

# New amendments to Portuguese tax law

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In this article Bruno Santiago and Pedro Soares da Silva discuss the latest amendments to Portuguese tax law including tax exemptions in M&A operations, exemptions of withholding tax, the taxation of severance compensations and the erosion of bank secrecy.

**T**his summer the Portuguese tax legislator introduced amendments to the tax law that have great relevance not only domestically but also internationally. The four measures that will be described below in more detail are:

- The procedural formalities required to obtain tax exemptions in M&A operations;
- The exemption of withholding tax on dependent labour performed in another country;
- The taxation of severance compensations obtained by directors when leaving a company; and
- The escalating erosion of bank secrecy in the fight against tax evasion.

In relation to international M&A operations within the European Union, even though tax law long ago established a neutral regime by the deferral of taxation of gains derived from an operation, the fact is that it was extremely difficult to proceed with these types of operations because of a lack of substantive rules and because of the disparities in laws among Member States. This situation has significantly changed with the entry into force in June 2009, of the new rules that implement into domestic law Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005 on cross-border mergers of limited liability companies as well as Directive 2007/63/EC of the European Parliament and of the Council of November 13, 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards to the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies. It is foreseeable that there will be an increase of these cross-border mergers in the near future.

However, notwithstanding the neutrality regime in what concerns income taxes, these operations may bear other relevant tax costs, namely, when there is a transfer of immovable property that is subject to municipal tax on the acquisition of immovable property at the rate of 6.5 percent as well as stamp duty at the rate of 0.8 percent, both on the value of the property. But, this being the case, it is possible, provided certain strict conditions are met and favourable opinions from different public authorities are provided, to obtain from the ministry of finance an exemption from these taxes. Nevertheless, the law established a set of requirements that must be met and a strict procedure with tight deadlines to be followed, that often discouraged the parties to ask for the referred exemptions. The new amendment introduced on August 12 (by Decree Law 185/2009), although clearly lacking in the authors' opinion in what would be desirable, may to a limited extent encourage parties to ask for these exemptions as the number of opinions from different authorities and the length of the process has been reduced.

In what concerns personal income tax, a minor but important improvement has also occurred this summer with the amendment of the personal income tax code by Law 100/2009. Before this amendment Portuguese employers were obliged to withhold tax on the payment of wages to their employees, notwithstanding the place where the work was performed. This amendment establishes an exemption of withholding tax in relation to employment income derived from work performed in other countries by resident individuals when that income is taxed in the source state by a tax similar to the Portuguese personal income tax. Although the impact in relation to the

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number of persons covered is small, this measure may give a temporary financial advantage to cross-border workers who go to work abroad during certain periods of time in countries with which Portugal has not concluded a double tax treaty, with an article similar to Article 15 of the OECD Model Convention (such as is the case with Angola).

Furthermore, Law 100/2009 also establishes rules on the taxation of severance compensation of corporate managers, directors or executives ("*gestores*") that may be of significance in relation to these types of individuals who are placed in Portugal working for multinational groups. In this case the rules introduced are aimed at combating a non-justified benefice derived by those individuals performing top functions who, when leaving the company, received multi-million euro severance payments which, to a large extent, were not taxed.

From the perspective of an individual, the major change is the end of the general exemption that formerly applied (1.5 x average monthly salary x number of years of seniority). This exemption still applies to non-managerial employees but as of September 12, 2009, no longer applies to managers, directors or executives who will be subject to personal income tax for the full amounts received.

The impact on corporate income tax is also considerable: now that these payments are subject to IRC at the rate of 35 percent (the standard rate is 25 percent), unless they are connected with previously defined productivity goals. Similarly, in case of anticipated termination of service, corporate tax is levied on the amounts paid to the extent they exceed the amount of tax that would be due until the end of the term of service.

The new regime disregards such payments when made to common employees and therefore clearly focuses on payments made to managers, directors or executives, which may affect different members of corporate bodies with executive services, such as public executive officers and company directors (share companies) or managers (quota companies).

However, there is an apparent ambiguity about the definition of an executive. Specifically, it is unclear whether the scope of the new regime covers an employee in a top position in a particular category. It is probable that the tax authorities will present some guidelines on the meaning of executive, e.g. that any employee in an executive position falls within the scope of the new regime regardless of a relationship of subordination.

Furthermore, the law does not regulate a number of situations where the taxation of severance compensation becomes complex, notably for tax purposes, par-

ticularly regarding the status of a person who was employed in more than one position (e.g. managers who formerly served the company in a subordinate relationship and vice versa). These are matters that require a careful assessment from the corporate, labour and tax law perspective in a variety of situations that should concern companies and individuals subject to income tax on income earned in Portugal.

Finally, Law no. 94/2009 of September 1, 2009, in force as of September 6, 2009, also contains important rules that may impact those involved in financial operations with Portuguese banks as well as foreigners investing in Portugal. Despite the existence of a relatively open regime in Portugal, this amendment further widens the access to data protected by bank secrecy rules without the need of any previous authorisations, when there is a suspicion of tax evasion. The aim is to improve the fight against tax fraud and evasion by increasing the power of the tax and customs authorities to access relevant bank documents and information with respect to companies and individuals subject to tax in Portugal.

In recent years there has been a demand for legal measures both from a tax and regulatory perspective, as the number of suspected illegal situations has grown in the finance area, in particular cases of offshore related financial transactions.

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banks. Prior to the end of July each year, banks are required to inform the tax authorities, of any financial transfers to entities located in offshore jurisdictions.

As to personal income tax, the new law requires individuals subject to tax in Portugal to include in their tax returns information about deposit or securities accounts held in non-resident banks.

Upon the implementation of these amendments by the legislator, tax law is becoming more and more complex and taxpayers must be aware that they should pay attention and seek expert advice in order to benefit from the more favourable tax regimes that are being introduced and that may be available to them. They should also be aware of the new limitations that are being introduced as well as the increasing powers of the tax authorities to tackle both legitimate and illegitimate tax planning.

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