

Portuguese Government submits Draft State Budget Law for 2021 to Parliament

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Executive summary

On 12 October 2020, the Portuguese Government submitted the Draft State Budget Law for 2021 (Draft Budget Law) to the Parliament. Among the proposed measures, the Draft Budget Law would: (i) strengthen the permanent establishment (PE) force of attraction principle and also expand the concept of PE; (ii) introduce new Real Estate Transfer Tax rules for the transfer of shareholdings; and (iii) exclude offshore entities from access to public support.

Detailed discussion

Update of the PE concept

The Draft Budget Law proposes to extend the so-called PE principle of force of attraction. It provides that the income derived from the sale of goods identical or similar to those sold through a PE to people or entities resident in Portugal should also be included in the calculation of the profit attributable to a PE of the entities that do not have headquarters nor effective management in Portugal.

Additionally, the Draft Budget Law proposes the following changes to the Portuguese Law:

- ▶ Any ships used in the prospecting or exploitation of natural resources should be included in the concept of a PE (currently, only the drilling boats used for these purposes are included in the concept of a PE).
- ▶ The time period that an activity exercised through the facilities, platforms or ships used in the prospecting or exploitation of natural resources constitutes a PE should be reduced from 6 months to 90 days.
- ▶ Service activities, including consultancy ones, provided by a company should be included in the concept of a PE, if such activities are carried out during a period or periods which, in total, exceed 183 days in a 12-month period beginning or ending in the relevant tax period, thus introducing the service PE rule.
- ▶ Contracts by which non-independent agents operating in the Portuguese territory on behalf of a company can bind it, and therefore, can create a PE are specifically foreseen in the Draft Budget Law - whenever the dependent agent has, and habitually exercises, powers of intermediation and conclusion of binding contracts, namely in the name of the foreign company, for the transfer of ownership of goods or the concession of the right of use concerning goods belonging to the foreign company or in relation to which the foreign company has the right of use, or for the rendering of services by the foreign company.
- ▶ The concept of a dependent agent operating in Portugal on behalf of a company is extended to include the circumstances in which it: (i) usually plays a decisive role for the conclusion of contracts on a routine basis and without substantial changes; or (ii) maintains a deposit of goods in Portugal for their delivery on behalf of the company, even though it does not usually conclude contracts in relation to those goods nor has any intervention in the conclusion of such contracts.
- ▶ Activities that involve an installation or a deposit of goods belonging to a company used or maintained for their delivery should no longer be excluded from the concept of a PE as activities of a preparatory or auxiliary nature.
- ▶ Activities that involve a fixed installation or a deposit of goods that are used or maintained by a company when it, or another company with which it is closely related (concept associated with a control situation, even if by a common entity, of more than 50%), exercise a complementary activity that forms a coherent set of activities of a business nature, in the same place or in

different places in Portugal, should no longer be excluded from the concept of a PE as activities of a preparatory or auxiliary nature, whenever:

- The installation or the deposit constitutes a PE of that company or another company with which it is closely related; or
- The set of activities resulting from the combination of activities carried out by two or more closely related companies in the same place, or by the same company or by companies closely related in different places in Portugal, does not have a preparatory or auxiliary nature.

New Real Estate Transfer Tax (RETT) rules for the transfer of shareholdings

The Draft Budget Law proposes application of the RETT to the acquisition of shares in joint stock companies, whose value of the asset results, directly or indirectly, in more than 50% of real estate located in Portugal and that are not allocated to an agricultural, industrial or commercial activity, excluding the trading of real estate, when by such acquisition, by amortization or by any other facts, any of the shareholders becomes the owner of at least 75% of the company's share capital or the number of shareholders is reduced to two married people or the equivalent.

This regime does not apply to companies with shares admitted to trading on a regulated market, subject to information disclosure requirements in line with the European Union law or subject to rules of equivalent international standards, which ensure sufficient transparency of information regarding the ownership of shares, as well as their permanent representations.

Additionally, the Draft Budget Law provides that, for the purposes of determining the 75% threshold outlined above, the own shares held by the company shall be proportionally attributed to its shareholders according to their respective shareholding in the share capital.

The Draft Budget Law further clarifies that, in the event of the dissolution/other forms of transfer for consideration of a company/investment fund under which all or some of its real estate is transferred to the shareholders/participants that have already been taxed, the RETT applicable to the new transfer is levied on the difference between the value of the assets then acquired and the amount by which the RETT was previously paid.

Exclusion of offshore entities from access to public support

In line with the provisions set forth in the Supplementary State Budget for 2020, it is proposed to exclude, from the public support created under the exceptional and temporary measures to respond to the COVID-19 pandemic, the entities with headquarters or effective management in countries,

territories or regions with a clearly more favorable tax regime (the so-called Portuguese blacklist) as well as companies that are dominated by entities (including fiduciary structures of any nature) residing therein or whose beneficial owner is resident in those countries, territories or regions.

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