tax notes international

Volume 68, Number 13 ■ December 24, 2012



# Portugal

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Reprinted from *Tax Notes Int'l*, December 24, 2012, p. 1239

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In 2012 Portugal continued implementing the memorandum of understanding on economic policy with the EU, IMF, and European Central Bank. In November parliament passed the 2013 austerity budget containing large and unpopular tax increases for both companies and individuals.

However, apart from the tax increases, other measures were adopted and implemented, including the Tax Arbitration Center as an alternative mechanism to settle tax disputes and the tax regime for nonhabitual residents as an incentive to attract foreigners.

### Income Tax

Regarding individual income taxation, the main change was the increase of the final flat tax rate from 25 percent to 26.5 percent for certain interest payments, income derived from securities paid by nonresident entities, and the positive balance between capital gains and losses arising from the disposal of shares, derivative financial instruments, and warrants.

Also, the withholding tax rates applicable to corporate income increased from 21.5 percent to 25 percent.

Legal entities resident in a blacklist offshore jurisdiction also suffered an increase in taxation from 30 percent to 35 percent on capital income paid by these legal entities, as well as payments made to bank accounts with no identified beneficial owner.

### Stamp Duty Tax

Parliament approved a new stamp duty tax rate of 1 percent for immovable property with a tax value higher than €1 million. This new stamp tax adds to the existing tax on immovable property that applies to the holding of immovable property in Portugal (Imposto Municipal sobre Imóveis). Special transitory provisions were enacted for the assessment of the tax due in 2012. The tax authorities are reevaluating the tax value of immovable property. Given that this process will not be finished until the end of the year, in 2012 the tax rate applicable is 0.8 percent for immovable property not yet reevaluated and 0.5 percent for immovable property that has already been reevaluated. However, if the owner is a legal entity resident in a blacklist offshore jurisdiction, the applicable rate is 7.5 percent, regardless of whether the immovable property has already been reevaluated.

### Tax Arbitration Center

On a positive note tax arbitration in Portugal is becoming more efficient by ensuring taxpayers' fundamental rights and promoting swiftness in the pending cases against the tax authorities. The great majority of the arbitral decisions are handled in less than four months, which is significantly faster when compared with the court system. The newly created Tax Arbitration Center is now a true alternative for both individuals and companies seeking to annul tax assessment acts, or those that have tax cases pending in the national courts. Many large companies have already opted to use this alternative to solve their tax disputes.

### Nonhabitual Resident Tax Regime

The nonhabitual resident tax rules became more clear during 2012, so the regime is now more attractive for qualified expatriates engaged in high-added-value activities and for other high-net-worth individuals. The new rules establish a simpler and more favorable tax regime for those who take up Portuguese tax residency.

Individuals who qualify as Portuguese tax residents and have not been taxed as a resident in Portugal in the five years before the qualification will benefit during a 10-year period from (1) a flat rate (20 percent) on Portuguese-source employment and business income derived from the listed high-added-value activities, and (2) the application of the exemption method (with progression) on foreign-source income, such as pensions or other income, provided that the source state is entitled to tax the income under an income tax treaty.

## Case Law

In 2012 the European Court of Justice ruled on Portuguese exit taxes (*Commission v. Portugal*, C-38/10) and is considering a case on Portuguese thin capitalization rules (*Fazenda Pública v. Itelcar-Automóveis de Aluguer, Lda*, C-282/12).

In *Commission v. Portugal*, the ECJ ruled that Portugal's exit taxation regime violates the freedom of establishment because of the requirement of immediate payment of tax on unrealized capital gains for companies that transfer assets attached to a Portuguese permanent establishment from Portugal to another member state. The 2013 austerity budget contains an authorization to change the corporate exit tax regime during 2013 to allow the migrating company to opt to be taxed immediately, to defer the taxation until the realization triggering event, or to pay the tax in several annual installments. These options will render Portugal's corporate exit taxation regime compatible with EU law.

In *Itelcar*, a Portuguese resident corporation received a loan from a corporation resident in the United States. The Portuguese thin capitalization rules establish that interest payments may not be deducted from taxable income if these payments exceed, in the tax year, twice the share capital participation held by the nonresident corporation. In this case the ECJ has the opportunity to declare to what extent the freedom of capital may be applicable when the excessive debt requirement is achieved, considering that the Portuguese legislation denies the deductibility of interest due from a loan provided by a related corporation resident in a third country. This decision will be particularly interesting because the Portuguese provision is slightly different from the legislation already analyzed by the ECJ, which could lead the ECJ to approach this case not through the legislation's aim, but only by the case's specific facts. ◆

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