Portugal

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I – General questions

1 – Introduction

Since the emergence of the Welfare State in Portugal, this is probably the most challenging time to write about taxation of non-profit entities. In fact, the wide economic and social changes that our country has been facing led it to a series of reforms, as well as to a renewed debate about the role of the State in the economy. Although the present report is focused on the current status, we will nevertheless stress some of the features that are now being questioned as well as some options that could, in the short or medium run, be re-visited.

Defining the legal and tax status of non-profit entities and understanding the rationale beneath the tax system is always defying. In our case, the task become even harder, given the current financial and budgetary crisis and the casuistic changes recently introduced.

Specifically regarding non-profit entities, the option was not to introduce a general or coherent cut in the expenditures, i.e. maintaining the normative or axiological options while introducing some ceilings in the benefits. The decision (following the praxis of the past) was to substantially change some features at the same time that others were kept unscathed. Therefore, what in the beginning was a coherent system has gradually become a rather confuse and muddled set of norms. The present study aims to provide a clear portrait of missing links behind the existing rules, in order to allow the understanding of the rationale behind the system.

Given the scope of the study we will only take in consideration the tax treatment of income perceived by collectives (setting aside non-profit activities performed by individuals[2]) who are granted status of legal persons (excluding entities whose personality is only attributed for tax purposes"[3]) and, among them, those who derive benefits to people other than its members or associates[4]. We will take in consideration a wide range of taxes, including income

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[2] Notwithstanding their role in the implementation of non-profit goals. One good illustration was the institution of 2010 as the European year of the "volunteer activities promoting an active citizenship" – See EU Decision 2010/37/CE, of 27th November 2009 and Resolution 62/2010, 25th August 2010 of the Portuguese Council of Ministers.

[3] See Art. 15 et seq. of the General Tax Code ("Lei Geral Tributária", Decree-Law 398/98, 17th December).

[4] Therefore, cooperatives will not be covered.

taxation, consumption taxation and other major levies[5]. The State (direct, indirect and autonomous administration) or any assimilated entity[6] will not be taken in consideration.

2 – Activities covered (in the privileged status)

Portugal has always (somehow) recognized a special status for entities pursuing non-profit activities. Nevertheless, the entitlement to this beneficial treatment was not, as a rule, linked to the concepts of "charity" or "non-profit" entity. Moreover, there is no horizontal coherence, in the sense that the entitlement to tax benefits depends on different concepts and criteria, which vary in accordance with the tax taken in question. Therefore, it is not possible to provide a straightforward subjective definition or delimitation of the entities covered.

The best option in order to start delimiting our object is to focus on the activities that qualify as "charity" or "non-profit". This list is to be found both at a constitutional and infra-constitutional level. Said list, which logically and chronologically precedes any (tax) regulation, is afterwards also used in the realm of taxation, for the delimitation of some of the benefits.

A first set of activities is to be found in the Constitution[7]. These are the "social solidarity" activities, as mentioned in Art. 63[8]. Those include cases of decrease of livelihoods or ability to work (as in sickness, old age, widowhood, orphanage, unemployment). In other dispositions, the Constitution also provides for a reinforced protection to activities set up in support of the family, including those envisaged for the children[9], youth[10], elderly[11] and disabled[12]. Moreover, and still at the constitutional level we find a wide set of other social objectives, which can also be also pursued by private entities[13] such as the protection of

[5] For an integrated view of the these incentives in the framework of the incentives recognized by the Portuguese legislator see MARTINS, Guilherme, *Os Benefícios Fiscais: Sistema e Regime*, Cadernos do IDEFF n.º 6, Almedina, Coimbra, 2006 or, from a previous date but still with interest, COSTA, Amável, RAINHA, José, PEREIRA, Freitas, *Benefícios Fiscais em Portugal: Objectivos Económico-Sociais, Sistematização por Actividades*, Almedina, Coimbra, 1977.

[6] For instance, Art. 116 of Law 62/2007, 10th September grants to all public education institutions the same incentives as granted to the State.

[7] For those, the beneficial (also tax) treatment received is, in a certain way, an implementation of the constitutional mandate.

[8] Constitution of the Portuguese Republic – hereinafter CPR ("Constituição da República Portuguesa" – 1976).

[9] Art. 69 CPR sets, as a goal, the protection of the children "in their integral development and particularly against all forms of neglect, discrimination and oppression and against the use of authority in the family and other institutions".

[10] Including a suis generis protection of their use of "leisure time" - Art. 70(1)(e) CPR which has to be understood in its historical context.

[11] Art. 67(2)(b) and 72 CPR.

[12] Art. 71 CPR.

[13] According with the mandate provided in Art. 63(5) CRP.

health[14], promotion of the job market[15], cultural and environmental aims[16], promotion of (non-professional) sport[17], etc.

A wider but still key concept for tax purposes is the one of "public utility". This term is only found in ordinary legislation[18] and comprises all activities that pursue an "objective of a social interest or pursue the interest of the national community or of any region of municipality, in cooperation with the central or local administrations"[19]. In specific, it covers all activities aimed to the relief of physical needs (protection and promotion of the health, physical well-being, control of diseases and elimination of poverty), social needs (promotion of education, citizenship. culture, human rights, youth associations), economic needs (promotion of the entrepreneurialism, of innovation and economic development, protection of the consumer), environmental needs (protection of the environment), cultural needs (preservation of the cultural and national heritage) and the elimination of discrimination (either based on gender, race, ethnic background, religion or any other form of tainted discrimination)[20]. If we look in detail, the type of activities fitting in this concept is very wide and range from the protection of cultural heritage of a museum[21] to the promotion of activities for leisure of the public servants[22].

3 – Special form of legal entities required for non-profit status

On a subjective analysis, the aforementioned activities can be pursued by a wide range of collectives. All of them may – as we will see *infra* – qualify for certain tax benefits as long as they receive the appropriate recognition. They can receive very different names such as public utility entities, non-profit entities of public utility[23], non-profit organizations for cooperation and development, private collective non-profit persons[24], social economy entities[25], etc.

[14] Art. 64 CPR.
[15] Art. 58 CPR.
[16] Art. 73 and 66 CPR, respectively.
[17] Art. 79 CPR.
[18] Decree-Law 460/77, 7th of November, on "public utility entities" as republished by Decree-Law 391/200, of 13th December.
[19] Art. 1 of the Decree-Law 460/77, 7 of November.
[20] According to Art. 2 of the mentioned Decree-Law 460/77, of 7 November. The structure here provided is of our responsibility. The provision only provides for a list of activities, without following a specific order.
[21] See art. 47(3) of Law 47/2004, 19th August.
[22] See Art. 4(1) of Decree-Law 106/2008, 25th of August, instituting the "Inatel Foundation".
[23] Art. 5(2) of Decree-Law 352/1989, 13th October.
[24] See Decree-Law 186/2006, of 12 September, regarding the financing of non-profit entities in the field of health.
[25] Concept coined by art. 11 of Decree-Law 61/2011, of 6th July, on the exercise of tourism and travel agencies. The concept covers "associations, 'Misericórdias', private institutions of social solidarity, public institutes and other non-profit entities". These institutions are waived of fulfilling some of the conditions required in that regulation, when organizing touristic or travel activities.

In the following section we will analyze these entities under two different perspectives. Firstly we will consider the civil law requirements that have to be met in order for any given collective to obtain legal personality. In a second moment we will examine the main types, taking in consideration their aims and profile. The latter exercise is of crucial importance as for income tax purposes, sometimes the beneficial tax treatment relies on that classification.

3.1 – Legal status of non-profit collectives

In general, non-profit activities can be pursued by either associations or foundations[26]. Both of them find their core regulation in the civil code[27] and constitute the two alternative ways of pursuing, collectively, a non-profit aim[28]. Exceptionally, minor economic activities can be pursued, if they are found useful to the development of their activities. The CC grants a wide leeway for the statutes to define the structure and other rules of the organization. Therefore, it is in the statutes that we will find aim, seat, effective structure and even the duration of the entity (in the cases they are set for a limited period of time). Latter on, we will briefly detail the regime applicable to other entities that can also be used for non-profit purposes.

3.1.1 Associations

Associations are collectives formed by individuals or corporations in order to pursue an aim other than the economic benefit of its members. They are endowed with legal personality at the time of the deed. Statutes might define: i) the eligibility criteria and further conditions for exclusion; ii) the structure, as long as it entails a general assembly, an executive and a supervisory board; iii) the attribution of the organs, within the loose limits set by law; iv) the time-limits of its activity, if set for a limited time-period; v) any other subject, as long as it does not collide with imperative law.

Among them we can find some specific regulated types as employers and employees associations (and, in specific, trade unions) and association for the protection of stock market investors[29], sport associations and federations[30], sport clubs[31], sport promoting associations[32]. One good example is the Portuguese Olympic and Paralympics committee[33].

[26] We shall remind that we have excluded cooperatives from the scope of the study.
[27] Adopted by Decree-Law 47 344, of 25th of November (hereinafter CC).
[28] See Art. 157 *et seq*. of the Portuguese Civil Code
[29] Decree-Law 486/99, 13th of December, as amended by Decree-Law 357-A/2001, 31st October.
[30] Art. 14 et seq. of Law 5/2007, 16th January.
[31] Art. 26 of Law 5/2007, 16th January (but not the sports societies – Art 27 of the same law).
[32] Art. 33 of Law 5/2007, 16th January.
[33] Art. 12 and 13 of the afore-mentioned law.

3.1.2 Foundations

Foundations are legal persons formed either by a public deed (inter vivos) or a will (mortis causa), in order to pursue a social interest aim[34]. Legal personality is not immediately endowed by the deed or will; it's further required the approval by a competent administrative authority. Hence the approval of the deed is granted, it is no longer possible to revoke it; similarly, and without prejudice of imperative inheritance rules, it is not possible for the heirs to revoke foundation. Furthermore, the competent authority shall deny recognition if the aim is not socially relevant or if the assets allocated to the foundation are insufficient to pursue its aims (and, in this latter case, if there are solid grounds to consider that the insufficiency can be overcome).

In a limited number of circumstances (namely when the original aim was exhausted) it is possible to change the aim of the foundation, without it losing its legal personality. The dissolution of the foundation is regulated by law, which also sets the destiny of the foundations remaining assets. One particular type of foundation, which immediately qualifies as "private entities of social solidarity", is the social solidarity foundations ("fundação de solidariedade social")[35].

3.1.4 Religious legal entities

Any group of individuals professing a certain religion or belief may create a "religious entity", a collective that has legal personality and is entitled to certain civil and tax benefits. The core regulation of these collectives is now to be found under the religious freedom act[36]. Its constitution is free, provided that there is a positive "opinion" of the "religious freedom Commission" (which has to take in consideration the scope, activities, duration and other relevant factors). They also have to register under the "registry for the religious legal persons"[37]. Provided that they also pursue similar activities to those of "private entities of social solidarity" they can require its status and eventually benefit from the preferential tax regime[38].

Catholic entities are, despite the existence of a "Concordata" between the Holy See and Portugal[39], also covered by the Religious Freedom Act. Nevertheless, they might be constituted under canonical law and their recognition as legal entities depends only of written information transmitted by the competent bishop to the competent administrative supervisory authority[40]. This specific "concordata" regime applies only to legal entities[41].

[34] Art. 188 CC.
[35] See art. 77 et seq. of Decree-Law 119/83, 25th of February.
[36] Law 16/2001, 22nd June, Religious Freedom Act – RFA ("Lei da Liberdade Religiosa").
[37] See Decree-Law 134/2003, 28th of June.
[38] Art. 40 *et seq.* of the Decree-Law 119/83, of 25th February.
[39] See Parliament Resolution 74/2004 and the ratification by the President of the Republic 80/2004, 16th November.
[40] Art. 45 Decree-Law 118/83, 25th February.

3.1.5 "Irmandades da Misericórdia" or "Santas Casas da Misericórdia"

Rather than a subtype of religious entities, this is a specific type, a hybrid between a religious and a civil association. They are constituted in accordance with Canonical Law and are aimed to the relief of basic social needs, in the light of the "Christian moral and doctrine"[42]. Still today, they are responsible for key activities of our social security system, working in close cooperation with the State[43]. Most of them are also recognized as "private entities of social solidarity" and, for that reason, qualify for the corresponding tax benefits. As we will see, there are some tax benefits that are specifically addressed to these "Misericórdias".

3.1.5 Other legal forms

The previous sections covered most of the legal forms currently used. There are, nevertheless, some additional structures, product of a certain regulations of the past and that ended up not to be reformed into the new structures.

One example is the "*Casas do Povo*"[44], local entities aimed to develop social and cultural entities relevant for a specific circumscription, in cooperation with the state and local authorities. They qualify immediately as "public utility entities". Not so common but still existing are the mutual aid associations ("associações de socorros mútuos") providing assistance to its members in the fields of health, learning, work, death, etc[45]. In terms of support to humanitarian activities abroad, the most used legal form is the non-governamental entities for cooperation to development ("organizações não governamentais de cooperação para o desenvolvimento")[46] and the non-governmental entities for the protection of environment ("organizações não governamentais de ambiente")[47]. These non-profit private entities are designed for the conception, execution and support to social, cultural, environmental, civic and economic projects, namely in developing countries. Once they are regularly constituted, they have to be registered in the Ministry for Foreign Affairs, receiving immediately the status of "public utility entity".

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[41] With the new Concordata between Portugal and the Holy See, income received by priests in connection with their "spiritual munus" is no longer exempted – being now taxed as employment income – Art. 2(1)(b) of the PITC.

[42] See Decree-Law 118/83, 25th February.

[43] In a recent public statement, the Portuguese government announced its intention to hand back to the "Misericórdias" 15 hospitals that had been previously nationalized from them. The main justification was that "Misericórdias" had proven to be more efficient in the administration of health in comparison with state-run hospitals.

[44] Instituted by Decree-Law 23 051, 23rd September and now regulated by Law 4/82 of 11th of January.

[45] Although they needed to adapt their statutes – See Art. 94(2) of Decree-Law 119/83, 25th February.

[46] Its core regulation is in Law 66/98, 14 October "Statute of the non-governmental organizations for cooperation to development".

[47] See Law 35/98, 18th of July.

Recognized as well as non-profit entities are the "wine regional associations", in charge of ensuring the authenticity and quality of wines from specific regions and support its production[48].

At a political level we can highlight the political parties[49]. There are also some residual non-profit activities that, although being developed by registered legal persons, can hardly fall in the scope of charities, given its rather specific aim. The best example is given by the condominiums of urban buildings. Those entities are excluded from the scope of this study.

4 – Special rules for non-resident of international non-profit entities

Portugal is part of the European Convention on the Recognition of the Legal Personality of International Non-governmental Organizations[50]. Therefore legal personality of foreign entities is, provided that all the requirements are fulfilled, also recognized also in Portugal.

In general, non-resident non-profit entities are not subject to specific rules or have to observe increased requirements. Also, they will qualify for the exemptions and other benefits if they fulfil the conditions also set for resident companies. There is an exception regarding the personnel of those institutions: they will be granted an exemption of personal income taxation provided that: i) they are not mere technical or administrative staff; ii) they are residents in Portuguese territory; iii) there is reciprocity in this treatment.

Nevertheless, there are still mismatches in regulations, across different States and especially within the European Union. The identification of the problems emerging from those mismatches is already known to the doctrine for a long time[51]. Also, there are several international instruments that were set in force for avoiding those problems, as well as some

[48] See Decree-Law 212/2004, 23rd August regarding the "Comissões Vitivinícolas regionais" (also formerly the Decree-law 416/89, 30th of November).
[49] See Organic Law 2/2003, of 22nd August as amended and republished by organic law 2/2008, of 14th may.
[50] Council of Europe, European Treaty Series, n.º 124, 24th of June 1986.
[51] We can cite the work performed under the auspices of IFA, namely the second subject of the 23rd congress, "The possibilities and disadvantages of extending national tax reduction measures, if any, to foreign scientific, educational or charitable institutions"; the proceedings of a seminar in 1985, on the 39th IFA Congress "International Tax Problems of Charities and other private institutions with similar tax treatment", and; most recently the first topic of the 1999 IFA congress. Also in 1991 it was held in Taipei, a conference on the topic, sponsored by the East Asian Legal Studies Centre of the University of Wisconsin and that analysed the systems of several countries (China, Canada, Singapore, Japan, Korea, UK, the Netherlands and USA). The proceedings are summarized in "Conference on the Tax Treatment of non-profit organizations", Bulletin for international fiscal documentation, vol. 45, n.º 12, 1991, pp. 569-615.

non-implemented proposals[52]. It seems, though, still difficult to reach an international or even pan-European agreement about this topics.

[52] See Bater, Paul, "International Tax Issues relating to non-profit organizations and their supporters", in Bulletin for International Taxation, vol. 53, nº 10, 1999, pp. 452-465.

II – Income Tax

1 – Formal and material conditions to benefit from specific tax measures

There are different handles for non-profit entities to obtain a special tax treatment: i.e., a tax incentive[53]. For income tax purposes we shall distinguish between two sets of "beneficial treatment"; ii) the one granted to certain qualifying activities[54]; iii) the second, granted to income derived by "public utility entities"[55]. Each one of these clusters requires different formal and material conditions, which we will detail in this chapter.

1.1 Exemption for income derived from certain activities

The main incentive is granted by the Corporate Income Tax Code (CITC) to income derived from cultural, recreational and sport activities, which generally exempt from CIT[56]. One should note that this exemption is strictly limited to these activities; hence income obtained from any commercial, industrial or agricultural activity, even if connected or ancillary, will be taxed (this would be the case, for instance, of broadcasting rights, financial investments, etc). To avoid any doubts, our legislator decided to exclude income derived from the "Bingo" games, very popular among some (cultural or sport) collectives in Portugal.

The substantive conditions for the exemption are: i) to derive the income directly from the qualifying activities (cultural, recreational and sports); ii) not to distribute it; iii) absence of any (direct or indirect) interest, of the board members in the operational results of those activities. Moreover, there are two formal conditions: i) the entity shall have accounts and records of all their activities[57]; ii) the income should not exceed € 7500 per year[58].

1.2 Exemption for qualifying non-profit entities

[53] About the notion of tax incentive ("benefício fiscal") in the framework of the Portuguese system see GOMES, Nuno Sá, Teoria Geral dos Benefícios Fiscais", Cadernos de Ciência e Técnica Fiscal, Lisboa, 1991, pp. 12 et seq.
[54] Art. 11 of the Corporate Income Tax Code, hereinafter CITC.
[55] Art. 10 of the CITC.
[56] Art. 11 of the CITC
[57] In case of non-profit entities, this obligation is now further detailed in Decree-Law 36-A/2011, 9th March. For all the other entities, they are already subject to strict regulations regarding accounting and bookkeeping and, for that reason, this precept does not add anything.
[58] Art. 54 of the Decree-Law 198/2001, Statute for Tax Benefits - STB ("Estatuto dos Benefícios Fiscais"). Section 2 of this article provides also special rules for deduction of expenses in new infra-structures by sport clubs.

There are also in persona exemptions, granted to certain qualifying entities[59]: i) public administrative utility entities[60]; ii) private social solidarity entities and assimilated entities[61]; iii) mere public utility entities pursuing, exclusively or principally, scientific, cultural, charity, aid, beneficence, social solidarity or environmental protection aims.

To fully explain this exemption we will trail the following path: i) first we will examine the notion of "public utility", which covers all the previously mentioned entities; ii) then we will examine the material and formal conditions for all the exemptions; iii) lastly we will assess specific conditions for each one of three aforementioned categories.

1.2.1 The concept of "public utility"

Portugal as always recognized a specific civil status for some non-profit entities. This was previously defined in Art. 416 of the Administrative Code and is now regulated in Decree-Law 460/77, 7th November, regarding "public utility" entities. This is the over-arching concept of the exemptions system granted by the CITC.

Qualifying for the status are non-profit entities which actively "pursue an aim of a general interest or national, regional or local aims, in close cooperation with the central or local administrative authorities". They can be grouped in three categories: i) mere public utility entities; ii) administrative public utility entities; iii) private entities of social solidarity.

The first is the generic category, in which fall all "public utility" entities who don't qualify in the other two groups. Besides pursuing one of the listed aims, they have to petition the status (of public utility) to the government 5 years after their foundation. The other two are detailed by specific law.

1.2.2 General conditions for the exemption

1.2.2.1 Material conditions

The exemption is subjected to three main conditions: i) nature of the activities; ii) time-span for which the income can be spent; iii) connection of interests[62].

[59] See Art. 10 CITC.

[60] Law 64-B/2011, 30th December (State Budget for 2012) revoked all benefits granted to attached entities to these – See Art. 115 of the mentioned law.

[61] According with our Supreme Administrative Court, decision 812/08, 7th January 2009 (clarification in the 4th of March 2009), religious legal persons can qualify for the benefits of art. 10 CITC not because they are should be immediately qualified as "mere public utility entities" but as they can be assimilated to "private institutions of social solidarity" - letter b and not c of art 10(1) of the CITC. Law 64-B/2011, 30th December (State Budget for 2012) revoked all benefits granted to attached entities to these, which seems not covering these institutions as by jurisprudential interpretation they were considered assimilated ones – See Art. 115 of the State Budget for 2012, regarding the revocation.

[62] For all these conditions see Art. 10(3)(a)(b) and (c) of the CITC.

Public utility entities have to exercise, exclusively or predominantly the activities mentioned in their statutes and for which they received the public utility status (i.e. they have to fit in the list provided for in Decree-Law 460/77, 7th November). Regarding the time-span, one should note that at least 50% of the net income, included in the tax base, has to be spent in the four subsequent tax years. In exceptional cases ("justo impedimento") the Director-General for Taxes can provide for an extra-period. Furthermore, the board ("membros dos órgãos sociais") cannot have any (direct or indirect) interest in the operative results of the economic activities pursued.

If the "nature of the activities" or the "connection of interests" conditions are not observed, the exemption is lost counting from the taxable year in which the fact is assessed[63]. Failure to comply with the "time-span" requirement leads to tax the amount of the income that should have been used in the given period[64].

1.2.2.2 Formal conditions

The main condition is to be recognized as a "public utility" entity. To become one, the collective has to[65]: i) be a legal person[66]; ii) with 5 years of effective activities, and; ii) has to petition for that status, together with the required documentation, showing that the activities pursued are within the scope of the law. The recognition is granted by the government and afterwards registered and published in the Official Gazette. As an exception, some entities (given its scope of activities or its regulation) obtain directly the "public utility status"[67].

The main duties of these entities are: iii) to cooperate with the State and municipalities, with services or grating them access to their facilities; ii) to have regulated public accounting[68]; ii) to send annually the annual financial report to the government (presidency of the Council of Ministers)[69].

1.2.3 Specific conditions for the exemption

[63] See Art. 10(4) CITC.
[64] Art. 10(5) CITC.
[65] These requirements steam from Decree-Law 460/77, 7th November.
[66] We have already provided an overview on the legal persons that can pursue non-profit activities.
[67] V.g. the Non-Governmental Organizations for Cooperation and Development – See Art. 12 of Law 66/98, 14th October.
[68] Currently this issue is governed by Decree-Law 36-A/2011, 9th of March. According to it, entities over a certain threshold of business, even if part of the non-profit sector, have to follow certain regulations of the national accounting standards. They have, namely, to present consolidated financial statements, some financial statements such as the balance sheet, the income statement (by nature or functions), the cash flow statements and the notes to the financial statements (attachments). They are also submitted to statutory audit report. Cooperatives and other entities following the international accounting standards follow are excluded from the scope of this Decree-Law 36-A/2011, 9th March. Sports and related entities were already obliged to have public accounting *ex vi* art. 46 of Law 5/2007, of 16th January.
[69] See Art. 12 Decree-Law 460/77, 7th November.

Regarding the first group ("mere public utility entities"), they will only qualify for the CIT exemption if they pursue, exclusively or predominantly, scientific, cultural, charity, aid, beneficence, social solidarity or environmental aims. The scope of the exemption is afterwards recognized in an order ("*despacho*") of the Ministry of Finance[70]. In the Portuguese system you can find also some sub-categories of these entities, which the "mere sports public utility entity"[71] of which the sports federations[72] are the best example.

The second group includes entities that were previously listed in Art. 416 of the Administrative Code which, for some reason, have not been converted and do not qualify in the next category ("private entities of social solidarity"). This (now) residual category includes associations such as with humanitarian, aid, and other social aims (covering entities as humanitarian fire departments, etc). They receive immediately the status of "public utility" as long as they keep complying with the duties set off for the "public utility". In a certain extent, this works as a fade-out regime

The core "public utility" entities are the "private entities of social solidarity" [73]. Their aim is "give an organized expression to the moral duty of solidarity and justice among citizens". They have to adopt one or more from the following goals[74]: "a) support of childhood and youth; b) support to the family; c) support to social and community integration; d) protection of all citizens in situations of old age, disability and all other situations of lack or decrease of livelihoods or ability to work; e) promotion and protection of health, namely with preventive, healing and rehabilitating health care services; f) education and professional training; g) resolution of housing problems". They can, additionally, pursue some secondary profitable activities, as long as they are compatible with the original non-profit aims. Given the public nature of the aims pursued and the strict conditions set, they are immediately granted the status of "public utility entity".

The Statute of the Private Institutions of Social Solidarity[75] states explicitly certain conditions that have to be observed, namely regarding: i) legal form; ii) specific mandatory rules for the organs; iii) authorization for certain alienation acts; iv) supervision; v) dismissal of management bodies; vi) remuneration of the members of the management bodies.

The recognized legal types are: a) social solidarity associations; b) associations of volunteers for social solidarity; c) mutual aid associations; d) social solidarity foundations; e) "Irmandades da Misericórdia". There are specific instructions regarding how structure of the governing bodies, its attributions and the voting system. In general, the following acts have to

[70] See Art 10(2) CITC.
[71] Art. 19 and 20 of Law 5/2007, of 16th January.
[72] See art. 14 of Law 5/2007, of 16th January.
[73] See Decree-Law 119/83, 25th February, Statute of the Private Institutions of Social Solidarity. For an historic and comprehensive overview about these entities' regime see Teixeira, António, "As Instituições Particulares de Solidariedade Social – Aspectos da Evolução do seu Regime Jurídico", General Direction for Social Action, Center for Technical documentation, Lisbon, 1996.
[74] We can see a certain similarity with the concept of social solidarity, as it is described in our constitution.
[75] Decree-Law 119/83, 25th February. This regulation follows the conditions previously set in the Resolution 96/81 of the Portuguese government.

be authorized by the competent authority: a) acquisition of real estate; ii) alienation of real estate; iii) acquiring a loan. Competent authorities can also, at any time, inspect or audit the activities as well as, in certain cases (of harmful management acts), dismiss some of the management bodies. Any position in the management bodies has to be performed without any remuneration, except if, given the volume of the transactions or the complexity of the administration, it is required the extended presence of one or more members. In the latter case, they can be remunerated, provided that this is allowed by the statutes[76].

1.3 Other subjective exemptions

Inside or outside the tax codes we find a wide number of subjective exemptions granted to certain associations that, in a certain way, follow the previously discussed constitutional mandate.[77]. Some of them are automatic, other are dependent of a previous authorization.

Immediately exempt from taxation is all income derived from activities other than commerce, industry or agriculture, by: i) legal entities aimed to regulate a certain independent professions; ii) associations and confederations of employees and employers associations[78]. Also exempt is income derived by regional wine production associations ("comissões vitivinícolas regionais"), expressly because of its non-profit status[79].

We can also find some exemptions conditioned to an authorization. In this situation those granted to "family associations"[80], "casas do povo"[81], "associations of independent workers"[82], "migrant's associations"[83], "disabled persons' associations"[84] and "youth associations"[85].

We can also find some mixed subjective-objective exemptions. For instance, income derived from training activities granted to associates (in the framework of their statute's activities) is exempted whenever it is obtained by trade unions or other associations of

[76] All these rules are to be found in Decree-Law 119/83, 25th February.
[77] Fulfilling the constitutional mandate present in Art. 46 and 48 of the CPR.
[78] Art. 55(1)STB.
[79] Art. 52 of the STB and Order ("Portaria") 668/2010, 11th August. This exemption does not cover deposits and other capital income, which is taxed at a rate of 20%.
[80] "Associações de Família" – see Art. 6(g) of Law 9/97, 12th may (recognizing the same benefits granted to public utility entities).
[81] See Law 171/98, 25th June (allowing them to obtain the benefits granted to public utility entities).
[82] See Law 87/98, 31st December.
[83] Art. 4 of Law 115/99, 3rd August.
[84] In portuguese, "Associações de Pessoas Portadoras de Deficiência" – See art. 10 of Law 127/99, 20th of August.
[85] "Associações juvenis" – Law 23/2006, 23rd of June. Moreover there was also a conditioned benefit to international scientific associations or societies that set their headquarters in Portugal, but it was recently revoked with the State Budget for 2012 (former Art. 57 STB)

independent workers[86]. In this same category falls income derived from the exploitation of school canteens, as long as this is done by the parent's associations[87]. Even though both activities have a commercial nature, and we can find market players offering the same service, the strong connection between the pursuance of the non-profit activities' aims and those activities determined the concession of the benefit.

3 – Tax treatment of income from purely non-profit activities

If the conditions mentioned in the previous sections are observed, the income is exempt. If not, there are still some incentives and special rules that might be applicable, regarding both the tax base and the tax rate[88].

The taxable base of non-profit entities is not computed as normal companies. If they do not exercise, primarily, commercial, industrial or agricultural activities, their taxable income is given by the sum of the net income of the different categories that would be considered for personal income taxation together[89]. That sum is, then, subject to a special rate of 21,5%[90]. A special reduced rate of 20% was applicable to private education entities integrated in the national education was recently revoked, so if they are not entitled to a more beneficial rate (because they are framed under other subjective exemption conditions), they will be taxed at the normal rate[91].

4 – Tax treatment of business or investment income used to support non-profit activities

Any costs (including depreciations, amortizations and rents of real estate) regarding nurseries, kindergartens, canteens, libraries, schools and other "social utility" equipments (recognized as such by the Directorate General of Taxes) is considered to be a deductible cost. These deductions are conditioned to the following requirements: i) to be made in benefit of that entities' personnel or retirees or family; ii) to be general; iii) not to have the nature of personal income or, having it, are specifically attributable to particular beneficiaries[92]. If

[86] Art. 55(2) STB.
[87] Art. 55 of the STB.
[88] These special rules do not apply to cooperatives.
[89] Art. 3(1)(b) of the CITC.
[90] Art. 87(5) CITC. This rate will be also applicable to the income derived from Bingo, as long as explored by "public utility entities" according with the interpretation of the tax administration in Despacho 330/89, of 02nd of January 1989.
[91] Art. 56 STB
[92] Art. 43(1) CITC.

related to nurseries or kindergartens made for the benefits of the workers relatives, the expenses are computed for 140% of its value[93].

The amount spent by companies in social vouchers, i.e., in vouchers granted to employees aimed to the payment of nurseries and kindergartens – as long as they are "reasonable", can be also taken in consideration as costs. The amount of the maximum deductibility takes in consideration the size of the employer[94].

Corporate entities can also deduct from their taxable profit any costs regarding membership fees paid to employers associations. Those are to be considered in 150% of its value, till a maximum of 2‰ of their turnover[95]. Even if though nothing stated in the law, a ruling from the tax administration accepts the deductibility of fees paid to non-residents entities[96]. Regarding investment income used to support non-profit activities, there are no specific provisions worth mentioning.

5 – Tax treatment of remuneration or reimbursement of expenses for employees, administrators and voluntary collaborators

Reimbursement of expenses is possible, as long as it is allowed by the entity's statutes. Volunteers are even entitled to reimbursement of expenses if it is made in the context of an activity organized by the "promoting entity", provided that said is: i) urgent; ii) justified; iii) not exceeding the parameters eventually set by that entity[97]. Reimbursements receive always the same tax treatment: they are not considered in the tax base if they don't exceed the ceilings defined by law[98].

In what concerns remunerations, we should distinguish three categories. Employees of non-profit entities are taxed as any other employee. Administrators, in the restricted cases where they are entitled and effectively receive remuneration, are taxed in the framework of employment income. Volunteers, although benefiting from a special status[99], are not entitled to any remuneration[100].

6 – Tax Treatment of Gifts, contributions and public subsidies

[93] Art. 43(9) CITC.
[94] See Art. 2 and 10 of Decree-Law 26/99, 28th January.
[95] Art. 44 CITC.
[96] See "Infomação Vinculativa" 505/05, of 20th July 2005.
[97] Art. 7(1)(j) of Law 71/98, 3rd November and Art. 19 of Decree-Law 389/99, 30 September.
[98] Art. 2(3) a contrario PITC, "Portaria" 1553-D/2008, 31st December and Decree-Law 137/2010, 28th December.
[99] Law 71/98, 3rd November and Decree-Law 389/99, 30th September.
[100] Art. 3 of Law 71/98, 3rd November.

6.1 Contributions and public subsidies

As we have already mentioned, the tax base of non-profit entities is determined applying the rules for individuals. Within the latter tax, it is excluded from the tax base any subsidies for maintenance as well as other amounts needed to cover extraordinary expenses regarding health and education, paid or attributed by the Regional Centres of Social Solidarity[101]. Therefore contributions and other public subsidies received through these centres will be, immediately, excluded from taxation.

In general, transfer of gifts or contributions from one tax exempt organization to another will follow the general rules. Nevertheless, capital and other gains are excluded from the tax base if they are derived from gratuitous transfers who are, at the same time, subject to stamp duty[102].

6.2 Tax treatment of gifts, contributions and public subsidies in the tax base of the non-profit organisation

The regime regarding donations is, nowadays, all contained in the Statute of Tax Benefits[103]. This uniformization of regime renders its understanding much more clear as there is now a single and coherent policy towards donation.

For tax purposes, it is considered as a donation amount, in cash or kind, attributed to private or public entities, granted without any monetary or commercial return[104]. Also, according with our Supreme Court, also amounts attributed to foundations will be framed under that notion (they have to be seen as "liberalities")"[105].

In the context of the recipient, qualifying donations are considered net worth variations, but they are excluded from income tax as long as they fall under the scope of stamp duty tax[106]. And, as we will see *infra*, this would be the case. Moreover, although subjected, those amounts will be exempt from tax.

[101] See Art. 12(4)Personal Income Tax Code (PITC)
[102] See Art. 12(6) of the PITC. This duty, as we will see *infra*, absorbed most of the inheritance and gift tax rules. This aims to prevent double taxation.
[103] Till the end of 2011 it was also in force the Scientific Patronage Act Law 26/2004, of 6th July, which was revoked by Art. 147 of the State Budget for 2012.
[104] Art. 61 of the Statute for Tax Benefits - hereinafter STB ("Estatuto dos Benefícios Fiscais").
[105] See Decision 23238, of 26th October 1995, of the Lisbon Central Administrative Court. Obviously, and as we will see latter on, the specific treatment of those amounts will differ, in accordance with several variables.
[106] As already mentioned.

8 – Special Rules for the accumulation of income and/or wealth in non-profit organizations

In general, Portuguese law leaves up to the non-profit organization the decision about the management of the income or wealth accrued by them. The most noticeable exception is to be found in corporation income tax law. At least 50% of the income obtained by public utility entities and exempted from corporate income tax has to be used till the 4th year following its reception[107]. Failure to do so leads to taxation of those amounts in that 4th year[108]. A contrario, this means that these institutions are absolutely free to decide about the time-span of the allocation of the 50% of the tax-exempted income, which grants them a wide margin of discretion. In our opinion too broad as, at the end, the entities can use this just as investment income and delay its use for effective social purposes (reason why the exemption was, in the first place, granted).

9 – Tax Treatment of the liquidation of a non-profit organization

There are no specific rules for non-profit organizations. The code simply states that tax rules set for the liquidation of societies should be applicable, "with the needed adaptations", to the liquidation of other entities that are not societies[109]. There is also no applicable case law or administrative practice.

In the few cases that the entity is not exempted from income tax, assets distributed (in accordance with civil law regulations or statutes) should be considered in their tax base by market prices[110]. Other cases are specifically regulated: in cases of dissolution of humanitarian fire-fighters associations their assets revert to other humanitarian associations in the region or to the respective municipalities[111].

10 – Tax Treatment of the deductions of gifts and contributions in the person of the donor or contributor

10.1 Introduction. Notion of donation

[107] Art. 10(3)(b) PITC. In exceptional cases it is always possible to petition the Director-General of Taxes to extend this period, by means of a petition submitted till the last day of the month preceding the end of the period.
[108] Art. 10(5) PITC.
[109] Art. 82 of the CITC.
[110] Art. 80 ex vi Art. 82 PCITC.
[111] See art. 29 of law 32/2007, of 13th August.

The institute of donation is quite specifically regulated and, despite the crisis and some cuts, the donations continue to constitute a non-negligible part of the expenditure with charities[112]. In general, those donations can be deducted to the tax base, irrespectively of the fact that the donor is an individual or a corporate. Nevertheless, the specific amount that can be deducted varies (inter alia) in respect of the nature of the activity for which the donation is granted, nature of the donor (individual or corporation), and the relative value of the donation in terms of the subject's taxable base. The rules currently in force are, as a consequence, extremely complex and almost end up in what we could call a "deduction maze"[113].

The system provides relief for both monetary and in kind donations. For the latter, the value to take in consideration is "the tax value that the goods had in the tax year in which they are donated, deducted, if necessary, of the reintegrations or provisions previously accepted for tax purposes"[114]. Also regarding donation in kind, in the framework of the Scientific Patronage[115], we have to distinguish between "stocks" and "human resources". Stocks shall be taken in consideration by its acquisition or production cost, eventually deducted from legally accepted provisions. Concerning human resources (v.g. researchers or scientists), the value to account should equal the cost to the employer with its remuneration, including mandatory social security costs[116].

Following a recent decision of our Supreme Court, unless otherwise mentioned in the text of the law, the deductibility of the donations is to be allowed if the entity falls within one of the categories of entities entitled to receive the donation, regardless of the status of "public utility"[117].

10.2 Deductions under the Statute for Tax Benefits

10.2.1 For corporate taxpayers

First of all, a corporation may deduct from the tax basis donations granted to some qualifying foundations (those whose initial assets received a contribution from a public entity or those aimed to social, cultural activities). To calculate the amount of the deduction, one has to take in consideration two variables: i) the majoration, taking in consideration the goal of the deduction; ii) the threshold for the deduction, which takes as reference a percentage of a company's turnover.

[112] Illustrating the relations between the donations and the tax incentives, see Bakija, Jon and Heim, Bradley, "How does Charitable Giving Respond to Incentives and Income? Dinamic Panel Estimates Accounting for Predictable Changes in Taxation", NBER Working Paper, n. 14237, 2008.

[113] This is not an exclusive of the Portuguese regime. For a comparative approach see Boffano, Stefania, "Elementi per un'analisi comparata delle erogazioni liberali agli 'enti non-profit'", Rassegna Tributaria, vol. 39, n.º 2, 1996, pp. 356-384.

[114] See Art. 62(11) of the STB and "Despacho" in proc. 442/08, of 7th April 2008.

[115] Now included in SPA, more exactly in Art. 62-A.

[116] See art. 62-A(5) and (6) of the SPA.

[117] Decision of the Supreme Administrative Court of 8th of February 2012, Proc. 878/11 (although this decision was based on already revoked legislation, its rationale seems to be applicable for the future).

Regarding the majoration it can range from 120% to 150%, in accordance with the goal pursued. For each class of donations, a specific scale of goals is set. Regarding the threshold, a company may deduct donations to qualifying entities, if the deduction does not exceed 0,8%, 0,6% and 0,1% of their turnover. Moreover, the value to be deducted can amount up to 120%, 130%, 140% or even 150% of the value effectively donated. It is clear that the regime seems complex and dense, but it seems aimed to establish a hierarchy among the different types of donations. In fact, and in accordance with empirical studies, donations from the poorer tend to flow more to basic needs activities while the wealthier tend to also include in their donations less stringent aims such as museums, art, etc[118].

In this segment we will start by detailing the 0,8% cases and, in subsequent segments, we will deal with the 0,6% and the 0,1% cases. The amount of the majoration will be dealt within each of the categories.

a) Deductions till 0,8% of the turnover[119]

A corporation can deduct donations till an amount equal to 0,8% of its annual turnover if the donation is attributed to: i) public utility entities[120]; ii) recognized entities ("*Inatel*") for culture and sports; iii) non-governmental organizations aimed to the promotion of citizenship, human rights, women's rights, gender equality and development; iv) other initiatives of humanitarian aid, in cases of natural disasters or international calamity (as long as recognized by the government).

As an incentive to these donations, the taxpayer is normally entitled to deduct 130% of the amount attributed. In exceptional cases the amount is raised up to 140% and 150% of the value effectively donated. It will be of 140% if they benefit the following activities: i) childhood or old age support; ii) support in the treatment of drug addicts or persons infected with AIDS, cancer patients or diabetics; iii) support of activities to the creation of new job opportunities or the social integration of persons, families or groups in cases of social exclusion. The benefits would be equal to 150% of the donation if the benefited activities are: i) support to pregnant women in difficult social, psychological or economic position; iii) support of single mothers; iv) support or endangered or abandoned newborns; v) support to centres for pregnant women or teenagers whose socio-economic situation hinders them to ensure the appropriate conditions

[118] As Colombo stated, "empirical studies confirm that some organizations, particularly churches, are largely funded by relatively small donations from middle and lower-income groups, whereas arts and education organizations rely more heavily on large gifts from wealthy contributors" – Colombo, John, "The Marketing of Philanthropy and the Charitable Contributions Deduction. Integrating Theories for the Deduction and Tax Exemption", Wake Forest Law Review, n. º 36, 2001, p. 685.

[119] For the years 2010 and 2011 this limit was 1,2% if the donation was attributed to activities aimed to reduce poverty –in accordance with Art. 110 of the State Budget for 2010 and art. 122(2) of the State Budget for 2011.

[120] In case of mere public utility entities, the deduction is only attributable if they are devoted to charity, aid, beneficence, social solidarity (or if they are social solidarity cooperatives).

for child-birth of education; vi) support to infra-structure and other services aimed to facilitate the conciliation between maternity and employment.

b) Deductions till 0,6% of the turnover

The list of qualifying entities is broader and includes: i) entities devoted to research (except scientific, culture, heritage and environmental[121]); ii) non-profit entities in the field of theatre, dance, music, festivals and other artistic expressions; iii) museums, libraries, and historic or documentary archives; iv) NGO's in the field of environmental protection; v) the Portuguese Olympic Committee, the Portuguese Confederation of sport and sport public utility entities; vi) amateur sports associations; vii) other cultural and sports entities ("*Inatel*"); viii) regular, professional, artistic schools, nurseries, kindergartens as long as officially recognized; ix) entities responsible for world festivals, if recognized; public, and; x) bodies responsible for promotion of theatre, music, opera and dance.

Again, as an incentive to these donations, the taxpayer is normally entitled to deduct 120% of the amount attributed. This rises to 130% when attributed in the framework of pluri-annual contracts and 140% in cases of donations to nurseries, kindergartens and public bodies responsible for promotion of theatre, music, opera and dance.

c) Deductions till 0,1% of the turnover[122]

Under this item it is included all amounts voluntarily attributed by the members of an association to it, if they are targeted to the achievement of the association aims.

d) General Cap and extensions.

For all the previous reported cases, there is a general cap of 0,8% of the turnover: therefore the combined amount of the donations considered for tax purposes can never exceed 0,8% of the taxpayer's turnover. There are also other regulation that extend these benefits for specific cases as to environmental[123] or cooperation and development non-governmental organizations[124].

10.3 - Tax Treatment of gifts within the Scientific Patronage Regime

10.3.1 Benefits

[121] Because, as we will see, these entities will be covered under the Scientific Patronage regime – also in STB.
[122] Also, for 2010 and 2011 this limit was 1,2% if the donation was attributed to activities aimed to reduced poverty –in accordance with Art. 110 of the State Budget for 2010 and art. 122(2) of the State Budget for 2011.
[123] See art. 13 of Decree-law 35/98, 18th July regarding Environmental Non-Governmental Organizations.
[124] See art. 13 of Decree-Law 66/98, 14th October.

There is another set of benefits, regarding donations granted for scientific purposes (such as research, innovation and industrial projects, scientific equipment, scientific events and human resources)[125]. Although not specifically aimed for non-profit entities, all associations, foundations and other institutions can benefit as well[126]. The legal technique of these incentives very much replicates the one previously explained.

A corporation can deduct donations an amount up to 0,08% of its annual turnover if the donation is attributed to a private institution; and with no limit if the donation is granted to a public institution. The deduction equals normally 130% of the amount effectively granted (140% if in the framework of pluri-annual contracts). Regarding individuals, they are granted a tax credit equal to 25% of the amount effectively donated.

10.3.2 Formal conditions

All entities receiving donations are obliged to issue a receipt for each donation and present and, till February of the year following the donation, an annual return with all donations received; moreover they shall keep an updated record of donations and donators[127]. It is also curious to note that from 2008, all monetary donations exceeding 200 EUR shall use a form that allows the identification of the donator, namely bank transfer, check or direct debit[128].

Private institutions wanting to qualify for this regime have to require, to the competent authority receiving this tax-privileged donations have to petition for that status to the Ministries of Finance and of Science and Higher Education. Also, they have to be accredited by an entity appointed by those two Ministries.

10.4 – Donations made by Individuals

In general, also individual taxpayers benefit from a beneficial tax treatment, provided that the donations were not previously considered as costs of their activity. This treatment amounts not to a deduction (in the tax base) but to a tax credit. The amount creditable is limited: i) to 25% of the value in case of unlimited deductions (the before mentioned cases of donations to public entities or public foundations); 25% of the value donated till a maximum of 15% of the tax assessed (before credits) in all other cases.

[125] This regime is now condensed in Art. 62-A of the STB. Previously it was governed by an autonomous law – the Scientific Patronage Act – Law 26/2004, 8th July, revoked by the State Budget for 2012.
[126] Art. 62-A (1) STB
[127] Art. 66 STB.
[128] Previously, Art. 11(3) SPA and now Art. 66(3) of the STB.

There is also a tax credit, with the previously mentioned limits, to the donations received by churches, religious entities, legal entities instituted or belonging to religious confessions. The value of the donation taken in consideration for the tax credit is of 130%[129].

It is true that most of these donations will be made by the wealthier part of the population. But there is an underlying feeling of distributive justice: the understanding that the wealthier should receive incentives to, free willing, share part of their fortune with the least fortunate[130].

10.5 - Tax Treatment of donations under the Religious Freedom Act

This Act extends the previous benefits to donations made to registered religious entities provided that they are made by individuals[131]. Individuals making a donation to registered religious persons receive a tax credit of 25% up to a limit of 15% of the tax assessed before credits.

[129] For all, see Art. 63 of the STB

[130] A different and contrasting opinion is reached in a recent US Study where the author concludes, in consideration with their domestic system of the 35% charitable deduction that "the neediest receive only 8% in direct assistance from the charitable deduction. High-income individuals contribute less as a percentage of their total giving to direct assistance of poverty organizations than their middle- and low-income counterparts. To continue justifying the 35% deduction for high-income individuals under the assumption that it protects the neediest is a fallacy, and to continue advertising it constitutes fraud" – see Valentine, Paul, "A Lay Word for a Legal Term: How the Popular Definition of Charity has Muddled the Perception of the Charitable Deduction, in Nebraska Law Review, Vol. 89, Issue 4, p. 997.

[131] Stressing the idea that underlying these donations has to be a matter of faith or belief, and that is only possible in case of individuals.

III – Value Added Tax

1 – Introduction

For VAT purposes, the concept of "non-profit organization" is expressly used[132]. Quite paradoxically, its scope is wider than the one of "public utility entity" (used for income tax purposes) but more restricted than the one of "non-profit entity"[133]. This happens because the legislator requires a set of conditions before granting that privileged VAT status (and, therefore, not all non-profit entities qualify). In this sense we can have a "civil" non-profit entity not being a VAT non-profit organization.

We will divide this exposition in two parts. In the first we will examine the VAT concept of "non-profit organization" as well as the benefits specially reserved for them. In a second moment we will detail other benefits that all non-profit organizations can benefit, regardless of fulfilling the conditions for the exemption. In both cases we, are dealing with simple exemptions: the subject will not charge VAT but, at the same time, has no possibility of deducting the VAT previously supported. Obviously, these entities might with resign from that regime[134].

2 – Special VAT Status for non-profit organizations

For VAT purposes, one entity can be considered a non-profit organization if: i) it does not distribute any profits; ii) the managing bodies have no a direct or indirect interest in the results of the activity; ii) has adequate accounting; iii) sets their transactions' prices in accordance with the competent authority or below market value; iv) does not enter in direct competition with taxable subjects[135]. Besides that, these entities have to present an annual return of their activities and face a reinforced duty of cooperation with tax authorities[136].

[132] Art. 10 VATC is expressly driven to define non-profit entity ("organismos sem finalidade lucrativa"), which will latter on be the key concept for VAT purposes.

[133] For a very detailed explanation of this concept see Laires, Rui, "A Noção de 'Organismo sem Finalidade Lucrativa' prevista na legislação do IVA", Ciência e Ténica Fiscal, n.º 426, Sept-Dec. 2010, pp. 7-83. At a more global level, see Hemels, S. "Effectiveness of EU VAT treatment of Charities", International VAT monitor, vol. 22, n.º 5, pp. 302-309 and Warburton, J., "Charities and business: A VAT conundrum", British Tax Review, 2007, n.º 1, p. 73-86.. See also, although taking in consideration that they were written about two decades ago, Giems-Onstad, O., VAT and non-profit organizations", International VAT Monitor, vol. 5, n.º 2, 1994, pp. 69-80 and Allen, Derek, *Value Added tax in the European Community as applied to voluntary non-profit organisations*, London Directory of Social Change, 1992.

[134] Art. 12 VATC.

[135] Art. 10 VATC.

[136] Art. 85(2) VATC, if "private institutions of social security"

Entities such as the "non-governmental organizations for cooperation and development" qualify directly for this status[137].

If performed by one of such entities, the following transactions are exempt from VAT: i) services and connected supplies of goods made by non-profit organizations for the collective interest of its associates, provided that the pursue political, trade union, religious, humanitarian, philanthropic, recreational, sporting, cultural, civic or representation of economic interests goals[138]; ii) exploitation of facilities aimed to sports, physical education, recreational and artistic activities[139]; iii) leases of books or other publications, musical scores, records, magnetic bands and other media supports as well as related services or supply of goods[140]; iv) tours (guided or not) to museums, art galleries, castles, palaces, monuments, nature parks, forests, botanical gardens, zoos and similar[141]; v) congresses, symposia, conferences, seminars, courses and similar events of a scientific, cultural, education or technical nature[142]; vi) theatrical, ballet, music, and music bands exchanges, if they are performed by cultural or recreational non-profit organizations[143].

2 – Further (objective) exemptions

There are other supplies of goods and provision of services that might benefit from a VAT exemption, taking in consideration its non-profitable nature, even if they are provided by an entity that does not qualify as a VAT "non-profit organization".

All goods and services related with social security and granted by the national system of social security (either by private institutions of social security or other entities) are exempted, as long as they have the nature of social security supplies and they are provided *animus donandi*[144]. Private entities of social solidarity and others whose public utility is recognized can be also exempted in cases of goods or services connected with nurseries, kindergartens, leisure centres, rehabilitation centres, centres for children or youth with difficult family support or disabled, nursing homes, day centres and other centres for old people, holiday centres, youth hostels and other social equipments[145].

[137] Art. 15(2) of Law 66/98, 14th October.
[138] Art. 9(19) VATC. For this to apply, the only counter payment accepted is the fee established in the statutes.
[139] Art. 9(8) VATC.
[140] Art. 9(12) VATC.
[141] Art.9(13) VATC.
[142] Art. 9(14) VATC.
[143] Art. 9(35) VATC.
[144] Art. 9(6) VATC.
[145] Art. 9(7) VATC.

Irrespectively of the entity that provides them, also the following goods or services may be exempted: education and professional training[146]; some artistic and sport performances[147]; some fund raising activities, if they don't distort competition[148].

Regarding upstream transactions, any entity is exempt from taxation if it provides the following non-remunerated supply of goods: i) goods attributed to private entities for social security and other non-profit non-governmental institutions, when aimed to be subsequently distributed to persons in need; ii) books attributed to a competent governmental department, cultural or educational institutions, education centres, social reintegration centres and prisons. In this case, it is a full exemption: the upstream entity does not charge VAT and has the right to deduct the VAT supported on the acquisition of goods or services.

Lastly, the reduced rate of VAT is applicable to equipments and other materials used by handicapped people. The description of those goods is to be found in a ministerial act[149].

3 – Special Rules with respect to the operation of the VAT Exemption

When we've dealt with donations in the framework of income taxes, we have seen that, in some cases, the taxpayer benefits from a tax deduction or tax credit. At a downstream level, and regarding VAT, the system provides that animus donandi supply of goods and services made by the non-profit entities to their donors are exempt insofar they don't exceed 5% of the amount received[150].

The State Budget for 2012 reinstated a special regime for certain entities of the Catholic Church, for the year 2012[151]. The beneficiaries are the Catholic Church itself, the Episcopal conference, dioceses, educational centres for priest of other religious, the parish funds ("fábricas da igreja"), religious institutes, orders, congregations, missionaries and lay associations.

Within this regime, the VAT supported in two categories of goods or services are refunded in 50% of the amount of VAT paid[152]. The categories are: i) objects solely intended to the religious cult, as long they do not exceed the 249,90 € threshold; ii) goods and services regarding the construction and maintenance of buildings used exclusively for worship, training of priest or other religious, apostolate and other charitable ends as long as it does not exceeds

[146] Art. 9(9), (10) and (11) VATC.
[147] Art. 9(14) VATC.
[148] Art. 9(20) VATC.
[149] See item 2.6 of the Annex I to the VAT Code and Joint Order ("Despacho Conjunto") n.º 26026/2006, 22 December, Official Gazette, II series.
[150] See Art. 64 of the TBS.
[151] Art. 1(a) and (b) of the Law 20/90, as repristined by Art. 179 of the State Budget for 2012.
[152] Except for Private institutions of social security and the "Misericórdia" of Lisbon, regarding which the amount of reimbursement is equal to 100% of the VAT paid – See Art. 179(2) of the State Budget for 2012.

the 997,60 € threshold. In both cases, the ceiling is to be determined without taking in consideration the VAT included in the invoice. Institutions option for this regime, cannot take advantage of the percentage regime that we will detail infra[153].

The re-institution of this regime may raise again the discussions about the compatibility with VAT Law (in fact, this reimbursement is economically equivalent with a half of a full VAT exemption).

Non-profit entities are obliged to issue a receipt of all received amounts. Regarding supplies of goods and services, they normally have to issue invoices, except in cases where all their activities are exempt. According with VAT rules they would be also relieved of maintaining updated accounts but, recent superseding general rules determine they are, in any case, obliged to follow an adapted version of the national accounting standards.

4 – Rules for Cross-Border services and supply of goods.

Regarding cross-border transactions, the Portuguese system does not deviate from the set of rules established in relevant secondary EU Law. We should, nevertheless, note that there is an exemption for exports (outside the EU) for recognized institutions, in the framework of its humanitarian, charitable or educational purposes, provided that the transactions are previously assessed.

Intra-community acquisitions will not be subjected to VAT if the subject is exempted from VAT[154]. These acquisitions will also be exempt if the same transactions or imports would be exempted in accordance with domestic law[155]. Therefore, will be exempted the intra-community acquisitions of personal goods inherited by resident non-profit entities[156], or the intra-community acquisitions of art works or collections, made by museums, art galleries or similar establishments[157].

IV – Inheritance, estate and gift taxes

[153] See art. 179(1) and (2) of the State Budget for 2012 as well as Art. 65(2) and 37(5) of RFA, Law 16/2001, of 22nd of June.

[154] For instance, this will be the case of a non-profit entity doing mostly Art. 9 exempted activities and whose global per year amount of intra-community transactions does not exceed the 10.000 € threshold. See Art. 53 of the VATC and Art. 5 of the Regime for Intra-community transactions – RITC.

[155] See Art. 15(a) and (b) of the RITC, and corresponding Art. 9 and 13 of the VATC.

[156] Art. 15(b) of the RITC and Art. 16 to 19 of the Decree-Law 31/89, 25th of January.

[157] If they also fulfil the conditions stated in Art. 79 (c) of the Decree-Law 31/89, 25th January.

1 – Introduction

Traditionally non-profit entities received a beneficial treatment in terms of inheritance and gifts taxation. The main problem of those rules was its old-age, which often offered some curious hermeneutical problems. As our civil code does not recognize the figure of the trusts or any trusts arrangements, the rules are not as complex as in other European systems.

In 2003 the inheritance and gifts tax code was abolished. Although most of its rules were abandoned, a small part survived and was incorporated in the Stamp Duty Tax Code – SDTC (maintaining that nature of inheritance taxation). Given that fact, and for simplicity reasons, under this section we will take in consideration all rules of the Stamp Duty Code, regardless of their specific nature of inheritance or gift taxation rules.

As we will see infra, this code is not extensive in terms of regulation of non-profit entities. One area that is not explicitly covered is precisely the one of cross-border wills, gifts or transfer of assets and there is no applicable case law or administrative practice. One should also note that Portugal doesn't have any kind of wealth tax.

2 – Exemptions

In general, stamp duty is levied in a series of acts, contracts documents, papers and other facts, expressly described in the law (both onerous and gratuitous ones). It entails a series of exemptions, some depending on the nature of the persons or of the transaction. We will start by those that depend on the nature of the persons.

2.1 Subjective exemptions

In terms of non-profit activities, the exemption rule follows the corporate income taxation model (based in the concept of "public utility") although being slightly broader. Exempt from taxation are: i) public administrative utility entities; ii) private social solidarity entities and assimilated entities; iii) mere public utility entities (for this tax, all entities qualify, and not only those pursuing scientific, cultural, charity, aid, beneficence, social solidarity or environmental protection aims – as in income taxation)[158].

Moreover, religious entities are always exempt in what regards the acquisition of any goods for religious purposes as well as regarding institutional acts for foundations, as long as they are registered as religious entities[159]. Family Associations are also exempted[160].

[158] Art. 6 of the Stamp Duty Tax – SDT ("Imposto do Selo").
[159] Art. 32(2) of Law 16/2001 "Religious Freedom Act".
[160] Art. 6(1)(g) of Law 9/97, 12th May.

2.2 Objective exemptions

Recently, and following a recent ECJ decision[161], revenues from lotteries and other games explored by non-profit institutions started to be taxed under the Stamp duty Tax[162]. Nevertheless, an exemption was granted to revenues derived from "bingo" and other games, organized by public utility entities when two requirements are met: i) the institution pursues, exclusively or predominantly, charitable, assistance or beneficial aims; ii) then revenue is aimed to those statutory aims or is, by law, mandatorily transferred to other entities[163].

IV – Other taxes and special regimes

1 – Introduction

Cohesion and simplicity are not the best descriptive of the Portuguese tax system. Therefore in most of our taxes one can always find an (objective or subjective) tax benefit for non-profit organizations. Normally the criteria and extension of the benefit do not match and it is unlikely that is to be found the rationale of such exemptions. This chapter will be structured by tax and will describe the most important features regarding non-profit organizations.

As a general rule, if a benefit is granted under the condition that the good in question is used for the effective prosecution of the entity charitable goals, then the benefit is withdrawn if it is given another use[164].

1.1 –Real Estate Tax

Real Property (Local) tax is levied on the tax value of real estate owned by a taxable subject in the 31st of December of each year. It is regulated in the Real Estate Tax Code – LRETC ("Imposto Municipal sobre Imóveis")[165].

Non-profit organizations have always been considered as a taxable person, however entitled for a beneficial regime. In a nutshell, this regime can range from a full exemption to a partial exemption (i.e. limited to the premises used for the non-profit activities).

[161] CJEU of 6th July 2010, Commission vs Spain, C-153/08.
[162] Art. 2(1)(o) and (p) SDA.
[163] Art. 7(p) SDA.
[164] See Art. 13 STB.
[165] Approved by Decree-Law 287/2003, 12th November.

In the realm of the full exemption we can only find only "Misercórdias"[166], whose legal status we have already detailed. Any real estate owned by them, whatever the purpose is, is exempted from tax[167] no matter the use it is given to the estate.

Benefiting from partial exemptions we find: i) public administrative utility entities; ii) private social solidarity entities and assimilated entities (except the Misericórdias, as previously explained); iii) mere public utility entities[168]; iv) trade unions, farmers unions as well as commerce, industry and other independent professional's associations[169]; v) associations or organizations of any religion or cult, that have been recognized legal personality[170]; vi) sports and youth associations[171]; vii) the main office of the cultural and recreational associations, non-governmental organizations and other non-profit entities to whom the public utility is recognized[172]. In all these cases, the exemption only includes the premises of the buildings used to implement the aims. In case of infringement, i.e., if the building is used for other aims, the entity is required to pay tax from the moment when the use started to be other. As a rule, the exemption has to be requested from the competent authority (normally the local head of the tax office).

Outside the Statute for Tax Benefits, we find other institutions whose real estate may be exempt from RET, provided it is allocated to the association's activities: i) consumers associations[173]; ii) family associations[174]; iii) "casas do povo"[175]; iv) environmental as well as cooperation for development non-governmental organizations[176], and; v) political parties[177].

Although hardly includable in the realm of charities, one should note that all national monuments and other classified as public or municipal interest are also exempt from RET[178]. So if a non-profit entity owns it, it will not be taxed.

The Religious Freedom act introduces some rules, aimed to ensure an enhanced protection regarding premises used for religious purposes. According to the Act, registered religious entities are, in all cases, exempt from any tax or contribution, general, regional or local regarding: i) places for cult or directly used for religious purposes; ii) premises used for the direct and exclusive support for the religious activities; iii) seminars or other institutions effectively used for the training of cult ministers or the teaching of religion; iv) ancillary parts

[166] Whose legal characterization
[167] Art. 44(1)(f) in fine of the STB.
[168] All in Art. 44(1)(f) STB.
[169] See Art. 44(d) STB.
[170] Art. 44(1)(c) STB. The exemption is restricted to "temples or buildings exclusively used for the cult or non-economically related activities".
[171] Art. 44(1)(i) STB.
[172] Art. 44(1)(m) STB. This exemption depends on a deliberation of the general assembly of the municipality where the property is located.
[173] Art. 18(1)(p) Law 24/96, 31st July.
[174] Art. 6(h) Law 9/97 of 12th may.
[175] Decree-Law 4/82, 11th January and Decree-Law 171/98, 25th June.
[176] Respectively Law 35/98, 18th July and Law 66/98, 14th October.
[177] Law 19/2003, 20th June.
[178] Art. 44(1)(n) STB, in line with Art. 78(2) CPR.

to these buildings, if they are used by private institutions of social security; v) gardens and public spaces of the described places if they are not used for profit[179].

1.2 –Real Estate Transfer Tax

In general terms, this is a tax levied on the transfer of the property (or limited real estate rights) over real estate located in Portuguese territory. It receipts revert to the local authorities and it is levied at the moment of the transfer. Also in the context we can find a beneficial treatment granted to non-profit entities. This levy is currently codified in the (local) Real Estate Transfer Tax Code - LRET ("Código do Imposto Municipal sobre as Transmissões Onerosas de Imóveis")[180].

There are several exemptions but (and in contrast with the previous tax) all of them are conditioned to the effective allocation of the estate to non-profit aims[181]. Eligible for the exemption are: i) public administrative utility entities; ii) private social solidarity entities and assimilated entities iii) associations or organizations of any religion or cult, that have been recognized legal in the framework of the religious freedom act[182]; iv) cultural, recreational and sport associations[183], and; v) agricultural associations[184]. Also exempted are museums, libraries, schools, institutes and education associations, associations for science, literature, arts, charity, assistance and beneficence.

The exemption has to be required and recognized before the acquisition[185]. In most cases, a prior approval of the local municipality is also needed[186]. Failure to fulfil the conditions of the exemption namely, using the acquired property for other aims, will lead to the payment of the full amount of tax. Moreover, all public entities involved in the exemption procedure (as, in most cases with non-profit entities, municipalities) are obliged to inform the tax authorities of any fact that might justify the withdrawal of the exemption[187].

Outside the "catalogue" we can also find other exemptions from RETT, such as the one granted to: i) consumers associations[188]; ii) "family associations"[189]; iii) "casas do povo"[190]; iv)

[179] See Art. 32(1) of the Religious Freedom Act.
[180] Approved by Decree-Law 287/2003, 12th November.
[181] Art. 6 LRETTC.
[182] Art. 6(f) RETTC and Law 16/2001, 22nd June.
[183] Art. 6(h) and (i) RETT.
[184] Art. 6(1)(h) RETT.
[185] Art. 10 LRETTC.
[186] Art. 10 LRETTC.
[187] Art. 11 LRETTC.
[188] Art. 18(1)(p) Law 24/96, 31st July.
[189] Art. 6(h) Law 9/97 of 12th May.
[190] Decree-Law 4/82, 11th January and Decree-Law 171/98, 25th June.

environmental as well as Cooperation for Development non-governmental Organizations[191]; v) neighbours associations[192]; vi) political parties[193]; and vii) youth associations[194].

1.3 – Road Circulation Tax

This tax is levied on motorized vehicles on an annual basis taking in consideration the different costs produced by their use. It is currently regulated in the Road Circulation Tax Code[195]. Under this code, not all public utility entities but only private institutions of social security are entitled to a subjective exemption regarding all the vehicles held[196]. This exemption has to be required for every vehicle held and is granted directly by the Director-General for Taxes.[197]

1.4 – Tax on Vehicles

Our system also contains also a tax on vehicles, levied upon the acquisition, based on the costs produced by motorized vehicles taking in consideration the environment, road infra-structures and accidents. This is currently regulated in the Tax on Vehicles Code - TVC[198]. Again, the exemption is restricted to private institutions of social solidarity. Nevertheless, some the exemption is limited to the fulfilment of very detailed conditions. The vehicle has to: i) has to be new; ii) have nine places, including the one for the driver; iii) be used for the transport of the beneficiaries in the context of public interest activities, which are appropriate to the nature and aims pursued by the entity[199]; iv) the vehicles have to carry permanent legible references to the organization (in a size never inferior to the license plate) in the sides and in the back[200].

This exemption is recognized by the Director General for Customs and Excise duties, before or at the same time of the vehicle's acquisition.

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[191] Respectively Law 35/98, 18th July and Law 66/98, 14th October.
[192] "Associações de Moradores" – See Law 87-B/98, 31st of December.
[193] Art. 10 Law 19/2003, 20th June.
[194] Law 23/2006, 23rd June
[195] In portuguese "Código do Imposto Único sobre Circulação" - Annex II of Decree Law 22-A/2007, 29th June.
[196] Art. 5(2)(b) of the Code.
[197] Art 5(6) of the Code.
[198] Annex I of Decree Law 22-A/2007, 29th June.
[199] Art. 52(1) of the TVC.
[200] Art. 52(3) of the referred law.

1.5 – Some preliminary remarks, regarding local authorizations.

Some of the previously mentioned taxes are local taxes, in the sense that (whole or the most significant part of) the revenue is allocated to the municipalities. Regarding those taxes, most benefits have to be preceded by an authorization from municipal authority. This happens in the RET (regarding the exemption granted to private institutions of social solidarity[201]), in the RETT (exemptions to: i) public utility entities; ii) private institutions of social solidarity, and; iii) religious collective entities[202]).

The system is based on the following axiom: if the revenues are local, any tax benefit (having as effect a decrease of their revenues) has to previously authorized by them. Although we understand the logic behind the system, we believe that such a system should be repealed. First of all because it is inscribed (or at least it is interpreted) as granting some margin of appreciation (rectius: discretionary) for local entities to chose the entities which will receive the benefits, when in theory they are only dependent of objective conditions stated in the law (they appeal for a technical and not a political appreciation). Secondly because in fact if there is a direct link between the incentive and the revenue (both local), there is no direct link between incentive and range of beneficiaries: an immovable bought / maintained in a municipality can be used for non-profit activities benefiting several surrounding municipalities. Therefore, and has the decisive element to grant the incentive (the social benefits) cannot be assessed only at a local level, the principal of subsidiary would always require the decision to be taken at an upper level.

2 – The percentage regime

Portugal provides also for the percentage regime: individuals wishing to do so may indicate a church or other religious community as the direct recipient of 5% of the taxes they effectively paid. This option has to be exercised in the annual tax return and the amount indicated is inscribed in the State Budget under a special item[203]. Those amounts are then delivered to the beneficiaries directly by the General-Directorate for taxes. There is no specific time-span to use the amounts: the law only states that these entities have to deliver a yearly report mentioning the use given to them[204].

This regime is quite different from the “church tax”, in force in some European States. This does not suppose any increase the individual’s taxpayer burden and it is not based on the

[201] Art. 40(1)(b) of the RETC.
[202] Art. 6(1)(d), (e) and (f) respectively
[203] See Art. 32(4) to (7) Religious Freedom Act.
[204] In fact, the law does not state explicitly that these amounts have to be used in activities connected with the cult.

register of an individual as a member of a certain religious community. Moreover, tax authorities do not disclose the individual's identity so his option will always remain under his sphere of privacy.

V – Some conclusions

Portugal faces currently one major economic and financial crisis. It is not the first and probably will not be its last. Nevertheless, and even facing these adversities, one should proudly notice that solidarity is and will continue to be part our genetic code.

In sociologic terms one should start by noting that social integration and interaction is still very strong. Besides work, life normally takes place in more or less enlarged social settings, either in enlarged notions of "family" or different collectives (namely sports, recreational, humanitarian and religious). Virtually everyone is member of one or more of these collectives and effectively spends their part of their leisure time in one of the promoted activities... and it is not uncommon for these entities to have a bar or a coffee which is rapidly converted in the meeting point of the local community. Also, these gatherings are the privileged forums where situations of social need are spotted, discussed and solved. Given this intensive social way of living, decreases of livelihood means are normally detected at an early stage and people are approached and offered help, by individuals acting in a mixture of their private capacity and as members / representatives of a certain collective[205].

This social setting helps to explain: i) that despite the new and strict regulation for non-profit entities, old-fashioned associations are still admitted and allowed to exist (as they are not more than the representation of the collective effort of a certain community); ii) that they are normally granted to a large margin of discretionarily both in terms of its constitution and organization (in order for them to be customized to the idiosyncrasies of each community); iii) that regardless of the size and of the nature, most of them receive some sort of protection, taking in consideration that, pursuing a social aim, they are working together with the State in satisfying social needs.

One first driving force of our system is the idea of neutrality. The idea that solidarity efforts done using any kind of collective form should, regardless of the "instrument used" not give rise to a higher tax burden in comparison with the activities performed by individuals in an informal way. If, in legal scholars, we find critics of corporate taxation per se, following a maiori ad minus reasoning, also non-profit entities should not be taxed... at all. Nevertheless, most countries opt for some form of company or legal entities' taxation.

Tax law, as an overlapping type of regulation, has to take into account the above mentioned social idiosyncrasies. Only through its understanding we can really perceive the

[205] Eventually the biggest challenge currently faced is the expansion of the number of people in need for support, given the impact of the recent austerity measures.

rationale of the Portuguese tax system[206]. The core benefits for non-profit entities are normally reserved to those who observe a rigorous and strict set of requirements: the "private institutions of social solidarity" or, in some cases, the wider "public utility entities". Nevertheless, the legislator recognizes that there are smaller collectives, without the capacities or resources to observe those requirements but, nevertheless, play an important role in tackling down situations of physical or social need. For those, the mere fact that they are non-profit (that they don't pursue industrial, commercial or agricultural activities) entitles them for some incentives.

In the middle, we find a wide range of benefits, sometimes without a coherent or perceptible rationale, that are a result of conjunctural decisions and do not totally fit the overarching rationale of the system. Given the multiplicity of non-profit entities that simultaneously: i) could not be changed by tax law; ii) but could also not be ignored by the tax legislator; the decision was not to rely on the "type of entity" but on its observance of a serious of enhanced criteria that all organizations might fulfil, if they want to obtain enhanced benefits (objective entitlement). Therefore, the level of compliance with those criteria (that allow a more scrutinized management, better supervision and more transparency in the activities pursued) is the key factor for the attribution of tax benefits.

The survey done allowed us to extract one important conclusion regarding the rationale for the benefits: the entitled entities are seen as a private way of promoting certain attribution or competences that, originally, would belong to the State. Obviously it belongs to politics, and not to the scope of this study, to ascertain what is the appropriate relation between the State and private entities in what comes to the implementation of those aims. Nevertheless, and with certain exception, the Weisbrod theorization seems able to explain the distribution found in the Portuguese system[207].

The previously mentioned sociologic elements helped us also to understand the status quo. But they cannot exempt the Portuguese tax system of some critics. Moreover, the rules currently in force were adopted in a period of over 20 years[208]. Therefore the initial pattern of tax intervention is now long gone and rules appear sometime in a chaotic co-existence.

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[206] Exploring the different rationales underlying these benefits, see Hansmann, The rationale for exempting non-profit Organizations from Corporate Income Taxation, Yale Law Journal, n.º 91, 1981, p. 68.

[207] According with this author, the services directly provided by the state are only targeted to meet the needs of the medium voter and therefore charity would be needed to provide for public goods in excess of the level than the median voter would be willing to vote for – See Weisbrod, Burton, "Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy" in: Phelps, Edmund (ed.) Altruism, Morality and Economic Theory, 1975, 171. Nonetheless, and traditional, several hospitals were directly run by the "Misericórdias" even in areas where no public hospitals were available. Also, there are several private schools with association contracts that equate then to public schools (namely they cannot refuse any student coming from their area of implantation).

[208] Just to illustrate the changes introduced in the regime in the last decade, compare the present report with the Portuguese national report produced for IFA 1999 – see Faria, Maria Teresa Barbot Veiga de, Portugal, in IFA Cahiers 1999, Vol. 84a Taxation of non-profit organizations, pp. 651-663.

The first and major critic is the absence of unified or coherent criteria to attain a tax benefit. Although we can identify a cluster for direct taxation ("public utility entity") and one for indirect taxation ("non-profit entity"), we still find numerous deviations to this pattern. Moreover, there are no reasons to maintain, within the same tax system, different notions of "non-profit institutions" as it will only act as an obstacle to the legitimate recognition of tax benefits to effective non-profit organizations.

In the author's opinion, tax law should stick to unified criteria (and to harmonize substantive or material requirements), found either in tax or in non-tax law. This would improve simplification, transparency and efficiency[209] of the system.

By harmonizing material requirements it would be easier for society in general, and for non-profit institutions in particular, to understand which activities are promoted by the State through tax expenditures and, in conformity, for them to decide which activities to undertake (perfectly aware of the tax consequences). When we refer to harmonization, we are not sustaining the existence of a single regime of benefits: there is no obstacle to have different levels of beneficial treatment, as long as they stand stable all through tax legislation.

A major effort should be done also at the level of the formal requirements. The system in force supposes a huge burden both at the level of the administration as at the level of taxpayers. At the level of the administrative costs, we have to highlight several aspects: i) the wide range of entities that are involved in the procedure of attribution of an incentive – that range from the local authorities to Ministers[210]; ii) the amount of documents and informs that have to be produced, and that to be assessed by the tax administration, some of them containing technical information outside its area of expertise and, therefore, difficult to analyse.

Most of those administrative costs have also their impact in terms of taxpayers. We shall distinguish the level of the recognition of the exemption and the level of the compliance costs.

At the first level, the infringement of the proportionality idea is irrefutable. Non-profit entities have to compile several documents and some of them are not needed or even useful to prove tax-related requirements[211]. There is also an infringement of the idea of subsidiarity, both by defect and excess. By defect because, as we've seen for local taxes, the incentives are normally subordinated to a prior approval of the municipality even when the impact of the entities activity is normally broader than the limits of the municipality. By excess because there

[209] Although based on other systems, a good set of proposals specifically target to improve efficiency can be found in Beer, Y., "Taxation of non-profit organizations: towards efficient tax rules", British Tax Review, 1995, n.º 2, pp. 156-172.

[210] Or even the presidency of the Council of Ministers, for the submission of certain financial reports, as mentioned supra.

[211] Sometimes it seems that some documents are set in order to increase the compliance burden and, in that way, decrease the amount of revenue "lost" with the incentive.

are some authorizations that need to be granted at the level of General Directions[212] (see also local taxes) or of the Ministries. In the latter cases, there are – or there should be – objective requirements that could be immediately ascertained by the local or regional tax authorities.

There are also several problems in terms of compliance costs. Again, the infringement of the proportionality idea is staggering. There are many documents that are excessive, not useful or simply irrelevant for the verification of the tax-related conditions (from which an exemption depends). At the level of the pure compliance we should highlight: i) the fact that, besides the normal income returns, there are several other returns that have to be filled and sent in an annual basis – which do not add anything to other existing controls for civil law purposes; in many, there is no connection between the information asked and the information needed to check tax-related conditions (infringing, therefore, the idea of proportionality); ii) the fact, even within tax law there are overlapping obligations, the introduction of the new accounting requirements was not followed by a corresponding adaptation in terms of the former accounting requirements, what leads to a multiplication of obligations at this level; iii) there are far too many entities dealing with compliance procedures, which could be easily replaced by the local tax authorities (idea of a one-stop shop); iv) the same idea of one-stop shop could be implemented in terms of registries; v) the system is still highly governamentalized / politicized: although most requirements exclude any margin of discretion, there are a lot of authorizations that have to be granted by members of government or by politically appointed entities – which can lead to some problems at the level of corruption and independence; v) there are still some areas of discretionarity (namely to ascertain the public interest of a public entity) which are not compatible with the current understanding of the rule of law and of the idea of independence in the relations between State and private parties.

We have obviously to acknowledge some important steps, as the harmonization of the accounting standards for entities of the non-profit sector[213]. But there is still much to be done... And much that could be done with simple legislative changes, and almost (implementation) cost free. Firstly we believe that all tax incentive should be gathered in the respective code, replacing the current dispersion of benefits all through the legal system. Secondly, most of the procedural requirements should be re-examined in order to check their necessity to the proof of effective material conditions of the benefits. Thirdly, the returns should also be simplified, harmonized and, if possible, be available online. In our opinion, the system would also benefit from a decrease in terms of governmental presence. We have listed a high number of recognitions, authorizations, certificates and other formalities that had to be done by a Minister or by the Director-General for Taxes. It is clear that, in practice, the decisions don't reach that high level as they are normally delegated to lower authorities. But, anyway, if the requirements are objective and depend merely on a technical examination – as

[212] V.g the "social utility" realizations, of Art. 43 of the CITC. It is quite confusing how a technical tax body (such as the top-tier level of the tax authorities in Portugal) are better (or even at all) prepared to ascertain the "social utility" of nurseries, kindergartens, canteens, libraries, and schools. This is a clear-cut case where subsidiary dictates that any type of analysis should be handed out to the local authorities.

[213] See Decree-Law 36-A/2001, 9th March.

it is the case with most of the requirements we've detailed – then there is no need to maintain these decisions at the high level.

In general, there is no connection between the amount and complexity of the requirements and the conditions that are needed to check the regularity of the benefit, which constitutes a clear infringement of the idea of proportionality. The burden suffered by non-profit entities has clearly no connection with the effective needs of the tax authorities in fighting tax fraud and avoidance or in ensuring effective fiscal supervision.

This might also introduce hindrances in terms of European Law[214]. In the authors opinion, the aftermath of cases such as *Centro di Musicologia*[215] and *Persche*[216] for this field is that: i) States remain free to decide their internal concept of charitable or non-profit activities and, consequently, to attribute them or not a beneficial tax treatment (or to choose which activities should receive incentives at the tax level); ii) obviously that beneficial treatment should be attributed in a non-discriminatory fashion; iii) in that definition, the main problem lies at the level of the formal or procedural requirements; iv) in our opinion, the answer lies in the proportionality analysis: the (discriminatory/restrictive[217]) conditions eventually required have to be adequate, necessary and proportional in the strict sense to ensure the eventual national interest invoked[218]. Therefore, burdensome requirements that find no direct connection in the control of the beneficial tax treatment (freely decide by the States) are to be considered incompatible with EU law.

Following this line of reasoning, it is inadmissible to require translations of documents that are not essential to assess the activity of the entity (if the rationale of the incentive is focused on the activity); on the other side, it should be allowed to prove the fulfilment of certain requirements even without the forms provided for in a certain Member-State. Therefore, if there is a specific time-frame to spend a certain amount of income, any Member State should allow the proof of the requirement using any kind of means, instead of asking a specific return or form for the declaration. That way, also non-resident entities, which have to comply with other forms, could prove that the time-span was observed and would not be harmed in their capacity of, for instance, attracting donations from other Member States.

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[214] See, for instance, Eicker, K. "Do the basic freedoms of the EC Treaty also require an amendment to the national tax laws on charities and non-profit organizations?", EC Tax Review, vol. 14, n.º 3, 2005, pp. 140-144 or Helios, M., "Taxation of non-profit organizations and EC Law", EC Tax Review, vol. 16, n.º 2, 2007, pp. 65-73.

[215] ECJ, 14th September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04. About the direct implications of this case see Hemels, S., "The implications of the Walter Stauffer case for charities, donors and governments", European Taxation, vol. 47, n.º 1, 2007, pp. 19-24 and Ecker, Thomas, "Taxation of non-profit organizations with multinational activities – Stauffer aftermath and tax treaties", Intertax, vol. 35, n.º 8/9, 2007, pp. 450-459.

[216] ECJ 27th January 2009, *Persche*, C-318/07 or Reimer, E., "Grenzüberschreitende Gemeinnützigkeit? – Vor der Entscheidung des EuGH im Fall "Centro di Musicologia Walter Stauffer", Steuer und Wirtschaft International, vol. 16, n.º 5, 2006, p. 197-205.

[217] Considered in a broader sense, both in its form and its effects.

[218] That, taking in consideration the European's Court Case Law could be the fight against tax fraud and abuse of the need to ensure the effectiveness of fiscal supervision.

On the other side, some non-profit entities may be eventually considered as Private-public sector enterprises, in the sense used by the CJEU in its case law. This is hardly the case in indirect taxation (as benefited entities have to be out of the market) and in direct taxes. Nevertheless, if that occurs, the benefits may be regarded as selective and they may be considered as (justified) State Aid. Nevertheless, the case law is not sufficiently defined to allow a clear depiction of the borders of the admissibility with EU Law in such cases[219].

Even if we don't have any clear incompatible tax rules to report, the fact is that there are several (formal) requirements that could be simplified in order to ensure a better compliance with the idea of an integrated single market[220]. Land locking of tax incentives still occurs, but normally is a consequence of a second-tiered rule: the benefit is granted to a certain entity or activity and then civil legislation establishes that those entities have to be seated in Portugal.

After the analysis, several conclusions have emerged. There is still a lot to be done in what concerns the taxation of non-profit entities in Portugal, either to align the regime with core internal constitutional principles or to ensure smother compliance with EU requirements and with the idea of a single market. There is still a lot to be done at the European and International level[221]. Contrary to what happens in other areas, most of the changes seem easy to introduce and we hope that the comparative analysis provided by the EATLP discussion will grant the motivational element for those changes to be introduced.

[219] See Stevens, Stan, "Tax Aid and non-profit organizations", EC Tax Review, vol. 19, n.º 4, 2010, pp. 156-169.

[220] Very similarly with the propositions of Koele, Ineke, "How will international Philanthropy be freed from Landlocked Tax Barriers", European Taxation, vol. 50, n.º 9, p. 409-418.

[221] See the recent thesis from Sabine Heidenbauer, *Charity Crossing Borders. The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe*, Rotterdam, Wolter Kluwers, 2011 or Kessler, J. and Brown, Harriet, Taxation of charities and non-profit organizations, 8th edition, Oxford Key Haven, 2011.