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by Francisco de Sousa da Câmara, Bruno Santiago, and José Almeida Fernandes

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Tax planning will be subject to closer scrutiny by the Portuguese tax authorities following the publication of Decree-Law 29/2008 of February 2008, which establishes the new regime for disclosure obligations to curb abusive tax planning.

The new decree-law focuses on the definition of ″tax planning schemes″ and on the disclosure obligations for the proponents of the schemes or their users, as well as on the fines and penalties that may be applied in case the disclosure rules are not respected.

The new legislation will enter into force on May 15, but also will be applied to tax planning schemes still being executed at the date of entry into force of the new regime.

Scope of Tax Planning Schemes

A tax planning scheme (TPS) is defined as any operation, plan, project, proposal, opinion, or recommendation, expressly or implicitly given, whether or not materialized in agreements, deals, or corporate structures; as well as any act to be performed, in performance or already performed, aimed at obtaining solely or as its main purpose the reduction, avoidance or deferral of taxes due or the obtaining of a tax benefit that would not be obtained, totally or partially, without the use of the scheme. Basically all income, expenditure, and property taxes are covered within the scope of these rules, including personal and corporate income taxes, value added tax, municipal tax on immovables, transfer tax on immovables, and stamp duties.

The disclosure obligations are triggered by operations that involve entities located in low tax jurisdictions (including listed tax havens and any jurisdiction in which there is either no corporate income tax, or the entity benefits from a partial or total exemption from tax, or the tax paid is equal to or less than 60 percent of the Portuguese corporate income tax that would be due if that entity would be considered resident in Portugal), as well as financial operations and operations on insurances, namely leasing, hybrids, derivatives, and financial instruments that are capable of determining a requalification of the income or a change in the beneficiary. Further, schemes that involve net operating and capital losses or fully or partially tax exempt entities are also considered reportable TPS. The scope of the disclosure obligations was slightly narrowed in comparison with the first drafts of the decree-law that were known, but will still encompass a wide range of reportable transactions.

Disclosure Obligations Rely on Promoters or Beneficiaries (Users)

The disclosure obligation relies on promoters, resident or located in Portuguese territory; namely, banks and other financial institutions, chartered accountants or accountants, lawyers, and solicitors. In case the promoter of the scheme is a nonresident entity or the scheme was developed by a third-party promoter, the duty to communicate the scheme relies on its beneficiary (user). In case the beneficiary (user) is a resident individual, the obligation to

disclose applies only to tax planning schemes involving the participation of entities located in low-tax jurisdictions as indicated above.

Range of Disclosed Information and its Exceptions

The information that must be provided to the tax authorities comprises the following items: (1) a detailed description of the tax planning scheme, including a description of the agreements, the corporate structures, the operations and transactions used, as well as the type of tax advantage pursued; (2) indication of the applicable law; and (3) name, domicile, and tax identification number of the promoter of the tax incentive scheme. The tax authorities can request further clarifications from the promoters regarding the information mentioned in (1), as well as information on the number of times a specific scheme has been proposed or the number of times the scheme was adopted by their clients.

This information must be provided on official forms of the Ministry of Finance to be published especially for this purpose. Promoters are required to submit those forms with the necessary information up to the 20th day following the end of the month in which the scheme has been conceived, proposed, or adopted for the first time. As for the users, if the tax planning was adopted without the involvement of any promoter or where the scheme has been proposed by a nonresident promoter, the scheme should be reported by themselves until the end of the month following its adoption.

The disclosure rules do not require promoters to reveal the name of the clients to whom those schemes have been proposed, but if the disclosure obligations are of the user, that will entail an identification of the concrete taxpayer benefiting from the scheme.

Notwithstanding, the decree-law still stresses that the obligation to inform the tax authorities derogates any professional privilege that the entities promoting these schemes may have. In this context, however, lawyers and solicitors are not required to inform the tax authorities if they were told of the scheme for the purpose of giving an opinion or in relation to judicial proceedings, whether the information is obtained before, during, or after the proceedings. Also, auditors rendering services in the context of the auditing of corporate accounts are not considered as performing an activity in their capacity as promoters and thus are not subject to disclosure obligations.

Noncompliance With Disclosure Obligations Subject to Several Penalties

Failure to comply with the disclosure obligation is penalized with a fine that may vary between €1,000 and €100,000. Further, two ancillary penalties may also be imposed: the loss of tax benefits and the official publication of the penalty at the expense of the breaching party. Also, the promoters of tax planning schemes will still continue to be required to disclose the relevant information whenever possible.

Moreover, the tax authorities are entitled to publish on the Internet that a certain tax planning scheme described in general and abstract terms is illegal and may be requalified, corrected, or subject to antiavoidance provisions.

Comments

The decree-law clearly shows the determination of the current government to fight not only tax fraud and tax evasion but also to curb tax avoidance. Portugal intends to follow a trend already adopted by the most developed tax systems (either in the United States or in Europe, namely in the United Kingdom or Germany), to combat abusive tax avoidance practices and to interact with other states to achieve these goals, as stated in the recitals of the decree-law itself.

Although the final version of the new regime has limited the scope of the disclosure obligations, the authors still believe the new regime highlights a clear mismatch between tax law in writing and in practice.

First, it is possible that the Portuguese tax authorities expect that this set of rules will allow them to make more use of the general antiavoidance clause or other specific clauses to prevent tax abuse. However, tax abuse and tax avoidance cannot be treated as being the same because the latter is understood to be an acceptable tool at the disposal of the taxpayers to minimize their tax burden. Further, the borderline between the two concepts is blurred, and the tax authorities will still have to clearly show the operation was exclusively or predominantly adopted for tax purposes.

Second, the corporate spectrum targeted by these rules is very different from the American or the English one, which has no comparison with the Portuguese market, where the major transactions are still predominantly of domestic nature and the

discussions with the tax authorities continue to be very much centered on formal issues (that is, the lack of accomplishment with ancillary obligations) or the denial of tax deductions based in general clauses that grant the tax authorities a degree of discretionary powers.

Third, the new regime will significantly increase the obligations and the compliance burdens of specific activities; but, the question remains whether the tax authorities are prepared to receive and treat the information now required. It is doubtful whether the tax authorities have the capacity to assimilate and treat the information, in particular if promoters and taxpayers interpret the definition of TPS literally and decide to communicate all types of situations that might be, in theory, perceived as tax planning. Also, the combination of this information with an additional request for a binding ruling on the possible application of antiabuse provisions can also lead to other issues. In the latter case, experience shows the tax authorities are never prepared to answer in a short time (not less than one year). However, the use of such a request for a binding ruling may inhibit the tax authorities from later invoking the application of antiabuse measures if no reply was granted within a six-month period from the date in which the binding ruling request was presented.

Finally, the success of the new regime hinges on the tax authorities' ability to process the new information, as well as on their capacity to create and develop the necessary guidelines to ensure an adequate and proportionate application of the regime for both tax authorities and taxpayers. ◆

♦ *Francisco de Sousa da Câmara, Bruno Santiago, and José Almeida Fernandes, Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados R.L.*