Réaliser dês affaires dans les pays de langue portugaise

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1_Introduction

The Madeira archipelago is situated in the North Atlantic, about 700 Kms from the African coast and 1,000 kms from Lisbon. Basically a 2 or a 4 hours plane journey from Lisbon or London, respectively.

The entire archipelago is made up of the islands of Madeira, Porto Santo, Desertas and Selvagens. The name of the main island and the archipelago derives from its extraordinary riches in scenery and vegetation.

The island of Madeira was discovered uninhabited by the Portuguese sailor João Goncalves Zarco in 1417, sailing under orders from Prince Henry, the Navigator. Shortly thereafter, Prince Henry began colonization of the islands and established sugar plantations. These plantations became the prototype for the plantation system developed for the Portuguese colonies in the Americas after 1550. Thereafter, Madeira became a regular port of call on the long sea voyages from Africa, South America and India to Europe.

The importance of Madeira wine to the local economy surpassed that of sugar from the late 17th century. A British colony of merchants and entrepreneurs established themselves in Madeira around this time, and developed other activities such as banking, export, and tourism industries. During the Napoleonic Wars, the British occupied and administered the islands and many made their homes there. From that period until the present day, there are still amongst the trading houses of Madeira a number of important British names and connections with the UK remain strong.

Currently Madeira is an autonomous region of Portugal, which has its own government and legislative assembly. The power of this assembly, however, cannot override decisions taken by the central government in Lisbon. As an autonomous region of Portugal, Madeira is essentially a civil law jurisdiction whose private law is largely derived from and inspired by the Napoleonic code.

The islands are relatively sparsely populated. The local population of the Madeira islands is around 250,000. The majority of the people live on Madeira Island. Porto Santo, 42 km (26 miles) northeast of Madeira Island, has an estimated population of 5,000. The capital and largest city is Funchal (115,950), located on Madeira Island.

During the twenty century, Madeira became a very important tourism destination within Europe. Large five-star hotels and other facilities have been constructed in or near Funchal and the tourism is the main source of revenue for the Madeira government.

However, Madeira's dependence on tourism and its other traditional sources of revenue prompted local and central authorities to diversify the island's economy through the creation of an International Business Centre (IBC). Therefore, since 1986 (date of entry of

Portugal in the European Communities) the IBC of Madeira has been recognized and authorized by the European Commission as a regional State Aid on the grounds of the European Treaties.

According to the Madeira regional authorities, the IBC is already responsible for 10% of the GDP of the region and represents around 2% of the total employment of Madeira. Moreover, the IBC is now one of the income generators in Madeira, after tourism, and plays a major role in the development of the regional economy.

In fact, recent studies have shown that Madeira has been the fastest-growing region of Portugal and one of the highest in the European Union in the last years. According to the latest figures, Madeira's GDP grew at the average of 10% in the second half of the last decade, passing from a GDP per capita of 52% of the EU average to 75%. In addition, the latest Aa3 rating given to the island by "Moody's" reinforces Madeira's position as one of the most attractive investment locations available within the European Union.

The IBC comprises four areas: the Industrial Free Trade Zone, the Financial Centre, the International Services Centre and the International Shipping Register.

2_ The new regime of the IBC of Madeira

In December 2002, after two years of difficult negotiations with the Portuguese Government, the EU Commission approved the new state aid scheme applicable to the IBC of Madeira for the period 2003 until 2006.

In its decision, the EU Commission particularly noted that the aid was granted in an outermost region of Europe, which is one of the least developed in the Union, and is aimed at promoting the establishment of activities which will play a part in the region's economy. In these circumstances, the Commission felt that this regional state aid was likely to make a promotional contribution to the economic diversification of the region and therefore to offset the additional costs of carrying on business which arise from the factors outlined in Article 299 (2) of the Treaty (remoteness, insularity, small size, difficult topography and climate and economic dependence on a few products).

Therefore, this decision was granted in accordance with the conditions laid down in the guidelines on national regional aid with regard to operating aid, and thus met the conditions necessary for it to be considered compatible with the common market under the derogation set out in Article 87 (3) of the Treaty.

The IBC will now comprise just three areas: an industrial free zone, an international services centre and an international shipping register. The new companies which will be licensed to carry on business there between 1 January 2003 and 31 December 2006 will be able to enjoy a reduced rate of corporate income tax of 1% in 2003-2004, 2% in 2005-2006 and 3% in 2007-2011.

Access to the scheme will be restricted to companies that meet the specific eligibility criteria, based on the number of new, permanent jobs created. Companies that create more than five jobs will have to access to the scheme without further conditions, while those that create between one of the five jobs will be eligible only if they make a minimum investment of € 75,000 during the first two years of business.

In all cases, the tax benefits will nonetheless be limited to a ceiling placed on the tax base, which ranges from € 1.5 million (where less than three new jobs are created) to € 125 million (where more than 100 new jobs are created). Regulamentation is expected to be published in the beginning of the summer of 2003.

In addition, companies involved will have to start business within a fixed time limit (six months in the case of international services and one year in the case of industrial activities), or else the new licenses granted in the IBC will no longer be valid.

Moreover, access to the international services centre is also restricted to the activities included in the list drawn up by the Portuguese authorities on the basis of the statistical classification of economic activities. This list includes a range of activities, namely; trading, holding, e-commerce transactions, transport and communication, real estate, renting and services to business and sporting activities. However, the list explicitly excludes all financial and insurance intermediary activities, financial and insurance auxiliary activities and intra – group centres.

Finally, the dividends received by non-resident shareholders from Madeira companies are exempt, from withholding tax in Madeira, provided the income obtained by these entities derives from operations carried out within the legal framework of the IBC of Madeira. In addition, non-resident shareholders will also benefit from an exemption on withholding tax on interest received from loans, bonds and advances of capital granted to IBC companies.

This new regime, by introducing a progressive taxation regime applicable to IBC companies, is deemed to be a very useful instrument in arguing against the application of anti-avoidance rules in the jurisdictions where the counterpart of the operation is located, since the Madeira companies' income is, from now on, always subject to tax.

3_ The old regime still applies

In 1987, the EU Commission authorised, for an initial three year-period, a financial and tax aid scheme for the IBC of Madeira. The Commission subsequently authorised two extensions of the aid, for three and five years. Furthermore, in 1995, the Commission decided that the tax aid could be granted to industrial, financial and services businesses, which set up operations in the IBC of Madeira until 31 December 2000. Therefore all companies established and licensed until that date qualify, among other things, for total exemption from corporate income tax until the end of 2011.

This means that after the authorisation granted by the Commission for the period 2003-2006, there are two different regimes applicable to companies licensed in the IBC of Madeira:
(a) companies licensed until 31 December 2000 will benefit until 2011 from total exemption on corporate tax on the income derived from their licensed activities within the IBC;
(b) companies licensed from 2003 until 2006 will be subject to a reduced taxation at the rates of 1% (2003-2004), 2% (2005-2006) and 3% (2007-2011), respectively.

Therefore the companies established in the four areas of the IBC of Madeira authorised until 31 December 2000 (Financial Centre, International Services Centre, Shipping Register and Industrial Free Trade Zone) will continue to benefit from the same tax incentives until 2011.

In particular, banks and other financial companies set up in the IBC of Madeira before 31 December 2000 will continue to benefit from exemption on corporate income tax on all revenues resulting from operations carried out with companies or branches established in the IBC or with non-residents in Portugal, provided the activities performed are included in their IBC licence. Moreover, interest paid by IBC Banks will continue to be exempt form withholding tax provided the beneficiaries (providers of the funding) are entities established in the IBC or are non-residents in Portuguese territory.

In this context, it is important to mention that the Financial Centre of the IBC of Madeira was qualified as a harmful tax measure by the Primarolo report, under the provisions set out in the Code of Conduct on business taxation. However, at the ECOFIN meeting held on January 2003, the Council agreed that, in view of the final adoption of the tax package and in the context of an agreement on the assessment of the results reach on the rollback until 2005 of the harmful measures, the Financial centre of Madeira should be granted an extension until 31 December 2011.

As far as the International Services Centre is concerned, the Holding, Trading, Trusts and other Services companies established in the IBC until 31 December 2000 will continue to benefit until 2011 from the former tax regime, with no specific criteria/limitations on the creation of employment, minimum investment or the amount of benefit.

Therefore, International Services companies will continue to benefit from total exemption from corporation tax (including capital gains) until 2011 on income derived from activities included in their IBC licence, provided the operations are carried out either with other companies established in the IBC of Madeira or with non-residents in Portuguese territory.

Dividends and interest paid by Madeira companies to their non-resident shareholders are also exempted from taxation, should the income obtained by Madeira companies benefit from corporate exemption.

Moreover, the companies incorporated in the Industrial Free Trade Zone until 31 December 2000 will benefit, until the year 2011, from corporate tax exemption on income resulting from operations carried out with both residents and non-residents in the Portuguese territory. These companies will also be exempted from transfer tax and gift and inheritance tax (where applicable) on the acquisition of real estate for purposes of setting up in the zone. Dividends and interests on shareholder's loans are also exempted from withholding tax, regardless of the residency of the investors.

Finally, the companies incorporated in the International Shipping Register until 31 December 2000 will continue to benefit until 31 December 2011 from corporate tax exemption on income derived from their licensed activity, namely from operations carried out by own ships, vessels or oil platforms in international waters. Moreover, these companies will continue to benefit from exemption on capital gains on the sale or transfer of a ship or vessel. In addition, the salaries of officers and crewmembers of vessels, which operate in international waters, will continue to be exempted from Personal Income tax.

4_ Facilities

Madeira has put at the disposal of international investors high-standard support services, providing a sophisticated network of banks and management companies, a local university and international schools, as well as a wide variety and choice of other related services, among the island's "state-of-art" telecommunications. In fact, Madeira has one of the most advanced networks in Europe, having become a hub for fibre optic cables, with a high availability of band-width, and has set up a science park with the purpose of promoting and implementing new technologies on the islands.

In addition, Madeira has a modern intercontinental airport, with ten daily connections from and to Lisbon as well as with frequent connections every week to other major European cities, namely London. Moreover, the Industrial Free Trade Zone has its own port with cargo and container facilities and the island is crossed by modern motorways.

On the other hand, Madeira enjoys a great quality of life, having a mild climate, one of the safest living environments in the world as well as one of the lowest costs living in the European Union. The Capital Funchal is a cosmopolitan and sociable city, while the unspoiled interior of Madeira is characterised by abundant vegetation and spectacular scenery. Residents on the island enjoy a vast range of leisure activities, such as golf, surfing, sailing, fishing, horse riding, and mountain climbing, complemented by a diversified network of high-quality hotels and restaurants. The existence of numerous foreign communities living in Madeira is a good illustration of the island's appealing life-style.

5_ International aspects

As far as the international aspects are concerned, one should point out the companies established in the IBC of Madeira benefit from the following advantages:

(a) IBC authorised by the European Commission

As mentioned above, the IBC of Madeira is firmly recognised and authorised by the European Commission. This Centre represents a temporary (until 2011) regional aid scheme enacted by the Portuguese State under the authorisation of the EU Commission on the grounds of the European treaties. This made Madeira an entirely EU business centre with increased respectability, and as such it is not included among those countries or territories regularly listed as Tax Havens.

This authorisation is also relevant as far as the application of CFC rules is concerned. In fact, in view of the application of the principle of supremacy of EU law over national law, the tax authorities of the jurisdiction of the EU investor in Madeira may not, in principle, apply CFC rules to neutralise the effects of the IBC tax measures on the investor's income. In fact, being authorised by the EU Commission on the grounds of EU law, any attempt to override the tax incentives granted by the IBC of Madeira through the application of CFC rules should be considered as a violation of EU law, (namely a violation of the supremacy of EU law over national law) not to mention the violation of international tax law (e.g. article 7º of the double tax treaty that may apply).

(b) Madeira is part of Portugal

Madeira is an autonomous region of Portugal and through Portugal has the advantage of having full member status within the European Union. This places Madeira in a unique position in that it is a recognised International Business Centre but falls within the European Union.

In fact, companies licensed to operate in the IBC of Madeira have the advantages of free circulation of goods, services, people and capital that apply to any EU company and should also benefit from the applicable EU Directives, namely the Merger Directive (90/434/EEC), the Parent Subsidiary Directive (90/435/EEC), and in the near future the Savings Taxation Directive (2003/48/CE) and the Interest/Royalties Directive (2003/49/CE).

In addition, the IBC companies are also subject to VAT (6th EC Directive) as are other EU companies and can also benefit from the advantages of using European single currency – the EURO.

(c) Madeira companies benefit from the Double Taxation Treaties entered into by Portugal

Madeira is an integral part of the Portuguese territory and accordingly Madeira companies are included, for all purposes, in the Double Taxation Treaties entered between Portugal and third companies.

In fact, all Treaties specify that "Portugal" include the continental part of the territory and the islands of Azores and Madeira. Until now, Portugal has signed 42 Tax Treaties and all of them (except two – the treaties entered with the US and Brazil) allow Madeira companies to benefit from the Treaties' provisions.

Therefore, companies established in the IBC of Madeira may take advantage of substantial tax reductions on interest, royalties and dividend payments granted by Double Taxation Treaties, as well as tax sparing clauses.

(d) E – Commerce – Madeira benefits from the lowest VAT rate in Europe

Madeira has the lowest VAT rate in the European Union (13%), which turns this island into a very attractive location for business to consumer (B2C) E – Commerce transactions.

In fact, under the provisions of E. Commerce Directive (2002/38/EC), of May, non-EU suppliers will be required to collect VAT on electronically supplied services purchased by non-taxable EU consumers. This services include website supply, web-hosting, distance maintenance of programmes and equipment, supply of software, supply of images, text and information, supply of music, films and games and supply of distance teaching.

For such purposes, a non-EU company supplying electronic services within the EU will be required to:

(a) Register for VAT in every Member State where its non-taxable customers reside.
(b) Register for VAT in a single Member State, under a special scheme, and to charge VAT at the rate applicable in the Member State where customers reside; or
(c) Set up a subsidiary or a branch within a single Member State and to charge VAT on sales to EU non-taxable customers at the rate applicable in the Member State where it is incorporated or established.

Therefore, by setting up a subsidiary or a branch in Madeira, a non-EU B2C supplier may use its tax competitiveness to supply its services at a VAT rate of 13%, regardless of the Member State where its customers reside.

Some large EU Internet providers are also already relocating their activity to Madeira in order to benefit from the VAT rate of 13% on their B2C digital supplies.

6_ Conclusions

The IBC of Madeira, formerly know as a Free Trade Zone (during the eighties), has a preferential tax regime authorized by the EC Commission. This regime has been extensively scrutinized under the Code of Conduct and the State Aid criteria and its acceptability derives from the fact that its tax measures are, on the one hand, not considered harmful and, on the other hand, have contributed significantly towards Madeira's economic improvement in the last twenty years. In several respects, Madeira's tax regime is unique in Europe creating really the opportunities to attract new investments. The wide range of tax incentives and the fact that Madeira has already reached a specific development point led the EC Commission to require that new eligibility criteria for the amount of the investment and jobs created be meet for companies obtaining licenses from January 1, 2003. This reduces, if not eliminates, the shelf company operations in favour of real investment structures to be set up from 2003. Former companies, however, can still enjoy the full exemptions initially recognised until 2011.