

Tax Reactions to the SARS-CoV-2/COVID-19 Pandemic in Portugal

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ABSTRACT

This study is focused on the tax measures that have been enacted in Portugal, following the health and economic crisis created by the SARS-CoV-2/COVID-19 pandemic. First, it aims at comprehensively characterizing the measures enacted, structuring them by thematic clusters, enabling the reader to understand the concrete impact of the significant array of legislation and administrative guidance does not allow. Second, it aims to critically assess the measures adopted and uncover the rationale behind their adoption. The study allowed us to conclude that the tax system was not the priority weapon used by the government to react to the pandemic. Nevertheless, many measures have been enacted, most of them with a non-substantial nature and related to the postponement of deadlines for the submission of tax returns or for payments of taxes due. A careful review of the measures revealed that some areas could have been better dealt with, in order to increase legal certainty of the addresses of the measures. Moreover, the connection between some measures and the pandemic is not completely clear, which raises suspicion on the real reasons behind the adoption of the rules. The same careful review has shown that many governmental actions correspond to best practices that should not only be praised but also be considered as examples to be followed by other countries. This is namely the case of the care in providing correct, easy-to-follow guidance to taxpayers on the impact of the measures that have been adopted. All in all, these surgical tax measures adopted seem to be able to avoid further commercial and financial disruptions in

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the economy, avoiding situations of bankruptcy or avoidable hardships for taxpayers which would have only added more disruption to the one that the SARS-CoV-2/COVID-19 inevitably introduced.

KEYWORDS

Tax measures – Pandemic – Portugal

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1. General Overview

As a member of the global economy, Portugal was not immune to the SARS-CoV-2/COVID-19 pandemic. The entry of the virus in our country was confirmed on 2 March when two Portuguese individuals¹ tested positive.

Despite the huge impact of the pandemic on our country, it was not affected like neighboring or comparable EU countries. There is no clear explanation of the reasons that could explain such a phenomenon. It may be related to an early governmental reaction and closure of schools and public offices. It may also be related to the fewer economic links with other EU countries and its peripheral geographical location.

Unlike in other countries, and at the political level, there was a noticeable level of consensus and of support of the government action (namely by the President of the Republic, by the Parliament, by the opposition parties and by civil society). There were no major controversies or sensitive reactions against the measures taken. This allowed a swift implementation of the measures which were adopted as early as a week after the first case².

On 12 March, merely ten days after the first cases, the government declared the “alert state”³ and adopted a more comprehensive set of rules.⁴ On 18 March, the President of the Republic further escalated, by declaring the “state of emergency”⁵ – something that only he may declare – for a period of 15 days. This period was extended twice, until 2 May⁶.

More recently, Portugal entered the so-called “second wave”, and the government adopted the “state of contingency”, which allows it to adopt some exceptional measures⁷. At the time of writing this report, the country is still reaching new daily peaks, both in terms of the number of infections as in what concerns the number of deaths.

The situation we experience since March led, besides the health crisis, to an economic crisis whose contours are yet unknown. Economic activity decreased significantly and, in several sectors, completely stopped. Unemployment rose, and part of the people remained

¹ A 30-year old man returning from working in Spain and a 60-year old man returning from vacation in the north of Italy.

² Order 104/2020 XXII, of 9 March of the Secretary of State for Tax Affairs. Hereinafter, we will refer to different orders (which corresponds to the Portuguese “circular”, all of which adopted by the Secretary of State for Tax Affairs.

³ “Estado de alerta”.

⁴ Decree-Law 10-A/2020, of 13 March 2020.

⁵ “Estado de Emergência”, an exceptional constitutional regime regulated by Art. 19 of the Constitution of the Portuguese Republic. It was declared by Presidential Decree of 14-A/2020, of 18 March, and regulated by governmental Decree 2-A/2020, of 20 March 2020. It was the first time-ever that this regime was in force.

⁶ First extension by Presidential Decree 17-A/2020 of 2 April 2020 (regulated by governmental Decree 2-B/2020 of 2 April) and second extension by Presidential Decree 20-A/2020, of 17 April (regulated by governmental Decree 2-C/2020, of 17 April.

⁷ Although not as severe as those that are possible under the “state of emergency”, which is the only one capable of temporarily suspending the exercise of constitutional rights, freedoms and guarantees

unemployed according to the official data provided by the national institute for statistics⁸. The unemployment growth was partly limited due to the adoption of partial lay-off rules by which the government-subsidized two-thirds of the salaries of employees of non-vital companies in case the employer decided to suspend normal activity, allowing employees to stay at home⁹.

The economic crisis and the governmental reaction lead to a decrease in tax revenues of the second quarter of the year. At the moment, the exact impact is not yet known. Anyhow, the latest available figures for the third quarter of 2020 show that tax revenues have bounced back, even if the numbers are yet far from the pre-pandemic indicators.

In general, the governmental reaction was focused on non-tax measures and subsidies¹⁰. Despite that trend, it has adopted meaningful measures in the tax field, both in the framework of direct taxes and in the field of indirect taxes. Many of the measures had a procedural nature and were enacted to be in force for a limited period of time.

The government is still discussing possible medium- and long-term reactions to the present situation. A recovery plan aimed at optimizing the use of EU funding has been bespoken to an independent expert. It was further adjusted by the government and, at the time of writing this report, is still under discussion and review. The first comprehensive set of mid-term reactions, the Portuguese State Budget for 2021 was presented, but – at the time of the writing of this report – is also under discussion at the Parliament.

The aim of this study is first to clearly identify the different profile of tax measures adopted in Portugal¹¹ as a reaction to the SARS-CoV-2/COVID-19 given the lack of comprehensive studies on this matter¹². Secondly, it aims to critically assess and review measures while providing recommendations on how to deal with this situation and this type of events in the future.

⁸ “Instituto Nacional de Estatística”. The overview is available on the following site: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&contecto=pi&indOcorrCod=0005599&selTab=tab0 (last access 25 October 2020).

⁹ Decree-law 10-G/2020, of 26 March 2020.

¹⁰ See, namely, Decree-Law 10-A/2020, of 13 March 2020, Law 1-A/2020, of 19 March 2020, Decree-Law 10-J/2020, of 26 March 2020, Portaria 85-A/2020, of 3 April 2020, Law 4-A/2020, of 6 April 2020, Decree-Law 12-A/2020, of 6 April 2020, Law 7/2020, of 10 April 2020, Portaria 91/2020, of 14 April 2020, Decree-Law 14-E/2020, of 13 April 2020, Law 10/2020, of 18 April 2020, Portaria 100/2020, of 22 April 2020, Decree-Law 20/2020, of 1 May 2020, Despacho 5545-C/2020, of 15 May 2020, Decree-Law 22/2020, of 16 May 2020, Despacho 5638-A/2020, of 20 May 2020, Portaria 121/2020, of 22 May 2020, Law 16/2020, of 29 May 2020, Decree Law 24-A/2020, of 29 May, Decree-Law 37-A/2020, of 15 July, Portaria 181/2020, of 4 August, Decree-Law 51/2020, of 7 August 2020, Decree-Law 53/2020, of 11 August 2020, Law 31/2020, of 11 August, Decree-law 58-B, of 14 August 2020, Law 43/2020, of 18 August 2020, Decree-Law 62-A of 3 September 2020, Decree-Law 78-A/2020, of 29 September 2020, and Decree-Law 87-A/2020, of 15 October.

¹¹ Our goal is to identify the main categories and the main lines of this measure. Given the expected readership of this study, it does not include a comprehensive description of the measures or of the connected compliance issues.

¹² One of the few articles referring to Portugal is I. M. Ramos & J. Rodrigues, Portugal’s Economic Response to COVID-19: Are We on the Right Path?, (1 May 2020), Journal Articles & Papers Tax Analysts (accessed 19 Oct. 2020). Besides, there is an article which includes a chapter on Portugal: T. Morales & J. Rogers-Glabush, Emergency Tax Measures in Response to the COVID-19 Pandemic: The Full Picture in Europe, 60 Eur. Taxn. 7 (2020), section 4.1.1.34

This study only takes into account data, materials and normative instruments published until 20 October 2020.

2. Direct tax measures

2.1. Introduction

Before addressing the direct tax measures adopted (which will be done in the next subsections), it is important to make a note regarding the tax measures that were not adopted. Even though they were expected, they were taken by other European countries and even proposed by international organisations.

During the “state of emergency”, Portugal re-instated border checks, and both entries and departures were limited to exceptional situations. Moreover, and for a longer period, circulation was discouraged and work from home strictly recommended (both by our as by other governments). This had an impact on the physical location of some individuals who got stranded in Portugal, being unable (or found it extremely burdensome) to return to their states of residency. The above-described situation may have tax impacts at several levels, the most significant as physical presence and permanence are tax-relevant criteria for both domestic¹³ and tax treaty law¹⁴.

Notwithstanding, there was neither any hard- nor soft-law indication on how the limitations on traveling should be taken into consideration for triggering the tax rules that are linked to a physical presence. As a consequence, tax authorities will be free to assess the situation, and likely we will see an increase of litigation which will be taking place at the international level since taxpayers, affected by overlapping (residence) claims of two different EU Member States, can now invoke the mechanism set in force by the tax dispute Settlement directive¹⁵.

Portugal adopted fewer substantive measures than comparable EU MS. In the next sections, we will cover those measures, starting with direct taxation and moving, then, to indirect taxation.

2.2. Personal Income Taxation

As mentioned, most of the economic support to individuals was granted through non-tax measures. For instance, there were no tax credits or extra deductions for healthcare workers. In what concerns those professionals, the government preferred to remove any caps

¹³ Namely for residency, art. 16 of the Portuguese Personal Income Tax Code (hereinafter PITC).

¹⁴ Residence article (normally art. 4) of the Portuguese tax treaty network.

¹⁵ Council Directive (EU) 2017/1852, of 10 October 2017 on tax dispute resolution mechanisms in the European Union, implemented in Portugal through Decree-Law 120/2019, of 19 September 2019.

to the remuneration of extra-work, allowing professionals wanting to work beyond their schedule the opportunity of increasing their final pay-check.

The most noticeable measure was an exceptional regime for the withdrawal of amounts invested in pensions saving plans¹⁶ which would otherwise only be possible – without triggering tax consequences – at the moment of retirement or after a specific age. The tax-free withdrawal was conditioned to the following circumstances: i) one could only withdraw amounts invested before 31 March 2020; ii) withdrawal would have to take place during the state of emergency; iii) the amount should be below 438.81 EUR¹⁷; iii) the withdrawer, or one of the members of the household, would have to be in one of the pre-defined situations of need (quarantine, prophylactic isolation or illness; absence from work to assist children or grandchildren¹⁸; unemployment or suspension of the work contract; or reduction of the weekly working hours due to one of the measures adopted by the government).

2.3. Corporate Income Taxation

One of the main concerns of the government was to strengthen the national health system. On the tax side, the government decided to promote donations to that sector. Accordingly, all donations (including in-kind donations) granted to public health institutions could be deducted from the CIT taxable base up to 140% of its amount and, furthermore, were exempted from stamp duty. This measure, first applicable to donations during the period of the state of emergency¹⁹, was extended to those made until 31 July 2020²⁰ and later on those made until 31 October 2020²¹.

Another measure regarded the payments that both companies and self-employed individuals have to make in advance of the tax due at the end of the year (“pagamentos por conta”). Such advance payments are computed on the basis of the economic indicators of the previous year. Given the reduction in economic activity, many of those became disproportionately higher than the amount of tax they were supposed to anticipate. Accordingly, the government decided to extend the cap for advance payments to cases beyond those foreseen in the CIT. Taxpayers were allowed to decrease the amount of the advance payment in case there was a significant (20% in some cases, 40% in other cases) of the 2020 turnover²².

¹⁶ “Planos-poupança reforma”. This regime was instituted by Law 7/2020, of 10 April 2020.

¹⁷ Which is the amount of the amount of the 2020 social support index (“Indexante de Apoios Sociais”), set by Portaria 22/2020, of 31 January 2020, in the framework of Law 4/2007, 16 January.

¹⁸ Since schools were closed since the 16th of March 2020.

¹⁹ § 1 of Order 137/2020 XXII, of 3 April 2020, which “extended” the interpretation of Art. 62(1)(a) of the Statute for Tax Incentives.

²⁰ Order 157/2020 XXII, of 4 May 2020.

²¹ Order 272/2020 XXII, of 27 July 2020.

²² Art. 12(2) to (8) of Law 27-A/2020, of 24 July 2020.

Following the understanding that smaller companies were hit harder than big ones, the government adopted several rules specifically applicable to them: i) a waiver for the 2020 advance payment; ii) an extraordinary tax credit to investment; iii) a special regime for losses resulting from corporate reorganizations, and; iv) a special regime to the carry forward of losses. We will deal with each one of these measures in the following paragraphs. Micro, small and medium companies, could (hereinafter MSM) benefit from a temporary waiver for the 2020 advance payment (“pagamento por conta”) and even request the reimbursement of the payments previously made insofar as they were not used to pay existing taxes and the amounts exceeded the foreseeable tax due for 2020²³. The same applied to the credits of special advance payments (“pagamentos especiais por conta”)²⁴.

To encourage economic recovery of MSM, the government instituted an extraordinary tax credit to investment (“crédito fiscal extraordinário ao investimento II”) for companies meeting certain conditions.²⁵ This consisted of a tax credit of 20% of the investment expenses²⁶ made in the period of one year (from 1 July 2020 to 1 June 2021) with a cap of 5 M EUR. Said credit can only be used against up to 70% of the tax due in 2020 and 2021, but remaining amounts (if existing) can be carried forward up to five years. Companies opting for this credit assume an additional compromise of not terminating any employment agreement over the following three years.

As a consequence of the decrease of the economy, the government considered that corporate reorganisations should be promoted beyond the normal terms. As such, MSM companies were also allowed to postpone any taxes that became due just because of the infringement of the rules concerning the deductibility of losses in cases of mergers, insofar as certain stringent conditions were met²⁷. In addition, the resulting (merged) company was exempted of the normally applicable surcharge on CIT (“derrama estadual”) for three years²⁸.

Finally, MSM could also benefit from a special regime for the carry-forward of tax losses (“regime especial de transmissibilidade de prejuízos fiscais”),²⁹ in cases they would meet the conditions to be considered companies facing financial trouble.

²³ Art. 1 and 2 of Law 29/2020, of 31 July 2020.

²⁴ Art 13 of Law 27-A/2020, of 24 July 2020.

²⁵ Art. 16 of Law 27-A/2020, of 24 June 2020 and Annex V. This credit would be available to companies with: i) with organised accounts; ii) whose taxable profit is not determined by indirect methods; iii) that have no enforceable tax debts.

²⁶ The eligible expenses are: i) expenses with development projects; ii) expenses with intellectual property.

²⁷ According to Art. 14 of Law 27-A/2020, of 24 June 2020. These conditions were: i) none of the merged taxpayers were created by demerger in the three years prior to the merger; ii) the main activity of the merged entities is substantially the same; iii) all taxpayers started their activity more than 12 months ago; iv) no profits are distributed in the three years after the moment of the merger; v) there are no special relations between the companies involved; vi) none of the companies have enforceable tax debts at the moment of the merger.

²⁸ Art. 14(3) of Law 27-A/2020, of 24 June 2020.

²⁹ Art. 15 of Law 27-A/2020, of 24 June 2020 and Annex IV.

3. Indirect taxes

3.1. Introduction

Surprisingly, there were not that many measures in the field of indirect taxes. As we will further illustrate in the following subsections, the government seems to have limited its action in this sector to the strictly indispensable measures required by the new context.

3.2. VAT

VAT was also used to strengthen support to the healthcare sector. Following the framework provided by the Commission Decision (EU) 2020/491 of 3 April 2020³⁰, the government adopted a temporary VAT exemption for the supplies of listed medical devices. This exemption was temporary and only valid from 30 January 2020 and 31 October 2020³¹. Initially, the exemption was limited to goods acquired by the State, public entities and not-for-profit entities. Later, this measure was extended to fire departments, charitable or philanthropic entities as well as entities devoted to answering to social needs³².

Still connected with health concerns but no longer restricted to the health sector, the government adopted a temporary extension of the VAT reduced rate³³ list of goods to cover facial masks and disinfection skin gel³⁴. Unlike the previous one, this measure applied regardless of who was acquiring. As facial masks and disinfection gel started to be of mandatory use in many daily situations, they became essential goods, a fact that provided the needed legitimacy for the inclusion of those goods on the reduced VAT rate list. The law included a sunset clause, being only valid until 31 December 2020. Notwithstanding, as the use of these goods becomes mandatory in an increasing number of spaces and situations, one should not exclude the possibility of an extension of the measure.

Besides the healthcare sector, also the not-for-profit sector was contemplated. For the duration of the state of emergency, the exemption for supplies to the State and certain not-for-profit institutions of goods for persons in need, normally extended to goods distributed to those persons in need, was extended to cases when those goods were kept in possession of those entities. This may have been done to allow these entities to stock

³⁰ Commission Decision (EU) 2020/491, of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020.

³¹ See Art. 5 of Law 13/2020, of 7 May, and Art. 3 of Law 43/2020, of 18 August 2020 (which extended the deadline from July to October 2020).

³² Despacho 8422/2020, of 3 September 2020.

³³ Currently 6% in mainland Portugal.

³⁴ The conditions that a product needed to fulfil in order to be considered as disinfecting skin gel were further defined in Despacho 5335-A72020, of 7 May 2020.

up, facilitating a better preparation for the months to come. Furthermore, the concept of “persons in need” was extended to those receiving health treatments³⁵.

Taking into account the importance of tourism, the government approved a reimbursement of 50% of the non-deductible VAT borne by companies active in the organization of fairs, congresses and similar events provided that certain conditions are met. The eligible expenses were: i) transportation, business and staff transportation, including tolls; ii) accommodation, food and beverages; iii) reception costs, including of non-staff members; iv) costs with immovable property and its equipment if mainly affected to those receptions³⁶.

3.3. Excises and other duties

Excises on cigarettes, cigars and other products subject to tobacco tax, are levied by means of a special stamp (“estampilha”) which is valid for a limited period of time. With the reduction of trade, there was the fear that these apostilles would lose their validity. Therefore, and only for those products, the validity of those stamps was extended until 31 December 2020. Furthermore, the government adopted special rules for the levy and collection of this tax in 2020³⁷.

Regarding alcohol tax, there was a new and special procedure allowing the production, storage and denaturation of alcohol outside of the designated warehouses (“entrepoto fiscal”). It also allowed adjustments to packing, labelling and commerce of alcohol products, insofar as the labelling was still adequate taking into account the special risks of the product³⁸. This procedure, originally in force until the end of the “state of emergency”³⁹ as extended until 31 December 2020⁴⁰.

In the above-mentioned cases of donations to health institutions, and as mentioned before, no stamp duty was levied until 31 October 2020.⁴¹

3.4. Surcharge on banks

One of the most emblematic measures (included on the second amendment to the state budget for 2020)⁴² was a surcharge on banks entitled “solidarity additional over the banking sector”⁴³.

³⁵ Order 122/2020 XXII, of 24 March 2020.

³⁶ Art. 2 and 3 of Decree-Law 54/2020, of 11 August 2020.

³⁷ Order 115/2020 XXII, of 17 of March 2020 and Portaria 350/2020, of 7 April.

³⁸ Portaria 89/2020, of 7 April 2020.

³⁹ Art. 5 of Portaria 89/2020, of 7 April 2020.

⁴⁰ Art. 1 of Portaria 105/2020, of 30 April.

⁴¹ Order 157/2020 XXII, of 4 May 2020 and Order 259/2020 XXII, of 16 July 2020.

⁴² Law 27-A/2020, of 24 July 2020.

⁴³ Art. 18 of Law 27-A/2020, of 24 July 2020, further described on the Annex VI to the law.

This surcharge is levied on a territorial basis on: i) credit institutions with “effective and main seat of the administration”, and on; ii) Portuguese branches and subsidiaries of credit institutions with seat in other countries⁴⁴. A rate of 0.02%⁴⁵ is applied on the amount: i) of the passive of the banks (*grosso modo*, the deposits held by a bank), deduced from the passive of own funds and of credits with special mandatory guarantees; ii) on the notional amount of off-balance derivatives⁴⁶. Those amounts are computed on the basis of the half-year averages of each month in what concerns the levy due for 2020, and on the basis of the accounts regarding the second semester of 2020, in what concerns the levy due for 2021⁴⁷. The law specifically stated that the amount is not deductible against the CIT taxable base⁴⁸. This surcharge entered immediately in force and, recently, the government proposed that it remains in force for 2022⁴⁹.

4. Procedural tax aspects

4.1. Introduction

As mentioned, the government’s reaction was quite swift, with the first measures being adopted on 9 March (merely one week after the confirmation of the first case). At that time, all the measures were procedural and were adopted as taxpayers and tax authorities became unable to perform their normal functions and obligations in a timely manner. That concern continued throughout the year, and it is still present.

This required the adoption of several non-substantive tax measures. We will deal with them along the next sections. For a better understanding of the measures, we have decided to group them into clusters: i) justification of non-compliance; ii) suspension of procedures; iii) postponements of deadlines for returns; iv) postponements of payments and payment in instalments; v) anticipation of reimbursements; vi) digitalization.

4.2. Justification of non-compliance

One of the first measures adopted concerns the opportunity for taxpayers or accountants of taxpayers to argue force majeure (“*justo impedimento*”) for non-compliance with procedural obligations⁵⁰ in case they were either infected or placed in prophylactic isolation.

⁴⁴ Art. 2 of annex VI of Law 27-A/2020, of 24 July 2020.

⁴⁵ Art. 5 of annex VI of Law 27-A/2020, of 24 July 2020.

⁴⁶ Art. 3 of annex VI of Law 27-A/2020, of 24 July 2020.

⁴⁷ Art. 21 of Law 27-A/2020, of 24 July 2020. The return was adopted by Portaria 191/2020, of 8 October 2020.

⁴⁸ Art. 10 of annex VI of Law 27-A/2020, of 24 July 2020.

⁴⁹ According to the proposal draft budget for 2021.

⁵⁰ §4 of Order 104/2020 XXII, of 9 March 2020 and Art. 14 of Decree-Law 22/2020, of 16 May 2020.

This measure was subsequently amended: i) on the one hand, to extend it to any tax obligations (not only procedural obligations); ii) to also cover cases when the taxpayer or its accountant could not transpose the border of a municipality or region due to special sanitary areas (“cerca sanitaria”); iii) on the other hand, to reduce the scope to cases where prophylactic isolation was determined by a health authority⁵¹.

4.3. Suspension of procedures

All tax enforcement and foreclosure procedures were suspended from 12 March until 30 June 2020, being applicable to (namely for the purposes of computation of deadlines) the regime for judiciary holidays⁵². The latter regime was also extended: i) to all deadlines running in favour of the taxpayer (namely in administrative and judicial appeals)⁵³; ii) to all instalment payment plans (however, the taxpayer could decide to continue to meet the payment deadlines)⁵⁴.

4.4. Postponement of deadlines for tax returns

Many of the adopted measures consisted of the postponement of deadlines for tax returns. The following deadlines were postponed: i) for the monthly and quarterly VAT returns (between April and August)⁵⁵; ii) for the annual CIT return (up to 31 August⁵⁶, further increased with a tolerance of 72 hours)⁵⁷; iii) for the simplified commercial information return (postponed first to 7 August⁵⁸ and then to 15 September 2020⁵⁹); iv) for the transfer pricing dossier (postponed until 31 August 2020)⁶⁰; v) for the submission of the overview of salaries and other income paid in the previous month (on the basis of which, namely, withholding taxes are computed)⁶¹; vi) for submitting the invoices issued in the previous month⁶².

⁵¹ §5 of Order 129/2020 XXII, of 27 March 2020 and Art. 14 of Decree-Law 22/2020, of 16 May 2020. Taxpayer would have to justify it on the basis of a declaration issued by the competent health authority.

⁵² Art. 1 and 5 of Decree-Law 10-F/2020, of 26 March 2020.

⁵³ Art. 7 of Law 1-A/2020, of 19 March 2020.

⁵⁴ Art. 1 and 5 of Decree-Law 10-F/2020, of 26 March 2020.

⁵⁵ See, namely, §1 of Order 141/2020, of 6 April 2020, §4 of Order 153/2020 XXII, of 24 April 2020, Order 229/2020, of 24 June 2020, v) of Order 296/2020 XXII, of 31 July 2020, and Order 330/2020 XXII, of 31 August 2020.

⁵⁶ §2 of Order 104/2020 XXII, of 9 March 2020.

⁵⁷ Last paragraph of Order 296/2020 XXII, of 31 July 2020.

⁵⁸ §1 of Order 153/2020 XXII, of 24 April 2020.

⁵⁹ §1 of Order 259/2002 XXII, of 16 July 2020 and iv) of Order 296/2020 XXII, of 31 July 2020.

⁶⁰ §2 of Order 153/2020 XXII, of 24 April 2020 and vi) of Order 296/2020 XXII, of 31 July 2020.

⁶¹ See, for instance, §5 of Order 153/2020 XXII, of 24 April 2020 and Letter i) of Order 386/2020 XXII, of 12 October 2020, extending the deadline expiring on the 10 of September 2020 to the 15 October 2020.

⁶² Letter ii) of Order 386/2020 XXII, of 12 October 2020, extending the deadline expiring on the 8 of September 2020 to the 15 October 2020.

The government approved a new model for the stamp duty declaration. To avoid further inconveniences derived from that novelty, it determined that it would only be applicable until 1 January 2021⁶³.

As in many other States, and following the adoption of Council Directive (EU) 2018/822⁶⁴, the deadlines for reporting arrangements under DAC6⁶⁵ were extended by six months⁶⁶. Accordingly, the deadline for reporting arrangements implemented or made available: i) between 25 June 2018 and 30 June 2020 was extended from 31 August to 28 February 2021; b) after 1 July 2002, instead of 1 to 31 July to 31 January 2021. For template arrangements (i.e. implementable without the customization) the reporting deadline is now 30 April 2021. This also required a postponement of the first moment for exchanging information covered by DAC6 which is now 30 April 2021 (previously it was 30 April 2020).

4.5. Postponement of deadlines for payments and payment in instalments

Many deadlines for payments were also postponed and payments in instalments were authorized or even promoted. We will deal with such measures under this section.

The following deadlines for payments were postponed: i) the deadline for VAT resulting from the monthly and quarterly returns due until June 2020⁶⁷; ii) the deadline for self-employed individuals to pay the first or second instalment of the PIT advance payment which was postponed to the deadline of the third instalment⁶⁸; iii) the deadline for the special advance payment (“pagamento especial por conta”) for CIT purposes⁶⁹; iv) the deadline for the first advance payment (“pagamento por conta”) and supplementary payment (“pagamento adicional por conta”) of CIT⁷⁰; iv) the deadline for the first advance payment (“pagamento por conta”) of PIT (pushed from 31 July to 31 August); v) the deadline for payment of stamp duty due from January until March (postponed until 20 April 2020)⁷¹

⁶³ § 1 of Order 121/2020 XXII, of 24 March 2020.

⁶⁴ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

⁶⁵ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

⁶⁶ Decree-Law 53/2020, of 11 August 2020.

⁶⁷ See, namely, §2 of Order 141/2020, of 6 April 2020, § 4 of Order 153/2020 XXII, of 24 April 2020, Order 229/2020 XXII, of 24 June 2020 and Order 330/2020 XXII, of 31 August 2020.

⁶⁸ Art. 12(1) Law 27-A/2020, of 24 July 2020.

⁶⁹ §1 of Order 104/2020 XXII, of 9 March 2020 and i) of Order 296/2020 XXII, of 31 July 2020 determined a postponement from 31 March to the 30th of June. A further temporary postponement was introduced by Law 29/2020, of 31 July 2020.

⁷⁰ §3 of Order 104/2020 XXII, of 9 March 2020, last paragraph of Order 258/2020 XXII, of 16 July 2020, and iii) of Order 296/2020 XXII, of 31 July 2020. The regime was further extended by Law 29/2020, of 31 July 2020.

⁷¹ § 4 of Order 121/2020 XXII, of 24 March 2020. In this case, postponement was conditioned to the fulfilment of all other tax obligations (including tax returns). The procedures regarding returns and payments were further clarified with Circular letter n. 90.029, of 3 April 2020.

and the one due in April and May (postponed until 25 May and 25 June)⁷²; vi) the deadline for the payment of social security contributions due within the first three months after the declaration of the emergency state; two thirds of the amount due could be paid between July and December in case of companies with up to 50 employees or companies, for companies with up to 250 employees or in the aviation and tourism and a reduction of 20% of their turnover, and for any companies in case their activity was legally suspended, in case they were non-for profit⁷³; vii) the deadline for the payment of taxes withheld regarding April and May 2020 (payment postponed to 25 May and 25 June)⁷⁴.

Payments in instalments were allowed in exceptional cases. During the second semester of 2020, CIT, PIT and VAT due amounts could be paid up to six instalments with no late interests due. This regime would be applicable only to companies and self-employed individuals, in the following circumstances: i) if the 2018 turnover was below 10 Million EUR, or; ii) if their activity started after 1 January 2019, or; iii) if their activity was suspended by law, or; iv) any taxpayers – regardless of meeting the previous conditions, in case their turnover at the month in which the payment had to take place suffered a decrease of 20% or more in comparison with the average turnover of the previous three months⁷⁵.

Payments of instalment plans for social security contributions were also temporarily suspended during the period in which the activity was legally closed⁷⁶.

The government adopted an exceptional regularization plan for tax and social security amounts: i) regarding facts occurred between 9 March and 30 June 2020, or; ii) regarding debts emerging in the same period⁷⁷. Besides allowing a deferral and payment in instalments, the government also allowed taxpayers in procedures of recovery or bankruptcy to include those debts in said plans.

Besides allowing, as in the above-mentioned cases, the taxpayer to apply for the payment in instalments, the government also determined that tax authorities should actively offer taxpayers, *ex officio*, the opportunity to create an instalment plan for PIT and CIT amounts, without the need of providing guarantees, in the following cases: i) the taxpayer does not owe any other taxes administered by the tax authority; ii) the deadline for voluntary payments has not yet expired, and; iii) the amount is due until 31 December 2020; iv) the debt is inferior to 5,000 EUR (in case of PIT) or 10,000 EUR (in case of CIT)⁷⁸.

⁷² §5 and 6 of Order 153/2020 XXII, 24 April 2020.

⁷³ Art. 3 of the Decree-Law 10-F/2020, of 26 March 2020.

⁷⁴ §5 and 6 of Order 153/2020 XXII, 24 April 2020.

⁷⁵ Art. 2 of Decree-Law 10-F/2020, of 26 March 2020.

⁷⁶ Art. 5 of the Decree-Law 10-F/2020, of 26 March 2020. Suspension followed the regime applicable to judiciary holidays.

⁷⁷ Art. 17 of Law 27-A/2020, of 24 July 2020

⁷⁸ See Order 354/2020 XXII, of 11 September 2020. The regime was further detailed by Despacho 8844-B/2020, of 14 September 2020.

4.6. Anticipation of reimbursements

To increase liquidity of MSM companies, the government determined that whenever the withholding taxes and advance payments in PIT or CIT or VAT assessments were higher than the amount effectively due (thus generating a credit), the taxpayer would be entitled to a reimbursement to be received up to 15 days after the corresponding request⁷⁹.

4.7. Further digitalization

Over the past years, there was a notable effort of digitalizing the tax administration, and, currently, it is virtually possible to comply with any tax obligation online. Immediately at the onset of the pandemic, the government stressed that the preferential means of contact with the tax authority should be by phone and on the tax portal⁸⁰. Moreover, the tax authority created a specific subsection on his portal, gathering all COVID-19 measures and related information⁸¹.

This effort was also visible in case of hybrid systems, such as VAT, that combines digital and paper features. To avoid compliance issues, and in what concerns taxpayers with limited turnover⁸², the government determined that, exceptionally, VAT returns could be submitted based on the data available on the taxpayer's e-portal, without the need of any accompanying documents. Any data that referred to physical documents could be submitted until July 2020 with a substitution declaration including a waiver of the applicable interest and penalties⁸³. Furthermore, and for a limited period of time⁸⁴, .pdf invoices could be treated as e-invoices (those issued from the tax authority portal)⁸⁵. This procedure was subsequently extended to the first quarter and to the March and April VAT returns⁸⁶ and to the May and June VAT returns⁸⁷.

⁷⁹ Art. 4 of Law 29/2020, of 31 July, being in force, under Art. 5 of the same instrument, until the end of the year until the end of the year in which the exceptional and temporary measures to respond to the SARS-CoV-2 epidemic and COVID disease cease".

⁸⁰ § 5 of Order 104/2020 XXII, of 9 March 2020.

⁸¹ Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/COVID_19/Paginas/default.aspx (last access on the 31 October 2020).

⁸² That would be the case of taxpayers with a 2019 turnover below 10 M EUR, taxpayers who activity started on or after 2020 and, finally, taxpayers which had re-initiated its activity on or after 1 January 2020 and whose turnover in 2019 was below 10 M EUR.

⁸³ §1 and 2 of Order 129/2020 XXII, of 27 March 2020.

⁸⁴ More precisely, until 20 December 2020, as determined by letter a) of Order 229/2020 XXII, of 24 June 2020 and vii) of Order 296/2020 XXII, of 31 July 2020.

⁸⁵ § 4 of Order 129/2020 XXII, of 27 March 2020.

⁸⁶ Order 153/2020 XXII, of 24 April 2020.

⁸⁷ Order 229/2020 XXII, of 24 June 2020.

5. International tax aspects

Portugal has not adopted any hard or soft instrument on international tax aspects. It should be noted that, even with the reinstatement of border controls, frontier workers were always allowed to circulate. Moreover, Portugal allowed both the return of their citizens as the return of anyone residing and working in Portugal, even if they were occasionally living abroad. However, as mentioned, border checks made it impossible in some cases and in others extremely burdensome (or risky) to move from the place where the taxpayer got shelter. And many non-resident taxpayers ended up being stranded in Portugal.

In what concerns the OECD guidance on tax treaties, Portugal is a member of the OECD and, as such, it is expected to follow those guidelines. There are no noticeable cases of divergence with OECD recommendations and positions. However, and at the time of writing of the report, there are no indications on whether such guidance will be followed or not. Although not strictly a tax measure, it should be noted that the supplementary budget⁸⁸ prohibited access to public subsidies to all companies located in a country with a more favourable tax regime⁸⁹. Which is part of a normative trend on creating limitations on commerce and any other commercial and financial relations with companies located in the so-called tax havens. Of course, this measure may be considered as infringing the free movement of capital, and it does not seem to be justifiable under any of justifications normally accepted by the Court of Justice of the European Union⁹⁰.

6. Post-CoViD tax measures

6.1. Introduction

This paper covers all measures adopted until the moment in which is being written. In what concerns future measures, the only indication that we have is the proposal for the 2021 State Budget⁹¹ which is currently being discussed at the Parliament. Even though not all of the tax measures present a direct link with the current health situation, the fact is that the SARS-CoV-2/COVID-19 pandemic has had a powerful influence in their design. In the following sections, we will cover those measures.

⁸⁸ Law 27-A/2020, of 24 July 2020.

⁸⁹ Art. 19 of the supplementary budget, Law 27-A/2020, of 24 July 2020. The list of countries located in a more favourable jurisdiction is currently listed on Portaria 150/2004, of 13 February 2004.

⁹⁰ On the issues related to the compatibility of measures that apply automatically against third-countries see J.F. Pinto Nogueira, *GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market*, 12 *World Tax Journal* 3 (2020), section, 4.4.3.

⁹¹ Draft budget Act, n. 61/XIV, presented by the government to the parliament on the 12 October 2020. Hereinafter we will refer to it as draft budget.

6.2. Direct tax measures

In what concerns personal income tax, the most interesting measure regards the slight decrease (on average 2%) of the withholding rates for individuals. This measure allows for an immediate increase of the net monthly amount of the wages without creating a permanent reduction of the underlying tax of PIT, whose rates are kept the same.

One of the most relevant proposals regards broadening the PE concept, which will now include offshore PEs and service PEs. It further aligns domestic CIT with the OECD MC 2017 in what concerns both preparatory and auxiliary activities, and the realm of the dependent agent concept. Finally, a limited rule of attraction is included by which the income generated by any sales of a company having a PE in Portugal will be considered as attributable to the Portugal located PE insofar as: i) the acquirer is a tax resident in Portugal; ii) the goods are identical or similar to those sold by the PE. This force of attraction is likely aimed at tackling online sales by multinationals but will not apply insofar as the company is located in a country with a tax treaty with Portugal.

The 10% autonomous taxation applicable to companies with tax losses will no longer apply to micro, small and medium companies under certain conditions. These companies, regardless of whether they registered losses, will be entitled to a new but temporary incentive for external promotion. Under this regime, companies may deduct 110% of the expenses incurred in 2021 and 2022 with external promotion (such as fairs and exhibitions abroad, acquisition of certain specialized services and promotion of internationalization). There is also a new incentive scheme for keeping employees, that can be invoked by companies that do not qualify as micro, small and medium companies insofar as they: i) are active in agricultural, commercial or industrial activities; ii) book profit in 2020. These companies will only benefit from direct subsidies and tax incentives if they keep the employment levels of 2020.

Entities located in territories with a more favourable tax regime or whose ultimate beneficial owner is located in those territories will no longer benefit from the extraordinary tax regimes created in the framework of the governments' reaction to COVID-19.

There are also several adjustments in an existing tax incentive for R&D expenses and the government requested a legislative authorization to create a new tax incentive for companies creating jobs in interior regions of the mainland territory.

6.3. Indirect tax measures

Most indirect tax measures refer to VAT. Some of the temporary measures created during 2020 see their time-span being expanded or become permanent. The government proposes to extend permanently the application of the reduced VAT rate for masks and skin disinfecting gel. Furthermore, the above-described exemption for supplies of certain medical equipment is extended until 30 April 2020.

There are new VAT benefits for universities, not-for-profit entities active in the field of science and technology and even to the Institute for the Conservation of Nature and Forests. The most emblematic measure is the creation of the VAT-voucher. Under this measure, VAT paid in certain services (such as restaurants, accommodation and cultural services) can be

converted into a voucher that the taxpayer can use for acquiring the same type of services in the following quarter.

6.4. Other measures

In the framework of the transfer of real estate tax, the government proposes extending the tax even to indirect transfers of immovable property. Accordingly, it is also considered covered by this tax the transfer of public limited companies whose asset value is derived in 50% or more from immovable property located in the Portuguese territory if said immovable property is used in commercial, industrial and agricultural activities.

7. Concluding remarks

The pandemic was a stress-test for governments throughout the world, being forced to react in a short amount of time with limited resources and without proper guidance or reasonable impact assessments.

Situations as this one we all have experienced should be taken into account when designing new features of the tax system, to ensure its adaptability to crisis situations. In the next examples, we will provide some illustrations on what can be corrected in the future or, on the other hand, of the best practices followed by the Portuguese government that could be considered as an example to other countries.

One of the issues faced was keeping the pace of all the developments. And ensuring that the measures would enter into force when they were supposed to. Sometimes, the government could not have full control of the legislative process and was doubtful whether a measure would enter into force in time. And, to avoid administrative action contradicting with future legislation, it issues administrative guidance. For instance, the State Secretariat for Tax Affairs felt the need to issue an order to ensure that a certain payment, postponed by a Supplementary budget, would not be requested by tax authorities in case the proceedings for the approval of that budget extended the deadline for that payment⁹². And this was expressly mentioned in the administrative order.

Despite the crisis situation, the pandemic has not abolished or suspended the Constitution or the Rule of Law (besides what was required by the exceptional state of emergency decree). Therefore, we were surprised to see an extension of the subjective or objective tax exemptions⁹³ by a mere order of the State Secretariat for Tax Affairs without any habilitating law or authorization by the State of Emergency Decree. Even if, in some cases, the

⁹² See Order 258/2020 XXII, of 16 July 2020, already described.

⁹³ Namely the already described extension of the VAT exemption for supplies to people in need, granted by Order 122/2020 XXII, of 24 March 2020 and whose subjective scope was even extended by a mere joint Despacho of three secretaries of State – see Despacho 8422/2020, of 2 September 2020.

extension was made under the cover of legislative interpretation. These are situations that, under the Rule of Law, should not be admissible – even if they are enacted in favour of the taxpayer. The legislative function is not to be exercised by an Order of the Secretariat of State.

Furthermore, we have noticed that some normative instruments mixed several topics which made its interpretation much more complex and reduces or eliminates the relevance of the “systematic” or “structural” element in normative interpretation⁹⁴. It would have been better if each legislative act was monothematic.

The past months were likely record months in terms of legislative and overall normative production. And many diplomas were amended several times in a limited period of time. In our view, it would have been better if the government, besides all the efforts in creating guides and brochures for the general audience, had decided to publish consolidated versions of the normative instruments. Despite the advantages of a brochure, there is nothing better for legal certainty than certainty about the law which is in force.

Despite the urgency, legislative measures should only be enacted when they have been or will be carefully thought. And in certain cases, we believe that more care should have been observed in legislative production. Some non-sufficiently revised wordings or by certain normative options (namely on deadlines⁹⁵ and on sunset clauses⁹⁶) will inevitably lead to legal uncertainty. Furthermore, some measures will lead to extra – and eventually avoidable – administrative costs (many administrative procedures and software systems have to be adjusted in a short amount of time)⁹⁷ and compliance costs (even when the measure

⁹⁴ For instance, Law 13/2020, of 7 May, included both VAT related matters and an extension of the maximum thresholds for the concession of guarantees by the State, the latter measure being a derogation to the State Budget Law, whose amendments follow a special procedure. Decree-Law 54/2020, of 11 of August 2020, mixed tax-relief measures for COVID-19 with VAT-relief measures for those affected by the 2017 fires in a specific region of Portugal. Law 43/2020, of 18 August 2020 mixed the extension of an exceptional VAT-relief with the temporary tax regime applicable to entities organising the UEFA champions league final in Portugal.

⁹⁵ For instance, instead of postponing the deadline by 3 days, Order 292/2020, of 31 July 2020, published on the very same day of the deadline for submitting the CIT annual return, granted a tolerance of 72 hours for submitting this declaration. Said novel wording will lead to uncertainties in what respects tax features connected with that deadline namely the computation of interests and fines.

⁹⁶ Art. 5 of Law 29/2020, of 31 July determines that the special tax measures implemented by that normative instrument will remain in force “until the end of the year until the end of the year in which the exceptional and temporary measures to respond to the SARS-CoV-2 epidemic and COVID-19 disease cease”. In our view, this may lead to a lot of uncertainty since it is not clear: i) if this requires or not an explicit declaration by the government, by the president or even by an international organisation, such as the World Health Organisation; ii) what type of exceptional and temporary measures have to stay in force for the validity to be extended; iii) if both temporary and (cumulatively) exceptional measures have to be in force, or if merely one of these type of measures have to be valid; in fact, it is not unlikely that many exceptional – but not temporary – measures will stay in force for several years as one cannot foresee that the virus will be completely eradicated soon; iv) if the relevant underlying health situation is the SARS-CoV-2 epidemic and COVID-19 disease (or if both of them cumulatively).

⁹⁷ For instance, Law 13/2020, of 7 May, introducing a VAT exemption for certain medical supplies, despite entering into force on the 8th of May, retroacted the exemption to the 31 of January 2020. This means that a significant number of returns, already processed, had to be revised and the VAT amounts re-calculated.

grants a postponement of a deadline, the taxpayer has to interpret new normative instruments and to adjust some routines and procedure).

In legislating, one should always take into account that any temporary tax measure has a “vocation for universality” regardless of whether it generates tax revenues or creates a tax advantage for taxpayers⁹⁸. And that some of the more perennial taxes were once mere temporary measures.

In some cases, the health situation is used as a justification to adopt measures with no⁹⁹ or limited connection¹⁰⁰ with the underlying situation. This extensive use of the crisis to adopt non-connected measures should be avoided in the future. Or, as an alternative, the government could use preambles (or even press releases) to explain a bit better why the crisis situation requires a new tax break for travel agencies¹⁰¹.

There are also several aspects in which the Portuguese approach deserves to be particularly praised. For instance, the inclusion of clear timelines or sunset clauses for temporary measures which will no longer be applicable *ipso iure* and regardless of any further intervention of the legislator¹⁰². Or the clear and graphically appealing instructions provided to taxpayers wanting to benefit from the flexibilization of payments¹⁰³.

One should also highlight and praise the efforts of the government and of tax authorities in making all the information more accessible to taxpayers, namely by creating the already mentioned specific sub-site for COVID-19 related measures, by the publication of summaries of measures or deadlines¹⁰⁴, and by creating a FAQ section on the tax authority website where repeated questions by taxpayers are listed and answered¹⁰⁵. Finally,

⁹⁸ In the subject matter covered by this study, see the two enlargements of the deduction of CIT of donations granted to people in need, in the extended interpretation provided to Art. 62(1)(a) of the Statute for Tax Incentives, by § 1 of Order 137/2020 XXII, of 3 April 2020.

⁹⁹ That is the case of the reimbursement of the 50% of the non-deductible VAT borne by companies dedicated to the organisation of fairs, congresses and similar events, under art. 2 and 3 of Decree-Law 54/2020, of 11 August 2020. It is undeniable that this sector suffered an impact due to the pandemic. However, there is no empirical evidence that the impact on this specific sub-sector was disproportionately higher than the impact on other tourism sectors such as hotels. Therefore, it is difficult to understand the connection of this measure with the pandemic, which is invoked in the preamble of this law as the reason legitimising this exceptional measure.

¹⁰⁰ For instance, the VAT exemption for medical supplies covered acquisitions made as of the 31st of January. It is difficult to admit that, as early as of the 31 of January 2020, health institutions were already massively acquiring medical devices for bracing themselves for the pandemic. Besides, most of the acquisitions covered by this exemption were already exempt which creates a doubt on the real addressees or goals of such a measure. Finally, the list of exempted good was quite comprehensive including, namely, any humidifiers, any devices for monitoring patients, any ultrasound portable scanners and any cotton buds.

¹⁰¹ See supra n. 100.

¹⁰² That is the case of the VAT exemption and extension of the reduced rate provided by Law 13/2020, of 7 May.

¹⁰³ Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/Manuais/Documents/Apresentacao_Flexibilizacao_Pagamentos.pdf (last access on 31 October 2020).

¹⁰⁴ See, for instance, Order 292/2020 of 31 July 2020.

¹⁰⁵ Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/COVID_19/Paginas/default.aspx under “Resposta às questões frequentes (FAQ)”.

one should praise the proactiveness required by law, ordering tax authorities *ex officio* to offer taxpayers the opportunity of paying in instalments if amounts were due within the deadline for voluntary payment¹⁰⁶.

All in all, the overall assessment is positive. Despite the secondary place granted to the tax system as an instrument of reaction against the health or economic crisis, there were several surgical changes that allowed some companies to avoid financial hardships, avoiding creating bankruptcies of taxpayers, which would only add more disruption to the one that the SARS-CoV-2/COVID-19 made inevitable.