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Assets Investment Funds: Taxation at the Investor's Level

The tax benefits regime applicable to the assets investment funds is mainly foreseen in article 22 of the Tax Benefits Statute (TBS).

Below is an explanation on the taxation regime applicable to tax resident and non tax resident investors in assets investment funds.

1 - Taxation at the investors' level in a national fund

Resident: single taxpayer
Single payers holding participation units (PUs) in assets investment funds (Funds) set up in accordance with the national legislation, not included in the scope of a commercial, industrial or agricultural activity, are exempted from personal income tax (IRS) in relation to the income received, including income earned as a result of the PUs redemption in such Funds.

The taxpayers may choose to aggregate all their income, in which case the tax retained or due by the Fund will have the nature of an advance tax payment.



In such case, the PU holders also have the right to deduct 50% of the profits paid to the Fund by corporate entities subject (and not exempt) to corporate income tax (IRC), as well as the income distributed by companies resident in an EU Member – State fulfilling the requirements and conditions established in article 2 of the Directive nr 90/435/EEC, July 23¹ (in accordance with article 40-A and nr 8 of the article 46, both of the Corporate Income Tax Code - IRC Code).

¹ Article 2.^o of the Directive:

“For the purposes of this Directive 'company of a Member State' shall mean any company which:

- (a) takes one of the forms listed in the Annex hereto;
- (b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
- (c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
 - impôt des sociétés/vennootschapsbelasting in Belgium.
 - selskabsskat in Denmark.
 - Koerperschaftsteuer in the Federal Republic of Germany.
 - foros eisodimatos nomikon prosopon kerdoskopikoy charaktira in Greece.
 - impuesto sobre sociedades in Spain.
 - impôt sur les sociétés in France.
 - corporation tax in Ireland.
 - imposta sul reddito delle persone giuridiche in Italy.
 - impôt sur le revenu des collectivités in Luxembourg.
 - vennootschapsbelasting in the Netherlands.
 - imposto sobre o rendimento das pessoas colectivas in Portugal.
 - corporation tax in the United Kingdom.or to any other tax which may be substituted for any of the above taxes.”

In case the investors opt for the income aggregation, it shall be mandatory to include all income of similar nature: interests, shareholdings profits and capital gains arising from shareholdings and other securities.

The aggregation also implies the request, up to January 31 of the subsequent year, of a statement from all financial institutions attesting the amount of the income received and relevant withholding tax. The mentioned statements must be attached to the annual IRS return (Model 3).

In case of income aggregation, the income will be taxed at the standard IRS rates, varying between 11,5% and 46,5%, in 2011.

The capital-gains or capital-losses obtained as a result of the sale of Funds participation units, are considered income from Category G (capital gains) and shall be included in the annual balance between the capital-gains and capital losses arising from securities and other financial instruments, which, when positive, is subject to a special withholding tax rate of 20%.

In this case, the investor may also opt for the aggregation of his income, with all the implications above mentioned.

Resident: Corporate taxpayers or single taxpayers developing a commercial or industrial activity

The PU income of a Fund set up in Portugal, obtained in the scope of a commercial or industrial activity, shall not be subject to withholding tax, being considered as income or proceedings of the activity developed by the taxpayers and taxable at the end i.e. after the annual income return is filed and the final amount of tax due is calculated.

The tax amount withheld or due by the Fund is considered as an advance tax payment, being deducted from the tax due at final by the taxpayer.

In such case, the PUs holders also have the right to deduct 50% of the income paid to the Fund by corporate entities subject (and not exempt) to IRC, as well as the income distributed by companies resident in a EU Member – State fulfilling the requisites and conditions established in article 2 of the Directive nr 90/435/EEC, July 23 (in accordance with article 40-A and nr 8 of article 46 of the IRC Code).

Non resident

The income arising from PUs in Funds set up in Portugal, obtained by non resident taxpayers and without a permanent establishment in Portugal, is exempt from IRS and IRC in Portugal.

2 - Taxation at the investor's level in a foreign fund

Resident

The income obtained, including resulting from PU's amortization, paid by the issuing entity to investors, natural persons, with tax residence in Portugal, is subject to withholding tax in Portugal at the rate of 21,5%.

The withholding tax is a final withholding tax except in case of income aggregation, in which case the tax will be considered as an advance tax payment of the final tax due. Please note that in case of income aggregation it is also mandatory to include all income with the same nature as mentioned above.

In case there is a convention, not excluding the investment funds, the tax credit may not exceed the tax paid in the origin country.

In case there is no convention, the deduction on the tax due on such income shall be the smaller of the following amounts:

- a) Income tax effectively paid abroad on the income;
- b) Income tax calculated in accordance with the national legislation on the income taxed in the country in cause.

The option for the income aggregation implies the aggregation of the other income subject to final withholding tax rates, as other capital income and capital gains, which shall be subject to the general tax rates ranging between 11,5 and 46,5% (in 2011).

In case of investors that are corporate entities or single taxpayers, earning income in the scope of a commercial or industrial activity, the same shall be considered as activity earnings. The withholding tax applicable shall be considered as a tax advance payment of the tax due at final.

Finally the PUs holders also have the right to deduct 50% of the income paid to the Fund by corporate entities subject (and not exempt) to IRC, as well as the income distributed by companies resident in an EU Member – State fulfilling the requisites and

conditions established in article 2 of Directive nr 90/435/EEC, July 23 (in accordance with article 40-A and nr 8 of article 46 of the IRC Code).

The sale of an UP from a non resident fund may originate capital gains, taxable in Portugal, under the terms previously mentioned.

Non resident

As long as the commercialising entity is provided with sufficient evidence of the foreign residence, the payments made to non Portuguese resident investors shall not be subject to taxation in Portugal, since the same will be considered of a foreign origin.

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Regulation on the Banking Sector Taxation

Rule nr 121/2011, published on March 30, 2011, regulates the taxation on the banking sector, foreseen in the State Budget Law for 2011. In fact, this new taxation aims to introduce in the national legislation a practice already used in other European Union States, with the dual objective to *“reinforce the tax effort carried by the banking sector and to mitigate in an effective manner the systemic risks that are associated to the same.”*

A) TAXPAYERS

The taxation on the banking sector is applicable to credit institutions with main and effective administration registered offices located in Portuguese territory, to subsidiaries, located in Portugal, of credit institutions which do not have its main and effective administration registered offices in the Portuguese territory, to branches, located in Portugal, of credit institutions with main and effective administration offices is located outside the European Union.

B) TAXABLE BASE

The taxation will be applicable to the passive (set of elements reflected in the balance sheet which, independently of its form, represent a debt before third parties) calculated and approved by the taxpayers less the own base funds (tier 1) and additional funds (tier 2) and the deposits covered by the Deposits Guarantee Fund (Fundo de Garantia de Depósitos).

However, from the passive will be excluded the elements that, in accordance with the accountancy rules applicable, are considered to be own funds: passive associated to the recognition of liabilities for defined benefit plans; provisions liabilities; passive resulting from the revaluation of financial derivative instruments; profits with deferred income, not including those regarding passive operations and passive related to assets not unconsidered in securitization operations. The rate applicable to the amount determined in this situation is of 0,05%.

The taxation will also be applicable to the notional amount of the financial derivative instruments not included in the balance and determined by the tax payers. The rate applicable to the final amount is, in this case, of 0,00015%.

The amount of the passive shall be calculated in accordance with the following rules:

- The amount of the original own funds and additional funds comprises the positive elements of both mentioned funds, in accordance with Bank of Portugal Rule nr 6/2010, December 30, both being included in the concept of passive,
- The additional own funds amount is determined not taking into account the eligibility limits foreseen in article 16 of the Bank of Portugal Rule nr 6/2010, December 30, and
- The deposits comprised by the Deposits Guarantee Fund will be of relevance only in relation to the amount effectively covered by such Fund.

The taxable base shall be determined by reference to the monthly final balances annual average having a correspondence in the accounts approved in the same year in which the tax is due.

C) PROCEDURES AND PAYMENT

The taxation on the banking sector must be declared annually by the tax payer through the official form nr 26, which must be submitted through the Internet until the last day of June. The payment shall also be due up to June 30, at the authorised charging places.

In case of tax payment default up to the end of the mentioned deadline, interests for late payment shall immediately accrue and the Tax Authorities may initiate the debt collection.

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Registration of Corporate Bodies Members with Banco de Portugal

1 – Introduction

On **January 18, 2011**, came into force **Instruction nr 30/2010** from **Banco de Portugal**, regarding the special registration of corporate bodies members (*management and auditing*) of the institutions subject to Banco de Portugal supervision (herein also designated by institutions).

2 – Scope

The **Instruction** referred is applicable to the petitions for special registration of:

- a) effective and alternate members of the management and auditing corporate bodies of the institutions subject to Banco de Portugal supervision;
- b) directors of foreign branches established by institutions with registered offices located in Portugal;
- c) directors of Portuguese branches established by institutions with registered offices located outside the EU.

3 - Documents that must be filed together with the registration petition

- a) specific questionnaire (available in Banco de Portugal internet site) duly completed;
- b) detailed “curriculum vitae”;
- c) photocopy of the identity card (front and back).

In case of a person not already registered with the **Banco de Portugal**, it is required to also file an updated criminal record. In case of foreign citizens residing abroad it is required to file an equivalent document issued by the competent authorities of the place of residence.

4 - Questionnaire

The questionnaire is valid for a period of **5 years** as from the filing with **Banco de Portugal**, and must be renewed with the first subsequent petition for registration of re-election or, as applicable, the first subsequent petition for the registration with **Banco de Portugal** of new functions (subject to registration) as a member of a corporate body in the same or other institution.

In case the information previously provided in the questionnaire changes, a new questionnaire duly updated must also be filed with **Banco de Portugal**, within a deadline of **15 days** as from the change.

Save as previously stated there is no need to file a new questionnaire in case of re-election.

5 - Formalities

The special registration petitions must mention the expression “*Registo especial*” (Special registration) in the subject and be addressed to: **Banco de Portugal - Departamento de Supervisão Bancária - Avenida Almirante Reis, nº 71, 5.º - 1150-165 Lisboa.**

6 - Appointment

The institutions must communicate to **Banco de Portugal** the date upon which the election is effective. Furthermore, simple photocopies can be used to evidence the election of members of corporate bodies.

7 - Applicability

Instruction nr 30/2010 shall not be applicable to the especial registration petitions pending on **January 18, 2011**.

The persons already registered with **Banco de Portugal** must only file a new questionnaire (duly completed) together with the registration petition for their (i) re-election or (ii) election to perform new functions (subject to registration) as a member of a corporate body in the same or other institution.

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The anticipated sale within the executive judicial procedures

The successive amendments to the executive judicial procedures have failed to put a stop to the crawling speed encountered by whomever is obliged to make recourse to such processing. The process of de-judicialisation of the executive procedures, which the new reform intends to moderate, and that has attributed to the executive agent powers to perform a great number of acts formally reserved exclusively to the courts, the electronic submission of files and all other measures implemented, have, alas, failed to shorten the time period of files pending. More often than not, the crawling pace of progress has fostered the existence of many situations where, assets coercively seized to be disposed for payment of judicially enforced credits, fail, on judicial sale, to have any proper market value. Such situations occur more frequently when movable assets, such as office equipment, commercial establishment contents or stocks are seized. In order to avoid the depreciation or deterioration of the assets seized there is,

Finally, it becomes mandatory to stagger payments made regarding long term vacation products, as regards the tourist residential rights, any payment being forbidden outside the agreed payment time scale.

The above Decree-Law came into force on April, 9th, 2011.

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New Legislation

Social Security – Regulatory Decree 1-A/2011, January 3: Regulates the Social Security Contributions Code.

Tax Arbitration – Decree-Law 10/2011, January 20: Approves the Tax Arbitration Legal Regime.

IRS – Mainland – Azores – Madeira - Order 2517-A/2011, February 3, Order 3074-A/2011, February 14 and Order 1/2011/M, February 18 (the latter rectified by Rectification 1/2011/M, March 1): Approve the IRS withholding tax rates in force during 2011, applicable in the Mainland, Azores Autonomous Region and Madeira Autonomous Region, respectively.

Tax Infractions - Constitutional Court Decision 24/2011, January 12 (P. 551/10) - 23-Feb-2011: Appraises and decides to be unconstitutional a disposition of the Tax Infractions General Regime foreseeing the subsidiary liability of the directors for the payment of the fines applied to the company and that is performed through the tax execution reversion mechanism.

Incorporation of Companies - Decree-Law 33/2011, March 7: Simplifies the incorporation of private limited liability companies (*sociedades por quotas*) and, in consequence, amends the Companies Code, the Commercial and Civil

Companies Immediate Incorporation Regime and the Incorporation of Companies Online Regime.

Companies - Rule 111-A/2011, March 18: Determines that the legal certification of accounts by a chartered accountant is applicable to companies, in what regards the deduction of the tax losses to be carried forward.

Companies - Decree-Law 53/2011, April 13: Adopts Directive 2009/109/EC of the European Parliament and of the Council of September 16, as regards reporting and documentation requirements in the case of mergers and divisions, amending in consequence the Companies Code.

Periodical Habitation Right in Rem - Decree-Law 37/2011, March 10: Amends the Periodical Habitation Right in Rem Legal Regime, adopting a community directive on this matter.

Economic Activities - Decree-Law 48/2011, April 1: Simplifies the regime of access and performance of several economic activities, amending several related legal diplomas. Among others, revokes the Restaurants and Drinking Establishments Legal Regime and the Restaurants and Drinking Establishments Classification and Requirements Regime.

Economic Activities – Licensing - Rule 131/2011, April 4: Regulates the preceding legal diploma and creates the sole electronic desk named «Entrepreneur Desk».

Commercial Interests - Order 2284/2011, January 21: Determines the late-payment interests statutory rate, in force during the first semester of 2011, regarding credits held by commercial companies, individual or collective.

Court Costs - Decree-Law 52/2011, April 13: Amends the Court Costs Regulation and the Code of Civil Procedure, in order to guarantee the access to the justice system.

Should any reader wish to obtain a copy of any of the mentioned or other laws please contact this Office.
Translations can be supplied at cost.

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Should you require any additional copies or wish us to respond to any queries you may have on any of the matters raised

in this newsletter, please contact this law firm or send an e-mail to any of the persons named above.

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