CUATRECASAS, GONÇALVES PEREIRA

# NEWSLETTER | TAX

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## I NATIONAL LEGISLATION

**Ministry of Foreign Affairs**
**Notice No. 102/2013, of 1 November**

Announcing the fulfilment of the internal constitutional formalities for the approval of the Protocol which amends the Convention between Portugal and Switzerland to Avoid Double Taxation in the matter of Income Tax and Capital and its Additional Protocol.

The Protocol came into force on 21 October 2013.

In addition to the amendments verified in several provisions of the Convention, it should be highlighted that the Protocol lays down a mechanism for the exchange of information, at the request of the contracting States' competent authorities, being expressly provided the lifting of banking secrecy.

**Ministry of Finance**
***Portaria* (Ordinance) No. 337/2013 of 20 November**

Amending for the first time *Portaria* No. 320-A/2011 of 30 December, establishing the nuclear structure of the Tax and Customs Authority and the competences of the relevant organic units, and setting out the maximum number of flexible organic units.

**Ministry of Finance**
***Portaria* (Ordinance) No. 340/2013 of 22 November**

Amending for the fourth time *Portaria* No. 363/2010 of 23 June, laying down the rules of implementation of the prior certification of invoicing software to be used by taxable persons subject to Corporate Income Tax ("IRC") and Value Added Tax ("VAT").

Among the main changes brought by this *Portaria,* noteworthy is the reduction of the cases of exemption from the obligation to use the invoicing software previously certified by the Tax and Customs Authority.

Accordingly, only taxable persons who:

- In the previous taxation period have had a turnover of EUR 100,000.00 or less, provided they do not choose to use the invoicing software; and
- Carry out transactions taxed through automated dispensing machines or supply services in which a receipt or an entry, transport, or service ticket or other pre-printed bearer document is usually issued, as proof of the payment

are exempted from the said obligation

These changes come into force on 1 January 2014.

## II ADMINISTRATIVE INSTRUCTIONS

**Tax and Customs Authority**
**Binding Information relating to Case No. 2012 003690 of 2 July 2013, published on 4 November 2013**
**Light passengers or mixed vehicles: tax deductibility of payments and autonomous taxation of the costs associated to renting agreements**

With the binding information above, the Tax Administration clarifies interpretation issues arisen about no. 4 of the binding information previously published on the same subject in case no. 2011 004399, regarding the acquisition cost to be taken into account for the calculation of the autonomous taxation and of the deductible value of the rent expenses (assessed on the basis of the annual depreciations' value which should be deductible).

Therefore, it is clarified that the relevant acquisitions cost corresponds to the retail price (or to the discounted price) used by the lessor in the determination of the monthly payments, including the residual value plus the applicable Value Added Tax.

**Tax and Customs Authority**
**Binding Information relating to Case No. 205.20.10-24/2013, of 6 November 2013, published on 15 November 2013**
**Dispatching to the Autonomous Regions of products subject to Tax on Oil and Energy Products previously released for consumption in Mainland Portugal**

In light of this Binding Information, the dispatching of oil and energy products already released for consumption in Mainland Portugal, and, therefore, not covered by the tax suspension scheme, entails the filing of a *Pedido de Autorização de Recepção* (Application for Authorisation of Receipt) at the regional customs of the destination and, after receipt of the products and payment of the tax due, a *Declaração de Introdução no Consumo* ("DIC") (Declaration of Release for Consumption) and a *Documento de Acompanhamento Simplificado* ("DAS") (Simplified Accompanying Document).

These transactions are subject to the tax refund scheme, following an application to be submitted by the taxpayer subject to taxation in Mainland Portugal (typically, the dispatcher of the products), which shall be accompanied by proof of the collection, the number of the *DIC*, a copy of the *DAS* stating the receipt of the goods by the recipient and proof of payment of the tax in the Autonomous Region of destination.

**Tax and Customs Authority**
**IR and International Relations Area – Office of the Sub-director-General**
**Circular No. 20168/2013 of 7 November**

Following the decision of the Court of Justice of the European Union of 6 October 2011, with this circular the Tax and Customs Authority clarifies that withholding of the corporate income tax on dividends distributed until 31 December 2011 arising from

holdings held in pension funds established in other Member States of the European Union or in the European Economic Area, in respect of which administrative complaints or hierarchical appeals are pending, must be annulled.

**Tax and Customs Authority**
**VAT Management Area – Office of the Sub-director-General**
**Circular No. 30155/2013 of 14 November**

This circular letter provides clarifications concerning *Portaria* No. 255/2013, which approved new models of annexes relating to the regularisation of fields 40 and 41, which are an integral part of the VAT return.

Taxable persons registered in the monthly scheme, that insert regularisations in their favour in field 40 or in favour of the State in field 41, should fill in the new annexes in the tax returns relating to the transactions carried out in October 2013 and taxable persons registered in the quarterly scheme should do so in the tax return relating to the transactions carried out in the 4 quarter of 2013.

Both in the cases in which the purchaser is not a taxable person and has not given his tax ID number to the supplier of the goods or services, and in the cases in which the purchaser is a final consumer non-resident in the national territory, the space intended for the tax ID number in the column to which field 2 respects must not be filled in, and it is not permitted to use number 999 999 999 or any other indication.

In these situations, as in those in which the taxable person is not established nor registered for VAT purposes in the national territory, regularisations may be entered globally in a single line of the annex to which field 40 of the VAT return refers, in the corresponding tax period.

Certification by a Chartered Accountant is mandatory for the following claims:

- Claims referred to in article 78(8) of the VAT Code ("CIVA") that shall be entered in table 2;
- Claims referred to in article 78(7) of the *CIVA*, that have fallen due before 1 January 2013 but considered as bad debts thereafter, which shall be entered in sub-table 1-C;
- Doubtful debts and bad debts, respectively referred to in article 78-A (2) and (4) of the *CIVA*, which have fallen due from 1 January 2013.

## III EUROPEAN CASE LAW

**Court of Justice of the European Union**
**Judgment of 7 November 2013 (Case C-249/12 and C-250/12)**
**Taxation – VAT – Directive 2006/112/EC – Articles 73 and 78 – Immovable property transactions carried out by natural persons – Classification of those**

**transactions as taxable – Determination of the VAT owing when the parties have made no provisions for it at the time of conclusion of the contract – Question as to whether or not the vendor may recover the VAT from the purchaser – Consequences**

In the judgment above, the Court of Justice ruled that Council Directive 2006/112/EC of 28 November 2006, on the common system of value added tax ("VAT Directive"), should be interpreted as meaning that, when a contract of sale or for the supply of services is concluded without the parties making any mention of VAT at the time the price is defined, and considering that the supplier is a taxable person subject to VAT, the price agreed must be considered as already including VAT, if the supplier cannot recover the VAT on that transaction from the purchaser in accordance with the applicable national legislation.

However, if under the applicable national legislation the suppliers can recover the VAT on the transaction in question, the price agreed must be regarded as not including VAT.

**Court of Justice of the European Union**
**Judgment of 7 November 2013 (Case C-322/11)**
**Request for a preliminary ruling – Articles 63 and 65 of the TFEU – Free movement of capital – Tax legislation of a Member State which does not allow deduction of the loss on the sale of immovable property situated in another Member State from the gain on the sale of securities in the Member State of taxation**

In this judgment, the Court of Justice was requested to rule on the compatibility with European law of national legislation of a Member State that does not allow a taxpayer who resides in that State, and is liable to income tax in that State, to deduct the losses arising from the transfer of immovable property situated in another Member State from the income from moveable assets taxable in the first Member State, although that would have been possible, albeit on certain conditions, if the immovable property had been situated in the first Member State.

The Court of Justice held that tax legislation with such provisions is compatible with European Law, if the first Member State did not exercise any tax power over the profits deriving from the transfer of immovable property in another Member State.

Indeed, despite the fact that such legislation contains a difference in treatment that entails a restriction of the free movement of capital, there is a direct link between the non-taxation of profits from the transfer of moveable assets in another Member State and the non-deductibility of losses arising from those transfers, for which reason the restriction is justified by an overriding reason in the public interest relating to the need to safeguard the balanced allocation of the power to impose taxes between Member States and ensure the cohesion of tax systems.

**Court of Justice of the European Union**
**Judgment of 21 November 2013 (Case C-494/12)**
**Directive 2006/112/EC – Value added tax – Supply of goods – Concept – Fraudulent use of a bank card**

In the Judgment above, the Court of Justice decided that the fraudulent use of a bank card as a means of payment of a good does not affect the ability of the transaction carried out being classified as a "delivery/transfer of goods" or not.

Indeed, the concept of "supply of goods" covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were is owner, independently from the forms of transfer of property provided for in national legislations.

The fact that the buyer does not pay the price directly to the supplier, but rather through the card issuer, which undertook to pay to the supplier the goods sold by it to purchasers that used the cards issued by it as payment means, does not change the classification of the transaction as a supply of goods for consideration.

## IV NATIONAL CASE LAW

**Constitutional Court**
**Judgment No. 622/2013 of 26 September 2013, published in *Diário da República* (Portuguese official gazette) of 6 November 2013**
**Case No. 143/13**

In this judgment, the Constitutional Court considered that article 15(1)(j) of Decree-Law No. 13/71 of 23 January as amended by Decree-Law No. 25/2004 of 24 January, providing for the payment of a fee for the issue by EP – Estradas de Portugal, S.A. of an opinion in connection with the procedures for the posting of placards or advertising objects in its area of jurisdiction, the amount of which increases with each square metre or fraction of square metre of the placard or advertising object to be posted, does not breach the Portuguese Constitution ("CRP"), notably, the principle of equality set out in article 13.

Indeed, the Constitutional Court considered that the benefit gained by individuals may constitute a criterion of calculation of the amount of a fee, even if it is a licence fee, and therefore, since the benefit gained by the advertiser tends to increase with the increase of the communicative effectiveness of the message advertised, which happens with the increase of the size of the advertising placard used, the fee established treats differently situations that are different and does not breach the principle of equality.

**Constitutional Court**
**Judgment No. 340/2013 of 17 June of 2013, published in *Diário da República* (Portuguese official gazette) of 11 November 2013**

**Case No. 817/12**

The Constitutional Court did not hold unconstitutional the rule arising from articles 61(1)(d) and 125 of the *Código de Processo Penal* (Code of Criminal Procedure) interpreted as meaning that the documents obtained through a tax inspection in accordance with taxpayers' duty of cooperation, may subsequently be used as means of evidence in criminal proceedings for the commitment of a tax fraud crime.

**Constitutional Court**
**Judgment No. 759/2013 of 30 October 2013, published in *Diário da República* (Portuguese official gazette) of 18 November 2013**
**Case No. 474/13**

The Constitutional Court held unconstitutional, attributing to the judgment general binding force, the rule set out in the final part of article 146-B(3) of the *Código de Processo e Procedimento Tributário* (Tax Procedural Code), when applied in the scope of the assessment of the taxable matter by indirect methods, pursuant to the provisions of article 89-A(8) of the *Lei Geral Tributária* (General Tax Law), on account of it precluding, in abstract terms, evidence that may prove to be, in concrete, adequate or even indispensable to clarify the facts that make it possible to demonstrate the truthfulness of the tax statements presented by the taxpayer, making access to courts unviable or unenforceable.

**South Central Administrative Court**
**Judgment of 14 November 2013**
**Case No. 06871/13**

In this judgment, the South Central Administrative Court states that there is an inadmissible overlapping of rules between the *Taxa de Ocupação da Via Pública* (Fee for the use of public road), relating to the occupation of parts of the council's public dominium with the installation of the equipment necessary to the distribution of cable networks, and the *Taxa Municipal de Direitos de Passagem* (Fee for the use of public rights-of-way).

Indeed, since the fees have a bilateral nature, the same use cannot be the factor that generates more than one fee, as in this case.

**South Central Administrative Court**
**Judgment of 14 November 2013**
**Case No. 07029/13**

In this judgment, the South Central Administrative Court held that the rule of article 812(6) of the Civil Procedure Code, which determines that the ruling ordering the sale of the assets seized should be served on the creditor who submits a claim holding a guarantee *in rem* over the asset to be sold, failing which the sale will be flawed in terms

that may cause the nullity or cancellation thereof, applies to tax enforcement proceedings.

**South Central Administrative Court**
**Judgment of 14 November 2013**
**Case No. 06594/13**

In this judgment, the South Central Administrative Court ruled that it cannot be concluded that the assets of the original debtor of a tax debt are sufficient to settle such debt when the only asset found is a disputed claim held over third parties, in which case the preconditions are met for the application of the reverse charge mechanism against the subsidiary debtors.

The reverse charge mechanism does not depend upon the enforcement being firstly directed against the assets of the original debtor, but merely on them being proven to be insufficient to settle the enforcement debt. The seizure of the assets of the original debtor only takes place where, following the reverse charge mechanism and the opposition to it filed by the person against whom the same was directed, the tax enforcement is suspended to determine which amount of the debt is settled by the assets of the original debtor and the residual amount to be paid out of the assets of the subsidiary debtor.

**South Central Administrative Court**
**Judgment of 14 November 2013**
**Case No. 05173/11**

In this judgment the South Central Administrative Court ruled that the requirements for the right of a company subject to VAT to deduct VAT on the goods purchased by it in the scope of its activity, which were eventually no used to obtain the income subject to taxation – in concrete, because the taxable person did not eventually pursue the economic activity as intended, are not fulfilled.

Consequently, the court held that, with regard to those goods, the company acted as a final consumer and cannot, consequently, deduct the VAT paid on purchase.

**Administrative and Tax Arbitration Centre**
**Arbitration Award of 16 October 2013, published on 7 November 2013**
**Case No. 28/2013-T**

In this arbitration award, the Arbitration Tribunal ruled on the lawfulness of the assessment of VAT in a situation in which a company managed the supply of programmed maintenance and car repair services to concessionaires, concluding contracts with insurance companies to ensure coverage of the costs that may arise from that management.

The Tax Authority considered that the debts made to the insurance companies reflected supplies of services subject to VAT, proceeding to the compulsory assessment of this tax in concrete.

The Arbitration Tribunal considered that the assessment was unlawful since the payments/receipts made by the company on behalf and on account, did not represent consideration for the supply of services for VAT purposes and that, even if they did, they would in any case be exempt from VAT, the same applying to the compensations received from the insurance companies, which, in this respect, has already been acknowledged by circular letter of the Tax Administration.

**Administrative and Tax Arbitration Centre**
**Arbitration Award of 29 October 2013, published on 7 November 2013**
**Case No. 50/2013-T**

In this arbitration award, the Arbitration Tribunal states that, with regard to buildings not divided into horizontal property (*propriedade horizontal*) comprised of several floors and units used independently, the taxable asset value of EUR 1,000,000.00 fixed in item 28 of the *Tabela Geral do Imposto do Selo* (General Stamp Duty Scale), which provides for additional taxation of urban properties for residential purposes with a taxable asset value of EUR 1,000,000.00 or more, cannot be calculated taking into consideration the sum of the taxable asset value attributed to the various parts or floors of the building.

Indeed, as happens with the Municipal Property Tax, also the Stamp Duty should be assessed individually for each part or unit used independently that comprises the properties, even if the latter are not divided into horizontal property, for which reason, taking into account not only the rationale for this tax, but also the principle of equality, the taxable asset value that constitutes the limit of application of item 28 must be the one of each individual part, floor or unit used independently.

**Administrative and Tax Arbitration Centre**
**Arbitration Award of 6 September 2013, published on 28 November 2013**
**Case No. 54/2013-T**

In this arbitration award, the Arbitration Tribunal ruled that accounting movements that do not have the necessary supporting documents cannot be qualified as confidential expenses for the purposes of article 88 of the IRC Code when they are artificial accounting operations, because the concept of confidential expenses implies the real existence of an expense, which was not proven in this proceeding (on the contrary, it was proven that the accounting operation under discussion did not involve an outflow of financial resources leading to a reduction of the Applicant's assets).

According to the Arbitration Tribunal decision, this type of irregularity in a tax payer accounting does not justify the autonomous taxation as confidential expense, but is

deemed to be a requirement for the application of indirect methods for the evaluation of the taxable base.

**Administrative and Tax Arbitration Centre**
**Arbitration Award of 15 October 2013, published on 28 November 2013**
**Case No. 14/2013-T**

In this arbitration decision, the Arbitration Tribunal ruled that article 3 (1) of the Vehicle Circulation Unified Tax Code ("IUC") establishes a rebuttable presumption concerning its tax payer.

Therefore, if the motor vehicle was transferred before the occurrence of the taxable event and if the vehicle is still registered, by that time, in the previous owner's name, the IUC tax payer shall be the new owner, as long as the property transfer is proven, in order to guarantee that the principle of equivalence is fulfilled – i.e., to guarantee that the tax payer is who really has the use of the vehicle and is the potential polluter

For the same reason, article 3 (2) of the IUC establishes that, if a financial lease contract is in force when the taxable event occurs, the tax payer shall be the lessee – as he is the user of the motor vehicle –, even if the right of ownership is registered in the lessor's name, as long as the lessor proves the existence of the financial lease contract.

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