TAX INFORMATION

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February 2010

2010 STATE BUDGET: GUARANTEES AND TAX ARBITRATION

TThe 2010 State Budget Proposal is sparse in the area of tax changes, which is rare and commendable: the budget should not contain reforms or structural modifications to the tax system, since it does not guarantee the balancing of separate laws.

Even so, the "new budget" proposal presented by the government to the Assembly of the Republic contains "changes" in the area of taxation that are noteworthy and important.

The government has established the following priorities for itself in the area of tax policy:

. to strengthen social justice and economic recovery;

. to expand environmental taxation; and

. to reconcile the relationship between tax authorities and taxpayers.

In view of my available time, my profession and the fact that I was the coordinator of Group V, in charge of the "Procedure, Process and Relationships between the Tax Authorities and Taxpayers", of the Work Group for the Study of Tax Policy, Competitiveness, Efficiency and Justice of the Tax System, which is at the root of some of the proposed "changes" in this area, is it about these – in the chapter "Tax Process and Procedure" of the State Budget Proposal, on improving the relationship between tax authorities and taxpayers – that I will now say a few words.

In this regard, the work group's report is truly extensive: it contains 9 titles, several chapters and 424 points, many of which – the majority – do not entail legislative changes and which, naturally, were not addressed in this venue.

From the outset, it was understood – and well, I believe – that there were no grounds for reform or structural changes in the area of legal or tax procedures; for this reason, the work group essentially limited itself to changes with one of the two following goals and areas:

. surgical legislative changes to facilitate the interpretation and application of tax law; and

. changes to bring taxpayers and tax authorities closer together (the so-called "reconciliation").

The 2010 State Budget Proposal weighs up and uses some of these suggestions, and adds several others, both through direct legislative changes and mere legislative authorisations, which the government plans to use before the end of the budget year.

The first (i.e. proposals for direct changes) include:

. change of default interest calculation and rate;

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. change of rules on notifications and summons;

. changes involving the offsetting of claims;

. changes involving tax lien suspension rules;

. deadline extension for tax debts paid in instalments; and

. reinstatement of the "tax amnesty" of 2005, called "tax adjustment of assets held abroad" ("RERT II").

The second (i.e. legislative authorisations on tax-related matters contained in the 2010 State Budget Proposal) include:

. revision of the General Tax Law (Lei Geral Tributária), the Tax Processes and Procedures Code (Código de Procedimento e de Processo Tributário) and Administrative and Tax Courts Statute (Estatuto dos Tribunais Administrativos e Fiscais), to harmonise them with the Administrative Court Procedure Code (Código de Processo dos Tribunais Administrativos);

. creation of a general central government tax system; and

. arbitration on tax-related matters.

As regards the computation and modified rate of default interest to the State and other public entities, including tax debts (currently 1% per month), on taxes and compensatory interest, the government is proposing that this rate be determined annually using the average of the monthly averages of the twelve-month Euribor from the preceding twelve months, plus five percentage points, thereby reducing the default interest rate and bringing it more in line with "the market", without losing its compensatory and mandatory function. It also proposes an extension to the maximum accrual period for default interest when the tax debt is paid in instalments, from 5 to 8 years, without exceeding the respective payment deadline.

As regards notifications and summons, whether by ordinary post, registered letter or registered letter with acknowledgment of receipt, these may now be effected via electronic data transmission, and are considered as delivered with proof of access to the electronic mailbox. When no such access exists, the notification may be repeated and, in accordance with the existing rules, is then considered as delivered. Citations, however, will likely require confirmation of access to the mailbox.

This measure, aimed at computerising notifications and summons, should require the existence of an institutional e-mail, and should likewise involve simplifying the content of notifications and summons, which should contain objective, simpler and clearer language that can be easily understood by all recipients. In this matter, the work group recommended initially limiting this to those already obligated to submit statements exclusively by electronic means (which will likely not happen).

With regard to the offsetting of claims, there is a proposal to introduce a new set-off system for tax debts in the enforcement phase with non-tax claims against central government entities, at the initiative of the debtor, in a slightly more "automatic" manner, although dependent on the "definite, liquid and enforceable" nature of the taxpayer's claim.

The intention with this is to establish the understanding – which is uncontested, and the same as that put forward by council member Lopes de Sousa – of impeding the tax authorities from offsetting taxpayer claims before the deadlines for contentious or non-contentious reaction. This measure, as with that allowing taxpayers to request the suspension of tax liens, prior to filing an internal appeal or legal opposition, by means of a guarantee, indicating the intention to put forward such a defence to contest the legality or enforceability of the debt, was also suggested by the Work Group for the Study of Tax Policy, as with that of the implementation of offsetting claims at the initiative of taxpayers.

In addition, the 2010 State Budget Proposal, under exceptional circumstances – involving the necessity of the measure in the economic recovery process, or when it is recommended in view of the inherent risks of debt recovery – allows for an extension in the number of monthly instalments, up to ten years, provided that the debt exceeds EUR 51,000 and each instalment is at least EUR 1,200. The aforementioned maximum limit of 8 years for the accrual of default interest is what seems to be somewhat out of line with the maximum number of instalments here. Moreover, instalment plans that are currently in force may benefit from this extension to ten years.

Finally, the government is proposing a new Exceptional Scheme for the Tax Adjustment of Assets, abbreviated as "RERT II", following a model similar to that in the 2005 Amending Budget (as in Italy and other countries). A special rate of 5% is now being proposed on the value of these assets, with the main effects of adjustment being the elimination of enforceable tax obligations for these assets and the respective declared income, and the elimination of liability for tax infringements, whether crimes or administrative offences, involving the concealment or modification of the adjusted assets.

In relation to RERT I, the only new changes are the express exclusion of assets located in countries or territories that are considered to be non-cooperative by the Financial Action Group (GAFI), and the reduction of the tax for investments in Portuguese government securities by 50%, deemed incompatible with Community Law and the free movement of capital, since the previous system provided

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for a 50% increase in taxes on income relating to undeclared, omitted or uncertain assets.

Also in the area of direct changes, of particular note are the express provision punishing the use of uncertified invoicing programs or equipment, together with the provision allowing for the reversal, against directors and managers, of debts resulting from fines against legal persons (which could not apply for lack of a regulation to this end), a debatable solution as it essentially entails the transfer of these monetary penalties.

Finally, there are three important proposals involving legislative authorisation.

Legislative authorisation has been proposed to revise the General Tax Law (*Lei Geral Tributária)*, the Tax Processes and Procedures Code (Código de Procedimento e de Processo Tributário) and the Administrative and Tax Courts Statute (*Estatuto dos Tribunais Administrativos e Fiscais*), in view of administrative litigation reform, introducing a tax procedure and a special tax procedure.

In this regard, the Work Group for the Study of Tax Policy believed that the change should be made as quickly as possible, and that the failure to harmonise administrative and tax litigation involved significant costs for economic and legal operators, given the difficulties of understanding the current system of taxpayer guarantees and the procedural system's lack of unity. What is certain is that, progressively from the start of the last decade, budgetary law has provided for legislative authorisations in this regard, including the release for public consultation (I believe in 2007) of a draft decree law that never saw the light of day.

Also of note – and to be applauded – is the legislative authorisation proposal involving the creation of a general central government tax system, which has been somewhat overlooked. In this area, the Work Group for the Study of Tax Policy also recommended the creation of a technical committee to draw up a "general system for taxes and other financial contributions to public entities", as established since 1997 by the Constitution and since 1999 by the General Tax Law, together with existing legislative authorisation in Article 52 of the 2002 State Budget Proposal, blocked at the time (the only one) by the member of parliament who abstained from voting on the remaining part.

If passed and implemented, this proposal will thus build on the general municipal tax system, with closer - although only partial - adherence to the principles of the Portuguese Constitution and the General Tax Law.

Lastly, of particular importance is the courageous legislative authorisation proposal to institute arbitration in the area of taxes as an alternative means of resolving legal disputes in tax-related matters.

This solution had returned to the agenda in October 2009, when the Work Group for the Study of Tax Policy's report was made known, recommending the consideration of alternative methods in dispute resolution, including arbitration and pre-litigation conciliation commissions, in tax-related matters. More recently, council member Santos Serra also defended this in a written interview with Jornal de Negócios. In acknowledgment of the advantages of arbitration in tax-related matters, the legislative authorisation now proposed by the government to be passed and implemented, will introduce this extrajudicial venue for resolving taxpayers' conflicts with the tax authorities.

The proposal to establish a six-month time limit, extendable by an equal time period, for arbitration awards, the lack of special formalities and a higher degree of specialisation among arbitrators due to the complexity of the issues they will be asked to resolve, will certainly lead to speedier decisions and will clear up pending issues at tax courts, even more so when the rules entail the irrevocability of arbitration awards and the ability to transfer pending proceedings from lower tax courts to arbitration courts, without additional legal fees.

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Lisbon, 5 February 2010
04/ 2010