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SOCIEDADE DE ADVOGADOS, RL

NewsLetter nr. 30 January 2011

www.amsa.pt

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A New Step on Derogation of the Bank Secrecy Regime

A new step on derogation of the banking secrecy regime was given with Law 37/2010, of September 2.

Based on the initial version of the General Tax Law (LGT), and up to the end of year 2000, (before the changes introduced by Law 30-G /2000, of December 29), the Tax Administration could access taxpayers banking information against their will, only if a court decision had been issued and provided the principle of proportionally was not violated.

Pursuant to article 63 - B nr 1 of LGT, the access to taxpayer banking information without his consent can be carried out on the situations described below:

- there is evidence of practice of tax crimes;
- there is evidence that the information disclosed is false or no tax returns were filed within the legal deadline;
- there is evidence of non justified increase of patrimony (increase of patrimony or expenses, including donations, on an amount exceeding € 100.000, verified simultaneously with the tax returns on the same tax period provided there is a non justified divergence between the disclosed income and patrimony);
- in case of a tax audit to corporate individuals or to private individuals with organized accounts;
- in case of review of the conditions of access to the tax benefits;
- in case of application of indirect tax methods.

Pursuant to article 63 - B nr 2 of LGT, the Tax Administration will have access to the banking information on **refusal** by the taxpayer or in case of authorization of access to family or third parties that have special relations with the taxpayer.

The decisions on the situations described above are taken by the General Director of Taxes or by the Customs and Excise General Director, or by their legal substitutes.

The taxpayers are notified and may be heard before the above decisions are taken. On the other hand, taxpayers are also allowed to appeal to the court from the final decisions issued by the administrative authorities.

On the other hand, according to article 63 - A of LGT, banks and financial entities are required to automatically report information on taxpayers that have tax debts and open bank accounts (e.g taxpayers listed on the tax authorities debtors list) if are considered as being part of the risk sectors; and international transfer of funds not subject to other communication regimes.

Banks and financial institutions are also required, until the end of July of each civil year to report, through an official model, international transfer of funds to entities with tax domicile on countries with more favourable tax regimes, if not subject to other communication regimes.

Upon request of the General Director of Taxes or of the Customs and Excise Director, or their substitutes, the banks and financial institutions should report to the Tax Administration the payments made with credit and debit cards to taxpayers (corporate taxpayers and individual taxpayers with organized accounts) of certain sectors of activity. The credit and debit card owners should not be identified.

CHANGES INTRODUCED BY LAW 37/2010 OF SEPTEMBER 2ND

The new law approved on September 2, introduces an innovation: allows the access to information and banking documentation without consent of the taxpayers which have **social security debts.**

It should also be noted that some changes were introduced in respect of access to bank accounts of corporate taxpayers with organized accounts.

Although the previous wording of the law did not mention bank secrecy derogation in respect of bank accounts of corporate entities with organized accounts, this derogation was already in force as a result of the general law of access to information and banking documents by the Tax Administration. Therefore, the new law only clarifies, avoiding doubts or misinterpretations, that the bank accounts of corporate entities with organized accounts may be accessed by the Tax Administration without consent of the taxpayers.

LAW 36/2010 OF SEPTEMBER 2ND

On the same date that was published the above mentioned law, it was also published Law 36/2010 of September 2nd, whose only purpose was to amend article 79º of the Legal Regime of Credit Institutions and Financial Companies. Such article regulates the exceptions to the professional secrecy duties which members of the management or auditing boards of credit institutions, their employees, representatives, agents and other persons providing services to them on a temporary or permanent basis are obliged to.

The above mentioned persons, in accordance with their professional/bank secrecy duties, may not divulge or use information on facts or data regarding the activity of the institution or its relations with clients which come to their knowledge solely as a result of the performance of their duties or the rendering of their services. Equally, the names of clients, deposit accounts and their movements, as well as other bank operations, are subject to professional/bank secrecy.

Prior to the publication of Law 36/2010, the exceptions to the professional secrecy were, basically, of two natures (i) the ones authorised by the client itself, and (i) the ones foreseen in the law. According to this last category, the elements covered by the obligation of professional secrecy could only be revealed:

a) To *Banco de Portugal* (the Portuguese Central Bank), within the scope of its duties;

b) To the Securities Market Commission, within the scope of its duties;
c) To the Deposit Guarantee Fund and to the Investor Compensation Scheme, within the scope of its duties;
d) Under the terms laid down in the criminal law and in the law of penal procedure:
e) To the tax administration, within the scope of its duties;
f) When any other legal provision expressly limits the obligation of professional secrecy.

Law 36/2010 amends the provision established in paragraph d) above, so that the secrecy may be derogated to *"judicial authorities, within a penal process"*.

However, the most relevant amendment that Law 36/2010 introduced was the creation within *Banco de Portugal* of a data base of existing banks accounts, with the indication of all holders of such accounts.

Therefore, within 3 months as from the entry into force of the law (which will only occur 180 days after its publication, i.e., on March 1st, 2001), all entities authorized to open bank accounts, whichever the type, must send to *Banco de Portugal* the identification of the respective accounts and holders, as well as the information of the persons which are authorized to operate the accounts, including attorneys and the respective opening date.

Afterwards, they shall send, on a monthly basis, the above mentioned data relating to the opening of new accounts, as well as information relating to the closing of any accounts.

Banco de Portugal must take the necessary measures to ensure that the access to such data base is reserved, and it may only transmit the information contained therein in accordance with the new paragraph d) above, i.e., only to judicial authorities, within a penal process.

Cidália Conceição / Madalena Pizarro
Senior Associates

"Zero" Licences

I – The Legislation Authorization

Through **Law 49/2010, November 12,** the Portuguese Parliament granted the Government an authorization to legislate on licensing procedures regarding several economic activities aiming for their simplification.

The aim of the mentioned Authorization is to simplify the access and performance of certain economic activities, by means of reducing administrative burdens on individuals and companies.

The mentioned simplification comprises **(a)** the elimination of several administrative permissions, which shall be substituted by a mere prior communication, **(b)** a reinforcement of the inspection over such activities and, also, **(c)** an increase of the sanctions for non compliance with the legal rules.

II – The Regimes Simplification

The mentioned Authorization foresees the simplification of the following regimes:

(i) Authorization for restaurants or drinking establishments, commercial or goods storage and supply of services establishments

The simplification of this regime includes, inter alia:

a) the substitution of the administrative authorisation for these establishments by a mere prior communication of the necessary information to verify the compliance of the legal requisites, to be performed at a sole electronic desk;

b) the simplification of the regime regarding urban operations subject to prior communication, allowing information to be sent in the same electronic support as the communication mentioned in the previous paragraph and eliminating the need to send unnecessary or redundant information;

c) the simplification of the regime regarding changes to the property or unit use where the establishments are installed, allowing for the application to be sent through the same sole electronic desk where the communication mentioned in paragraph a) is made and eliminating the need to send unnecessary or redundant information;

d) the simplification and extension to other activities of the regime regarding legal or regulatory exemption requisites applicable to the premises, equipment and performance of the economic activities carried in the establishment, namely through the creation of a prior communication regime with a deadline;

e) the simplification of the municipalities public domain private use regime usually associated to the exploitation of a commercial establishment, replacing the licensing or the use concession by a mere prior communication, issued electronically, and by the inspection by the municipalities as per the previously approved criteria;

f) the regulation of the municipalities public domain private use regime and making the production of effects of the criteria to which the mentioned private use must be subject, depend from its disclosure in the same Internet site where the communication mentioned in paragraph a) is performed;

g) the regulation of the local municipalities power regarding public domain private use, namely by granting the municipalities the possibility to remove, destroy or by any mean make useless the elements illegally occupying the public domain and granting them powers to stop or demolish works with the same end;

h) the regulation of the fees, including the determination that these would only be due after its disclosure through the site in the Internet where the prior communication under the terms of line a) will be performed; and

i) the regulation of the access to the data communicated under the terms of line a).

(ii) Display of advertising messages with commercial nature

The simplification of this regime comprises, inter alia:

a) the elimination of the advertising display licence of advertising messages of commercial nature when the message is related with goods or services commercialised in the establishment or nearby, without prejudice of the rules regarding the public domain occupation; and

b) the determination that the criteria to which the display of advertising messages of commercial nature must be subject, depends on its disclosure through a site in th Internet.

III – Licensing Procedures Elimination

The Authorization foresees also the elimination the following activities licensing procedures **(i)** game machines exploration, **(ii)** public shows ticket sale agencies and **(iii)** auctions.

IV – Opening Hours Timetable Maps

The Authorization also foresees the prohibition of subjecting the opening hours timetable maps and respective display to an administrative authorisation.

V – New Grounds to Apply Sanctions

The Authorization comprises also new groundings for the application of sanctions, as follows:

a) the *interdiction to develop the activity* may only be ordered if the agent carries the violation with obvious and severe abuse of

the activity performed by him or with manifest and severe violation of the duties which are inherent to the same;

b) the *closing of the establishment* can only be ordered when the violation has taken place due to the establishment activity;

c) the *interdiction to develop the activity* and *closing of establishment* term may not exceed *two years*.

VI – Prior Legislation regarding Services Supply

The mentioned Authorization also has the purpose of adapting the access and performance of economic activities regime to Decree-Law 92/2010, July 26, which has adopted to the national law Directive 2006/123/EC, of the European Parliament and of the Council, December 12, on services in the internal market, and has established the necessary principles and rules to simplify, within the national territory, the free access and render of services with economical offset, via the:

1 – creation of a services sole desk which shall make available all the necessary information for the development of the activity in Portugal, as well as relevant information for the services recipients;
2 – limitation of the cases where it is possible to demand a license or authorization for the supply of services within the national territory;
3 – elimination of formalities considered to be unnecessary within the scope of the administrative procedures;
4 – acknowledgment to any European Union individual or company the freedom to render services and of establishment within the national territory.

VII – Authorization Term

The Government shall have **90 days** to legislate on the above mentioned matters, which are comprised within the **Simplex Programme.**

Maria João Graça
Senior Associate

Shares Without Nominal Value

Decree Law 49/2010 of May 19 introduced changes in the Portuguese Companies Code in order to establish the possibility of existence, with a general character, of shares without nominal value, expressed only by the number of shares of the share capital of the respective public limited company.

Considering the current economic environment the Portuguese legislator considered relevant eliminate the competitive disadvantage that national companies might have to face in relation to companies with offices in countries which have already recognised such institute, namely Germany, Belgium, Italy and USA.

Shares without nominal value extend the possibility of financing of such companies, conside-ring that they facilitate capital increases that, otherwise, would not be allowed, or would need to have a previous reduction of the share capital, i.e., that would imply an "harmonium operation", contributing, therefore, to a simplification of the corporate acts that were necessary to obtain such result.

The elimination of the share's nominal value requirement does not harm the functions that are recognized to nominal value, notably the "organizational" and "informative" functions. The organizational function is replaced by the concept of issuance value, which will guarantee one of the structural pillars of the share capital, i.e, its intangibility. On the other hand, the informative function is assured by the percentage that the share represents in relation to the shareholder universe, notably, for the determination of the measure of the rights of each shareholder.

The above mentioned decree law further clarifies that in the same company, shares with nominal value and shares without nominal value cannot

coexist and that the latest must represent the same fraction of the share capital.

Now, it is just a matter of time to see if, and in what measure, will Portuguese companies use this new prerogative.

Madalena Pizarro
Senior Associate

Social Security Contributions by Members of Corporate Bodies

The Social Security Contributions and Benefits Act (hereinafter the Social Contributions Act) reshaped the social benefits regime and systematized it in a sole legal diploma, it being previously governed by several legal diplomas which made it subject to varied interpretations on particular points.

The social contributions regime applicable to members of corporate bodies was, precisely, one of the many topics that was governed by disperse diplomas and subject to several possible interpretations.

The Social Contributions Act detailed which workers are subject to and those excluded of such regime.

Without innovating on the matter the Act considers the following workers to be subject to the said regime:

- The directors and managers of companies and cooperatives;
- The directors of companies that manage other legal persons when contracted to perform management functions land when payment of said services are the responsibility of the managed legal person;
- The directors of state owned companies or other legal persons, whichever the corporate object pursued, which are not subject to the public servant social protection regime and which have not legally opted for a different legal social protection regime;
- The members of auditing bodies of legal persons;
- The members of other corporate bodies of legal persons.

Changes were made regarding workers who are not subject to the above mentioned social contributions regime of which we highlight the following changes:

- Shareholders (of *sociedades por quotas*) who pursuant to the articles of association are also directors of the company but do not actually exercise such function nor receive any remuneration for it.
- Employees elected to management positions in legal persons with which they have a permanent labour contract, when the said labour contractis in force for more than a year at the date the employee is empowered as management and the mentioned contract led to the registration of the employee in a mandatory social protection regime;
- Members of corporate bodies of profit organi zations which are not remunerated for their positions and: **a)** are subject to a social protection regime in reason of another position which is remunerated above the social support index (IAS) which presently amounts to € 419,22; or **b)** individuals receiving pensions in reason of retirement or invalidity from mandatory social protection regimes, both national or foreign.

In what regards the base for contributions the limits of a minimum of one IAS and the maximum of 12 IAS is maintained.

The maximum limit is no longer applicable to the sum of all remunerations received by the member of the corporate body in the several legal persons he may be a member of but is instead applied to each of the different remunerations received from the legal persons in which he is a member of the corporate bodies.

The diploma maintains the possibility to apply the contribution rates over the remunerations

effectively received when the real amount of the remunerations exceeds the maximum of 12 IAS when the member of the corporate body is over 56 years of age in 2010. This limit is being raised 6 months for every calendar year until 2028, year in which the age limit will be 65 years.

The Social Contributions Act expressly included in the base for contributions two remuneration categories that were previously subject to different interpretations:

- The amounts paid as bonuses when paid for the exercise of a management position irrespective of shareholder capacity and such bonuses are not chargeable to profits. Said amounts must be divided by the months of the period they pertain to;
- The amounts paid as attendance fees.

The contribution rate is now of 29,6%, where **20,3%** (instead of the previous 21,25%), is paid by the legal person and the remaining **9,3%** (instead of the previous 10%) paid by the individual.

The termination of the obligation to pay the contribution rates only occurs with the resignation or the removal of the member of the corporate body or when the company is closed or liquidated. However if the legal person has terminated its business activity for VAT purposes and has no employees, the members of corporate bodies may request the termination of their functions and respectively payment of social security contributions.

Margarida Calixto
Senior Associate

Tax Arbitration

On the 20th of January Decree-Law nr 10/2011 was published approving the new tax arbitration regime, an alternative mean of conflict resolution between the Tax Administration and taxpayers.

The arbitration courts will be competent to rule on the following matters: **a)** declaration of illegality of acts of liquidation of tax, of withholding of tax and payments of taxes on account; **b)** declaration of illegality of acts of assessment of net income, taxable income and acts of assessment of patrimonial values; and **c)** the determination of any matter related with any questions related with facts and rights related with the decision of assessment of taxes whenever the law does not assure the rights mentioned in b) above.

The arbitration regime is based on the contradictory principle, equal rights to the parties, independence of the court, oral discussion of matters, free analysis of the facts, free assessment of the required proof diligences, cooperation, good faith and public court decisions without the identification of the relevant parties.

Arbiters (one or three), shall be appointed by the Administrative Centre of Arbitration, and by the relevant parties.

The arbitral decision shall be issued and notified to the parties within a six month period following the beginning of the arbitrary process. One single prorogation of 6 months is allowed.

The arbitration courts shall decide according to the law in force. Equity decisions are not allowed.

Appeal against the decisions may occur on limited cases. Court claims can be filed before the Central Administrative court.

The arbitration fees regulation is not yet approved.

Finally, this Decree-Law allows the taxpayers that have court claims pending in courts for more than two years, to transfer those processes to the arbitration centre within a year following the approval of this regime.

Cidália Conceição
Senior Associate

Incorporation of Companies: The Share Capital Limit

The Council of Ministers, on the past 30th of December, approved a Decree Law that adopts measures to simplify the incorporation procedure of a type of limited liability company foreseen in the Portuguese Companies Act *(sociedades por quotas)* amending the necessary share capital which shall now be freely determined by the shareholders *(sócios)*.

Presently the law establishes, pursuant to the Portuguese Companies Act, that *sociedades por quotas* require a minimum share capital of € 5.000,00.

Pursuant to the said amendment, the Portuguese Law follows other countries such as Germany, France, the United Kingdom, the United States of America and Japan, among others. This was also a recommendation of the World Bank.

The Decree Law awaits now the promulgation by the President of the Republic.

New Legislation

Law nr 35/2010 of September 2nd: Governs the simplification of accounting rules and information of micro companies.

Law nr 36/2010 of September 2nd: Amends the Legal Regime of Credit Institutions and Financial Companies (21st amendment to Decree Law nr 298/92 of December 31st).

Decree Law nr 111/2010 of October 15th: Amends Decree-Law nr 48/96 of May 15th and Decree nr 153/95 of May 15th on the opening hours of commercial businesses.

Decree nr 1087/2010 of October 22nd: Governs the National Tourism Registration.

Decree Law nr 118-A/2010 of October 25th: Amends Decreed Law nr 363/2007 of November 2nd and Decree Law nr 312/2001 of December 10th, simplifying the small power electric production facility legal regime, namely microproduction units.

Decree nr 1167/2010 of November 10th: Creates a special procedure for the creation of horizontal property, amendments thereof, related loans and other financing and credit agreements, with mortgage, with our without personal security, which translates in the immediate registration of the above acts with a sole desk.

Decree nr 1213/2010 of December 2nd: Approves the requisites for local natural gas distribution licenses and sale thereto as well as governing the evaluation and selection criteria revoking Decree nr 1296 of November 22nd.

Law nr 54/2010 of December 24th: Approves the Radio Law and revokes Law nr 4/2001 of February 23rd.

Decree-Law nr 134/2010 of December 27th: Amends the VAT Code and the VAT legal regime in the intra-Community transactions pursuant to the legislative authorization granted under article 129 of Law nr. 3_B/2010 of April 28th and adopts article 3rd of Directive nr 2009/69/CE of the Council, June 25th and Directive nr 2009/162/UE, of the Council, of December 22nd.

Decree nr 1315/2010 of December 28th: Determines which economical activities may be financed under microcredit and sets the amount limits of said credit.

Law nr 55-A/2010 of December 31st: Approves the State Budget for 2011.

Should any reader wish to obtain a copy of any of the mentioned or other laws please contact this Office.
Traslations can be supplied at cost.
NEWSLETTER
Published periodically by:
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