

**The new Portuguese taxation regime for  
mergers, demergers, transfers of assets and exchange of shares**

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The taxation regime applicable to mergers, demergers and transfers of assets is contained in articles 67 to 72 of the Corporate Income Tax Code (CIRC), which have transposed Directive 90/434/EEC of the Council of 23rd July 1990 (Directive) on the common system of taxation applicable to mergers, demergers, transfers of assets and exchanges of shares concerning companies of different Member States. Such system was recently modified by Decree-Law 221/2001, of 7th August 2001. The main modifications shall be outlined in this text.

**I - Definition of the scope of the regime.**

The new version of article 67 (1 to 6) CIRC defines the scope of the taxation regime for mergers, demergers, transfers of assets by identifying the operations within the concepts of merger, demerger, transfer of assets or exchange of shares - actually, it transcribes nearly *ipsis verbis* article 2 of the Directive. Article 67(7) states that the taxation regime applies either to resident companies with a turnover of more than PTE 30.000.000\$/EUR 149,639.37 or to non-resident companies acting under the Directive, and article 67(9) states that the system also applies to mergers, demergers and transfer of assets concerning other entities than commercial companies. According to article 67 (8 and 10) the system does not apply to operations which involve the transfer of aircrafts or ships to non-

resident airline or shipping operators as well as those operations whose purpose is to avoid taxation (thus maintaining two restrictions contained in the primitive versions of articles 68 (2) and 67(9) CIRC, respectively).

## **II - Specific Taxation for Mergers, Demergers and Transfers of Assets**

The modified version of article 68 (which maintain the terms of the primitive article 67(4)) states that, for the purposes of assessing the taxable income of the companies subject to a merger, a demerger or a transfer of assets, the income resulting from the transfer of on-balance-sheet businesses as a consequence of the merger, demerger or transfer of assets shall not be taken into consideration, nor shall the provisions concerning the transferred credits, stocks and obligations be considered as a profits or earnings, provided that the above-referred operations relate **(I)** to the transfer of on-balance-sheet businesses allocated to a permanent establishment in the Portuguese territory (a) between resident companies; (b) between a resident company and a company residing in another European Union (EU) Member-State, or (c) between EU-resident companies (either in the same or in different Member-States), provided that, in all of these cases the transferred on-balance-sheet businesses remain allocated to a permanent establishment located in the Portuguese territory and play a part in generating the latter's taxable income, or **(II)**, to the transfer of a permanent establishment located in the territory of an EU Member-State, from a Portuguese-resident company to another Portuguese-resident company. This legal regime does not apply to the transfer of a permanent establishment located outside the Portuguese territory, of a resident company to another EU-resident company, the

former being only entitled to deduct the tax payable where the establishment is located (article 68 (2), new version).

### **III - Transfer of tax losses**

Decree-Law 221/2001 also revised the regime applicable to the transfer of tax losses (article 69 CIRC), which applies, as before, to mergers under permission by the Finance Minister granted upon the presentation of a plan to restructure or rationalise the applicant companies' activities. However, it now applies also to demergers in which the demerged company is wound, to transfers of assets which entail the transfer and subsequent extinction of a permanent establishment located in the Portuguese territory, between a non-resident company acting under Directive 90/434/EEC, and to the transfer of a permanent establishment located in the Portuguese territory carried out within a merger, demerger or transfer of assets and between EU-resident companies, provided that the transferred on-balance-sheet businesses remain allocated to a permanent establishment located in the Portuguese territory.

### **IV - Regime applicable to transfer of shares to the shareholders of merged or divided companies and to exchange of shares**

Articles 70 and 71 exempt from taxation the transfer of shares to the shareholders of merged or demerged companies and or to the shareholders of the receiving company in the case of exchange of shares, provided that the transfer complies with the conditions set forth therein.

### **V - Capital Gains**

Decree-Law 220/2001 also modified the method of calculation of capital gains for the purposes of the operations within articles 67 to 72 CIRC. According to article 43 CIRC, capital gains consist of the difference between the acquisition value of the transferred on-balance-sheet businesses and the realisation value, which, according to the modified version of article 43 (3d), in case of mergers and demergers, is the market value of the on-balance-businesses transferred within such operations.