

THE ASSOCIATION OF GLOBAL CUSTODIANS

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4 March 2011

Exmo. Senhor Prof. Sérgio Vasques
Secretário de Estado dos Assuntos Fiscais
Ministério das Finanças
Av. Infante D. Henrique, 1
1149-009 Lisboa
Portugal

Re: Tax Relief Arrangements on Portuguese Securities

Dear Prof. Vasques:

We write on behalf of the members of the Association of Global Custodians (the "Association") to convey members' concerns regarding current tax relief arrangements in Portugal, which present challenges that materially affect non-resident investors' ability to obtain the due tax treaty entitlement. As you may know, the Association is an informal group of ten global banking institutions, listed on the letterhead above, that conduct significant custodian services and related asset-servicing functions on behalf of cross-border institutional investors worldwide, including non-resident institutional clients investing in Portugal.

The Association is aware that various other industry groups have submitted extensive comment letters to you concerning the material challenges non-resident investors encounter. Specifically, we reference a letter sent to you by the British Bankers' Association (the "BBA") on 19th August 2010, and for your convenience we attach a copy of that letter hereto. The Association concurs in the views and suggestions conveyed in the BBA's letter; for purposes of Association's members' comments here and for emphasis, we set out below the core requests for clarification and confirmation, as noted in the BBA letter, around the issues that most significantly impact Association members and their clients.

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(1) Relief at source form for treaty relief on dividends and interest (MOD 21-RFI)

- That any properly authorized agent/attorney may sign form MOD 21-RFI on behalf of the investor.

- Where not already in place, that investors may provide a single stand-alone tax office residency certification, to be used in conjunction with all forms MOD 21-RFI for a particular calendar year or ideally in lieu of such forms MOD 21-RFI.

(2) Reclaim form for treaty relief on dividends and interest (MOD 22-RFI)

- Clarification of the investor's ability to appoint an authorized agent/attorney to sign form MOD 22-RFI on behalf of the investor.

- Where such appointment has been made, that it be possible to direct any refund cheque or electronic payment to such party or the designated IBAN cash account.

- For payments to be made electronically, removal of the requirement to receive a separate certificate from the banking institution at which the payee holds a cash account. Ideally, other than the MOD 22 RFI form, no further documentation should be required.

- Supplemental to the comments set out in the BBA letter regarding these process issues, the Association proposes that, where not already possible, investors be permitted to provide a stand-alone certificate of tax residency to be used in conjunction with a non-certified form MOD 22-RFI or, ideally, in lieu of such forms.

(3) Treaty reclaims for investment / pension funds and trusts

- Confirmation that investors may appoint an authorized agent/attorney (as previously noted in above) and, where such an appointment has been made, that rejection notices will be directed to such party.

- Flexible application of the potential 15 or 30 day limitation to ensure that treaty relief is not lost where an investor/authorized agent/attorney is unable to respond to requests for additional evidence within the statutory period set forth under the relevant tax treaty.

- That there will be constructive engagement with the appropriate foreign competent authority with a view to resolving issues that affect the authority's ability to provide the further evidence sought by the Portuguese Taxation Authorities ("PTA").

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(4) Differentiation between Portuguese custodian banks and International Central Securities Depositories (ICSDs) in respect of documentation requirements and account structure

- Clarification as to whether the PTA is considering a change in its current position regarding the differentiation between ICSDs and Portuguese custodian banks.

(5) Register requirement and the consequent need to operate segregated accounts or provide transactional details for pooled account positions

- Clarification as to whether the PTA is considering a change in its current register requirement and the associated structuring of securities accounts and tax relief arrangements.

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In addition to the above requests, the Association would like to provide you with members' comments on the recent changes announced in the 2011 State Budget.

As you are aware, the Portuguese 2011 State Budget introduced a new tax rate of 30 percent on all income where such income is paid into an omnibus account held on behalf of "non-disclosed" beneficiaries. As a result, where the beneficiaries underlying an omnibus account are not "disclosed" for income purposes, then in substitution of the default withholding tax rate of 21.5 percent (or the respective Double Taxation Agreement (DTA) tax rate, as applicable), a 30 percent withholding tax rate will be applied. Multiple interpretations of this new law, especially in respect of operational procedures, have resulted in Portuguese custodians and withholding agents requiring varying and non-standardized documentation and information to accommodate the change. In the interests of standardization for all concerned -- i.e., the investor, the intermediary and the Portuguese custodian -- Association members suggest the PTA issue guidance detailing the procedures and documentation required to comply with the new regulations.

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The Association greatly appreciates the opportunity to provide the comments and requests set forth above and believes a follow up discussion with you of these issues in greater detail, potentially in coordination with the BBA, would be of considerable value.

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If you are amenable to such a discussion, please contact the undersigned as an initial matter together with potential dates and times for such a discussion.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dan W. Schneider". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dan W. Schneider,
Baker & McKenzie LLP,
Counsel to the Association

CC:

Sarah Wulff-Cochrane

Director

British Bankers' Association (BBA)

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Attachment

Prof. Doutor Sérgio Vasques
Secretary of State for Tax Affairs
Ministério das Finanças e da Administração Pública
Avenida Infante D. Henrique, 1
1149-009 Lisboa
PORTUGAL

19 August 2010

Dear Prof. Vasques,

Re: Tax Relief Arrangements on Portuguese Securities

The British Bankers' Association (BBA) is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms. Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy. The International Custody Tax Liaison Group (ICTLG) is affiliated to the BBA and is the principal forum for custody tax practitioners operating out of the United Kingdom¹.

During the period December 2006 to April 2008 the BBA entered into correspondence with the Ministério das Finanças e da Administração Pública to highlight various issues adversely impacting the provision of tax relief to foreign investors deriving income from Portuguese securities.

The BBA is appreciative that during and subsequent to that period, a number of measures were introduced to improve the situation. However, we believe that some issues remain and some further complications have been introduced, as detailed below. We would like to use this opportunity to bring these matters to your attention in the hope that you may be able to introduce further pragmatic measures to address them.

Relief at source form for treaty relief on dividends and interest (MOD 21-RFI)

The BBA notes that the issues in relation to this form have eased in the period following our previous correspondence although the BBA understands that Portuguese custodian banks have adopted different approaches when interpreting how the form is to be completed.

The BBA understands in particular that only the first form filed on behalf of an investor for a particular year is now required to be certified by the investor's tax office. However, issues remain in that this position is not formalised by the Portuguese authority and some local custodians hold that it is still necessary for each form to be signed by the investor.

While the instructions to the form indicate that it must be submitted to the withholding agent no later than the date that the obligation to withhold tax arises (i.e. the pay date), it is understood that in practice, and consistent with the Budget Law for 2008, it will be accepted

¹ ICTLG members include most of the major global custodians (Bank of New York, Brown Brothers Harriman, Citibank, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Northern Trust, RBC Dexia, State Street Bank & Trust Co. and UBS AG)

by the withholding agent up to the deadline for the withholding agent to pay the tax over to the Portuguese tax authority (i.e. end of the month of pay date + 20 days). The result is that the investor has a minimum of 20 days after pay date and a maximum of 50 days after pay date to provide the form to the withholding agent.

Where a signed and certified form for the initial income payment in a calendar year is not received in time, the certification on that form will still be considered valid for the purpose of any claims by the investor in respect of subsequent income payments arising in the year. However, the investor will be required to submit a new form MOD 22-RFI to recover excess withholding on the initial income payment. Any subsequent MOD 21-RFI forms that are signed but received by the withholding agent after the deadline will similarly result in the investor being required to submit further claims using form MOD 22-RFI.

The BBA has identified two continuing issues in relation to form MOD 21-RFI:

(1) Requirement for the investor or its legal representative to sign form

The form is required to be signed by the investor or a Portuguese legal representative appointed by the investor. The BBA understands that such legal representative would act as guarantor for the investor and represent the investor for all tax purposes in Portugal. Practically, foreign portfolio investors are highly unlikely to wish to appoint such a legal representative, not least because it would probably not be economically viable for them to do so. Conversely, most foreign portfolio investors will provide a power of attorney in favour of the intermediary that acts for them, authorizing the intermediary, *inter alia*, to file claims for tax relief on their behalf. However, based on the instructions for completion of form MOD 21-RFI, it is not clear whether such attorneys are able to sign such a form on behalf of the investor. In consequence, the investor may be unduly burdened by the obligation to complete the form when it has usually appointed an attorney to act for it in this regard. This in turn increases the likelihood of the deadline date covered at (2) below being missed.

(2) Deadline date for provision of form to withholding agent

As noted above, the form is required to be submitted to the withholding agent by no later than 20 days after the month of income payment - i.e. anywhere between 20 to 50 days after income payment. Where the initial form for a particular calendar year needs to be sent to the investor for signature and the investor's tax office for certification before being forwarded to the withholding agent, this deadline date will often be missed.

The BBA respectfully suggests that in order to alleviate these issues, the Portuguese authority consider allowing the following or, if already permissible, making it clear that the following are allowed:

- Any properly authorized agent/attorney may sign form MOD 21-RFI on behalf of the investor. (Currently, Portugal is virtually unique amongst countries of investment in potentially not allowing the use of general powers of attorney for this purpose.)
- Investors may provide a single stand-alone tax office residency certification, to be used in conjunction with all (signed but not certified) forms MOD 21-RFI for a particular calendar year or ideally in place of such forms MOD 21-RFI

Reclaim form for treaty relief on dividends and interest (MOD 22-RFI)

As with form MOD 21-RFI above, the BBA notes that the issues in relation to this form have eased in the period following our previous correspondence.

We also recognize and support the developments that have taken place to further automate the communication process with local custodians via access to a website. We believe that this may further enhance the process for the investors that we act for.

The BBA notes that there is one continuing issue in relation to form MOD 22-RFI, which is the requirement for the investor or its legal representative to sign the form. The points noted at (1) above in respect of form MOD 21-RFI – excluding the last sentence - equally apply in this regard.

In addition, we note that where refunds are made by cheque, cheques are starting to be sent directly to the investors as opposed to their local custodian or authorized agent/ attorney. This gives rise to two issues: Firstly, ICTLG members will track reclaim applications and reconcile refund payments as part of their service offering to investors. If payment is made directly to the investor, the ICTLG member and its Portuguese custodian bank are likely to continue questioning the status of the claim with the Portuguese tax office until such time as they are made aware that payment has actually been made. The second issue is that cheques sent to the registered address of large institutional investors may expire due to them not being cashed in time. The reason for this is that the portfolio investment activities of such investors may well be managed out of an entirely separate office. Moreover, the investor will often be unable to react to such correspondence as it has specifically appointed the authorized agent / attorney to act for it in this regard.

The BBA understands and welcomes the current modernization efforts by the Portuguese authority, aimed at gradually reducing the paper procedures and moving to an internet-based platform, which we hope will lead to a full electronic tax reclaim submission process (paperless) in the near future. Within this effort, and as already contemplated on the MOD 22 RFI form, investors are able to indicate an IBAN cash account where they intend to receive the tax refund. We understand that investors, by signing the MOD 22 RFI form, are already confirming they wish to receive the tax reclaim on the IBAN mentioned on said form. However, the Portuguese tax office has requested a separate certificate, from the banking institution where the investor holds a cash account, confirming the investor is the owner of the cash account. The account title must match the investor name. Such certification requirement may create a further issue in so far as certain entities may not have cash accounts opened in their names (for instance collective investment vehicles that are managed by a fund manager in whose name the account is opened), or, the investor may wish to delegate to the ICTLG member the tracking, reconciliation and processing of refund payments; this will require the funds to be paid to the ICTLG member, which will reconcile the funds and then pay the investor.

We respectfully suggest that the Portuguese authority consider adopting the following measures in order to remediate the current situation:

- Consistent with our earlier comments, clarify the investor's ability to appoint an authorized agent/attorney to sign form MOD 22-RFI on behalf of the investor
- Where such appointment has been made, direct any refund cheque or electronic payment to that party or the designated IBAN cash account.
- For payments to be made electronically, remove the requirement to receive a separate certificate from the banking institution where the investor holds a cash account. Ideally no further documentation should be required in addition to the MOD 22 RFI form. However, should it facilitate any necessary internal or audit controls, the local custodians or global custodians could provide a certification letter where

they confirm both their ownership of the IBAN cash account and their commitment and responsibility to credit the tax reclaim refund to the final beneficiaries or else return the funds to the Portuguese authority.

Treaty Reclaims for investment / pension funds and trusts

Following the publication of Circular 6/2009 on 6 April 2009, the Portuguese authority has required additional evidence in respect of foreign investment / pension funds and trusts to support their claims for refund of excess initial withholding under the applicable tax treaty. This involves the investor establishing that it is considered to be a legal entity for the purpose of the tax treaty and treated as a company and the beneficial owner for tax purposes. We understand that the completion of form MOD 22-RFI is sufficient for this purpose. Furthermore, the investor must demonstrate that it is fully liable for tax and not tax-transparent. We understand that a certification to this effect from the investor's tax office on headed paper (which may, by concession, be combined with the standard tax residence certificate wording) is necessary to satisfy this requirement. Finally, we understand that the provision of necessary evidence will cover all tax reclaims filed for the investor in the same year.

The BBA understands that where necessary the Portuguese authority will generally contact the investor's tax office directly to confirm the investor's eligibility for treaty relief. If that tax office fails to respond, the Portuguese authority will contact the investor directly in order to gather the necessary evidence of treaty eligibility. Where a reclaim application is rejected by the Portuguese authority due to the absence of additional evidence and the investor fails to respond to the Portuguese tax office within 15 or 30 days of such rejection, the entitlement to reimbursement is potentially lost. (This is subject to the granting of a possible 30 day extension upon request and / or possible administrative appeal.)

The BBA considers that the current situation is highly unsatisfactory for all concerned (the investor, the intermediary acting for the investor, the investor's tax office and the Portuguese authority. We respectfully suggest that the Portuguese authority consider adopting the following measures in order to remediate the current situation:

- Consistent with our earlier comments, accept the investor's ability to appoint an authorized agent/attorney and where such appointment has been made direct rejection notices to that party. BBA ICTLG members frequently encounter situations where the 15 or 30 day period has expired due to Portuguese tax authority letters being sent to the registered address of large institutional investors. As previously mentioned, the portfolio investment activities of such investors may well be managed out of an entirely separate office. Moreover, the investor will often be unable to react to such correspondence as it has specifically appointed the authorized agent / attorney to act for it in this regard.
- Apply the potential 15 or 30 day limitation flexibly, so that treaty relief is not lost where an investor or its authorized agent/attorney is unable to respond to requests for additional evidence within the statute period allowed under the relevant tax treaty.
- Work constructively with the appropriate foreign competent authority to resolve issues affecting the competent authority's ability to provide the further evidence

sought by the Portuguese tax authority. This should notably include the US competent authority, which we understand is not currently prepared to issue anything other than a standard "form 6166" residence certificate.

Differentiation between Portuguese custodian banks and International Central Securities Depositories (ICSDs) in respect of documentation requirements and account structure

During the course of our previous correspondence you had explained that ICSDs should be distinguished from Portuguese custodian banks in so far as ICSDs are prohibited from offering electronic settlement services to investors that are ineligible for exemption from withholding tax on bond interest and must be recognized by ministerial order.

The BBA had noted this explanation but had pointed out that this differentiation effectively encouraged foreign portfolio investors to hold their Portuguese bonds via an ICSD rather than a Portuguese custodian bank. While noting that this issue is perhaps principally of concern to the Portuguese custodian banks, the BBA had respectfully suggested that the Portuguese authority further consider whether the differentiation between ICSDs and Portuguese custodian banks is desirable from a policy, competitive and discriminatory perspective and, if not, whether similar facilities to those currently enjoyed by ICSDs should be granted to Portuguese custodian banks, to the extent that they are able to effectively restrict such facilities to investors that are eligible for exemption from withholding tax on bond interest.

The BBA would be interested to know whether the Portuguese authority is presently minded to alter its position with regard to the differentiation between ICSDs and Portuguese custodian banks.

Register requirement and the consequent need to operate segregated accounts or provide transactional details for pooled account positions

During the course of our previous correspondence the BBA had noted that the register requirement is virtually unique to Portugal and that it could be eliminated without detriment or replaced with more efficient and cost effective tax relief arrangements. The BBA had suggested, as an example, that foreign intermediaries should be able to open pooled accounts with Portuguese custodian banks for eligible investors with such accounts benefiting from tax exemption on interest under Portuguese domestic tax law and/or appropriate treaty relief on dividends or interest derived from Portuguese securities. The BBA had further envisaged that there should be no requirement to furnish forms or beneficial owner breakdown details in order to secure such exemption or treaty relief. Instead, the Portuguese tax authority would maintain the right to request retrospective beneficial owner breakdown details on a limited random sample basis in order to give reasonable assurance that these arrangements were being operated properly.

The Ministério das Finanças e da Administração Pública had however expressed concerns that the BBA proposal would lead to a considerable deterioration of current control standards and that it was not clear how banks would reconstruct retrospective breakdown details as this was only considered feasible if banks had previously anticipated the need for such information.

In response to these concerns, the BBA had provided further information in support of its proposal and had respectfully suggested that the Portuguese authority reconsider its position with regard to the register requirement and the associated structuring of securities accounts and tax relief arrangements in the light of that further information.

We believe that the BBA proposal is essentially in line with the "best practice" recommendations contained within January 2009 report on Possible Improvements to Procedures for Tax Relief for Cross-Border Investors issued by the OECD Informal Consultative Group and the associated Implementation Package issued in February 2010 as a public discussion draft by the OECD Pilot Group on Improving Procedures for Tax Relief for Cross-Border Investors. We also believe that it is compatible with the European Commission Recommendation on Withholding Tax Relief Procedures issued in October 2009.

The BBA would be interested to know whether, in the light of these developments, the Portuguese authority is prepared to reconsider its position in this regard.

The BBA very much appreciates your continued participation in this dialogue and believes that there may be considerable value to be derived from arranging a follow up meeting between representatives of the BBA and the Ministry of Finance and/or designated officials of the Portuguese authority. If you are agreeable to such a meeting, we would be grateful if you would let the undersigned know which date(s) would be convenient for this purpose.

We would very much like to work with you in this regard and remain at your disposal for any other information or assistance that you may require.

We look forward to hearing further from you in this connection.

Yours sincerely,



Sarah Wulff-Cochrane

Director

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