ABREU & MARQUES
E ASSOCIADOS
SOCIEDADE DE ADVOGADOS, RL

NEWSLETTER Nr. 33 - JANUARY / FEBRUARY 2012

PUBLISHED PERIODICALLY BY:
Abreu & Marques e Associados, Sociedade de Advogados, RL
Rua Filipe Folque, 2 - 4.º andar, 1069-121 Lisboa - Portugal
Tel: +(351) 213307100 – Fax: +(351) 213147491
E-mail: amsa@amsa.pt – Website: www.amsa.pt

EDITOR:
Jorge de Abreu (Founding Partner) jorge.abreu@amsa.pt

CONTRIBUTORS:
João Monge Gouveia (Senior Associate) joao.gouveia@amsa.pt
Maria João Graça (Senior Associate) maria.graca@amsa.pt
Andreia Faustino (Associate) andreia.faustino@amsa.pt

Should you require any copies of the legislation herein referred or wish us to respond to any questions you may have on any of the matters raised in this newsletter, please contact this law firm or send an email to any of the persons named above.

CONTENTS

1. **NEW LEGISLATION** (page 1)
Selection of the most important legislation published in the last months.

2. **EFFECTIVE TAXATION ON DISTRIBUTED PROFITS** (page 2)
The changes introduced by Law 55-A/2010 of 31 December (State Budget Law for 2011) with regard to taxation on dividends distributed on Holding Companies (SGPS in Portuguese).

3. **NON RESIDENTS TAX REPRESENTATION** (page 2)
The European Union Court of Justice, which has considered the duty imposed by the Portuguese State to non resident individuals to appoint a tax representative *"as a restriction to the capital movements"*.

4. **NEW VOLUNTARY ARBITRATION LAW** (page 3)
Law 63/2011 – Dec 14, 2011 – Amends the Voluntary Arbitration Law, and revokes the prior regime, as well as amends the Civil Procedures Code and the Administrative Courts Procedures Code.

5. **PRIVATIZATIONS** (page 5)
The second amendment to the Privatizations General Law, by Law 50/2011, of September 13.

1 - NEW LEGISLATION

• **Labour Code -** Law 53/2011 - Oct 14, 2011 - Amends the Labour Code regarding the compensation due on several types of termination of labour agreements, applicable only to new labour agreements.

• **Fix term labour agreement -** Law 3/2012 - Jan 10, 2012 - Approves the fix term labour agreements extraordinary renovation regime, its relevant rules and the compensation calculation formula.

• **Updating of rents -** Notice 19512/2011 - Sept 30, 2011 - Fixes, in 1,0319, the updating coefficient applicable to the several types of rental agreements, to be in force during 2012.

• **Evaluation of urban real estate -** Rule 307/2011 - Dec 21, 2011 - Fixes the construction average cost per square meter to be in force during 2012.

• **2011 State Budget - PEC - Property Tax Code - Amendments -** Law 60-A/2011 - Nov 30, 2011 - Amends, envisaging the budget consolidation, the 2011 State Budget Law, the Decree-Law 287/2003 regarding the taxation on real estate, as well as the Property Tax Code. Amends the legislation approving a set of additional measures foreseen in the Stability and Growth Programme (PEC) for 2010-2013.

• **State Budget -** Law 64-B/2011 - Dec 30, 2011 - Aproves the State Budget for 2012.

• **Tax Paradises -** Rule 292/2011 - Nov 8, 2011 - Amends the list of countries, regions and territories with more favourable tax regimes.

• **Financial sector -** Decree Law 119/2011 - Dec 26, 2011 - Establishes the legal limit of the guarantee for the reimbursement of deposits with credit institutions, adopting the EU directive regarding this matter. Amends the Legal Regime of the Credit Institutions and Financial Companies and revises *Fundo de Garantia do Crédito Agrícola Mútuo*.

• **Banking sector -** Decree Law 127/2011 - Dec 31, 2011 - Regulates the transfer to the State of the liability with pensions

foreseen in the alternate social security regime, foreseen in the collective labour regulation in force in the banking sector.

• **Credit institutions -** Law 4/2012 - Jan 11, 2012 - Amends the legislation that approved reinforcement measures in view of the credit institutions financial soundness and subsequent stability of the financial markets.

2 - EFFECTIVE TAXATION ON DISTRIBUTED PROFITS

The changes introduced by Law 55-A/2010 of 31 December (State Budget Law for 2011) have had a substantial impact on Holding Companies (SGPS in Portuguese), with regard to taxation on dividends distributed to them, with the result that these companies will now be subject to the same conditions applicable to companies in general.

Presently, Holding Companies will no longer be able to benefit from the double taxation avoidance system when the Holding Company's shareholding in the company distributing profits is less than 10%, or when the dividends distributed have not been subject to **effective taxation.**

Thus, Holding Companies, as is the case with companies in general, are no longer eligible for 100% deduction on dividends received from their shareholdings in cases where the shareholding is less than 10%, or where there is no **effective taxation.** In practice, Holding Companies are fully eligible for taxation under the IRC, with regard to dividends received, without enjoying any mechanism for avoiding double taxation.

In spite of introducing changes in such a sensitive matter, the legislating body, on publishing the State Budget Law for 2011, did not clarify its understanding of effective taxation.

However, the question of how the Tax Authorities will interpret the concept of **effective taxation** is for the moment clarified with the publication of Circular 24/2011 of 11 November, 2011.

Thus, by an Order of the Secretary of State for Tax Affairs, the Tax Authorities have clarified that the effective taxation requirement must be interpreted in the sense of requiring that the income be derived from profits that have been subject to IRC or any other similar or analogous tax, from which it is not exempt or excluded. It is also sufficient for taxation to have taken place within the legal sphere of one of the entities forming part of the attribution chain, that is, for taxation to be verified within the legal sphere of the distributing entity or legal sphere of its affiliate.

The above mentioned Order establishes, by way of example, that profits are considered as effectively taxed in the absence of a tax burden as a result of the deduction of tax losses because these profits are derived from income that is part of the taxable profit.

The effective taxation requirement is considered as applicable when the company generating the distributed profits does not enjoy any exemption and such profits arise from income that is not covered by any exemption.

Lastly, the Order of the Secretary of State for Tax Affairs has clarified that there is no minimum taxation limit, that is, the distributed profits are not covered by a minimum threshold for the effective taxation rate.

Andreia Faustino / Associate
andreia.faustino@amsa.pt

3 - NON RESIDENTS TAX REPRESENTATION

On May 5, 2011, was issued a decision, by the European Union Court of Justice, which has considered the duty imposed by the Portuguese State to non resident individuals to appoint a tax representative *"as a restriction to the capital movements"*.

In fact, the Portuguese State, foresees in nr. 1, article 130 of the IRS Code that *"non residents earning income subject to IRS, (...) must for tax purposes, appoint an individual or corporate entity with residence or registered offices located in Portugal to represent them before the Portuguese Tax Authorities and guarantee the compliance (…)".*

In light of such duty imposed by the Portuguese State, on July 18, 2007, the European Commission has notified the same in order for the Portuguese State to harmonise the internal legislation with the community law, since it has considered the *"duty imposed to the non resident to appoint a tax representative resident in Portugal capable of being incompatible with the community law and with the EEA Agreement"* establishing the free movement of persons and capital principle.

The Portuguese State, against the interpretation of the Commission, decided to maintain the wording of article 130 of the IRS Code, arguing that the disposition in cause was not incompatible with *"the freedoms recognised by the EU Treaty and by the EEA Agreement"*, and that this disposition only envisages to guarantee the effective compliance of the formalities imposed to the taxpayers (resident and non resident) that are away from the Portuguese territory, as well as guarantee the efficiency of the tax controls and tax evasion fight.

Upon the opposition of the Portuguese State to amend the legislation, the Commission decided to file an action against Portugal for the State non compliance – Free movement of capital.

The European Court of Justice, after analysing the arguments raised by the Commission and the Portuguese State, concluded that *"the duty foreseen in article 130 of the IRS Code is a restriction to the capital movements", since it is "unarguable that to impose to the taxpayers in cause a duty to appoint a tax representative, article 130 of the IRS Code imposes them a duty to develop actions and, of, in practice, bear the remuneration cost of such representative. Such duties are a burden for such taxpayers, capable of dissuade them to invest capital in Portugal and, inter alia, to perform investments on real estate. Thus the referred duty must be considered as a restriction to the free*

movement of capital, forbidden, in principle, by articles 56 nr 1, EC and 40 of the EEA Agreement".

The European Union Court of Justice has considered that the argument raised by the Portuguese State, concerning the need to guarantee the efficiency of the tax controls and the tax evasion fight within the scope of the IRS is not valid, since the same supersedes what is need to reach such goal.

The Commission also considers that it is not yet demonstrated that the mechanisms of mutual assistance by the Member States competent tax authorities, in the field of direct taxation, that are available to the Portuguese Republic in accordance with Directive 77/779, are insufficient to reach such goal.

The decision issued within the scope of the present case is binding and susceptible of being invoked by the European Union citizens in a dispute before the Portuguese State. Therefore, and since the jurisprudence from the European Union Court of Justice is binding, the Portuguese State must eliminate the disposition imposing to non resident individuals the duty to appoint a tax representative, from its tax legislation.

Andreia Faustino / Associate
andreia.faustino@amsa.pt

4 - NEW VOLUNTARY ARBITRATION LAW

On October 2011 the Assembly of the Republic aproved in general the Law Proposal nr. 32/XII presented by the XIX Government of Portugal.

As we can read in the Explanatory Memorandum of the Law Proposal referred to above, embodiment is given to action 7.6 of the Memorandum of Understanding signed between Portugal, the European Commission, the European Central Bank and International Monetary Fund, which provided for the submission by the Government of a new arbitration law by the end of September 2011.

Strictly speaking, it must be noted that the desire to change the law of arbitration, at least politically, had existed for two years.

In early 2009, the then Government had asked the Portuguese Arbitration Association to submit a proposal for a New Law of Arbitration in Portugal that was in line with the Model Law on International Commercial Arbitration of UNCINTRAL (united nations commission on international trade law) of 1985 and amended in 2006.

The challenge was accepted, and even during the year 2009, was presented by the Portuguese Arbitration Association a project that gave rise to the above mentioned Law.

Therefore, on December 14, 2011, it was published in the Daily Republic the New Law of Voluntary Arbitration - Law 63/2011, of December 14.

The New Law adhered to international standards of reference in arbitration, making the Portuguese regime closer to the Model Law on international commercial arbitration, as indeed, had been asked by the Government.

The New Law of Voluntary Arbitration has as a main objective to attract national and foreign businesses and economic players to the advantages and potential of Portugal to host international arbitrations.

The main innovations of the New Law of Voluntary Arbitration are:

• **Discretion of the arbitrability of the dispute -** referred to in Article 1 nr. 1 and 2 - when a financial interest is not at stake the arbitration agreement is valid if the parties can conclude the transaction on the right at issue.

• **Incident of refusal of the arbitrators -** Article 9 nr. 3 refers that arbitrators must be independent and impartial and that who is invited to be an arbitrator, under nr. 1 of Article 13, must disclose all circumstances which might give rise to justifiable doubts as to their impartiality and independence. Any reason that may raise reasonable doubt about his ability and independence, as well as the lack of qualifications that the parties agreed are considered grounds for refusal.

• **Preclusion of the appeal of the arbitral decision -** In national arbitrations prevails the principle of preclusion of the appeal of the arbitral decision, unless the parties have expressly agreed the possibility of appeal to the relevant State Courts and provided that the question was not decided by equity or by amicable settlement - article 39 nr. 4. In international arbitrations the same principle prevails replacing State Courts by another arbitral court and provided that the conditions of such appeal have been set - article 53.

• **Granting of injunction by arbitral courts** (adoption of Chapter IV of the Model Law on international arbitration, amended on 2006) - Article 20 nr. 1 foresees that the Arbitral Court may, unless otherwise stipulated, at the request of a party, and after hearing the other, declare the injunctions it considers necessary in relation to the subject of dispute. Such injunctions refer to those established down in Article 20 nr. 2 and can be ordered through cooperation with State Courts, as provided for in article 22 nr. 5.

• **Preliminary Orders -** Articles 22 nr. 1 and 5 and 23 nr. 4 refer that either party, unless otherwise agreed, may request the arbitral court, on application, to order an injunction and simultaneously request that a preliminary order is addressed to the other party, without prior hearing, so that there is no frustration of the purpose of the requested injunction. The preliminary order shall expire 20 days after the date on which it is issued and is binding on the parties, but is not subject to enforcement by a State Court.

• **Unenforceability of exceptions -** based on the national law of one of the parties, provides that if arbitration is international and one of the parties to the arbitration agreement is a State, an organization controlled by a State or a company

controlled by it, such party can not rely on its national law to challenge the arbitrability of the dispute or its capacity to be party to the arbitration or to otherwise evade its obligations under that agreement. This unenforceability is established under article 50.

• **Applicable law, equity and amicable settlement** - Provided for in Article 39 nrs. 1 to 3 reporting that arbitrations are allowed to judge according to the existing law, according to equity, and those which the solution is made by appeal to the settlement of the parties on the basis of balance of interests.

• **New rules for the conduct of arbitration proceedings** - Changes are very significant in this respect - as those referring to injunctions - the arbitration may be agreed between the parties even before the appointment of the first arbitrator. On failing the agreement between the parties and before the inexistence of a rule on the New Law of Voluntary Arbitration, the arbitral court conducts the arbitration in such manner it deems appropriate, defining the appropriate procedural rules, and may explain the solution of subsidiary application of the Code of Civil Procedure.

According to this new procedure two written articles are foreseen - the petition and defense - unless the parties agree otherwise. It is allowed to modify or supplement any of the parties' pleadings in the course of the arbitral proceedings, unless the arbitration court does not accept it given the delay in its presentation without justification. The court decides, also, according to the rules adopted if hearings of evidence should be conducted or if the case is to be decided solely on the basis of documents and other evidence.

Where a party so requests, the court is obliged to perform one or more hearings to take evidence, unless the parties have previously waived evidence.

If a party fails to present defense, default of appearance is no longer considered effective.

• **Immediate interlocutory appeal of the decision of the Arbitral Court and Negative Effect of arbitration agreement** - Decision on the competence of arbitrators contained in interlocutory decision can be contested before the Court of Appeal ("Tribunal da Relação") within 30 days after notification to the parties. These changes are set out in Articles 46 nr. 3 a) and 59 nr. 1 f). Article 18 nr. 9 foresees that the State Court must acquit the defendant which has evoked exception of violation of the arbitration agreement, unless it is manifestly void, originally or subsequently ineffective or unenforceable.

• **Third Party Intervention** - It is regulated in article 36, which requires that third parties are bound by the arbitration agreement in which the arbitration is based, whether from its completion or even if they acceded to it subsequently. This adhesion requires consent of all parties to the arbitration agreement and may be made only for the purpose of such arbitration, as referred to in article 36 nr. 1. Article 36 nr. 7 also foresees that the arbitration agreement can regulate third party intervention in arbitrations taking place in a different way.

• **Arbitration decision, res judicata and supplementary decision** - The arbitration process ends when judgment was given or when there is decision to close the process that occurs: a) when the claimant quit the application or b) the parties agree to terminate the process or even c) if it has become useless or impossible in the light of Article 44 nrs. 1 and 2; d) The process could may close as per agreement as referred to in article 41 nr. 1.

On what constitutes an innovation, given the previous law, when it is not possible to form a majority to decide between the arbitrators, the arbitration decision is given by the president of the court, in this respect article 42, nr. 1, and partial decisions are also allowed. The ruling on the dispute must be given within 12 months from the date of acceptance of the final arbitrator.

Parties may seek clarification and correction of the decision, which was not expressly mentioned in the previous law, and the deadline to do so is of 30 days after notification of the decision.

• **Enforceability of the decision** - In the light of article 42 nr. 7 the arbitration decision which susceptible of appeal has the same binding force between the parties that a decision of a state court that has become final and the same effect as a decision of a state court.

• **Annulment of the arbitration decision and its conduct** - is regulated in article 46, being formulated directly in the Court of Appeal ("Tribunal da Relação") or Central administration court and is now of 60 days, with only two grounds for annulment by officious acknowledgement: 1) unarbitrability of the case and 2) offense by the decision against the principles of international public policy of the Portuguese State. Any other grounds must be demonstrated by the party seeking the annulment.

• **Confidentiality of the arbitration** - It is established in art. 30 nr. 5 and 6 and is along with the elimination of the deposit of the decision in State Court one of the advantages of arbitration option.

With the new Law of Voluntary Arbitration we can say that Portugal is closer to the legislation governing this issue internationally, being particularly a law more detailed and flexible than its predecessor, with more procedural guarantees for the parties.

We can say that the new law allows Portugal to increasingly use arbitration to resolve disputes, also being able to accommodate more international arbitrations.

João Monge Gouveia / Senior Associate
joao.gouveia@amsa.pt

5 - PRIVATIZATIONS

Law 50/2011, of September 13, has introduced a second amendment to the General Law on Privatizations.

This amendment, anticipating the current privatizations procedures, aimed to adopt the national law to the community legislation and also to update the former, in accordance with the last revisions of the Portuguese Republic Constitution and the Securities Code.

The most relevant amendments are the following:

1 - The reprivatizations essential goals foreseen in the law are reduced to the following three:

(i) to modernise the economic units and increase their competitiveness and contribute to the sectorial or corporate restructuring strategies;

(ii) promote the reduction of the State weight in the economy;

(iii) promote the reduction of the public debt weight in the economy.

2 - The reprivatization procedures (either through the sale of shares or increase of share capital) by rule and preferentially shall now be effected through a public tender or public offer in accordance with the Securities Code.

There is still the possibility of using the limited public tender or direct sale mechanism, whenever (i) the national interest or sector defined strategy so demands or (ii) the economic-financial situation of the company so recommends.

3 - It was eliminated the legal disposition foreseeing that a percentage of the capital to be reprivatized was reserved to emigrants.

4 - Regarding the *shares acquisition or subscription by small subscribers regime*, the law still foresees that this acquisition may benefit from special conditions, as long as those shares are not charged or object of a legal transaction through which the ownership of the shares or the relevant inherent rights are transferred, even if with future effects, during a certain period of time as of the date of its acquisition or subscription, otherwise the relevant operation being considered null.

It was eliminated the legal disposition waiving the voting right of such shares in the general meeting, during the period of non transferability.

5 - The *shares acquisition or subscription by employees regime* has also been amended.

Independently of the reprivatization form chosen, the employees working for the company to be reprivatized have a preferential right to acquire or subscribe shares, and, for such purpose, it may be taken into consideration, in particular, the effective duration of their labour supplying.

The acquisition or subscription of shares by the employees of the company to be reprivatizated may benefit from special conditions, as long as such shares are not charged or object of a legal transaction through which the ownership of the shares or the relevant inherent rights are transferred, even if with future effects, during a certain period of time as of the date of its acquisition or subscription, otherwise the relevant operation being considered null.

Furthermore, it is now foreseen that the shares acquired or subscribed by the employees, shall grant voting rights to its holders during the non transferability period.

The above referred regime may also be applied to the employees of companies in group or controlling relation, with the company resulting from the transformation of the public company being reprivatized.

6 - It was eliminated the possibility of the State to appoint a director with special powers of veto regarding certain matters and the legal disposition foreseeing privileged shares (with right of veto regarding certain matters) that were aimed to be maintained within the Estate ownership.

7 - Currently the law foresees the possibility of being incorporated one special commission for the monitoring of each one of the reprivatization procedures that shall be extinguished with the term of the relevant reprivatization procedures. These commissions shall replace the former "reprivatizations monitoring commissions".

Regarding incompatibilities and as in the past, it is now foreseen that the functions as a member of the special commissions are not compatible with the functions as a member of the corporate bodies of the companies to be reprivatized.

8 - It was eliminated the taxes and registration costs exemption regarding the amendment of the articles of association of the companies being reprivatized.

9 - It was also added a new article imposing the Government the duty to (within a maximum deadline of 90 days after the law is in force) to establish the extraordinary regime to safeguard strategic assets in sectors considered essential for the national interest, in accordance with the community law.

The above referred amendments have entered into force on September 14, 2011, and are applicable to all reprivatization procedures initiated after such date, as well as, to all pending procedures that have not been object of a reprivatization decree law by such date.

Maria João Graça / Senior Associate
maria.graca@amsa.pt