

# TAX

Newsletter

1<sup>st</sup> Quarter 2020

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## EDITORIAL

In these exceptional times we are living, I hope above all that you are all in good health!

The quarter that has just ended is inexorably marked by the COVID-19 pandemic, to which the Government has been responding with several measures, including some tax related measures, even if quite limited so far. We have been reporting on these measures through our publications, which you can revisit [here](#).

Domestically, the beginning of the quarter was also marked by the process of approval of the State Budget for 2020, which eventually aggregated the bulk of the remaining tax related novelties.

Although doomed from the start, the State Budget Law was finally published on March 31, and its main tax measures were analyzed in the legal flash that you can revisit [here](#).

It is also worth noting that on January 30, the Government presented in Parliament the Draft Law 11/XIV, transposing Directive (EU) 2018/822 of May 25 ("DAC6"), which establishes a new obligation to report operations to the Portuguese tax authorities.

The DAC6 was approved on May 25, 2018 by the Council of the European Union and amended, for the fifth time, Directive 2011/16/EU on administrative cooperation in the field of taxation, also known as DAC (Directive on Administrative Cooperation).

DAC6 introduces an important set of rules on automatic exchange of tax information for certain transactions and structures ("mechanisms" according to the adopted terminology).

Under the new rules, "intermediaries" (including financial and tax advisers and lawyers) who design, market, organize, make available for implementation or manage the implementation of potentially aggressive tax-planning arrangements are now subject to a reporting obligation.

Reportable mechanisms are defined in broad terms and include mechanisms that do not necessarily have a tax advantage as one of their main benefits.

According to DAC6, intermediaries established in the EU are obliged to report these cross-border arrangements.

However, Draft Law 11/XIV goes further and extends the reporting obligation to mechanisms that are not cross-border in nature, i.e., where the involved parties and effects are located and produced exclusively in Portuguese territory.

EU Member States should have transposed DAC6 into domestic law by December 31, 2019 and are obliged to apply the new rules from July 1, 2020.

On the other hand, we should consider the particularly demanding transitional regime for cross-border mechanisms already available (not applicable exclusively to domestic mechanisms), which requires that mechanisms whose first implementation step occurred or will occur in the period between June 25, 2018 and June 30, 2020 must be reported by August 31, 2020.

Therefore, it is expected that Parliament will approve the Draft Law soon, regardless of a possible delay in the entry into force of the new regime caused by the current pandemic context, although we have no information on this to date.

It is also noteworthy that on February 28, Portugal deposited with the OECD the instrument of ratification of the Multilateral Convention (the "Multilateral Instrument") to implement tax treaty related measures to prevent base erosion and profit shifting.

The Multilateral Instrument will come into force on June 1, from which date the changes resulting from it will be felt in the application of the tax treaties entered by Portugal.

Let me end by wishing you determination and perseverance and reiterating our commitment to be



by your side to overcome these great challenges together.

*Diogo Ortigão Ramos*

## I. PORTUGAL'S STATE BUDGET LAW 2020: NEW STAMP DUTY EXEMPTION FORESEEN IN REGARD TO CASH POOLING MECHANISMS

Recently published, the Portuguese State Budget Law for 2020 (the State Budget) introduced some changes to the stamp duty (SD) code. It foresees, among other minor amendments and clarifications, for a new exemption specifically applicable to cash pooling arrangements (*i.e.*, arrangements in which two or more companies comprising a group, the participants, agree on the centralization of their treasury management functions with a third party, usually a bank, which will be in charge of balancing the accounts of each entity in the cash pool).

Indeed, the State Budget introduces a new exemption applicable to any loans with a maturity period of up to one year and granted within a cash pooling arrangement, provided that, among the participants, there is a dominant or group relationship, defined by the SD Code as a relationship in place between (i) a parent company and the subsidiaries in which the former entity owns, directly or indirectly, a minimum shareholding percentage of at least 75% of share capital and 50% voting rights, and (ii) the same subsidiaries themselves.

By introducing this new exemption with respect to cash pooling arrangements, the lawmaker seems to have struck a compromising balance between the need to ensure taxable income at the level of SD and the need to not fiscally burden Portuguese companies' treasury functions.

Pursuant to these changes, cash pooling arrangements deserve a fresh new look by corporate groups seeking for a tax efficient solution addressing their treasury needs, overcoming the uncertainty that still exists around the Portuguese tax authorities' conservative approach to the tax treatment applicable to the provision of short-term loans. In a nutshell, this new exemption should be seen as good news to all stakeholders, as it will allow for greater levels of security in intra-group financing arrangements. Cash-pooling arrangements should increasingly become the preferred way to manage the treasury needs of corporate groups.

Therefore, it is of the utmost importance to make sure that such arrangements are properly drafted and implemented, and that they are coherently aligned and compliant with the group's transfer pricing policies.

*Diogo Ortigão Ramos  
João Pedro Russo*

## II. PORTUGUESE STAMP DUTY ON INTRAGROUP FINANCING AND THE STANDSTILL CLAUSE OF THE EU CAPITAL DIRECTIVE

Indirect taxation on the raising of capital has been a matter of harmonization in the European Union since 1969, when Council Directive 69/335/EEC, of July 17, 1969, sought to govern indirect tax levies on the raising of capital (the "**1969 Directive**").

When Portugal acceded to the European Communities, in 1986, among the special provisions established in the 1969 Directive (as amended by Directive 85/303/ECC, of June 10, 1985) was article 7(1), which established that "*Member States shall exempt from capital duty [as defined in the article] transactions [...] which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less [being such*



exemption] *subject to the conditions which were applicable, on that date, for the grant of the exemption, or, as the case may be, for imposition at a rate of 0.50% or less.*"

The precise consequences and accurate interpretation of this aptly named "standstill clause" was the subject of several rulings by the Court of Justice of the European Union. One such ruling was in Case no. C-366/05 – *Optimus*, where the Court was referred the following questions under a preliminary ruling issued by a Portuguese court in a dispute between the telecommunications company Optimus – Telecomunicações, S.A. and the Portuguese Tax Authorities:

- 1) Whether the 1969 Directive imposed a "...a clear and unconditional obligation, on the part of Member States, to exempt from capital duty [in the case at hand, Portuguese stamp duty] transactions which, on 1 July 1984, were exempted or taxed at a rate of 0.50% or less."
- 2) Whether, from its date of accession to the European Communities (January 1, 1986) onwards, Portugal was prohibited from introducing a stamp duty levy on a share capital increase falling within the scope of the 1969 Directive, considering that, on July 1, 1984, such a taxable event was exempt from stamp duty under national law.

In answering the first question, and because no reservations to the 1969 Directive were made by Portugal when it acceded to the European Communities, the European Court of Justice ruled that a clear, unconditional and unambiguous obligation was imposed on Portugal to exempt from stamp duty transactions that, on July 1, 1984, were either exempt or were taxed at a rate of 0.50% or less.

In response to the second question, the Court ruled similarly, stating, "it would therefore be contrary to the wording of article 7(1) of Directive 69/335, and to the

objectives of that directive, to reintroduce into the Portuguese legal system, after 1 January 1986, a stamp duty on increases in the share capital of capital companies [...] paid in cash, when such a duty was not imposed on such transactions on 1 July 1984."

The 1969 Directive would ultimately be repealed and replaced by Council Directive 2008/7/EC of February 12, 2008, concerning indirect taxes on the raising of capital (the "2008 Directive").

Among the provisions introduced by the 2008 Directive there is a new and improved iteration of the referred "standstill clause," under which Member States that, as of January 1, 2006, charged a duty (e.g., stamp duty) on contributions of capital to capital companies (as defined in the 2008 Directive, which includes financing via shareholders' loans), may continue to do so, in strict compliance with the remaining articles of the 2008 Directive.

However, regarding Member States that, after January 1, 2006, discontinued the levying of duties over transactions included in the 2008 Directive, those Member States effectively forfeited the right to reintroduce these levies over the same taxable events.

Some of the rules governing the taxation of intragroup financing relating to Portuguese stamp duty may be questioned in light of the latest iteration of the standstill clause.

Since 1999, Portuguese stamp duty legislation has included an exemption applicable to loans (and underlying interest) granted by shareholders to their subsidiaries (i.e., shareholder loans).

Until 2011, this exemption depended on the nature of the loans themselves and applied to shareholder loans with a maturity date of at least one year. These requirements were eased in the State Budget for 2011 so that all shareholder loans were in principle exempt, irrespective of the corresponding effective duration.

However, from 2016 onwards, the exemption was once again amended, this time to introduce stricter



requirements for the exemption. Under the regime currently in force, for the stamp duty exemption to apply to shareholder loans, two requirements must be met: (i) a minimum shareholding of 10% between lender and borrower; and (ii) this minimum shareholding must have been continuously kept for at least one year before the granting of credit or since the incorporation of the borrower if the incorporation occurred less than one year before the credit was granted (in which case, the one-year holding period must be completed prospectively).

In our view, the amendments introduced in 2016 represent a back and forth movement that is neither desirable nor allowed by the 2008 Directive, against which these amendments run unjustifiably afoul. In the matter of indirect taxation on the raising of capital, the Member States must either stand or walk in the same direction, not being allowed to turn back.

Pedro Vidal Matos  
João Pedro Russo

### III. LEGISLATION

#### Council of the European Union

##### Implementing Regulation (EU) 2020/261, of December 19

- Amends Regulation (EU) 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic registers

#### Regional Parliament of Azores

##### Regional Legislative Decree no. 1/2020/A, of January 8

- Approves the Regional Budget Law for 2020 of the Autonomous Region of the Azores

#### Ministry of Finance

##### Ordinance no. 3/2020, of January 13

- Sets the average construction value per square meter for the year 2020 for the purposes of article 39 of the Property Tax Code

#### Ministry of Justice

##### Ordinance no. 4/2020, of January 13

- Lays down the rules on electronic proceedings applicable to cases before Administrative First Instance Courts, Tax First Instance Courts, Central Administrative Courts and the Supreme Administrative Court

#### Ministry of Foreign Affairs

##### Notice no. 8/2020, of January 14

- Announces the entry into force of the Agreement between the Portuguese Republic and the Republic of Angola on Mutual Administrative Assistance and Cooperation in Tax Matters

#### European Commission

##### Implementing Regulation (EU) 2020/21 of January 14

- Amends Implementing Regulation (EU) 79/2012 which lays down the implementation rules for certain provisions of Council Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax ("VAT"), namely concerning the VAT rates applicable to electronic supply of services and distance sales of goods.

#### European Commission

##### Implementing Regulation (EU) 2020/34, of January 15

- Amends Regulation (EC) 1126/2008 which adopts certain international accounting standards in accordance with Regulation (EC) 1606/2002 of the European Parliament and of the Council regarding International Accounting Standard 39 and International Financial Reporting Standards 7 and 9

#### Office of the Secretary of State for Fiscal Affairs

##### Order no. 785/2020, of January 21

- Establishes the withholding tax rates applicable to employment and pension income perceived by residents in Portuguese mainland in 2020





Presidency of the Regional Government of the Azores  
Regional Regulatory Decree no. 2/2020/A, of January 27

- Establishes financial incentives for the acquisition of electric vehicles and charging points in the Autonomous Region of the Azores

Ministry of Finance  
Ordinance no. 19-A/2020, of January 24

- Approves the extraordinary procedure and deadline for reporting of rents perceived during the year of 2019 under urban lease agreements

Ministries of Finance, Labor, Solidarity and Social Security  
Ordinance no. 27/2020, of January 31

- Updates the value of the social support index for 2020

Regional Parliament of Madeira  
Regional Legislative Decree no. 1-A/2020/M, of January 31

- Approves the Regional Budget Law for 2020, of the Autonomous Region of Madeira

European Commission  
Implementing Regulation (EU) 2020/194, of February 12

- Lays down execution rules for the application of Council Regulation (EU) 904/2010 regarding the special VAT regimes applicable to taxable persons supplying services to non-taxable persons, doing distance selling of goods and certain domestic supplies of goods

Ministry of Finance  
Ordinance no. 42/2020, of February 14

- Establishes the additional rate on CO2 emissions applicable to certain oil and energy products and the value resulting from the application of that rate to the factors of each product

Presidency of the Regional Government of the Azores  
Regional Decree no. 5/2020/A, of February 14

- Approves implementation rules for the Regional Budget Law of the Autonomous Region of the Azores for 2020

Office of the Secretary of State for Fiscal Affairs  
Corrigendum no 151/2020, of February 18

- Amends Order no. 2083/2020, of February 13, publishing the withholding tax rates applicable in 2020 to employment and pension income perceived by residents in the Autonomous Region of the Azores

Council of the European Union  
Regulation (EU) 2020/283, of February 18

- Amends Regulation (EU) 904/2010 regarding measures to enhance administrative cooperation to combat VAT fraud

Council of the European Union  
Directive (EU) 2020/284, of February 18

- Amends Directive 2006/112/EC regarding the introduction of certain obligations for the suppliers of payment services

Council of the European Union  
Directive (EU) 2020/285, of February 18

- Amends Directive 2006/112/EC on the common system of VAT regarding the special regime for small enterprises and Regulation (EU) 904/2010 regarding administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special regime for small enterprises

Ministries of Finance, Environment and Climate Action, Agriculture and Sea  
Ordinance no. 50/2020, of February 27

- Lays down the formalities and procedures for granting exemptions and reduced tax rates on tax on oil and energy products

Regional Parliament of Madeira  
Regional Legislative Decree no. 2/2020/M, of March 3

- Establishes the minimum wage for the Autonomous Region of Madeira

Ministry of Finance  
Ordinance no. 60/2020, of March 5



- Amends the conditions and procedures for the application of the special regime for deferred tax assets, notably concerning the exercise of unilateral rights of acquisition

Ministry of Finance

Ordinance no. 78/2020, of March 20

- Approves the filling rules for Model 30 tax form

Presidency of the Council of Ministers

Resolution of the Council of Ministers no. 18/2020, of March 27

- Approves the revision of the Interior Revitalization Program

Presidency of the Council of Ministers

Resolution of the Council of Ministers no. 16/2020, of March 27

- Approves the “Working in the Countryside” Program, which aims to reduce the Portuguese regional asymmetries



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