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# TAX

Newsletter

4th Quarter 2019

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# EDITORIAL

The last quarter of the year was defined by the end of the legislative term, which began in 2015, due to the parliamentary elections held in October and the formation of a new government in Portugal.

Unsurprisingly, the Socialist Party strengthened its electoral position by becoming the most voted party, but it failed to reach a parliamentary majority supportive of the new government, still headed by Prime Minister António Costa.

However, the post-electoral agreement of the last legislative term between the Socialist Party and the remaining left-wing parties was not reenacted this term. Also, we have witnessed a significant shift of votes to smaller parties, with three new parties reaching representation in the parliament, with the party that got a seat in parliament for the first time in 2015 bolstering significantly its position.

As such, the conditions are set for a dynamic shift of the balances and majorities that the government must reach in the parliamentary chess game.

In this post-electoral context, internally the last quarter of 2019 lacked significant updates in tax matters.

Also, the State Budget Law for the 2020 legislative procedure has been delayed, as expected, and is expected to conclude in February. Although we will return to this topic with a more in-depth analysis based on the final approved document, the main idea to retain from the government's draft State Budget Law presented to the parliament is that, with few exceptions, there have been no noteworthy amendments in tax matters.

From an international standpoint, within the context of OECD and G-20's BEPS Project (*Action 1*), another step was taken in the work program towards a common solution, gathering an international consensus to address the new tax challenges arising from the economy's increasing digitalization.

From October to December 2019, OECD made available for public consultation two documents with the solutions developed for the two pillars it has established.

Pillar 1 strives for a new allocation of taxation rights between countries, revolutionizing the current model of international taxation established in the second decade of the last century. Essentially, it aims to allocate for taxation purposes part of the profits generated by goods and services sold digitally to the countries where the consumers are based, regardless of whether the suppliers of these goods and services have a physical presence in those countries.

Pillar 2 (also known as GloBE) aims to reach a consensus to introduce coordinated measures that ensure a minimum level of taxation on a multinational level, avoiding profit shifting to countries with low or inexistent levels of taxation on structures and operations yet to be covered by anti-abuse schemes in place in the BEPS Project.

Undoubtedly, these are ambitious goals for which solutions must be adopted, no less ambitiously, until the end of 2020.

At this point, we would like to wish you a great 2020, which will certainly be full of tax updates, in which Brexit and the global trend in tackling tax fraud and tax evasion will surely continue to stir on an international level.

*Diogo Ortigão Ramos*

# I. *SOCIEDADES DE INVESTIMENTO E GESTÃO IMOBILIÁRIA* (SIGI)

Law No. 97/2019, of September 4 (“**L 97/2019**”), recently amended the regime applicable to SIGI (the Portuguese REIT), which was introduced in Portugal on February 1, 2019, by Decree-Law No. 19/2019, of January 28 (“**DL 19/2019**”).

Regarding the tax regime, this amendment was made to tackle DL 19/2019’s “original sin”: not being supported by a parliament legislative authorization, the government’s DL 19/2019 sought to apply to the SIGI the tax regime applicable to Undertakings for Collective Investment (“**UCI**”), based solely on their qualification as *sociedades de investimento imobiliário*. It addressed this issue through a mere reference in its preamble.

L 97/2019 is noteworthy for granting the legal and tax regimes applicable to SIGI greater political legitimacy through parliamentary approval, as well as the legal certainty needed to overcome any concerns regarding the compatibility of the initial regime with the legislative power in tax matters, which is constitutionally attributed to the parliament.

Moreover, L 97/2019 also introduces significant changes and clarifications to the SIGI’s legal and tax regimes.

We outline the main aspects of the current legal and tax regimes applicable to SIGI, highlighting the amendments made by L 97/2019 in contrast to the initial regime.

- **Main activity:** The SIGI’s main activity consists of investments in real estate assets available for lease. These investments may be carried out by acquiring property rights, surface rights or other rights of an equivalent nature on real estate, as well as allowing SIGI to develop construction and refurbishment projects on real estate assets available for lease. Regarding the allocation of the real estate assets, leases can include other non-typified agreements that include the services necessary for the use of the underlying real estate asset (e.g., when the real estate asset is used as a store or a space in a shopping center, or as office space).
In our view, the new regime clarified that it was not the legislator’s intent to allow the SIGI’s main activity to include real estate assets other than those meant to be leased temporarily.

  Provided the requirements are verified, the SIGI’s main activity may also comprise investments in other SIGI. Investments in other types of entities are also permitted; e.g., in certain companies established in Portugal (now possible due to the amendments made in L 97/2019), in the European Union (“**EU**”) and the European Economic Area (“**EEA**”), and even in certain UCI subject to Portuguese law.

  SIGI are obliged to retain their rights on real estate assets, as well as the above mentioned investments in other entities, for a minimum of three years from the acquisition date. If they do not keep them for at least three years, they may lose their qualification as a SIGI, as well as access to its preferential tax regime.

  L 97/2019 establishes that this requirement must be determined on an ongoing basis. Failure to comply with it may trigger the forfeiture of the SIGI statute and the underlying legal and tax regimes; it does not require the failure to occur for a minimum period or for it to be a recurring event (under the initial version of DL 19/2019, it was six months or two consecutive fiscal years).

- **Asset composition:** The SIGI’s asset composition must consider the following cumulative ratios: (i) at least 80% of the SIGI’s total asset values should be investments in real estate assets for lease and eligible

entities (as defined in the previous point); and (ii) at least 75% of that value should be leased real estate assets (as defined in the previous point).

Failure to comply with either one or both of these ratios triggers the forfeiture of the SIGI statute, as well as access to its underlying legal and tax regimes, provided the failure to comply lasts for six months (for failure to comply with both ratios), or for two consecutive fiscal years or two non-consecutive fiscal years within a total five fiscal years' period (for failure to comply with only one of the ratios).

- **Debt exposure limitations:** L 97/2019 has not modified the debt exposure limitations, meaning the SIGI's debt cannot exceed 60% of its total asset value.

  This requirement also needs to be assessed on an ongoing basis, as failure to comply with it may trigger the forfeiture of the SIGI statute, without it being necessary for this situation to be maintained for any period.

- **Capital dispersion:** Within a year from incorporation (or conversion into a SIGI), all shares in a SIGI must be admitted to trade on a regulated securities market or, alternatively, selected for negotiation in a multilateral trading facility in Portugal or another EU or EEA Member State.

  However, L 97/2019 establishes that from the third and fourth calendar years following admission on a regulated securities market or multilateral trading facility (and not immediately after that admission, as required under the initial regime), the SIGI's share capital must be diluted (by up to 25%) through a number of shareholders carrying a maximum of 2% of voting rights.

  Failure to comply with this dispersion requirement for six months triggers the forfeiture of the SIGI statute and of the underlying legal and tax regimes.

- **Mandatory profit distributions:** This obligation remains unchanged, so the SIGI must continue to make mandatory distributions of the distributable profits for each fiscal year: (i) 90% regarding profits arising from the distribution of dividends and income derived from shares or participation units held by the SIGI; and (ii) 75% regarding other profits.

  There are no specific penalties for failing to comply with this requirement.

Regarding the tax regime applicable to SIGI, under L 97/2019, the regime applicable to Securities and Real Estate Investment Companies and Funds established by articles 22 and 22-A of the Tax Benefits Law ("**TBL**") applies to SIGI.

Any taxable profits the SIGI earns are subject to corporate income tax ("**CIT**") at the standard 21% rate, and no municipal or state surcharges apply.

However, under this regime, the SIGI benefits from a CIT exemption on investment income, rental income, as well as capital gains (except those arising from the sale of companies resident in tax havens, as defined by Portuguese law).

L 97/2019 introduced a feature specifically applicable to SIGI, under which, to apply the exemption on capital gains earned from the sale of real estate assets, those real estate assets must be maintained for lease purposes for a minimum of three years.

L 97/2019 also establishes that the forfeiture of the SIGI statute determines the non-application of articles 22 and 22-A of the TBL tax regime. Therefore, it will trigger the taxation of the SIGI's profits under the CIT general regime. A full fiscal year would be considered to exist between the date of forfeiture and the end of the corresponding calendar year.

Under L 97/2019, the income derived from SIGI participations, paid or made available to shareholders, as well capital gains generated from transferring these participations, will be taxable according to the CIT and personal income tax general regimes, on termination of the application of articles 22 and 22-A of the TBL regime.

Forfeiture of the SIGI statute means the SIGI may not reacquire this statute for the following three years. It also means administration and auditing bodies will be liable for any damages arising from the forfeiture.

Regarding stamp duty, considering the brief reference in DL 19/2019's preamble regarding the application of the *sociedades de investimento imobiliário* tax regime to SIGI, it was discussed whether it should be extended to paragraph 29.2 of the Stamp Duty General Table ("**SDGT**"), which subjects UCIs to stamp duty, on a quarterly basis, of 0.0125% on their total net asset value.

Considering that L 97/2019 does not specifically state that this provision shall apply to SIGI, it may be concluded that these entities are not subject to stamp duty under paragraph 29.2 of the SDGT. This reasoning is supported by the fact that SIGI do not assume the nature of UCIs and are not subject to the same legal regime.

Regarding the taxation of SIGI, L 97/2019 introduces the above specifications that are contrary to the regime established for UCI, but not regarding the taxation of their shareholders, which follows article 22-A of the TBL.

In summary, resident individual shareholders of SIGI are subject to 28% tax on any dividends and capital gains, whereas nonresidents benefit from a reduced 10% rate (except, e.g., on dividends paid to individuals resident in tax havens, to which an aggravated rate of 35% applies).

Resident corporate shareholders are also subject to CIT on dividends and capital gains, at a standard rate of 21%, potentially increased by any amounts of municipal surcharge (up to 1.5% over taxable profit of the year) and state surcharge (on taxable profit over EUR 1.5 million, with progressive rates between 3% and 9%). Nonresident corporate shareholders are generally taxed at a 10% rate imposed on both dividends (although aggravated rates of 25% and 35% may apply) and capital gains.

Essentially, L 97/2019 gave the tax regime for SIGI the legal certainty it initially lacked, changing and clarifying its legal regime.

Overall, and despite that additional improvements that may still be introduced, the regime's new configuration is attractive enough for investors to use this vehicle, which is confirmed by the emergence of the first SIGI in Portugal.

*Gonçalo Bastos Lopes*
*João Pedro Russo*

## II. TONNAGE TAX

Decree Law No. 92/2018, of November 13, approved, in the field of taxation, (i) a special regime for determining the taxable amount based on the tonnage of ships and vessels ("**tonnage tax**"), and (ii) a tax regime applicable to crew members.

The main objective of approving this decree is to promote the national merchant navy, create jobs, foster innovation, and increase the fleet of ships flying the national flag, thus enhancing the expansion of the Portuguese maritime transport sector and the development of national ports and naval industry, while increasing competitiveness, economic growth and qualified maritime employment.

To achieve these objectives, taxable persons subject to corporate income tax ("**CIT**") with a head office or place of effective management in Portugal that engage, as their main activity, in activities related to

the maritime transport of goods or persons, are now able to opt, starting from fiscal year 2018, to apply the tonnage tax special regime, when the crew of these ships or vessels is composed of at least 50% of Portuguese nationals, European Union ("**EU**") nationals, European Economic Area ("**EEA**") nationals or nationals from a Portuguese-speaking country.

Under the above decree, taxable persons with ships or vessels registered outside the EU or the EEA may also opt to apply the special tonnage tax regime, provided the conditions established under the regime are met, except those regarding towage and drainage activities and registered in any state that is not a Member State of the EU or of the EEA.

The special tonnage tax regime only applies to income from activities carried out by ships or vessels engaged in the maritime transport activity of goods and persons flying the flag of a Member State of the EU or of the EEA and are strategically and commercially managed from a Member State of the EU or the EEA.

The special tonnage tax regime may also apply to ships or vessels chartered to third parties, with or without crew, provided certain conditions are met, as well as to those acquired under long-term rental or leasing, with these cases being treated as ships or vessels owned by the company.

Following the option to apply the tonnage tax special regime, the corresponding taxable amount, regarding the activities eligible for the regime, will now be calculated based on the net tonnage of each ship or vessel, by applying daily values that may vary between EUR 0.75 (for net tonnage of up to 1,000 net tons) and EUR 0.20 (for net tonnage above 25,001 net tons).

Under this regime, it will not be possible to deduct costs or losses relating to the above activities or any other deductions to the taxable amount. However, it does not exclude the application of specific CIT rules, such as those regarding transfer pricing, autonomous taxation or CIT assessment and payment.

In this context, although the effective tax rate under the tonnage tax special regime is low, whenever the activity does not generate profit (in which case, under the general regime, it would not, in principle, give rise to the payment of CIT), it will always give rise to the payment of CIT under the special regime at stake, regardless of whether the taxable person makes a taxable profit.

Even though the decree under analysis establishes that the option to apply the tonnage tax special regime determines that the taxable person will not be able to benefit from other tax incentives and benefits with the same scope, it does not exclude the possibility of applying it to companies established in the Free Zone of Madeira (*Zona Franca da Madeira)*.

The decree also establishes an exemption from personal income tax ("**PIT**") and reduces social security contribution rates due on amounts received by crew members of ships or vessels eligible for the application of the tonnage tax special regime, whenever the crew member remains onboard for at least 90 days in each taxable year.

Portugal, like other countries such as the Netherlands, France and Germany, has introduced in its domestic law a simplified tax regime to address, in a protective manner, the competitiveness of the world's maritime goods transportation sector.

Although, to date, no official data has been published regarding the application of this regime, it might be attractive for companies that operate in the maritime goods transportation sector and are established in other countries that have not yet approved a similar regime or if they have one in place that is not as competitive as the Portuguese tonnage tax special regime.

*Ana Helena Farinha*
*André Caetano Ferreira*

# III. LEGISLATION

*European Commission*
*Commission Implementing Regulation (EU) 2019/1661, of September 24*
- Amends the classification of certain goods in the Combined Nomenclature

*Ministry of Finance*
*Ordinance No. 339/2019, of October 1*
- Approves the Monthly Stamp Duty Declaration form and respective filling rules

*Ministry of Foreign Affairs*
*Notice No. 93/2019, of October 1*
- Announces the entry into force of the Convention between the Portuguese Republic and the Republic of Angola to Eliminate Taxation of Income Taxes and Prevent Fraud and Tax Evasion

*Ministry of Finance*
*Ordinance No. 352/2019, of October 7*
- Approves the filling rules for Model 37 tax form

*Ministry of Finance*
*Ordinance No. 351/2019, of October 7*
- Approves the filling rules for Model 39 tax form

*Ministry of Finance*
*Ordinance No. 350/2019, of October 7*
- Regulates the tax authorities' reporting and accounting control system applicable to custom warehouses for manufacturing of tobacco products, establishing the procedures that economic operators must adopt

*Ministry of Finance*
*Ordinance No. 362/2019, of October 9*
- Updates the currency depreciation coefficients applicable to goods and rights sold during 2019

*Ministry of Finance*
*Ordinance No. 365/2019, of October 10*
- Approves Model 10 tax form and respective filling rules

*Ministry of Finance*
*Ordinance No. 368/2019, of October 11*
- Approves the filling rules for Model 25 tax form

*Ministry of Finance*
*Ordinance No. 370/2019, of October 14*
- Approves Model 3 tax form and the respective filling rules

*European Commission*
*Commission Notice No. 2019/C347/11, of October 14*
- Updates the interest rates and the discount reference rates applicable to State aid recovery as from November 1, 2019

*Presidency of the Council of Ministers*
*Decree-Law No. 163/2019, of October 25*
- Establishes the corporate income tax regime applicable to *Caixa de Previdência dos Advogados e Solicitadores*

*Presidency of the Council of Ministers*
*Decree-Law No. 165/2019, of October 30*
- Establishes the reverse charge mechanism on the acquisition of cork, wood, pine cones and pine nuts with bark by value added tax taxable persons established in Portugal

*European Commission*
*Commission Implementing Regulation (EU)2019/1776, of October 31*
- Amends the classification of certain goods on the tariff and statistical nomenclature and on the Common Customs Tariff

*Council of the European Union*
*Information (2019/C 386/02), of November 14*
- Communicates the amendment of Annexes I and II of the Council's conclusions of March 12, 2019, concerning the revised list of non-cooperative tax jurisdictions in the European Union

*Parliament*
*Parliament Resolution No. 225/2019, of November 14*
- Approves the Multilateral Convention for the application of measures regarding Tax

Conventions aimed at preventing the Erosion of Tax Bases and the Transfer of Profits (“**Multilateral Instrument**”)

*Presidency of the Republic*
*Presidential Decree No. 70/2019, of November 14*

- Ratifies the Multilateral Instrument

*Office of the Secretary of State of Tax Affairs*
*Order No. 10551/2019, of November 18*

- Approves Model 22 tax form and respective filling rules

*Presidency of the Council of Ministers*
*Decree-Law No. 167/2019, of November 21*

- Sets the minimum wage for 2020

*Council of the European Union*
*Council Implementing Regulation (EU) 2019/2026, of November 21*

- Amends Implementing Regulation (EU) 282/2011 regarding supplies of goods or services facilitated by electronic interfaces and the special regimes applicable to taxable persons that provide services to non-taxable persons and make distance sales of goods and certain domestic supplies of goods

*Council of the European Union*
*Council Directive (EU) 2019/1995, of November 21*

- Amends Directive 2006/112/EC concerning distance sales of goods and certain internal supplies of goods

*European Commission*
*Commission Regulation (EU) 2019/2075, of November 29*

- Amends Regulation (EU) 1126/2008, revising several international accounting standards

*Ministry of Foreign Affairs*
*Notice No. 125/2019, of December 11*

- Announces the compliance of the internal constitutional requirements for approval of the agreement between the Portuguese Republic and Ukraine on paid work carried out by dependents of the diplomatic, administrative and technical staff of diplomatic missions and consular posts, signed in Kiev on October 8, 2017

*Ministry of Foreign Affairs*
*Notice No. 124/2019, of December 11*

- Announces the compliance of the internal constitutional requirements for approval of the agreement between the Portuguese Republic and the Republic of Moldova on paid work carried out by dependents of the diplomatic, administrative and technical staff of diplomatic missions and consular posts, signed in Lisbon on June 16, 2016

*Presidency of the Council of Ministers*
*Decree-Law No. 174/2019, of December 13*

- Creates additional specialized sections within the tax courts as established by the Statute of the Administrative and Tax Courts

*Ministry of Finances*
*Ordinance No. 406/2019, of December 20*

- Approves the tax form for communicating rental income and respective filling rules

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