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Focus on: PORTUGAL

Investment Tax Code approved - non-habitual resident individuals et elimination of double taxation

On 11 September 2009, the President approved the new Investment Tax Code through the enactment of Decree-Law No. 249/2009, published in the Republic Gazette of 23 September 2009.

The Investment Tax Code creates a new tax regime for non-habitual resident individuals for 10 years (2009-2019). Non-habitual residents individuals are defined as "new" residents in Portugal as from 2009 provided they were not residents in Portugal during the previous 5 years.

The Decree-Law grants, amongst other benefits, the application of the exemption method of elimination of double taxation for passive income (interest, dividends, capital gains, income from capital or immovable property and pensions), independent personal services income, and royalties provided that:

- the income is derived by non-habitual residents, and may be taxed at source under the provisions of a tax treaty; or
- if there is no treaty, the income does not arise from Portuguese sources or from a jurisdiction listed in the Portuguese tax haven's black list, and may be taxed at source according to the provisions of the OECD Model Convention.

For foreign-source employment income, the application of the exemption method is granted provided that:

- it is derived by non-habitual residents, and may be taxed at source under the provisions of a tax treaty; or
- if there is no treaty, the income does not arise from Portuguese sources, and it is effectively taxed at source.

Non-habitual residents may opt to use the standard credit method for the elimination of double taxation. In this case, the income will be taxed under the standard Portuguese income tax regime.

USA

Regulations issued on determination of interest expense deduction for US branches of foreign corporations

The US Treasury Department and Internal Revenue Service (IRS) have issued final regulations and removed temporary regulations regarding the determination of the interest expense deduction of foreign corporations that operate in the United States through branches. The final regulations were published in the Federal Register on 28 September 2009 and designated T.D. 9465.

The final regulations update the existing rules regarding the allocation of interest expense under Section 882 of the US Internal Revenue Code (IRC) and the calculation of the branch profits tax under IRC Section 884. The final regulations adopt without substantive change the temporary regulations issued on this topic on 17 August 2006.

The final regulations are applicable for tax years ending on or after 15 August 2009. However, Treasury Regulation Section 1.882-5(f) states that taxpayers may choose to apply Temporary Treasury Regulation Section 1.882-5T (Determination of Interest Deduction), rather than applying the final regulations, for any taxable year beginning on or after 16 August 2008 but before 15 August 2009.

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FRANCE

Anti-tax evasion and anti-tax haven

The Council of Ministers, while adopting the Finance Bill 2010, made an announcement on expected measures against tax evasion and uncooperative jurisdictions.

The Council indicated that a Regulation will shortly be issued to determine the type and information and other particulars that financial institutions will be required to disclose in their annual reports on account of activities in tax havens.

After having noted the March 2010 compliance deadline issued by the G20 to uncooperative jurisdictions, the Council instructed the relevant Ministers to prepare fiscal retaliatory measures against uncooperative jurisdictions before the end of 2009. The measures would be proposed within the framework of the Finance Amendment Bill 2009 and would apply to all uncooperative jurisdictions without a tax information exchange agreement with France. They would consist of:

- increase of the withholding tax on interest, dividends and royalties paid to tax haven residents to 50% (from 0% to 35% currently);
- non-deductibility of remunerations, fees and similar payments made to tax-haven residents unless the payer justifies the genuine and reasonable character of the payment (currently, the burden of proof is on the tax administration);
- exclusion of dividends received from tax haven affiliates from the benefit of the participation exemption regime whereby 95% of dividends received are exempt from French tax;
- obligation for firms exceeding a yet to be defined turnover threshold (rumoured to be EUR 400 million) to prepare and permanently maintain transfer pricing documentation (currently documentation is to be submitted only at the request of the tax administration); and
- tightening of the CFC rules at the level of either the minimum participation threshold, or the foreign low-tax definition, or the economic activity safeguard test, or all.

DENMARK

New guidelines on valuation of businesses and intellectual property for transfer pricing purposes

On 21 August 2009, the tax authorities published new guidelines on the valuation of businesses and intellectual property (IP) which significantly change the generally accepted approaches to valuing different intangible assets, as well as entire businesses, for Danish transfer pricing purposes. The new guidelines have entered into force, and are applicable with effect from 21 August 2009.

The tax authorities have in previous years focused their audit activity on IP arrangements, particularly those involving one-time transfers of IP. Historically, the Danish guidance on IP arrangements, including the valuation of IP, has been limited to the Danish documentation rules, which are based on the OECD Transfer Pricing Guidelines, as well as a set of fairly basic guidelines for determining goodwill values. The goodwill guidelines were based on historical financial results, and did not take into account expectations on future returns.

The new guidelines cover both transfers of entire businesses and transfers of different intangible assets. The focus is, however, on the transfer of a business, and thus offers only limited guidance for to valuing different intangible assets. The guidelines also include a summary of valuation approaches applied in the past for Danish tax purposes but this part of the guidelines serves mainly as a historical overview as it does not provide any substantial recommendations (apart from the conclusion that a valuation based on historical data should be replaced with approaches based on future expected income).

The various valuation approaches described include:

- cost-based approaches;
- discounted cash flow (DCF) models;
- economic value added (EVA) approaches;
- valuation methods using earnings multiples; and
- a relief from royalty method.

The guidelines do not, however, put these approaches in the context of either the OECD Guidelines or the Danish documentation rules. The descriptions of different methods are fairly general, with comments which may be controversial (e.g. elements in determining a reliable interest rate for discounting purposes, buyer versus seller perspectives, and reliable tax rates for purposes of determining after-tax cash flows). No specific guidance or recommendations are included (apart from some very broad recommendations regarding the documentation requirements).



INTERNATIONAL MODELS

The Panamanian Trust

Trusts in Panama are regulated by Law no. 1 of 5 January 1984 which has provided added flexibility in the creation and management of trusts following modern concepts derived from Anglo-Saxon law. This circumstance makes Panamanian trusts different from those existing in other civil law jurisdictions.



The salient features of Panamanian trusts are the following:

- Parties to a trust can include all types of clauses, provided that they do not violate law, moral or public interest.
- Trusts can be created by means of a private document, except for trusts of real property located in Panama or certain In Rem Rights. Even trusts with mortis causa effect can be created by private document without the need for a will if the trustee is licensed by the Superintendency of Banks and authorised to engage in the trust business.
- The duration of a trust can be indefinite.
- The trust instrument is not recorded or published; thus, it is in fact a private document. However, the trust company must maintain proper due diligence records and procedures in order to avoid the use of trusts as instruments for money laundering. The authentication of signatures by notary public is required only in the trust instrument.
- The person involved in handling the trust including the authorities must maintain its confidentiality under penalty of up to USD 50,000 and a jail sentence of 6 months.
- Trusts are irrevocable, which can be favorable for tax purposes, unless otherwise specified in the trust deed. The settlor can also maintain, during his lifetime, ample powers such as being able to remove the trustee, changing the jurisdiction of the trust, adding and removing beneficiaries, adding and removing property subject to the terms of the trust, modifying the trust deed, having veto power over the administration by the trustees, etc., without invalidating the trust (as a sham, under most Anglo-Saxon jurisdictions) providing that the trust has a valid object (such as hereditary disposition of the trust property to the beneficiaries).
- Offshore trusts, i.e., those in which the beneficiaries (which in accordance with Panamanian law can include the settlor) do not derive income from a Panamanian source, as defined by the Fiscal Code of Panama, are tax exempt.
- Trust assets are regarded as a separate estate and for all legal purposes these are considered independent from the assets of the trustee, the settlor and the beneficiaries (until they latter receive income derived there from). Therefore trust assets cannot be attached by the creditors of the trustee, the settlor, or the beneficiaries. The Panamanian source income from the trust assets is taxed separately from the personal income of the trustee.
- Trust assets can be of any kind, including future assets (that is, those not existing at the time the trust is created).
- Beneficiaries can be designated by category. Future beneficiaries can also be designated provided that they come into existence during the life of the trust.
- The Trust Deed may indicate that the administration of the trust is subject to a foreign law.
- The trust deed may provide that controversies arising from the interpretation of trust clauses or the administration and/or distribution of the assets, be decided by a foreign court or arbitrators in a foreign country.
- The Law allows the trust situs or assets to be transferred to another country if so authorized by the trust deed.
- The settlor, trustee, or beneficiary may be corporations or other entities, which make handling the trusts much more flexible.

