

CHANGES BUT NO 'TAX-QUAKES' IN THE PORTUGUESE 2008 BUDGET - BARROCAS SARMENTO NEVES

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Over the last decade the Portuguese annual budget has often produced what can be referred to as periodic 'tax-quakes' , making radical structural amendments to Portuguese tax legislation. After 10 years of tax budgets aimed at harmonising the tax regime, simplifying administrative procedures and bringing it in line with EU directives, the time has arguably come for measures which stimulate foreign investment and the internationalisation of the Portuguese economy.

Joana Pizarro Bravo y Ana Sofia Rendeiro, abogadas del departamento fiscal de Barrocas Sarmento Neves, pasan revista a los cambios fiscales que el gobierno portugués ha introducido en su reciente presupuesto estatal. Lamentan que, en vez de aplicar las medidas necesarias para estimular la inversión extranjera y la internacionalización de la economía lusa, el gobierno haya presentado solamente varias enmiendas a los reglamentos fiscales. No obstante, a su juicio, algunas de estas medidas son positivas, por ejemplo, los reglamentos relacionados con las retenciones fiscales, los

precios de transferencia y una nueva estructura para la remuneración del capital social convencional en acciones. El resultado de todo esto es un marco fiscal más sofisticado y transparente.

The 2008 Budget however, falls short of this by making instead a number of procedural amendments to the tax rules without being bold enough to offer the incentives needed to attract foreign investment.

Notwithstanding this, certain positive fiscal measures have been enacted which are summarised here.

In respect of the Parent/Subsidiary Directive, the withholding tax exemption has been extended by reducing the minimum holding percentage requirements – from 15% to 10% or where the acquisition cost is at least €20,000,000 – and by reducing the holding period from two years to one.

In relation to the transfer pricing rules, and following the OECD's recommendations, the Budget enacts the Advanced Pricing Agreements (APA) Regime. This however, requires the introduction of further legislative rulings before it comes into force.

Relevant amendments are introduced to the procedures applying to withholding tax relief on income paid to non-resident entities, which permits Portuguese paying entities to apply Double Taxation Agreements and EU Directives withholding tax relief, even if, at the date they are required to, non-resident entities have not yet provided the standard form/certificate issued by their residence State. Although a fine may apply, Portuguese paying entities will not be held liable for taxes which are not withheld provided that the referred certification is subsequently delivered.

The capital-loss regime on the dissolution of Portuguese companies has also been amended and now restricts the deductions which can be made by the holding company. If the respective companies form part of the same tax group, capital losses may only be deducted by the shareholder on the amount that exceeds tax losses offset within the group. Additionally, capital-losses on the dissolution of a company domiciled in a black-listed territory are not deductible.

Positive changes

The new framework regarding the conventional remuneration of share capital is a positive change in the financing of companies. Small and medium companies may deduct from their taxable income amounts corresponding to conventional share capital remuneration. This amount is equal to 3% of the cash contributions made by the shareholder either on the incorporation of the company or in respect of share capital increases occurring between 2008 and 2010. This is an attempt to equalise the inbound and outbound financing tax regime by promoting the financing of Portuguese companies through equity and preventing their thin capitalisation.

Another step to diminish the tax burden on financing companies through equity is the exclusion of stamp duty taxation on cash contributions in company share capital increases, pursuant to the ECJ decision in the Optimus case (where it was held that capital increase taxation breached Directive 69/335/CEE). Although this amendment came into force in January 2008, in our opinion taxpayers may reclaim stamp duty paid in the preceding four years.

Several other relevant fiscal measures have also been enacted, such as tax incentives connected with real estate urban rehabilitation (municipal property tax exemption for properties undergoing rehabilitation, and company income tax exemptions for urban rehabilitation real estate investment funds incorporated between 1 January 2008 and 31 December 2012) and the extension of the more favourable tax regime applying to pure holding companies (SGPS) and venture capital companies (SCR) to venture capital investors (individuals investing through a single shareholder private limited liability company).

Although several much needed changes have not been delivered by this Budget (such as a reduction of the VAT rate, and the deduction of interest paid by SGPS, amongst others) it does however appear to be heading towards a more sophisticated and clearer taxation framework. However, in our opinion, the delay in introducing much needed changes may result in the unnecessary loss of fiscal attractiveness for international investors and economic agents.

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