

# CUATRECASAS, GONÇALVES PEREIRA



## NEWSLETTER | TAX LAW

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**TAX LAW NEWSLETTER**

I INTERNATIONAL LEGISLATION

*European Commission*

*Implementing Regulation (EU) 2016/1963 of 9 November 2016*

Amends Implementing Regulation (EU) 2015/2378 as regards standard forms and linguistic arrangements to be used in implementing Council Directives (EU) 2015/2376 and (EU) 2016/881, regarding automatic exchange of information.

II NATIONAL LEGISLATION

*Ministry of Finance*

*Decree-Law no. 66/2016, of 3 November*

Approves an optional regime for the revaluation of tangible assets allocated to commercial, industrial or agricultural activities, as well as for investment properties and assets of a tangible nature allocated to concession agreements.

*Ministry of Finance*

*Decree-Law no. 67/2016, of 3 November*

Approves an exceptional regime for the settlement of tax and social security debts, by means of full payment or payment in instalments, with exemption from the payment of interest and other expenses associated with the debt, or with reduction of said amounts.

*Ministries of Finance and Economy*

*Ordinance no. 291-A/2016, of 15 November*

Updates the unit tax rate on petroleum and energy products applicable in mainland Portugal to unleaded petrol and diesel.

*Parliament*

*Resolution no. 229/2016, of 21 October, published on 18 November*

Establishes the "green card" procedure on tax and financial transparency in the European Union.

*Parliament*

*Law no. 36/2016, of 21 November*

Exempts from Value Added Tax ("VAT") donations of movable assets to museums which are part of the Portuguese Museum Network.

*Ministry of Finance*

*Ordinance no. 293-A/2016, of 18 November*

Establishes, under Article 14 of the special regime applicable to deferred tax assets approved by the Law 61/2014, of 26 August, the conditions and procedures for the acquisition, by shareholders from the State, of share capital increase option rights through incorporation of the amount of the special reserve, and subsequent issue and free allocation of shares.

*Ministry of Finance*

*Order No. 14076/2016, of 23 November*

Approves "Form 52 – Reassessment of Tangible Assets and Investment Properties – Special Autonomous Taxation", and its instructions.

### III ADMINISTRATIVE INSTRUCTIONS

*Tax and Customs Authority*

*Binding Information concerning Case No. 2011 002704, of 2 January 2014, published on November 2016*

*Transfer of a business as a going concern – "Trespasse"*

Clarifies that, pursuant to item 27.1 of the General Stamp Duty Table – Within transfers of commercial, industrial or agricultural businesses as a going concern (*trespases*), Stamp Duty is only levied on the share capital realization or subsequent increase if the contribution of one or more shareholders is made in kind, through the transfer of a group of assets (i.e., assets and liabilities) which constitutes a business, if such group of assets also includes the lease of a non-residential property.

*Tax and Customs Authority*

*Binding Information concerning Case No. 2010 003547, of 23 July 2014, published on November 2016*

*Legal nature of assets allocated to municipal water supply – de-allocation from the municipal public domain – transfer against consideration subject to Property Transfer Tax*

Clarifies that the realization of share capital of a municipal company under the form of joint stock company by means of contribution of real estate assets that belong to the municipal public domain, including feeder, distributor and lifting pipes allocated to the

supply of water accounted as assets of municipalities, qualifies as a transfer of property over real estate against consideration, being subject to Property Transfer Tax ("PTT") at a 6.5% rate levied over the value allocated to such assets.

*Tax and Customs Authority*

*Binding Information concerning Case No. 2016 001266, of 4 October 2016, published on November 2016*

*Contribution in kind of real estate assets to pension funds made by the sole participant*

Clarifies that contributions in kind of real assets to a pension fund made by the sole participant do not represent a transfer of real estate for PTT or Stamp Duty purposes, since pension funds are autonomous estates without legal personality, for which reason the rights *in rem* over the real estate assets remain within the same legal person.

*Tax and Customs Authority*

*Binding Information concerning Case No. 2013 001823, of 28 November 2013, published on November 2016*

*Contribution in kind of real estate to the capital of private subscription closed-end real estate investment funds*

Clarifies that the contribution in kind of real estate into the capital of private subscription closed-end real estate investment funds does not qualify as a transfer of real estate against consideration, for which reason the transaction is not subject to PTT.

*Tax and Customs Authority*

*Binding Information concerning Case No. 2016 001064, of 5 August 2016, published on November 2016*

*Properties for resale – expiry of exemption*

Clarifies that the purchase of a plot licensed for construction purposes, in respect of which the acquirer intends to build a residence for resale, cannot benefit from the PTT exemption applicable to the acquisition of properties with the aim of resale, since the subsequent transfer cannot be qualified as the resale of the purchased asset (plot for construction), but instead as a sale of the built asset (the residence).

*Tax and Customs Authority*

*Binding Information concerning Case No. 2013 002923, of 15 November 2013, published on November 2016*

*Properties for resale*

Clarifies that neither the division of a property unit into two units, nor the development of rehabilitation works, imply the loss of the PPT exemption granted upon an acquisition with the aim of resale.

Further clarifies that, if the exemption expires (due to the absence of resale within 3 years), PTT will be levied based on the value of each of the unsold new units at that time.

*Tax and Customs Authority*

*Binding Information concerning Case No. 2014 002372, of 29 August 2014, published on November 2016*

*Concurrent tax benefits for the acquisition against consideration of property by a Pension Fund set up and operating in accordance with national law*

Clarifies that, within the acquisition of real estate assets against consideration, a pension fund set up and operating in accordance with national law may opt between a PTT exemption (Article 16.2 of the EBF) and a PPT rate reduction (Article 49.1 of the EBF).

*Tax and Customs Authority*

*VAT Management Area – Office of the Deputy Director-General*

*Circular Letter no. 30/184, of 14 August 2016*

Clarifies that the exemption provided for in Article 9.2 of the VAT Code applies to thermal facilities when providing services aimed at the prevention, treatment or cure of illnesses or other health disorders and as long as these services are provided based on medical prescriptions that stipulate the appropriate treatment for the pathology of the thermal facilities user. This exemption does not apply to services rendered without medical prescription, well-being, aesthetic, beauty or relaxation services, or food and accommodation services, even if they are provided to recipients of health care services.

Further clarifies that taxpayers operating thermal establishments, that are not legal persons governed by public law, may waive the VAT exemption, regarding services not rendered in the context of agreements with the State, within the scope of the health system.

*Tax and Customs Authority*

*Department of Customs Regulation Services – Movement of Goods Division*

*Circular Letter no. 15 541/2016, of 10 November 2016*

Establishes the rules for the granting of Authorised Economic Operator status, following the entry into force of the Union Customs Code.

Revokes Circular Letter 41/2011, Series II, of the former Directorate General for Customs and Excise Taxes – DGAIEC.

*Tax and Customs Authority*

*Department of Excise Tax and Vehicle Tax Services – Tobacco Tax Division*

*Circular Letter no. 35 061/2016, of 15 November 2016*

Clarifies the labelling and packaging obligations applicable to electronic cigarette refills manufactured or imported after 20 November 2016 within the terms of the Health Law, as well as the procedure to be adopted to obtain authorisation to market these products.

Further clarifies that electronic cigarette refills manufactured or imported before 20 November 2016 may be released for consumption and marketed until 20 May 2017. After this date, all packages that do not comply with the labelling and packaging obligations provided for in the Health Law must be withdrawn from the market, even if the excise stamp remains valid after that date.

#### IV INTERNATIONAL CASE LAW

*Court of Justice of the European Union*  
*Judgment of November 24, 2016*  
*Case C-464/14*

In the Judgment in question, rendered in the framework of a request for a preliminary ruling, the Court of Justice of the European Union states that, as per Articles 63 to 65 of the Treaty on the Functioning of the European Union, the fact that the legislation of a Member State allows the full or partial relief of dividends received by a company whenever said dividends are distributed by a company domiciled in the same Member State, not allowing the same deduction when the distributing company is domiciled in a Third State, constitutes a restriction on the free movement of capital – also applicable to Third States.

The Court of Justice of the European Union also states that such a restriction could only be justified by overriding reasons of public interest relating to the need to preserve the effectiveness of fiscal supervision, which is not the case whenever the authorities of the Member State are able to obtain from the Third State the necessary information allowing them to verify that the requirements for benefiting from the full or partial relief are verified, which was the case in the situation under analysis.

#### V NATIONAL CASE LAW

*South Central Administrative Court*  
*Judgment of 27 October 2016, published on November 2016*  
*Case no. 09730/16*

In the judgment in question, the Court stated that the right to deduct VAT is not precluded when, in limited cases and in exceptional circumstances of blameless destruction or misplacement of the original documents, duplicates (*segundas vias*) of destroyed or misplaced invoices are submitted, these mean being satisfactory to provide the supervisory body with control of a taxpayer tax situation.

*Administrative Arbitration Centre*

*Tax Arbitration Court*

*Arbitration Decision of 19 September 2016, published on November 2016*

*Case no. 14/2016-T*

In the decision in question, the Tax Arbitration Court stated that taxation, pursuant to 28.1 of the General Stamp Duty Table, of buildings under co-ownership with a value for tax purposes greater than one million euros but in respect of which the tax value of the share of each co-owner is inferior to that amount represents an arbitrary discrimination between ownership and co-ownership situations, since the owner of a property with a value for tax purpose of less than one million euros would not be subject to taxation.

The Tax Arbitration Court stated that, since there are no reasonable grounds for the abovementioned differentiated treatment, it must be deemed contrary to and in breach of the principle of tax equality provided for in the Constitution of the Portuguese Republic.

*Administrative Arbitration Centre*

*Tax Arbitration Court*

*Arbitration Decision of 29 September 2016, published on November 2016*

*Case no. 40/2016-T*

In the decision in question, the Tax Arbitration Court stated that events organised by a taxpayer, despite having a dissemination and projection of its image and brand to numerous target publics, as well as an advertising component, are part development of its corporate scope, reason why any associated expenses are intended to ensure the development of its corporate purpose within the economic circuit in which it operates, and not to represent the company within a market in which it is not present: As such, the related expenses cannot be considered representation expenses subject to Corporate Income Tax autonomous taxation.

The Tax Arbitration Court also stated that, in this respect, the taxpayer is entitled to deduct all VAT related with the aforementioned expenses.

*Administrative Arbitration Centre*

*Tax Arbitration Court*

*Arbitration Decision of 18 October 2016, published in August 2016*

*Case no. 88/2016*

In the Arbitration Decision in question, the Tax Arbitration Court concluded that the Portuguese legislator has been aware of the practice of *merger leveraged buy-out* operations and has never determined its illegality, or derived any other tax effects from them.

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The Tax Arbitration Court further stated that financial costs deriving from financing entered into by the incorporated entity in order to acquire the shares of the incorporating entity may be accepted for CIT purposes in the sphere of the entity resulting from the merger if it is deemed that the capital has been applied in the fulfillment of the corporate purpose of the entity (post-merger entity, which must not be mistaken by the absorbing entity but rather is a synthesis of both merged entities), provided that the merger itself was not exclusively or mainly motivated by non-business reasons nor is fraudulent.

### IV OTHERS

#### *Council of Ministers*

#### *Proposals of Resolution 25/XIII to 34/XIII*

Approve the bilateral agreements between the Portuguese Republic and the Federation of Saint Christopher and Nevis, Belize, Guernsey, Turks and Caicos Islands, British Virgin Islands and Andorra on the tax exchange information.

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