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MUNICIPAL PROPERTY TAX ON WIND FARMS

A critical look at the Supreme Administrative Court's decision of 15 March 2017

For some years now, there has been a controversy surrounding the qualification, for the purposes of the Municipal Property Tax (hereinafter "Property Tax" or "IMI"), of wind farms.

Pursuant to Article 1, Paragraph 1 of the Property Tax Code, ***"the tax is levied on the taxable value of rural and urban buildings located on Portuguese territory***".

According to Article 2 of the same Code, *"**a building is any fraction of the territory, covering water, plantations, buildings and constructions of any nature incorporated or established therein, on a permanent basis, as long as it forms part of the estate of a natural or legal person and, under normal circumstances, has economic value**, as well as water, plantations, buildings or constructions, in the previous circumstances, with economic autonomy in relation to the land where they are located, even if located in a different estate or without a patrimonial nature"*.

With Administrative Notice 8/2013, of October 4, the Tax Authority ("TA") expressed its opinion that each wind turbine and each substation of a wind farm are independent units in functional terms. Therefore, they fall within the above described definition of building and, consequently, are subject to IMI.

This position gave rise to evaluations, performed by the TA, of the property taxable value of these items and to additional Property Tax assessments that most owners of wind farms contested. One of the main reasons for challenging these assessments was the fact that, on an individual basis, the elements of a wind farm – such as wind turbines and substations – had no economic value and, therefore, could not be regarded as buildings and, as such, as be covered by the IMI's incidence rules.

This controversy has been reflected in a wide-ranging litigation between the TA and the taxpayers, and, for the first time, on March 15, the Supreme Administrative Court ("STA") ruled on the issue.

According to this decision – which had a unanimous vote from all the judges – **the constituent elements and component parts of a wind farm cannot by themselves be regarded as urban buildings falling within the category "others".** In so far as they do not constitute economically independent items, that is to say, **they do not have sufficient capacity to develop an economic activity on their own**, and are characterized as *ad integrandum domum*, without economic autonomy in relation to the whole of which they form part.

This decision is, of course, favourable to taxpayers and it is expected that future decisions on the case-law will accompany this unanimous decision by the STA. To this extent, this could be considered a "win" campaign against the position hitherto advocated by the TA.

Notwithstanding the above, our view on the position adopted by the STA is, at this stage, cautious.

First of all, a careful analysis of the decision at stake will show that **the STA seems to leave the door open to the possibility that, in certain circumstances, a wind farm may be qualified as a building.**

In fact, although the STA disagrees with the IMI incidence in the terms advocated by the TA in the specific case, they also mention, at a certain point, that it is possible to *"conclude in favour of, in principle, in the part of the territory occupied by the entire wind farm, not only the presence of the*

indicated physical element but also the economic element, reason for which the wind farm (...) could constitute a single building for the same purpose and economic activity".

In addition, and in what almost seems like an anticipation of this judicial precedent, on January 11, 2017, Ordinance 11/2017, of January 9, was published, listing the typologies of urban buildings that should be subject to evaluation according to the method of the cost added to the value of the land, foreseen in Paragraph 2 of Article 46 of the IMI Code.

This list includes electro-production centres and electricity transformation facilities.

To this extent, **notwithstanding their recent victory in court, taxpayers' lives may not become easier in the future, since it can be understood that the combined implementation of Ordinance 11/2017 together with a careful analysis of the wording of the STA judgment may grant the TA new mechanisms and arguments to continue seeking tax revenue on wind farms**.

Teresa Pala Schwalbach
(tps@servulo.com)

Rua Garrett, n.º 64 1200-204 Lisboa - Portugal Tel: (+351) 21 093 30 00 Fax: (+351) 21 093 30 01/02
geral@servulo.com www.servulo.com