOTSUNE

BAE, KIM & LEE LLC

BAKER MCKENZIE

BIRD & BIRD ADVOKAT KB

CETINKAYA

CUVAL ABOGADOS

DAVIES WARD PHILLIPS & VINEBERG LLP

DELOITTE IMPUESTOS Y SERVICIOS LEGALES, SC (DELOITTE MEXICO)

DLA PIPER NEDERLAND NV

FOGLIA & PARTNERS

GAIA SILVA GAEDE ADVOGADOS

GORRISSEN FEDERSPIEL

HERBERT SMITH FREEHILLS CIS LLP

ISIDORA & COMPANY

KPMG

LENZ & STAEHELIN

LOYENS & LOEFF

© 2021 Law Business Research Ltd

MOCHTAR KARUWIN KOMAR

PATRIKIOS PAVLOU & ASSOCIATES LLC

PHH TAX

QUEVEDO & PONCE

ROCA JUNYENT

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

SRS ADVOGADOS

WOLF THEISS

© 2021 Law Business Research Ltd

CONTENTS

PREFACE.......... vii
Tim Sanders

Chapter 1 THE CONTINUING CHALLENGES OF TAXING THE DIGITALISED ECONOMY: AN INTRODUCTION.......... 1
Alex Jupp, Joshua Atkinson and Alex Rigby

Chapter 2 AUSTRIA.......... 16
Andreas Baumann and Karin Spindler-Simader

Chapter 3 BELGIUM.......... 27
Christian Chéruy and Marc Dhaene

Chapter 4 BRAZIL.......... 53
Maurício Barros

Chapter 5 CANADA.......... 67
Julie Colden

Chapter 6 CHILE.......... 83
Francisco Javier Allende D and Mauricio Carloza C

Chapter 7 COLOMBIA.......... 96
Benjamin Cubides

Chapter 8 CYPRUS.......... 109
Stella Strati

Chapter 9 DENMARK.......... 121
Jakob Skaadstrup Andersen

Chapter 10 ECUADOR.......... 136
Alejandro Ponce Martínez

© 2021 Law Business Research Ltd

Chapter 11 HONG KONG 151
Steven Sieker and Wenwen Chai

Chapter 12 HUNGARY..165
János Pásztor, Alexandra Tőth and Bence Kálmán

Chapter 13 INDONESIA..177
Mulyana, Sumanti Disca Ferli, Bobby Christianto Manurung, Ratna Mariana and Astrid Emmeline Kohar

Chapter 14 ITALY 196
Giuliano Foglia

Chapter 15 JAPAN 212
Kei Sasaki, Kohei Kajiwara and Yoshiko Nakamura

Chapter 16 LEBANON 229
Simon El Kai, Souraya Machnouk, Hachem El Housseini and Nour El Haddad

Chapter 17 LUXEMBOURG..243
Pieter Stalman and Delphine Martel

Chapter 18 MALTA..266
Juanita Brockdorff and Michail Tegos

Chapter 19 MEXICO 281
Eduardo Barrón

Chapter 20 NETHERLANDS 305
Jian-Cheng Ku and Rhys Bane

Chapter 21 NIGERIA..319
Theophilus I Emuwa, Chinyerugo Ugoji, Jibrin Dasun and Temiloluwa Oladele

Chapter 22 NORWAY..332
Anders Nordli and Kari-Ann Mosti

Chapter 23 PORTUGAL..347
Mafalda Alves

© 2021 Law Business Research Ltd

Chapter 24 RUSSIA 363
Oleg Konnov and Sergei Eremin

Chapter 25 SOUTH KOREA 377
Sungdoo Jang and Maria Chang

Chapter 26 SPAIN..391
Raúl Salas Lúcia, Elena Ferrer-Sama, Pilar Vacas Barreda and Javier de Diego de Mingo

Chapter 27 SWEDEN..409
Carl-Magnus Uggla

Chapter 28 SWITZERLAND 423
Frédéric Neukomm and Floran Ponce

Chapter 29 TAIWAN 436
Dennis Lee and Michael Wong

Chapter 30 TANZANIA..447
Paul Kibuuka

Chapter 31 THAILAND 457
Panya Sittisakonsin and Sirirasi Gobpradit

Chapter 32 TURKEY..471
Oytun Canyas, Orcun Cetinkaya and Bengisu Incikli

Chapter 33 UNITED ARAB EMIRATES 487
Silvia A Pretorius

Chapter 34 UNITED KINGDOM 505
Tim Sanders

Chapter 35 UNITED STATES 532
Moshe Spinowitz, Robert C Stevenson and Leonard I Greenberg

Chapter 36 VIETNAM..556
Fred Burke and Thanh Vinh Nguyen

Appendix 1 ABOUT THE AUTHORS..571
Appendix 2 CONTRIBUTORS' CONTACT DETAILS..595

© 2021 Law Business Research Ltd

PREFACE

This edition has been revised to describe domestic tax changes that have occurred in each jurisdiction since the last edition, including those made, and proposed, in response to the covid-19 pandemic. Where appropriate, the contributors also update the progress made in their respective jurisdictions in implementing laws to comply with the Base Erosion and Profit Shifting (BEPS) Actions.

The pandemic's economic impact has been profound, and while temporary reliefs have been introduced in many countries, and are described, at this stage it is unclear how countries will change their tax laws in the longer term and balance the need to recover the enormous costs of the pandemic with the desire to stimulate economic growth in contracting economies. How this conflict will evolve and be resolved seems likely to be the major tax story of 2021. This preface will make some tentative observations in this area.

As will be seen from the chapters herein, in 2020, countries continued to implement changes to their domestic laws to comply with BEPS Actions notably in respect of hybrid entities and instruments, controlled foreign companies and transfer pricing. One key area highlighted last year, which has progressed in 2020, is the taxation of the digital economy. In October 2020, the OECD published two blueprints and launched a public consultation as part of its work on the taxation of the digital economy. These blueprints are key developments in the international conversation on the challenges of taxing the digital economy. However, although the OECD has progressed efforts in 2020 to find a consensus, many countries, frustrated by the lack of concrete law, are progressing their own unilateral measures to tax the digital economy. For example, Spain's 'Google Tax' is due to come into force on 16 January 2021 and the United Kingdom has already introduced a Digital Services Tax. Pressure for unilateral action is likely to increase as countries look for new tax sources to recover revenue spent on fighting covid-19. Potentially taxation of digital companies allows many economies to raise material amounts of tax revenue without an adverse economic impact on the recovery in their own jurisdictions, where the digital taxpayers often have minimal presence and pay little tax. However, that analysis must factor in whether the US, that has most to lose (as many of the largest digital companies are US-based), will take retaliatory action. The previous political regime showed that it is willing to impose tariffs on goods imported from countries that unilaterally impose a digital tax. This is an area to watch carefully in 2021. The increased pressure to tax the digital economy because of the covid-19 pandemic has been acknowledged by the OECD, with the OECD Secretary-General stating on an online press conference on 12 October 2020 that digital businesses that are thriving during the pandemic would 'be the targets' of countries looking for resources to 'make ends meet'.

Many countries have introduced packages of short-term tax measures to help businesses and individuals through the pandemic. These may comprise deferring tax payments and

© 2021 Law Business Research Ltd

extending filing deadlines, to subsidies such as those afforded to businesses that furloughed staff and measures allowing more generous loss carry-back. The question countries must face in 2021 is how long they can afford to provide these short-term reliefs and what will replace them. There is a lot of pressure to help certain sectors particularly hard hit by the pandemic such as tourism and hospitality and, for example, Austria's reduction in VAT to 5 per cent on restaurants, and admission to cultural events for 2021 is the sort of measure one might expect to be introduced elsewhere.

The wider question is how countries can reconcile the desire to provide economic support and stimulus for growth after the pandemic with the need to recover the budget deficit caused by covid-19 pandemic-related costs: how to raise additional tax from shrinking economies, without stifling any recovery. As referred to above, one obvious target is to tax the digital economy; another possible avenue is to introduce measures that encourage inward investment. It is also likely that in the drive to increase tax revenues, many tax authorities will take a far more aggressive and proactive approach to recover tax and penalties from tax payers regarded as non-compliant or participating in perceived tax avoidance. However, it would be naïve to imagine that these sorts of measures alone will be enough and even if one factors in tax changes in areas such as personal capital taxes, it seems likely that some increase in business and personal income taxes will be needed.

How US tax reform in 2021, post the presidential election, evolves is another factor likely to impact the wider tax landscape and is an area that needs to be kept under review.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
London
January 2021

© 2021 Law Business Research Ltd

Chapter 23

PORTUGAL

Mafalda Alves[1]

I INTRODUCTION

Why is Portugal a top choice for foreign investors? Portugal has put into place important strategies to stimulate its economy, focusing on key sectors such as high-tech industries, R&D, renewable energy, tourism and real estate. The significant reduction of bureaucracy involved in the investment process, a high-skilled labour force and a modern and very attractive tax system have taken foreign investment in Portugal to the next level.

The Portuguese tax system surpasses other regimes in many ways, both for companies and individuals, being one of the most attractive regimes in Europe.

Companies benefit from a participation exemption regime on capital gains and dividends, applicable to both EU and non-EU countries that also benefit from a wide network of double tax treaties (about 80), including treaties with Malta, Luxembourg and Hong Kong, as well as from several investment protection agreements, namely with Portuguese-language countries, which ensures the efficiency of cross-border transactions.

The non-habitual resident's regime applicable to individuals establishes a 20 per cent tax rate for certain Portuguese employment and self-employment sourced income, as well as a tax exemption for most foreign sourced income. The cherry on top? Inheritance tax does not apply to spouses and direct relatives and wealth tax does not apply in Portugal.

We believe it should not be a surprise that Portugal has become a top choice for foreign companies and high net worth individuals.[2]

II DOING BUSINESS IN PORTUGAL – CORPORATE LAW

i Corporate entities

There are different forms for establishing a business in Portugal, from sole trader to several types of companies, as defined in the Companies Code.

Five types of entities are listed in the Companies Code:

a partnerships;
b private limited companies;
c single-member private limited companies;
d public limited liability companies; and
e limited partnerships (simple or limited by shares).

1 Mafalda Alves is a tax partner at SRS Advogados.
2 The information provided herein has not been updated concerning the state budget for 2021.

© 2021 Law Business Research Ltd

The two most commonly used are private limited companies and public limited liability companies. Choosing one of these business entities depends on several factors: the simplicity level, both in terms of structure and operation or the minimum amount of paid-in capital required.

In a public limited liability company, the liability of each shareholder is limited to the value of his or her shareholding. The minimum number of shareholders for the incorporation is five, and the capital is divided into shares. Bearer shares have not been allowed since 2017.

Private limited companies are the most common type in Portugal, especially for small and medium-sized companies, given their great flexibility.

ii Non-corporate entities

A tax transparency regime applies to certain resident entities: (1) civil law companies not incorporated in a commercial form; (2) incorporated firms of professionals; and (3) holding companies the equity of that is controlled, directly or indirectly, for more than 183 days, by a family group or a limited number of members.

A fiscal transparency regime also applies to complementary business groupings (ACEs) and European economic interest groupings treated as resident in Portugal.

III DOING BUSINESS IN PORTUGAL – TAX REGIME

i Tax on profits

Determination of taxable profit

Resident companies' taxable profit is calculated on the basis of accounting income adjusted according to specific rules contained in the Portuguese tax legislation.

Business expenses are generally tax-deductible provided that they are incurred in generating taxable profits or deemed essential for maintaining the structure of the company. Nonetheless, some expenses are not deductible for purposes of computing taxable profits, even if accounted for as costs or losses in the relevant accounting period. That is the case, for example, of the following items:

a corporate income tax (CIT) paid;
b compensation paid in respect of insurable events;
c daily expense or allowances and payments relating to an employee's travel using his or her own car, under certain circumstances;
d excessive depreciation and accounting provisions; and
e interest and other forms of remuneration from shareholder loans exceeding certain limits.

Intangible assets without a fixed life cycle acquired on or after 1 January 2014 may be depreciated over a 20-year period (5 per cent per year) counted from the initial recording of the asset in the company's books.

Capital and income

The CIT Code adopts a wide definition of taxable income. Capital gains are treated as ordinary business profits and taxed accordingly.

© 2021 Law Business Research Ltd

Capital gains and capital losses on the sale of a company's assets are computed as the difference between the proceeds of disposal, net of related expenditure, and the acquisition cost, reduced by any depreciation claimed. However, capital gains may be exempt from tax (capital losses may not be deducted) under the participation exemption regime (see below).

Only 50 per cent of the difference between capital gains and losses are taken into account if, in the year prior to the disposal or before the end of the second following year, the proceeds are reinvested in the acquisition, manufacture or construction of tangible fixed assets or non-consumable biological assets, except for second-hand assets acquired from related parties.

Losses

Tax losses may be carried forward for five years (tax losses registered by entities qualifying as small and medium-sized enterprises, as provided by Decree Law 372/2007, of 6 November, may be carried forward for 12 years). In any case, the deduction is limited to 70 per cent of the taxable profit assessed in the relevant tax year.

Losses carried forward may be lost if, between the tax year in which the losses were suffered and the year in which they are used, 50 per cent (or more) of its share capital is transferred to different shareholders.

The pandemic crisis of 2020 brought a specific decision in this matter. Tax losses assessed in 2020 and 2021 may be carried forward for 10 years and the deduction limit regarding these losses is of 80 per cent of the taxable profit assessed in the relevant tax year. 2020 and 2021 will not be considered in the carry-forward of fiscal losses accrued up to 1 of January 2020.

Rates

The regular CIT rate applicable to resident companies in Portugal is 21 per cent. The tax rate applicable to the first €25,000 of the taxable income of taxpayers qualifying as small and medium-sized enterprises, as provided by EU Commission Recommendation 2003/361/EC, is 17 per cent. A municipal surcharge is levied in addition to CIT in most municipalities at a rate of up to 1.5 per cent of taxable income.

Corporate taxpayers with taxable income of more than €1.5 million are also subject to a state surcharge of 3 per cent. The surcharge increases to 5 per cent for taxable income exceeding €7.5 million, and to 9 per cent for taxable profits in excess of €35 million.

Administration

Filing tax returns

CIT assessment returns must be filed by Portuguese-resident entities and permanent establishments of non-resident companies and submitted by 31 May following the end of the calendar year, or five months after the authorised year-end if the company's tax year does not follow the calendar year. An annual return containing simplified corporate information must also be filed by 15 July or by the 15th day of the seventh month following the end of the tax year.

In this matter, as in other fiscal deadlines, the Portuguese government authorised specific delays for the fiscal year 2020 because of the pandemic crisis.

Following Organisation for Economic Co-operation and Development (OECD) recommendations under the base erosion and profit shifting (BEPS) Action Plan, ultimate

© 2021 Law Business Research Ltd

parent entities or other reporting entities of multinational groups of companies that register turnover higher than €750 million are required to complete and file a country-by-country report. Entities with tax residency in Portugal integrating a multinational group of companies, subject to the country-by-country report obligation must also communicate to the Portuguese tax authorities by electronic means which entity constitutes the reporting entity of the group, the respective tax jurisdiction, its tax identification number and address.

Taxable persons liable to CIT and their representatives must also file statements in respect of registrations, changes or cancellations on the taxable persons' registry, and are required to keep a tax documentation file in respect of each accounting period for a 10-year period containing all accounting and tax information.

Tax authorities

Taxes in Portugal are administered by the Portuguese Tax and Customs Authority, which is organised as a vertical structure integrated into the Ministry of Finance and divided into two main services: the Directorate General for Taxation and the Directorate General for Customs and Excise Taxes.

The Tax Authority has competence to carry out tax audit procedures, make additional and late interest tax assessments, and impose penalties and fines on non-compliant taxpayers.

Advance rulings

Taxpayers may request advance rulings regarding their tax affairs, including their eligibility for tax benefits. When advance rulings are issued, the tax authorities may not derogate from such rulings in relation to the taxpayers that requested it, except pursuant to court decisions.

Subject to the payment of a fee, advance rulings may be provided urgently (within 75 days), provided that such request is accompanied by a tax framework proposal. The proposed tax framework and the facts to which the urgent request for an advance ruling relates are considered tacitly sanctioned by the tax authorities if the request is not answered within 75 days.

Non-urgent rulings are delivered within 150 days.

Apart from the advance ruling regime, a taxpayer and the Portuguese Tax Authority may negotiate advance pricing agreements on transfer pricing issues. The OECD Transfer Pricing Guidance from February 2020 should also be considered here.

Means of appeal

Following a tax audit, the taxpayer is allowed to challenge an additional tax assessment made by the tax authorities, either by means of an administrative claim submitted to the tax authorities, or through a judicial or arbitration appeal to the tax courts or to the tax arbitration court.

Decisions of the tax courts may be appealed to the Central Administrative Court of Appeal and/or to the Administrative Supreme Court.

Tax group

Portuguese-resident companies that are members of an economic group may opt to be taxed under the special group taxation regime.

The parent must hold, directly or indirectly, for a minimum one-year period, at least 75 per cent of the subsidiaries' share capital and 50 per cent of their voting rights. All

© 2021 Law Business Research Ltd

companies in the group must be tax-resident in Portugal (albeit indirectly held, through a European Union (EU) or European Economic Area (EEA) resident company) and must be subject to Portuguese CIT on their worldwide income at the standard CIT rate to benefit from this regime. This regime is also applicable if the parent company has a permanent establishment in Portugal that holds the capital of the subsidiaries, and some other cumulative conditions are met.

Entities with tax losses in the preceding three years are not eligible for this regime, except where their share capital has been held by the parent for more than two years.

ii Other relevant taxes

Value added tax (VAT)

Portuguese VAT legislation basically follows the EU common system of VAT. It applies to the supply of goods, services, intra-community acquisitions and imports into the Portuguese territory.

Any person or corporate entity that independently carries out an economic activity, or that carries out a single taxable transaction either in connection with the performance of the above-mentioned activities or that is subject to personal tax or CIT, is liable to charge VAT on every supply (of goods or services) it makes in the scope of its activities, and afterwards to deliver the due amount to the tax authorities.

There are three VAT rates: 23 per cent (standard), 13 per cent (intermediate) and 6 per cent (reduced).

In the autonomous regions of Azores and Madeira, the VAT rates are currently reduced to 18 and 22 per cent (standard), 9 and 12 per cent (intermediate), and 4 and 5 per cent (reduced), respectively.

Immovable property transfer tax (IMT)

IMT is levied on the transfer for consideration of immovable property.

The tax is payable by the purchaser, whether an individual or a company, resident or non-resident. The taxable amount corresponds to the higher of the contractual price or the tax value.

The tax due is assessed as described above at the following tax rates:

a rural property: 5 per cent;
b urban property and other acquisitions: 6.5 per cent;
c urban property for residential purposes: progressive tax rates up to 7.5 per cent; and
d rural or urban property where the purchaser is domiciled in a blacklisted jurisdiction: 10 per cent.

Municipal immovable property tax (IMI)

IMI is levied annually on immovable property located in Portugal. Tax is levied on the tax value of the property as of 31 December of each year.

The taxable value of urban property corresponds to the tax value recorded on the tax registry.

© 2021 Law Business Research Ltd

The IMI rates are as follows:

a rural property: up to 0.8 per cent;

b urban property: 0.3 to 0.45 per cent; and

c rural or urban property where the owner is domiciled in a blacklisted jurisdiction: up to 7.5 per cent.

Additional to the IMI (AIMI)

AIMI is annually due by individuals, companies and inheritances that own residential property or plots for construction located in Portugal and the taxable basis corresponds to the tax value of all above mentioned properties owed or held by each taxpayer (as at 1 January of each year).

The applicable taxable basis is deducted from the amount of €600,000 for individuals and inheritances and €1.2 million in case of married or living in non-marital partnership taxpayers, who opt to submit a joint tax return.

The applicable rates, after deductions provided, are as follows:

a individuals and inheritances: 0.7 per cent; (1 per cent on the part of the tax value ranging between €1 million and €2 million; and 1.5 per cent on the part of the tax value exceeding €2 million, regarding property held by individuals);

b companies: 0.4 per cent;[3] and

c urban properties owned by entities in blacklisted countries: 7.5 per cent.

Stamp tax

Stamp tax is levied on all acts, contracts, documents, titles, books, papers and other taxable events set out in the Stamp Tax Code that are signed or take place in Portugal, provided that they are not subject to VAT.

Loans granted to resident entities, regardless of the nature or place of resident of the lender, are generally subject to stamp tax ranging from 0.04 to 1.76 per cent, depending on the credit or loan term. A tax exemption may be granted to the following transactions provided certain requirements are met: long-term loans qualifying as suprimentos[4] for Portuguese commercial law purposes, made by the shareholder, provided that the participation exemption requirements are met (minimum participation and detention period); and short-term (less than one year) cash management loans made by parent companies to their subsidiaries.

IV TAX RESIDENCE

i Corporate residence

Companies are deemed to be resident in Portugal for tax purposes if their head office or place of effective management is located in the Portuguese territory. These two criteria are often met simultaneously, providing consistency under tax law. However, if this is not the case, the place of effective management is the decisive factor.

3 If the immovable property is used for residence purposes by the shareholders or the members of the statutory bodies of the company (or any related individuals), tax rates established for individuals shall apply.

4 A legal concept for shareholder loans with a deadline for repayment of over one year.

© 2021 Law Business Research Ltd

According to Portuguese case law, the place of effective management is defined as the place where the management decision-making takes place, and where adequate substance (regarding both people and premises) exists.

Resident companies are taxed on their worldwide income. Non-resident companies are taxed on their Portuguese-source income.

ii Branch or permanent establishment

In general terms, domestic branch profits are taxed on the same basis as corporate income. Nevertheless, there are some differences in their tax treatment (general administrative expenses incurred by the head office may be allocated to the branch, and there may be restrictions on the deductibility of certain expenses charged by the head office to the branch).

All income is included in the tax base of the permanent establishment located in the Portuguese territory, regardless of its geographical source, provided that such income is attributable to the same. All allowable items of expenditure, deductions and credits are also taken into account, regardless of the source of the income to which such items relate, provided that they are attributable to the permanent establishment.

V NON-HABITUAL RESIDENTS REGIME AND OTHER TAX INCENTIVES FOR INWARD INVESTMENT

i Special tax regime for non-habitual residents

The non-habitual residents regime is available for citizens who have become residents in Portugal for tax purposes, according to the criteria defined by the personal income tax (PIT) Code, and who have not been deemed as resident in Portugal in any of the previous five years. The non-habitual residents regime is applicable for 10 consecutive years. If a taxpayer does not meet the requirements to be considered as resident in any year within that period (thus not using the complete period), the taxpayer may continue to benefit from the regime as soon as he or she meets the requirements.

As this regime is based on effective residence in Portugal, the non-habitual resident's income will be subject to tax in Portugal on a worldwide basis. Notwithstanding this, the following will apply:

a Income obtained in Portugal from high value-added activities of a scientific, artistic or technical nature is taxed at a special rate of 20 per cent. These activities are defined in Ordinance No. 230/2019 of 23 July (which amended Ordinance No. 12/2010 of 7 January, still in force for certain cases), and include professionals such as physicians, dentists, teachers, specialists in IT, authors, journalists, creative and performing artists, engineering technicians as well as companies' general-directors and executive managers, and directors of companies that promote production investment, provided they are allocated to eligible projects and are granted tax benefits under the Investment Tax Code.

b Foreign-sourced income may be exempt from tax in Portugal, provided that some requirements are met (the exemption method for the elimination of double taxation will be applicable on income derived from foreign sources).

c Retirement pensions from abroad have an attractive regime. Providing that the requirements are met, after many years exempt, the tax flat rate is now of 10 per cent.

© 2021 Law Business Research Ltd

ii Participation exemption for dividends and capital gains

Profits and reserves distributed to Portuguese-resident companies by their subsidiaries and capital gains and losses arising from the sale of shareholdings in such subsidiaries are not subject to CIT, provided that:

a the Portuguese company holds at least 10 per cent of the share capital or voting rights of the subsidiary;

b the shares have been held for at least 12 months prior to the distribution or transfer of the shares (or if the shares are maintained for that period, in the case of distribution of profits);

c the company distributing the dividends or reserves is subject to and not exempt from Portuguese CIT, similar tax referred to in the Parent–Subsidiary Directive or similar tax provided that its applicable rate is not lower than 60 per cent of the Portuguese standard CIT rate, unless:
- at least 75 per cent of the profits derive from an agricultural, industrial or commercial activity, or from the rendering of services that are not predominantly targeted to the Portuguese market; or
- the main activity of the subsidiary does not consist in performing certain activities (including but not limited to banking operations and operations related to the insurance business);

d the company distributing the dividends or reserves, or whose capital is subject to sale, is not domiciled in a blacklisted jurisdiction; and

e the profits or reserves do not qualify as deductible costs in the distributing entity.

The exemption regime will not be applicable to capital gains or losses arising from the transfer of a shareholding in a subsidiary whose assets are composed, directly or indirectly, in more than 50 per cent, of real estate located in Portugal (purchased on or after 1 January 2014), unless these assets are allocated to an industrial, commercial or agricultural activity that does not consist of the purchase and sale of real property.

iii Patent box

Income arising from the assignment or temporary use of patents and industrial designs registered on or after 1 January 2014 may benefit from a 50 per cent exemption, provided that:

a the assignee uses the industrial property rights in a commercial, industrial or agricultural activity;

b the results obtained by the transferee from the use of the industrial property right do not consist of delivery of goods or services creating deductible costs to the original owner of the industrial property rights, or any other company integrated in the same tax group, whenever special relations are deemed to exist;

c the assignee is not resident in a blacklisted territory; and

d the accounting records of the taxpayer are organised in such a way as to allow the identification of the costs and losses directly attributable to the industrial property right subject to the assignment or temporary use.

© 2021 Law Business Research Ltd

iv General

Apart from the exemptions from withholding tax on outbound payments granted under the CIT Code (see below), there are some other notable tax incentives provided in the Portuguese Tax Benefits Statute and ancillary legislation. The following are an example of such incentives.

Madeira free zone

Companies licensed to operate under the scope of the Madeira International Business Centre benefit from extremely attractive tax benefits, such as a reduced CIT rate of 5 per cent until 2027 (except for intra-group services, financial intermediation and insurance), and exemptions from stamp duty and from property transfer tax and municipal property tax in relation to real estate located in Madeira and registered for company business use, depending on the date of the licence. Shareholders of the companies covered by the scheme, both individuals and companies, may benefit from income tax exemption on dividends and interests paid out.

Undertakings for collective investment (UCIs)

Under this regime, Portuguese UCIs only, including securities investment funds (SIFs), real estate investment funds (REIFs), securities investment companies (SICs) and real estate investment companies (REICs), are generally tax-exempt regarding dividends, interest, rental income and capital gains included in their taxable profits.

The taxation of non-resident investors will depend on the type of UCI to which the income relates.

Income arising from SIFs and SICs, including income distributed by these entities, capital gains from the disposal of units or shares, or income arising from the redemption of units, is fully exempt from tax in Portugal.

Income arising from REIFs and REICs, including income distributed by these entities, capital gains from the disposal of units or shares, or income arising from the redemption of units, is subject to a 10 per cent flat rate tax in Portugal. Following similar REITS models implemented in Europe, the Portuguese government has approved, with effect from 1 February 2019, the Decree Law 19/2019 of 28 January, which establishes the regime applicable to *Sociedades de Investimento e Gestão Imobiliária* (SIGI). SIGI, the so called 'Portuguese REITS', intends to promote real estate investment and to develop the real estate market, focusing on the letting market. SIGI will be subject to the tax regime applicable to real estate investment companies.

When more than 25 per cent of non-resident entities are directly or indirectly held by Portuguese residents, or are located in blacklisted jurisdictions, they are subject to tax on the income arising from UCIs at a rate of 25 or 35 per cent, respectively.

Capital gains realised by non-resident entities

Capital gains from the transfer of shares, warrants and other securities issued by Portuguese-resident entities and realised by non-resident entities are income tax-exempt. This exemption does not apply to the following:

a non-resident entities, at least 25 per cent of whose equity is directly or indirectly owned by resident entities (exceptions may apply depending on the tax residence and tax regime applicable to the non-resident investor);

b entities domiciled in a blacklisted territory;

© 2021 Law Business Research Ltd

c capital gains obtained from the transfer of shares in Portuguese companies more than 50 per cent of whose assets consist of real estate located in Portugal or from the sale of shareholdings in Portuguese holding companies that control Portuguese companies 50 per cent of whose assets consist of real property located in Portugal; and
d capital gains arising from the sale of shares of a non-resident company, where the value of those shares at any time in the previous 365 days resulted, directly or indirectly, in more than 50 per cent, from real estate assets located in the Portuguese territory, unless the relevant real property is allocated to an agricultural, industrial or commercial activity that does not consist in the acquisition and resale of real property.

Conventional remuneration of the share capital

Under this regime, 7 per cent of cash contributions made by the shareholders, as well as of conversions of shareholder loans made upon the incorporation or at the time of a capital increase, up to a €2 million threshold, may be deductible from the company taxable income.

Programme seed

Targeted to attract individuals' investment in start-ups, the programme allows for a deduction to the investor payable income tax (up to a limit of 40 per cent) of 25 per cent of the cash contributions. Capital gains from the sale of the start-up company shares may be excluded from taxation if the sale price is reinvested in new eligible investments.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Except in certain circumstances, most income obtained by non-resident entities in the Portuguese territory is subject to withholding tax. Income is deemed to be obtained in Portugal, as a rule, if the debtor is a resident, or has its head office or place of effective management in Portugal, or if its payment is attributable to a permanent establishment in Portugal.

The CIT withholding tax rate is generally 25 per cent.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Outbound dividends paid by Portuguese-domiciled companies are exempt from withholding tax, providing that the company receiving the dividends:

a is resident in a Member State of the EU or EEA, or a country with which Portugal has concluded a double tax treaty that includes a provision for administrative cooperation in the field of taxation similar to that existing in the EU;
b is subject to and not exempt from a tax mentioned in the EU Parent–Subsidiary Directive, or a tax that is similar to CIT tax, in other cases, provided that the applicable tax rate is not less than 60 per cent (12.6 per cent) of the CIT rate; and
c has held, directly or indirectly, for a 12-month period prior to the distribution a participation of at least 10 per cent of the share capital or voting rights of the company.

© 2021 Law Business Research Ltd

If the 12-month period is not completed, dividends paid will be subject to a 25 per cent withholding tax (which can be recovered after the completion of such period) eventually reduced under an applicable tax treaty.

Under a specific domestic anti-abuse provision (resulting from the transposition of Council Directive 2015/121/EU, of 27 January, which amended the Parent–Subsidiary Directive), withholding tax exemption on dividends is denied in case of an arrangement or series of arrangements the main purpose or one of the main purposes of which is to obtain a tax advantage that defeats the object and purpose of eliminating double taxation on profits, in case such arrangement or series of arrangements is not regarded as genuine, all facts and circumstances considered.

Interest paid by Portuguese-domiciled subsidiaries to a parent company that is a resident in an EU Member State may benefit from a withholding tax exemption under the EU Interest and Royalties Directive.

iii Double tax treaties

Portugal has entered into double taxation treaties with 80 countries to prevent double taxation.

Under these treaties, withholding tax rates on outbound dividend, interest and royalty payments are reduced provided that the beneficial owner of the income sourced in Portugal is a tax resident of the other contracting state. For a detailed list of the tax treaties in force and rates applicable to interest, royalties and dividends, see Appendix I at the end of the chapter.

Portugal is a signatory of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Under this convention, existing bilateral tax treaties are considered to be modified to include specific rules preventing the granting of treaty benefits in deemed inappropriate circumstances, notably in situations of creation of opportunities for non-taxation or treaty-shopping arrangements aimed at obtaining reliefs for the indirect benefit of residents of third jurisdictions.

The MLI has been ratified by the President of the Portuguese Republic. However, it shall enter into force on the first day of the month following the expiry of a period of three calendar months beginning on the date of the deposit of the instrument of ratification with the Secretary-General of the OECD. It has been deposited on 28 February 2020.

Therefore, the amendments introduced by the MLI to bilateral treaties became effective on 1 June 2020.

VII TAXATION OF FUNDING STRUCTURES

i Thin capitalisation

The former thin capitalisation rules were abolished in 2013 and replaced by an earnings stripping rule that limits tax deductibility of interest expenses.

Under this rule, net financial costs are only deductible up to the higher limits of €1 million or 30 per cent of the earnings before depreciations, net financing expenses and taxes.

Any exceeding financing expenses may be deductible on the following five tax years after deducting the financing expenses of each year, provided that the above-mentioned limits are not exceeded.

© 2021 Law Business Research Ltd

Furthermore, in respect of shareholder loans, deductible interest cannot exceed the 12-month Euribor rate in force on the day the loan was granted, plus a 2 per cent spread or 6 per cent spread for medium-sized enterprises. This limitation does not apply where transfer pricing rules are applicable.

ii Return of capital

Companies may return cash to shareholders by means of a dividend distribution, capital reduction, redemption of shares or liquidation (under the applicable legal limits).

A payment to shareholders in connection with a reduction of capital along with redemption of shares is regarded for tax purposes as a capital gain on any value exceeding the purchase price of the shares.

Liquidation proceeds are deemed to be capital gains or capital losses that are eligible for the participation exemption regime.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Business acquisitions are usually structured as either asset or share deals. Different tax regimes should apply to these operations.

There are various taxes that can be either levied on the acquisition of assets (property transfer tax, VAT or stamp tax) depending on the nature of the assets. However, taxable capital gains are less likely on a sale of shares.

The acquisition of shares of a public limited liability company is not subject to VAT or property transfer tax. The acquisition of shares of a private limited company by quotas, of a general partnership or of a partnership association may be subject to IMT if these entities hold real estate and following to the share acquisition, one of the shareholders holds at least 75 per cent of the share capital, or the number of shareholders reduces into two, with these two individuals being married or unmarried partners.

ii Reorganisation

Restructuring operations such as mergers, demergers, spin-off transactions, transfers of assets and share exchanges may be performed without income tax constraints for companies and shareholders involved under the Portuguese tax neutrality regime.

Exemptions from property transfer tax, stamp tax and notarial and registration fees may also be granted by the Ministry of Finance upon request, provided that certain conditions are met.

iii Exit

When a company transfers its tax residence abroad, it is deemed as liquidated and is subject to CIT on the positive difference between the market value and the book value of its assets, provided that these are not allocated to a permanent establishment of the company in Portugal. The same regime applies on the end of activity of a permanent establishment of a non-resident entity located in Portugal (the transfer outside Portuguese territory, by any act or legal instrument, of assets allocated to that establishment may also be taxed).

The tax payment resulting from the transfer of residence can be made in five annual instalments added of interest, provided that certain conditions are met.

© 2021 Law Business Research Ltd

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Portuguese general anti-avoidance rules provide for a general principle of substance over form under which the tax authorities may disregard the legal form agreed upon by the parties where a transaction is deemed to be tax-driven (even if not exclusively), and they may recharacterise the facts for tax purposes in accordance with the underlying economic reality.

ii BEPS

Portugal has already enacted several unilateral anti-BEPS measures, notably:

a controlled foreign corporation (CFC) rules;
b an earnings stripping rule to limit interest deductibility based on earnings before interest, taxes, depreciation, and amortisation (EBITDA) levels;
c denial of the participation exemption regime where the dividends received give rise to a deduction for the subsidiary;
d denial of the participation exemption regime on structures that lack economic substance;
e an obligation to disclose aggressive tax planning schemes;
f a revised patent box regime incorporating the nexus approach; and
g adoption of the 2014 EU directive on automatic exchange of tax information and exchange of information procedures under the Common Reporting Standard.

iii CFC rules

Under the CFC rules, profits or other income derived by non-residents in the Portuguese territory and subject to a more favourable tax regime can be attributed, as a rule, to Portuguese-resident shareholders who hold, directly or indirectly, at least 25 per cent of the share capital in proportion to their shareholding.

iv Transfer pricing

Portugal has implemented detailed transfer pricing legislation that broadly follows the methodologies and principles in the OECD guidelines.

Under Portuguese transfer pricing rules, domestic and cross-border inter-company transactions must be at arm's length, and the Portuguese tax authorities have wide-ranging powers to adjust declared income if they consider that market conditions have not been respected.

Special relations are deemed to exist between two entities where one such entity has the power to exercise, directly or indirectly, a significant influence on the management decisions of the other entity.

All companies undertaking transactions with related entities, even if they are not obliged to prepare a transfer pricing file, have to fill out additional declarations as part of their annual tax reporting obligations.

Additionally, taxpayers with annual net sales and other income equal to or greater than €3 million in the fiscal year prior to the year under consideration are required to prepare a transfer pricing file, which should contain an analysis of all of the aspects of every transaction with related parties.

© 2021 Law Business Research Ltd

v Tax clearances and rulings

Upon request, tax and social security authorities may deliver a written confirmation that a company's tax affairs are in order. These certificates are valid for three and four months.

Binding advance rulings may be awarded in specific situations (see above).

X YEAR IN REVIEW

The tax reforms launched in 2014 and 2015 to foster tax competitiveness have proven to be very effective in the past few years.

The modern tax system implemented in 2014 and 2015 allowed the introduction of new foreign investment tax incentives and the implementation of new international standards (namely on tax avoidance) in a way that should not entail major tax changes to be effective.

The long-awaited REITs regime has been introduced in 2019 – the SIGI regime. The SIGI regime provides a special investment vehicle for real estate and aims to develop the real estate market (in particular, the letting market). SIGI will be subject to the tax regime applicable to real estate investment companies (the new tax regime for REIC has also been introduced in 2015).

All the measures show that foreign investment is a rock-solid trend under Portuguese tax policies.

Finally, Anti-Tax Avoidance Directive (ATAD 1, amended by ATAD 2) was partially implemented in 2019. Although its implementation required some tax amendments and obliges the players to keep these rules in mind when performing their business, as the Portuguese legislation had already foreseen most of ATAD 1 measures to avoid tax evasion, we believe that its implementation will not entail a major shift in the playing field for companies in Portugal.

XI OUTLOOK AND CONCLUSIONS

Portugal has managed to improve economic conditions in the past few years and the economy was expanding at a stable pace. The pandemic crisis resulted in some problems, but the Portuguese tax system remains solid, attractive and with specific measures that were taken to sustain the difficulties that appeared in this particular moment with economic consequences worldwide.

Besides the economic news, Portugal has a modern and very competitive tax regime, both for companies and individuals who become resident in Portugal.

Foreign investment has been a key focus of tax policy in recent years.

Corporate tax benefits and a competitive participation exemption regime (on dividends and capital gains) makes Portugal a unique location for corporate investment.

The special tax regime applicable to high-value individuals who transfer their residence to Portugal (and the Golden Visa regime) have also been considered exceptional investment opportunities.

In this scenario, we believe the implementation of 'Portuguese REITs' (SIGI) in 2019 and the approval of a new tax regime for former residents may take foreign investment in Portugal to the next level, although heavily real estate-driven.

A negative highlight goes to the maintenance of the 'heavy' tax rates applicable to 'regular' resident individuals.

© 2021 Law Business Research Ltd

Appendix I: Treaty rates for dividends, interest and royalties (per cent)

	Dividends	Interest	Royalties
Algeria	10/15	15	10
Andorra	5/15	10	5
Angola	8/15	10	8
Austria	15	10	5/10
Bahrain	10/15	10	5
Belgium	15	15	10
Brazil	10/15	15	15
Bulgaria	10/15	10	10
Canada	10/15	10	10
Cape Verde	10	10	10
Chile	10/15	5/10/15	5/10
China	10	10	10
Colombia	10	10	10
Croatia	5/10	10	10
Cuba	5/10	10	5
Cyprus	10	10	10
Czech Republic	10/15	10	10
Denmark	10	10	10
Estonia	10	10	10
Ethiopia	5/10	10	5
France	15	10/12	5
Georgia	5/10	10	5
Germany	15	10/15	10
Greece	15	15	10
Guinea Bissau	10	10	10
Hong Kong	5/10	10	5
Hungary	10/15	10	10
Iceland	10/15	10	10
India	10/15	10	10
Indonesia	10	10	10
Ireland	15	15	10
Israel	5/10/15	10	10
Italy	15	15	12
Ivory Coast	10	10	5
Japan	5/10	5/10	5
Korea	10/15	15	10
Kuwait	5/10	10	10
Latvia	10	10	10
Lithuania	10	10	10
Luxembourg	15	10/15	10
Macao	10	10	10
Malta	10/15	10	10

© 2021 Law Business Research Ltd

	Dividends	Interest	Royalties
Mexico	10	10	10
Moldova	5/10	10	8
Morocco	10/15	12	10
Mozambique	10	10	10
Netherlands	10	10	10
Norway	5/15	10	10
Oman	5/10/15	10	8
Pakistan	10/15	10	10
Panama	10/15	10	10
Peru	10/15	10/15	10/15
Poland	10/15	10	10
Qatar	5/10	10	10
Romania	10/15	10	10
Russia	10/15	10	10
San Marino	10/15	10	10
São Tomé and Príncipe	10/15	10	10
Saudi Arabia	5/10	10	8
Senegal	5/10	10	10
Singapore	10	10	10
Slovakia	10/15	10	10
Slovenia	5/15	10	5
South Africa	10/15	10	10
Spain	10/15	15	5
Sweden	10	10	10
Switzerland	5/10	10	5
Tunisia	15	15	10
Turkey	5/15	10/15	10
United Arab Emirates	5/15	10	5
United Kingdom	10/15	10	5
United States	5/10/15	10	10
Ukraine	10/15	10	10
Uruguay	5/10	10	10
Venezuela	10/15	10	10/12
Vietnam	5/10/15	10	10/7.5

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

MAFALDA ALVES

SRS Advogados

Mafalda Alves is the leading partner of the tax department at SRS Advogados. She is a former deputy for the Secretary of State for Tax Affairs and was appointed as independent member of the Portuguese Green Tax Reform Committee.

She has solid experience in the tax area, advising in domestic and international tax law, including financing operations, restructuring of corporate and high net worth individuals' assets, mergers and acquisitions, real estate transactions and tax litigation.

SRS ADVOGADOS

Rua Dom Francisco Manuel de Melo, No. 21
1070-085 Lisbon
Portugal
Tel: +351 21 313 20 00
Fax: +351 21 313 20 01
mafalda.alves@srslegal.pt
www.srslegal.pt

© 2021 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-797-3

© 2021 Law Business Research Ltd