

THE PARTNER LOANS' MULTIDISCIPLINARY ANALYSIS - PORTUGUESE'S CASE STUDY

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ABSTRACT

This paper seeks to understand the framework of the loans from partners to the company in a multidisciplinary overview. In particular, it studies the accounting and taxation treatment of the loans from members to societies. For this purpose, it researches several data sources of Portugal: Portuguese Accounting Standards (Sistema de Normalização Contabilística - SNC), Value Added Tax (Imposto sobre o Valor Acrescentado - IVA), Corporate Income Tax (Imposto sobre o Rendimento das Pessoas Coletivas - IRC). The results show that, in the accounting domain, loans from business owners to entity meet the requirements to be considered financial liabilities. The financial position's statement presents it in the second element. Under the lending contract, the lender can receive interest or not. In the case of income receipt, it is subject to taxation in the beneficiary's sphere, and it constitutes a financial expense the borrower's realm. This operation is VAT exempt, according to article 9^o. In the CIT, the interests are tax expense under some circumstances predicted in the tax law. The paper presents some limitations because it is restricted to Portugal jurisdiction; it could be interesting to analyse it in other countries.

Keywords: *Partner Loans, VAT, Corporate Income Tax, Accounting*

1. INTRODUCTION

According to Canas (2011), the "suprimento" is a mechanism that allows exceeding the lack of capital and the economic insufficiency of the companies, replacing capital entries (Pereira, 2018). This figure appears with the approval of Decree-Law no. 262/86 of 2 September, therefore, this is not a new mechanism and tends to have more relevance in times of financial difficulties. The Portuguese lawmaker, recently, introduces an essential option for commercial entities using this type of contracts. The Decree-law 79/2017, of 30 June allows Portuguese companies to increase the entities' social capital using this figure, in moments of financial distress to companies it can represent a good option for both sides. On the one hand, for the business that has to challenge to obtain the traditional credit; thus, it can be a solution for treasury problems. On the other hand, for a partner, it can be an opportunity to obtain financial income, the interest, if it is stipulated.

2. THE PARTNER LOANS' ON PORTUGUESE JURISDICTION

2.1. In Commercial Law

The Portuguese Commercial Law predicts the possibility of the business partners to loan money to the company. This prediction is present in article 243 until 245 of the Commercial Companies Code – Código das Sociedades Comerciais (CSC). In article 243, the Portuguese legislator calls this juridical figure as "Contrato de Suprimento" and defines as the contract that allows to partners lend money or other fungible things to the entity. The company have the requirement to return the same quantity of the same kind and quality. Pereira (2018) evidences the second modality as the one by which the partner agrees with the company the deferral of its credits on it. Cordeiro (2007) considers that this contract has the characteristics of the loan contract, according to article 1142 of Civil Law, although the differences in the contract's form.

According to typicality principle, the societies that have as the primary goal the trade acts must adopt one of the company's kinds foreseen in the Commercial Law¹, depending on the kind of partners liabilities responsibility (Carvalho and Moreira, 2013). The private and public limited companies are the most popular kind of commercial entities in Portugal. Concerning the private limited entities, the law predicts the partner's loans contract in Title III of Chapter IV of the Commercial Law. Nevertheless, the legal framework of public limited companies does not foresee those kinds of agreement between companies and partners, so, Portuguese doctrine discusses its admission (Abreu, 2003, Pinto, 2016, Ventura, 1989, Furtado, 2001, Domingues, 1998, Pereira, 2001, Meira, 2005). Legal dispositions predict two instruments to obligate the partners to make borrowing, and they are the social contract and members' deliberation. According to article 244.1, society's contract can obligate the partner to make the advance of the money² (Pita, 2018). This legal disposition remits to the article 209.1, due to this remission, legislator equates supplementary instalments to loans of partners; additionally, the social pact can impose that obligation for all or some associates. In the case of members' decision, the resolution binds the shareholder that signs the deliberation's minutes, according to the article 244.2 of the same law; it means that only the associates that voted the decision have the requirement to make loans for the company (Ramos, 2018, Meira, 2005). Thus, according to CSC's article 244.3, this situation can result directly, of the agreement between the society and the business associate, not depending on the members' deliberation.

Table 2: Legal obligation to lend to society by shareholders

Obligation to lend to society by shareholders		
Society's contract	Members' deliberation	Agreement between shareholders without deliberation
Article 209.1, 244.1, 287.1 of the CSC	Article 244.2 of the CSC	Article 244.3 of the CSC

Source: Author

The partner that celebrates a contract of this nature with the company became entity's creditor on the amount borrowed and, eventually, over the correspondent interest. The law does not prohibit the payment of interest to the lenders due to the loan; nevertheless, in the absence of a compensation agreement, Abreu (2015) considers that no interest is due. According to the Pereira (2018), this mechanism presents two essential characteristics that define it, and they are the quality of parties involved and the permanence character. In the first, it is necessary two crucial pieces that they are not substitutable, the company and the company's owners (Pereira, 2018). On the other hand, legislator decides to impose to this legal figure consistency and stability in order to assure the entity' interest and the general creditors that are not owners, Thus, the lawmaker determined a temporal limit of one year that allows the qualification of that instrument. Being the credit classified as "suprimento" is subject to the dispositions of the article 245 of the CSC, it means that, in case of insolvency, shareholders cannot collect the loaned money from the company, before general creditors receive all their company's credits.

¹ CSC's article 1.2.

² Article 244.1 of the CSC.

2.2. In Accounting Law

According to the Conceptual Framework of the Portuguese Accounting Law - Sistema de Normalização Contabilística (SNC) - financial statements represent financial effects of company's transactions, wherefore, the accounting rules aggregate these operations in classes, in accordance with its characteristics. The elements of financial statements represent these classes. The asset, liability and equity typify the financial position's elements; on the other hand, the incomes and expenses represent the income statement's elements. Paragraph 49 of the Conceptual Framework exhibit the legal concept of the balance sheet's elements, between them, the liability's definition. This concept has underlying the definition of IASB Conceptual Framework; thus, liability is a present obligation of the entity arising from a past event, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits. The partner's loan respects classification of liability, the society has a present engagement with the shareholder due to a past occurrence, that will imply a resource's exit. As it was, already explained, this kind of contract assumes different perspectives, taking into account its particularities, its specificities imply particular attention in accounting recognition. If the lending has a term less than one year, it is not a contract of "suprimento", so it will be a current liability on the financial statement, the company should pay it in the next twelve months. In the case of the term of payment occur in more than one year, it obeys the legal concept of "suprimento", so in the financial accounts, it assumes the non-current position. This mechanism predicts the possibility of pay interest to the lender. In the company's sphere, the partner's right can configure an expense or an asset. According to the Conceptual Framework, the expense is the decrease in future economic benefits during the accounting period. It occurs over the form of outflows, or assets depreciation, or occurrence of liabilities, that result in a decrease of equity and not being related with results distribution to capital owners. So, the payment of loan compensation most of the times congregates the characteristics of the expense, so, the income statement presents information about it. Nevertheless, the Portuguese Accounting and Financial Reporting Standard 10 - Norma Contabilística e de Relato Financeiro (NCRF), predicts that the entity must capitalize the borrowing costs when directly imputed to acquisition or construction of an asset that needs time to conclude for the use or selling. It means that, if the equity's owners loan money to a company to help the company to acquire or construct a thing that will be classified as an asset in the future, the interest paid will be recognized as an asset, also. In this case, this amount of interest, when capitalized, will be subject to the depreciation according to the imposed accounting rules to the main asset. Taking into consideration the Ordinance 218/2015 of July 23 that institutes the Portuguese Accounts Code - Código de Contas (CC) - the mechanism's occurrence implies an accounting record in the account 253 - Equity Participants. In the same time that the interest payment implies a registration on the class of financial expenses, in particular, 691 - Supported Interest. In the case that the borrow supports de acquisition or construction of assets that qualify in the future, it needs to transfer the amount, the value paid of interest will not be represented in the spending's account (691) but in the investments account. The ordinance 220/2015, of July 24 imposes a mandatory application of financial statements models to entities subjects to the Portuguese Accounting Law. The detail level of financial information required depends on the corporation's dimension. So, this legal disposition presents several models according to the company's kind. So, if equity owner loans money to the company, and it is expected to receive in the operational period or in a term less one year, the borrow's information will be held in the current liability - Passivo Corrente, in particular in obtained financing - Financiamentos Obtidos. By the other hand, if it is expected receive the money in more than one year, it means it is qualified as "suprimento", the lending's information will be held in the non-current liability - Passivo Não Corrente, in particular, in the item obtained financing - Financiamentos Obtidos.

Image 1: Statement's part of financial position

Passivo			
Passivo não corrente			
Provisões			
Financiamentos obtidos			
Responsabilidades por benefícios pós-emprego			
Passivos por impostos diferidos			
Outras dívidas a pagar			
Passivo corrente			
Fornecedores			
Adiantamentos de clientes			
Estado e outros entes públicos			
Financiamentos obtidos			
Outras dívidas a pagar			
Diferimentos			
Passivos financeiros detidos para negociação			
Outros passivos financeiros			
Passivos não correntes detidos para venda			
Total do passivo			
Total do capital próprio e do passivo			

Source: Attachment 1 of the Ordinance 220/2015, July 24

2.3. In Tax Law

In Value Add Tax sphere, the financial operations' benefits of an exemption predict on article 9 of the VAT Code. The Directive 2006/112/EC of the 28 November 2006 approved by the Council of the European Union (2006), imposes this exemption and legislator transposes to Portuguese Jurisdiction (Roriz et al., 2015). According to article 1.1.a) of Portuguese IVA Code, the onerous goods' transfer and the provision of the services are subject to tax when these operations happen in national territory and make by a IVA taxpayer. Article 4^o of the same law clarifies that the one operation is services provision if it is not a transfer of goods, an intra-community acquisition or the importation of a good, it means that it has a residual framework. Despite the general principle about which the tax is settled over all onerous services' operations, the VAT Code's article 9.27 foresees the operations related to the banking activity are tax-free, it means that they are subject to tax but exempt (Palma, 2011b). Thus, the loan made by the partner to the company is VAT exempt due to this legal disposition (OCC, 2016). On the other hand, the payment of interest constitutes an inherent and resultant consequence of the main operation, the loan, so, it must be considered that the interest payment enjoys of the same exemption of the principal transaction (Palma, 2011a). In the Corporate Income Tax domain, the payment of interest represents a tax expense relevant for the determination of the corporate income tax's base. Nevertheless, it needs to have a document to support the transaction and the accounting record (APECA, 2018). Although in the accounting dimensions, there is no limit of the rate interest to pay to shareholders, in the tax domain is not happens the same. According to the article 23-A.1.m) of the CIT, is not accepted as fiscal expenses the amount of interest that exceed the limits imposed by law, in particular, the Ordinance 274/2014 (Ministério das Finanças, 2014). This legal document imposes two limits, one for large companies and another for small and medium-sized. In the first case, is subject to an interest rate of 2% added the Euribor rate, this means that if the company pay more than this limit, the difference that exceeds will not be accepted as tax expenditures. In the second case, the limit rate is 6% added to the Euribor rate. In the domain of Income Tax Natural Persons, the loans devolution at the nominal value not represents an operation with gain, so it is not subject to taxation.

However, the article 10.1.h) of the IRS Code forecasts the onerous cession of the partners' loans as a tax transaction in the part of the gain. The article 49 of the same law determines the acquisition value, for tax purposes, it means that it is the loan's nominal value. The positive difference between the nominal value of the loan and the cession value is subject to taxation according to the article 72.1.C) of the IRS Code, it means that it is taxed by an autonomous tax rate of 28%, although the beneficiary can opt for the inclusion with the other tax incomes. The law imposes withholding under the receipt of interest, and it means that entity when pays this kind of income needs to withhold an autonomous rate of 28%, second article 71.1.a) of the IRS Code.

3. CONCLUSION

According the Portuguese commercial law shareholders can lend money to the company, this operation can have the status of "suprimento" if the loan has a return term higher than one year. This mechanism renders the partner creditor of the company with particular specificity, because, if it collects the condition to be qualified as "suprimento" represents that in case of insolvency the members can not receive the money without the other creditors receive all theirs debts. In accounting domain, the loan is recognized as a liability, that according to the return term will be presented in the financial position statement as current or non-current liability, if it is less or more than one year, respectively. On the other hand, most of the times, the interest regarding the concept of expenditure; however, it can be considered as an asset if it observes the conditions of the NCRF 10. In the taxation realm, legislator determines some particularities about it. First, the VAT Code exempts the partner's loan, taking into consideration the European Union's Council Directive, second, the IRS Code does not determine any taxation to the return of the borrowing, if the return value is the same that the nominal amount. In the company's area, the interest paid is also a tax expense, when recorded in the accounting area as a spending.

LITERATURE:

1. ABREU, J. M. C. D. 2003. *Suprimentos. Estudos em Homenagem ao Prof. Doutor Raúl Ventura*. Coimbra: Coimbra Editora.
2. ABREU, J. M. C. D. 2015. *Curso de Direito Comercial*, Coimbra, Almedina.
3. APECA 2018. IRC/IRS - Juros de suprimentos T18060074 (CF47573) / 2018-06-04. https://www.apeca.pt/infordoc_ct_new/index.php?e=1: Associação Portuguesa de Empresas de Contabilidade e Administração.
4. CANAS, M. G. D. S. M. 2011. *O Contrato de Suprimento como (nova) forma de financiamento societário*. Master, Instituto Universitário de Lisboa.
5. CARVALHO, M. M. & MOREIRA, S. 2013. Direito das Sociedades Comerciais (Capítulo I). Sumários desenvolvidos das aulas de Direito para a Economia e Gestão. In: UNIVERSIDADE DO MINHO (ed.). Braga, Portugal.
6. CORDEIRO, A. M. 2007. *Manual de Direito das Sociedades - das Sociedades em especial*, Coimbra, Almedina.
7. COUNCIL OF THE EUROPEAN UNION 2006. Council Directive 2006/112/EC of the 28 November 2006 on the common system of value added tax. *Official Journal of the European Union* 11.12.2006, L 347.
8. DOMINGUES, P. T. 1998. *Do Capital Social, Noção, Princípios e Funções*, Coimbra, Coimbra Editora.
9. FURTADO, P. 2001. *Curso de direito da sociedades* Coimbra, Almedina.
10. MEIRA, D. A. 2005. O Contrato de Suprimento Enquanto Meio de Financiamento da Sociedade. *Revista de Ciências Empresariais e Jurídicas / Review of Business and Legal Sciences.*, 139- 166.

11. MINISTÉRIO DAS FINANÇAS 2014. Portaria n.º 279/2014. Diário da República n.º 251/2014, Série I de 2014-12-30.
12. OCC 2016. PT16044 - IVA - Isenções 01-01-2016. <https://www.occ.pt/pt/noticias/iva-isencoes/>: Ordem dos Contabilistas Certificados.
13. PALMA, C. C. 2011a. *Enquadramento das Operações Financeiras em Imposto sobre o Valor Acrescentado*, Coimbra, Almedina, Coleção Cadernos IDEFF.
14. PALMA, C. C. 2011b. *Introdução ao Imposto sobre o Valor Acrescentado*, Coimbra, Almedina.
15. PEREIRA, J. A. 2001. *O Contrato de Suprimento*, Coimbra, Coimbra Editora.
16. PEREIRA, R. V. 2018. *O aumento do Capital Social por incorporação de suprimentos*. Master Degree, Universidade Católica Portuguesa.
17. PINTO, A. M. 2016. Cessão de créditos de suprimentos, prestações acessórias pecuniárias e prestações suplementares. *E depois do Código das sociedades comerciais em comentário*. 1^a ed. Coimbra: Almedina.
18. PITA, M. A. 2018. *Curso Elementar de Direito Comercial*, Lisboa, Áreas Editora.
19. RAMOS, M. E. 2018. *Direito Comercial e das Sociedades entre as Empresas e o Mercado*, Coimbra, Almedina.
20. RORIZ, J., PEREIRA, L., ESTEVES, L. F. & BASTOS, R. 2015. *IVA (Revisão ao Código)*, OCC.
21. VENTURA, R. 1989. O contra de suprimento no Código das Sociedades Comerciais. *O Direito*, 121, Janeiro-Março.