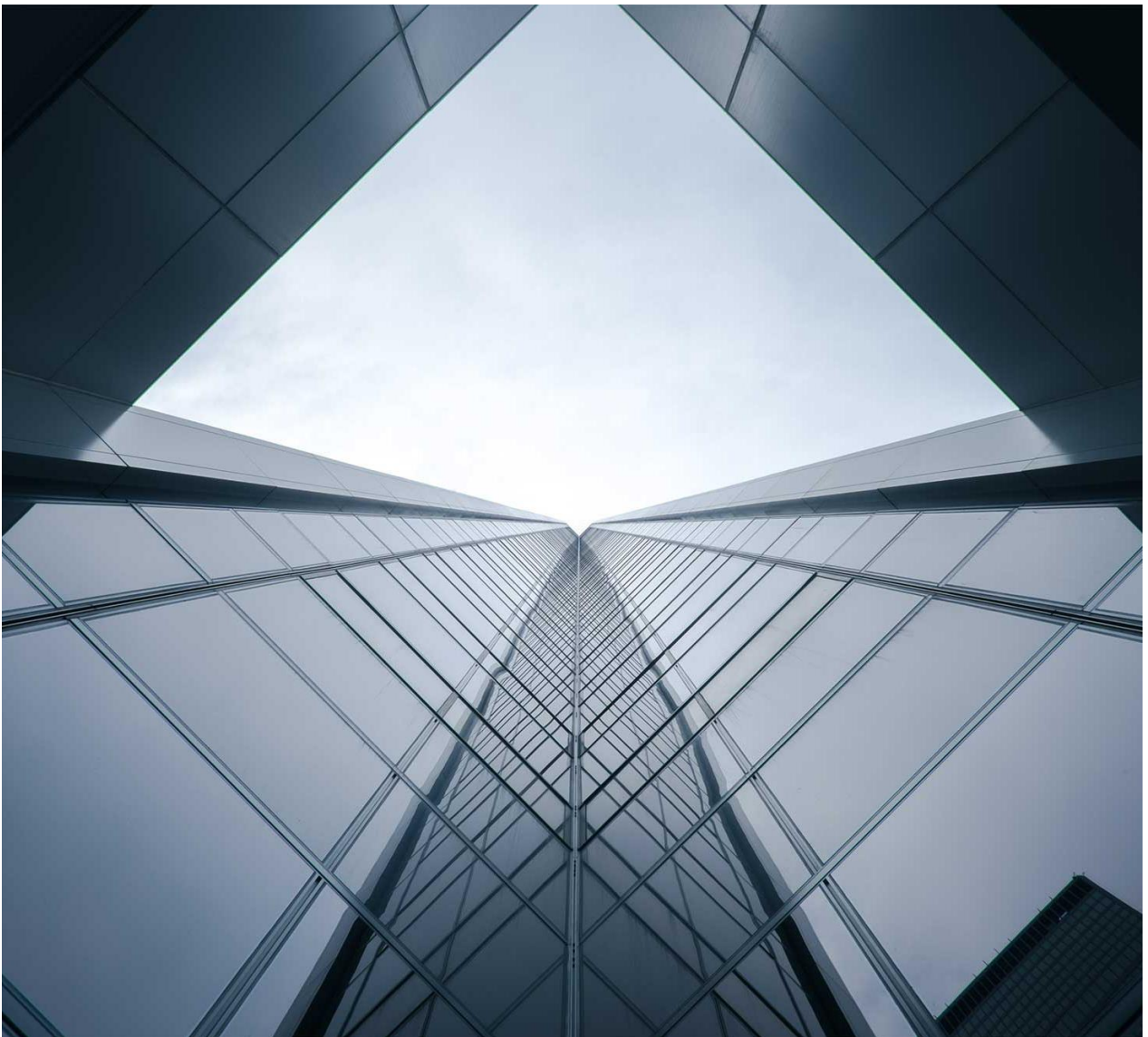


Tax



4th Quarter 2023 | February 2024



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Editorial

In the fourth quarter of 2023, the State Budget Proposal for 2024 was presented and discussed. This proposal, which has been approved and in force since January 1, 2024, includes significant changes in several areas, including:

- > far-reaching changes to the non-habitual resident regime;
- > consolidation of the personal income tax measure for young people (*IRS Jovem*);
- > tax benefits for companies (capitalization incentive);
- > measures that impact companies and employees, such as the autonomous levy (*tributação autónoma*) and *per diems*;
- > Personal income tax (“PIT”) and corporate income tax incentives for startups;
- > housing incentives relating to real estate transfer tax (“RETT”) and stamp tax; and
- > referral of cases to tax arbitration.

For more information, see our [**Guide to the State Budget for 2024**](#).

Regarding the taxation of individuals, we highlight Council of Ministers Resolution 148/2023 of November 17. This resolution extended until December 31, 2026, the program for incentivizing the return of expatriates and emigrants (*Programa Regressar*).

As regards administrative doctrine, we highlight Circular Letter 20262/2023 of November 27. This circular concerns Law 56/2023 of October 6, where the tax authorities regulate the retroactive effects of article 50 of the More Housing Program. Article 50 establishes the regime for exempting the sale of land or nonresidential real estate from taxation and suspends the deadline for reinvesting capital gains.

Turning to caselaw, we highlight Supreme Administrative Court judgment 11/2023 of November 17. This judgment standardized the court’s view that article 43.2 of the PIT Code—which limits taxation to 50% of capital gains for residents in Portugal but not for nonresidents—constitutes a restriction on capital movements.

In terms of real estate taxation, the State Budget Law for 2021 increased the rates of the Real Estate Tax (“RET”) and Additional RET (ARET), created an additional RETT rate for high-value real estate acquisitions and limited tax benefits for urban rehabilitation. These changes—the effects of which continue to this day—have sparked a wide debate about their compatibility with European Union (“EU”) law, particularly with the principles of proportionality, non-discrimination and free movement of capital, as well as with taxpayers’ fundamental rights, such as the right to property, equality and legal certainty. This article analyzes the main legal arguments for and against these measures, as well as their possible economic and social impacts.

Another topic that caught our attention this quarter was the possibility of moving cases from ordinary courts to tax arbitration, following the entry into force of Law 67/2023 of October 15. This law amended the legal regime on tax arbitration provided for in Decree-Law 10/2011 of January 20, allowing parties to agree to submit disputes to tax arbitration at any stage of the judicial proceedings. This legislative development aims to promote the speed, efficiency and specialization of tax justice, as well as to reduce the backlog of administrative and tax courts. However, it also raises practical and legal issues. For this reason, we have prepared an article that aims to clarify the main doubts and challenges that this possibility poses to taxpayers and the tax authorities.



The Cuatrecasas team has been closely monitoring the latest developments and trends in tax and para-fiscal taxation and has prepared the following opinion articles for this newsletter:

- > Fernando Lança Martins and Cristiana Marques Aparício discuss the impact of increased tax rates on real estate in Portugal.
- > Filipe Duarte Geda addresses the possibility of referring pending tax cases to tax arbitration.

Serena Cabrita Neto

Portugal Tax Team Coordinator



Higher real estate taxation in Portugal: Yet another infringement of EU law?

Fernando Lança Martins and Cristiana Marques Aparício

Higher rates for real estate located in Portugal

The State Budget for 2021, approved by Law 75-B/2020 of December 31, includes increased **RETT** and **RET** rates on real estate purchases and ownership in Portugal by entities that are—directly or indirectly—dominated or controlled by entities with tax domicile in countries, territories or regions with more favorable tax regimes. Specifically, it establishes a higher RETT rate of 10%, rather than the general progressive rates of up to 7.5%; and a higher RET rate of 7.5%, rather than the general rates of up to 0.45%.

An entity is considered to be dominated or controlled by an entity with a tax domicile in a country, territory or region subject to a more favorable tax regime if there is a “dominance relationship” between the two, as defined in the Portuguese Commercial Companies Code. The dominant entity is considered to be in a control relationship with the controlled entity if it can exercise direct or indirect dominant influence over the controlled entity. This influence is presumed if the dominant entity, directly or indirectly:

- holds a majority stake (i.e., more than 50%) in the subsidiary’s share capital;
- holds more than half of the voting rights in the subsidiary; or
- can appoint more than half of the members of the subsidiary’s management body or supervisory board.

In early 2024, the Portuguese tax authorities published the first set of binding information on this regime, which we summarize below:

- The regime covers the jurisdictions with a more favorable tax regime, as listed in Order 150/2004 of February 13. These differ from those included on the EU’s list of non-cooperative jurisdictions for tax purposes, and there are significantly more of them.
- The criteria for determining the existence of a control relationship consist of relative presumptions that can be rebutted if—considering all facts and circumstances—the presumed dominant entity is not actually able to exercise a dominant influence over the presumed controlled entity.
- The presumptions established in the Portuguese Commercial Companies Code are not exhaustive, and other circumstances can result in a dominance or control relationship being considered to exist.
- Although the criteria for determining the existence of a dominance relationship are established in the Portuguese Commercial Companies Code (which applies to companies), the term “dominant entity” should be broadly interpreted to include both natural persons and investment funds.



Are the increased RETT and RET rates compatible with the Treaty on the Functioning of the European Union?

The regime that imposes higher RETT and RET rates increases the cost of foreign real estate investment based solely on the residence of the entity that dominates or controls the buyer or owner of the real estate.

Therefore, this regime may be considered a restriction on the free movement of capital, as established by the Court of Justice of the European Union's caselaw, by restricting and discriminating against nonresidents' investments.

Under the free movement of capital, restrictions on transactions between Member States and transactions between Member States and third countries are generally prohibited. However, a restriction may be permitted if it is based on an overriding reason in the general interest (i.e., the "rule of reason").

Based on the preparatory work for the legislation establishing these increased rates, the Portuguese tax authorities may attempt to justify the regime by claiming that it is necessary to prevent tax evasion (allegedly) resulting from structures dominated or controlled by entities with a tax domicile in jurisdictions with a more favorable tax regime (i.e., where income attributed to these entities is deferred or not taxed). However, this regime does not pass the proportionality test, which requires any restriction on the free movement of capital to be appropriate, necessary and reasonable.

This regime seems to be based on an irrebuttable presumption that corporate structures controlled by entities with a tax domicile in jurisdictions with a more favorable tax regime are merely seeking tax advantages. First, the increased rates apply even if the shareholder structure is not intended to obtain a tax advantage. Second, increasing RETT and RET rates is unlikely to effectively prevent income tax from being deferred or evaded, as intended by the legislative preparatory work. Finally, this regime appears unreasonable in relation to its stated objectives, with the increased rates being 33% and 1567% higher than the general maximum rates. It could also end up applying to taxpayers controlled by entities established in jurisdictions that, despite being on the Portuguese list of jurisdictions with a more favorable tax regime, have already entered agreements with Portugal to exchange information on tax matters.

To conclude, the regime that imposes higher tax rates on real estate in Portugal raises serious concerns regarding its compatibility with EU law. Despite this, the Portuguese tax authorities are expected to continue applying the increased rates, even to investments covered by the free movement of capital. Therefore, taxpayers should analyze their Portuguese real estate investment structures and challenge the legality of any tax assessments based on this regime in the courts, with the aim of recovering any overpaid taxes and ultimately compelling the Portuguese tax authorities to comply with EU law.



Renewed possibility of referring pending tax cases to tax arbitration

By Filipe Duarte Geda

Law 82/2023 of December 29, which approved the State Budget for 2024,¹ reintroduced the possibility of referring cases pending before the tax courts since the end of 2021 to tax arbitration.

As this involves a transfer of proceedings, to be able to use this option, the following criteria must be met:

- (i) The claim and cause of action in the case must remain unchanged—however, the claim may be reduced.
- (ii) The tax court must have been asked to terminate the case.
- (iii) The choice of arbitrators cannot be made by the parties.

This is a transitional measure that will be in force until December 31, 2024. However, it is not a new measure. In fact, at the beginning of tax arbitration in 2011, and later in 2019, we had the extraordinary possibility of transferring pending cases to tax arbitration. However, statistical data show that this measure was not widely adopted at the time. Only approximately 150 cases were transferred to tax arbitration, considerably lower than expected for a measure aimed at relieving the backlog of tax courts.

To overcome the challenges of previous versions, the new regime established in the State Budget for 2024 clarifies that if an arbitral decision terminates a transferred case due to the arbitral tribunal's lack of jurisdiction, the case will be returned to the original tax court and resume from where it left off before being transferred to tax arbitration.

This precision of the new regime is welcome. We are all aware of the Portuguese tax authorities' tendency to raise objections regarding the arbitral tribunal's lack of jurisdiction, which can prevent the merits of a taxpayer's claim from being heard. The new regime ensures that proceedings continue in the original court after the case is terminated.

Another new feature of the measure now in force is the ability to transfer pending tax disputes valued at over €10 million, which exceeds the limit for Portuguese tax authorities to be bound by the jurisdiction of arbitral tribunals (but without amending the pertinent binding ordinance).

This possibility has two interesting effects:

- (i) During this year, different rules regarding the maximum value allowed for tax arbitration disputes will coexist, depending on whether the case was initially filed with the arbitral tribunal or transferred from a tax court.

¹ For more information, see our [***Guide to the State Budget for 2024.***](#)



- (ii) The second—still more peculiar—characteristic is the introduction to tax arbitration of the possibility of an ordinary appeal in cases with a value exceeding €10 million that have been transferred under this regime, just as there would be if the dispute had remained in the tax courts.

In practice, the possibility of an ordinary appeal in disputes involving more than €10 million brings the arbitral tribunal closer to a first instance court, which will typically issue a decision within six months. This may make it easier to decide whether or not to refer the case to tax arbitration by the end of this year.

For more information about the contents of this document, please contact *Cuatrecasas*.

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