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Landmark change to Portugal's tax treatment of fiduciary structures

By Verónica Pisco

The Individuals Income Tax Code suffered major alterations, in Portugal, with effect for Portuguese residents, from 1 January 2015. The new tax law was published on 31 December 2014, together with the new Budget for 2015 and alterations to the Corporate Tax Code. In consequence, trusts established by Portuguese residents are now to be taxed for the first time. Under the terms of the new law, any amounts distributed by trusts will be taxed as capital or as a gain.

Capital (art. 5 CIRS)

According with the law, any amount paid out of a trust to Portuguese residents are considered income payment, when they are not related to a liquidation, revocation and extinguishment of the trust, commencing 1 January 2015. This income will be taxed at 28%, for trusts, domiciled on the so called white listed countries and at 35%, for trusts situated at the so called black listed countries.

Gains/ Losses (art. 10 CIRS)

In addition, when a trust is wound up and the assets distributed to the settlor, this distribution will also be taxed. However, in this case only the gain will be considered. The gain/ loss will correspond to the difference between the value settled on trust at the outset and the value of the trust when its liquidation, revocation and extinguishment happens or when a deed of distribution is signed. However, the loss will not be considered if the trust is situated in those countries considered tax heavens. The gain will be taxed at 28%, for trusts, domiciled on the white listed countries and at 35% for trusts situated at the black listed countries.

Special Imputation (art. 20 CIRS)

It's important to know that since 1 January 2012, the Individuals Income Tax Code already predicted the taxation of income produced by trusts situated at the black listed countries (**but just the black listed countries**) considering it as being income of the individuals resident in Portugal, if those individuals hold, directly or indirectly, at least 25% of the trust or 10% of the capital shares, rights of vote or rights over income or patrimonial elements of such entities. Such income would be taxed as business income, when the capital shares are affected to a business or professional activity as capital, on the remaining situations.

Stamp Duty Tax (art. 1 CIS)

The reform produced to the tax laws in Portugal also affected gifts. If the distribution of moneys, resulting from liquidation, revocation and extinguishment of the trust, is done to someone different from the settlor, it will be considered a free acquisition. In consequence, the beneficiary of such gift, being resident in Portugal, will be subjected to 10% tax of the value received.

Black Listed Countries

Current list of countries, territories and regions with clearly more favourable privileged tax regimes (known as 'tax heavens'), dates from 8 November 2011 (Portaria 292/2011).

(See Fig.1 on Next Page For List)

The implications of these changes at the Non Habitual Tax Scheme

This scheme allowed an exemption from paying taxes for new residents in Portugal for a fixed period of 10 years, if certain conditions were in place.

Now, the question is how the new changes to the taxation of trusts in Portugal will affect this scheme applicable to individuals resident in Portugal? Or to those who were willing to become residents in Portugal under this scheme? The answer will depend on the trust's country of domiciliation and if there is in force any double taxation agreement between Portugal and the country where the trust is located.
Therefore, residents under this scheme can still be exempt from tax in the following circumstances:

a) they are liable to tax in another State that has entered into a double taxation treaty with Portugal.

b) Where there is no double taxation treaty in place between a given State and Portugal, the resident in Portugal

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Fig 1. Black Listed Countries

1) Andorra;
2) Anguilla;
3) Antigua and Barbuda;
4) Netherlands Antilles;
5) Aruba;
6) Ascension;
7) Bahamas;
8) Bahrain;
9) Barbados;
10) Belize;
11) The Bermudas;
12) Bolivia;
13) Brunei;
14) Channel Islands(Alderney, Guernsey, Jersey, Great Stark, Herm, Little Sark, Brecqhou, Jethou e Lihou);
15)Cayman Islands;
16) Territory of the Cocos (Keeling) Islands;
17)Cook Islands;
18) Costa Rica;
19) Djibouti;
20) Dominica;
21) United Arab Emirates;
22) Falkland Islands;
23) Republic of Fiji;
24) Gambia;
25) Grenada;
26) Gibraltar;
27) Guam;
28) Guyana;
29) Honduras;
30) Hong Kong;
31) Jamaica;
32) Jordan;
33) Queshm Islands;
34) Kiribati Island;
35) Kuwait;
36) Labuan;
37) Lebanon;
38) Liberia;
39) Liechtenstein;
40) The Maldives;
41) Isle of Man;
42) The Northern Mariana Islands;
43) The Marshall Islands;
44) Mauritius;
45) Monaco;
46) Montserrat;
47) Nauru;
48) Christmas Island;
49) Niue Island;
50) Norfolk Island;
51) Sultanate of Oman;
52) Pacific islands not mentioned specifically;
53) Republic of Palau;
54) Panama;
55) The Pitcairn Islands;
56) French Polynesia;
57) Porto Rico;
58) Qatar;
59) Solomon Islands;
60) American Samoa;
61) Independent State of Samoa;
62) Saint Helena;
63) Saint Lucia;
64) Saint Kitts and Nevis;
65) San Marino;
66) Saint Pierre and Miquelon;
67) Saint Vincent and the Grenadines;
68) Seychelles;
69) Swaziland;
70) Svalbard (Spitsbergen archipelago and Bear Island);
71) Tokelau;
72) Tonga;
73) Trinidad and Tobago;
74) Tristan da Cunha;
75) Turks and Caicos Islands;
76) Tuvalu;
77) Uruguay;
78) Republic of Vanuatu;
79) British Virgin Islands;
80) American Virgin Islands;
81) Republic of Yemen.

may be deemed to have been taxed in the other State if that State is a signatory to the Convention on the Organization for Economic Cooperation and Development (OECD);

c) Where the other State does not appear on the list concerning States with privileged tax regimes, clearly more favourable (tax heavens);

d) Where the income is not considered to have been obtained in Portuguese territory.

Conclusions

These changes can have major repercussions for all those who choose Portugal as their home and hold foreign trusts and/or assets within the trust structure. Now any trust is affected, irrespective of its location. So, if the trust is used solely for holding a property, it will not be affected. Therefore, trusts can still be useful for estate planning purposes. However, if a trust is used to hold funds, deposits, insurance vehicles or any activity that can produce income, which will be distributed during the person's residence in Portugal, then it will be subject to tax and will no longer be efficient from a tax planning point a view.

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