

Portugal - New tax regime for collective investment undertakings

Operational Tax News

On July 1st, 2015, the new Portuguese tax regime for collective investment undertakings (CIU), approved by the Decree-Law 7/2015 of January 13th, came into effect.

This regime, which is applicable to all CIU organized under Portuguese law, sets forth that the majority of income obtained by a CIU is no longer taxed at its level, but rather at the level of its investors.

Therefore, under this new regime, Portuguese CIU are exempt from taxation on investment income, rental income and capital gains (except when sourced in a tax haven). On the other hand, any income paid by a Portuguese CIU to its investors is now taxed, usually by way of withholding.

As a result of this new regime, Portuguese CIU are now treated differently than non-resident CIU, in terms of Portuguese taxation, since that:

- Resident CIU are exempt from taxation on investment income, rental income and capital gains (except when sourced in a tax haven), from July 1st, 2015 onwards;
- Non-resident CIU remain subject to Portuguese withholding tax at a final rate of 25% on Portuguese sourced investment income and rental income (capital gains assessed by non-resident entities are usually exempt from tax in Portugal), despite the possibility of applying the reduced tax rates provided in tax treaties.

In light of the above, and considering the Court of Justice of the European Union ("CJEU")'s case-laws, namely Santander (C- 338/11), we believe that it is possible that the current Portuguese tax framework, which creates a different tax treatment between resident and non-resident CIU, might be in breach of the principles of freedom of establishment and free movement of capital of the European Union, since these were the conclusions of CJEU in the aforementioned case wherein a Member State applied withholding tax on income paid to non-resident CIU, when resident CIU were exempt.

Therefore, given that as a result of those decisions of the CJEU, the Member State involved was compelled to reimburse the tax withheld to non-resident CIU, we believe that there may be an opportunity for non-Portuguese CIU to try to claim for a refund of any tax withheld after July 1st, 2015, based on the same arguments.

In this context, we are available to support any non-Portuguese CIU in the process to claim these tax refunds, as well as to explore the best course of action to attain that goal.

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