

Portugal: Tax residence certification and entitlement to compensatory interest by taxpayers  
within a relief at source system

Decision of the South Central Administrative Court, proc. 07898/14, 10.09.2015

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## 1 – Introduction

Tax treaties need to be implemented in real life situations. They are worthless if taxpayers cannot claim benefits therein enshrined.

Application of treaties depends on the fulfilment of certain requirements. Some of them are established on the treaties, others stem from domestic law. In what concerns the latter, they vary immensely from country to country. Entitlement to the benefits of the same treaty may differ in accordance to which country is granting those benefits.

One of the most problematic requirements concerns subjective treaty entitlement. Treaties are not comprehensive in defining residence and entitlement relies mostly on what is established by domestic law. And when we look at different jurisdictions we see a huge diversity not only on the criteria to assess residence but also on the modalities to proof residence (in that or in other jurisdictions).

Many countries (and in particular, the “other contracting state”) make subjective treaty entitlement dependent on the possession, by the paying agent, of a tax certificate of residence issued or certified by the taxpayer’s residence tax authorities. This declaration confirms that a certain person is, under their domestic law, and for a given period, treated as a resident in their jurisdiction.

Certificates of residence are still, in many countries, the preferred way to prove the residency status. Nonetheless, in a world that mobility is increasing and that exchange of information is increasingly more effective, one may wonder whether these certificates continue to be the best option for these purposes.. Are they enough by themselves to grant access to a certain treaty? On the other hand, what effects should be associated to the lack of the certificate? If the taxpayer is, due to some reason, unable to obtain the certificate: should he automatically be excluded from claiming treaty benefits at source?

The case *sub judice* is an example of the difficulties faced by taxpayers claiming for treaty benefits at the source state in particular when failed to provide the paying agent a certificate of residence before the date of the payment. In a nutshell, the two questions that the court had to face were: i) is the taxpayer entitled to the restitution of the amounts that were unduly withhold at source by the Portuguese paying agent, even if the required

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certificates were not made available before the payment?; ii) is the taxpayer entitled to compensatory interest and, if so, since when should it be calculated?

## 2 – Facts of the case

### 2.1 Introduction

Our taxpayer is *Isabel*, national and resident in Portugal until December 2004. At that moment she informs the Portuguese and Dutch authorities that she moved her residence to the Netherlands (and appointed a tax representative in Portugal)<sup>2</sup>. This case refers to the years 2005 to 2009, period where she was already living and working in the Netherlands.

In the first half of 2005 she took some language courses at the University of Leiden and worked for a temporary employment agency (that withhold taxes in accordance with Dutch law applicable for resident individuals).

From September 2005 onwards, she was contracted by the Portuguese Ministry of Education to work as a teacher in the Netherlands<sup>3</sup>. It is not explicitly mentioned but we assume that she was teaching Portuguese to the soon our immigrants living in that country. In the course of the proceedings (and this has relevance for tax treaty purposes) she has provided evidence that she had not moved to the Netherlands in order to obtain this job<sup>4</sup>.

The income paid by the Portuguese government (Ministry of Education) was withheld at source in Portugal and at the same time taxed in the Netherlands. Isabel considered that under the applicable tax treaty, the amounts could not be withheld at source in Portugal and complained before the Ministries of Education and Finance and before the tax authorities.

The answer came in April 2006 (*nb*: about seven months after the start of her employment). The Directorate for international relations of the tax authorities informed her that: i) under the applicable treaty provision - Art. 19(1)(b) - she would not have to suffer any withholding tax in Portugal; b) nonetheless, and in order to obtain the reimbursement of the amounts previously withheld, she had to submit a specific return (mod 17-RFI).

On December 2006, the first “semi-good news” came (*nb*: more than one year and three months after the start of the employment): the amounts would stop being withheld at source if she presented translation of several documents she had previously delivered (which she eventually did). As nothing happened we assume that she kept complaining. On February 2007 (*nb*: we are now close to one and a half years of employment) she was informed that the ministry of education was still waiting for instructions from the Ministry of Finance about the procedures to be applicable to stop withholding at source. And only on January 2009 (*nb*: almost two and a half years after the start of her employment) they finally stopped to withhold.

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<sup>2</sup> At the time of the facts, the appointment of a tax representative was mandatory. This obligation was considered as incompatible with EU Law by the Court of Justice of the European Union. See PT: ECJ, 5 May 2011, Case C-267/09, Commission / Portugal, [2011] ECR I-3197, ECLI:EU:C:2011:273, ECJ Case Law IBFD. Currently, the appointment of a tax representative is merely optional.

<sup>3</sup> The first contract was signed on the 1st of September 2005 and the second contract on 18 September 2006, which was extended on the 1st of September 2007. All these contract and renewals were done for the full school year.

<sup>4</sup> From the data provided we assume that she moved mainly for personal reasons.

On May 2007, the Portuguese tax authorities requested the Dutch authorities for information about the residency status and whether the taxpayer had paid taxes in the Netherlands (as a resident) on the amounts paid by the Portuguese Ministry of Education.

As the amounts had been withheld, Isabel had to follow the procedure to obtain the respective reimbursements. She timely submitted the adequate forms: i) on May 2007, regarding the amounts withheld in 2006<sup>5</sup>; ii) on July 2008, regarding the amounts withheld in 2007<sup>6</sup>; iii) on March 2009, regarding the amounts withheld in 2008<sup>7</sup>.

On April 2009, she appealed to the first instance court. In the meanwhile, and less than one month after (May 2009), the tax authorities reacted to her reimbursement claims (*nb*: the first was submitted more than two years before, on May 2007) informing her that there were formal deficiencies, They pointed out, namely, that the forms had not been signed by Dutch tax authorities and did not describe accurately which remittance forms were used by the Portuguese Ministry of Education for the payment of salaries / withholding the amounts.

In September 2009 she sends all the documentation back, together with a statement from the Ministry of Education mentioning that the documentation requested by the Ministry of Finance simply does not exist. As it is not mentioned, we assumed that she was able to get the forms signed by the Dutch tax authorities. Still in September 2009, the legal representative of Isabel was notified that: i) Isabel would be reimbursed of the amounts withheld at source; ii) but she would not be granted any compensatory interest for the delays in the reimbursements. The latter was based on the fact that, for tax authorities, the complete documentation for the reimbursement had only been received in September 2009.

In October 2009 the taxpayer receives a cheque of EUR 9 903,39 regarding the amounts that had been withheld, but no interest or other compensation was paid.

## 2.2 Legal framework

### 2.2.1 Domestic Law

In Portugal resident individuals are taxed on their worldwide income, whereas non-residents are only taxed on the income sourced in Portugal<sup>8</sup>. Income derived by non-residents is normally subject to withholding taxes<sup>9</sup>. In case of salaries, the paying agent is obliged to withhold at source and send that money to tax authorities<sup>10</sup>.

If a tax treaty applies, then the paying agent may be waived from the obligation of withholding personal income tax (fully or partially). In those situations, the beneficiary of the income (non-resident taxpayer) must provide the paying agent with evidence that the requirements provided by the tax treaty are met, using a specific form<sup>11</sup>. To be noted that the

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<sup>5</sup> An amount of EUR 3 783,22.

<sup>6</sup> A total of EUR 4023,23.

<sup>7</sup> A global amount of EUR 916,87.

<sup>8</sup> See PT: Código do Imposto sobre o Rendimento das Pessoas Singulares – CIRC, 1989 [Personal Income Tax Code - PITC], Art. 15.

<sup>9</sup> Art. 71 and 100 *et seq.* PITC.

<sup>10</sup> Art. 100 of our PITC.

<sup>11</sup> The current version in its main features matches with the one that was required at the time of the facts. The Form is available in both Portuguese and English at the following website:

form in force at the time of the facts required, among others: i) full identification of the taxpayer; ii) identification of the stream of income that would be received from the paying agent; iii) identification of the paying agent; iv) identification of the legal representative of the taxpayer in Portugal; v) certification by the residence State tax authorities (they should sign and stamp that certificate).

If any of the above requirements is not met (and it may occur namely due to refusal of the residence State tax authorities of certifying a foreign form) or, even if they are met, in case the paying agent withholds the amount (namely because he is unsure of whether he should really withhold or not), the taxpayer has a two year period to claim the reimbursement.

This reimbursement procedure at the source state (of “unduly” withheld tax) should not be confused with the ordinary credit system, taking place at the residence State. This is merely the procedure to request for the repayment of amounts that, in accordance with the treaty, shouldn’t have been (totally or partially) withheld at source. To initiate the procedure, the taxpayer has to submit a specific form to the international relations’ service of the Portuguese tax authority<sup>12</sup>. Among others, this form requires<sup>13</sup>: i) full identification of the taxpayer; ii) identification of the (Portuguese resident) paying agent; iii) full identification of the income stream (description of the income; date of conclusion of the contract; payable date; gross income; tax withheld; tax to be repaid); iv) certification by the entity that withheld the payment (needs sign a statement certifying the number of the “remittance form” by which the withheld amounts indicated by the taxpayer were forwarded to the tax authorities)<sup>14</sup>; iv) identification of the legal representative of the taxpayer in Portugal; v) certification by the residence State tax authorities (they have to sign and stamp the certificate).

In practical terms, this procedure requires the taxpayer to following these steps: i) the taxpayer has to fill out the form, in 3 ways<sup>15</sup>; ii) he needs to remit the form to the paying agent and asking them to find out all the numbers of the remittance forms that were used (in case the income declared falls into different remittance forms, the taxpayer needs to re-do the forms in order to have them matching the remittance forms used by the paying agent); iii) the paying agent sends him back the form (sometimes a pre-paid envelope is needed, depending on the paying agent); iv) the taxpayer then needs to send the forms to his residence state tax authorities, who will take some time to certify the form (if they agree to do so); v) the tax authorities remits the forms to the taxpayer (depending on the country, sometimes a pre-paid envelope is needed); vi) finally the taxpayer needs to send the forms to the international relations’ office of the Portuguese tax authorities and wait for the decision; v) he is then notified whether the documents were correctly filled or of the amount of the reimbursement.

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[https://info.portaldasfinancas.gov.pt/NR/rdonlyres/6002B253-E9C3-4933-874C-1CB961169848/0/rfi-21%20\(2008\).pdf](https://info.portaldasfinancas.gov.pt/NR/rdonlyres/6002B253-E9C3-4933-874C-1CB961169848/0/rfi-21%20(2008).pdf)

<sup>12</sup> The current version of this form, is available at the following website (the previous one was Mod-17 RFI): [https://info.portaldasfinancas.gov.pt/NR/rdonlyres/0ECAC0EE-2355-427F-B793-7C341ECDB0D1/0/RFI-24%20\(2008\).pdf](https://info.portaldasfinancas.gov.pt/NR/rdonlyres/0ECAC0EE-2355-427F-B793-7C341ECDB0D1/0/RFI-24%20(2008).pdf).

<sup>13</sup> The similarities with the tax certificate of residence are evident.

<sup>14</sup> In practice, and as there is only one field for a “remittance form”, it means that the taxpayer has to submit has many forms as the remittance forms that have been used.

<sup>15</sup> One for the Portuguese tax authorities (international relations’ office), the second for the residence state tax authorities and the third for the beneficiary of the income (taxpayer).

Under Portuguese law it is possible to request a judicial injunction for the tax authorities to act in a certain way<sup>16</sup>. If the judge considers that the request is admissible, he may order the tax authority to react in a period that cannot be inferior to 30 days or superior to 120 days.

In terms of burden of proof, domestic law establishes that it should fall onto the party that requests a specific right<sup>17</sup>. Therefore and already adapting to this case, if the taxpayer claims a relief or a reimbursement, he needs to provide evidence that he or she is entitled to such relief or reimbursement.

Our general tax law stated that any administrative tax procedure should be concluded within six months. This term would be suspended in cases of delays imputable to the taxpayer<sup>18</sup>.

Compensatory interest (“*juros indemnizatórios*”) is due in cases of error imputable to the [tax] services that result in a payment of a higher amount comparatively with the one that was due<sup>19</sup>. These interest are namely due: i) if the legal term that for the restitution of taxes is not observed; ii) if the credit note is not issued up to the 30<sup>th</sup> day after the annulment of any tax act on the initiative of the tax authority; iii) if the revision of the tax act, as requested by the taxpayer, takes more than one year (except of the delay is not imputable to the tax administration<sup>20</sup>).

## 2.2.2 Tax Treaty Law

At the time of the facts, there was a tax treaty in force between Portugal and the Kingdom of the Netherlands<sup>21</sup>.

In what concerns treaty entitlement (objective or subjective) the treaty had no noticeable deviation. It should be noted that the treaty is absent regarding the need to present a tax certificate of residency (as normal, with any treaty)<sup>22</sup>.

Art. 19 (“Government service”), presented some deviation regarding the text of the models. The wording used on the treaty is the following:

“1.(a) Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or a political or administrative subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

- (i) is a national of that State; or

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<sup>16</sup> See PT: Código do Procedimento e Processo Tributário – CPPT [Tax Procedures and Process Code - TPPC], Art. 147.

<sup>17</sup> See PT: Lei Geral Tributária – LGT [Art. 74 of our General Tax law - GTL], Art. 74.

<sup>18</sup> Art. 57 GTL.

<sup>19</sup> Art. 43(1) GTL

<sup>20</sup> Art. 43(3) GTL.

<sup>21</sup> Signed on 20 September 1999, Treaties IBFD.

<sup>22</sup> See Art. 1 and 4 of the convention.

(ii) did not become a resident of that State solely for the purpose of rendering the services.

(...)

2.(a) Any pension paid by, or out of funds created by, a Contracting State or a political or administrative subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3. The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political or administrative subdivision or a local authority thereof.”

For these cases (“governmental services”) relief of double taxation is granted by the residence state by means of ordinary tax credit<sup>23</sup>.

### 2.3 Pleadings of the parties and procedures before this court’s decision

The first instance court<sup>24</sup> issued the following ruling: i) request the tax authorities to reimburse, in 60 days, the amounts unduly withheld at source by the Ministry of Education (if not done yet); ii) recognized the taxpayer the right to compensatory interest, computed since 15 October 2008 (for the tax years of 2005) and from 2 January 2009 (for the tax years 2006 and 2007).

In 2014, the “*Fazenda Pública*” appealed to the South Administrative Court. Firstly, noting that the full reimbursements had been paid already in 2009. Secondly, considering that no compensatory interest would be due since the requirements of which reimbursement depends were only met shortly before the effective reimbursement took place<sup>25</sup>.

According to the “*Fazenda Pública*”, for several year, tax authorities had seek to “clarify what would be the tax treatment applicable to the taxpayer, requesting information to the Dutch State or requesting for legal opinions to the [portuguese] center for tax studies”<sup>26</sup>. From this follows that “the tax situation of the taxpayer was not defined in the date when she submitted the requests and thus it could not be concluded, as stated in the appealed decision, that the tax authority had all the elements needed to grant the reimbursement from the moment they were requested”. Besides that “the request should be prompted by the forms approved by order of the Ministry of Finance, needed to be certified<sup>27</sup> by the tax authorities of the residence State and the taxpayer should attach the elements that allow to conclude that the reimbursement is legitimate”. Moreover, and even without the needed documents, tax authorities tried to ascertain the tax residency of the taxpayer by exchange of information, which was only received and treated in August 2008.

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<sup>23</sup> Art . 24 of the convention.

<sup>24</sup> The text of the decision is silent, regarding the date of the decision

<sup>25</sup> Within the period foreseen by the law for an administrative decision.

<sup>26</sup> Quotation from the text of the decision. This centre for tax studies is in charge, namely, of solving difficult matters that arise in day to day operations of tax authorities.

<sup>27</sup> In the sense of stamped and signed.

Besides that, other information explicitly required in the forms was only delivered on 09 September 2009. This would be the right moment to start computing the legal period for the legal period for the administrative decision. And this period was respected since the decision was issued in less than 6 months.

### **3 – Court’s decision**

The South Administrative Court rendered its decision on 10 September 2015 (process number 07898/14). In a nutshell, and as previously mentioned in the introduction, the two issues dealt with were: i) should tax authorities be requested to pay the amounts unduly withheld at source by the Ministry of Education?; ii) is Isabel entitled to any compensatory interest and, if so, since when should it be computed?

The first claim was easily upheld: the court noted that tax authorities had already reimbursed the claimed amounts (even before the date of the first instance court ruling) and thus the claim was no longer valid.

Regarding compensatory interests, the court overruled the first instance court and decided that the taxpayer was simply not entitled. Under our domestic law, compensatory interest is only due if one shows evidence that the procedure was not decided in due time (at the time of the facts, in six months) and that such delay was due to an error imputable to the tax authorities. To the court, this was not the case.

In this case, the burden of the proof (of the requirements for the reimbursement) falls on the taxpayer. And the right way to put forward this evidence is using the certificate approved by the government. This request had only been properly delivered by the 18 September 2009, date in which it was approved by the tax authorities. That approval was notified to the taxpayer on 22 September 2009 and the amounts effectively reimbursed in 1 October 2009. The six-month period for the decision has clearly not been exhausted.

According to the Court, in this procedure, one cannot see any error imputable to the tax authorities. Even if the correct fulfilment of the forms does not amount to a “substantive formality” of the taxpayer’s right to be reimbursed, it matters to determine the moment from which the tax authorities have all available data to decide (the beginning of the six-month term period). As the court states “in other words, without the certification by the residence state tax authorities of the residence status of the taxpayer and without the declaration of the resident paying agent amount the amounts withheld and delivered to the Portuguese state, the request for a waiver of the withholding is not complete and, thus, the deadline foreseen in Art. 57,º/1 of the GTL for the conclusion of the administrative tax procedure is not exhausted”. In fact, and as established in Art. 57/4 GTL, “the deadline for completion is suspended if the delay in the proceedings is caused by the taxpayer due to his lack of fulfilment of his cooperation duties’ - which is the situation under examination since the interested party has not observed the burden of proof that impeded on him (...). From this

one can conclude that the reimbursement at stake does suffer of any error or alike that can motivate the request to condemn the tax authorities in paying the compensatory interest”.

To sum up, the appeal of the “*Fazenda Pública*” was totally upheld. Tax authorities were not condemned to reimburse as they had already done so. Tax authorities were also not condemned to pay compensatory interest as the compensatory interest depends on an error of the tax authorities and, according to the court, there was no error and the term for the administrative decision had been fully respected.

#### 4 – Comments on the Court’s decision

The court had two questions and answered both on a very conclusive manner.

The first one is a no-question. In fact, the reimbursement had already taken place and there were documents providing sufficient evidence that the payment had been done.

The second one is not as straightforward. The approach of the court is very clear: under domestic law, compensatory interest depends on an error of the tax authorities and in this case one cannot see an error. As the administrative decision (for the reimbursement) was correct, the only error would be the omission in answering the request within the six-months terms set by law. But the term should only be counted from the moment when the form and info therein contained was delivered. In these terms, there is nothing to point out to the decision. Nonetheless, are some issues that we would like to highlight in this framework

The first issues concerns the value of the data requested in the forms. Although foreseen in domestic law, the content of the forms is determined and approved by and order<sup>28</sup> of the Ministry of Finance and it is not a simple translation of the requirements set in law. The form goes beyond what would be a “graphic” arrangement of the legal foreseen requirements.

In our legal system, these orders, circulars and similar administrative acts bind the (tax) administration but not the taxpayers. Therefore they cannot additional requirements or burden to the taxpayer *vis a vis* what is established by treaty or domestic law.

A careful reading of the forms shows the opposite. In our view, the form goes beyond what is set by law and is disproportionate. First of all, because the form requires data that tax authorities (already) have. For instance, tax authorities have, in their data system, information about the amounts withheld by taxpayer<sup>29</sup>. The taxpayer should merely identify the payment, without the need to provide all the connected data that is requested (as mention *supra*). In some instances, the information required assumes the nature of *probatio diabolica*. In our view, it is not admissible to condition the reimbursement to the provision of data that: i) is not in his sphere of knowledge; ii) that may be obtained by the tax authorities using their database. This is the case of the remittance number of the forms used by the Ministry of Education to deliver the withheld amounts to the Ministry of Finance. This case is

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<sup>28</sup> “Portaria” in Portuguese.

<sup>29</sup> Paying agents are obliged to provide information about the amounts withheld with the indication of the taxpayer to whom the amounts were withheld.

a paradigmatic example of this as, at the end, the Ministry of Education certified that these remittance form numbers did not exist.

Hence, we would be a bit more careful when concluding that the term for the decision may only be computed when the full form and certificate of residence is delivered. In our view, national courts could make use of the proportionality test in order to ascertain what requirements mentioned in forms are in fact adequate, necessary and proportional *ss* for the request. This is for sure more burdensome for the courts but would enhance the fairness of the decisions. If the court considered that a specific request is disproportionate for proving a certain substantive requirement, then it should consider the request as unlawful<sup>30</sup>. This would also have a spill over effect on our tax (and administrative) system. Once those requests were rejected in courts, soon the forms would be amended and the compliance costs would decrease, without a decrease of the control framework system of the tax authorities.

Another issue that raises some concerns is the request of signature and stamp of the Portuguese forms by the residence State tax authorities<sup>31</sup>. In our view, this request pursues two aims: i) ensuring that the source State<sup>32</sup> has sufficient evidence of the residence of the taxpayer; ii) ensuring that the residence State is aware that one of its residents is receiving income from Portugal. Again, we believe this request is simply disproportionate. In what concerns the source state interests, as they already ask a certificate of residence issued by the residence state tax authorities. Regarding the residence state interests, we believe that its protection is not an attribution of the source state and could never be used as a valid proposition to deny entitlements at the source state level. Moreover, and if the residence state as any suspicions regarding the transactions<sup>33</sup>, it can use one of the instruments for mutual assistance between tax authorities to spontaneously exchange information. As this case takes place inside the EU, and in case there is any suspicion, the source state is even obliged to spontaneously exchange information<sup>34</sup>.

Another example of disproportionate request is the one of providing the bank account number of the taxpayer. In our opinion it could be maintained in the form (to speed up the reimbursement procedure) but only with an optional nature<sup>35</sup>.

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<sup>30</sup> This is the case, for instance, of requesting the taxpayer's bank account, when the payment is done with a cheque.

<sup>31</sup> In other countries, there are additional procedures to certify the genuine character of the certificate such as the consular legalisation or the certification with an apostille in accordance with the Hague Convention abolishing the legalisation requirement for foreign public documents of 5<sup>th</sup> October 1961. See Kupalov, O., Medvedeva, M., Alexandrov, R., *Specific aspects of permanent residence (tax residence) confirmation*, 10 Tax planning international transfer pricing 4, p. 15-16.

<sup>32</sup> In this case, Portugal.

<sup>33</sup> For example, as any data that leads them to conclude that the taxpayer is not declaring the income sourced in Portugal in their residence state.

<sup>34</sup> See Council Directive 2011/16/EU of 15 February 2011, on administrative cooperation in the field of taxation and repealing directive 77/799/EEC, Art. 9(1). [[http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/evdeulaw/pdf/evd\\_directive\\_2011-16-eu\\_administrative\\_cooperation\\_taxation.pdf&q=2011%252F16%252FEU&hlm=altering&WT.z\\_nav=Search&olid=4934&title=+Directive+2011%252F16%252FEU+Administrative+cooperation+taxation](http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/evdeulaw/pdf/evd_directive_2011-16-eu_administrative_cooperation_taxation.pdf&q=2011%252F16%252FEU&hlm=altering&WT.z_nav=Search&olid=4934&title=+Directive+2011%252F16%252FEU+Administrative+cooperation+taxation)] and the transposing instrument in Portugal PT: Decree-Law 61/2013, of 10<sup>th</sup> May. The same was possible under the previous directive, in force at the time of the facts.

<sup>35</sup> In particular taking into account that till recently the reimbursements were being done with bank cheques, even in cases where the taxpayers had provided the full bank information.

Our domestic law also does not set out the requirements for foreign certificate of residence, which may raise questions of whether the certificate is or not valid for Portuguese tax purposes. In practice, we don't see this issue arising that often but nothing prevents it from being raised in the future<sup>36</sup>.

Finally, we should make a brief mention to the legal value of the forms. Currently it is settled case law that the Portuguese form for certifying tax residence is not an *ad substantiam* requirement of the taxpayers' entitlement to tax treaty benefits but merely an *ad probationem* requirement. According to case law, "the proof of the residence is a mere *ad probationem* requirement, as the certification of the residence is a mere act of recognition of the requirements for the conventions' benefits. The tax authority role is limited to the confirmation of those requirements and what truly matters is the effective verification of them, reason why the forms cannot constitute the sole means of proof to certify the residence. Thus, even if not matching with the current official model, if the certificates presented [by the taxpayer] are certified by the respective tax authority and certify the residence, they shall be accepted by tax authorities as an effective proof of the residence of the entities"<sup>37</sup>. Given the similarity of the forms (and of the rationale behind them) we believe that this is also applicable for the reimbursement forms. In simple terms, this means (in what concerns residence certification) that tax authorities may require them as the proper form to initiate the procedure but they can be substituted by any other means of proof that shows that the legal requirements are met. And failure to deliver them may not be, by itself, solid ground to refuse the taxpayers right or entitlement.

The *sub judicio* situation seems a bit paradoxical. On one hand it is recognized that the residence form is only an *ad probationem* requirements. One the other hand, only from the moment the forms are delivered (with all fields dully filled) one can start computing the term for the tax authority to decide. It would have been fairer to recognize the *ad probationem* nature of the form also in the context of the reimbursement procedure and start computing the term for the administrative decision from the moment the taxpayer provided tax authorities with the information needed to prove the requirements of which his right or entitlement

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<sup>36</sup> In other jurisdictions, taxpayers are often unsure about the validity of those foreign certificates and submit request from rulings, before considering those certificates as valid. In the case of Poland, and as mentioned by Kanczew "(...) polish tax regulations do not describe precisely what document must be provided, how long it is valid for, etc. Polish entities often have doubts regarding this issue – the best example may be the official website of the Ministry of Finance, which contains hundreds of rulings issued at the request of taxpayers who had doubts on how to interpret the regulations relating to the certificate.". See M. Kanczew, Certificates of Tax Residence – Practical Aspects Relating to Payments Made by Polish Entities to Foreign Contractors, 52 Eur. Taxn. 5 (2012), Journals IBFD, sec 7, p. 241. [[http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/et/html/et\\_2012\\_05\\_pl\\_1.html&q=%2522certificates+of+tax+residence%2522&WT.z\\_nav=Navigation&colid=4945](http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/et/html/et_2012_05_pl_1.html&q=%2522certificates+of+tax+residence%2522&WT.z_nav=Navigation&colid=4945)].

<sup>37</sup> PT: SAC, 22 June 2011, 0283/11 [<http://www.dgsi.pt/jsta.nsf/35fbbf22e1bb1e680256f8e003ea931/b89544e9bcee9b55802578c300567eb9?OpenDocument&ExpandSection=1>]. See also PT: SAC, 6 Feb. 2013, 0839/11 [<http://www.dgsi.pt/jsta.nsf/35fbbf22e1bb1e680256f8e003ea931/3e8a1d31268d9f0280257b21005698ad?OpenDocument&ExpandSection=1>] and PT: SAC, 19 Nov. 2014, 0141/14 [<http://www.gde.mj.pt/jsta.nsf/35fbbf22e1bb1e680256f8e003ea931/b598ac2f9254ba6e80257d9a0053461f?OpenDocument&ExpandSection=1>]. On this topic, but reporting on a lower instance court decision, see Sousa da Câmara, F., *Treaty overrides administrative rule, Portuguese Tax Court Says*, Tax Notes International, 26 April 2007.

depends. Otherwise, and in practice, the forms will continue to have – at least in this particular, and *ad substantiam* nature.

## 5 – Conclusions

When commenting Portuguese tax cases the first note goes invariably to the length of the procedures. The issue *sub judice* refers to a simple and straightforward situation of application of tax treaties. And this application was even requested to a public / governmental entity (*in casu*, the Portuguese Ministry for Education) which should be more sensitive in respecting legality.

Despite that, the taxpayer had to undergo an incredibly lengthy procedure, with the request of several documents, several data (some of them out of his sphere of knowledge) and – as mentioned in the decision – several translations. This is still a paper based process based on very repetitive tasks (the forms need to be done in triplicate and there is a limit of income streams that can be included in each form). The procedure is time consuming, not only for taxpayers but also for paying agents and tax authorities. Clearly, the costs associated with claiming treaty benefits are too burdensome in our country. And this may have a deterrent effect on the exercise of an economic activity in our country (if a resident in another jurisdiction is fully aware of the onerous procedures he has to face, he may refrain from exercising his activity in Portugal). And there is always the risk of not being able to overcome all the procedural obstacles, leading him to double taxation<sup>38</sup>.

Even nowadays, we experience several cases of paying agents (some of them even part of the state administration) that are not “comfortable” with immediately exempting the taxpayer in accordance with domestic law and prefer to refer the taxpayer immediately to the reimbursement procedure – even when the taxpayer provides *ab initio* all the required documentation and info. In other cases, these paying agents simply remit the question to the competent service (international relations service) of the Portuguese tax authority. Nonetheless, as this request does not fall within the concept of “binding ruling”, tax authorities are not obliged to reply and, in most cases we known, they effectively don’t reply. In these cases, the paying agent keeps withholding the amounts as there is no sanction for denying the immediate application of the treaty, even if the immediate application (and the immediate waiver) is foreseen by domestic law. Other systems face even worst problems<sup>39</sup>.

Even if our domestic law foresees a system of direct application of the treaty (“relief at source”) the above mentioned difficulties convert *de facto* this into a “refund system” (where refund is not the *ultima ratio* for the taxpayer but the rule), which goes against the express recommendation of the OECD in the commentaries to the Model<sup>40</sup>. Under this

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<sup>38</sup> Cumulation of the source withholding taxation and the residence (worldwide) taxation.

<sup>39</sup> For an overview of these issues see Y. Janitra Jaya, *Administrative Requirements for Claiming Treaty Entitlement: Problems and Solutions*, 70 Bull. Intl. Taxn. 5 (2016), Journals IBFD. [[http://online.ibfd.org/document/bit\\_2016\\_05\\_int\\_4](http://online.ibfd.org/document/bit_2016_05_int_4)]

<sup>40</sup> Para. 26.2 OECD Model: Commentary on Article 1 (2014), Models IBFD “A State can therefore automatically limit the tax it levies in accordance with the relevant provisions of the Convention, subject to possible prior verification of treaty entitlement, or it can impose the tax provided for under domestic law and subsequently refund the part of that tax that exceeds the amount that it can levy under the provisions of the

system, the taxpayer continues to face a procedural burden that, as we have evidenced in the previous section, is disproportional with the treaty entitlements he is claiming<sup>41</sup>. In our view, if courts started apply a stricter scrutiny of these forms and procedures, maybe some of the requests would be considered unlawful and, eventually, removed from these forms.

Much effort is done in what concerns the substantive dimension of treaties<sup>42</sup>. We believe that, at this moment, one should start looking as well to what can be done at the formal aspects connected with the application of the treaties. Especially in those cases where the substantive and procedural dimension come so closely related as in the residence certificates<sup>43</sup>.

One should surely not neglect the need for source state tax authorities to ascertain the residence of the taxpayer, as a pre-condition of treaty access. Nevertheless, the burden created should not go beyond what is strictly required for a sound determination of the residence. This is even more acute in the context of the European Union, where this burden may lead to an obstacle to market access and create a serious hindrance to cross-border provision of services and other activities<sup>44</sup>.

A first step is the creation of global taxpayer identification (or at least, a simpler way to identify taxpayers active in different jurisdictions). The positive experience of the VIES – VAT information Exchange System<sup>45</sup> would be the perfect inspiration for a global initiative. But the ideal would be the institution of a single taxpayer number, valid throughout the globe. Once this identification was instituted, the certification of residence would be much easier.

Within the OECD there was already a “certificate of residence project”, within the TaxXML Business Analysis Sub Committee / OASIS Tax XML certificate of residence working group. Comprising representatives from both industry and government tax authorities. In a presentation done on 2007, it was already “identified the certificate of Residence (CoR as a suitable initial project to explore Government-to-Government Interoperability” and that this could be implemented using XML language. The original idea would be to develop a test case with 3 jurisdictions (Canada, the United Kingdom and the United States), identifying consistencies and differences in order to reach a “common

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Convention. As a general rule, in order to ensure expeditious implementation of taxpayers’ benefits under a treaty, the first approach is the highly preferable method”.

<sup>41</sup> Sometimes the “direct cost” of the procedure may amount to a substantial part of the refund that the taxpayer would be entitled at the end.

<sup>42</sup> BEPS is only an example of many projects done in this field.

<sup>43</sup> According to Lang, “[v]ery often it is almost impossible to draw a clear borderline between substance and procedure: if somebody is entitled to a certain right under substantive law, he can only make use of this right if he fulfils the criteria under procedural law to do so. If there is no or not sufficient legal protection, entitlement to a right is completely meaningless. It is quite easy to provide examples of such situation in the tax treaty area: if a country requires a resident of a Contracting State to show a certificate of residence and this taxpayer is not able to come up with such a form because the tax authorities of this residence state refuse to grant him such a certificate, the withholding tax reduction he is entitled to, under the tax treaty, in the source state is completely worthless”. See Lang, M., *The Procedural Conditions for the Implementation of Tax Treaty Obligations Under Domestic Law*, 35 Intertax 3 (2007), sec. 1, pag.147.

<sup>44</sup> For specific examples of the problems created by residence certificates in the EU context see the report of the expert group of the EU, released on November 2015, entitled “Ways to tackle cross-border tax obstacles facing individuals within the EU”, having as general reporters Pasquale Pistone and Gerard Meussen.

<sup>45</sup> See [http://ec.europa.eu/taxation\\_customs/vies/](http://ec.europa.eu/taxation_customs/vies/).

model”.<sup>46</sup> Many other documents of this subcommittee can be found online<sup>47</sup>. There was even a final report, produced in 2007<sup>48</sup> but for reasons that we could not determine, those plans were not further implemented. This issue was then recovered en passant, in the context of the information consultative group on the taxation of CIV’s<sup>49</sup>.

It may be true that “the administrative aspects of the application of tax treaties is a subject that is considered by most to be boring and unchallenging”<sup>50</sup>. Maybe they are not thrilling enough to trigger a comprehensive action project (such as BEPS). But they surely have a real impact in the investors’ decision on expanding its activity on a certain jurisdiction. Thus, it should be one of the priorities of tax authorities and governments across the globe.

It is not sure when such a project will get wide consensus and will be materialized. Anyhow, and despite that, we believe that the new system needs to be fully based on (automatic) exchange of information and purely based on digital systems.

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<sup>46</sup> See presentation of Susan Smoter, delivered on 24<sup>th</sup> September 2007 and available at: <http://www.oecd.org/tax/administration/39548888.pdf>.

<sup>47</sup> Namely the conference call notes of 27 April 2005 (<https://www.oasis-open.org/committees/download.php/12473/CoR%20CC%2020050427.pdf>), 6 July 2005 (<https://www.oasis-open.org/committees/download.php/13655/CoR%20CC%2020050706.pdf>), 18 January 2006 (<https://www.oasis-open.org/committees/download.php/16334/CoR%20CC%2020060118.pdf>), 19 April 2006 (<https://www.oasis-open.org/committees/download.php/17868/CoR%20CC%2020060419.pdf>), 22 May 2006 (<https://www.oasis-open.org/committees/download.php/17367/CoR%20CC%2020060322.pdf>)

<sup>48</sup> See OASIS TaxXML TC – Certificate of Residence Analysis, version 1.0, 24<sup>th</sup> September 2007, available on [www.oasis-open.org/committees/download.php/25984/taxxml-cor\\_analysis\\_model-1.0-spec-wd-10.doc](http://www.oasis-open.org/committees/download.php/25984/taxxml-cor_analysis_model-1.0-spec-wd-10.doc).

<sup>49</sup> See OECD, Report of the informal consultative group on the taxation of collective investment vehicles and procedures for tax relief for cross-border investor on possible improvements to procedures for tax relief for cross-border investors, Center for Tax Policy and Administration, 12 January 2009. [<https://www.oecd.org/tax/treaties/41974569.pdf>]

<sup>50</sup> See Russo, R., Administrative Aspects of the Application of Tax Treaties, 63 Bull. Intl. Taxn. 10, , sec. 1, p. 482 (2009), Journals IBFD [[http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/bit/pdf/bifd100909.pdf&q=%2522Administrative+Aspects+of+the+application+of+tax+treaties%2522&hlm=altering&WT.z\\_nav=Search&colid=4943&title=Administrative+aspects+of+the+application+of+tax+treaties](http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/bit/pdf/bifd100909.pdf&q=%2522Administrative+Aspects+of+the+application+of+tax+treaties%2522&hlm=altering&WT.z_nav=Search&colid=4943&title=Administrative+aspects+of+the+application+of+tax+treaties)]