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by Francisco de Sousa da Câmara; and Bruno Santiago

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Viewpoints

Thoughts on Portugal's New Disclosure Rules

by Francisco de Sousa da Câmara and Bruno Santiago

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Tax planning in Portugal will become subject to closer scrutiny by the Portuguese tax authorities soon if no major political obstacles to proposed new rules are raised in the final stage of the approval process.

Following an authorization granted by parliament in the budget bill for 2007, the government prepared new disclosure rules to tackle tax planning and tax avoidance schemes. (For prior coverage, see *Tax Notes Int'l*, Oct. 22, 2007, p. 356, *Doc 2007-23024*, or *2007 WTD 200-3*.) The draft is being discussed in consultation with several economic groups, and the last political verdicts are awaited.

In a nutshell, the document focuses on the definition of tax planning schemes (TPSs) 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.

It is expected that this new legislation will take effect on January 1, 2008, and will be applied to TPSs created before the entry into force of the law, provided those operations continue receiving assistance of any kind from the promoter after January 1, 2008, including non-tax-related assistance.

Scope of Tax Planning Schemes

A 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 the reduction, avoidance, or deferral of taxes due or the obtaining of a tax benefit that would not be obtained 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, VAT, municipal tax on real estate, transfer tax on real estate, and stamp duties.

Moreover, operations that involve entities located in low-tax jurisdictions (including those in tax havens or any jurisdiction in which there is either no corporate income tax, 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 was considered resident in Portugal), as well as financial operations and operations related to insurances — namely, leasing, hybrids, derivatives, and contracts on financial instruments that are capable of determining a requalification of the income or a

Entities Required to Disclose the Schemes	Type of Schemes or Operations	Deadlines to Disclose	Forms
Promoters	Schemes or operations involving entities located in low-tax jurisdictions or financial or insurance operations	Up to the 10th day following the scheme or tax planning conception and before the presentation or proposal of the scheme to any client	To be published by the Ministry of Finance
	Any tax planning schemes	Up to the 20th day following the end of the month in which the scheme was conceived, proposed, or adopted the first time	
Users	Self-tax planning or schemes proposed by nonresident promoters	Up to the end of the month following its adoption	

change in the beneficiary — are always considered to be TPSs that must be communicated to the tax authorities.

Disclosure Obligations

The disclosure obligation rests 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). If the beneficiary is a resident individual, the obligation to disclose applies only to TPSs involving the participation of entities located in low-tax jurisdictions as indicated above.

The information that must be provided to the tax authorities comprises: a detailed description of the TPS, including a description of the agreements, the corporate structures, the operations, and transactions used, as well as the type of tax advantage pursued; indication of the applicable law; indication of the estimated tax saving; clarification of whether the scheme was conceived at the client's request; indication of the number of times the scheme has been proposed or adopted and the number of clients involved; and name, domicile, and tax identification number of the promoter of the tax incentive scheme.

This information must be provided on official forms issued by the Ministry of Finance, to be published especially for this purpose. The deadlines to disclose information are as indicated in the table on p. 758.

Under the draft, the disclosure rules do not require promoters to reveal the name of the clients to whom those schemes have been proposed.

Notwithstanding, the draft 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.

Noncompliance Penalties

There is a general obligation to disclose these schemes to the tax authorities until the 20th day of the month following their conception, proposal, or adoption. Failure to comply with this obligation will result in a fine that may vary between €1,000 and €100,000. Furthermore, 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 TPSs will continue to be required to disclose the relevant information whenever possible.

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

Comments

The current draft shows the determination of the current government to fight not only tax fraud and tax evasion, but also to combat tax avoidance. It is also a clear indication that Portugal intends to follow the fashionable trend already adopted by the most developed tax systems (either in the United States or in Europe, particularly in the United Kingdom or Germany), to combat abusive tax avoidance practices and to interact with other states to achieve these goals.

However, in the authors' view, this draft represents a clear reflection of the current mismatch between tax law in writing and in practice.

First, the Portuguese tax authorities may expect that this set of rules will allow them to make more use of the general clause to prevent tax abuse. However, tax abuse and tax avoidance are still different things, and the current legal requirements to combat tax abuses may still prove to be a serious obstacle for the tax authorities in making tax adjustments.

Second, the corporate spectrum targeted by these rules is very different from the American or the English one; the latter markets do not have the minimum comparison with the Portuguese environment, where the major tax operations are still of domestic nature and the discussions with the tax authorities continue to be 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 them a degree of discretionary powers.

Third, there is no doubt these rules will significantly increase the obligations and the compliance burdens of specific activities, but are the tax authorities prepared to handle the information required? It is not difficult to predict that the Portuguese tax authorities do not have capacity to assimilate and process masses of information, in particular if promoters and taxpayers interpret the definition of TPS literally and start communicating all types of situations that may be considered as tax planning (namely involving tax incentives, tax exemptions, or less burdensome structures) or together also use this opportunity to request specific binding rulings. In the latter case, experience shows the tax authorities are not prepared to answer in a short time frame (not less than one year), and that they may also become inhibited from using anti-abuse measures based on domestic legislation that only allows the tax authorities to respond in the period of six months counted from the date in which the binding ruling request was lodged.

Awareness and familiarity with tax planning may eventually increase opportunities to reduce potential loopholes rapidly and efficiently, including on an international scale (considering the exchange of information under the mutual assistance EC directive, the double tax treaty, or other specific bilateral treaty provisions), but it remains to be seen whether the tax authorities will be content to close loopholes by means of legislation, which would apply to future planning, or would try to close the tax gap.

In the authors' view, this regime also gives rise to many doubts in relation to the scope and control of its application — in other words, its true effectiveness. Apart from lawyers, other promoters subject to strict legal professional privilege and confidential rules should also receive further protection when the promotion of the transactions is derived from their advisory role. Not to say that some financial resident entities that act between nonresident promoters and their users may consider themselves as mere intermediaries and "facilitators" when they allow nonresident promoters to offer their individual and corporate clients tax-efficient solutions; within these limits, it is also not clear, for instance, if in cross-border situations there is a disclosure obligation in case of a resident promoter of an international TPS that will originate a tax saving solely in another country.

In many aspects, these rules seem to be overambitious, overtaking the most modern rules in the area, namely the ones adopted by the Joint International Tax Shelter Information Centre countries (that is, they do not limit themselves to cover specific type of schemes, they do not require any liaison to the type of remuneration for creators or marketers of TPSs, and, in several instances, impose communications and disclosure obligations before the TPSs have been discussed with potential clients).

One may even question whether this draft will enter into force on January 1, 2008, or will end up like the French proposals that were withdrawn after bitter discussions.

Finally, it also remains to be seen whether the application of this regime, which theoretically hampers the tax authorities from obtaining information from specific taxpayers involved in abusive tax planning, would be requested or introduced with cross-referencing of information or other types of requests, which could then be considered a clear violation of constitutional rights that protect privacy (article 26) and also a violation of the European Convention on Human Rights (article 8).

Overall, it would be better to start preventing abusive tax planning and abusive tax shelters with current rules instead of importing foreign models applied in the most strict and orthodox way. At the end of the day, the success of this new regime will depend first on political support and, then, to a significant degree, on the tax authorities' ability to manage and treat an increasing flow of information and on their capacity to create and develop the necessary guidelines to ensure appropriate application of the regime. ◆