

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | TAX LAW

TAX LAW NEWSLETTER | March, 2016

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I INTERNATIONAL LEGISLATION

European Commission

Implementing Regulation (EU) 2016/323, of 24 February, published in 11 March

Laying down detailed rules for cooperation and exchange of information between Member States regarding goods under excise duty suspension in accordance with Regulation (EU) No. 389/2012.

European Commission

Implementing Regulation (EU) 2016/346, of 10 March

Determining the items to be included in the Customs Information System.

European Commission

Implementing Regulation (EU) 2016/379, of 11 March

Amending Regulation (EC) No. 684/2009 in what concerns the information to be submitted under the applicable computerized procedures for the movement of excise goods under suspension of excise duty.

II NATIONAL LEGISLATION

Ministry of Finance

Decree-Law No. 8/2016, of 4 March

Amending Decree-Law No. 26-A/2014, of 17 February, which established the draw "*Factura da Sorte*" (translatable as "Lucky Invoice"), determining the change of the prize awarded to savings public debt instruments issued by the Portuguese Treasury and Debt Management Agency.

Parliament

Law No. 7-A/2016, of 30 March

Approving the State Budget for 2016.

For further information, please see our [Tax Legal Flash](#) on the subject.

Parliament

Law No. 7-B/2016, of 31 March

Approving the Major Planning Options for 2016-2019.

Ministry of Finance

Ordinance No. 62/2016, of 31 March

Amending the Regulation of the draw "*Factura da Sorte*", approved by Ordinance No. 44-A/2014, of 20 February.

Ministry of Finance

Office of the Secretary of State for Tax Affairs

Order No. 64/2016-XXI, of 31 March

Postpones to the last day of June 2016 the deadline for financial institutions to report to the Tax Authorities the data foreseen in Article 7 of the Financial Information Reporting Regime, due to the non-approval and ratification of the Foreign Account Tax Compliance Act ("FATCA"), signed between Portugal and the United States of America.

III ADMINISTRATIVE INSTRUCTIONS

Tax and Customs Authority

Binding Information concerning Case No. 1661/2014, of 23 July 2014, published on 24 March 2016

Framework applicable to the remuneration of doctors working for ULS, E.P.E. (local health units)

Clarifies that the regime for cross-border workers provided for in the Double Tax Treaty between Portugal and Spain shall apply to doctors working for *Empresas Públicas Empresariais - E.P.E.* (translatable as Corporate Public Companies) provided that the remaining requirements of the regime are complied with (i.e., that the doctors live across the border and return to their homes on a daily basis) since they do not belong to the administrative structure of the Portuguese State even if subject to the legal framework applicable to civil servants.

Tax and Customs Authority

Binding Information concerning Case No. 9584, of 19 February 2016, published on 3 March 2016

Real estate transactions – Inexistence of premises for the application of the exemption waiver

Clarifies that it is not possible to waive the Value Added Tax ("VAT") exemption on the transfer of real estate whenever the purchaser intends to lease the property (VAT exempt activity) but does not yet have a known tenant.

Further notes that, if the VAT exemption is not waived on the acquisition of the property, such waiver cannot occur on a subsequent lease.

Tax and Customs Authority

Tax Management Area - CIT

Circular No. 20186/2016, of 26 February 2016, published on 3 March 2016

Discloses the municipal surtax rates applicable to the 2015 tax period, to be collected in 2016.

Further clarifies that under the terms of the new law establishing the funding regime of municipalities and inter-municipal entities (Law No. 73/2013, 3 September), the surtax is levied on the taxable profit subject to and not exempt from Corporate Income Tax ("CIT") for the 2015 tax period and that:

- The standard rate applies to taxpayers whose turnover in 2015 exceeds €150,000.00;
- The reduced rate applies to taxpayers whose turnover in 2015 does not exceed €150,000.00 but is higher than the amount indicated in the "scope of exemption" column;
- Taxpayers whose turnover in 2015 does not exceed the amount shown in the "scope of exemption" column are exempt from municipal surtax;
- In cases where the exemption is subject to the verification of other requirements besides turnover, the criteria mentioned in the "scope of exemption" column must be met.

Tax and Customs Authority

Binding Information concerning Case No. 10017, of 26 February 2016, published on 3 March 2016

Invoicing – Invoicing of commissions regarding insurance mediation activity carried out in exclusivity

Clarifies that an entity which, within its commercial activity, exclusively carries out VAT exempt transactions, without a right of deduction, is exempted from the obligation to issue invoices. Notwithstanding it may choose to do so, in which case it is required to fulfil all invoicing or simplified invoicing legal requirements.

Tax and Customs Authority

Tax Management Area - PIT

Circular No. 20183/2016, of 3 March 2016

Harmonizes the procedure to prove the existence of a non-marital partnership, for Personal Income Tax ("PIT") purposes, whenever the Tax Authorities taxpayers' register does not show that the taxpayers have shared a common tax residency for a minimum period of 2 years.

It further determines that proof of non-marital partnership may be performed by any means legally admissible, clarifying that whenever such proof is performed by submitting a statement issued by the parish, said document must be accompanied by a sworn statement of the taxpayers that they live in a non-marital partnership, as well as a certified copy of their complete birth certificates.

Additionally clarifies that this procedure is applicable only to the year 2015 and onwards, not to prior years.

Tax and Customs Authority

Binding Information concerning Case No. 9860, of 4 March 2016

Right of deduction – Moment in which the right arises

Clarifies that the acquirer may use its right of deduction even if the invoices in which the tax is mentioned have not yet been registered in the accounts, provided that the deadline of 4 years from the date of invoicing has not yet elapsed.

Tax and Customs Authority

Binding Information concerning Case No. 9949, of 11 March 2016

Real Estate Operations – Operation subject and not exempt – Contract for use of space and rendering of services connected with the fruition of the property – Leasing of a property together with the rendering of other services, and not just a simple and straightforward lease

Clarifies that a leasing including the rendering of certain services in connection with the use and fruition of the property, namely the management of facilities, exterior cleaning services and exterior maintenance, represents a leasing with connected services not covered by the VAT exemption foreseen in paragraph 29) of Article 9 of the VAT Code, therefore VAT being levied at the general rate.

Tax and Customs Authority

Tax Management Area - CIT

Circular No. 20184/2016, of 14 March 2016

Clarifies the state/regional surtax calculation method whenever the taxable income of the taxpayer is subject to different tax regimes by virtue of its activity being carried out both inside and outside Madeira Free Trade Zone ("MFTZ").

It further clarifies that the exclusion of payment of the regional surtax applicable to entities operating within the MFTZ under Article 36 of the Statute of Tax Benefits ("STB") does not apply neither to companies which have been licensed after 1 January 2015, which are subject to the new regime provided for in Article 36-A of the STB, nor to entities licensed before such date but which have opted for the new regime, which are required to pay 20% of the regional surtax assessed over the taxable income arising from the activity carried out within the FZM.

Tax and Customs Authority
Tax Management Area - Property Tax
Circular No. 40114, of 16 March 2016

Clarifies that entities belonging to central, regional and local authorities, or its business sectors, which own properties or surface rights, must report to the tax office of the area of the property the entering of lease agreements under the aided leasing regime for the purpose of permanent residence of households, so that the attribution of the benefit of automatic exemption of Property Tax is controlled.

The Property Tax exemption shall be registered in the land registry (with the code "68 – aided leasing for housing") after being confirmed that the taxpayer does not have any debts towards the Tax Authorities or Social Security as provided in the STB.

Tax and Customs Authority
Tax Management Area - Income Taxes and International Relations
Circular No. 20185, of 29 March 2016

Establishes the procedure for immediate assignment in Tax Offices of pre-issued passwords to access the Tax Authority's website, in Tax Offices.

IV NATIONAL CASE LAW

Constitutional Court
Judgement No. 100/2016, of 23 February 2016, published on March 2016
Case No. 1021/14

In the Judgment in question, the Constitutional Court declared constitutional the provision of paragraph 4 of Article 19 of the Statute of Tax Benefits ("STB"), when interpreted with the meaning, also adopted in an arbitration decision of the Administrative Arbitration Centre, that the disregard of the costs incurred with workers who are part of the household of the employer, for the purposes of the employment creation benefit, can only be applied to individual businesspersons, as companies regardless of their corporate type do not have a household.

Constitutional Court
Judgement No. 139/2016, of 8 March 2016
Case No. 927/15

In the Judgment in question, the Constitutional Court ruled constitutional the provision of paragraph 3 of Article 31 of the STB with the meaning that the tax exemption applicable to capital gains perceived by a holding company from the onerous transfer of participations is never applicable if the stake was acquired to related parties and was held for less than three years prior to sale.

Supreme Administrative Court
Judgement of 24 February 2016, published in March 2016
Case No. 082/16

In the Judgment in question, the Supreme Administrative Court states that for the purpose of assessing the adequacy of a guarantor to secure the payment of the enforceable debt it is not enough that the Tax Authorities use an objective criterion, being also necessary that such criterion is adequate for that purpose.

Therefore, the Tax Authorities are not allowed to use the participation valuation criterion set forth by the Stamp Duty Code for the purposes of assessing that tax, without there being a legal rule determining its applicability for the purpose of valuating the estate of the guarantor and without demonstrating its suitability for this purpose.

Administrative Arbitration Centre
Tax Arbitration Court
Arbitration Decision of 12 November 2015, published on 14 March 2016
Case No. 326/2015-T

In the Arbitration Decision in question, the Tax Arbitration Court ruled that the financial costs incurred in by an holding company to increase the equity of a subsidiary meets the requirements for tax deductibility, considering that the corporate purpose of a holding company is exclusively to manage shareholdings, which naturally involves its acquisition, the management operations necessary for the appreciation of the financial asset, financing and eventual subsequent sale.

Administrative Arbitration Centre
Tax Arbitration Court
Arbitration Decision of 21 January 2016, published on 14 March 2016
Case No. 92/2015-T

In the Arbitration Decision in question, the Tax Arbitration Court ruled that the financing costs incurred by a company for the purchase of 100% of the shares of the company that would afterwards incorporate it under a reverse merger, continue to be tax deductible post merger.

The Tax Arbitration Court considered that the requirements for tax deductibility of financing expenses are met since (i) the funds were actually applied in the activity of the company as it stands post-merger, i.e., as a synthesis of both merged companies, "even if contained in the juridical «shell» of the surviving entity" and (ii) it is not established that the merger was, solely or principally, motivated by non-business reasons or fraudulent.

Administrative Arbitration Centre
Tax Arbitration Court

Arbitration Decision of 22 January 2016, published on 14 March 2016
Case No. 218/2015-T

In the Arbitration Decision in question, the Tax Arbitration Court ruled that the qualification of the building mentioned in the license of use must be taken into consideration for the purpose of determining its tax value.

Hence, a service station must be assessed globally as per the rules of the Municipal Property Tax Code applicable to properties of the category "Other", whenever it is composed of a fuel station (identified in the license of use as a building of the category "Other") and a convenience store/coffee shop (identified in the license of use as a building of the category "Commercial"), the latter being ancillary and unrepresentative within station's economic activity.

Contrary to the procedure followed by the Tax Authority, the Arbitration Court understood that these properties must be evaluated using, with the necessary changes, the method foreseen for urban properties for housing, commerce, industry and services and not the method of construction cost plus land value.

Administrative Arbitration Centre
Tax Arbitration Court
Arbitration Decision of 29 January 2016, published on 29 March 2016
Case No. 268/2015-T

In the Arbitration Decision in question, the Tax Arbitration Court ruled that the income obtained by an Insurance Company arising from participations and units held under unit-linked contracts is to be included in its taxable income, but is capable however, to benefit from the mechanisms of elimination of double taxation, in particular those provided for in Article 22 of the STB and Article 51 of the CIT Code.

V OTHERS

Convention to Avoid Double Taxation between Portugal and Senegal

The Convention between the Portuguese Republic and the Republic of Senegal to Avoid Double Taxation and Prevent Tax Evasion in respect of Taxes on Income, which was signed in Lisbon on 13 June 2014, enters into force on 20 March 2016.

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