PORTUGAL

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

The Portuguese Corporate Income Tax ("CIT") Code was subject to a reform in 2014 which revamped the rules dealing with M&A deals. For that reason, only minor changes have been introduced in the last couple of years. Find below an outline of the main changes introduced recently:

- The application of the Portuguese participation exemption regime now requires the uninterrupted maintenance of a 10% shareholding for 1 year in the capital of another company;
- A new anti-hybrid mismatches clause has been introduced in order to deny the application of the participation exemption to inbound dividends which gave rise to a deduction at the level of the distributing company;
- A new sectorial anti-abuse provision was introduced to deny the application of the participation exemption regime to inbound and outbound dividends whenever there is an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage, defeat the object and the purpose of elimination of double taxation;
- Tax losses arising as from 2016 may be set-off against 70% of the profits and carried-forward for a period of 5 years (previously the period for carry-forward was 12 years);
- A new tax deferral mechanism was included in the exit tax provision. The new options for the deferral of payment of tax are in accordance with the case-law of the ECJ and provide for the option of: (i) immediate payment of CIT upon exit; (ii) option for payment in five instalments; and (iii) option for deferral until the year of effective disposal of the asset or transfer of residence to another (non-EU) jurisdiction.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Portuguese Authorities have not been in the forefront of BEPS implementation at this stage, although they have approved a number of direct tax measures recommended by the BEPS Action Plans or imposed by the PSD and ATAD. There is no official position or guidance from the Tax Authorities on how Portugal will implement the measures recommended by BEPS Action Plan 6, in particular in the context of the Multilateral Instrument.

In recently enacted tax treaties or protocols Portugal has negotiated the inclusion of Principal Purpose Test clauses (see, for example, the protocol with France or the tax treaties with Ivory Coast, Senegal or Saudi Arabia) rather than Limitations on Benefits clauses. This seems to indicate that Portugal would most likely opt for a Principal Purpose Test clause for the implementation of BEPS Action 6 in the context of the Multilateral Instrument.

Portugal had already enacted measures mirroring the majority of those included in the Anti-Tax Avoidance Directive ("ATAD"), as outlined below:

- **Controlled Foreign Corporation ("CFC") rule:** Portuguese CFC rules foresee that a company resident in Portugal, holding directly or indirectly shares in a qualifying CFC, is subject to tax on the profits realised by that CFC even if no dividend distribution occurs. For Portuguese tax purposes, a CFC is an entity held by Portuguese residents (25 per cent shareholding or 10 per cent where more than 50 per cent of the capital is held by Portuguese residents) which is located in a low-tax jurisdiction (i.e. blacklisted territories and jurisdictions imposing no CIT or where CIT liability does not exceed 60 per cent of the Portuguese CIT standard rate – 12.6%);

- **General Anti-Abuse Rule ("GAAR"):** The Portuguese GAAR provides that a particular transaction may be disregarded for tax purposes whenever a transaction (or set of transactions) involves: (i) the creation of wholly artificial arrangements; (ii) with abuse of legal forms; (iii) in order to reduce, eliminate, or defer the tax normally due or to obtain undue tax advantages;
- **Interest barrier rule:** since 2013, Portugal replaced its former current thin-capitalisation rules by an interest barrier rule which limits the deductibility of net financial expenses to the higher of the following: (i) Euro 1 million; or (ii) 30% of adjusted EBITDA (operating profits before interests, taxes, depreciations and amortisations). The Portuguese regime includes specific rules for thresholds to be calculated at the level of entities taxed as part of a tax group;
- **Exit tax:** The Portuguese CIT Code provides for an exit tax upon the transfer of residence of Portuguese companies to other territories. Whenever the company transfers its residence to other EU/EEA countries, besides the possibility of immediate payment of CIT upon exit, the exit tax rules provide for an option for payment in five instalments and an option for deferral until the year of effective disposal of the asset or transfer of residence to another (non-EU) jurisdiction. The application of options for deferral imply the accrual of interest on an yearly basis over the amount of tax that would be due and the migrating company would be required to provide a bank guarantee covering the 125% of the tax due (in order to cover tax and interest accruing annually);
- **Switchover clause:** the domestic participation exemption applicable to inbound dividends (from the EU, EEA or third countries) does not apply to distributions of profits which gave rise to a deduction at the level of the distributing company.

In addition to these measures, Portugal has also implemented in its domestic law the anti-hybrid mismatches clause and the new sectorial anti-abuse provision recently introduced by the PSD.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES AMONG ACQUISITIONS MADE THROUGH A SHARE DEAL VERSUS AN ASSET DEAL IN YOUR COUNTRY?

A. Share deal

Under a share deal, any potential or effective tax contingencies or liabilities will remain at the level of the entity whose shares are being transferred (target entity). The value for tax purposes of the assets owned by the target entity is not subject to a step-up in value and tax attributes (such as tax losses, tax credits or tax benefits) will be generally carried over.

The Portuguese CIT Code provides that tax losses generated in tax years starting on or after 1 January 2016 can be carried forward for 5 years (capped at 70% of the taxable income of the entity generating income). However, this rule does not have retroactive effects and the tax losses of prior financial years shall be carried-forward for the number of years that were allowed under the CIT Code at the time they were registered (6 years carry-forward for losses computed before 2010, 4 years if the losses were computed in 2010 or 2011, 5 years if the losses were computed in 2012 or 2013 and 12 years if the losses were computed in 2014 and 2015).

In addition, the Portuguese CIT Code includes a set of anti-trafficking rules according to which tax losses carried forward will be forfeited upon a change in direct ownership of at least 50% of shareholding or voting rights. Specific safe-harbors are included for purposes of change of this ownership test covering for example: (i) internal reorganisations whereby shareholding of the company is changed from direct to indirect ownership or from indirect to direct or (ii) reorganisations undertaken under the tax neutrality regime.

Share deals generally do not give rise to VAT, Stamp Tax or Real Estate Transfer Tax (RETT) at the level of the purchaser. However, the acquisition of quotas of a limited company - Lda type (not qualifying as a corporation or S.A.) - that owns immovable property is liable to the payment of RETT at a 6.5% rate when, by such acquisition, one of the shareholders becomes the owner of a participation of at least 75% of the equity of the company (applicable on the property tax value or balance sheet value if higher).

The shares being transferred will benefit from a step-up in value for tax purposes at the level of the purchaser.

The sale of shares may give rise to capital gains or losses at the level of the seller. For more details on this aspect, please see Section 18 below.

B. Asset deal

Asset deals usually allow for greater simplicity for the seller and purchaser, since there is no need of pre-structuring of the transaction.

Any historical tax contingencies or liabilities will not be transferred to the purchaser of the asset (although some exceptions may be found in property taxes). Tax attributes (such as tax losses, tax credits or tax benefits) linked to the activity carried on by the seller with recourse to a certain asset may not be carried over to the purchaser. The value for tax purposes of the assets transferred will benefit from a step-up in value at the level of the purchaser.

Capital gains derived from the sale of assets may benefit in some cases from a reinvestment relief, according to which 50% of the capital gains derived from disposals of tangible fixed assets and intangible assets held for more than one year may be exempt if the sales proceeds are invested in similar assets during the period beginning one year before the year of the disposal and ending two years after the year of the disposal. This rule does not apply to investment properties.

From a VAT perspective the acquisition of a business as a going concern susceptible of forming an independent branch of activity (including the assets, liabilities and commercial relations of seller) is not subject to VAT, if the purchaser is liable or becomes liable by virtue of the transaction, to this tax. The transfer of single asset(s) is subject to VAT at the standard 23% rate.

If the transfer is not subject to VAT, an assessment must be made as to whether or not stamp tax should be levied on the transaction. For stamp tax purposes reference should be made to "trespasse" (sale as a going concern under Portuguese civil law) which is liable to Portuguese stamp tax at 5% on its value. The purchaser must pay stamp tax. There is an ongoing discussion on whether the taxable base should be the purchase price or the goodwill (with recently unpublished rulings favoring the latter).

The purchase of real estate located in Portuguese territory triggers RETT and Stamp Tax on the acquisition value or the property tax value, whichever is higher, at rates of up to 6.5% percent for RETT (depending on the nature of the building) and 0.8% for Stamp Tax. Both taxes are borne by the acquirer and should be paid before registering the public deed of acquisition.

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

The Portuguese CIT Code does not include any specific provisions which provide for a step-up in value of the assets of the target company.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

The acquisition cost of certain intangible assets (such as goodwill) with unlimited-life may be CIT deductible at a 5% rate over 20 years. This rule applies only to goodwill acquired in a (non-tax neutral) business combination registered or purchased as of 1 January 2014. Portuguese tax law does not provide for a definition of 'business combination'. In any case, the interpretation of the concept of 'business combination' should be consistent with the definitions set out in IFRS 3. Any goodwill registered with such transaction (which would be subject to Stamp Tax to the extent the assets transferred qualified as a transfer of a going concern for Portuguese tax purposes) would be deductible for CIT purposes. Should no goodwill arise from the transaction, no CIT deductibility would be available (but simultaneously there would be no Stamp Tax implications).

6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Interest expenses are tax deductible according to an accrual basis, provided they are required to be incurred or borne to "obtain or ensure" the receipt of income liable to CIT. Deductibility of interest expenses is therefore subject to a "correlation test" according to which expenses should only be deductible to the extent they can be considered linked to the income liable to tax, i.e., that they were incurred to obtain or ensure the receipt of income liable to tax.

In addition to the general deductibility test for expenses, interest barrier rules will apply irrespective of the debt being intra-group or external financing. According to the Portuguese interest barrier rules, the deductibility of net financing expenses (i.e. difference between interest paid and interest received) will be limited to the higher of the following: (i) EUR 1 million; or (ii) 30% of adjusted EBITDA. Interest in excess or unused interest (up to the EBIDTA threshold) of the limit may be carried forward for 5 years. The concept of "net financing expenses" does not encompass financial expenses which were capitalised as acquisition cost of a certain asset (as these will be amortised or depreciated throughout the useful life of the asset).

For intra-group financing, interest expenses will only be deductible to the extent that they are arm's length. Whenever transfer pricing rules do not apply, interest expenses paid in the context of shareholder financing are only tax deductible to the extent the interest rate applied does not exceed a rate determined by ministerial order.

The Portuguese CIT Code does not have any specific anti-abuse rules dealing with the deductibility of interest expenses borne for the acquisition of a group company.

7. WHAT ARE USUAL STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?

For Portuguese tax purposes, debt-push down strategies generally require foreign investors to structure the acquisition of a local target company through a Portuguese local vehicle (HoldCo). The Portuguese HoldCo and local target company may be taxed under the tax group regime and therefore interest paid by the HoldCo would be off settable against the target company's profits. Another alternative would be to merge the Portuguese HoldCo and the local target company. Debt push-down structures will only be tax efficient to the extent the amount of interest paid does not exceed the thresholds set out by Portuguese interest barrier rules and that the financing arrangements are compliant with transfer pricing rules. In addition, the application of the General Anti-Abuse Rule may also need to be considered on a case-by-case basis. In reverse mergers, tax authorities have questioned transactions either based on the indispensability of the financing (under the old rules) or by considering that the transaction was implemented principally for tax motives, i.e. absent of valid economic reasons.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Portuguese tax law provides for a notional interest deduction on subscribed share capital contributions with limited scope. The notional interest deduction corresponds to a CIT deductible deemed interest expense in the year of the capital contribution and the following five fiscal years computed through the application of a 7% rate over the share capital contribution not exceeding EUR 2 million. The notional interest deduction only applies to share capital contributions subscribed in cash or through the conversion of shareholder loans (granted in cash) into share capital. Contributions in kind to the capital of the company do not qualify for the purposes of the notional deduction. In case the company reduces its share capital within the five year period the notional deduction is recaptured (added to taxable profits) and increased by 15%. The application of the notional interest deduction implies a reduction of the second threshold of the Portuguese interest barrier rule, from 30% to 25% of the adjusted EBITDA.

9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE?

Portuguese anti-loss trafficking rules only deal specifically with direct acquisitions of shares. Tax losses carried forward will be forfeited upon a change in direct ownership of at least 50% of shareholding or voting rights. Currently there are no rules dealing with tax losses forfeit due to changes on the activity. The following safe-harbors were included for purposes of change of this ownership test:

- internal reorganisations whereby shareholding of the company is changed from direct to indirect ownership or from indirect to direct;
- reorganisations undertaken under the tax neutrality regime;
- changes due to succession upon death of the former shareholder;
- prior ownership by the purchaser of at least 20% of shareholding or voting rights of the company since the taxable period in which the tax losses were registered; and
- the purchaser is an employee or a member of the company's bodies since the taxable period in which the tax losses were registered.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Any specific items which should be included in the scope of a tax due diligence will be directly linked to the nature of the transaction (asset deal vs share deal), the business carried on by the target or any specific tax attributes or benefits associated with the target company or assets. In any case, the following items can be identified as being generally relevant in all due diligences:

- Statute of limitation: Portuguese tax law provides different statutes of limitation depending on the nature of the tax and if the target entity had tax losses or not and therefore contingencies identified in the same FY may have different statutes of limitation;
- Tax losses: Due to several changes in the period for tax losses carryover (see Section 3 above), a tax due diligence should identify with detail the year in which tax losses were registered and the year in which they will forfeit;
- Group taxation applicable to the Target: Since all entities part of a Portuguese tax group are jointly responsible for the payment of corporate taxes, it is relevant to cover this aspect if the Target was or is integrated in a tax group.
- Real Estate: In case of real estate property owned by the Target it is important to review the VAT nature of (previous) purchases – if under the waiver of VAT exemption regime and whether the certificates of waiver were obtained.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

In most instances there is none. In any case, Real Estate Transfer Tax (RETT) may apply on the acquisition of quotas of a limited company - Lda type (not qualifying as a corporation or S.A.) - that owns immovable property in Portugal. The purchaser would be liable to the payment of Real Estate Transfer Tax at a 6.5% rate when, by such acquisition, one of the shareholders becomes the owner of a participation of at least 75% of the equity of the company (applicable on the property tax value or balance sheet value if higher). No other indirect taxes (such as VAT, Stamp Tax, Municipal Property Tax or other charges or fees) are due on the transfer of shares.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

As a general rule, expenses incurred or borne are deductible for CIT purposes to the extent they had the purpose of obtaining or ensuring the receipt of taxable income. According to this "correlation test", acquisition costs should only be deductible to the extent they can be considered linked to the income liable to tax, i.e., that they were incurred to obtain or ensure the receipt of income liable to tax. The acquisition cost of shares is not immediately deductible as an expense for CIT purposes but will be taken into consideration for the computation of capital gains or losses upon sale. Acquisition costs with the majority tangible and intangible assets are generally amortised / depreciated and therefore deductibility will occur on a pro rata basis taking into consideration the useful lifetime of those assets. The acquisition cost of certain intangible assets (such as goodwill) with unlimited-life may be CIT deductible at a 5% rate over 20 years.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

As a matter of principle, based on ECJ and Local Arbitration case law, input VAT on acquisition costs may be recoverable if the holding company (Portuguese acquisition vehicle) in a share deal provides services subject to VAT to its subsidiaries. The VAT regime applicable to holding companies remains contentious in Portugal and ultimately depends on whether such holding companies carry out transactions which are subject to VAT, such as the provision of administrative, financial, commercial and technical services by the holding company for the benefit of its subsidiaries. For asset deals, VAT paid on the value of the single assets (when not excluded as a transfer of going concern) is recoverable under the generally applicable rules. It is important at early stage of any M&A transaction to review the cost structure and the VAT and CIT treatment.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

The acquisition tax structuring should take into account, amongst others, the following aspects:

- **Distribution of dividends** – Domestic withholding tax exemption whenever the following requirements are met: (i) 10% of the share capital or voting rights of the Portuguese company held for at least 1 year prior to distribution; (ii) available for shareholders resident in EU/EEA Member-States (excluding states with no exchange tax information) or any jurisdiction which has signed a tax treaty with an exchange of information mechanism; and (iii) the company receiving the dividends (if a third country) should be liable to nominal rate of 60% of the Portuguese rate (i.e. 12.6%). In case exemption is not applicable, lower rates may still apply under a tax treaty in place. 35% withholding applies to blacklisted jurisdictions.
- **Financing** – Outbound interest is subject to a 25% flat rate. A domestic withholding tax exemption is available for creditors qualifying as an associated company (i.e. a company holding a direct participation of at least 25% for a period of, at least, two consecutive years) for purposes of the Interest and Royalty Directive. Otherwise, a reduced withholding tax rate may be applicable under a tax treaty in place; 35% withholding applies to blacklisted jurisdictions.

- **Divestment** – Capital gains derived by non-residents are subject to a flat 25% rate. However, capital gains derived by non-resident entities without a permanent establishment in Portugal may benefit from an exemption provided certain conditions are met (see Section 18 below).
- **Other considerations** – (i) economic rationale – since Portuguese tax law has Specific and General Anti-Abuse provisions, the tax authorities may disregard the application of domestic exemptions based on the lack of economic substance; (ii) residence of the foreign investor – investors resident in blacklisted jurisdictions are subject to a more burdensome tax treatment.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL ENVIRONMENT THROUGH MERGERS OR A TAX GROUP?

Upon completion of an acquisition, groups may reorganise their corporate structures under the tax neutrality regime for corporate restructurings. The Portuguese tax neutrality regime is the transposition of the EU Merger Directive and provides for a mechanism of deferral of capital gains taxation on mergers, demergers, partial demerger, transfers of assets and exchange of shares to the extent the value for tax purposes of the assets or shares transferred is carried over. The Portuguese regime extends the neutrality regime to a broader set of transactions than that covered by the Merger Directive. In order for a subsidiary to be included in a Portuguese tax group, the parent company must hold the participation for more than one year from the date the regime begins to be applied (except when the subsidiary is newly incorporated). For this reason, newly acquired target companies may only be included in a tax group one year after acquisition. A period of two years is required in case the company registered tax losses.

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET COMPANIES OF WHICH MAIN ASSETS ARE REAL ESTATE?

Share deals generally do not attract Real Estate Transfer Tax (RETT) at the level of the purchaser. However, the acquisition of quotas of a limited company – Lda type (not qualifying as a corporation or S.A.) - that owns immovable property located in Portugal is liable to the payment of RETT at a 6.5% rate when, by such acquisition, one of the shareholders becomes the owner of a participation of at least 75% of the equity of the company (applicable on the property tax value or balance sheet value if higher).

Companies owning real estate will also be liable to Municipal Real Estate Tax (IMI), which is a real estate tax levied annually on property located within each municipality. The IMI rates range from 0.3% to 0.8% over the property tax value. However, whenever the properties are owned by entities resident in blacklisted jurisdictions a 7.5% rate will apply. The Budget Law for 2017 introduced an additional 0.4% IMI charge for companies on the right of ownership, usufruct or surface over real estate property located in Portugal (urban property classified as «commercial, industrial or for services» fall outside the scope of this additional charge). The property tax value of real estate property may be subject to revaluation by the Portuguese Tax Authorities, which may result in increased tax costs in the future at the level of the target company.

The VAT framework applicable to the acquisition of the real estate properties by the target company may also be relevant. The acquisition of real estate is generally exempt from VAT, unless the vendor waives the right to exemption (which would allow the purchaser to deduct the input VAT). The option for taxation is only possible for real estate complying with certain requirements and provided both vendor/lessor are Portuguese VAT taxable persons and fulfill, among others, the condition of conducting supplies that give the right to VAT deduction. Prior assessment of whether these requirements were complied with may also be relevant.

Ownership of real estate assets in Portugal may also lead to the non-application of the domestic exemption on capital gains derived by resident or non-resident investors.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

The Portuguese CIT Code provides for tax group regime which is an elective regime for the combination of tax liabilities of group of companies. The tax group regime is applicable whenever the parent company holds, directly or indirectly, at least 75% of the subsidiaries' share capital and 50% of voting rights for more than one year (except when the subsidiary is newly incorporated). The Portuguese tax group operates under a "pooling system" where the tax group itself has no fiscal personality, i.e. the parent company and its subsidiaries remain autonomous taxpayers for tax purposes. The individual tax results of group members are aggregated and therefore losses derived by one of the group entities (after being integrated in the group's perimeter) may be offset against the profits of other group entities. Tax losses derived prior to integration in the group may only be off-set against the profits of that same entity (and not directly against profits derived by other group entities). The Portuguese tax group regime does not eliminate intra-group transactions and thus transfer pricing rules are still applicable.

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

For Portuguese CIT purposes, capital gains derived by Portuguese companies are included within the taxable profits generally subject to the standard 21% CIT rate (plus state surtaxes up to 7.5% and a municipal surcharge of up to 1.5% of the taxable profits). Under the participation exemption regime, a Portuguese company deriving capital gains from the sale of shares or quotas may benefit from an exemption provided the following requirements are met:

i) 10% of the share capital or voting rights of the company whose shares are being sold;

ii) 1 year holding period prior to sale;

iii) The company whose shares are being sold should be subject either to CIT, taxes listed in the Parent Subsidiary Directive or if resident outside the EU/EEA a tax comparable to the Portuguese CIT at a nominal rate, corresponding to at least 60% of the Portuguese rate (i.e. 12.6%).

The participation exemption regime does not apply whenever the assets of the company whose participation is disposed consist of more than 50% of Portuguese real estate (except for properties assigned to an agricultural, industrial or commercial activities not related to leasing and property trading or property acquired before 1 January 2014).

Differently, capital gains derived by non-resident shareholders are subject to a flat 25% rate. Although the participation exemption regime does not apply in this situation, the law provides a domestic exemption if capital gains are derived by non-resident entities without a permanent establishment in Portugal and provided that the following conditions are met:

i) the seller is not owned, directly or indirectly in more than 25% by a Portuguese resident company/individual;

ii) the seller is not resident in a blacklisted jurisdiction; and

iii) the gains derived do not relate to shares or corporate rights in resident companies whose assets consist in more than 50% of Portuguese-situs immovable property or holding companies, when such companies are in a control relationship with resident companies whose assets consist in more than 50% of Portuguese-situs immovable property.

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

The reinvestment regime provided by the Portuguese Code does not apply to the sale of shares. Under this regime, 50% of the positive difference between capital gains and capital losses can be excluded from taxation to the extent that the total amount of the sale's proceeds is reinvested in the year prior to the disposal or before the end of the second following year (i.e. N-1, N, N+1 and N+2) in the acquisition, manufacture or construction of tangible fixed assets or non-consumable biological assets and used for the activity of the acquiring company (i.e. only assets and not shares). In order for the reinvestment regime to apply, the assets in which the proceeds are reinvested: (i) may not have been acquired from a related party for transfer pricing purposes; and (ii) must be held for a one year period. This rule does not apply to investment properties (i.e. real estate).

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

Portuguese tax law does not require any specific substance requirements for holding companies (such as minimum number of employees, turnover, etc.). Notwithstanding, Portuguese CIT Code includes a set of anti-abuse provisions which deny the application of the participation exemption regime to inbound and outbound dividends whenever there is an arrangement or a series of arrangements which have been put into place for the purpose of obtaining a tax advantage that defeats the object and the purpose of elimination of double taxation, i.e., whenever the arrangement does not have valid commercial reasons and lacks economic substance. Furthermore, Portuguese tax law provides for a General Anti-Abuse Rule which allows the Portuguese Tax Authorities to deny a tax benefit if a certain structure is tax driven. Against this background, it is clear that holding companies must comply with a certain level of substance, namely the financial, material and human resourced necessary for the carrying on of its activity within the context of the group.

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

As outlined above, generally the restructuring should be analysed if it may be structured within the Portuguese tax neutrality regime, which is the transposition of the EU Merger Directive deferral mechanism for mergers, demergers, partial demerger, transfers of assets and exchange of shares.

In addition to potential CIT implications, mergers and spin-offs may also give rise to indirect taxation liability.

No VAT or sales tax applies to a merger transaction. The VAT Code expressly excludes from the scope of the tax, the transfer, whether or not for consideration, of a commercial establishment representing all or part of an independent business when the purchaser is or becomes subject to VAT. A transfer of assets which qualifies as "trespasse" (sale as a going concern under Portuguese civil law) may also be subject to Stamp Tax at a 5% rate on the value of the business unit being transferred (tax borne by the acquirer).

The transfer of real estate located in Portuguese territory through a merger or a spin-off also triggers Real Estate Transfer Tax ("RETT") and Stamp Tax on the acquisition value or the property tax value, whichever is higher, at rates of 6.5% percent for RETT and 0.8 percent for Stamp Tax for commercial buildings (lower rates for residential buildings up to 6%). A special tax incentive allows companies involved in a merger to qualify for exemption from IMT with respect to the transfer of real estate, as well as exemption from registration fees and stamp tax that normally would be due. The exemption (or refund if requested after the transaction) is granted only upon specific request to the Minister of Finance (and consent is generally lengthy).

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

Portuguese tax law does not include specific management incentives. The only exception to this may be a flat reduced rate applicable under the Non-Habitual Resident ("NHR") regime. The Portuguese NHR taxation regime was introduced in 2009 and provides certain special tax rates and rules applicable to individuals that qualify as NHR. Among the benefits granted under this regime, Portuguese sourced income derived by NHR from high added value activities deemed to fall either under employment or business and professional income is taxed at 20% flat rate (applicable only after the Portuguese Tax Authorities' decision). The list of professions and activities that qualify as "high added-value" for purposes of the NHR regime includes senior management. The concept of "top management" for the purposes of the NHR regime is defined as those persons in a management position with a specific power to bind the corporate entity. Therefore, assuming that the applicant is in a management position and has the power (even if limited) to bind the entity, the functions performed may qualify as "high added-value" and therefore benefit from the flat 20% rate. Board members are excluded from benefiting from the regime.

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