

LEGAL ALERT

PORTUGUESE TAX AUTHORITIES ISSUE RULING ON THE NEW TAX
REGIME FOR UCITS AND REITS AND THEIR INVESTORS

In January 2015, an entirely new tax regime for Undertakings for Collective Investment in Transferable Securities (UCITS) and for Real Estate Investment Trusts (REITs)(both in fund or investment company form) was enacted in Portugal to **enter into force on the 1 July 2015**. In mid-June 2015, the tax authorities issued a ruling which provides further clarity on what will be the tax authorities' understanding of the features of the new regime as well as on some transitional issues (the latter will not be dealt with in this newsletter).

In very broad terms it can be said that **the new regime establishes taxation at the investor level whilst the fund is only taxed at a small rate on its net asset value**.

However, **UCITS and REITs may be taxed marginally on their income**. This will happen in case the UCITS and REITs receive income other than investment income, rental income and capital gains or when they receive these types of income from a blacklisted tax haven.

If the UCITS and REITs happen to be taxed on their income, the tax authorities have ruled on the costs they consider deductible to such income in order to show the taxable profit. The costs associated with exempt income are not deductible, including commissions paid on deposits, costs born with the acquisition and sale of securities and real estate (including in the latter case real estate agent costs and taxes, condominium expenses, insurance, tax on the holding of immovable property, stamp duty and costs for the maintenance of immovable property), interest and other financial costs in case the capital was borrowed to finance the acquisition or maintenance of the assets whose income is excluded from tax, as well as fees and commissions paid to an investment manager. The costs that the tax authorities consider deductible include external inspections, evaluation of real estate and supervision fees.

Tax losses from previous years are deductible to the tax base in the same terms as any ordinary company operating in Portugal. However, contrarily to the latter, UCITS and REITs are not subject to municipal surcharge or state surcharge, because they are only subject to the ordinary corporate income tax rate of 21% on their taxable profit. Additionally, UCITS and REITs are not subject to payments on account of the final corporate income tax liability and the **income received is not subject to withholding tax by the payer**.

The Portuguese tax authorities also clarify that UCITS and REITs are covered by the special neutrality regime foreseen for mergers, divisions and transfer of assets and that an entry in kind made by UCITS and REITs in another UCITS and REITs may be considered a transfer of assets for the purposes of the special regime. This neutrality regime is extended to mergers, divisions and transfers of assets made with UCITS and REITs resident in other Member States of the EU or of the EEA (in the latter case provided certain other requirements are met).

The management company of the UCITS and REITs is jointly and severally liable for the tax due by each UCITS and REIT it manages.

The net asset value (NAV) of the UCITS is subject to stamp duty at the rate of 0,0025% for those that invest solely in money market instruments and bank deposits and 0,0125% for the remaining UCITS and REITs. This tax is due quarterly.

Individuals resident in Portugal that invest in UCITS and REITs **are subject to withholding tax**, in principle, **at the rate of 28%**. This withholding is final in case the individual receives income outside the scope of a commercial, industrial or agricultural activity, and it is considered a payment on account of the final tax liability if the income is received within the scope of his business activity.

Corporate bodies resident in Portugal that invest in UCITS and REITs **are subject to withholding tax at the rate of 25% which in principle is considered a payment on account of the final tax liability**.

The income obtained by non-resident individuals and corporate bodies that invest in UCITS is exempt from tax in Portugal.

Non-resident individuals and corporate bodies that invest in REITs are taxed at the rate of 10%. The income obtained by non-resident beneficiaries is considered income from immovable property for the purposes of Article 6 of the applicable double tax treaty and the income derived from the sale, including redemption, of participation units or shares is considered capital gains for the purposes of Article 13 of the applicable double tax treaty.

This advantageous tax regime for non-residents does not apply if the non-resident is located in an off-shore jurisdiction on the Portuguese blacklist or if the non-resident beneficiary is held, directly or indirectly, in more than 25% by entities or individuals resident in Portugal.

The beneficiary has to demonstrate that it is a non-resident in Portugal. The requirements to make this demonstration vary depending on the beneficiary being (i) a central bank, a public law entity or agency or an international organisation recognised by the Portuguese state; (ii) a credit institution, a financial company, a pension fund or an insurance company domiciled in any OECD country or in a country or jurisdiction with which Portugal has entered into a double tax treaty, (iii) UCITS and REITs domiciled in any OECD country or any country with which Portugal has entered into a double tax treaty or a tax information exchange agreement; (iv) other cases.

If the demonstration is not made prior to when withholding tax is due, tax will be withheld, but the beneficiary may request to be reimbursed until the end of the second year following the tax event. In principle the tax authorities are required to pay the reimbursement within one year after the presentation of the request, and the taxpayer is entitled to receive interest in case the tax authorities fail to meet this deadline.

If the shares in the fund or shares in an investment company are obtained in the **secondary market**, the holder shall inform the entity where such units are registered or deposited or, in the absence of such entities, to the UCITS and REITs, the date and price of acquisition. In the absence of such communication the withholding due on the redemption will be made on its gross amount.

The considerations made summarize the main features of the new regime.

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