Portugal

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Francisco de Sousa da Câmara[1]

1. Identification of low-tax regimes

1.1 Definitions

For the time being, Portuguese legislation contains two different approaches to identify low-tax regimes, as follows:

(a) For a specific purpose (i.e. to avoid entities in low-tax jurisdictions benefiting from withholding exemptions for corporate or individual income tax purposes on the payment of interest from Portuguese public debt) a list of low-tax jurisdictions has been defined and published in the Portuguese Official Gazette.

(b) In order to preserve flexibility, for other purposes (see sections 2.3.1 and 2.3.2 below) low-tax regimes have been defined broadly, including jurisdictions where no tax is paid (foreign jurisdictions that apply a zero rate of tax) or where the effective foreign tax rate is equal to or less than 60 per cent of the Portuguese corporate income tax (IRC) rate (i.e. 19.2 per cent or less[2] based on a current Portuguese corporate income tax rate of 32 per cent – hereinafter in this report a low-tax jurisdiction is sometimes merely identified by reference to the threshold tax rate of 19.2 per cent or less).[3] These specific anti-avoidance rules have been in effect from 1995;[4] and, in

[1] Partner, Morais Leitão, J. Galvão Teles & Associados; Visiting Professor of International Tax Law, Universidade Nova de Lisboa.

[2] Portugal adopts a comparable tax approach but the current legal provision tolerates some difference between foreign tax and domestic tax.

[3] If the corporate income tax rate is reduced from 32 per cent this threshold will also reflect such reduction, provided the CFC's legal definition is maintained.

[4] See Decree Law 37/95 of 14 February 1995.

the early days, reference was made to a 20 per cent nominal tax rate rather than to an effective tax rate. The change occurred in 1998.[5]

A proposed new law presented by the government was recently (October 2000) approved by Parliament.[6] This proposal intends to amend the current definition of a low-tax jurisdiction and substitute for the current criteria of comparing the effective foreign and domestic tax rates three categories criteria as follows.

A jurisdiction will qualify as a "low-tax regime" provided: (a) it is included in a list of low-tax jurisdictions that will be published by the Ministry of Finance; or (b) individuals or corporate bodies are exempted from individual or corporate income tax or its equivalent in such jurisdiction; or (c) the foreign tax paid by the individual or the corporate body is equal to or less than 60 per cent of the individual or corporate income tax that would be paid if the entity was resident in Portugal.

Although the primary aim was to prevent the abusive use of the classical tax havens (defined as jurisdiction where no taxes or very limited taxes are paid), the current regime may also be used to challenge less conspicuous structures supported by the preferential tax regimes existing elsewhere. Although not designed for such a specific task, these measures can also be a constraining factor for multinational companies in their international operations. The current debate within the EU and the OECD on "harmful" tax competition amongst different countries has also been a useful way to identify the enormous quantity of tax measures existing in the so-called ordinary or high-tax jurisdiction. Therefore, not only countries such as Luxembourg or Switzerland, but also countries like Belgium, Denmark, Ireland, the Netherlands and Spain may also be considered as "low-tax jurisdictions" if we are considering specific vehicles or transactions.[7]

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[5] Decree Law 366/98 of 23 November 1998.

[6] Proposal of Law Nº 46/VIII. This proposal was approved by Parliament's general plenary session and it is now being discussed by Parliament's Economy and Finance Committee.

[7] Portugal, like many other developed high-tax jurisdictions, provides tax incentives to persons involved in specific activities in order to attract foreign capital and business. *Inter alia*, under the regime of art 49-A of the Portuguese Tax Incentives Statute many subsidiaries or branches of multinational companies may benefit from

1.2. Comparable tax approach: calculation of income

For the time being, in order to determine whether a non-resident entity is subject or not to an effective tax rate of 19.2 per cent or less, taxpayers and tax authorities have to calculate foreign income according to the tax rules applicable in the foreign jurisdiction. However, it is expected that this regime will be amended soon (see the proposed new law mentioned in 1.1 above) in order to ensure that such calculations occur in accordance with Portuguese tax rules.

1.3. Legal ground

There are several legal provisions that define low-tax regimes. These rules are limited to specific situation, such as:

- to limit the exemptions from WHT on the payment of interest of public debt – Portaria Nº 377 B/94 of 15 June 1994;
- to deny the deductibility of payments made to entities located in those jurisdictions – article 57-A of CIRC;
- CFC rules – article 57-B of CIRC.

As we mentioned above (see 1.1 (a)), a list that identifies low-tax jurisdictions already exists for a specific purpose. This list, covering countries and jurisdictions throughout the world, is included in Portaria nº 377 B/94 and, apart from two amendments, has not been updated since 1994.[8] The *ratio legis* was rather to identify tax havens than low-tax jurisdictions and, perhaps, because of this does not mention

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corporate income tax exemptions for a certain period (e.g. ten years). Will these companies or branches be considered as CFCs *vis-à-vis* the state where their parent company or their head office is located?

[8] Two mistakes in this Portaria 377 B/94 were amended by *Declaração de Rectificação* Nº 95/94 of 30 June 1994 (DR. Nº 149, 30 June 1994) and Portaria 268/96 of 19 July 1996. First, Switzerland, was immediately excluded (although Switzerland appeared in the first list of the Portaria 377 B/94 published in the Official Gazette it seems that the original document that was approved for publication did not contain this state). Secondly, the Dominican Republic was deleted and Dominica was added instead. This list closely followed the Spanish blacklist.

the regime itself. However, it is also true that tax havens such as Caribbean islands. Gibraltar, Isle of Man, Jersey and Guernsey are included together with Monaco and Luxembourg (concerning holding companies), although no reference at all is made to the specific regimes that may be considered low-tax regimes.

Although being compulsory and binding, the current list has a very restricted range; nevertheless, it has been helpful for the tax authorities to identify low-tax regimes for other purposes, namely to challenge the deductibility of payments made to those jurisdictions. However, in the latter case, the list is a mere tool that allows the tax authorities to identify certain types of jurisdiction as tax havens and consequently to request further information from taxpayers.

Proposal of Law Nº 46/VIII referred to above, intends to amend articles 57-A and 57-B of CIRC (i.e. the provisions that refer to denial of the deductibility of payments made to entities located in low-tax jurisdictions and to CFC rules, respectively) and foresees the introduction of a blacklist to apply for these two purposes.[9]

1.4. Qualifying criteria

The Portuguese tax regime has followed the jurisdictional or entity approach in identifying low-tax jurisdictions. A low-tax regime is qualified by reference to a list (cases indicated above 1.1 (a)) or at the specific level of the foreign entity concerned (cases indicated above 1.1 (b)).

As a rule, the method to determine low-tax jurisdictions takes into account the absence of tax, but also considers the entities located in jurisdictions where the

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[9] This regime seems out of fashion. Some of the main criticisms appear to be as follows: (a) first, it goes against the current general tax principles because it erects a non-rebuttal presumption that listed countries are target territories; taxpayers automatically bear the burden of proof – see below; (b) second, this rule may violate the principle of neutrality (preventing investments in target territories to avoid unnecessary discussions), without certainty about the goals that it intends to prevent; and (c) third, updating the list will require exhaustive work and resources that may be beyond the capacity of the Portuguese tax authorities.

effective tax rate is equal to or less than 60 per cent of the IRC rate (i.e. 19.2 per cent or less based on a current Portuguese IRC rate of 32 per cent).[10]

This method does not take into account any temporary element within a specific regime. However, following other European regimes, the Portuguese regime also exempts from the CFC regime, for instance, certain entities engaged in industrial or commercial activities.

As a rule, the burden of proof is shared between the tax authorities and tax-payers; the former bear the burden of proof in order to identify the low-tax regimes (i.e. the tax authorities should evidence that non-residents entities were subject to a favourable tax regime where the effective tax rate was equal to or less than 19.2 per cent); and the latter should evidence that income earned by the foreign entity was taxed at a higher rate than 19.2 per cent. For specific purposes taxpayers can still evidence that such income is active business or that payments made to entities located in such low-tax jurisdictions were connected with effective transactions and such amounts were not unreasonable, i.e. respected the arm's length principle – see 2.3.1 and 2.3.2 below.

The tax judge can automatically raise the issue of the existence or lack of existence of a low-tax regime if such a question is appropriate to decide the case that is pending, based on the existing legal tax provisions.[11]

The proposed new law will simplify the tax authorities' tax. From the new law onwards, it suffices to show that the foreign entity is located in a jurisdiction included in the blacklist to invert the burden of proof. Afterwards, the taxpayer will have to justify the payments (see 2.3.2.2 below) or the exemption regime applicable to the CFC (see 2.3.1.2 below).

[10] Currently, the corporate income tax rate is 32 per cent and individuals are subject to a progressive regime up to a tax rate of 40 per cent.

[11] However, the judge can request further documents or proofs from any of the parties, if he/she considers those elements as relevant in deciding the case. To the best of our knowledge, there are still no tax court decisions about this matter.

2. Domestic tax provisions

2.1. Introduction

The introduction of domestic anti-avoidance relating to the use of low-tax regimes by multinational enterprises, companies in general (or individual) is extremely recent. For a long time Portugal has been seen as, and assumed itself to be, a net capital importer.

The main concern centred on preventing foreign companies from extracting investment return from Portugal without paying sufficient taxes. More recently, Portugal has become interested in attracting foreign investment and several measures were introduced to exempt from tax types of income related to such investments.

The first specific anti-avoidance rule introduced in the early version of the corporate income tax code (1989) was absorbed from the scheduler system.[12] This rule granted the possibility for the tax authorities to adjust the profits of companies emerging from transactions where special relationships existed.

As a member of the EU and the OECD, Portugal followed the international trend, first by continuing to introduce specific rules dealing with the use of low-tax regimes (e.g. restrictions on deductions of payments to entities benefiting from low-tax regimes and CFC rules in 1995 and thin capitalization rules in 1996), and secondly by introducing a general anti-avoidance rule. The latter measure became effective on 1 January 1999, and was already amended and regulated.

Apart from these international anti-avoidance rules few measures (such as presumptions or legal fictions) previously existed in the majority of tax codes or laws in order to prevent specific domestic abuses.

[12] *Grosso modo* art. 57 of the CIRC corresponds to art. 51A of the Industrial Tax Code.

2.2 Anti-avoidance in general

2.2.1 The new GAAR

As a general rule, a company is free to organize its business in the way it deems appropriate. However, the tax authorities have always been empowered to adjust some transactions according to the arm's length principle, making the necessary tax assessments when the operations between related parties did not respect that principle. Basically this reallocation of profits among related (resident or non-resident) companies occurred under the transfer pricing rules. Moreover, it has been possible for the tax authorities and for the judges to requalify agreements and recharacterize categories of income in accordance with the general principles of interpretation.[13]

Anti-avoidance measures have become more popular in Portugal during the last five years, at the same time as the combating of tax evasion emerged as a key point in political speech. Until 1999 Portugal did not have a general anti-avoidance rule (GAAR) and all abuses had to be proved with reference to specific provisions (e.g. transfer pricing, thin capitalization rules, CFC rules, etc, hereinafter also called specific anti-avoidance rules (SAAR or AAR)). With effect from 1 January 1999 a new general anti-avoidance provision was included in the former Tax Procedure

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[13] Tax law interpretation follows the guidelines set out in art. 9 of the Civil Code. The law should not be solely interpreted in a literal manner, but in accordance with its object and purpose so long as the purpose is not inconsistent with the text of the law. Supplementary means of interpretation (e.g. preparatory works) are generally considered only if the wording of the legislation in unclear or incomplete. The same principles apply to the interpretation of tax treaties and, here, the OECD model and commentaries have been used as interpretative aids in few decisions. Although Portugal is not a signatory to the Vienna Convention on the Law of Treaties it should be considered that, under art. 8(1) of the Portuguese Constitution, customary international law has effect in Portugal. Therefore, the courts would be likely to apply the interpretation rules in arts. 31-3 as a result of their general acceptance as customary international law. We fully agree with Glória Teixeira and David Williams, "The Portuguese tax system and double tax agreement network", *Intertax*, 1994, Nº 4, 169.

A recent case in the Administrative Supreme Court is also a good paradigm of the powers that tax authorities and courts were already empowered with before the introduction of a general anti-avoidance measure. See ASC, Decision of 8 July 1998, Rec. Nº 13.405, AD 445/99. In this case, concerning the Four Seasons Country Club, the Supreme Court considered that a timeshare agreement could be concealing a contract of mandate of sale in order to avoid taxation denying the applicability of English law to interpret the agreement on the basis that such agreement regulates an immovable *situs* in Portuguese territory. An interesting analysis of this problem (whether the previous regime was or was not sufficient to fight tax avoidance) is presented by Joaquim Pedro Formigal Cardoso da Costa, "A evasão fiscal e fraude fiscais face à teoria da interpretação da lei fiscal", *Fisco* Nº 74/75, pp. 41-53.

Code, article 32-A of the TPC.[14] Six months later a similar provision was introduced by article 38(2) of the General Tax Law (GTL).[15] Meanwhile, the GAAR was further developed by the new Tax Proceeding and Procedure Code (TPPC), article 63, which became effective on 1 January 2000.

In accordance with the current general anti-avoidance rule (article 38(2) of the GTL), a transaction may be recharacterized if it is proved that the sole or the principal objective was the reduction or elimination of tax which would otherwise be due.[16] In a literal translation, article 38(2) stipulates as follows:

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[14] This measure was approved by Parliament (included in the Budget Bill for 1999 – art. 51(7) of Law 87B/98 of 31 December 1998), at the same time as the government approved the General Tax Law (GTL), also effective from 1 January 1999 without containing such a rule.

[15] Art. 38 was amended by Law 100/99 of 26 July 1999.

[16] The burden of proof is borne by the tax authorities who need to prove: (a) that taxpayers motives were not accomplished such an act or series of acts but to accomplish others; (b) that the acts or agreements were performed in order to defraud the state, i.e. they were performed with the sole or principle motive of giving rise to the elimination or reduction of taxation that would be due if other acts had been performed; (c) that the acts or transactions avoided (those that would have had an equivalent economic result) would lead to a more onerous transaction, i.e. it would trigger more taxes.

Such a measure allows the tax authorities to put themselves in the position of taxpayers for the purpose of interpreting their motives.

The traditional doctrine sustains that the introduction of such a provision contravenes the Constitution because it uses undetermined concepts which undermine the principle of legality as far as it grants a discretionary power to the tax authorities, where the latter may violate the principle *mullum tributum sine lege*.

This general framework is defended or, at least, stressed by several authors such as Abel Xavier, *Direito Tributário Internacional*, p. 332, ed. Almedina, Coimbra, 1993; Diogo Leite de Campos, "Evasão fiscal, fraude fiscal e prevenção fiscal", *Problemas Fundamentais do Direito Tributário*, pp. 217-12, ed. Vislis, Lisboa 1999, and L. Menezes leitão, "A introdução na legislação portuguesa da medida destinada a reprimir a evasão fiscal internacional: o Decreto-Lei nº 37/95, de 14 de Fevereiro", *Ciência e Técnica Fiscal*, Nº 377, pp 94-5, ed. Ministério das Finanças 1995.

Nevertheless, more recently, the recourse to a general anti-avoidance rule (GAAR) has also been recognized by other authors as a necessary, adequate and quite efficient instrument to fight against tax avoidance allowing the tax system to reach its mains goals, i.e. achievement of material equity and justice with a view to the realization of a social state of law. See J. C. Saldanha Sanches, *Manual de Direito Fiscal*, pp. 94-5, ed. Lex, Lisboa 1998; J. Bacelar Gouveia, "A evasão fiscal na interpretação e integração da lei fiscal", *Ciência Técnica e Fiscal*, Nº 373, pp 7 *et seq*., ed. Ministério das Finanças 1994; Casalta Nabais, *O dever fundamental de pagar impostos*, pp. 332 *et seq*., ed. Almedina, Coimbra 1998 e Gonçalo Nuno Cabral de Almeida Avelãs Nunes, "A cláusula geral anti-abuso de direito em sede fiscal – artigo 38º, nº 2 da Lei Geral Tributária – à luz dos princípios constitucionais do Direito Fiscal", *Fiscalidade*, Nº 3, pp. 39 *et seq*., 51-3 Ver. ISG, July 2000.

However, considering its inaccurate formulation and procedural frame, even some of these authors consider that the current art. 38(2) of the General Tax Law is completely unsuited to the desired aim and not in accordance with the Constitution. The main criticism against the current provision by the proponents of GAARs themselves is the absence of an element that shows the abuse of law. In fact art. 38(2) of GTL is not clear in defining the border between legitimate and illegitimate tax avoidance or, in other words, where the taxpayer may arrange his affairs in such a way as to pay less tax or where it crosses the border and such behaviour can be interpreted as abusive and contrary to the provisions that he/she tried to avoid. This point is well made, but a definition is still required. In our opinion, the constitutional problem is not solved by the simple fact of saying that the abuse of law is the key point to apply the GAAR and that such a rule should be interpreted by the ability to pay principle and be based on the social welfare approach postulate by the Constitution. At the end of the day Parliament's proper field, in closing gaps or loopholes with the creation of laws, may become tainted by administrative interpretations which in fact represent a recourse to analogy which is explicitly prohibited by Portuguese law (GTL, art. 11(4)).

“Juridical acts or agreements do not produce effects when it is evidenced that they were performed with the sole or principal objective of reducing or eliminating the taxes that would have been payable if juridical acts or agreements of equivalent economic result had been pursued; in this case, the taxation that would arise in the latter case will apply to the former.”

Shortly before the introduction of this GAAR, another anti-avoidance measure, identical to the one in article 11(1)(a) of the Merger Directive, had been added to the CIRC. According to this measure, Portugal will refuse to allow, in whole or in part, the benefit provided therein to cases in which tax evasion or tax avoidance is the principal objective, or one of the principal objectives, of a merger, division, transfer of assets or exchange of shares (article 62(9), CIRC). Probably it was not only the existence of comparable regimes, but also EC law which convinced Parliament and even the government that it was time to fight tax avoidance with a GAAR.

The introduction of this GAAR was not well received and it was widely criticized by taxpayers, the business and the professional community, companies, judges, lawyers and even the tax authorities. The common criticism against a GAAR (that its very existence threatens to lower the standards of precision applied by the legal draftsmen) was applied. Its wording is very imprecise and responsible for the abolition of all types of certainty. In spite of an intense controversy on how to interpret this new concept – in its goals as well as in its wording – the majority of authors interpret it in a way that authorizes the tax authorities to recharacterize an act or agreement for tax purposes, although the act or agreement performed continues to produce civil effects.[17] To the best of our knowledge, although never used during

[17] The use of this GAAR is, therefore, distinguished from the use of the simulation provision which intends to fight against the use of simulation by taxpayers (established in art. 39 of the GTL) for tax and civil purposes – see Luís A. Carvalho Fernandes, “Alcance do regime do art 32º-A do Código do Processo Tributário e a Simulação Fiscal”, *Rev. de Direito e Justiça*, Vol. XIII, 1999, Tomo 2, pp. 143-62; Diogo Leite de Campos, “Simulação dos negócios jurídicos”, *Problemas Fundamentais do Direito Tributário*, pp. 219-24, ed. Vislis, Lisboa, 1999; Manuel Anselmo Torres, “A simulação na Lei Geral Tributária”, *Fiscalidade*, Nº 1, pp. 33-45, Ver ISG, Janeiro, 2000.

its first year (1999-2000), the existence of the GAAR clearly reduced the audacity of several taxpayers. Meanwhile, the legislator understood the need to introduce some amendments, but instead of changing article 38(2) of the GTL, a new provision was included in the new TPPC, establishing that the assessment of taxes based on any anti-avoidance rules requires that a procedural administrative file has previously been put in place.

2.2.2. The procedural administrative file to apply the GAAR and other AARs

In order to clarify concepts article 63(2) TPPC expressly states that for the purposes of this law, anti-avoidance rules are all provisions which determine that juridical acts or agreements do not produce effects *vis-à-vis* the tax authorities provided they were performed with the clear intention of abusing the legal forms, from which results the elimination or reduction of taxes that would otherwise have been due. The allusion to the abuse of law is included for the first time within this concept, but new questions arise – what is an abuse of legal forms in accordance with Portuguese law?

The recourse to alternative "legal forms" poses additional problems. As Prof. Vanistendael points out. "The tax avoidance that is considered problematic typically occurs when factual situations are moulded in legal forms that bear less tax than would alternative legal forms". Continuing his reasoning the same author adds: "It is clear that on the basis of considerations of economic efficiency and fiscal justice a taxpayer should not be able to use legal constructions or transactions to avoid similar situations being subject to the same tax burden".[18] The question is whether accordingly this should not be a role reserved for legislators, as a principle deriving from the doctrine of the separation of powers.

The procedure of adjustment that was enacted seems contrary to a ruling system. It may be initiated within the period of three years following the date on

[18] Frans Vanistendael, "Judicial interpretation and the role of anti-abuse provisions in tax law", *Tax Avoidance and the Rule of Law*, pp. 131-54 (132), ed. Graeme S. Cooper, IBFD, 1997.

which the operation took place or the agreement or the act was signed by the taxpayers.

The tax authorities apply these anti-avoidance rules without giving the taxpayers an opportunity to present his arguments in advance. The right granted to the taxpayer to challenge the tax authorities' views may be exercised within a 30-day period from the date on which the pertinent notice was served to the taxpayer by the authorities. The taxpayer may present all the evidenced proofs he considers relevant, but an oral contradictory principle was not adopted nor has an independent body been created to discuss and decide such problematic issues.[19]

The anti-avoidance measures cannot be applicable unless a prior authorization is granted by the head of the tax authorities service in charge of such issue, or by the public servant to whom such powers have been delegated. It is possible to try to overturn such authorization through a separate court appeal, but is the latter appeal able to sustain the use of such measures and any eventual assessment? What is the value of such a right if this appeal does not prevent the tax authorities from pursuing their initiative?[20]

Moreover, unless otherwise indicated in the law, the use of anti-avoidance measures also requires that such decision invokes and makes evidence of the following grounds:

(a) the description of the agreement signed or the operation or act performed by the taxpayer and its true economic substance;

(b) the indication of the elements that undoubtedly evidenced that such operation or act had, as its sole or main intention, the avoidance of taxes that would have been due if the equivalent operation or act had been made instead;

[19] The taxpayer should present his view, orally or in writing, but cannot enter into a debate with the tax authorities. The non-existence of an independent body to arbitrate on this issue is open to criticism, not only because it involves very complex matters but also because it would probably bring more discussions to court. Further criticisms can be seen in Francisco de Sousa da Câmara, "Avaliação indirecta da matéria colectável e os preços de transferência na LGT", pp. 337-86, *Problemas fundamentais do direito tributário*, ed. Vislis, Lisboa, 1999.

[20] In the current regime it seems that such appeal does not sustain the administrative procedures. See, for further procedural details, Jorge Lopes de Sousa, *Código de Procedimento e de Processo Tributário*, Anotado, comments to art. 63, pp. 318-20, ed. Vislis, Lisboa, 2000.

(c) the description of the acts of similar economic substance that could have been carried out instead and the legal provisions that would have then applied.[21]

In view of the constitutional and legal difficulties in the use of these provisions, one expects that the tax authorities will be very prudent and circumspect in resorting to the GAAR.

2.2.3. Previous rulings as safe harbours

The legislator elected advance tax rulings as safe harbours. In fact, AARs cannot be applicable if the taxpayers had requested a ruling invoking the same facts on which the agreement or the operation had been and the tax authorities had not replied within a six-month period after presentation of the taxpayer's application for the said ruling (TPPC, article 63(8)).

2.2.4. Restricting tax planning activity vis-à-vis tax gaps and loopholes

It is obvious that the domestic legislator, with the aim of increasing public revenue, may be interested in restraining the taxpayer's degree of freedom by laws that, one way or the other, discourage the systematic use of the opportunities granted by privileged tax systems. Once again, this is quite legitimate on the part of the

[21] The use of this clause is extremely difficult because art. 11 of the GTL stipulates that, first of all, one should observe the general rules and principles of interpretation and application of the law, which means that tax law interpretation depends on the civil law rules (the criteria defined by art. 9 of the Civil Code should be, therefore, applied); however, if one is interpreting terms and concepts known by specific branches of law, those terms and concepts should be interpreted as they are within their field, unless otherwise expressed by law; if doubt persists about the meaning of the law to apply, one should interpret it based on the economic substance of facts.

See *Lei Geral Tributária, Comentada e Anotada*, Diogo Leite de Campos, Benjamim Silva Rodrigues and Jorge Lopes de Sousa, pp. 168 and 70, ed. Vislis, 2nd edn, Revista e Anotada, Lisboa 2000.

One should also recognize the limits to the use of such rules, Frans Vanistendael argues "It is clear that in many cases the tax statue will leave the taxpayer with a choice between different legal instruments because the legislator has provided different forms that can reasonably be used in similar factual situations. In those instances the objectives of economic efficiency and social equity (i.e. taxing similar events equally) may not be achieved. If this is so, so be it. It is indeed the role of the lawyer to make intelligent (legal) distinctions, where non lawyers like government. The recent introduction of article 57-A and 57-B CIRC in Portuguese law must be regarded in this light. Nevertheless, the tax authorities cannot eschew the basic constitutional principle of legality. This means that taxpayers will always have access to tax planning wherever the law has left a door open, either because of the option left open by those who wrote the law or due to the limitations inherent in legislations (the impossibility of foreseeing and covering all possible situations).

Even after articles 57-A and 57-B CIRC[22] came into effect, many gaps and blank spaces concerning low-tax jurisdictions remain. Those loopholes can be legitimately used by taxpayers in tax planning, thus forcing the legislator to make better law, as one may see below.

2.3. Specific rules dealing with the use of low-tax regimes

Apart from the provisions to deny the deduction of payments to entities benefiting from low-tax regimes (see 2.3.1) and CFC rules (2.3.1), the other main provisions that have been used and which have serious potential in limiting the use of low-tax regimes by multinational enterprises are the transfer pricing and the thin capitalization rules (article 57 and 57-C of CIRC).

2.3.1. Controlled foreign corporation (CFC) rules

2.3.1.1. CFC regime

In accordance with an international trend, it has also been recognized in Portugal that tax havens create new possibilities for avoidance and (indirectly) make some taxpayers bear the burden of tax for others.

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economists and sociologists from this point of view do not see any difference." Vanistendael, *op. cit.*, p. 154. On the other hand, choices also raise the issue of responsibility and mal-practice.

[22] The advantages offered by low-tax jurisdictions increase whenever they are covered by treaties on double taxation. Such is the case for the Madeira Free Zone, which, as a rule, benefits from such agreements signed by Portugal. In this particular situation, corporations can, in certain cases, receive the cumulative benefits of tax exemption on the income received, no (or lower) withholding tax on profits distributed among the shareholders and tax sparing clauses, when applicable.

In 1995 the Portuguese legislator introduced rules with the specific objective of preventing avoidance of domestic tax through the creation of CFCs established in tax havens.

2.3.1.1.1. Policy objectives

The main objective is to eliminate the benefits of tax deferral for passive (investment) income or other base company income received by CFCs and to prevent the diversion of passive and certain base company income to CFCs.

2.3.1.1.2. Definition

For Portuguese tax purposes a CFC is an entry located in a low-tax jurisdiction, i.e., entities located in jurisdictions where no tax is paid or where the effective foreign tax rate is equal to or less than 60 per cent of the Portuguese IRC rate (i.e. 19.2 per cent or less based on the current IRC rate of 32 per cent)[23] and controlled by Portuguese residents (individuals, corporate participators)[24] whenever these latter own, directly or indirectly, al least:

- 25 per cent of the capital; or
- 10 per cent thereof, where more than 50 per cent of the capital is held by Portuguese residents.

Article 57-B CIRC refers expressly to resident participators, thus leading to the conclusion that this regime is applicable to individuals or corporate participators, but that it does not include non-residents such as Portuguese permanent establishments of foreign entities. In addition, it seems that it does not apply where the foreign

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[23] This concept will probably be changed by the end of this year 2000 or the beginning of 2001, in accordance with the Proposal of Law Nº 46/VIII – see section 1.1. and footnote 6 above.

[24] A company entity is a resident in Portugal whenever it has its head office or place of effective management in Portugal. The territory of Portugal comprises mainland Portugal and the Autonomous Regions of Madeira and the Azores. Permanent establishments such as branches are not residents. An individual is deemed to be resident of Portugal if: (a) he remains there for more than 183 days in any calendar year; (b) he visits Portugal for a shorter period in any year in which he has available a place of abode on 31 December of that year and from the circumstances it can be inferred that his intention is to keep and occupy such adobe as his permanent residence; or (c) he is, on 31 December of any year, a crew member of a ship or aircraft operated by a resident legal entity.

entity has not been formed as a company (for example, when it was set up as a different kind of foreign entity – a foundation).

During recent years, taxpayers probably did not find it difficult to be excluded from the CFC regime by negotiating the tax rate (e.g. currently above an effective tax of 19.2 per cent). The inclusion of a blacklist as set out by the new Proposal of Law 46/VIII will prevent taxpayers from using such a scheme for a majority of tax havens. Probably this trend will still continue for the use of vehicles in other low-tax jurisdictions which are not expected to feature in such a list.[25]

2.3.1.1.3. Attributed income

Regarding the taxation of Portuguese residents, article 57-B CIRC provides that "profits resulting from the activities of a CFC shall be taxable in the hands of its resident members and shall be attributed to them in the proportion laid down in the CFC formation contract". Portuguese residents may therefore be taxed even if no dividends are distributed by the CFC. This technique is similar to the tax transparency regime which exists in several countries and is also similar to the taxation of the European Economic Interest Grouping (EEIG).

Like CFC legislation in other countries, the Portuguese anti-tax haven legislation (in particular, article 57-B CIRC) does not encompass active business income, nor does it aim to interfere with the ability of Portuguese taxpayers to compete internationally. In fact, the CFC veil cannot be lifted by the Portuguese authorities in order to tax active business income, which continues to benefit from the deferral regime. On the other hand, passive income, including income realized by base companies, is – despite the exceptions analysed below – attributed to resident participators (members) in the CFC, provided certain requirements are met.[26]

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[25] See section 1.1 *in fine* above. Probably, not surprisingly in the sphere of sovereignty, ordinary or high-taxation states are introducing more sophisticated anti-avoidance measures against foreign CFCs, while at the same time they are, with surgical precision, increasing the number of "tax havens" within their own territory.

[26] Portuguese law does not recognize exemptions from CFCs which are not based exclusively on the income earned by the corporation. Thus, common exemptions recognized internationally (such as (a) an exemption for CFCs that distribute a certain percentage of their income for a year; (b) an exemption for CFCs whose shares are traded on a stock exchange; (c) a *de minimis* exemption where the total income or tainted income of a participator's *pro rata* share of such income does not exceed a certain amount; (d) an exemption for CFCs

2.3.1.1.4. Jurisdictional or transactional approach?

The Portuguese regime has followed the jurisdictional or entity approach. This focuses much more on the CFC's country or residence and on the tax regime where the latter is located than on the type of income earned.[27]

In adopting, predominantly, the jurisdictional approach, the Portuguese legislator probably tried to reduce the administrative and compliance burdens. There are, however, still several difficulties, namely:

- analysis of the indirect percentage held by residents;[28]
- determination of which foreign jurisdiction apply a zero rate of tax or a tax rate below 19.2 per cent;
- inclusion or exclusion of certain types of income earned by the CFC, in particular because parties will try to convert tainted income into active business income.[29]

2.3.1.2. Exemptions from the CFC regime

2.3.1.2.1. Tainted and non-tainted income[30]

The jurisdictional approach adopted by article 57-B CIRC is not absolute.

Paragraph 4 of article 57-B of the CIRC provides an exemption from the CFC regime,[31] if the following two conditions are net simultaneously:

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that are not established or operated for the purpose of avoiding domestic taxation) could only provided they are explicitly inserted in art. 57-B(4) CIRC.

27 Traditionally, this jurisdictional approach is the opposite of the transactional, which looks directly at the nature of the income earned by the CFC. Often, when this particular income is directly attributed to shareholders without the benefit of deferral, such income is referred to as tainted income. We will also use this term as opposed to "non-tainted income", which is predominantly active business income.

28 If the CFC is not a personal holding company, it is sometimes difficult, even for resident members to obtain information because of anti-disclosure rules existing abroad.

29 See above note 25.

30 See above note 25.

31 The exemption is both qualitative (the nature of the income) and quantitative (75 per cent of profits must derive from the qualifying activity) but problems arise with respect to the proof to be submitted. No guidelines exist at all this moment with which to fill in these concepts.

- at least 75 per cent of the CFC's profits are derived from an agricultural or industrial activity in the territory where it is registered, or from a commercial activity with no activity on the part of residents in Portugal;[32]
- the non-resident company's main activity does not comprise certain operations specified by the law, such as:
  (a) banking (even if not carried out by credit institutions);
  (b) insurance (provided the underlying income is derived from insurance for commodities/products located outside the CFC's residence territory, or from insurance relating to persons who are not resident in that territory);
  (c) holding of participating interests or other securities, intellectual or industrial property rights, or rights relating to know-how or technical assistance; and
  (d) rental of assets (except immovable property situated in the CFC's country of residence).

Possible legal gaps not filled by the article 57-B(1) CIRC derive directly from the nature of the resident entities covered, the nature of the income obtained by the CFC and from the possibility to characterize the CFC's activity.

2.3.1.3. Interest of a resident participator

2.3.1.3.1. Direct and indirect participations

The CFC regime will be rather easy to apply as long as a participator directly controls a participation of 25 per cent or more and complies with filing requirements. It will not be so easy to apply the CFC rules if the participator does not fulfil its filing requirements. Problems will surely arise in determining whether more than 50 per cent of the CFC's capital is held by residents. Moreover, it is quite a complex task to verify the degree of control if applicability of the regime depends on the compliance of several residents with participations between 10 per cent and 25 per cent held

[32] However, the exception is still valid in spite of the participation in such activities by residents in Portugal, as long as the activity is predominantly directed toward the CFC's local jurisdiction market (art. 57-B(4)(a) CIRC).

directly or indirectly. It is even more difficult to find out the percentage held by residents if part or all of the control is exercised through a long chain of intermediary holding companies.[33]

The ownership requirements must be met at the closing date of the CFC's tax year[34] and will have an impact on the resident taxpayer's current tax period.

Article 57-B does not clarify how the indirect percentage is to be calculated. However, it is likely that this percentage is obtained by calculating the direct percentages and multiplying them by the succeeding participations among themselves (i.e. by pyramiding the holding).[35]

2.3.1.3.2. Participators and beneficial owners

Finally, other problems will arise with the personal interposition of foreign entities. Portuguese law does not expressly allow the tax authorities to disregard the interposition of a company indirectly held by a resident beneficial owner through a trust. Under article 57-B CIRC, it seems that the Portuguese resident must always be a participator in a foreign company. Not only does the wording of the law refers to "members (participators) of CFC's but it also implicitly provides that residents effectively participate in such companies and are not merely beneficial owners.

Therefore, in our opinion, the concept "indirect participators" cannot include beneficial owners. Besides, further complexities (or impossibilities) would arise in attributing the CFC's income to those who are not participators and who could hypothetically receive a small part of the cake. In addition, it seems that beneficial

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[33] This is more difficult to analyse in the Portuguese regime, because the mere holding of 10 per cent of the CFC's capital by one person triggers applicability of this regime if 50 per cent of the company is owned by residents. In addition, if this is the case and one individual or company does not declare its participating interest, it becomes impossible to apply this rate. In any case, such a situation is also almost impossible to verify because foreign bearer shares can be sold without formalities and, in general, information is not disclosed.

[34] Would it be possible for Portuguese residents to swap their participating interests in order to prevent applicability of the CFC regime (i.e. could residents sell their shares in the CFC before the end of the tax period and acquire the same shares again in the next tax year) for the sole purpose of avoiding taxes? Would such sales acquisitions produce effects *vis-à-vis* the Portuguese tax authorities? Provided the legal requirements are met the GAAR could be used to fight against such behaviour.

[35] Domestically, this regime already allows tax consolidations when 90 per cent or more of the company is controlled directly or indirectly – see art. 59 CIRC. No guidelines whatsoever exist to determine if the "indirect percentage" could be replaced by "an indirect control" through a personal fictitious interposition. Therefore, within the limits and constraints mentioned below, the Portuguese tax authorities and the courts will have to decide about the precise meaning of this "indirect holding" of participating interests.

owners of CFC's cannot be treated in the same way as participators, because article 57-B does not oblige them to comply with filing requirements.

The concept of legality (article 106 of the Portuguese Constitution) and the right to organize one's affairs so as to minimize taxes should be enough to prevent the authorities from extending tax law provisions through administrative regulations. On the other hand, it should not be forgotten that Portuguese law declare all income generated in Portugal or abroad whenever they receive it. Therefore, the sole discrepancy between the tax treatment of resident participators and beneficial owners of CFCs is that the former are obliged to attribute income even when dividends are not paid and that the latter may benefit from tax deferral. For the time being there are no legal provisions giving then the same tax treatment and the fictitious interposition theory is not tenable provided there seems to be no simulation or tax fraud in such arrangements.[36]

2.3.1.4. Foreign taxable income subject to IRC or IRS

2.3.1.4.1. Determination of profit

One of the most important questions is whether profits derived by the CFC and to be attributed to Portuguese resident individuals or corporations must be calculated according to the foreign or the Portuguese tax rules.

Currently (October 2000), article 57-B(2) CIRC provides that the income to be attributed to Portuguese residents corresponds to net profit (after taxes) calculated according to the tax rules applicable in the CFC's residence state (i.e. according to the legal system of the tax haven).

[36] In our opinion, as a rule, an indirect percentage cannot be replaced by an indirect control criterion. These things are different and also lead to different results. Legal certainty requires a restricted interpretation of the concept of indirect participation. Thus, *inter alia*, the parameters to judge the interposition of a third person or a fiduciary will be the principle of legality, the *bona fide* principle and the autonomy of taxpayers as opposed to the abuse of law, simulation and *fraus legis* principles. Within its own limits the GAAR may also play its role for this specific purpose.

This method, although not followed by other OECD countries,[37] was probably chosen to avoid the practical difficulties arising from an attempt to apply Portuguese rules to the calculation of the CFC's profits. Therefore, if the CFC has not income (e.g. costs are higher than profits), no income can be attributed to Portuguese residents. On the other hand, the Portuguese authorities cannot discuss the types and kinds of tax costs or the amounts of tax charges and expenses incurred by the CFC (i.e. the rules on depreciation, provisions as well as the rules on deductible business expenses are established according to the CFC's residence state). This situation has an extraordinary impact on jurisdictions where it is possible to manipulate the tax base (e.g. where interest is fully deductible and where there are no thin capitalization rules). Consequently, foreign income is only attributed to Portuguese residents when obtained by a CFC in accordance with the foreign income tax rules and must be attributed within the Portuguese tax period in which the annual accounts of the CFC are approved.

The new proposal of law (see section 1.1 above) establishes that the CFC's income should be determined in accordance with domestic laws (i.e. the corporate income tax code).

Foreign income attributed to individuals is treated as net business or agricultural income where the foreign participation is allocated to a business or agricultural activity and is treated as investment income in all other cases. According to general principals it seems that this foreign source income is included as "net income" in the individual's business or farming taxable income or in the corporation's taxable income.[38]

2.3.1.4.2. Relief from double taxation: transparency regime

Distributions Under the CFC regime, any resident holding a relevant participation in the CFC is deemed to have received his share in the CFC's income

[37] Controlled Foreign Company Legislation, p. 61, *Studies in Taxation of Foreign Source Income*, ed. OECD 1996.

[38] See art. 19 of the CIRS.

pertaining to the relevant assessment period in which the CFC closed its annual accounts even if such a share has not been effectively paid to him (e.g. it is paid into a reserve account or used to make a further investments). The resident would accordingly be taxed in Portugal.

Since the CFC's profits, whether distributed or not, are taxed to those Portuguese residents, in order to prevent double taxation, the future distribution of profits to them does not generate any further tax. Each time a resident shareholder receives a real distribution of dividends he will deduct from his taxable income and up to that limit, the profits already attributed in the previous years. For this purpose the resident should have clear accounts summarizing its position *vis-à-vis* the profits already attributed to and the dividends distributed by the CFC.

Capital gains There are no measures to avoid double taxation through the sale of CFC shares or comparable interests.

Capital gains are subject to tax when taxpayers realize them on the sale of assets (e.g. if the value of the realization is higher than the value of acquisition). In this particular case the law does not provide that a gain from the sale of participating interests in the CFC in a future year should be calculated for tax purposes by subtracting from sale proceeds not only the amount of the acquisition value (original book value is subject to correction for inflation) but also the undistributed earnings upon which he was subject to tax. Thus, because the taxpayers is not allowed to increase the value of his CFC holding by the amount of earnings less the sum of distributions received during the year, he could be subject to double taxation.

Avoidance of international juridical double taxation A Portuguese resident may benefit from a unilateral measure or from treaty provisions (if applicable) to avoid international double taxation.[39]

[39] Portugal gives unilateral relief from double taxation to individuals by means of an ordinary tax credit for foreign source self-employment income (category B), business income (category C) and agricultural income (category D). Any non-used credit may be carried forward for five tax years. Foreign source income from other categories (e.g employment income, investment income, income from immovable property, capital gains,

Under the unilateral measure introduced in the CIRC, a Portuguese resident corporation is granted a tax credit which is limited to the lower of the following amounts:

(a) the foreign income tax paid; or

(b) the fraction of the IRC liability, calculated prior to the credit, corresponding to the foreign income (taxable in Portugal).

This relief is granted in the year of distribution by means of a credit against IRC in an amount equal to the income tax previously paid (when the profits were attributed to the Portuguese resident) in Portugal. If the credit cannot be used, either totally or partially, in that year because there is no IRC liability (e.g. the company has losses or has other tax credits to be used first), the company may carry forward the unused tax credit over the net five tax periods.

In general, Portugal follows the ordinary credit method in its treaties on the avoidance of double taxation.[40]

Domestic double taxation In 1995, article 57-B of the CIRC did not clearly define how the regime worked when two or more resident entities qualify indirectly (one or two through another one) for the CFC regime. If one or more resident individuals or companies own indirectly 10 per cent or more of a CFC through the interposition of another resident company directly subject to the CFC regime, could the former entities be subject to tax on the basis of their indirect percentages? This particular situation was not covered by article 57-B CIRC. In 1998, in order to prevent resident companies from interposing other exempted resident companies (namely based in the Madeira Free Zone) between the former and a foreign CFC, a new paragraph was added to article 57-B of CIRC (paragraph 8) stipulating that the imputation is made directly to the resident parent as if the exempted company was not interposed.

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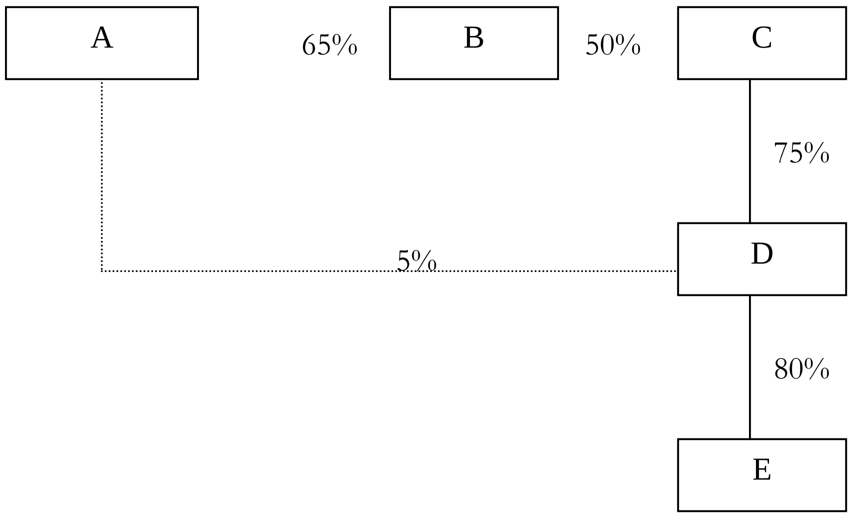
pensions or other income) obtained by individuals is fully taxable in Portugal, unless a tax treaty provides for relief – CIRS, art. 80D.

[40] Until now, Portugal has not allowed a resident to obtain relief from economic double taxation in the international context.

In any case, despite this legal omission, it seems clear that two resident entities cannot be liable to pay tax on the same profits generated by the CFC. Any other interpretation could, in our opinion, be refuted on the basis of the concept of legality and the *non bis in idem* principle, both of which are anchored in the Portuguese Constitution.

2.3.1.4.3. Example

A Portuguese company (A) retains 65 per cent of a Spanish company (B) which holds 50 per cent of a Dutch BVI company (C). The latter holds 75 per cent of company (D) incorporated under the Netherlands Antilles law in the form of a NV. This company owns 80 per cent of a Cayman Islands bank (E). In addition, company (A) owns directly 5 per cent of the Antilles company (D).



Both companies D and E may be considered to be located in low-tax jurisdictions and neither is engaged in direct economic activity. Therefore, it is important to analyse the percentage held by the Portuguese company A in D and E. Company A has the following foreign interests:

• direct participations:	65% in company B	
	5% in company D	
• indirect participation in D:	65% x 50% x 75%	= 24.375%
indirect participation in E:	5% + 24.375% x 80%	= 23.5%
total participation in D:	5% + 24.375%	= 29.375%
total participation in E:		23.5%

Company A qualifies for the purpose of article 57-B CIRC with respect to the participation in company D. Therefore, company A should declare 29.375 per cent of the profits obtained by company D which will be included in its taxable income.

Company A, on the other hand, does not have a relevant participation in company E. It has only an indirect participation in company E and the latter is less than 25 per cent. Taking into consideration that the remaining 20 per cent of company E's capital is not controlled by Portuguese residents, company A is not covered by article 57-B CIRC in respect of company E.

2.3.1.5. Losses

Article 57-B CIRC does not allow Portuguese residents to deduct losses generated by the CFC. In addition, there is no provision allowing the CFC's losses to be carried forward or carried back.

2.3.1.6. Procedural matters

As indicated above, qualifying participators in CFC's must declare and compute annually their CFC share in their personal taxable income. Until now only corporate bodies were obliged to provide the tax authorities with information about their participating interests (if these were 25 per cent or more) in other companies or entities.[41]

Corporate bodies owning a relevant share in the CFC's must attach to their annual tax return the following documents: (a) the balance sheet and the profit and loss account together with the decisions adopted by the CFC's general meeting or board of directors (certifying that those accounts were duly approved by the competent statutory body)[42] along with their annual tax return; (b) a document showing the chain of direct and indirect ownership between resident and non-resident entities; (c) a document evidencing the calculus according to which the effective tax rate was determined. For this calculation one should take into consideration the income tax levied on the profits obtained by the non-resident company and the net income of such period added to the non-deductible expenses, including the income tax.[43]

In our opinion, for practical purposes (the type of information contained in the tax forms) it still seems necessary to amend the tax forms in order to prevent abuse and also to allow the authorities to verify and control the exemptions expressly indicated in article 57-B(4) CIRC (see 2.3.1.2. above). It also seems clear that only those resident taxpayers subject to the CFC regime under article 57-B(1) are obliged

[41] See attachment A (table 11) and C (table 10) to the annual tax return for IRC purposes. This threshold of 25 per cent and not 10 per cent may be insufficient to control indirect ownership in CFCs. However, attachment H, which intends to obtain information (by gross, i.e. assimilating all information by category of income and not by company) about the relationship with associate companies, head office or permanent establishment or CFC's, may help the tax authorities to audit and verify the accuracy of taxpayers' declarations. Although individuals that own a participation in a CFC not as entrepreneurs or as an agricultural business should impute their share in the CFC's net income in their tax return as investment income (see Form 3, attachment E, Table 4, Line 25), it is our opinion that this procedural obligation is still insufficient, because individual resident taxpayers do not have to declare their participations in foreign companies. They just have to declare such relationship in case they make payments to those non-residents – see form 130, which is presented once a year. This form should also be completed by corporate bodies.

[42] Corporate taxpayers are required to file a final annual return with the competent local tax office for a given year in June of the following year. Any outstanding liability must be paid upon filing the annual return. For individuals with holding interests in CFCs, the filing deadlines are between 16 March and 30 April in respect of the previous year in question and the tax assessment should be completed by the authorities by the end of May.

[43] In the future, in accordance with Proposal of Law Nº 46/VIII, instead, taxpayers will have to evidence the tax paid by the non-resident company and the calculation of the tax that would be payable if the entity was resident in Portuguese territory, in cases in which the place of residence is included in the black list to be created. An interesting feature to consider is to find out whether in calculating the tax that would be payable in Portugal one may consider more favourable general regimes (e.g. holding companies regime – SGPS) or even domestic tax incentives rather than the general corporate tax regime, in order to make that comparison effective or not. In our opinion, bearing in mind the wording and the meaning of the law, this comparison must be made in order to avoid unjustified discrimination against CFCs.

to comply with filing requirements on their foreign participation and related profits. This situation is surely open to tax evasion or at least tax avoidance and the ambiguous way in which legal exceptions are worded will trigger problems with respect to the proof that should be presented by taxpayers in order to benefit them.

2.3.1.7. Penalties

If resident participators qualifying for the CFC regime fail to declare this or to provide the necessary documents issued by the CFC along with their tax return, they are subject to severe fines which range from a minimum of PTE 11,100 to a maximum of PTE 876,300 (in the case of negligence) and PTE 22,200 and PTE 1.752,600 (in the case of an intentionally misleading filing). Omissions or lack of accuracy in tax returns are also subject to fines which range from a minimum of PTE 5,600 to a maximum of PTE 5.476,200 depending on the taxpayer's behaviour (e.g. negligence or intention) and on whether such omissions had or did not have an impact on the amount of tax to be paid.[44] Eventually, they can also be taxed by indirect methods and subject to additional sanctions (e.g. disqualification from receiving any public subsidy or credit or tax incentives during a period of up to three years). Unsubstantiated expenses are not only non-deductible but also subject, separately, to a 32 per cent or 60 per cent penalty tax, respectively, if the taxpayer is subject to tax or if it is an exempted entity.[45]

Moreover, if a taxpayer fails to declare its share in the CFC's profits this could be considered tax fraud, which is a criminal offence. Tax fraud can be penalized by:

- a prison sentence of up to five years imposed by tax courts; and
- fines.

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[44] These figures relate to the penalties applicable to corporate bodies for violations of arts. 31 and 34 of the Tax Inspections Statute.

[45] The new Proposal of Law 46/VIII intends to increase these penalties, from the current additional penalty tax rates of 32 per cent and 60 per cent, to rates of 50 per cent and 70 per cent.

2.3.2. Restrictions on the deduction of payments to entities benefiting from low-tax regimes

2.3.2.1. The main rule

In the same drive against low-tax jurisdictions a new measure was introduced in 1995 prohibiting domestic entities from deducting some payments made to individuals or corporate bodies located in low tax jurisdictions as tax charges – article 57-A of the Corporate Income Tax Code. The definitions of a low-tax jurisdiction is also given with a reference to an effective tax rate equal to or lower than 19.2 per cent (when this measure was introduced reference was made to a nominal tax rate).[46]

The above-mentioned rule applies to individual (applying to payments made by entrepreneurs) and corporate income taxes.

The law applies to any payments or amounts due for whatever reason, but does not specify any type or category of services. Thus, in principle, all types of payment made to individuals or collective bodies may be challenged.[47]

Article 57-A of CIRC does not cover payments made on an account held in a low-tax jurisdiction if the payment is made to a beneficiary that has its residence in a "high or ordinary" tax jurisdiction. It is assumed that the beneficiary performed a service and issued a corresponding invoice… However, bizarre or unusual situations may lead to a through audit and, eventually, the applicability of the anti-avoidance rules in general.

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[46] The accurate provision is explained in 1.1(b) above and in footnote 1. This provision is also applicable to payments made by individuals (entrepreneurs) in accordance with art. 31 CIRS.

[47] One should note that under the Portuguese corporate income tax code only expenses that are indispensable for the creation of profits or gains or for the maintenance of the productive source are considered to be tax costs or losses (art. 23 CIRC). There are contradictory decisions about the type of requirements of the documents on which payments are based (e.g. invoices). One should distinguish formal requirements (e.g. whether the invoice mentions all the VAT requirements (art. 35 of CIVA) or not – see AC, 27 October 1999, Rec. 23.768, AD 462/851 this Court decision states that meeting this requirement is essential in order to be allowed to deduct the payment for corporate tax purposes); ASC, 16 February 2000, Rec. 24.133, *Rev. Fiscalidade*, Nº 3/79, adopts a completely different approach; this position is commented on by J.L. Saldanha Sanches) from the substantial evidence that allows the interpreter to consider that the service was effectively rendered or not or that the amount was reasonable or not. The ASC has already decided that even in the absence of invoices it was possible to consider that some services were performed and payments (commissions) made to a company resident in the Isle of Man should be considerer tax costs, although merely based "credit notes" and additional proof presented by witnesses in Court – ASC, 6 October 1999, AD 463/969.

2.3.2.2. Exceptions: inversion of the burden of proof

The application of this provision requires an analysis of the own tax situation of the beneficiary and the payer may avoid the applicability of such measure if it is able to prove that the payee is not benefiting from such a regime, although it is located in a state or territory which has, in general, a low-tax regime.

Moreover, notwithstanding this primary condition, taxpayers may evidence – i.e. they bear the burden of proof in this matter – that not only be transaction motivating such payments were real, but also the amounts paid respected the arm's length principle and were reasonable. It is possible that the tax authorities will not consider proof enough the existence of documents (even deed of agreements), if no material evidence is submitted. Reports, trademarks, patents, commissions, etc., paid by residents in Portugal should have a real value for the payer. The cases presented to our courts in these matters are not of an extensive nature. If the tax authorities put taxpayers in a very difficult position it is expected that the courts will show flexibility in their appreciation of the elements of proof.[48] In addition, in accordance with article 57-A(3) and (4) CIRC taxpayers (i.e. the payer) should be able to demonstrate the effective tax rate of the payee provided the tax authorities request such information within a previous term of 30 days.[49]

There are no legal references to payments made by entities located in low-tax jurisdictions to entities located in Portugal.

2.3.2.3. Additional constraints and penalties

In general, all payments of services and commissions made to non-resident entities located in low-tax jurisdictions are subject to a WHT rate of 15 per cent (unless the fees refer to services concerning transportation, communications, and

[48] See AC, Decision of 6 October 1999, Rec. 23.817, AD 463/969.

[49] This obligation is based on the assumption that payer and payee are associated entities. Otherwise, to provide this proof as well as other proofs regarding the payee's status is not under the payer's control as the Administrative Supreme Court already noticed in a similar case, Administrative Supreme Court decision of 6 October 1999, Rec. 23.817, AD 463/969.

financial activities paid to non-resident entities without a permanent establishment in Portugal – these fees are not subject to tax in Portugal), because the majority of treaties signed by Portugal do not cover those territories.[50]

As a rule, the refusal to allow the deductibility of the payments led to an additional assessment for such amount and compensatory interest would also be assessed for late payment. Moreover, this situation leads to the applicability of penalties in view of the mistake made when the tax returns were completed. Of course, this situation may also be considered as a fraud and treated as a tax crime if the remaining elements show it as such.[51]

In addition, there are tax provisions that oblige companies to make an additional assessment relating to unsubstantiated expenses, i.e, confidential or non-documented payments. Currently, this rate is 32 per cent. Also, this rate is increased to 60 per cent when the beneficiary is tax exempted.[52]

Please note that this provision was not enacted with the purpose of preventing multinational companies from making payments to entities benefiting from a low-tax regime outside Portugal. Moreover, it does not represent an increase in the WHT rate on payments made abroad, but rather a "penalization" of the payer (it would be subject to a higher tax in virtue of the increase in its taxable income). As far as I am aware the presence of a tax convention does not prevent the tax authorities from applying this.

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[50] In specific situations, income paid to non resident entities is also expressly excluded from tax, provided it was not obtained in Portugal, which is deemed to happen in the following cases when income paid to a non-resident entity represents a charge for a foreign permanent establishment located outside Portugal and is connected with its activity; and when income paid to non-resident entity is remuneration for a service performed outside Portugal and is not connected with assets located in Portugal (this situation does not include payments related to the following services: studies, projects, technical support, management support, accountancy, audit, consultancy, organization, and research and development). In principle, fees paid for services performed by entities resident in countries that have entered into a tax treaty with Portugal are not taxable at source.

Portuguese tax treaties, which are based on the OECD model, follow the generally accepted principle that a company will be taxed only in its state of residence, except when it carries on business in another state (the source state) through a PE therein. There may be some minor exceptions related to technical assistance fees, which may be analogized expressly to royalties according to the definition of the term royalties in each particular convention. Unless specifically addressed, these fees cannot be subjected to tax at source according to the above-mentioned principle.

[51] See 2.3.1.7 above

[52] Unsubstantiated expenses, which are not only non-deductible, but are separately subject to a 32 per cent surtax, making an effective tax burden of 64 per cent (the normal 32 per cent plus the 32 per cent surtax). The 32 per cent charge is increased to 60 per cent where such expenses are incurred by either totally or partially

2.3.2.4. Other specific anti-avoidance measures

Anti-avoidance measures such as transfer pricing and thin capitalization, which are not tied exclusively to the use of a low-tax regime, gain special importance in this domain.

The fact that one of the entities is located in a low-tax jurisdiction facilitates the argument that the conditions established between the two enterprises differ from those which would exist between two independent entities located in high-tax jurisdictions.

2.3.2.4.1. Transfer pricing

In general, the arm's length principle governs transfer pricing in transactions between non-arm's length resident entities and in transactions between a resident entity and a non-arm's length non-resident. The General Directorate of Taxes is authorized to make the necessary adjustments in order to determine the taxable profit of an entity (e.g. company, foreign branch or agency) where, because of special relations between the parties, the conditions deviate from those that would be agreed by non-related trading partners in comparable transactions under the same circumstances (article 57 CIRC). There are no provisions regarding advance pricing agreements.

2.3.2.4.2. Thin capitalization rules

Thin capitalization rules were introduced on 3 February 1996 in order to prevent tax evasion. Where the local direct or indirect indebtedness of a Portuguese corporate taxpayer to a particular non-resident related party at the end of tax period exceeds to debt/equity ratio of 2:1, the interest paid on the excessive indebtedness is, for IRC purposes, a non-deductible expense for the borrower (article 57-C CIRC).

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exempt corporate taxpayers or by entities not carrying on business activities. The new proposal of law intends to increase these rates of 32 per cent and 60 per cent to 50 per cent and 70 per cent, respectively.

However, the interest on an excessive indebtedness is deductible if the taxpayers proves to the tax authorities (within 30 days following the end of the tax period in question) that the loan conditions between the related parties are comparable with those prevailing in the market (article 57-C (7,8) CIRC).

2.4. The administrative provisions relating to declarative obligations

Resident companies or Portuguese permanent establishments of non-resident companies making payments abroad have to comply with specific types of declarative obligations regardless of the type of operations, as follows:

- all types of payment abroad have to be described in a form (form Nº. 130) which contains relevant information: (a) the identity of the recipient; (b) the type of income paid (e.g. services, royalties, interest, dividends, etc…): (c) relationship between the parties, etc.;
- provided a double tax treaty applies and in order to benefit from the treaty, non-resident taxpayers need to complete, sign and send the treaty forms (provided they are receiving dividends, interest or royalties) to the Portuguese tax authorities and to the payer of those amounts. In this case, the payee's residence needs to be certified by the foreign tax authorities in the same form. To make other types of payments without WHT it is enough for the resident payer to obtain and to hold the certificate of residence of the foreign entity, prior to making such payment. This certificate of residence is valid for the calendar year period. In general this document is only seen by the tax authorities during the course of tax audits;[53]
- if payments are subject to WHT other types of forms are also required, identifying the entities (payer and payee), the type of payment involved, its value and the date on which such WHT occurred;

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[53] For further details see Francisco de Sousa da Câmara, Portugal, *Practical Issues in the Application of Double Tax Conventions*, Cahiers de droit fiscal international, Vol. LXXXIIIb, Kluwer 1998. Please note that Portugal substituted the former bilateral forms with a single form applicable to all treaties and that the issuance of

- the tax return presented each year should evidence, in two specific areas, the transactions that occurred between associated entities and the ones which involved low-tax jurisdictions.[54]

3. Double tax conventions

3.1. The Portuguese convention network

As a rule, Portugal has not entered into tax conventions to eliminate double taxation with states or territories which are generally considered as tax havens. However, Portugal signed a convention to avoid double taxation with Luxembourg and the latter is included in the current list of states or territories considered to have a preferential tax regime which prevents Luxembourg holding companies from benefiting from IRS or IRC exemptions (through withholding) on the payment of interest of certain public bonds (see 1.1(a) above). As seen above (see 1.2.3.), new lists will be created (probably they will already have to come into existence when this report is published) to define states and jurisdictions to which anti-avoidance tax measures may apply.

The Portuguese treaty network was very limited until the beginning of the 1990s. Noticing this, the Ruding Committee urged: "Member States not only to conclude bilateral income tax treaties where none exist between them, but also to complete those where their coverage is limited" by the end of 1994.[55] Since then, a programme has been initiated to complete conventions with the EU Member States that were missing (e.g. Greece, Ireland, Luxembourg, the Netherlands) as well as with other states that have important relationships and business dealings with Portugal.[56]

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certificates of residence was also regulated in 1999 and in 2000, after the publication of the article mentioned above.

[54] See footnote 40.

[55] Report of the Committee of the independent experts on company taxation, pp. 57 and 266 (Table 3A 21), ed. Commission of the EU, Luxembourg 1992.

[56] All these four treaties were already signed and two of them will be in force in 2001 (Ireland and the Netherlands). Nevertheless, meanwhile, the gap continues to exit with the EU's enlargement (e.g. Sweden) and with the renouncing of a previous treaty with Denmark.

3.2. Limitation of the conventions' benefits

3.2.1. Evolutionary approach

During a period of 30 years (from the 1960s to the early days of the 1990s) no convention signed by Portugal contained a limitation of benefits clause.

As a rule, Portugal does not negotiate the insertion of standard provisions of limitations in the conventions signed with other states.

The first approach to adopt anti-abuse provisions, was taken following the 1977 OECD model and its commentaries. The "beneficial owner" clause appeared in the sole conventions signed in the 1980s with Germany and Italy and legal fictions were also used in other treaties (e.g. such as those considering that capital gains arise from the sale of shares in companies owning real estate as if they arose directly from immovable property, and thus taxing them in Portugal – this is the case in the treaties signed with France, Ireland, Spain, the United States and Venezuela).[57]

In 1992, the Ruding Committee noted that

"Member States continue to conclude bilateral treaties with third countries that contain provisions (such as Article 16 of the USA – Model Treaty 1981) which exclude cross-border dividend, interest and royalty payments from treaty protection in the case of treaty shopping. Such agreements can discriminate against enterprises of other Community countries. Therefore, the Committee considers that there is a need for the coordination of Member States' policy at the Community level with a view to approximating their tax treaty provisions in areas covered by Community law (as in the cases of withholding taxes on dividends, interest and royalties, for example), and to avoid conflicts with treaty provisions".[58]

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[57] In general the treaties signed in the 1990s and already in force also contain those clauses (Bulgaria, Czech Republic, Ireland, Korea (Rep.), Luxembourg, Mozambique, Poland, Romania, Spain, United States, Venezuela). See Maria Margarida Cordeiro Mesquita, *As convenções sobre dupla tributação*, Cadernos CTF (179), Lisboa 1998.

[58] See the Report (quoted at footnote 54 above), p. 206.

Nevertheless, at such stage, the same Committee still stressed that "there are doubts within the Community, however, whether treaty-shopping clauses are incompatible with the fundamental principles of Community law as far as residents of other Member States are concerned".[59] It was in this context that Portugal was concluding its long treaty negotiations with the USA.

The second approach to fight against anti-avoidance measures was introduced into the Portuguese network with the convention signed with the USA in 1994 (effective from 1 January 1996). This was the first convention containing such a clause (article 17 of the convention corresponds to the US limitation on benefits clause), complemented by a provision in the protocol.

However, on 26 October 1993, a new treaty signed with Spain already included a protocol that intended to prevent treaty abuse. From 1993 onwards, a greater number of treaties included a clause or a protocol with the specific effect of limiting the benefits or preventing treaty abuse. The new treaties with the Netherlands (1999) and Brazil (2000) incorporate such clauses in the treaty sections or in a particular protocol.

3.2.2. Examples

In the case of Spain, provision 3 of the protocol states that:

"With respect to articles 10, 11, 12 and 13, it is understood that the tax reduction or exemptions provided for in the Convention in connection with dividends, interest, royalties and capital gains, shall not apply where such items of income are derived from a Contracting State the capital of which is held, directly or indirectly, for more than 50% by shareholders or members who are non-residents of that other State.

[59] *Ibid.*, p. 138.

The provisions of this paragraph shall not apply if such company carries on in the Contracting State in which is a resident a substantial business activity other than the mere holding of securities or other assets."

This provision is based on the "look-through approach" as defined by the commentaries to the 1992 OECD model and its effect is mitigated by the so-called "bona fide activities" provision.[60]

Nevertheless, there are other categories of measures limiting the benefit of the conventions such as:

(a) There can be exclusion of certain entities or of certain income from the benefit of the convention. The new treaty signed with Brazil excludes the entities benefiting from the incentives granted under the Manaus, Sudam and Sudene regime (i.e. Brazilian side), as well as entities located in the Madeira or Azores Free Zones (i.e. Portuguese side).

The exclusion regarding the entities benefiting from the Madeira and Azores tax favourable regimes was also foreseen in article 17(6) of the US-Portugal treaty. On the other hand, one should notice that in the treaty signed with Spain, dividends, interest, royalties and capital gains became specifically indicated as the sole categories of income in the limitation of benefits provisions in the above-mentioned terms. The treaty with Luxembourg provides for a limitation of benefits if the resident is the beneficiary of special tax treatment – designed to limit benefits for 1929 Luxembourg holding companies, and their shareholders.

(b) The US-Portugal double taxation treaty identifies certain persons entitled to treaty benefits – the so-called "safe-harbour tests". Provided the persons are not expressly identified as such, as they do not meet the requirements specially indicated in article 17 in addition to that of residence, they are excluded from the treaty benefits.[61]

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[60] See the 1992 model tax convention of income and capital, commentaries to art. 1 (paras. 13 *et seq.*). An analysis of this clause is given by Stella Raventos, in the chapter concerning Spain, in *The Compatibility of Anti-abuse Provisions in Tax Treaties with EC Law*, pp. 173-88 (specifically at 180-2), Eucotax, ed. Kluwer, 1998.

[61] Nevertheless, para. 2 also establishes a bona fide activities provision, in order to entitle those entities apparently excluded from benefiting from this convention. Analyses of this clause may be seen in Adelaide

(c) The "beneficial owner" and the "artiste-company" clauses started to be introduced in the treaties concluded after 1977, but in practice it has proved to be rather inefficient.[62]

The anti-avoidance measures included in the treaties with the USA, Spain, Brazil and the Netherlands do not expressly refer to requirements tied to the effective taxation of certain entities or certain income in the source state.

3.3. Administrative cooperation

The treaties signed by Portugal follow the various OECD model conventions (depending on the dates of signatures) and all of the include, without exception, provisions concerning the exchange of information as well as the mutual agreement procedure.

As far as our knowledge goes, there has been no good example of treaty problems, being resolved by mutual agreement procedures. There are a few cases which have been pending for many years. There is no set procedure for the applicability of this procedure, which is merely supported by the OECD provisions inserted into the bilateral treaties. The platonic regime established in article 25 leads states to breach the *pacta sunt servanda* principle quite often and overriding treaties, in oblique ways, became a trend if not a fashion.

Until the last OECD model convention version (April 2000) Portugal maintained a reservation to article 26 of the OECD model, in order to apply article 26 in accordance with the draft of the convention of 1963. This reservation was

Passos. "ADT Portugal-EUA: A tributação da sociedade", *Fisco* Nos. 76-7, Ano VIII March/April 1996, pp. 3-26, and Manuela Duro Teixeira. "O ADT Portugal-EUA: Limitação de benefícios", *Fisco* Nos. 72-3, Ano VII. August/September 1995, pp. 23-32.

62 See De Sousa da Câmara, *op. cit.*, pp. 589-90, ed. Kluwer, 1998. Portuguese income obtained by a non-resident company without a permanent established in Portugal is not subject to tax in Portugal (art. 4(3) d) *in fine* of the CIRC) provided one may evidence that the artists and sportsmen do not control, directly or indirectly, such a company.

already contested by a few members of the tax authorities themselves and the new treaties signed by Portugal did not follow the draft of the convention of 1963.[63]

As a full member of the EC, Portugal has already implemented Directive 77/799/EEC in domestic legislation. In this context Regulation 218/92 is also applicable.

Moreover, both at the EC and the OECD level, Portugal is accompanying the trend in respect of the exchanging information and administrative cooperation, namely under the Code of Conduct and the harmful tax competition projects.

3.4. Relationship between double tax conventions and domestic anti-avoidance rules

3.4.1. Treaties take precedence over domestic law

According to the Portuguese constitutional system, international provisions binding the Portuguese state should prevail over domestic rules.[64]

First of all, domestic anti-avoidance rules cannot override the tax treaties' provisions. Secondly, the tax authorities cannot domestic rules that would override a specific tax treaty.[65]

The prevalence of the conventional international law has been respected – at least as a general principle accepted by tax authorities, taxpayers and courts – and no limitations or restrictions were pointed out up until now.

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[63] Maria Margarida Cordeiro Mesquita, "A política convencional portuguesa em matéria de dupla tributação", Estudo em homenagem ao Professor Doutor Pedro Soares Martínez, vol. II, pp. 371-89, at p. 388), ed. Almedina, Coimbra 2000.

[64] Art. 8(1) and (2) of the Portuguese Constitution provides that: (1) the rules and principles of general or ordinary international law shall be an integral part of Portuguese law; (2) rules provided for in international conventions duly ratified and approved shall, following their official publication, apply in Portugal as long as they remain internationally binding with respect to the Portuguese state.

3.4.2. The use of domestic anti-avoidance rules in the international context

Domestic anti-avoidance rules are very recent. Apart from the broad transfer pricing principle (which mandates that transactions should respect the arm's length principle), the three international anti-avoidance measures (e.g. non-deductibility of costs, CFC rules and thin capitalization rules) were only included in the Corporate Income Tax Code in 1995 and 1996.

As far as our knowledge goes, the tax authorities still did not negotiate provisions in DTTs defending the applicability of domestic anti avoidance rules which would have the effect of conflicting with the DTT itself. This approach was also not sustained with the introduction of reservations to the OECD model convention. The sole anti-avoidance rules included in the treaties negotiated by Portugal were pointed out above (see 3.2.1.3).

Based on the commentaries to the OECD model as well as other studies, the argument was already defended in Portugal that the domestic anti-avoidance measures – and in particular CFC rules – are compatible with the OECD model and the bilateral treaties signed by Portugal, provided double taxation is avoided.[66]

However, the question mark persists: how to avoid double taxation if both Member States do not agree with a partial and effective solution to avoid such taxation?

Although the commentary to the OECD model states that, at least in the view of the majority of Member States, CFC legislation is compatible with the

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[65] Teixeira and Williams, op. cit., p. 168.

[66] Maria Margarida Cordeiro Mesquita, "O artigo 57º-B do Código do IRC e as Convenções sobre dupla tributação e o Tratado da Comunidade Europeia", CTF 382/61-7 (at pp. 63-5). However, it seems that this pragmatic position is overturned by the same author, when the latter defends that foreign domestic anti-avoidance rules may not apply and prevail over DTTs, in view of the precedence of international provisions over domestic ones. In the case, the author defended that entities benefiting from Madeira's preferential tax regime should benefit from the treaty regime in order to avoid the applicability of foreign anti-avoidance rules – see Maria Margarida Cordeiro Mesquita, "Aplicação das convenções sobre dupla tributação a empresas instaladas nas zones francas da Madeira e de Santa Maria", *Rev. Direito e Justiça*, Vol. XI, Tomo 2, pp. 119 *et seq.* (at pp. 127-8), 1997, and at *As Convenções sobre dupla Tributação*, *Cadernos* CTF (179) p. 33, ed. Ministério das Finanças, Lisboa, 1998.

OECD model (commentary relevant for post-1992 treaties), several indicators show that the opposite is in fact the case.[67]

Apart from violations to article 7 or, in certain circumstances, article 10(5) of the OECD model and accordingly to any treaty provisions that incorporate the same principles, the ambit of domestic legislation such as the Portuguese is too wide and breaches the spirit of double taxation treaties.[68]

In our opinion, in order to respect constitutional principles, as mentioned above, domestic anti-avoidance rules cannot override double tax treaties or EC law, nor can the tax authorities disrespect the latter and apply domestic provisions which contradict European law.

Some European provisions allow Member States to deny the applicability of such regimes in the case of abuse.[69] However, article 1(2) of Directive 90/435/EEC was not specifically implemented in the Portuguese CIRC (contrary to the path followed in relation to Directive 90/434/EEC, where article 11 was implemented by article 62(9) of the CIRC).

In our opinion, apart from the treaty consideration, it is also arguable whether CFC rules may be applicable within the EU and in cases where the Parent-Subsidiary Directive may potentially apply (i.e. the requirements of articles 2 and 3 are met). Although the directive does not affect the tax treatment of undistributed profits and does not contain provisions about distributions, it seems that such interpretation based on the sole decision (or imposition) of a Member State would violate the goals of this directive. If such domestic provision is applicable (i.e. the tax authorities make an additional assessment) and the retained profits are considered to be received by the parent company, the latter should be granted the possibility to benefit from the directive relief.[70]

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[67] Daniel Sandler develops this point in *The Treaties and Controlled Foreign Company Legislation: Pushing the Boundaries*, 2nd edn., pp. 219 et seq., Kluwer 1998. See also, *How Domestic Anti-avoidance Rules Affect Double Taxation Conventions*, Proceedings of a Seminar held in Toronto, Canada, in 1994, 48th Congress of IFA, Kluwer 1995.

[68] *Ibid.*, p. 221, The French case, *Strafor Forcom SA* (12 December 1996), Lower Administrative Court of Strasbourg, Nº 9158), quoted by Sandler, was a good example of this.

[69] In any case, the interpretation of this abuse has to be compatible with EC law, as has been pointed out by the Court and by several authors.

[70] See Otmar Thommes, *EC Corporate Tax Law*, Commentary on the Parent-Subsidiary Directive, art. 1, para 22, ed. IBFD, 1992.

In addition, the future domestic CFC regime to be adopted in Portugal (see 1.1 above) may eventually be considered in breach of article 52 of the EC Treaty because CFC rules may apply to companies resident in certain EU Member States directly (those mentioned in the list) but not to companies resident in other states, unless additional proof is given.[71] Following the same pattern, some anti-avoidance treaty provisions (e.g. a paradigm example is given with paragraph 3 of the protocol signed with Spain) may be considered contrary to article 52 of the EC Treaty because discrimination towards citizens of other Member States (that cannot incorporate a subsidiary in Portugal or Spain to control a participation in the other Member State) is applicable.[72]

On the other hand, other international provisions included in DTTs (e.g article 17 of the DTT signed with the USA) may be regarded as incompatible with EC law, although uncertainties and arguments can probably only be reduced by litigation either at the domestic or the EC level.

4. OECD and EU initiatives against harmful tax competition

For the time being the OECD and the EU initiatives do not have the effect – from a legal point of view – of limiting the use of low-tax regimes by residents in Portugal. However, in the author's view, the current trend against such zones may be seen as a deterrent for taxpayers as well as for those who advise taxpayers.

Recently, the EU Commission initiated a new approach against preferential tax regimes in Europe through the use of the state-aid mechanisms.

Under this new approach Portugal was already asked to justify the Free Zone of Madeira and Azores regime.[73]

[71] The existence of EU Member States in such a list may be contrary to art. 52 of the EU Treaty.

[72] See Stella Raventos, for arguments proving and denying discrimination, Spain, *The Compatibility of Anti-Abuse Provisions in Tax Treaties with EC Law*, pp. 181, 182, Eucotax, Kluwer 1998, see Thömmes, *op. cit*.

[73] The compatibility of Belgium's beneficial tax regime for coordination centres with state aid rules as outlined in EC Treaty art. 87 is also being examined (see Luc Hinnekens, *Tax Notes International*, pp. 1513-15). Probably several other European regimes are being challenged.

On the 28 June this year the European Commission announced the launch of an investigation into the financial and tax aid regime for the Madeira Free Zone (Portugal) under article 88(2) of the EC Treaty.

In July this year the Portuguese government was asked to present its observations and to render additional information regarding the compatibility of the Madeira regime with the EU's current stance on regional aid.

The Portuguese government has already presented its observations as well as a new requested to grant tax incentives to new entities that would like to initiate operations in the international business centre of Madeira and Azores Free Zones from 1 January 2001 onwards. Meanwhile, interested parties have also been invited to present their observation in accordance with article 88(2) of the EC Treaty concerning the state aid granted to the Madeira regime – C 37/2000 (OJ 2000, C 301/4-12, 21 October 2000).

The Commission's final decisions are expected by the end of 2000 or the beginning of 2001, at the latest. However, in the present climate of suspicion of incompatibility with EU rules on states and the peripheral area of Madeira is under pressure from a market that requires stability and certainty.

Résumé

L'économie portugaise a change d'une manière spectaculaire au cours des 20 dernières années, les questions de fiscalité internationale allant de pair avec évolution. Le point critique a été marqué par les années 1980. Les relations commerciales internationales se sont considérablement intensifiées avec effet, en premier lieu, d'attirer des investissements étrangers massifs et, en second lieu, de réorienter les sociétés portugaises les plus dynamiques vers les marchés extérieurs.

En même temps, des incitations fiscales ont été accordées aux non-résidents investissant au ou aux sociétés résidantes qui investissent à l'étranger. De telles mesures étaient en violation des principes de neutralité en matière d'importation et d'exportation des capitaux. De plus, le régime fiscal actuel contient toujours plusieurs mesures de ce type qui, dans des cas spécifiques, favorisent davantage l'investisseur étranger que le résident qui investit à l'étranger (par exemple, article 49-A EBF et décrets-lois nos. 401/99 du 14 octobre 1999 et 409/99 du 15 octobre 1999).

D'un autre côté, les recettes de l'impôt sur le revenu des sociétés, calculées en pourcentage des recettes fiscales totales (16.25 pour cent en 1999), ou en pourcentage du PIB portugais (4 pour cent en 1998), ont baissé au point de devenir un problème préoccupant, et ce parallèlement à la croissance de la concurrence internationale en matière fiscale (source : Direcção de Serviços do IRC).

C'est la raison pour laquelle, au cours des cinq dernières années, le Portugal a décidé d'appliquer le type de règles générales et spécifiques tendant à éviter l'évasion fiscale que d'autres membres de l'Union européenne et de l'OCDE avaient déjà introduites dans leur législation.

Outre la règle sur le prix de transfert déjà en vigueur (selon laquelle les opérations doivent être conformes au principe de l'assimilation à une entreprise indépendante – article 57 du Code de l'impôt sur les revenus des sociétés (Code IRC), le Portugal a édicté en 1995 et 1996 trois règles spécifiques tendant à éviter l'évasion fiscale, à savoir : une règle visant à refuser la déduction de paiements aux bénéficient de régimes à fiscalité privilégiée au titre du coût de l'impôt (article 57-A du CIRC) ; des règles CFC – sociétés étrangères dominées (article 57-B du CIRC) ; et des règles sur la sous-capitalisation (article 57-C du CIRC). Le 1 janvier 1999, le Portugal a également mis en vigueur une règle générale visant à éviter l'évasion fiscale qui a été vigoureusement contestée par les contribuables et, si l'auteur est bien informé, n'a reçu aucun commencent d'application jusqu'à ce jour.

En général, aux fins des règles susvisées, au pays à fiscalité privilégiée est défini comme un pays où aucun impôt n'est payé ou dans lequel le taux effectif de l'impôt étranger est égal ou inférieur à 60 pour cent du taux IRC (c'est-à-dire 19,2 pour cent ou moins, sur la base d'un taux IRC actuel de 32 pour cent).

Un projet de nouvelle loi tendant à modifier la définition actuelle du régime à fiscalité privilégiée a été récemment (octobre 2000) approuvé par le Parlement réuni en session plénière générale.

Aux termes de cette disposition, un pays sera considéré comme un régime à fiscalité privilégiée si (a) il figure sur une liste de pays à fiscalité privilégiée que sera publiée par le ministère des Finances ; ou (b) des personnes physiques ou des personnes morales sont exonérées de l'impôt sur les personnes physiques ou les personnes morales, ou de son équivalent dans ces pays ; ou (c) l'impôt étranger payé par le personne physique ou la personne morale est égal ou inférieur à 60 pour cent de l'impôt sur les revenus des personnes physiques ou des personnes morales qui serait payé si ladite entité était un résident du Portugal.

Bien que l'objectif primordial soit d'éviter l'usage abusif des refuges fiscaux classiques, le régime actuel peut être également utilisé pour contester des structures moins évidentes soutenues par les régimes à fiscalité privilégiée qui existent ailleurs. C'est pourquoi ces mesures peuvent également avoir un effet contraignant sur les sociétés multinationales dans le cadre de leurs opérations internationales, bien que les présomptions éventuelles soient réfragables.

Primo, cet article montre les efforts du Portugal pour définir les régimes à fiscalité privilégiée et analyse les mesures générales et spécifiques visant à éviter l'évasion fiscale (par exemple, non-déductibilité des paiements faits aux régimes à fiscalité privilégiée et règles CFC) qui mettent des limites à l'utilisation des structures impliquant un recours à ces régimes.

Secundo, cet article s'efforce de contribuer au débat susceptible de s'instaurer dans ce domaine en opposant les rôles des trois pouvoirs du système juridique constitutionnel portugais (le Parlement, les tribunaux et le gouvernement (administration)), et en soulignant la possibilité de voir l'un d'eux empiéter sur les compétences particulières de l'autre et réciproquement. Il est fait expressément référence à la législation, aux décisions des tribunaux et aux opinions des autorités fiscales.

Tertio, après avoir analysé les règles internes visant à éviter l'évasion fiscale, l'article met l'accent sur le réseau de conventions portugaises, fat référence à l'approche conventionnelle de ce problème et pose la question de savoir si les règles internes visant à éviter l'évasion fiscale peuvent ou non prévaloir sur les conventions fiscales ou si l'applicabilité de ces règles internes signifiera nécessairement que les conventions fiscales ou si l'applicabilité de ces règles internes signifiera nécessairement que les règles conventionnelles cessent ou non de sortir leurs effets. En même temps, l'interaction avec la législation de l'Union européenne est analysée.

Finalement, un bilan est également établi concernant les initiatives contre la concurrence fiscale à l'intérieur de l'Union européenne et de l'OCDE et les efforts récemment renouvelés de la Commission de l'UE pour analyser la compatibilité des régimes à fiscalité privilégiée dans l'UE, et ce dans le contexte des règles sur l'assistance étatique.

Zusammenfassung

Die portugiesische Wirstschaft hat sich in den letzten 20 Jahren drastisch gewandelt, und dieser Wandel war unter anderem geprägt durch das Auftreten internationaler Steuerfragen. Die Entwicklung began in den achtziger Jahren. Die internationalen Wirtschaftsbeziehungen nahmen beträchtlich zu. Zunächst wurden in massivem Umfang ausländische Investitionen angelockt und sodann wandten sich die dynamischeren portugiesischen Unternehmen verstärkt den ausländischen Märkten zu.

Gleichzeitig wurden nicht Ansässigen, die in Portugal investieren wollten oder ansässigen Unternehmen, die im Ausland investierten. Steueranreize geboten.

Diese Anreize bedeuteten eine Verletzung der Neutralitätsgrundsätze der Kapitaleinfuhr und ausfuhr. Hinzu kommt, dass das geltende Steuersystem nach wie vor eine Reihe von Möglichkeiten dieser Art bietet und in bestimmten Fällen den ausländischen Anleger starker begünstigt als den Inländer, de rim Ausland investiert (z.B. Artikel 49A des EBF und Verordnungsgesetze Nr. 401/99 vom 14. Oktober und 409/99 von 15.Oktober 1999).

Andererseits sank der Anteil des Körperschaftsteueraufkommens am Gesamtsteueraufkommen (16.25 Prozent im Jahr 1999) bzw, am portugiesischen Bruttoinlandsprodukt (4 Prozent im Jahr 1998) so stark, dass dieser Rückgang ebenso wie die Zunahme des internationalen Steuerwettbewerbs Anlass zur Sorge gab (Quelle: Direcção de Serviços do IRC).

Deshalb beschloss Portugal in den letzten fünf Jahren, die allgemeine und speziellen Regeln zur Bekämpfung von Steuerumgehungen anzuwenden, die andere EU- und OECD. Mitglieder bereits früher eingeführt hatten.

Zusätzlich zu der bereits geltenden Verrechnungspreisvorschrift (wonach bei Geschäftsvorgängen das Fremdvergleichsprinzip gelten muss – Artikel 57 des Körperschaftsteuergesetzes (CIRC) führte Portugal 1995 und 1996 die folgenden drei Regeln zur Bekämpfung von Steuerumgehungen ein: eine Regel, nach der Zahlungen an Rechtspersönlichkeiten in Niedrigsteuersystemen nicht mehr als steuermindernde Kosten abgezogen warden Können (Artikel 57-A CIRC); CFC-Regeln (Artikel 57-B des CIRC) und Fremdkapitalisierungsbestimmungen (Artikel 57-C des CIRC). Seit 1. Januar 1999 hat Portugal darüber hinaus eine allgemeine Vorschrift zur Bekämpfung von Steuerumgehungen erlassen, gegen die die Steuerzahler heftig protestiert haben und bisher, soweit dem Autor bekannt ist, noch nicht angewandt wurde.

Für Zwecke dieser Regeln wird ein Niedrigsteuergebiet in der Regel als Rechtsgebiet definiert, in dem keine Steuern gezahlt warden oder in dem der effecktive Steuersatz 60 Prozent oder weniger des “CIRC-Satzes” beträgt (d. h. 19,2 Prozent oder weniger, wenn man den geltenden CIRC-Satz von 32 Prozent zugrunde legt).

Ein vorgesehenes neues Gesetz, mit dem die geltende Definition eines Niedrigsteuersystems geändert warden soll, wurde vor kurzem (Oktober 2000) von der Vollversammlung des Parlaments genehmigt.

Nach diesem Gesetzentwurf gilt ein Gebiet als Niedrigsteuersystem wenn (a) es in einer vom Finanzministerium zu veröffentlichenden Liste der Niedrigsteuergebiete aufgeführt ist; oder (b) natürliche und juristische Personen in diesen Gebieten von der Einkommenoder Körperschaftsteuer befreit sind; oder (c) die von der natürlichen oder juristischen Person gezahlte ausländische Steuer 60 Prozent oder weniger der Einkommen- oder Körperschaftsteuer entspricht, die bei Ansässigkeit in Portugal zu zahlen ware.

Das primäre Zield war natürlich die Verhinderung einer missbräuchlichen Nutzung klassicher Steueroasen, doch kann dieses neue System auch gegen weniger offensichtliche Strukturen angewandt warden, die andere Vorzugssteuersysteme nutzen. Die Massnahmen können deshalb auch die internationaler Unternehmen beschränken, wobei die betreffenden Vermutungen jedoch widerlegbar sind.

Der vorliegende Bericht schildert als erstes den Versuch Portugals, Niedrigsteuerysteme zu definieren, und nennt eine Reihe allgemeiner und spezieller Massnahmen zur Verhütung von Steuerumgehungen (Z. B. Nicht- Abzugsfähigkeit von Zahlungen in Niedrigsteuersysteme und CFC-Regeln), die die Anwendung von Konstruktionen beschränken, mit deren Hilfe solche Systeme genutzt warden sollen.

Zweitens soll der Bericht einen Beitrag zur Diskussion über dieses Thema darstellen, indem er die Rollen der drei Gewalten im verfassungsrechtlichen System Portugals (Parlament, Gerichte und Regierung) gegenüberstellt und mögliche Einwirkungen einer Gewalt auf die Bereiche einer anderen aufzeigt. Konkret warden Hinweise auf einzelne Gesetze, Gerichtsentscheidungen und Stellungnahmen der Steuerbehörden gegeben.

Drittens befasst sich der Bericht nach einer Analyse der inländischen Bestimmungen zur Vermeidung von Steuerumgehungen mit dem Netz der portugiesischen Steuerabkommen, geht auf die Behandlung des Problems im Rahmen dieser Abkommen ein und stellt die Frage, ob inländische Bestimmungen zur Vermeidung von Steuerumgehungen gegenüber Steuerabkommen Vorrang haben können oder nicht oder ob die Anwendung diesser inländischen Bestimmungen notwendiegerweise bedeutet, dass Abkommenbestimmungen ausser Kraft gesetzt warden oder nicht. Gleichzeitig warden de Zusammenhänge mit dem EU- Recht untersucht.

Schliesslich wird ein Vergleich zwischen den Initiativen der EU und der OECD gegen Steuerwettbewern und den erneuten Bemühungen der EU-Kommission gezogen, die Verträglichkeit von Vorzugssteuersystemen in der EU im Rahmen von staatlichen Subventionsmassnahmen zu untersuchen.

Resumen

La economía portuguesa ha cambiado espectacularmente en el curso de los últimos 20 años, no siendo ajena a este cambio la fiscalidad internacional. El punto crítico lo marcaron los años ochenta. Las relaciones comerciales internacionales se han intensificado y sus consecuencias han sido la entrada masiva de inversiones extranjeras y la reorientación de las sociedades portuguesas más dinámicas a los mercados exteriores.

Al propio tiempo se acordaron incentivos fiscales a los no residentes inversores en Portugal y a los residentes inversores en el extranjero. Estas medidas violaban el principio de neutralidad en la importación y exportación de capitales. Además, el sistema fiscal vigente contiene todavía normas de este tipo que, en determinados casos, favorecen más al inversor extranjero que al residente inversor en el extranjero (p.e. artículo 49A EBF y decretos-leyes 401/99 del 14 octubre 1999 y 409/99 del 15 octubre 1999).

Por otra parte, la recaudación del impuesto de sociedades, calculada en porcentaje de recaudación tributaria total (16,25 por ciento en 1999) o del PIB

portugués (4 por ciento en 1998) ha descendido hasta el punto de convertirse en un problema preocupante, que se produce de forma paralela al crecimiento de la competencia internacional en materia fiscal (Direcção de Serviços do IRC).

De ahí que Portugal haya decidido, en los últimos cinco años, aplicar la normativa general y específica para evitar la evasión fiscal que otros miembros de la Unión Europea y de la OCDE tienen ya incluida en su legislación.

Además de la regla sobre precios de transferencia vigente (según la cual las operaciones han de ser conformes al principio de asimilación a una empresa independiente – artículo 57 del Código del Impuesto de Sociedades (Código IRCX). Portugal promulgó en 1995 y 1996 tres normas específicas para luchar contra la evasión fiscal: una para no admitir la deducción de pagos a entidades que se beneficien de regímenes de baja fiscalidad (artículo 57-B del CIRC) y normas sobre subcapitalización (artículo 57-C del CIRC). El 1 de enero de 1999 Portugal promulgó una norma general para luchar contra la evasión fiscal fuertemente discutida por los contribuyentes y que, si estamos bien informados, todavía no se ha aplicado.

En general y a efectos de las normas citadas, un país de baja fiscalidad es aquel en que, o bien no se pagan impuestos, o bien el tipo real del impuesto extranjero es igual o inferior al 60 por ciento del tipo IRC (es decir, 19,2 por ciento o menos, teniendo en cuenta un tipo IRC actual del 32 por ciento).

El Parlamento, en sesión plenaria general, ha aprobado recientemente (octubre 2000) un proyecto de ley para modificar le definición actual de régimen de baja fiscalidad (RBF).

A tenor de esta disposición, un país de baja fiscalidad es aquel que (a) figure en una lista de países al efecto publicada por el Ministerio de Hacienda o en que (b) las personas físicas o jurídicas estén exentas del impuesto sobre la renta de las personas físicas/sociedades, o de su equivalente en estos países, o (c) el impuesto extranjero pagado por la persona física o jurídica sea igual o inferior al 60 por ciento del impuesto sobre la renta de las personas físicas/sociedades que pagaría una entidad residente en Portugal.

Aunque el objetivo primordial sea evitar el uso de los paraísos fiscales clásicos, también puede utilizarse el régimen actual para hacer frente a estructuras menos evidentes alentadas por RBF existentes. De ahí que estas medidas puedan tener también un efecto coactivo sobre las multinacionales en sus operaciones, aunque se admita la prueba en contrario.

La ponencia muestra, en primer lugar, el esfuerzo realizado por Portugal para definir los RBF y analiza las medidas generales y específicas para luchar contra la evasión fiscal (p.e. no deducibilidad de los pagos a RBF y normas CFC) que limitan la utilización de estructuras que recurran a dichos regímenes.

En segundo lugar, la ponencia se esfuerza en contribuir al debate que podría tener lugar en este campo con el enfrentamiento de los tres poderes del sistema jurídico constitucional portugués (legislativo, ejecutivo y judicial), subrayando la posibilidad de ver a uno de ellos arrogarse las competencias de otro. Se hace referencia expresa a la legislación, la jurisprudencia y la doctrina fiscal.

En tercer lugar, tras analizar las normas internas de lucha contra la evasión fiscal, la ponencia destaca la red de convenios portugueses, hace referencia al enfoque que hacen de este problema y plantea la cuestión de si las normas internas prevalecen o no sobre los convenios o si su aplicabilidad significa necesariamente que las normas de los convenios dejan o no de surtir efecto. También se analiza la interacción con la legislación de la Unión Europea.

Por último, se hace un balance entre las iniciativas contra la competencia fiscal dentro de la Unión Europea y la OCDE y los esfuerzos renovados de la Comisión de la UE para analizar la compatibilidad de los RBF en la UE en el contexto de las normas sobre asistencia entre Estados.