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Family businesses: tax effects on corporate transactions in Portugal

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Empresas familiares: efeitos fiscais das transmissões das participações sociais em Portugal

This study systematizes the Portuguese tax regime of corporate transactions in family business. After a short reference to family business in the context of European Union and in Portugal it is established the central point of the analysis: the irrelevance of the classification as family enterprise for tax purposes. However, the precedent inference does not influence the main lines of examination and the conclusions. In order to ensure a correct and complete analysis there are identified several legal aspects related to the taxation of income generated by family business and earned by the members of the family. At last it is scrutinized the legal tax regime applied to shares transitions by inter vivos or mortis causa transactions.

Este estudo analisa sinteticamente o regime fiscal português nas transmissões de empresas familiares. Após uma breve referência à empresa familiar no contexto da União Europeia e em Portugal entra-se no ponto central da análise: a irrelevância da caracterização e classificação de uma entida de como empresa familiar para efeitos fiscais. No entanto, a inferência precedente não influencia as principais linhas de estudo e as conclusões. Para garantir uma análise correta e completa do tema são destacados alguns aspetos legais relacionados com a tributação dos rendimentos gerados pelas empresas familiares e auferidos pelos membros da família. Por fim, é feita uma referência ao regime jurídico-fiscal aplicado às transições de ações por operações *inter vivos* ou mortis causa.

Keywords: Family Business; Inheritance Taxation; Corporate Transactions; Succession Agreements.

Summary: 1. Introduction – 2. Family businesses in the European Union and in Portugal: a brief comment – 3. Family business and income taxation – 4. Taxation of shareholders transfers – 4.1 Inter vivos transfer of ownership – 4.2 Mortis causa transmissions – 5. Conclusion

1. Introduction

Family businesses are a peculiar reality and, although they are often classified as closed commercial companies, they do not outflow from the influences of market behaviour[1]. If, in typological terms, there are some difficulties in conceptual delimitation of family business, the greatest challenges are related with operation and management, especially those that arise directly from the existence of an influence of the "business family". Although the most commonly studied aspects are connected to management and ownership, we will deal with another aspect, either directly or indirectly, impacts

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1. These companies have their own characteristics that make them more resilient, but at the same time, also more vulnerable. P. Gianiodis, S. Lee, H. Zhao, M. Foo e D. Audretsch, *Lessons on small business resilience*, in Journal of Small Business Management, vol. 60, 2022, 5, 1029-1040, https://doi.org/10.1080/00472778.2022.2084099

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the previous aspects: the tax implications arising from the transmission of the shares of family companies, *maxime, mortis causa* transferences.

The relevance and influence of these companies on the economic development and on social progress demands a careful analysis of the legal regime. It is very important to consider if it exists a specific protection or specific rules or, otherwise, if those companies are completely unprotected and became on a disadvantage position in front of the others. The special vulnerability of these entities is very evident in managerial terms, but the exposure to additional variables that may generate difficulties and may jeopardize the continuity of business activity, with all the problems that this entails, requires the adoption of measures that allow the reinforcement of its stability.

For many family businesses, economic sustainability depends both on the way they are managed and on the planning of the transfer of the assets that characterise the business between members of the same family, especially between generations. Business activities are often influenced by emotional aspects – in which the heart takes precedence over reason – but consider also the tax implications of control or ownership. The transmission of the company can cause divergences and introduce considerable changes in the management and operation and, therefore, in the continuity of the activity[2].

At this level, it is important to ponder the implications arising from this idea of continuity of relationships resulting from the guarantee of transmission of the company from generation to generation and the interconnection between family and business assets[3]. The ambivalence of the factors mentioned above is evident. If, in one hand, they contribute to conveying a sense of security and continuity, since they allow greater flexibility and responsiveness to market challenges, on the other hand, they make the continuity of family businesses, especially on smaller ones, dependent on decisions in which the economic basis can be left on the sidelines.

It is essential to mention that there is no consensus among the specialists around the definition family business and, mainly because of that, some important characteristics remain unclear[4]. It is also important to consider that the long-term sustainability of family businesses is intrinsically related to the successful transfer of entities from one generation to the next. The planning of the transmission is therefore a very important aspect and the consideration of the tax effects of each of the options can have a decisive influence on the decision. On a global scale, and also within the European Union, the divergences between national tax systems are very evident and can have a substantial impact on the costs of the transference process.

2. The influence that tax law can have on the shaping of testamentary dispositions (or lack thereof) is felt very strongly in these cases, especially since this can result in high burdens for the beneficiary of the testamentary disposition. Moreover, that disposition of the estate – which is free, in the sense that it cannot be coerced and clarified – is also limited by the rules of succession. On the impact of tax rules on the freedom to test, D. Almeida, *Rethinking the law of succession. Will we have the freedom to test?,* Master's Thesis, Coimbra: Faculty of Law of the University of Coimbra, 2019, especially pp. 100 et seq.

3. In this context, the family agreement and the succession agreements are of particular importance, which may contain specific rules on the transfer of shareholdings in the share capital, participation in the governing bodies and the executive management of the company. In addition, they may also affect some of the existing contractual employment relationships, for example, by becoming incompatible or by removing such incompatibility. It should be noted that both of these figures are of very limited use in the Portuguese legal system. Without going into too much detail, we will only say that the admissibility of the succession agreement is limited by the requirements of Art. 2028, 946 and 1700 of the Portuguese Civil Code. Broadly speaking, it can be said that the succession agreements contained in the prenuptial agreements are admitted, and it is possible to convert the succession agreements considered null and void to be converted into a testamentary disposition if the formal requirements of the will have been fulfilled. Article 946(2) of the Portuguese Civil Code. For a historical view of succession agreements in Portugal, see G. Cruz, *Os Pactos Sucessórios na História do Direito Português*, in Revista da Faculdade de Direito da Universidade de São Paulo, São Paulo, vol. 60, 1965, 93-120.

4. H. Frank, A. Kessler, S. Beck, J. Suess-Reyes e E. Fuetsch, *The enterpriseness of business families: Conceptualization, scale development and validation*, in Journal of Family Business Strategy, vol. 14, 2023, 2, 100522, https://doi.org/10.1016/j.jfbs.2022.100522

2. Family businesses in the European Union and in Portugal: a brief comment

Family businesses are a very specific reality in the business context, but are usually defined by using a three circles's, or areas, interconnected model. Each one of the circles pointed out some generic characterizing notes: property, family and management. This model, developed by Tagiuri and Davis at the end of the 1970's[5] , has been improved and adopted in a very flexible way by most authors, reflecting the difficulties inherent to the definition of the concept, namely to those that demand the possibility of including in this notion companies or groups of companies listed on regulated markets. The most important feature of the model is the possibility to reveal the interaction between the three circles of people and the diversity of interests of each group and subgroups. It also provides a system that can be used to relieve family tensions, neutralising personal differences and replacing them by business interests in a dynamic, and almost constantly changing, relationship[6].

The difficulties inherent to a precise delimitation of the concept stems, in part, from the differentiation of the perspectives of analysis. While some authors focus the concept on property, others demand that there is also a family involvement in the management of the companies[7]. There seems to be no doubt that family business are companies in which the owners have the possibility to control it and to decide whether or not this control remains in the sphere of future family generations[8]. The essentiality of a definition, tendentially precise, of the concept it is also related to the rank that those companies have in the global economic context and in the European Union.

The prominence of family companies on the global economy is revealed by various studies and was recently confirmed in the *Global Family Business Index*[9]. Of the 500 largest family businesses, 54% are based in Europe, while the North American continent is home to 30% and Asia and the Pacific 16%. The same study also shows that these companies, with already recognized longevity, employ about 24.5 million people and collect revenues of about 8.02 billion dollars[10]. Contributing to economic growth on a global scale, these companies are also considered extremely important in terms of guaranteeing social values. The commitment to the fulfilment of family values that constitutes the matrix of many of these entities has led to the consideration that they comply with ESG on a voluntary basis. The compatibility between the professional and personal lives of those who interact with society is seen as an essential parameter to measure the activity and to fulfil their mission[11].

5. R. Tagiuri e J. Davis, *Bivalent Attributes of the Family Firm*, in Family Business Review, 9, 1996, 2, 199-208. This idea appears in some works prepared by the authors in 1978 and would be published for the first time in John Davis' PhD Thesis in 1982. It was not until 1996 that special emphasis and dissemination would be given through the publication of the cited article. This model replaced another model, used until then, which only considers the existence of two circles: family and business.

6. K. Gersick, J. Davis, M. Hampton e I. Lansberg, *Generation to Generation: Life Cycles of the Family Business*, Harvard Business School Press, 1997.

7. J. Astrachan, S. Klein, e K. Smyrnios, *The F-PEC Scale of Family Influence: A Proposal for Solving the Family Business Definition Problem*, in *Family Business Review*, vol. 15, 2002, 1, 45-46, https://doi.org/10.1111/j.1741-6248.2002.000

8. We cannot fail to mention that the specificities inherent to these entities. Although, in most cases, family businesses have been created by a person who transforms them into a place of work and development of professional activities of some other members of the same family, the characterization as a family business depends of the existence of effective control over the activity of the entity exercised for more than one generation. Only with transmission of effective control to, at least, another generation we can say that it is a family business.

9. Prepared by the University of St. Gallen, Switzerland and available in https://cfb.unisg.ch/en/research/global-family-business-index/.

10. This figure roughly corresponds to the value estimated by the International Monetary Fund for the sum of the Gross Domestic Product at market prices of Germany and Japan (in 2023) and is more than half of the projected value for Chinese GDP.

11. L. Huang e A. Chen, *Family business succession and corporate ESG behaviour*, in Finance Research Letters, 60, 2024, 104901, https://doi.org/10.1016/j.ribaf.2023.102136 e L. Parreirão, Empresas Familiares – da Governance à Respons-

In the Portuguese legal order the process of setting up the family business has no specificities[12] – the identification of the partners, the choice of the name of the company, the type of company to be adopted, the corporate purpose, the location of the registered office, the share capital, the amount and nature of the shareholding, the manner in which the entry of each shareholder is implemented, the composition of the bodies, the rules relating to the exercise of rights vis-à-vis the company and the rules for the dissolution of the company – but, with regard to other facets, there are some distinctions, although not resulting from a differentiated treatment of family businesses.

From an objective point of view, the constitution of these companies must comply with the requirements placed on other entities that adopt forms similar to the one chosen to materialize the family partnership. In the implementation of these requirements, especially with regard to the ownership of shareholdings, control and direction of the company, we find that family culture and values are carefully considered and affect, often in an essential way, the governance structure of the company and can also be extended to other aspects.

The family ties that connect partners, shareholders or holders of control of the company requires a harmonious composition of the interests in question, always respecting the long-term continuity of the business activity carried out. This is important not only to ensure harmony in the development of business activities, but also, and at the same time, an equal composition of family interests. These specificities will influence the selection of the type of company to be formed. It should be remembered that the transfer of shareholdings and the possibility of limiting or conditioning *inter vivos* or even *mortis causa* business is a fundamental aspect to consider in almost all the decisions related to the company structure. If, in the first type of transaction, the range of limitations is quite wide and extends to various types of companies, the second one suffers significant contractions since the limitations to be established by contract or the deviation from legal norms can only happen in cases where the law allows it[13].

The distinctive aspect of family businesses stems from the relationships between owners and managers. The influence that those aspects have on day-to-day and on long-term planning and management is quite visible and is influenced mainly by the strategy for the transmission of shares to the next generation and all the economic compensations that need to be done in order to correct asymmetric income distributions among family members.

The transfer of the management powers of the company and, above all, of this one obeys, in this case, duly established and consolidated criteria that may cause tension between family members who disagree with it or who have not had the opportunity to express their opinion about it. The choice of the beneficiaries of the transfer may reflect the need to bequeath values, knowledge and specificities of the business to those who are more skilled or better able to perform these tasks and respect the legacy[14]. This choice can be a factor of family tension, especially in cases where it involves a change in the additional rules of succession laid down in civil law, affecting both the size and composition of the hereditary share of legitimate hiers and testamentary inheritors.

The company is not considered only as an economic vehicle and requires management policies focused on the continuity of the legacy, the family name and the practices associated with it. Stakeholders, whether they are customers, suppliers or members of the community who directly or indirectly interact with it, rely on this continuity of values and principles. This authenticity is also highly valued in commercial terms and that influences the market value of the company. The continuity and the permanence of control within the same family may imply, or restrain, certain types of

abilidade Social. Lisboa, 2019.

12. J. Rodrigues, *Família Empresária: Estrutura, Recursos e Poder*, Lisboa, 2019 e L. Ferrão, *Empresas Familiares: do Governance à Responsabilidade Social*, Lisboa, 2019.

13. Cfr Articles 265 and 266 for private limited companies and articles 328 and 329 for public limited companies, all of the Portuguese Commercial Companies Code (Código Comercial Português).

14. E. Bracci e E. Vagnoni, *Understanding small family business succession on a knowledge management perspective*, in IUP Journal of Knowledge Management, vol. IX, 2011, 1, 8-36.

transfers and even pressure on the maintenance of their control, management and direction within the same family circle. What is at stake here is not so much (or not only) the continuity of the business activity, but rather the permanence of that activity, carried out in those terms, in order to perpetuate the values and mission adopted by the founders.

Added to these constraints is the more or less visible impact of tax burdens.

3. Family business and income taxation

Having elucidated, very succinctly, the motivations behind the choice of the beneficiaries of the shareholding's transfers in family businesses, it is now time to focus on some of the main aspects related to the taxation of income arising from the exercise of business activity. It should be noted that there are no distinctive tax rules in Portugal either. The tax regime does not suffer any deviation in these cases, but, the peculiarities of these companies and the choices made end up having an impact on the level of tax burdens or being conditioned by them[15].

As mentioned above, these companies bring together several members of a family, individuals who can perform, in the organizational structure, various tasks or functions. It is relatively common for the family business to be the employer of some family members who own, control and manage it. The choice of a particular person to perform a specific function can – and should, of course – be subject to the human resources recruitment criteria established by the company's management.

Within this framework, income from work obtained as a result of the exercise of a professional activity – dependent or as a provision of services – will be treated as such, disregarding the existence of a family relationship with the individuals who have control of the entity that made them available to the worker or service provider. Nor could it be otherwise. First of all, because the family business is, from a legal and economic point of view, an autonomous centre for the attribution of rights and duties, and the lifting of the legal personality is only justified in very specific cases.

This type of income enjoys the same prerogatives and protection as are applied to income from work and self-employment. Notwithstanding what has just been mentioned, the limitations arising from the principle of good faith and abuse of rights must be considered here, with particular importance and focus, whenever it is necessary to determine whether the payments are undue, excessive or defrauding of the legal commands.

We would say, however, that this is an area in which the principle of freedom of management holds a leading place, and the situations in which these other principles can be invoked in a restricting way will be rather scarce. An example of this is the situations in which there is formally a payment of remuneration for the work, but in fact, what is remunerated is the participation in the capital of the company. In other words, these will be situations in which it is possible to conclude that the payment does not correspond to the provision of work or services.

In order to rule out the declared nature of the benefits a distinction from similar ones is not enough, nor is a disproportionate difference in the amounts in question. It must be clear that these specific payments correspond, in whole or in part, to an advance distribution of profits. There is a different range of situations within this group of people who are employees of the company, but who have family ties to the people who control the company's activity: those who have a dual condition, whether this derives from holding capital or the power to control the company and the existence of an employment relationship, and those who have no other management position or hold capital are employees. The latest group should be treated by the company on an equal condition to all the other employees, but the diversity of relationships mentioned before may have implications for the classification of the income provided to the members of each of these groups. We would say

15. In this specific issue, there is a difference from the regulation existing in other countries, either because there is a specific tax regime for this type of company, which may extend to the taxation of income from work earned by family members who are employees of the company or, even if there is not a particular regulation, because this gives rise to an advantage or disadvantage in tax terms compared to companies that are not part of the category of family businesses.

https://doi.org/10.6092/issn.2036-3583/19805

that, typically, the income made available to an employee, whether or not they are a member of the family that owns and/or controls the family business, should be treated as wages. To that extent, they are considered a company expense, contributing to the decrease in the company's gross income, taxable income at company level and distributable profits. For the same reason, the other costs borne by the employer or beneficiary of the services provided, which cannot be categorised as wages, but rather as other costs to be borne on behalf of those services, are, provided that all other legal requirements are met, considered as costs for accounting and tax purposes, contributing to the determination of the company's accounting and tax results[16].

In the sphere of the beneficiaries, these amounts are treated as wage or as business income, and fall, as the case may be, into *category A* of income or *category B* income from the Portuguese Personal Income Tax (Imposto sobre o Rendimento das Pessoas Singulares - IRS). In any case, they are aggregated and taxed in accordance with the rules established in arts. 22 et seq. of the Personal Income Tax Code (Código do Imposto sobre o Rendimento das Pessoas Coletivas – CIRS)[17].

The same reasoning shall be applied to the profits distributed[18] to shareholders. They are considered as part of *income category E*, pursuant to Article 5(2)(h) of the IRS Code. The taxation of such income will occur during the period in which it is made available to the partners. In cases where there is an advance on account of the profits to be distributed, this allocation will have to be made to the tax period in which they were actually received and not to the period to which they should be allocated at company level. This income is currently subject to taxation operationalized through the application of a 28% withholding tax, settled through a withholding tax[19] – cfr. Article 71(1), a) CIRS – and may, under the terms of paragraph 6 of the same article, be subject to aggregation or not.

The taxable income can have a more favourable treatment if the requirements of Article 40-A of the CIRS are met, namely: (a) the entity distributing the income fulfils the requirements and conditions established in article 2 of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in parent companies and subsidiaries of different Member States; (b) the beneficiary of the distribution of profits opts for the aggregation of income and, (c1) both the entity distributing the profits and the beneficiary are resident for tax purposes in Portugal, in another Member State of the European Union or in a Member State of the European Economic Area or (c2) not being resident in a Member State, are resident in a State that is bound by administrative cooperation in the field of equivalent taxation in force between the States of the European [20]Union. That reduction in the tax base must be understood as a partial elimination of

16. V.g. contributions to the social security system borne by the employer and employment insurance, as well as other possible financial or non-financial benefits, such as those that fall into the category of so-called *fringe benefits*. The possibility of making contributions to the social security system appears as one of the advantages associated with the perception of income as a result of the existence of an employment or service contract compared to the collection of dividends. Another advantage is the regularity of income since, although there may be advance distributions of profits – the so-called advances for profits – these are subject from the outset to the existence of values high enough for there to be distributable profits and, if all the other legal conditions are met, the periodicity can hardly be monthly. 297(1) and Article 34 of the Portuguese Commercial Companies Code (Código das Sociedades Comerciais - CSC).

17. Law nr. 82-E/2014, 31 December 2014.

18. The determination of the amount of profits to be distributed to the shareholders complies with the rules contained in the Commercial Companies Code, *maxime* of arts. 32 and 217 (private limited companies) and 294 (public limited companies), with the distribution of at least 50% of the distributable profit being mandatory. The amount available for effective distribution to the shareholders requires the deduction from the profits the amounts classified as the legal reserves, statutory reserves and free reserves, as well as the amounts corresponding to the expenses of setting up research and development that are not fully amortized. – Cfr. Articles 33rd, 217th, 218th, 295th and 296th of the CSC.

19. This withholding must be communicated to the Portuguese Tax Authority by February of the following year, under the terms of Article 119(12) of the CIRS.

20. In this case, the taxpayer must prove, pursuant to paragraph 3 of the aforementioned article 40-A of the CIRS, that the entity complies with the requirements and conditions established in article 2 of Council Directive 2011/96/EU of 30 November, made by means of a declaration confirmed and authenticated by the competent tax authorities of the Member State of the European Union or the European Economic Area of which it is resident.

economic double taxation of distributed profits[21].

In the sphere of the company, the amounts corresponding to the distributed profits, although they constitute negative equity variations, are not relevant for tax purposes – cfr. Article 24(c) of the Corporate Income Tax Code (CIRC) – these amounts are therefore considered to be part of the income used to establish the company's taxable income.

Finally, a brief reference to the tax transparency regime applicable in some cases to family businesses. In cases where the requirements of Article 6(1) and (4)(c) of the CIRC are met, i.e., in cases where there is a simple asset management company whose majority of the share capital belongs, directly or indirectly, to a family group for a period of not less than 183 days (in a year), the taxable amount that should be taxed in the sphere of that company is attributable to the partners. Although this is a particular situation for family businesses, there is still this tax specificity.

4. Taxation of shareholders transfers

The considerations that we made in the previous point are slightly different from the aspects that we will analyze below and that concern the taxation of family business operations in the Portuguese legal system. It should be noted that there are no tax rules explicitly designed for these specific situations. We also recall that in the complexity of family businesses we find *nano* companies, small companies, medium-sized companies and large companies and that they adopt, among us, various corporate models. This diversity may also condition the mode chosen for its transmission to the next generation of families.

Most of the reflections on these issues focus on quantitative aspects that reveal trends resulting from the analysis of specific experiences and which mainly emphasise characteristics related to the distribution of powers of control within the company and their transmission to subsequent generations. The positions of owners, managers and others are thus differentiated, which makes it possible to choose the successor for each of them very early on and to prepare the transfer very carefully; alternatively, this decision can be left until later, choosing the natural successor as the one with the greatest guarantees of ensuring the continuity of the company's activity and the perpetuation of the values and ideas that have underpinned its creation and operation up to that point[22]. These choices are, of course, always based on the need of ensuring an harmonious coexistence between the various members of the family and the continuity of business activity[23]. In terms of business continuity and business expansion in a long-term basis, it is important to consider the influence of the internationalization of activities and openness to external financiers and the incentives for the diversification of investments achieved, in particular, through the geographical dispersion of family businesses and sectoral adaptations or changes[24].

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21. The present regime was introduced by Decree-Law No. 192/2005, of 7 November. Between 2005 and 2013, a similar regulation was in force for the income resulting from the division as a result of the liquidation of these entities that were qualified as capital income, but it was repealed by Law No. 83-C/2013, of 31 December. The application of this regime, which allows for a reduction in the taxable amount, does not influence the determination of the rate to be withheld by the entity when it makes available to the taxpayer the amount that corresponds to it in the distributed profits. The latter is obliged to withhold the amount of the tax determined by reference to the total amounts distributed and to pay the amount withheld into the State coffers. The elimination of this partial imposition is carried out *a posteriori* if the legal requirements for this are met.

22. On this issue, see R. L. Xavier, Family Succession in the Company, Lisbon: Universidade Católica, 2027.

23. L. Melin, M. Nordqvist e P. Sharma, *The SAGE Handbook of Family Business*, Londres, 2013, M. Gilding, S. Gregory e B. Cosson, *Motives and outcomes in family business Succession Planning*, in Entrepreneurship Theory and Practice, 39, 2015, 2, 299-312, https://doi.org/10.1111/etap.12040 J. Baron e R. Lachenauer, *Family business handbook: how to build and sustain a successful, enduring enterprise*, Harvard, 2021 e S. Buckner Jr., *Succession Planning Strategies for Small Family-Owned Businesses*, Walden University Doctoral Thesis, 2021.

24. In this context the environmental concerns emerge as one of the factors that decisively influence the direction of the activities to be developed by family industries. The younger generations tend to have a higher degree of sensitivity to these issues than the generations that preceded them.

The (apparent) non-prioritization of financial aspects on the transmission of the business to the next generation and their replacement by the need to preserve socio-emotional wealth can lead to economic inefficiencies. It is precisely in order to avoid or mitigate these inefficiencies that the planning of the operation and the consideration of the tax impact of each of the available options that this issue assumes a not insignificant importance in the context of the continuity of family businesses[25]. The diversity of legal forms assumed by family businesses also influences the greater or lesser flexibility in terms of the planning of the transfer of shareholdings in the share capital and the tax impact that may arise from them.

The heterogeneity of family businesses and the forms of organisation of family members in each of the structures of these companies is, as mentioned before, influenced by economic and non-economic objectives[26]. And are precisely the non-economic objectives, such as the reputation and good name of the family that represent what we can call socio-emotional wealth[27] that, having no measurable economic value, influence other components of the company's valuation, and will influence some of the decisions related to tax planning, more or less aggressive, to be adopted in the case of the transfer of shareholdings.

Within the various possible hypotheses, it will be excluded from this analysis, for reasons of logical reasoning, the transfer of the shares to other members of the same family through onerous legal transactions[28]. In such situations, the absence of differentiation in relation to any other transactions carried out between two taxpayers who do not have any family ties with each other is evident.

In other situations, that we will analyse in more detail, it will be considered several sets of norms, not only those related to the capacity of disposition of the patrimonial assets but, also, those that regulate the succession *mortis causa*. Among the latest ones, it should be empathised the rules defining the various types of beneficiaries of the inheritance and which, in the Portuguese regime, define the inheritance rights of each of the members of the family. In fact, it is important to mention that for these purposes the sociological concept of family is not decisive, but only the legal densification of that sociological concept. In tax terms, the degrees of kinship may be relevant for determining the subjective incidence of the tax and the rate to be applied in each specific transmission. Let us focus, firstly, on the transfer of shareholdings in family businesses by free inter *vivos* business and them in *mortis causa* business transfers.

25. We only note that tax burdens are one of the factors to be considered in deciding whether to choose either the form of transmission or the people to whom the company will be transferred.

26. J. Daspit, J. Chrisman, T. Ashton e N. Evangelopoulos, *Family firm heterogeneity: a definition, common themes, scholarly progress, and directions forward*, in Family Business Review, vol. 34, 2021, 3, 296-322, https://doi.org/10.1177/08944865211008350

27. P. Berrone, C. Cruz e L. Gómez-Mejía, *Socioemotional wealth in family firms: Theoretical dimensions, assessment approaches, and agenda for future research*, in Family Business Review, vol. 25, 2012, 3, 258-279, https://doi.org/10.1177/0894486511435355 P. Berrone, C. Cruz e L. Gómez-Mejía e M. Larraza-Kintana, *Socioemotional wealth and corporate responses to institutional pressures: Do family-controlled firms pollute less?*, in Administrative Science Quarterly, vol. 55, 2010, 1, 82-113, https://doi.org/10.2189/asqu.2010.55.1.82 e R. Zaman, T. Jain, G. Samara e D. Jamali, *Corporate Governance Meets Corporate Social Responsibility: Mapping the Interface*, in Business & Society, vol. 61, 3, 2022, 690–752, https://doi.org/10.1177/0007650320973415

28. The transfer of shares in family companies for consideration is subject to taxation under the general terms. However, the lack of anti-abuse provisions seems to allow it to be made for a symbolic value, and it is only possible for the Tax Authority to correct the value of the transfer if it has well-founded suspicions of the existence of a transfer value different from the declared value. As in other cases, whenever the shares or quotas transferred by means of a onerous transaction are of a general partnership, in limited partnership, by quotas or anonymous, when the cumulative requirements of Article 2(d) of the CIMT are met, municipal tax on onerous transfers of real estate (IMT) will have to be paid. In subparagraph (iii) we can find a reference indirectly related to family businesses and which refers precisely to those situations in which, by virtue of the transfer of ownership, the number of partners is reduced to two who are revoked or de facto partners. In this case, it is the family relationship that determines the existence of differential treatment for tax purposes.

4.1. *Inter vivos* transfer of ownership

In formal terms, the transfer of family business shareholdings fulfils the same requirements of other similar free *inter vivos* transactions and, unlike *mortis causa* transmissions, considers the family ties between the transferor and transferee. Since 1 January 2004, these transfers have been subject to stamp duty (Imposto de Selo), which has replaced the Inheritance and Gift Tax (Imposto sobre Sucessões e Doações)[29].

The subjection to taxation of the free transfer of companies shares by *inter vivos* transactions is regulated in Article 1(3)(c) of the Stamp Duty Code (Código do Imposto do Selo - CIS), and the tax is charged, under the terms established by Article 3, on the holders of the economic interest in question, i.e., on the beneficiaries of the donation (donees)[30].

In the specific case of transfers of shareholdings in family businesses, the value to be considered will be determined according to the type of company in question.

Being a *joint-stock company*[31], the relevant value for these purposes corresponds to the quotation on the date of transfer or, in the absence of such value, on the earliest date within the previous six months. In those cases where the shares do not relate to a company listed on the official market, it will correspond *to (i)* the nominal value of the shares transferred when it does not exceed (euro) 500.00; *(ii)* in cases where the sum of the par value of the shares transferred exceeds that value in accordance with the application of the following formula

$$Va = \frac{1}{2 \times n} \times \left[S + \frac{(R1 + R2)}{2} \times f\right]$$

Where,

> Va represents the value of each share at the date of transmission;
>
> n is the number of shares representing the capital of the investee company;
>
> S it is the substantial value of the investee company, which is calculated from the book value corresponding to the last financial year prior to the transfer with any corrections that may prove to be justified, considering, where appropriate, the provision for taxes on profits;
>
> $R1$ and $R2$ are the net profits obtained by the investee company in the last two financial years prior to the transfer, R1 + $R2$ = 0 in cases where the sum of these results is negative, where f *is* the capitalisation factor of the net profits calculated on the basis of the interest rate applied by the European Central Bank to its main refinancing operations, as published in the Journal of the European Union and in force on the date on which the transmission takes place, plus a spread of 4 %[32];

29. This change resulted from the repeal of the so-called Inheritance and Gift Tax Code operated by Decree-Law No. 287/2003, of 12 November, which carried out a profound reform of the various legal regimes related to the taxation of assets and incorporated it into the Stamp Duty Code approved by Law No. 150/99, of 11 September and which is included in the respective Annex I, rules on the taxation of free translative transactions, whether *inter vivos or mortis* causa. Although it has introduced many differentiations in the case of the taxation of free transfers of assets, the differences are smaller than in other causes.

30. The donation contract is regulated in art. 940 et seq. of the Civil Code Portuguese, and must take the form established by law.

31. Cf. Article 15(3) of the Stamp Duty Code (Código do Imposto do Selo – CIS).

32. It should be noted that the segment of the rule relating to the f factor, prior to the revision of the norms imposed by Article 156(2)(b) of Law No. 7-A/2016 of 30 March 2016, was deemed unconstitutional by the Constitutional Court in Ruling No. 750/2022 of 4 November 2022, delivered in Case No. 1030/20, Section 2. It was understood that this segment is not in accordance with the principle of proportionality in its dimension of necessity. Although I agree with the decision and its reasoning, I would add that the legislature's freedom in the distribution of the tax burden is based on the principle of ability to pay. The design of taxation rules and models needs to consider parameters or standards for determining the tax base that not only correspond to reality but, above all, that the result of their application does

(iii) or, in the case of companies incorporated less than two years ago, the value of the shares transferred will be taxed, and the unit value will be calculated accordingly by dividing the value of the substantial amount of the investee company (S, within the meaning referred to in *(ii)*), by the number of shares representing the capital of the investee company (n);

In other cases, i.e. in the transfer of shares in family businesses that are not to be considered public limited companies, the value of the shares or shares is determined from the last balance sheet by the value attributed in the division or liquidation of those companies. This will not be the case only if, after this transfer to the heir, legatee or donee of the deceased partner or donor, the latter transmits to him/her, the value of the transfer has been fixed in the articles of association.

The tax authority has a limited power of control in determining the value on the basis of the last balance sheet. Although it is required under Article 31(1) of the CIS to send to the Directorate-General for Finance the extract of the balance sheet and other documents submitted or available. The value to be considered for tax purposes may not, without further justifications, disregard the data contained in those documents. In other words, the tax authority may only correct the taxable patrimonial value of the properties if it does not correspond to the value recorded in the respective land registry or from the values of other elements of the assets or liabilities of the family business, based on the violation of the applicable accounting standards - cfr. paragraph 2 of article 31(1) of CIS[33].

The diversity of regimes based on the type of asset transferred – shares or other types of shareholdings – reflects the differentiation arising from Commercial Law of the various corporate types, corresponding, broadly speaking, to the other that distinguishes between partnerships and capital companies. In the specific case of family businesses, these are, due to their specific characteristics, suitable for partnerships. Even when they take the form of a public limited company, which is precisely the typical form of capital companies, these characteristics do not change. It should also be noted that the normative provision contained in the final part of paragraph 1 of article 15 of the Stamp Duty Code in which the power to determine the value of the transfer of quotas and shareholdings is returned to the company as early as in the articles of association.

The introduction of a capitalisation factor of net profits (f) on the formula for calculating the value of the shares of unlisted companies transferred intends to approximate the value of the shares of unlisted companies to the market value that they would have if they were counted, that is to say, of the *prime earing ratio*[34] or a standard of average normality and deviates from the exact value, an approximate value of the market value[35].

The acquisition of the right of ownership over the shares is, therefore, subject to taxation in terms of stamp duty, under item 1.2. of the General Table of Stamp Duty, contained in Annex II of the

not appear – in general or in the specific case – to be manifestly out of step with that reality. We can concede that the principle of ability to pay does not have an absolute value, in the sense that it is not required to be determined on the basis of real or market values. It is also mandatory to argue that there must be a rationality and a high degree of correspondence with real values. The introduction of a formula for calculating valuation and uncounted shares on the basis of objective elements related to the business activity – such as S, *R1* and *R2 – and of a* valuation factor, which is identical for all sectors of economic activity and directly related to the financial markets, such as the ECB's refinancing rate, requires a verification of the appropriateness of that factor for the determination of valuation (or devaluation) of shares. In addition, the introduction of a fixed value of 4% for the f factor makes it possible to minimise, cancel or even increase the effects arising from variations in the refinancing rate, leading to an appreciation of shares whose value is determined by the mere application of the formula. The differential treatment of listed and non-listed shares led to discriminatory treatment and it is not in accordance with Article 13 of the Constitution of the Portuguese Republic. The discrepancy with the actual real value of the shares is covered by the reasoning contained in the Judgment, although the latter does not expressly mention it.

33. A similar position arises from Circular No. 11/2007 of the Directorate-General for Taxes (Direção Geral dos Impostos) of 18 October 2007.

34. In this sense, see F. Pereira, *Avaliação Fiscal de ações não cotadas*, in Estudos/Centro de Estudos Fiscais, Lisboa, 1983, 22, which, although analysing the regime in force before the entry into force of the new Stamp Duty Code, can be used in this way.

35. Cf. Ruling no. 280/2020 of the Constitutional Court.

CIS, being applicable the rate of 10% and, if the assets of the transferred family business include real estate, 0.8% on the value of these assets. There will be no tax assessment and payment if the beneficiary of the donation is “the spouse or de facto partner, descendants and ascendants”.

That tax exemption based on the existence of a special family relationship with the donor is, unlike the exemption in the case of transfer on death, treated in the same way in other legal systems. Although with some specificities, we find in several legal systems rules of total or partial exemption from the payment of tax levied on free transfers of goods by *inter vivos* business, in some cases much more comprehensive in subjective terms than the one we analyse.

4.2. *Mortis causa* transmissions

The transfer *mortis causa* of shareholdings in family businesses is very similar to the free transfer by *inter vivos* procedure examined before. However, some important distinctions must be made.

The shareholdings, as a hereditary asset, are taxed conjointly with the other hereditary components at the time of the opening of the decease. Until 2004 the moment to consider was the date of the concrete division of the inheritance.

This legal solution, which may seem to call into question the principle of ability to pay is, however, the one that best suits the legal nature and autonomy of the illiquid and undivided inheritance autonomous patrimony. In this situation the taxpayer is the inheritance itself – an illiquid and undivided patrimony – and it is up to the representative of household (*cabeça-de-casal*)[36] or legatees to comply with the tax authority not only the reporting obligations but also the payment obligations on account of the taxes that may be due for the transfer. According to Article 3(3)(a) of the CIS, in the case of free transfers on death, the burden of tax falls on the heirs and legatees. And it is precisely at this point that we will find relevant differentiations that derive exclusively from the first level of kinship between *the deceased* and the heirs and legatees.

In the use of his testamentary autonomy, the shareholder may establish that they will be assigned to a specific person. This precise destination is usually guided by considerations related to their ability to manage the family business and continue it in a similar way.

If there his no will or similar disposition, the successors will be determinate in accordance with the rules of the Civil Code, *maxime* in arts. 2024 et seq. What matters is whether or not the successors fit into one of the situations mentioned in Article 6(1)(e) of the CIS[37], such as, surviving spouse, the *de* surviving unmarried partner, descendants or ascendants of the deceased and whether the transfer was subject to taxation under item 1.2. of the CIS general table[38].

The consideration of the family and, above all, of the narrower family nucleus for tax purposes is not exclusive, as one might think, of direct income taxes. Although it is in these cases that we find clearer rules on certain aspects, also in other taxes – and this is one such example – we find the reflection of arguments arising from the protection of the family. This delimitation corresponds to

36. The exercise of the functions of head of the couple shall be determined in accordance with Article 2079 et seq. of the Civil Code.

37. Although article 6 was amended by Law no. 12/2022, of 27 June, this exemption regime has not undergone any change, corresponding to the previous subparagraph c) of article 6 of the CIS, as amended by Law no. 64-A/2008, of 31 December.

38. While the original wording of article 6 of the CIS contemplated a total and unrestricted exemption from stamp duty for legitimate heirs – cfr. Article 2157 of the Civil Code – the new wording introduces into the category of exempt persons the de facto partner, who is not a legitimate heir, and limits the exemption to free transfers subject to the amount 1.2. of the CIS general table. The tax treatment of free transfers on death has undergone numerous changes over the centuries and, although it was considered as potentially equalizing income and wealth in the immediate aftermath of the French Revolution, the truth is that it was not introduced immediately, has experienced advances and setbacks and has yet to be proven to contribute. effectively, to reduce the distribution of income and wealth or, even, that the amounts collected with this tax represent a significant portion of tax revenue. In Portugal, the system in force until the tax reform introduced in 2003 did not contain a general provision exempting the beneficiaries of the inheritance from taxation, but rather provisions exempting the free transfer of certain assets or up to a certain value.

a legal definition and determination, but it is now permeated by sociological considerations that determine the extension, for some purposes, of this exemption. Basically, it is recognised that for the purposes of the transfer of property on death to a de facto partner, it is, in terms of stamp duty, treated in a similar way to the transfer to the spouse of disagreements or ascendants.

A small (but not negligible) detail: while the legal heirs acquire this status in the form of mandatory legal provisions that prevent their removal, the de unmarried partner only enters the status of heir or legatee if this the *de cujus* has an express and valid provision concerning to it.

When the company is not transferred to the heirs mentioned on article 6 of the CIS disposition, the transaction is not free of charge. In such cases, we need to consider a different question: the influence of the tax burden on s free disposal of the holders of the shareholdings, relegating to the background those who should be the guiding interests in the definition of the beneficiaries of the transfer of family businesses.

Although we believe that, with some advance planning, it is always possible to define a framework for the transfer of the various positions occupied by each of the family members in the company and compensation of the charges which takes into account a composition of interests that allows the financial impact of the tax to be amortized[39]. It is clear that the rules of tax law influence, decisively, the decisions taken by the *de cujus*, distorting – or being able to distort – the composition of social bodies and influencing the destiny of the family business.

5. Conclusion

The taxation of family businesses in Portugal is not subject to special rules and, for this reason, the study of the tax implications of their incorporation, management and dissolution is very slighted studied. There is also no differential treatment of the profits generated by these companies and distributed to the shareholders. It can therefore be said that family businesses are a complex reality in Portugal, at least from an administrative and managerial point of view, but not so much for tax purposes.

In this specific field – that of taxation – the exemption from taxation of the transfer of the company *mortis causa* is made with reference to the general rules in force and disregarding in absolute terms the will of the author of the inheritance. This approach, although it allows for neutrality in the distribution of assets, can have a decisive influence on the management of assets during life and also on the design of testamentary dispositions.

By choosing not to introduce a differential treatment of family businesses also in tax matters, not even with regard to the transfer of shareholdings, the Portuguese legislator noted its preference for the neutrality of tax rules and the importance it attaches to the principle of business continuity[40]. In fact, this option represents a convergence with the legal regimes that regulate business activity, but, above all, the importance that these companies have in the national and international socio-economic context. It is also clear that the continuity of the business in the same family depends much more on the capacity that it has to follow up on the project initially outlined than on fiscal or financial issues.

39. These constraints have been analysed for some decades by the European Commission and the European Parliament.

40. This principle occupies the central place in the decision to set up a business and in many management decisions, which does not mean that one or other decisions cannot be influenced by factors of another order and not measurable in economic terms. In addition to the studies that affirm the medium and long-term (un)sustainability of these companies, we find others that, more optimistic, point to the fact that more than 30% of these companies manage to maintain their activity for at least three generations, that is, about 60 years, aligning their "survival" rate with that of other companies. Without dwelling on this divergence, we will simply say that the diversity of results seems to result from the use of slightly different notions of family business. J. L. Ward, *Keeping the Family Business Healthy: How to Plan for Continuing Growth, Profitability, and Family Leadership*, New York: Palgrave Macmillan, 2011, S. Ahmad, K. A. Siddiqui and H. Mahmoud AboAlsamh, "Family SMEs' survival: the role of owner family and corporate social responsibility," *Journal of Small Business and Enterprise Development*, 27, 2, 2020, pp. 281-297.

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