dateline Portugal

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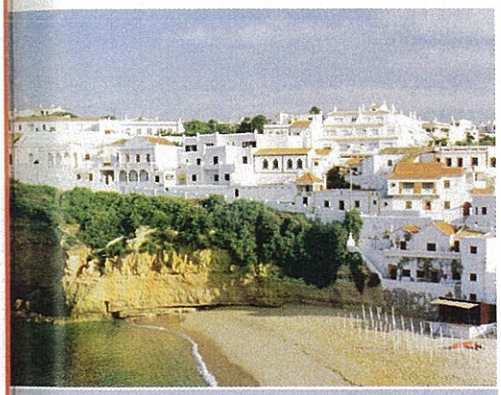

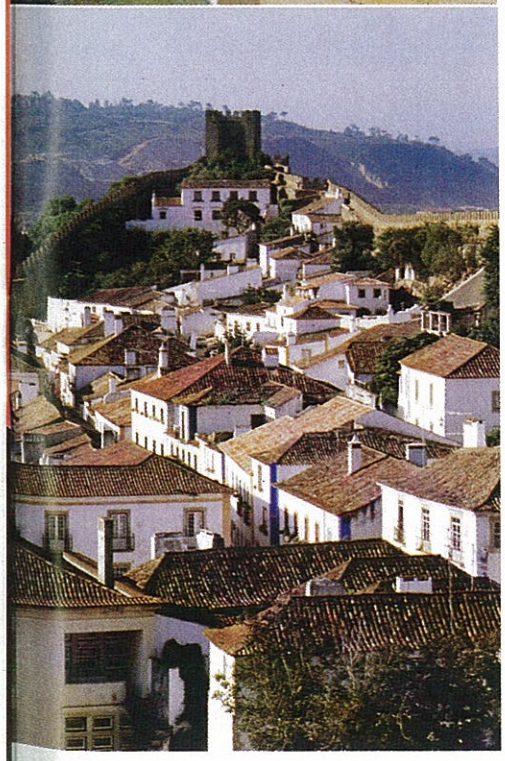

ECJ TO RULE ON PORTUGUESE CAPITAL GAINS REGIME

In October 2006, the European Court of Justice (ECJ) received reference for a preliminary ruling from the Portuguese Administrative Supreme Court concerning the compatibility of a provision of the Personal Income Tax Code with the right of establishment and the free movement of capital provisions of the EC Treaty (Case C-443/06). In the main proceedings, Erika Hollmann, resident for tax purposes in Germany, contended that Portuguese law, by allowing a 50% deduction in the capital gain derived from the sale of immovable property located in Portugal only when the seller is resident in Portugal, constitutes a restriction on the freedom of establishment and the free movement of capital between member states.

In the Administrative Supreme Court, the tax authorities contended that the provision did not infringe on these liberties or discriminate between resident and nonresident taxpayers because member states retain their tax sovereignty over what concerns personal income tax and while a resident taxpayer is taxed on his overall income (based on his ability to pay), a nonresident taxpayer is taxed only on the income attributed to Portuguese sources. According to the tax authorities, the different treatment of resident and nonresident taxpayers is not discriminatory because they are not in the same circumstances. Further, the authorities claimed that nonresidents are taxed on their capital gains at a flat rate (25%) while resident taxpayers are taxed at progressive rates (that can go up to 42%). In this context, granting the deduction could represent a more favorable and unjustified treatment of nonresidents compared with resident taxpayers.

The ECJ heard the case on June 28, 2007, and the Advocate General's opinion and the court's ruling are not expected before the end of the year. If the court rules in favor of the taxpayer, it is expected to have a positive effect on the real estate market in the Algarve region, attracting more nonresident investors. JOIT will report on the ruling when it is issued. ●

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(Continued from page 41) for the use of satellite transponder capacity and not the transfer of a right to the transponder itself. Had there been a transfer of the transponder itself, it would have amounted to a right to use the equipment and rental charges would have been royalties.

Taxation of Transponders as Fees for Technical Services

Would the services provided by a Service Provider amount to a technical service as contemplated under section 9(1)(vii) of the ITA or a DTAA? Fees for such services connote payments for management, technical, or consultancy services. Transponder services could fall within the ambit of technical services.

India's DTAAs with some countries provide that fees for technical services arise on providing services that *make available* technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or design. Where the definition of fees for technical services includes the "make available" clause, there may not be any tax implications for such payments, as transponder services do not make available any technical skills to Customer. The Delhi Tribunal discussed this in *PanAmSat.*

Even if the relevant DTAA does not have a "make available" clause, Service Provider can rely on the service provided being general and standard. This view was upheld by the Madras High Court in *Skycell Communications Limited and Another v. DCIT and Others* (251 ITR 053). The court held that the facility remained the same regardless of the subscriber—individual, firm, or companies. Technical service referred to in section 9(1)(vii) contemplates the rendering of a "service" to the payor of the fee. Mere collection of a "fee" for the use of a standard facility that is provided to all those willing to pay for it does not amount to a fee for technical services.

In view of this decision, it could be argued that the services are standard and provided to all customers. A technical service would arise if the service requires specialized skills or is of a technical nature. Generally, agreements for service entered into by Service Providers are common for all Customers and are available on Service Provider's website. Hence, being a standard facility, the services provided should not be considered fees for technical services.

Conclusion

Payments for a transponder do not come within the definition of "use of process" under the provisions of DTAAs. In addition, relying on the Supreme Court ruling in *BSNL* and the Madras High Court ruling in *Skycell*, use of transponder capacity should constitute the provision of services other than technical services and therefore should not be taxable as fees for technical services. ●