CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | TAX LAW

TAX LAW NEWSLETTER | April, 2015

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I NATIONAL LEGISLATION

Ministry of Finance
Regulatory Decree no. 4/2015 of 22 April

Fourth amendment to Regulatory Decree no. 25/2009, of 14 September, which establishes the depreciation and amortisation regime for the purposes of Corporate Income Tax ("CIT").

The changes include those that establish the following:

- To determine depreciable or amortisable value unbundling expenses are not considered and the residual value is deduced;
- A request to adopt amortisation and depreciation methods other than straight line and declining-balance methods must be duly justified and sent to the Tax Authorities by the end of the tax period in which the taxpayer intends to start applying such methods;
- A request to extend the regime for intensive use of depreciable assets to others assets not specifically referred to in the law must be duly justified, specify the depreciation rates to be applied and must be sent to the Tax Authorities up to the end of the first tax period in which the taxpayer intends to apply that regime;
- A request for the use of minimum depreciation and amortisation rates lower than those set forth by the law must be duly justified and sent to the Tax Authorities by the end of the tax period in which the taxpayer intends to start applying such rates;
- The acquisition or revaluated value of passenger cars or vans, including electric vehicles, above which depreciations are not accepted as taxable cost shall be defined by Ordinance.

Parliament
Law no. 33/2015, of 27 April

Second amendment to the regime of the Extraordinary Contribution on the Energy Sector, approved by article no. 228 of Law no. 83-C/2013, of 31 December.

Legislative Assembly of the Autonomous Region of the Azores
Regional Legislative Decree no. 13/2015/A, of 27 April

First amendment to Regional Legislative Decree no. 10/2014/A, of 3 July, which creates measures to reduce the use of plastic bags.

Ministry of Economy
Decree-Law no. 66/2015, of April 29

Approves the legal regime of On-line Games and Betting and amends, among others, the General Scale of Stamp Duty.

Ministry of Economy
Decree-Law no. 67/2015, of April 29

Establishes the legal regime of practice and exploitation of sports betting on a territorial basis and amends, among others, the General Scale of Stamp Duty.

Ministry of Finance
Ordinance no. 117/2015, of April 30

Defines the models, the technical specifications and conditions of the excise stamps meant to be applied in the sealing of spirituous beverages.

Ministry of Finance
Ordinance no. 119-A/2015, of 30 April

Approves the form to declare supply utilities contracts (Form 2 of Municipal Property Tax), aimed to the providers of water, energy and fixed telephone services communicate to the Tax and Customs Authority, by 15 April, July, October and January of each year, all the agreements entered into (or modified) with their clients in the previous quarter, as well as the correspondent instructions for its filling.

Ministry of Finance
Ordinance no. 119-B/2015, of 30 April

Approves the new form for the purposes of the Extraordinary Contribution on the Energy Sector (declaration form 27), as well as the correspondent instructions for its filling.

Ministry of Finance – Minister's Office
Legislative Order no. 7-A/2015, of 30 April

Regulates the procedures for the refund of the CIT assessed in the tax return.

II ADMINISTRATIVE INSTRUCTIONS

Tax and Customs Authority
Binding Information concerning Case no. 6428, of 27 March 2015, published on 2 April 2015
Location of operations – Supply of training services and other related services – analysis of the concept of "services related" to training

Informs that, despite Article 9 of the VAT Code expressly stating for the supply of food and accommodation services to be related to vocational training and, for this reason, be exempt from VAT, the application of this exemption is dependent, in each case, on it being concluded that these supplies of services:

- Are effectively ancillary to the supply of vocational training services, which constitute the main supply;
- Are carried out by organisations that Article 9 of the VAT Code envisages as providers of training services and are included in the scope of its licensed operations;
- Are essential, and not merely useful, for the performance of the training services and within the scope of the goals of the former.

It concludes that training contracts entered into between a Portuguese educational cooperative and a company based in a third country, under the terms of which, apart from training courses in the areas of mechanics, renewable energy and domestic appliance repairs, the students are provided with food, accommodation and transport services, and if the amounts to be invoiced for each supplied service are broken down in the aforementioned contracts, those contracts are only exempt from VAT with regards to the supply of training services. Food, accommodation and transport services are not considered to be related to the training activities for purposes of applying the exemption established for training services, since they do not fulfil the abovementioned requirements.

Tax and Customs Authority
Office of the Subdirector-General of Income Taxes and International Relations
Circular no. 20.176, of 2 April 2015

Discloses the most frequent questions arising from the most recent reform of Personal Income Tax ("PIT") (which shall only be applicable to the tax returns to be submitted in 2016), and their respective answers.

Tax and Customs Authority
Excise Duty and Vehicle Tax Services
Circular no. 35.045, of 24 March 2015, published on 8 April 2015

Complementing Circular no. 35.037 [see our NEWSLETTER TAX | January, 2015], this circular approves instructions concerning the liquid containing nicotine in recipients used to charge and recharge electronic cigarettes, particularly with regards to the following aspects:

- Terms and procedures for obtaining marketing authorisation on brands of liquids containing nicotine;
- Requirements and procedures for operating a tax warehouse for the production of liquids containing nicotine; and
- Registration of economic operators with *Imprensa Nacional – Casa da Moeda (INCM)*.

Tax and Customs Authority
Area of Collection
Circular no. 90020, of 10 April 2015

This circular clarifies that the waiver to tax representation provided for in Article 130-A of the PIT Code merely applies to tax obligations related to PIT, not being effective for other taxes, including VAT.

It also clarifies that the waiver must be made by registered letter, preferably with return receipt, to the last known address of the represented party.

The tax representative must give notice of the waiver to the Tax and Customs Authority at any Tax Office, for the waiver to be effective towards it, by means of a copy of the waiver notice sent to the represented party, of the original record of the letter and of the original of return receipt (if any).

III EUROPEAN UNION CASE LAW

Court of Justice of the European Union
Judgment of 14 April 2015
Case C-76/14

In this Judgment, rendered within a reference for a preliminary ruling, the Court of Justice of the European Union decides that the creation by a Member State of a tax on motor vehicles, levied on second-hand imported vehicles, at the time of their first registration in that Member State, as well as on vehicles already registered in that Member State, at the time of the first transfer of the right of ownership within that same State, does not contravene the principle of free movement of goods.

However, exemption from that tax on the domestic second-hand motor vehicles in respect of which a similar tax previously in force and subsequently declared incompatible with EU law has already been paid (instead of its reimbursement with interest) does constitute a violation of the principle of free movement of goods, since it favours sales of domestic second-hand vehicles and discourages the importation of similar vehicles.

Court of Justice of the European Union
Judgment of 16 April 2015
Case C-591/13

In this Judgment, rendered in the context of an action for failure to fulfil obligations under the Treaty, the Court of Justice of the European Union gives its opinion on the legal regime in a Member State regarding the taxation of capital gains realised on the sale of an investment asset that forms part of the assets of a permanent establishment located within that Member State.

According to the analysed legal regime, the taxation of those capital gains is deferred if they are reinvested in the acquisition or production of replacement assets that shall form part of the assets of a permanent establishment of the same taxpayer, located within the Member State in question. However, if the reinvestment is made in assets that shall form part of the assets of an establishment of the same taxpayer located in another Member State, the capital gains in question are subject to immediate taxation.

The Court of Justice of the European Union concludes that these provisions constitute an illegal restriction on the principle of freedom of establishment, because they give rise to a cash-flow disadvantage for the taxpayer wishing to reinvest those capital gains in the assets of a permanent establishment located within the territory of another Member State, resulting in a difference in treatment that cannot be explained by an objective difference in situation and cannot be justified by overriding grounds of public interest.

Court of Justice of the European Union
Judgment of 16 April 2015
Case C-42/14

In this Judgment, rendered within a reference for a preliminary ruling, the Court of Justice of the European Union decides, in line with previous decisions, that the letting of immovable property and the supply of water, electricity and heating as well as waste management accompanying that letting must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes.

However, those supplies are deemed to be a single complex supply if their different elements are closely linked, in such a way that they form, objectively, a single, indivisible economic supply, which would be artificial to split. For this purpose it is necessary to analyse the economic reason on the basis of the conclusion of such contract.

If the lessee is not able to freely choose the suppliers and the terms of use of the goods or services provided with the letting, this indicates that the supplies and letting must be considered a single supply for VAT purposes.

Court of Justice of the European Union
Judgment of 23 April 2015
Case C-111/14

In this Judgment, rendered within a reference for a preliminary ruling, the Court of Justice of the European Union decides that the neutrality of VAT is not compatible with a national provision which refuses the supplier of services the possibility to recover from the recipient the VAT paid by the former following a compulsory assessment (which was based on the grounds that the services have been supplied from a fixed establishment located in the territory of the Member State in question), when the recipient of those services, VAT taxpayer established in the territory of said Member State, had also paid that tax on the

mistaken assumption that the supplier did not have a fixed establishment in that State, without having the right to the correspondent deduction.

The Court of Justice of the European Union holds that, in order to ensure the neutrality of VAT, the Member States have to provide for the possibility of regularising the invoices incorrectly issued (*in casu*, invoices issued without VAT because of the improperly application of the reverse charge rule), where the person who issued the invoice shows that he acted in good faith. However, where the risk of any loss of tax revenue has been totally eliminated, the principle of the neutrality of VAT requires the regularisation to be admitted without being dependent upon the discretion of the Tax Authority on to the good faith of the issuer of the relevant invoice.

Thus the Court of Justice of the European Union notes that the principle of neutrality of the tax would not be undermined in this case if the national provisions in question allowed the supplier of services, after having paid the VAT due as a result of the compulsory assessment, to adjust the invoices issued and recover that VAT from the recipient of the services, who should be granted the right to obtain the correspondent deduction.

Court of Justice of the European Union
Judgment of 23 April 2015
Case C-16/14

In this Judgment, delivered within a reference for a preliminary ruling, the Court of Justice of the European Union decides on the VAT taxable amount of an operation assimilated to a supply of goods for consideration.

The Court of Justice of the European Union states that, when dealing with a definitive allocation of a real estate asset built by the taxpayer to an exempt area of activity, in respect of which VAT was previously wholly deducted (upon its previous allocation for the purposes of the company's business), the taxable amount shall be the purchase price of similar goods at the time of the allocation to an exempt area of activity. In this context, it is irrelevant to assess the elements of such purchase price, more specifically if one of those elements results from the payment of interest.

Therefore, the cost criterion shall only be used to determine the taxable amount of a situation as described above if it would not be possible to ascertain the purchase price of a similar good in the market (*in casu*, property real estate asset whose location, size and other essential characteristics are similar to those of the asset in question).

IV NATIONAL CASE LAW

Supreme Administrative Court
Judgment of 25 March
Case no. 0107/13

In this Judgment, the Supreme Administrative Court decides that the updating of the tax value of a property, previously assessed in accordance with the old Property Tax and Agricultural Tax Code, following improvements conducted into that property and resulting from a valuation carried out pursuant to the rules of the existing Municipal Property Tax Code, did not allow the Tax Authorities to assess taxable income subject to PIT by indirect methods and to consider as a capital gain the difference between the second and first tax valuations, since the increase in value reflects a merely potential or latent capital gain, not effectively realised.

Supreme Administrative Court
Judgment of 25 March 2015
Case no. 01080/13

In this Judgment, the Supreme Administrative Court stated that if a company did not pay Stamp Duty at the time of its incorporation and transfer of assets because the notary considered that there was an exemption, the liability for this payment, ascertained following a tax inspection, shall be borne entirely by the company (as entity that should borne the underlying cost) and not by the notary (in its capacity of taxpayer), on the assumption that the notary acted with due diligence in the collecting of such tax.

North Central Administrative Court
Judgment of March 12
Case no. 00173/05.6BEBRG

In this Judgment, the North Central Administrative Court states that the Tax and Customs Authority does not have to provide evidence regarding the falsity of the invoices for the purposes of refusal of VAT deduction. Instead, it is sufficient to simply identify facts from which results the strong probability of the underlying operations being simulated, in order to rebut the presumption of veracity of taxpayers' declarations and accounting.

The inexistence of contracts, budgets or any other documents concerning the acquisitions to which the invoices relate, as well as the reentry in cash, on the purchaser's bank account, of the total net value of the check issued for payment, constitutes sufficient evidence that the invoices do not represent real transactions. Thus, it shall be to the purchaser to provide the competent authorities with proof that the issued invoices, in respect of which VAT has been deducted, correspond to real transactions.

North Central Administrative Court
Judgment of March 12
Case no. 00005/04.2

In this Judgment, the North Central Administrative Court states that ancillary obligations must have a legal basis, and therefore the Tax and Customs Authority cannot impose the

compliance with the former when such obligation derives from an administrative circular and not from statutory provisions.

Thus, considering that the law does not prescribe any obligation of prior notification to the Tax and Customs Authority, by corporate income taxpayers, concerning their intention of destruction of outdated inventories or with loss of value, the Tax and Customs Authority cannot ignore the extraordinary loss, reflected on the taxpayer´s accounting and as such reported for tax purposes, exclusively on the basis of lack of said prior notification.

South Central Administrative Court
Judgment of 15 April 2015
Case no. 05108/11

In this Judgment, the South Central Administrative Court confirms that an invoice can only confer the right to deduct the payable tax if it is issued with respect to the legal requirements.

Thus, in the case of invoices issued breaching legal requirements and that, simultaneously, are considered by the Tax and Customs Authority as not corresponding to real transactions, it is not sufficient for the taxpayer to prove that the underlying transaction took place in order to secure right to deduct, being also necessary to provide evidence that the formal requirements of the invoice are duly observed.

Administrative and Tax Arbitration Centre
Tax Arbitration Court
Arbitration Decision of 19 December 2013, published on 8 April 2015
Case no. 130/2013-T

In this Arbitration Decision, the Arbitration Court gives its opinion on the legality of a PIT assessment issued following the application by the Tax and Customs Authority of transfer pricing rules to a company's purchase of shares from its main shareholder, considering that the selling price exceeded what would have been agreed between independent entities and this excess should be reclassified as an advance on profits, taxed in the hands of the shareholder, a natural person, as capital income.

The Arbitration Court annulled the PIT assessment, underlining that transfer pricing rules can only be applied to under PIT in Category B (organized accounting regime), and not under Category E.

It further notes that the transaction could only be reclassified by application of an anti-abuse provision and not through the application of the legal presumption determining that entries of amounts in any current accounts of the shareholders, that do not derive from loans, from the provision of work or from the exercise of management functions, are presumed to be made as profits or advance payment of profits, which had indeed been rebutted in this case.

Administrative Arbitration Centre
Decision of 04 December 2014, published on 9 April 2015
Case no. 307/2014

In this Arbitration Decision, the Arbitration Court decided that, for the purposes of rules concerning liability to PIT, the classification of '*rent beneficiary*' constitutes a legal position that is not dependent upon a declaration of intent by the taxpayer, as it could lead to the breach of the principle of tax legality and of taxpaying capability.

As such, '*rent beneficiary*' is the person who, according to civil law, is entitled to its receipt, *i.e.* the owner, the usufructuary and/or the landlord, for which reason any person outside this legal framework, namely a person who receives rents under a rent assignment agreement, cannot be classified as PIT taxpayer for the rents in question.

Administrative Arbitration Centre
Decision of 10 November 2014, published on 9 April 2015
Case no. 278/2014-T

In this Arbitration Decision, the Arbitration Court analyzes the conditions for the adjustment of VAT in favour of the taxpayer based on credit notes, in light of the requirements listed in Article 78(5) of the VAT Code.

The Court decides that the presentation of current account statements concerning the acquirer and the adjustment of the credit note, as well as the corresponding accounting entries, can demonstrate that the acquirer was informed of the rectification or that the tax was repaid.

The Court also stresses that the classification of a document as "internal document of the company" is not sufficient to affect its adequacy as evidence of the facts alleged by the taxpayer.

V OTHER INFORMATION

Legislative Proposal no. 316/XII

Legislative Proposal no. 316/XII, approved by the Council of Ministers on 2 April 2015, which amends the Tax Benefit Code and approves the new regime applicable to licensed entities in the Madeira Free Trade Zone from 1 January 2015, was published on the Parliament website.

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income concluded between Portugal and Oman

On 28 April 2015, at the official website of the Portuguese Government, it was made public information concerning the signature, between Portugal and Oman, of a

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

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