Portugal

National Reporter

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1. General

1.1. Introduction

1.1.1. History: Portuguese tax treaty network

In the mid 1960s, following the tax reform that introduced a scheduler system to tax the effective income of tax payers,[2] Portugal took the first steps to negotiate and enter into bilateral treaties based on the OECD report entitled *Draft Double Taxation Convention on Income and Capital.*

After this first period, between 1968 and 1972, Portugal sank into a lethargic period (although it was briefly shaken out of this reverie a few times, namely in 1974 and 1980) from which it only recovered at the end of the 1980s, when important and decisive steps were once again taken. Nevertheless, the Portuguese tax treaty network is still the least extensive in the European Union.[3] Moreover, in spite of the Ruding Report's recommendations, Portugal has yet to conclude four treaties with European Union countries (e.g. Greece, Luxembourg, the Netherlands, Sweden). These days the

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[2] The scheduler tax system was abolished by the tax reform on 1 January 1989. On this date three important tax codes were introduced to tax income and immovables, as follows: (i) the individual income tax code ("IRS code"); (ii) the corporate income tax code ("CIRC Code"); and (iii) The municipal tax on immovables ("CPA Code").

[3] See the Portuguese double tax treaty network table – Appendix 1 at the end of this report.

conventions negotiated by Portugal include hybrid provisions inspired by the OECD draft of 1963, but which also draw on the 1977 and the present OECD model. In specific points, the conventions are also influenced by the United Nations model.

1.1.2. Background evolution of domestic and treaty rates

It should also be noted that an important evolution has taken place over the last thirty years, regarding the domestic and international tax rates of capital (passive) income.

In the 1960s and in the early days of the 1970s the domestic tax rates on dividends were much lower than the ones foreseen in double tax conventions ("DTC"). Domestic rates on interest and royalties were closer to international rates.[4] The effective application of the treaties, and the procedural issues involved, became crucial with the increase of domestic tax rates, which became less advantageous for foreign investors. These days' domestic withholding rates vary between 15 per cent and 25 per cent (e.g. 15 per cent for royalties, 20 per cent for interest and 25 per cent for dividends) and DTC rates are slightly lower.[5]

The first administrative guidelines enshrining the mode of application of the first treaties appeared in 1972. The guidelines followed the framework mentioned below (section 1.3.1). Mainly, these guidelines assume Portugal to be the contracting state of source and have a double instructional function: on the one hand to allow taxpayers to fulfil the forms to claim DTC benefits; and on the other hand enabling the tax authorities to control the admissibility of such claims and the completion of all the necessary tests foreseen in the DTC.

[4] See tables comparing the treaty rate with the domestic tax rate at the date of the treaty signature in Manuel Pires, *Dupla Tributação Jurídica Internacional sobre o Rendimento*, pp. 639, 653, 654 and 666, ed. Centro de Estudos Fiscais, DGCI, Lisbon, 1984.

[5] Of course several exceptions exist; either full or partial tax exemptions (e.g. interest of public debt paid to non-residents) or other incentives (e.g. exclusions of a specific percentage of taxable income, namely for dividends derived from shares of companies quoted at the stock exchange market or concluding their process of privatization).

1.1.3. Introduction to the procedural issues

Conventions concluded by Portugal do not contain guidelines regarding the procedures by which they should be implemented. There are no articles establishing withholding of the full amount of tax at the source with subsequent refunds as expressly stipulated in article 29 of the Germany's DTC with USA and other DTCs. Following the OECD model, the treaties signed by Portugal limit references to these issues to the articles on dividends (10 (2)) interest (11(2)) and royalties (12(2))[6] and sometimes to the article concerning the mutual agreement procedure (25 (3)).

Almost all these articles expressly state that "the competent authorities of the contracting states shall by mutual agreement settle the mode of application of these limitations"[7] However, taxpayers are not sure if these mutual agreement procedures were arranged or not, because the treaties alone (including their ratification and the notice that the exchange of instruments of ratification had occurred) are published in the Portuguese Official Gazette (*Diário da República*). Moreover, the commentaries to the OECD model expressly state that the model does not deal with procedural issues and that paragraph 2 of article 10 or 11 "lays down nothing about the mode of taxation in the State of Source". "It therefore leaves that state free to apply its own laws and, in particular, to levy the tax either by deduction at source or by individual assessment". In addition, it establishes that the state of source "can either forthwith limit its tax to the rates given in the Article or tax in full and make a refund according to its own laws".[8]

In Portugal there are no legal provisions establishing the procedures for making claims for treaty relief. The mechanics for the grating of treaty relief were always explained by administrative guidelines (*Circulares*).

[6] It should be stressed that following the reserve introduced by Portugal on art. 12(1) of the OECD model convention. Portugal agreed the right to tax royalties at source in all the conventions concluded until now.

[7] The first treaties did not include this clause (e.g. United Kingdom, Belgium, Spain and France) but the latter referred to the problem directly in art. 26(3) and (4). Recently, two other conventions omit these references (e.g. conventions signed with Korea and with the Czech Republic).

[8] Commentary to art. 10 (dividends), paras. 18 and 19, and to art. 11 (interest), para. 9

Until now the tax authorities have issued an administrative guideline for each treaty, regulating the way it should be applied (see section 1.3.1. below). The sole exceptions to this rule are the treaties with Finland and the latest conventions, which either have not entered into force, or entered into force very recently.[9] According to Portuguese law, these Guidelines (*Circulares*) are mere administrative rules whose main purpose is to interpret and clarify the text of the law and *in casu* of the treaty. In spite of being legally binding *vis-à.vis* the tax authorities, these rules cannot override legal or conventional provisions.

As a rule, when Portugal is the country of source, specific administrative guidelines establish three types of regime to provide relief at source, as follows:

(a) one approach is for the reduced treaty rates to be applied by the payer of the income in question (dividends, interest or royalties);

(b) the second approach is to be taxed according to domestic withholding tax rates in full and to claim for a refund of the tax paid in excess;

(c) the third approach is applicable to other items of income that cannot be taxed in Portugal as the state of source. The exemption method applies, for example, to business profits obtained in Portugal and not derived from a permanent establishment.

In order to benefit from the convention rates regarding income characterized as dividends (10) interest (11) or royalties (12), non-residents are obliged to complete, sign, certify and send (directly, through the payer of income, or through the relevant tax authorities) the treaty forms to the Portuguese tax authorities. In general taxpayers may choose between the first and the second approach, both of which may be applicable. There are a few exceptions as one will see below (section 1.3.1).

The applicability of other treaty articles (such as 7 (with 5 and 9), 13, 14, 14, 15, 21) is not regulated in those administrative guidelines. Those guidelines do not require the fulfilment of other conditions than the ones expressly stated in the treaty. When

[9] See Appendix 1.

income is to be taxed in the state of residency (paragraph 1 of articles 7 and 14 or 21), the Portuguese payer has to obtain the payee's certificate of residence confirmed by the foreign tax authorities in order to allow the recipient to obtain DTC benefits at source (Portugal). In fact, the Portuguese authorities may require an administrative certification of residency issued by the contracting state of which the recipient of income is resident.[10]

When Portugal is the country of residence relief from double taxation is claimed through a tax credit mechanism and the provision of some documents to the recipient of income is required (see section 1.3.2. below).

In general a bilateral approach is required to verify the entitlement to treaty relief; information is supplied at source by the payer of income, but in addition the residence of the effective beneficiary shall always be certified by the revenue authority in the contracting state.

1.1.4. Certificate of residence

It may appear to be slightly odd, but in Portugal the certificate of residence should be requested from the Director of Services of Tax Incentives (*Direcção de Serviços dos Benefícios Fiscais*). In fact, Portugal's small tax department of international affairs (with fewer than 10 persons) is integrated within Tax Incentives Services, in accordance with the Ministry of Finance's organic structure.

1.1.4.1. Application to obtain the certificate of residence in Portugal

When Portuguese residents request residence certificates they should include the following data:

[10] Therefore, in such cases it is not necessary to fill in specific forms in order to benefit from exemption of

(a) full name;

(b) taxpayer number; this number is granted by the tax authorities for individuals and by the National Registry of Legal Entities ("RNPC") for Corporate Bodies;[11]

(c) address/head office;

(d) the treaty under which the application is made;

(e) the purpose of such request (e.g. indicating the name of the entity to whom this certificate will be sent (in principle the payer) stating the entity's address or head office);

(f) the amount of Portuguese escudos or foreign currency he/she/it expects to receive from the non-resident. In practice the Portuguese tax authorities issue these certificates although no reference at all is made to the amount of money the resident entity will receive. Often creditors are not aware of the amount they will receive, especially if they will not collect income (e.g. dividends or interest) directly, but through a bank or other custodian entity;

(g) the date of request.[12]

1.1.4.2. Documents required to be attached to the application

Apart from signing this request taxpayers are obliged to present further documents as follows:

tax at source.

[11] Upon implementation of Decree Law 19/97 of 21 January 1997, which is still expected to occur in 1997, tax authorities will also grant a taxpayer number to corporate bodies according to art. 1 (3) of Decree Law 463/79 of 30 November 1979 with the wording given by Decree Law 19/97.

[12] See Administrative Ruling (*Of. Circulado*) No. 13/95 of 17 May 1995.

1.1.4.2.1. Individuals

Individuals should prove that they delivered their tax returns in the previous year according to article 57 of CIRS; or they should justify why they did not present their tax returns (e.g. because he/she established residence in Portugal during that precise year; or, because he/she did not earn income that obliged him/her to present a tax return). In this case, they should prove that they already remained in Portugal for at least 183 days in the year they are requesting the certificate of residency.

1.1.4.2.2. Collective bodies

These entities (companies or other collective bodies) should prove that they delivered their tax return in the previous year, according to article 96 of CIRC.[13]

If the corporate body was created in the current year the declaration of the commencement of business activity with the local tax authorities should be attached to the request. By then, the corporate body will have already obtained its tax identification number from the national Registry for Legal Entities ("RNPC").

No other documents (e.g. a certificate of good standing for the beneficiary or a copy of the transfer of technology agreement) have to be presented. There is no imperative legal provision stating the validity term of a certificate of residence issued by the Portuguese or the foreign tax authorities. In practice this certificate is considered valid if it is issued within the civil year in which it is used.

Generally resident taxpayers can obtain these certificates within a period of seven days (one week) following the presentation of their written requests at *Direcção de Serviços de Benefícios Fiscais* with the address in Av. Eng. Duarte Pacheco, nº 28, 4, 1070, Lisbon. However, local authorities may also certify the residence of a taxpayer in Portugal and they often attest to it in the DTC forms. In such cases, the local

[13] See Administrative Ruling (*Of. Circulado*) in 13/95 of 17 May 1995.

authorities should forward a copy of the certificate to the *Direcção de Serviços dos Benefícios Fiscais*.[14]

This certificate of residence, as well as the certification of residence included in the bilateral treaty forms, is issued by the Portuguese tax authorities. The Portuguese authorities automatically assume that such residents are the effective beneficiaries of the foreign income. There are no legal or administrative provisions defining the concept of "beneficial owner" for tax purposes, for either foreign or resident taxpayers.

1.1.4.3. Foreign residents

Foreign residents requiring DTC benefits should prove their residency in the other contracting state, which they generally do by the certification of an original stamp on the Portuguese forms for non-residents applying for reduced withholding tax rate ("WTR") or refund. Practice shows that until now (basically during 1996 and 1997) the American IRS just sends to Portugal a certificate evidencing that the recipient of income field a US tax return in the previous year. The US refuses to certify the residency of US recipients, but it seems that the Portuguese authorities have not contested the current practice.

1.1.5. Presentation of tax claims: relief by direct application of treaty rates or by repayment

Tax claims should be presented and forms filled in for specific types of income (dividends, interest and royalties). The payment of other type of income abroad does not require taxpayers to present a specific tax claim with a proper administrative form.

[14] See Ofício Nº. 1.845 of 15 November 1993 issued by SAIR.

In such other cases a simple certificate of residency is considered enough to prove residency and other DTC testes (e.g. beneficial owner test), as we will see below.

Dividends, interest and royalties paid abroad are subject to withholding taxes, unless an exemption applies. The availability of such exemptions depends on the type of income, the nature of the recipient and other specific circumstances.[15]

According to Portuguese law, payers of income such as dividends, interest and royalties are obliged to withhold and they can be held liable for failing to retain or remit the tax to the tax authorities. They can be liable not only for the tax considered due, but also for interests and penalties, when they are making payments to non-resident entities without a permanent establishment in Portugal.

When the payer of income is allowed to withhold according to the treaty rate (because the received the accurate form the recipient of income duly completed and certified previous to the payment – see sections 1.3.1 and 1.3.4 below), he has no advance formalities to accomplish. Subsequently, he remits the tax withheld at source to the state (treasury department) according to domestic laws[16] and he sends the three forms (e.g. the conventional form and domestic forms 41, 42, 43 or 44 and form 130 – see their identification below – section 1.3.1) to the Tax Incentives Department, referred to above.

The procedures involving the presentation of claims to get treaty relief, following the method for limitation of tax to be paid in Portugal, are much simpler. In addition, they do not represent a cash-flow disadvantage or a major administrative cost for the recipient of income.

However, when relief is granted by Portuguese refund these procedures are more complete and complex and they may require time to be duly accomplished. As a rule the period for filing a claim is four years, this is consistent with the majority of specific

[15] DTC exemptions for interest (e.g. public debt interest) may oblige the parties (e.g. recipient and payer) to respect general procedures – see the Portuguese/Brazilian treaty (see art. 11(4) and conventional form "MIV – BR"). Full domestic exemptions do not require the execution of additional formalities.

[16] In general amounts deducted by payer should be paid to the state by the 20th of each of the months following the deduction – see arts. 91(3) of CIRS and 75 (6) of CIRC.

administrative guideline.[17] First, one should bear in mind that all the elements are to be sent altogether to the Portuguese authorities by the non-resident recipient (e.g. sometimes the latter does not release the right documents to provide proof of the full payment of the tax; or, at other times the documents aggregate several items and amounts, making the analysis more difficult). Secondly, it is often the case that applicants do not attach any documents to explain the payments and the information rendered in those forms is far from crystal clear. Thirdly, provided the amount to be refunded is substantial (e.g. PTE 15,000,000)[18] whether documentation is attached or not, the tax authorities will not reimburse before an audit and fiscalization is rendered. This audit is done at the payer of income's residence/head office in order to confirm the accuracy of the refund request.

Thus, this procedure rarely takes less than one year to be completed and often takes between one and three years to be finalized. The tax authorities can request further information and data, if required, to analyse a specific file.

These procedures become even more complex, if the claim is presented by the effective beneficiary, but the investment was made by an institutional investor (e.g. custodian bank) and the shares or the bonds are not registered in the name of the effective beneficiary. The tax authorities services have already denied several claims (e.g. to UK individuals in these circumstances) because they were not able to prove their status as holders of such securities during the four-year period granted to request reimbursements (see section 2.2.2. below).

With the liberalization of capital movements within and outside the EC, there is no particular problem these days with the repayment of tax in foreign currency. According to informal information obtained from the tax authorities services it seems that, in practice, repayments to claimants are made in foreign currency while

[17] Apparently there are formal agreements between the contracting states to establish a four-year period, but no public information exists on this point. Therefore it is moot that a five-year claim can no longer be presented. Moreover, it should be noted that reciprocity does not exist in all treaties. At least, some specific administrative guidelines mention that foreign states reimburse within a six-year period calculated from the year in which the assessment should have been made (e.g. Circular 1/72 (point 1.1) concerning the UK/ Portuguese treaty, states that the assessment year finishes on 5 April in the UK).

repayments made through a bank, agent or an authorized representative in Portugal are made in Portuguese escudos.

It is also the practice of the Portuguese tax authorities not to grant a refund with interest, assuming that the claimant has had the option to claim for the application of the reduced rate method.[19] However this assumption is not absolute. Therefore, it seems to be unacceptable for claimants that are individuals or collective bodies other than companies, or even for companies when they are receiving dividends in respect of bearer shares not registered or deposited. No legal provisions at all establish this requirement.

Moreover, Portuguese institutional investors often criticize the fact that they need to obtain a certificate of residence each time they receive foreign income and they intend to apply for a specific DTC.[20] It is not uncommon to have a foreign custodian bank acting as a portfolio manager. It then becomes necessary for the Portuguese investors (e.g. institutional investors) to send these forms duly certified several times during the civil year, depending on the type of securities and income involved and, moreover, frequently the amount of money to be reimbursed is insignificant. As a power of attorney also seems necessary in certain cases (e.g. when institutional investors are involved), the potential cost and time involved in the process means that such claims are often not economically viable or worthwhile.

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[18] For the time being there are no administrative guidelines to indicate precisely the amounts which determine when fiscalization is and is not required.

[19] One should note that rents from immovable property located in Portugal obtained by non-residents without a permanent establishment in Portugal may be subject to tax in accordance with art. 6 of a DTC. In general net income (rents deducted from specific expenses and "CPA") is subject to a domestic tax rate of 25 per cent to be applied forthwith by the non-resident taxpayer or by its representative. As a rule, gross rents were first subject to a 15 per cent withholding as an advance levy and, therefore, it is possible that no tax at all should be paid by the non-resident corporation. In reverse, it can happen that the tax authorities are obliged to reimburse such a non-resident within three months of the deadline for filing the annual return (31 May of the next following year), unless the taxpayer elects to set the refundable amount off against future IRC liability. Interest on late payment from the tax administration (e.g. where the tax authority has postponed payment of a refund is chargeable at 5 percentage points over the prevailing basic discount rate of the Portuguese Central Bank.

[20] The specific administrative guidelines (*Circular*) Nº 28/83 of 5 May 1983 concerning the DTC concluded between Portugal and France establishes that both states agree that all the payments of dividends, interest and royalties from Portugal to France could benefit from the DTC reduced rate every year with a sole form for reduction at source (form MII.F). Nowadays, this procedure requires that payer and payee are the same.

1.2. Rules and procedures: requirements and documents to evidence claims

1.2.1. General situations for limitation at source and for refunds

Currently taxpayers do not confront specific non-tax procedures that stand in the way of their entitlement to treaty benefits. Moreover, practice shows that taxpayers are far from providing excessive documentation or evidence to support a claim. In fact, empirical knowledge also suggests that taxpayers often fail to attach the minimum documentation to prove and support their claims, which necessarily obliges the tax authorities to start an audit of the payer's account, in order to confirm such unsupported statements.

In addition, some other difficulties may arise when the foreign recipient does not have enough links with the payer of income. In this situation it can be difficult for the recipient to obtain a copy of the form which proves the payment of tax according to the normal domestic tax rate. It is often the case that the recipient to be informed by the payer of the gross amount of income paid to him and of the amount of tax withheld at the source, without receiving documentation beyond a simple letter or a mere banking transfer. Of course, in such cases the tax authorities do not make a decision before an audit is undertaken.

1.2.2. Mismatch of rules

It is possible that a mismatch of rules (e.g. regarding the timing for the presentation of refund claims – Portugal assumes a four-year period following the date of collection as a general rule) can occur, but there are no signs of mutual agreement procedures, or court cases pending, for the discussion of this issue. This is a particular important issue regarding the concepts that are erected as requirements to

be accomplished by both states (e.g. qualification of a trust or other reality or the beneficial owner test).

1.2.3. Claims presented by institutional investors

In contrast, the claims presented by institutional investors (intermediaries or custodians) require the presentation of further documentation identifying (or showing the ability to identify) each client and referring to the respective data and respective powers that entitle then to present such claims. There are no administrative guidelines that require them to present further documentation, although of course there is not only a need for them to prove their legitimacy to present such claims, but also a need to prove that their representatives are able to qualify for the treaty benefits. Practice shows that Portuguese tax authorities have been generous appreciating the majority of these situations.

1.3. Applying the rules and procedures: administrative guidelines

Apart from the specific guidelines issued on a case-by-case basis and applying exclusively to one treaty, there are few general administrative guidelines. From time to time, general administrative guidelines are issued to interpret or clarify the procedures to apply the treaty rules or to adapt the applicability of domestic income taxes with treaty rules.

1.3.1. Specific administrative guidelines: Portugal as the source country

All the administrative guidelines were draft in the same way, and were structured as follows:

(a) First, they refer to the Portuguese legal documents relating to the convention (e.g. Parliament Resolution approving the Treaty; Ratification made by the President of Republic Decrees; Notice concerning the exchange of the instruments of ratification) and to the Official Gazette where one may find the texts;

(b) Secondly, they expressly state the date on which the convention provisions shall have effect;

(c) Thirdly, they indicate which types of income (dividends, interest and royalties) may benefit from the reduced rates of withholding tax or may allow the recipient to present a claim to obtain the refund of tax paid in excess in the other country. A summary of 10(4), 11(4) and 12(3) of the OECD model convention is also expressly stressed in order to prevent inaccurate treaty claims;

(d) Fourthly, they indicate the two main requirements that allow recipients of dividends, interest or royalties to claim a reduction of taxes with regard to treaty relief. The requirements are as follows: (i) a substantial requirement clarifies that the claimant should be an effective beneficiary of the income and resident of the other state in the year to which they relate, or on the date at which withholding tax is made according to the rates due under the convention;[21] and, (ii) a formal requirement compels the effective beneficiary to fill in and present an application (in accordance with a form previously defined by the tax authorities) duly certified by the tax authorities of the state in which the former is resident.

(e) Fifthly, the guidelines state the date by which the form should be filled in and presented to the tax authorities and to the payer of income. In general, these guidelines sate that such forms shall be presented according to the following rules:

- Where the intention is to benefit from an exemption or reduced treaty rate, the prospective beneficiary shall deliver the applicable form, duly completed and certified by the tax authorities, to the payer before the date of payment;

- If full tax is paid according to domestic legal provisions, the effective beneficiary shall present a claim for a refund of the tax withheld in excess within the four years following the date of the tax collection.

(f) Following these preliminary and basic explanations, the guidelines assume that Portugal is the country of source and indicate the precise forms that shall be used by non-resident claimants. These are as follows:

- The form should be duly completed and signed by the claimant and the tax residence of the claimant should be certified by his/her/its tax authorities.

- The forms should be completed in duplicate, triplicate or quadruplicate (depending on the countries, on the type of income and on the method followed: exemption, reduced rates or refund of tax).

- The forms for limitation of tax to be paid in Portugal (i.e. the ones allowing the payer to reduce the withholding tax according to the treaty rate) should be completed in triplicate (duplicate in the case of the USA) by the beneficiary entity (companies or individuals resident in Mozambique) who will forward two of the copies to the payer of income. Payers are obliged to fill in specific domestic forms when they deduct tax ("IRS or "IRC") on payments (forms nos. 41 and 43 when income is paid to individuals (from entities respectively resident in mainland Portugal or Madeira and Azores) or forms ns. 42 and 44 when income is paid to companies (from entities respectively resident in mainland Portugal or Madeira or Azores)). Payments are certified by the tax authorities on these forms, unless the payments are made electronically at a bank. Payments to non-resident entities oblige payers to complete the domestic form nº 130 and send all these forms (i.e. one copy of the treaty form, form nº 41, 42, 43 or 44, and form 130) within the two weeks after the payment is made

[21] The treaty signed with the UK also includes a subject-to-tax clause. This means that tax treaty relief from tax in the source country of income depends on the recipient of the income being "subject to tax" in his country of residence.

to *Direcção de Serviços dos Benefícios Fiscais* with the address Av. Eng. Duarte Pacheco, nº 28, 4, 1070 Lisboa.

- The forms for repayment of tax paid in Portugal should be duly completed, signed and certified. The beneficiary or the tax authorities (depending on the conventions) will forward these forms to *Direcção de Serviços dos Benefícios Fiscais* (at the address above mentioned) supported by a voucher for the Portuguese tax payment (i.e. the forms nos. 41, 42, 43 or 44) requesting the refund of the tax withheld in excess.

All the guidelines expressly state that the payment of dividends corresponding to non-registered or non-deposited bearer shares cannot benefit from a reduction of tax at source. Moreover, individuals and other type of persons not being companies (please note that in general "Companies of persons" qualify as companies for treaty purposes) can only claim for the refund of the Portuguese tax withheld in excess.

(g) Subsequently the administrative guidelines indicate not only the place where one can obtain these forms in Portugal, or in the other treaty country, but also the place to deliver them to when they are completed.

(h) Finally, these guidelines turn their attention to a few terms of the treaty. Moreover, they confirm that the foreign tax authorities also issue forms, in spite of being different from the ones issued by the Portuguese tax authorities and explained heretofore, the requirements of the forms to be used by Portuguese residents are in substance similar.

Basically these guidelines help non-residents without a permanent establishment in Portugal claiming for treaty relief in case they receive dividends, interest or royalties, i.e. they establish the conditions and the procedures to follow in case it is necessary to reduce the "WTR" at source or to request a refund with the consequent presentation of the applicable form. For other treaty benefits non-residents just need to present a certificate of residence to the Portuguese payer. On the other hand, from the Portuguese perspective, residents in Portugal may obtain treaty benefits provided they certify their

residence in Portugal. In general for dividends, interest and royalties this statement certified in Portugal. In general for dividends, interest and royalties this statement certified by the Portuguese tax authorities is included in the appropriate form issued in the country of source and for other items of income it is given by a simple certificate issued by the Department of Tax Incentives.

1.3.2. General administrative guidelines: Portugal as the residence country

Above we described the rules for non-residents to apply treaty benefits, defining the type of claims and applications they should present in order to avoid excessive taxation at source (Portugal).

Nevertheless, apart from the same type of forms issued by the counterparts of Portuguese treaties, there are administrative guidelines for establishing Portugal as the residence country and therefore clarifying how double taxation should be eliminated or relieved. Portugal followed the credit method as the country of residence including for dividends, interest and royalties, except in the Mozambique treaty where a tax sparing clause was introduced.[22] In fact the underlying (indirect) tax credit was not included in any of the treaties signed by Portugal.

As a rule Portugal limits the foreign tax credit to the amount of Portuguese corporate income tax ("IRC") that would be imposed on that foreign-source income if no credit for foreign tax was given. A similar unilateral measure is included in CIRC (see articles 71(2) b) and 73).

Under the principle of credit, the corporate income tax code calculates tax on the basis of the taxpayer's total income, including the income from the other states (see article 58(1) b) of CIRC), which according to the treaties may be taxed in those other states. Then, it allows a deduction from its own tax for the tax paid in the other state under the limitation above mentioned. Portuguese corporate bodies should have a certificate issued

by the foreign tax authorities stating the full amount of tax paid abroad or at least any form or document evidencing such declaration.[23] Such documents prove the declaration registered in form 22 (i.e. the tax return for corporate bodies).

For individual income tax ("IRS") purposes, each year taxpayers should attach to their tax returns (forms nos. 1 and 2) a document evidencing the payment made to them, indicating its nature and the amount withheld at the source provided they intend to benefit from treaty relief. In this case taxpayers may be obliged to present the same type of documents authenticated by the foreign tax authorities.[24]

These amounts should be quantified in table 10 of form 2, to be filled in by individuals.

The tax authorities confirm these statements immediately after receiving these forms (nos. 1 and 2) and will forward them to the Portuguese IRS Department to obtain a proposal as to how the foreign tax can be deducted.

The same rules should be followed regarding companies or other Portuguese entities (EEIGs) subject to the transparency tax regime, in order to allow resident individuals partners to declare and deduct their share of the foreign tax.[25]

1.3.3. Publication of administrative guidelines

Currently, the administrative guidelines concerning treaties are published by the tax authorities themselves – long after the date on which they are issued – and by some well

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[22] In the Portuguese-Mozambique treaty, Portugal included a tax sparing clause in order to preserve the Mozambique tax incentives created to encourage foreign investment.

[23] Those documents should correspond to the Portuguese tax return forms completed by non-residents with a permanent establishment in Portugal (e.g. form 22) or/ and the domestic forms for payments made to non-residents without a permanent establishment in Portugal to whom such income should be attributable (e.g. forms 41, 42, 43 and 44).

[24] See *Ofício Circulado* Nº. 9/91 of 15 April 1991 issued by SAIR.

[25] See Administrative Ruling (*Of. Circulado do SAIR*) Nº. 9/91 of 15 April 1991.

known tax newsletters, but in fact there is no consistency in these publications and therefore no certainty at all is offered by the existing guidelines.[26]

In fact, the majority of guidelines regarding double tax treaties and published as leaflets in the seventies (e.g. 1972 regarding the treaties with the UK, Spain and Belgium) were not republished again by the authorities or by any publisher and, therefore, very few people are familiar with them. In Portugal the international tax field is a particularly closed world where information is released from the top to the lower echelons in a very restricted way.

In general, treaties are negotiated by public tax belonging to the Centre of Fiscal Studies ("CEF"). The drafts and the minutes of meetings or other agreements are kept by the "Ministry of Finance" in total secrecy.[27] This is one of the reasons why no one knows whether Portugal has settled on the mode of applications of the limits mentioned in articles 10, 11 or 12 with the other contracting states or not. It is also noticeable that "CEF" has few effective contacts with the international tax department integrated within the Tax Incentives Services. Lack of effective day-to-day communication between these services the claims every day with the ones that issue interpretative decisions and draw up and plan international tax polices.

Apart from these two services it is not unfair to say that all the other tax authorities' services (e.g. local authorities – *Repartições de Finanças*) are unfamiliar with international tax issues, as will be seen below in comments on specific situations.

[26] Publications of such administrative guidelines (*Circulares*) is imposed by law (art. 11 of Law 65/93 of 26 August 1993) but practice shows that it is very difficult to know whether an administrative guideline exists or not regarding a specific matter. The tax authorities have never published the complete set of such guidelines together in a whole book. These days it is considerably easy to get this information in newsletters, or in the web (http://www.dgci.min-financas.pt), but former guidelines are still a mystery, especially the ones issued in the 1970s or the 1980s, which may still have influence on these subjects.

1.3.4. Administrative forms

In general, taxpayers (individuals or collective bodies including companies) are obliged to answer a questionnaire to claim for reduction of the Portuguese tax on dividends, interest and royalties arising in Portugal.

There are two types of questions relating to recipients (e.g. individuals and companies) and one type of information common to both that should be provided regarding the type of income that will be received. The type of questions to be answered by non-residents are identical, whether taxpayers require reduction of "WTR" or refunds. Those non-residents are requested to identify themselves, but they shall also certificate their residency in forms and complete the questionnaire.[28]

1.3.4.1. Forms for individuals

Individuals are in general obliged to complete the following questionnaire:

"1. In the calendar year in which the income was attributed or made available, were you present in Portugal for more than 183 days, continuously or with interruption?

1.1. If you were for a shorter period, did you have, at the 31st December of the same year, a permanent home in Portugal with the intention of maintaining and occupying it as your usual residence (Please state the locality)?

1.2. At the 31st December of the same year, were you a crew-member of a ship or aircraft at the service of an entity with its residence, head office or effective management in Portugal?

If so, please answer the following questions:

[27] As far as our knowledge goes these elements were never requested by taxpayers invoking the free access of citizens to the public administrative archives in accordance with Law 65/93 of 26 August 1993.

2. Do you have a permanent home in the State "Arcadia"? If so, where?

2.1. And do you have a permanent home in Portugal?

2.2. If you have a permanent home in both States, please state the personal and economic connections you have with each one of them.

2.3. For how long were you present in each of the States?

3. Did you carry on any commercial or industrial activity in Portugal in the year, in which the income was attributed?

If so, please state the circumstance.

4. Should there be an agent or representative from whom any necessary information should be obtained, please provide the relevant name, address and phone number."

1.3.4.2. Forms for companies

Companies, on the other hand, are required to reply to the following questions:

"1. Where is the company's business managed and controlled?

2. Was at least 25 per cent of equity capital or social capital of the company controlled, in the year the income was attributed or paid, direct or indirectly, by non-resident shareholders?

3. If so, did the company carry on in the resident State any effective commercial or industrial activity, apart from securities or other asset management?

4. Did the company carry on any commercial or industrial activity in Portugal, in the year in which the income was attributed or paid?

[28] See the list of forms to be completed by non-residents. Appendix 2 at the end of this report.

5. Should there be in Portugal an agent or representative from whom any necessary information should be obtained, please provide the relevant name, address and phone number."

1.3.4.3. Additional questionnaire for individuals and companies

Finally, there is some information that should be given regarding the type of income received by the non-residents, as follows:

List of income the claim for repayment is related to

I. Dividends Date of the income availability, even as advanced payment on profits account. (Payer entity name and address).		Shares description, other corporate rights or participation in profits (Please state number and nominal value of each share, type of corporate rights or interest)	Gross income (in escudos)
II. Interest Debt-claim nature (Payer entity name and address)	Maturity date, maturity presumption availability quantitative amount, or other ones, as established by law for said income	Show in this column: 1. In the case of bonds, the number and nominal value of each one. 2. The amount of other debt-claims.	Gross income (in escudos)
III. Royalties Description of royalties and date of contract		Payments date or availability (Payer entity name and address)	Gross income (in escudos)
		TOTAL (in escudos)	

1.3.5. Confidentiality of beneficiaries

Offices or individuals that accept and handle claims for treaty relief are not publicly identified, but of course they have to identify themselves before the tax authorities indicating their names, addresses and tax numbers. The tax authorities should maintain confidentiality regarding their identification.

All the treaty claims and other forms (e.g. the ones relating to payment, such as forms 41, 42, 43 and 44, and the one relating to control – form 130) are secret *vis-à-vis* third parties and they only used by the tax authorities.

1.3.6. Availability of economic information obtained from forms

Taking into consideration that relevant information on treaty applicability is not included in tax returns delivered every year, but just on the forms mentioned above (which were not computerized and statistically treated in the recent past), there is no credible and accurate information regarding the application of tax treaties, namely: (a) total value of tax refunds made abroad per year; (b) total value of the amounts that were not withheld at source, based on treaty relief's; (c) discriminated value per country or per type of income, etc.

Assuming that Portugal is still a net importer of capital and that the tax authorities continue to defend old theories of introducing or maintaining high tax rates at source,[29] it seems that an urgent examination of this information is required (e.g. creating new tables or forms to be delivered with the yearly tax returns) in order to introduce a tie-break between the liberal and the collection's conception.

[29] It is interesting to note that Portugal obtained an authorization to maintain temporarily (until the year 2000) a withholding tax on dividends for the Patent-Subsidiary Directive purposes (Council Directive 90/435/EEC of 23 July 1990), justified on budgetary grounds. The Proposal for a directive to tax interest and royalty payments maintains the same type of allowance temporarily.

International tax competition demands that effective efforts are made in order to introduce and study the figures, particular nowadays when tax competition and tax erosion are the most fashionable issues and several liberal papers reveal the role of indirect gains obtained with low rates.[30]

1.3.7. Taxpayers and advisers may seek help from the authorities

Taxpayers and their advisers may seek help and guidance from the tax authorities (International Tax Services organized within the Tax Incentive Department in Lisbon) in making claims and they often do it. Experience shows that local tax authorities services are not familiar with such claims and in practice they limit their intervention to the certification of residency.

Moreover it is not easy to get these forms at the local tax authorities. In general, these services do not have the forms available for taxpayers. In practice, under the existing guidelines these forms are only available in Lisbon (*Direcção Geral das Contribuições e Impostos, Direcção de Serviços dos Benefícios Fiscais, Departamentos das Relações Internacionais*, Av. Eng. Duarte Pacheco, nº 28, 4, 1070 Lisboa) or at a specific address in the other contracting state.

1.3.8. Additional problems created by forms

1.3.8.1. Introduction

Without doubt these forms are important documents to prevent frauds and abuses, but in our opinion it should be clear that the formalities cannot be enshrined in such a

[30] The Commission's Report on the development of tax reform of 1996 felt the need to study and pay attention to this specific subject, but recommendations are still incipient and lack theoretical and empirical basis – see pp. 492-7.

way as to contravene the wording of the treaty. Moreover, they also cannot constitute technical or administrative barriers to hinder taxpayers from getting treaty benefits.

The majority of Portuguese treaties include the possibility for contracting states to settle, by mutual agreement, the mode of withholding of the tax. Paradoxically (unless they are dealing with different type of procedures which would be slightly odd), the OECD commentaries state that each state should be able to use the procedure provided in its own laws, i.e., to limit its tax to the treaty rates or tax in full and make a refund. But it is true that: (a) firstly, in Portugal these agreements, whether in existence or not, never come to light; (b) secondly, there are no legal provisions establishing the regime and refund, or alternatively stating the requirement for certification.

Therefore, taxpayers are only aware of the fact that conventions indicate the maximum tax rate that can be levied by the source state, which means that, technically, the payer may reduce withholding tax, provided the requirements to apply the convention (basically, that the recipient is the effective beneficiary and is resident in the other contracting state) are fulfilled.

In our opinion it is legally arguable whether the possible invocation of convention provisions is constrained by the previous accomplishment of such formalities. First, because these administrative guidelines are not legal provisions but represent mere administrative regulations that cannot restrict the effect of treaty provisions. Second, because as far as taxpayers' knowledge goes, Portugal has not yet concluded mutual agreements establishing the mode of withholding of the tax. Therefore, at least it seems they are not enforceable *vis-à-vis* taxpayers. Third, there is no legal basis to impose any system, particularly the complex "retain and refund" one. Last, but not least it seams rather negative to prevent taxpayers from benefiting from a WTR when taxpayers have had no opportunity to comply with them, namely when they were not able to present a form prior to payment.[31]

[31] An interesting discussion of this subject may be seen in K. Vogel, *On Double Taxation Conventions*, Kluwer, 1991, pp. 466 and 467 (para. 35).

1.3.8.2. Claims for refunds involve difficulties: examples

It is common for Portuguese tax authorities to challenge qualification of payments made abroad, recharacterizing declared "fees" connected with services rendered by non-residents as "royalties" connected with deemed transfer of technology.

Unless a tax treaty applies, Portuguese source income from royalties derived by non-resident corporations without a permanent establishment in Portugal is subject under the IRC to a 15 per cent withholding tax rate.

In these circumstances, a company making this payment abroad is deemed liable to deduct the tax at source and therefore becomes liable for the tax which should have been withheld but was not. Moreover, the payer becomes obliged to pay the tax that he did not deduct, plus interest, from the date on which deductions, were to have occurred (see article 91 of CIRC).

Taking into consideration that the form was not presented in good time, the Portuguese authorities invariably make the assessment according to the ordinary tax rate (15 per cent), even if those payments were made to a resident in a contracting state and the applicable treaty provision establishes a 5 per cent maximum rate to be taxed at source.

In the absence of a mutual agreement stating otherwise (which it seems should not be effective without being a matter of public knowledge), the legality of such a procedure seems a moot point *vis-à-vis* the wording of the treaty.

Moreover, subsequently the payer would find it extremely difficult to apply for treaty relief, because the application forms for refunds are not prepared for such cases, namely to be filled in by the payer. Therefore, the payer would request the payee to get the confirmation of residency and to state that tax was paid on his behalf delivering a power of attorney to the payer in order to allow him to receive the tax paid to the Portuguese authorities.

At this stage the payer would also like to receive the tax paid on the payee's behalf. This can be very hard work. In fact, the payer of gross income and of tax subsequently assessed is not entitled to get the fax *per se* and probably it will be difficult for the payer to be reimbursed of the full amount of tax he has paid,[32] unless he makes a claim to a competent civil court of the payee's jurisdiction.

These situations are really critical when the payer and the payee are independent companies. Experience shows that if the authorities assess the tax four or five years after the remittance of funds abroad (which is common), and the companies do not belong to the same group, it is rather difficult for the payer to be reimbursed of such tax.

In short, claims for refunds have significant disadvantages for the recipient. First, the clear cash flow disadvantage without interest. Second, the additional documentation that should be sent by the beneficiary (or his tax authorities) provided he received it from the payer. Last but not least, the waste of time that a probable fiscalization of the payer accounts will entail, requiring personnel dealing with these issues.

In any case it is not possible to request urgency in these procedures.[33] Advance decisions or applications do not exist for these specific cases. However, taxpayers can request particular advance rulings to find out if the tax authorities consider that a specific transaction is eligible for a treaty benefits. This is the case if taxpayers have doubts about the eligibility of a certain entity (e.g. partnership or a trust) or if they doubt whether the Portuguese authorities will consider that entity as the beneficial owner or not.

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[32] Then, the payer becomes liable to pay the taxes of third parties who received the gross income. In our opinion, this domestic legal provision is of arguable status, because it can represent the paradigmatic breach of the ability-to-pay principle enshrined in tax law. If, in this particular case, domestic law was not voted on or authorized as such by the Parliament (i.e. if government alone decided that payers of income to non-resident entities should be responsible for their taxes in case they did not deduct tax when the payment was made), it can be considered unconstitutional because it seems to offend legality and ability-to-pay principles. In the author's opinion the constitutionality of arts. 96 of CIRS, 91 of CIRC and 15 of the Tax Procedure Code ("CPT") is therefore debatable, at least while it permits the payer of such income to be identified as the person liable for the tax (and the related compensatory interest), not withheld at source. In view of the fact that the wording of such legal provisions is not without ambiguity, it is possible to defend (contrary to general opinion) the argument that those articles do not lay the primary responsibility for the payee's tax with a payer, and therefore are not unconstitutional. Thus, if the tax authorities assess primarily the payer for the tax he did not deduct, he should also defend the argument that such assessment is illegal violating the above mentioned provisions. Alternatively and as a subsidiary point he could invoke the indirect violation of the Portuguese Constitution (e.g. legality and ability-to-pay principles). Exceptions to the most important canon of taxation ("equity") cannot be introduced without an express authorization granted by the Parliament.

Finally, it is important to note that the Portuguese authorities are now aligning domestic practices with international trends, in order to reduce abuses.[34]

2. Specific situations

2.1. Residence status

2.1.2. Legal provisions

For domestic purposes an individual is deemed to be resident of Portugal if: (a) he remains here for more than 183 days in any calendar year; or (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 abode 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 (see article 16 of CIRS).

Also for domestic purposes, to qualify as a resident, a company or unincorporated entity must have its head office or place of effective management in Portuguese territory (see article 2(3) of CIRC).

Basically, the concept of residency followed by Portugal in its treaty network follows the OECD model (article 4), but these rules were subject to modification in accordance with the specific negotiations of each treaty.

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[33] An exception exists for the reimbursement of tax related with interest of public debt, but reimbursements are not made by the tax authorities. Such reimbursements are made directly by the public debt department or by the custodians (e.g. banks) – see section 2.2.6 below.

[34] Within the scope of this, interest on bonds paid to non-residents cannot benefit from the treaty rates if such bonds were bought the day before the payment of interest, because the main portion of such interest belonged to the seller, according to domestic laws (see art. 6(3) of CIRS).

2.1.2. Formalities to request residency in Portugal

Some formalities have to be complied with if one intends to request and prove residency in Portugal. These formalities are as follows:

(a) First he/she/it has to request a taxpayer number (see above section 2.1.4.1.).

(b) Secondly, to obtain a certificate of residency taxpayers are requested to present previous returns (see section 1.1.4. above). But the fact that they changed residence, or they were incorporated in the middle of a civil year, constitutes an impediment to this.

(c) Then, to be considered residents in Portugal individuals have to evidence that they have requested this tax number more than 183 days ago or that they have their habitual abode in Portugal.[35]

(d) Other entities, including companies, need proof that they were incorporated in Portugal or that they have their head office here. The tie-break provision generally establishes that such person "shall be deemed to be a resident of the contracting state in which its place of effective management is situated".[36] In practice, they establish proof on their residency with the previous tax returns, or the forms regarding commencement of activity.

Provided the documents to apply for the tax residence were presented to the tax authorities (e.g. the forms applying for a tax number regarding individuals or for the commencement of activity for other entities, both including their residency in Portugal) in accordance with the conditions above mentioned taxpayers can claim for a certificate of residency.

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[35] Of course conventions may have special tie-break rules when taxpayers have habitual abode in both states or in neither of them. Generally the OECD rules are followed but, in particular conventions, the mandatory command establishing that the competent authorities of the contracting states "shall settle the question" was substituted by "shall endeavour" to solve the question (see art. 4(2) d) of the treaties with Brazil, Finland, Norway, Switzerland).

[36] There are few exceptions and the most relevant is probably the one included in the treaty with the United States, which states that "the competent authorities of the Contracting States shall endeavour to settle the questions by mutual agreement". If the competent authorities are unable to make such determination, the person shall not be considered to be a resident of either contracting states for the purposes of enjoying benefits under this convention (see art. 4(3)). The role played by the terms "shall settle" and "shall endeavour" seems to be significant when parties referred to individuals or other entities (e.g. companies) in art. 4(2) and (3) respectively.

2.1.3. Specific cases for individuals

2.1.3.1. Immigrant wishing to be treated as a resident

If a recent immigrant wishes to be treated as a resident in Portugal he should start requesting a taxpayer number.[37] Moreover, to make this proof abroad he should request a certificate of residence at the competent local tax department (*Repartição de Finanças*), i.e. in the locality he will be resident. For the time being, there is no connection between the internal administration services and the tax authorities and, therefore, it is possible that one can be considered tax resident in Portugal while at the same time having a visa of residence in other state.

In practice, if such an immigrant requests a residency certificate the tax authorities will ask him to attach a proof (e.g. tax number request plus the address he has in Portugal) that he has changed his residency to Portugal for at least 183 days.

It is relatively easy to become resident for tax purposes because nothing but the identity card/passport and the address in Portugal is required to get a taxpayer number and to present the form and become registered as resident. As the highest marginal tax rate in Portugal is 40 per cent, wealthy individuals can benefit from a change of residency to Portugal.

Taking into account that the higher Spanish is 47.60 per cent (plus the eventual complementary rate of 8.40 per cent allocated to regions) for individuals earning more than PTE 10,488,000, it can be tempting for Spanish taxpayers to change their residence to Portugal.[38]

[37] See art. 2 (1) of Decree Law 463/79 of 30 November 1979 with the wording given by Decree Law 266/91 of 6 August 1991.

[38] Recently the Portuguese tax authorities were asked by the Spanish authorities to deny certificates of residence to Spanish nationals that changed residence to Portugal, yet maintain their centre of vital interests in Spain. According to art. 4(2) and c) of the DTC they have to be considered as residents in Spain.

It is interesting to note that in particular cases the right to tax is shared between the two contracting states, taking into consideration the length of residency in each country.[39]

2.1.3.2. Individual wishing to be treated as a non-resident

In the reverse case, individuals that leave Portugal for an indefinite period and who wish to be treated as non-residents in Portugal should fill in a specific domestic form and deliver it to the local tax authorities. For that purpose they should indicate the new address where they will be resident.

Such an individual must appoint a legal representative if he/she will continue to receive Portuguese income. Representatives should sign the form accepting the charge. They can be individuals or corporate bodies, provided they are resident in Portugal (see article 120 (1) of CIRS). This person acts as the contact person with the authorities and he/she has to fulfil all the non-resident's tax obligations; completing the appropriate tax return for certain categories of domestic-source income and settling payment of the underlying tax liability. In addition he/she may be held liable for the fulfilment of the tax obligations of the non-resident taxpayer.[40]

2.1.3.3. Other appointments of legal representatives

Non-resident corporate bodies without permanent establishments in Portugal or membership or partnership of non-resident EEIGs and other transparency entities as

[39] Both the agreements with Austria and Switzerland established in art. 4 (4) that "where an individual has transferred his residence from a Contracting State to the other Contracting State, the right of the first State to tax such individual on account of his residence is limited to the income regarding such period before that transfer of residence and the right of the other Contracting State to tax such individual on account of his residence is limited to the income regarding such period as after that transfer of residence".

[40] See administrative guideline Nº 14/83 of 31 May 1983. This representative does not become liable for the taxes payable by the non-resident taxpayer (he/she/it is just liable for the fulfilment of formal obligations – e.g. to

defined by article 5 of IRC code, are also obliged to appoint a legal representative if they receive Portuguese income (see article 101 of CIRC).[41]

If this appointment is not made, or the legal representative does not expressly accept it, the non-resident taxpayer can be subject to a penalty ranging from PTE 5,000 to PTE 500,000 for individuals and from PTE 10,000 to PTE 1,000,000 for corporate bodies. These fines can be applied by the chief of the local tax department (see article 39 of the legal regime applicable to tax (other than customs) for offences approved by Decree Law 20-A/90 of 15 January 1990 – "RJIFNA").

Furthermore, it is strictly forbidden to effect any payment abroad of any category of domestic source income derived by non-residents, unless it is conclusively proven that any underlying tax liability is paid or adequately secured (see article 130 of CIRS and 106 of CIRC). This infraction can be penalised with a fine ranging from PTE 30,000 to PTE 3,000,000 for individuals and from PTE 30,000 to 6,000,000 for corporate bodies (see article 40 of "RJIFNA"). This fine has to be applied by the District Tax Director (*Director Distrital das Finanças*) according to article 54 of RJIFNA.

2.1.4. Tie-break rule for companies

A company with a head office or effective direction in Portugal is considered resident for corporate income tax purposes. Therefore, it can happen that the same company is considered resident in two countries. Almost all the tie-break rules that feature in Portuguese treaties establish that at the end the company is resident in the place of effective management.

Nevertheless, in practice it is very difficult to apply this rule. First, one should say that no administrative guidelines or court decisions exist concerning this specific situation,

present tax forms), unless he also acts as a real legal representative of the non-resident taxpayer. In the latter case he/she/it is liable for the tax according to article 14-A of CPT.

[41] Corporate bodies without a permanent establishment in Portugal are not obliged to appoint a legal representative provided: (a) they just obtain capital gains with the sale of securities (which are exempt of tax for the time

namely to precisely state where the effective management is considered to be. Secondly, it should also be stated that Portuguese forms for corporate bodies (e.g. the form relating to the commencement of activity and forms concerning periodical (yearly assessments) were not designed to deal with such situations. Finally, even in the form to declare the commencement of activity there are no specific tables to indicate that although the head office is in Portugal, the effective direction is established abroad or vice versa.

2.1.4.1. Effective management abroad

Therefore, if companies have their effective management abroad, we consider that this information should be inscribed and registered in table 40, i.e. the space reserved for "Observations" in the form relating to the commencement of activity. This explanation should be registered in the table 5 and 40 (registering for example as a limited liability company (point 2) or a corporation (point 3) and cumulatively as a permanent establishment (point 7) when the effective management is abroad – table 5). Moreover, it would be advisable for taxpayers in this situation to clarify this precise point orally and in writing with the local competent authorities.

Later, if the effective management is maintained abroad and the company intends, to claim that it is not resident in Portugal for corporate income tax purposes, the company should fill in the tax return form as a permanent establishment of a non-resident entity.[42]

These issues can also be decisive when it comes to allowing the non-resident company (e.g. a company with its head office in Portugal and effective management in Spain) to benefit from the Spanish treaty network, namely to be treated as permanent

being); (b) they receive investment income (e.g. dividends or interest) subject to final withholding tax rates – see specific administrative guidelines 12/89 of 20 July 1989 and Circular 14/93 of 31 May 1993.

[42] In the author's opinion, this could also be declared at any time by presenting a form for amendments to previous declarations (form *Declaração de Alterações*), to be precise, the points on tables 4, 5 and 40.

establishment in Portugal.[43] However, the Portuguese department for international tax affairs seems to have had no experience in dealing with these situations.

One should also be cognisant of the fact that the local authorities have very little, if any, experience in receiving these kinds of statements. Taking into consideration the fact that frauds and abuses should be prevented, it is understandable that there are complexities involved in the attempt to prove that one is a resident or a non-resident (especially in this case) in Portuguese territory.

In the latter case one understands that at least the majority of directors (or the executives) should be resident in the other contracting state, and should have evidence to show that they direct the company from there. Probably they will be able to show that all the board of directors' meetings were held in the other state and that the company was effectively managed from that point. But, of course, the Portuguese authorities could well raise questions to ascertain why the company was incorporated and has its head office in Portugal, instead of abroad. The company should be ready to respond to such inquiries and should be prepared to evidence residency in the other contracting state. The burden of proof will rest with the company and its directors.

2.1.4.2. Effective management in Portugal

On the other hand, it would appear to be simpler for a company without a head office in Portugal to be classified as resident, because it shall be treated as resident in accordance with Portuguese domestic legal provisions (see article 2 (3) of CIRC) provided the effective management is in Portugal. The forms indicated above should be filled in and the supporting explanations sent to the local authorities department. This type of information should be rendered and supported with documentation, so as to avoid double taxation issues and mutual agreement procedures.

[43] One may imagine a triangular case as indicated in para. 53 of art. 24 of the OECD model where the state of residence is Spain, the state of source is a third state and Portugal is the state where a permanent establishment receiving dividends, interest or royalties is situated.

2.2. Withholding tax: specific cases

2.2.1. Direct ownership without intermediaries

2.2.1.1. Portugal being the country of source

As was pointed out above, if one (S) is a resident of another treaty state (P) and owns shares in a company resident in Portugal (R), tax relief can be claimed in Portugal in the following circumstances:

(a) If S is a company it is possible to claim for a reduction of the tax withheld at the source (generally from 25 per cent to 15 per cent or 10 per cent), provided the recipients (in state P) sends the applicable forms to the payer in Portugal duly completed, signed and certified by the authorities of state P proving its residence in state P. Moreover, the shares detained by the company (S) should not be bearer shares, unless they are registered or deposited in a bank. The payer can only reduce tax on the payment to S if he received these forms prior to the payment being made.

(b) If S is an individual, other than an individual resident in Mozambique, administrative guidelines state that he/she cannot claim for a reduction of the tax at the source. He/she will be subject to the domestic tax rate (25 per cent) and will have to fill in the forms to request the refund of the excessive amount of tax withheld (see above section 1.3.4). This refund system is also applicable to other corporate bodies or companies that did not apply for the reduced treaty rate.

Generally relief is not granted as a credit available against other taxes due now or in the future. This kind of set-off does not exist for these purposes.

2.2.1.2. Portugal being the country of residence

Considering now that such entity (S) is a resident of Portugal (P) and owns shares in a company resident in another treaty state (R), tax relief applies as follows:

(a) S being resident in Portugal will have to start by requesting the appropriate form to fill in and to certify residence. Then S will send this form directly to the payer of dividends in country R before the payment is made, in order to benefit from a reduction at source. In a case where the payment had already occurred, S will request a refund by filling in the appropriate form that he or the Portuguese tax authorities will send to the foreign tax authorities accompanied by the proof that the tax was paid in full in country R.

(b) In addition, S will credit foreign tax against the domestic (IRS (for individuals) or IRC (for corporate bodies)) tax on that income. Grating a credit for foreign taxes, Portugal limits the credit to the amount of domestic tax that would be imposed on that foreign source income if no credit for foreign tax was given. A tax sparing credit clause was included in the Mozambique treaty; so as not to jeopardize Mozambique domestic tax incentives. Therefore, Portugal gives a credit against its own tax for the tax which the company would have paid if the tax had not been spared under the Mozambique tax exemption or/and holiday provisions.

2.2.2. Payment of dividends through intermediaries[44]

The situations mentioned above should not charge if the shares are held by the bank located in state R in the name and on behalf of the entity (S) resident in state P. In principle both certificates (to claim for the limitation at source or to request a refund) should indicate that entity (S) is the beneficiary of the dividends. Probably the custodian

[44] Here the term "intermediary" does not refer to the person that acts as an agent or nominee.

(e.g. a Bank) will sign the form in the name of the beneficiary with a power of attorney. The custodian, by virtue of such powers, will also collect the dividends on behalf of S.

The same principle should apply if the custodian is not located in the same state as the payer (R) but in a third state (Arcadia), provided the custodian appears to hold the shares and collect dividends in the name and on behalf of its client. In principle, no further documentation is required apart from the power of attorney, the forms and the documents generally used or required (see above sections 1.3.1, 1.3.2, and 1.3.4).

In any case it is important to know the legal regime of state R (i.e. the state of the company that issues the shares) and of Arcadia (the state where eventually the shares are deposited).

2.2.3. Deposit and registration of shares

First, it is important to distinguish between foreign and Portuguese shares. It is also relevant to distinguish between certificates (titles) and book entry forms (without title) within the broad term Portuguese shares. Both can be nominative or bearer shares.

One should bear in mind that Portuguese law states that all foreigner shares located in Portugal should be deposited with a credit institution.[45]

All the deposited foreign or Portuguese shares (certificates) should be registered in the name of the beneficiary and be deposited in the custodian bank, unless the latter is obliged to deposit them at the Portuguese Clearing House (CVM). Even bearer shares are deposited in the beneficiary's name.[46] Of course, for confidential and banking secrecy purposes the bank does not reveal the identity of its clients. But in specific circumstances (e.g. to vote in general meetings or to make a claim for a refund of tax) the bank may issue a statement certifying the number of shares owned by the client.[47] All the shares of

[45] See art. 2 of Decree Law 408/82 of 29 September 1982.

[46] See art. 1(4) of Decree Law 408/82 of 29 September 1982 and 56 and 88 of the Securities Central Market Code ("CMVM").

[47] See art. 54 of the Securities Central Market Code ("CMVM").

companies quoted in the three markets of the stock exchange should be registered in the Portuguese Clearing House (*Central de Valores Mobiliários* – CVM). Other shares are also freely registered in the CVM according to the decisions of the board of directors. In principle, individuals also have to prove that the acquisition of such shares was made through the intervention of a credit institution or that a communication was made by the seller to the tax authorities, in order to exercise their rights, namely to collect dividends.[48]

Book entry forms (i.e. shares not represented by certificates) should be registered in the CVM in the name of the bank depository and the latter is obliged to have individual accounts in the name of the beneficiaries. Therefore, if a foreign entity has book entry forms of Portuguese companies registered in the CVM it is important that the bank representing the foreign entity obtains the treaty form duly completed and collects the dividends proving that the non-resident qualifies for the treaty regime and that it is the owner of such book entry forms. In case of reimbursement it is possible that the Portuguese authorities will request the bank to present the power of attorney or at least the instructions granting powers to act in the name and on behalf of the beneficiary.

2.2.4. Complex situations

One of the most complex issues appears when the client's bank is located in Arcadia, but the custodian bank to whom the former gave instructions is situated in state R. In these ubiquitous cases the accounts are generally registered by the custodian bank (in state R) in the name and on behalf of the client's bank located in Arcadia and not in the name of the client itself (S) resident in state P. Therefore, in state R neither the company paying dividends nor the custodian bank knows who in fact is the beneficial owner of the dividends. These accounts are well known as "omnibus accounts" and, in practice, they allow the client's bank to apply the treaty between Arcadia and state R provided both entities (client's bank and payer) are able to make the treaty applicable. This situation may

[48] See art. 128 of CIRS.

occur in countries such as Portugal where the concept of "beneficial owner" is almost unknown and where no such control exists.

Of course in principle this should not be envisaged as such. In reverse, if S appears in state R claiming for the applicability of the treaty this will be immediately denied because S is not known. This situation occurs frequently in Portugal when non-resident individuals instruct banks abroad (e.g. in the United Kingdom) to make the acquisition and the latter contact Portuguese banks that appear as custodians. In spite of contravening legal provisions (because the shares are not registered in the name and on behalf of their beneficiary and legal owners) these situations occur and prevent the owners from claiming treaty reductions directly.

Finally one should refer to the possible hypothesis of someone (e.g. a woman) that intends to claim the relief on the grounds that she is the owner of the shares registered in the name of the husband. This situation could be difficult, but in our opinion it will be legally possible for her to qualify for application of the treaty. First she will have to prove that she is the legal owner of the shares and that the husband just owned them on her behalf. She must prove that she owned the shares (e.g. the shares were acquired (by gift or sale) by her). Secondly, probably she would have to defend the fact that she is the beneficial owner of the shares. Problems will occur with the elements of proof, and these need to be considered in each specific case.

2.2.5. Beneficial owner test and anti-avoidance measures

In Portugal there are no legal domestic provisions or administrative guidelines regarding the qualification of a limited liability or corporation (resident or non resident) as the beneficial owner of dividends, i.e. there is no anti-avoidance legislation, nor any court decisions, preventing a Portuguese subsidiary wholly owned by a parent company resident

in a third state (state T) from benefiting from a treaty signed between Portugal (state P) from state R, the country where the company distributing the dividends is located.[49]

Nevertheless few treaties signed by Portugal foresee anti-avoidance measures (e.g. a limitation of benefits clause or a protocol) namely the ones signed with the United States and with Spain. Typical cases of treaty shopping are therefore hindered by such conventional rules.

According to these two treaties, S will not benefit from treaty reductions because it does not meet the so-called "ownership" test, unless S is engaged in the active conduct of a trade or business in Portugal (other than the business of making or managing investments).[50]

Moreover several other treaties inspired by the OECD model convention of 1977 included the "beneficial owner" clause. The treaties concluded with Germany, Italy, Mozambique, Bulgaria, Korea, Ireland, Poland, the Czech Republic and also the ones with Spain and the United States require that the recipient is the beneficial owner of dividends.

The term "beneficial owner" is not recognized by Portuguese law as such despite the fact that the concept is an easy one to understand. Nevertheless, according to Portuguese law the legal owner of the shares is the beneficial owner of the dividends, unless a different agreement was established, such as a usufruct agreement.[51] Therefore, it seems that in the absence of express protocols or other anti-avoidance clauses (limitation of benefits) the beneficial owner requirements in articles 10, 11, and 12 only exclude agents or mere nominees as indicated in paragraph 12 of the OECD model commentary to article 10.

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[49] In addition, one should remark that the beneficial ownership test was just included in the treaties negotiated after 1977, i.e. following the OECD model convention of 1977.

[50] See part 3 of the protocol attached to the treaty between Portugal and Spain and art. 17(2) of the treaty between Portugal and the United States. The latter points out two other cumulative requirements as follows: (a) the item of income is connected with or incidental to the trade or business in the first mentioned state; and (b) such trade or business is substantial in relation to the activity in the other state that generated the income.

[51] Following the Roman-Germanic legal system some restrictions to the legal concept of ownership are also known in Portugal (e.g. the *usus fructus* as a temporary right of using a thing or benefiting from the *fructus* (e.g. income such as dividends) of a property (movable or immovable) may be granted to a different person than the one having the ultimate property or the "property itself").

In fact, taking into consideration the example mentioned above, S is not legally obliged to pay the parent company resident in state T the dividends received from state R. This is in spite of the likely fact that such payment would be made. However, one could also state that the ultimate owner of such sums is not the parent company but the individual/s controlling such company.

This is probably one of the questions that could be raised by the authorities involved, but, in the absence of a general anti-avoidance rule in Portugal, there seems to be little scope for the tax authorities to challenge this scheme.

2.2.6. Interest and royalties procedures

The type of procedure to be accomplished regarding payments of interest and royalties is the same as the one used for dividends, although the questionnaire to be answered by the recipient is different (see section 1.3.4.3. above).

In these cases companies will probably be more reluctant to choose the refund method instead of the reduced rate method. Apart from the classic handicaps, the repayments of tax on interest and royalties will involved an additional objection that has led parties to prefer to reduce withholding tax. This is the possibility that tax authorities have to make adjustments to the taxable income of the payer (generally interest and royalties are deductible, provided the arm's-length principle is respected) which may occur in the course of a tax audit undertaken with the purpose of proceeding to the repayment of tax.

2.2.6.1. Interest from Portuguese public debt

Interest on public debt earned by entities without residence in Portuguese territory may be exempt of IRS or IRC, provided the recipient is not resident in a low tax

jurisdiction.[52] The particular bonds qualifying for the exemption are defined from time to time by Order (*Portaria*) of the Minister of Finance.[53] Custodians must maintain with "CVM" accounts for: (a) taxpayers exempt from IRS and IRC (including residents and non-residents); (b) Portuguese corporate taxpayers entitled to receive payment gross (e.g. banks); (c) individual income taxpayers (even if they are entitled to a final flate-rate withholding and no further taxation), or Portuguese corporate taxpayers not included in the two categories above.

Foreign payment centres (settlement centres – e.g. CEDEL and EUROCLEAR) and international operators are obliged to have an account with depository institutions affiliated to the CVM. These accounts must be segregated from any other accounts under management by the depository institutions and must be classified according to the three categories listed above. Non-resident settlement systems are obliged when requested by the Director of the Portuguese public debt to provide information regarding the clients on whose behalf they act (e.g. taxpayer identification, as well as the nature and volume of business transacted). In such cases DTC forms are not required to be completed.

Custodians should provide a list identifying the eligible entities (the name of the recipient exempt of tax or subject to a final withholding rate, the nature and the quantity of securities they hold) to the public debt department or to whosoever the latter indicates. An entity (either a custodian or a settlement centre) that did not submit the relevant documentation by the deadline for exemption at source may still obtain a "quick refund" of the full amount of withholding tax applied by sending the relevant documentation to the public debt department or to whosoever the latter indicates. In such cases reimbursement is made by one or the other of these entities within the following five days.[54] Finally if such entity has missed the deadline for relief at source and for a quick refund of withholding tax, the beneficial owner of the eligible public bond may claim a full refund through a standard refund procedure directly with the Portuguese tax authorities.

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[52] See arts. 1 and 3(1) of Decree Law 88/94 of 2 April 1994 and Order (*Portaria*) Nº 377-B/94 of 15 June 1995. The latter indicates the countries, territories and other regions considered to be a low tax jurisdiction, presenting the so-called "blacklist".

[53] Currently there are already several securities eligible for tax exemption.

2.2.6.2. Royalties: problems arising from different qualifications

A different question arises when the tax authorities qualify as a royalty something that the parties involved in a previous agreement considered to be a service agreement or any agreement that did not involve the payment of royalties. In Portugal, several court cases evince such situations when the payments related to engineering agreements, management services and even cost-sharing agreements were classified as royalties.

Generally additional assessments are made several years following the payment ahead of income or the remittance of capital related to the share contribution on the cost.

Then, apart from internal administrative and judicial reviews and appeals, the payer and the recipient will have additional difficulties in making the treaty applicable.

Provided a tax treaty applies the remittance of capital sums (other than dividends, interest and royalties), and the payment to independent persons non resident in Portugal is not subject to withholding tax in Portugal, the only further procedure is the requirement to obtain a certificate of residency for such a resident.[55]

2.3. Business income

2.3.1. Tax returns presented by corporations

Corporate taxpayers either resident companies with permanent establishments abroad or Portuguese permanent establishments of foreign corporations are required to file with the competent local tax office a fiscal return. This tax return is filed for a given year in

[54] See Circular Nº. 17/90 of 27 March 1990.

[55] Of course it is assumed that such an independent person does not have a fixed base in Portugal, does not say in Portugal for 183 days, and is not for any reason considered to be in Portugal.

May of the following year. A self-assessment is made with the delivery of such return, and any tax liability must be paid.

Portugal applies the ordinary credit method as unilateral relief for the avoidance of double taxation on foreign-source income received by resident companies or by Portuguese permanent establishments of foreign companies where the income in question is effectively attributed to them.

2.3.2. Permanent establishment in Portugal

If Import Co. intends to start developing its activity in Portugal as a permanent establishment it is necessary for the company to initially register as such, namely at "RNPC", the Commercial Registry Department and the competent local authorities. After completing a declaration of commencement of activities for tax purposes as a permanent establishment, Import Co. shall continue to register its accounts in accordance with the accounting rules and the other legal requirements applicable to companies to the same sector of activity.

Therefore, Import Co, shall be taxed at the source (in Portugal) in accordance with article 7 paragraph 1 of the applicable tax treaty and with CIRC rules. As a rule only the profits attributable to that permanent establishment may be taxable in Portugal.[56] In this case it is important for the permanent establishment to receive the certificate of residency of Import Co. in order to prove that the treaty may be applicable. Business resident in state O credit or exempt the Portuguese corporate income tax in accordance with the applicable DTC rules.

2.3.3. Non-resident without a permanent establishment in Portugal

Assuming that Import Co. does not consider that the activity performed in Portugal constitutes a permanent establishment (e.g. it is a construction or installation project that does not last more than 183 days) it shall act as a non-resident without a permanent establishment in Portugal. Therefore, any income realized by the company in Portugal should only be taxed in state O and all the payments should be made abroad in gross according to the invoice received in Portugal. The payer should receive a certificate of residence issued by the tax authorities of state O in order to allow Import Co. to benefit from the DTC "exemption method" (e.g. articles 5 (4) and 7).

If the Portuguese tax authorities consider that the duration of the company's activity in Portugal exceeds the period agreed within the contract, they will make an assessment. In this case, the tax authorities will try to make an assessment to this deemed Portuguese permanent establishment. Profits and costs will be imputed in accordance with the specific tax treaty and the specific IRC legal provisions. Experience shows that currently the authorities try to redirect this entity without a permanent establishment in Portugal, the tax authorities try to argue that such a company received royalties for know-how during the life of the project in order to assess the payer of income. From the authorities' point of view, then it would be possible to assess the payer of income, because tax was not withheld at source.

2.3.4. Resident company obtaining foreign income

Under the existing tax treaty network, Portugal applies the ordinary credit method as the general rule. Therefore, Portuguese companies with foreign permanent establishments should include all income obtained abroad and, in general, they may credit in Portugal the

[56] See a brief résumé of the several criteria provided by Portuguese treaties in order to ascertain permanent establishment profits. Gloria Teixeira and Prof. David Williams in "The Portuguese Tax System and Double Tax Agreement Network", *Intertax* 1994/4, p. 174.

lower of the following amounts: (a) the foreign tax paid; (b) the fraction of the IRC liability, calculated prior to the credit, corresponding to the foreign income (taxable in Portugal) – see section 2.3.2., above for further details.

In case the Portuguese Export Co. has a permanent establishment in state O it will be taxed there and it will benefit from a tax credit in Portugal for the tax paid abroad in accordance with the rules above mentioned. In this situation, it has been considered enough for the Portuguese company to receive a certificate issued by the foreign tax authorities stating the amount of taxes paid abroad by the permanent establishment.

If the Export Co. does not consider that the activities constitute a permanent establishment, it will include all income in its tax basis which will be taxed in Portugal accordingly. In principle income is not taxed in state O and therefore there are no foreign tax credits.

2.4. Other situations

Similar procedures applicable to permanent establishments may be extended to independent individuals with a fixed base in Portugal.

3. Disputes and unresolved issues

Taxpayers may appeal administratively (to the director of the tax authorities district) or judicially against any assessment made by the tax authorities. They also may appeal to the Minister of Finance, against the decision issued by the director of the tax authorities district. However, instead of appealing to the Minister of Finance they have a new opportunity to appeal to the first instance tax court. If they appeal to the Minister of Finance they can still appeal to the tax section of the Central Administrative Court of Lisbon (formerly the second instance tax court).

Generally taxpayers prefer to follow the administrative path (director of the tax authorities district and Minister of Finance) instead of going immediately to court to discuss the interpretation and application of conventions to avoid double taxation.

Portugal introduced legislation establishing an independent procedure to deal with complaints about unfair tax administration. The Ombudsman will deal solely with tax complaints, but he/she still needs to be appointed by the Prime Minister and the Minister of Finance according to article 7 of Decree Law Nº. 205/97 of 12 August 1997.

The Ombudsman will have the power to initiate inquiries as well as to respond to complaints. The Ombudsman's conclusions are mere recommendations and therefore are not legally binding. No experience exists to indicate whether recommendations will be followed in practice or not. Before now Portuguese legislation had a general ombudsman regime without specific powers for taxation. Recommendations were followed in certain cases.

Questions relating to disputes of facts or procedures should be discussed by administrative and hierarchic appeal. Such procedures are readily available but they take a certain amount of time to decide. Minor procedure disputes may be resolved in a few months, but when complex questions of qualification of income or characterization of permanent establishments arise, the questions take several years to be resolved.

These decisions are taken by the tax authorities themselves and therefore they are not as fair and independent as they would be if decided by the courts.

Until now there has been no experience of treaty problems resolved by mutual agreement procedures. There are few cases pending at this moment.[57] For the time being there is not a set procedure for the applicability of this procedure which is merely supported by the OECD provisions inserted into the bilateral treaties. The platonic

[57] The author is aware that in a recent case, in spite of having been invited to consider a mutual agreement procedure one year ago, regarding the qualification of fees (of engineering agreements and management services) and costs (of cost-sharing agreements) as royalties, the Portuguese Minister of Finance has not yet replied to the Finnish Minister of Finance. On the other hand, the author is also aware that a different procedure is pending without a predicable solution. In this case the dispute moves in turn to the resident concept for a corporation having its head office in Madeira. The Swiss authorities defend that the company is resident in Switzerland.

regime established in article 25 may lead the states to breach the *pacta sunt servanda* principle more often and overriding treaties may become a trend if not a fashion.

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[58] This is a general rather than a specific bibliography on the subject.

Appendix 1

Convention/State	*Legislation*	*Administrative guideline*
Germany	L 12/82 30.09.82	C 10/85 20.06.85
Austria	DL 70/71 8.3.71	C 11/74
Belgium	DL 619/70 15.12.70	C 11/72 11.06
Brazil	DL 244/71 2.06	C 17/73 19.10
Bulgaria	R.. 14/96 11.04	-
Korea	R.. 25/97 8.05	-
Spain	R.A.R. 6/95 28.01	C 3/96 18.04
USA	R.A.R. 39/95 12.10	C 14/96 18.12
Finland	DL 105/71 26.03	-
France	DL 105/71 26.03	C 2/73 29.01
Ireland	R.A.R 36/92 3.11	C 9/97 4.06
Italy	L 10/82 1.06	C 11/85
Mozambique	R. 36/92 3.11	C 8/96 15.05
Norway	DL 504/70 27.10	C 10/72 29.05
Poland	R. 57/97 9.09	-
United Kingdom	DL 484/97 24.07.68	C 1/72 3.01
Czech Republic	R. 26/97 9.05	-
Switzerland	DL 716/74 12.12	C 13/76 8.03 C 83/76 22.10

L – Law

DL – Decree-Law

R – Parliament Resolution

C – Administrative Guideline (Circular)

Appendix 2: Forms to fill in to claim for double tax treaty relief

	Individuals				Corporate entities				
Convention/ state	Reduction at source	Refund			Reduction at source			Refund	
		Dividends interest and royalties	Dividends	Interest and royalties	Dividends interest and royalties	Dividends	Interest and royalties	Dividends interest and royalties	Divi
Austria		MI-A			MII-A			MIII-A	
Belgium		I-BG			II BG			III BG	
Brasil		MI BR			MII BR			MIII BR	
Bulgaria									
Czech Republic									
Finland		MI-FN			MII-FN			MIII-FN	
France		MI-F			MII-F			MIII-F	
Germany		RF-1			RF-2			RF-3	
Hungary									
Ireland		MI-IRL			MII-IRL			MIII-IRL	
Italy		RIT-1			RIT-2			RIT-3	
Korea									
Mozambique	MII-MOC	MI-MOC			MIII-MOC			MIV-MOC	
Norway		MI-NR			MIII-NR			MIII-NR	
Poland									
Spain		MI-E			MII-E			MIII-E	
Switzerland		MR-P1			MR-P2			MR-P3	
UK			MI-RU	MIV-RU		MV-RU	MVI-RU		MII-
USA		MI-EUA			MII-EUA			MIII-EUA	

Résumé

La législation fiscale portugaise, qu'elle soit conventionnelle ou nationale, ne contient pas de dispositions légales ou d'autres types de directives concernant les procédures à suivre pour appliquer les conventions conclues avec le Portugal.

Les mécanismes destinés à accorder les avantages de la convention ont toujours été expliqués par des directives ("circulaires"). Les autorités fiscales ont publié près d'une "circulaire" pour chaque convention, réglementant la manière dont il convient de l'appliquer. Ces "circulaires" indiquent les conditions à remplir pour la présentation des créances fiscales, la déduction pouvant être effectuée para l'application directe des taux conventionnels ou par voie de remboursement. De plus, ces "circulaires" précisent quels sont les formulaires à remplir pour des types de revenus spécifiques (dividendes, intérêts et redevances). Ces directives administratives ne réglementent pas l'applicabilité des autres articles de la convention (tels que les articles 7 (en relation avec les articles 5 et 9), 13, 14, 15 et 21).

Les contribuables (personnes physiques ou morales, y compris les sociétés) sont tenus de répondre à un questionnaire pour demander une réduction de l'impôt portugais sur les dividendes, les intérêts et les redevances ayant leur source au Portugal. Le type de questions auxquelles les non-résidents doivent répondre este le même, indépendamment du fait que les contribuables demandent une réduction de la retenue à la source ou un remboursement. Toutefois, les formulaires à remplir sont différents. Au cas où le non-résident a l'intention de bénéficier immédiatement des taux prévus par la convention, ces formulaires doivent être présentés au débiteur du revenu avant le paiement, et la résidence dûment certifiée par les autorités fiscales compétentes.

Lorsque les revenus sont exclusivement imposables dans l'Etat de la résidence, le débiteur portugais doit obtenir le certificat de résidence du bénéficiaire, confirmé par les autorités fiscales étrangères, afin de permettre au bénéficiaire d'obtenir les avantages de la DTC à la source. Si le pays de la résidence est le Portugal, la double imposition est évitée

au moyen d'un crédit d'impôt, et la fourniture d'un certain nombre de documents au bénéficiaire des revenus est exigée.

Bien qu'elles aient force de loi vis-à-vis des autorités fiscales, ces "circulaires" ne peuvent imposer des règles annulant les dispositions légales ou conventionnelles.

Les demandes présentées par des investisseurs institutionnels (intermédiaires ou curateurs) doivent être accompagnées d'autres documents permettant d'identifier (ou indiquant le moyen d'identifier) chaque client et se référent aux données respectives et aux pouvoirs de représentation qui les autorisent à présenter de telles demandes. La pratique montre que les autorités fiscales portugaises ont fait preuve de libéralisme dans leur évaluation de la plupart de ces situations.

Les impositions supplémentaires soulèvent de nouvelles difficultés touchant l'applicabilité des règles de la convention. Les autorités portugaises imposent invariablement les contribuables sur la base du taux fiscal ordinaire, les obligeant ainsi à demander des remboursements.

En général, aux termes des dispositions de la législation nationale, le débiteur est considéré comme assujetti à l'impôt, présumé dû par le bénéficiaire, qui aurait dû être retenu à la source, mais ne l'a pas été.

Des problèmes constitutionnels peuvent surgir si les dispositions internes établissant cet assujettissement n'ont pas été votées ou autorisées para le Parlement. Il est évident de prime abord que cette façon de procéder représente le mode de recouvrement de l'impôt le plus commode et les plus simple ; toutefois, on ne peut ignorer qu'elle constitue aussi une violation paradigmatique du principe de la solvabilité ancré dans la législation fiscale. Il arrive souvent que le débiteur ne soit pas remboursé du montant intégral de l'impôt qu'il a payé au nom du bénéficiaire, à moins qu'il n'intente une action devant un tribunal civil compétent de la juridiction de bénéficiaire. Ce problème est étudié en détail.

En outre, indépendamment des questions de caractère général, ce rapport passe en revue des situations spécifiques relatives au statut de résident, et des problèmes pratiques

liés à l'application des conventions qui concernent essentiellement les revenus industriels et commerciaux, les dividendes, les intérêts et les redevances.

Zusammenfassung

Da sauf der innerstaatlichen Gesetzgebung bzw, internationalen Abkommen beruhende Steuerrecht Portugals enthält keine Vorschriften order sonstige Richtlinien, wonach die von Portugal eingegangenen Doppelbesteuerungsabkommen durchzuführen wären.

Die Verfahren für die Gewährung von Abkommensvergünstigungen wurden bisher stets durch Verwaltungsrichtlinien (*circulares*) erläutert. Die Finanzbehörden haben im Durchschnitt fast für jedes Abkommen eine Richtlinie veröffentlicht, in der die Art und Weise der Durchführung erklärt wird. Diese Richtlinien bestimmen die Voraussetzungen, die bei der Beantragung von Steuernachlässen zu erfüllen sind, wobei zwischen der direkten Anwendung von den in Abkommen vorgesehenen Steuersätzen und der Erstattung bereits gezahlter Steuern unterschieden wird. Die Richtlinien erwähnen außerdem, welche Formulare für bestimmte Arten von Einkünften (Dividenden, Zinsen und Lizenzgebühren) zu benutzen sind. Die Anwendung anderer Abkommensartikel (z.B. Art. 7 (zusammen mit Art. 5 und 9), 13, 14, 15 und 21) wird in den Richtlinien nicht behandelt.

Steuerpflichtige (natürliche Personen oder Körperschaften, einschließlich gewerblicher Unternehmen) müssen einen Fragebogen ausfüllen, um auf die in Portugal anfallenden Dividenden, Zinsen und Lizenzgebühren eine reduzierte Inlandssteuer zu beantragen. Für die Gewährung niedrigerer Quellensteuersätze wie auch für die Steuerrückerstattung müssen Steuerausländer die gleichen Fragen beantworten, aber auf unterschiedlichen Formularen. Falls ein Steuerausländer die unmittelbare Anwendung der

Abkommenssätze zu beantragen wünscht, müssen die Formulare dem Zahler der Einkünfte vor der Zahlung übermittelt werden, und die Steuerbehörde muss eine Wohnsitzbestätigung ausstellen.

Sollen Einkünfte ausschließlich im Wohnsitzstaat besteuert werden, muss der portugiesische Zahler vom Zahlungsempfänger eine Wohnsitzbestätigung durch die ausländische Steuerbehörde beibringen, um dem Empfänger die Inanspruchnahme der DBA-Vergünstigungen an der Quelle zu ermöglichen. 1st Portugal das Wohnsitzland, wird die Freistellung von Doppelbesteuerung über ein Steueranrechnungsverfahren beantragt, wobei dem Empfänger der Einkünfte bestimmte Unterlagen zur Verfügung zu stellen sind.

Die "Richtlinien" sind zwar für die Steuerbehörden verbindlich, doch können sie Rechtsvorschriften und Abkommensbestimmungen nicht außer Kraft setzen.

Von institutionellen Anlegern (Zwischenhändlern oder Treuhändern) eingereichte Anträge machen die Beibringung weiterer Unterlagen erforderlich, aus denen die Identität jedes Kunden hervorgeht (oder hervorgehen kann) und die sich auf die jeweiligen Sachverhalte und Vollmachten für die Antragstellung beziehen. Die bisherige Praxis zeigt, dass die portugiesischen Behörden sich in den meisten Fällen in der Beurteilung der Sachlage großzügig zeigen.

Zusätzliche Veranlagungen ergeben neue Schwierigkeiten für die Anwendbarkeit der Abkommensbestimmungen. Die portugiesischen Behörden gehen bei der Veranlagung in der Regel vom normalen Steuersatz aus und stellen dem Steuerzahler anheim, eine Regel vom normalen Steuersatz aus und stellen dem Steuerzahler anheim, eine Rückerstattung zu beantragen.

Nach inländischem Steuerrecht gilt der Zahler im allgemeinen als verantwortlich für die Zahlung der eigentlich vom Zahlungsempfänger Steuer, die an der Quelle fällig war, aber nicht erhoben wurde.

Verfassungsprobleme können entstehen, wenn die innerstaatlichen Bestimmungen, auf die sich diese Verantwortung gründet, nicht vom Parlament angenommen wurde. Auf ersten Blick erscheint es als das praktischere und einfachere

Steuereinzugssystem, aber es lässt sich nicht übersehen, dass es auch eine Verletzung des im Steuerrecht verankerten Grundsatzes der Zahlungsfähigkeit darstellt. Vielfach erhält der Zahler nicht die volle Rückerstattung der von ihm für den Zahlungsempfänger einfordert. Dieses Problem wird ausführlich erörtert.

Darüber hinaus behandelt der Bericht abgesehen von den allgemeinen Fragen auch spezielle Situationen im Zusammenhang mit dem Wohnsitzstatus sowie praktische Fragen der Abkommensdurchführung, hauptsächlich hinsichtlich Betriebsgewinn, Dividenden, Zinsen und Lizenzgebühren.

Resumen

La legislación tributaria portuguesa, ya sea nacional o convencional, no contiene ni disposiciones legales ni cualquier otro tipo de directriz sobre procedimientos a seguir para aplicar los Convenios (CDI) concluídos con Portugal.

Los mecanismos destinados a conceder los beneficios del CDI se han expuesto siempre mediante directrices administrativas („circulares"). Las autoridades tributarias han publicado casi una „circular" por CDI, reglamentando la forma en que ha de ser aplicado.

Estas „circulares" indican las condiciones que han de cumplirse en la presentación de reclamaciones de impuestos, pudiendo efectuarse la deducción por aplicación directa de los tipos del CDI o por vía de reembolso. Además, estas „circulares" precisan los impresos a cumplimentar para los específicos tipos de renta (dividendos, intereses y cánones). Estas directrices administrativas no reglamentan la aplicación de los demás artículos del CDI (como los artículos 7 (en relación con los 5 y 9), 13, 14, 15 y 21).

Los contribuyentes (personas físicas o jurídicas, incluso las sociedades) han de cumplimentar un cuestionario para solicitar reducción del gravamen portugués sobre

dividendos, intereses y cánones de fuente interna. Las cuestiones que han de responder los no residentes son las mismas, con independencia de que los contribuyentes soliciten reducción de la retención en la fuente o reembolso. No obstante, los impresos a cumplimentar son diferentes. Cuando un no residente desee beneficiarse en seguida de los tipos previstos por el CDI, ha de presentar los impresos al deudor de la renta antes del pago y su residencia ha de ser certificada debidamente por las autoridades tributarias competentes.

Cuando las rentas son gravables exclusivamente en el Estado de residencia, el deudor portugués ha de obtener el certificado de residencia del beneficiario, confirmado por las autoridades tributarias extranjeras, a fin de que el beneficiario tenga acceso a los beneficios del CDI en la fuente. Cuando el país de residencia es Portugal se evita la doble imposición mediante el crédito de impuesto, exigiéndose entonces al beneficiario aporte determinada documentación.

Aunque tengan fuerza de ley respecto de las Autoridades tributarias, estas „circulares" no pueden imponer normas derogatorias de las disposiciones legales o convencionales.

Las demandas presentadas por inversores institucionales (intermediarios o depositarios) han de acompañarse con otros documentos que permitan identificar (o indiquen el modo de identificar) a cada cliente y se refieran a los respectivos datos y poderes de representación que les autorizan a su presentación.

La práctica muestra que las autoridades tributarias portuguesas son bastante liberales en la valoración de la mayoría de estos casos.

Las imposiciones complementarias presentan nuevas disficultades en lo que se refiere a la aplicación de la normativa del CDI. Las autoridades portuguesas gravan invariablemente a los contribuyentes en base al tipo fiscal ordinario, obligándoles así a reclamar reembolsos.

En general y a tenor de las disposiciones de la legislación interna, se considera sujeto a gravamen al deudor por el impuesto presuntamente debido por el beneficiario, que debería haber sufrido retención en la fuente pero que no la ha sufrido.

Pueden existir problemas constitucionales cuando las disposiciones internas que establezcan esta sujección no hayan sido votadas o autotizadas por el Parlamento. Es evidente que este modo de proceder es la forma más simple y cómoda de percepción del gravamen; sin embargo no hay que ignorar que constituye una violación paradigmática del principio de solvencia de la legislación tributaria. Con frecuencia el deudor no obtiene el reembolso de la totalidad del impuesto pagado en nombre del beneficiario salvo que intertponga recurso ante el tribunal civil competente de la jurisdicción de este último. Este problema se estudia con detalle.

Además, con independencia de los temas de carácter general, la Ponencia estudia situaciones específicas del estatuto de residencia así como problemas prácticos de aplicación de los CDI referidos fundamentalmente a las rentas industriales y comerciales, dividendos, intereses y cánones.