FACULDADE DE DIREITO
UNIVERSIDADE NOVA DE LISBOA

André Augusto Tavares de Mello Soalheira Moreira

THE PORTUGUESE AND THE ENGLISH TAX TRANSPARENCY REGIMENS

A Comparative Analysis

Dissertação com vista à obtenção do grau de
Mestre em Ciências Jurídicas Empresariais.

Orientador:

Professor Doutor Gustavo Lopes Courinha da Faculdade de Direito da Universidade de Lisboa

Junho de 2016

André Augusto Tavares de Mello Soalheira Moreira

THE PORTUGUESE AND THE ENGLISH TAX TRANSPARENCY REGIMENS

A Comparative Analysis

Dissertação com vista à obtenção do grau de
Mestre em Ciências Jurídicas Empresariais.

Orientador:

Professor Doutor Gustavo Lopes Courinha da Faculdade de Direito da Universidade de Lisboa

Junho de 2016

Declaração de Compromisso de Anti-Plágio

Declaro por minha honra que o trabalho que apresento é original e que todas as minhas citações estão corretamente identificadas. Tenho consciência de que a utilização de elementos alheios não identificados constitui uma grave falta ética e disciplinas.

Lisboa, 15 de junho de 2016

André Tavares de Mello Moreira

The Portuguese and the English Tax Transparency Regimens

A comparative analysis

Table of contents:

MISCELLANEOUS

Acronyms:

- **CIRS – *"Código do Imposto sobre o Rendimento das pessoas Singulares"* (Individuals Income Tax Act)**
- **CIRC 1988 – *"Código do Imposto sobre o Rendimento das pessoas Colectivas"* (Companies Income Tax Act) as it was enacted in its original version**
- **CIRC 2015 – *"Código do Imposto sobre o Rendimento das pessoas Colectivas" (Companies Income Tax Act)* with all the amendments made until 2015, inclusive.**
- **CTA 2010 – *"Corporation Tax Act 2010"***
- **Einkommensteuergesetz – 'German' Income Tax Act**
- **ICTA 1988 – *"Income and Corporations Taxes Act 1988"***
- **ITA 2007*"* – *"Income Tax Act 2007"***
- **ITTOIA 2005. – "*Income Tax (Trading and Other Income) Act 2005"***
- **LP's Act 1907 – "*Limited Partnerships Act 1907"***
- **LLP's Act 2000 – *"Limited Liability Partnerships Act 2000"***
- **TCGA 1992 – *"Taxation of Chargeable Gains Act 1992"***
- **VATA 1994 – *"Value Added Tax Act 1994"***

Technical terms list:

- ***"Sociedade de profissionais"* –** A company that is subject to tax transparency according (CIRS 2015, art 6,b,a)).
- ***"Autonomous Taxation"* –** Taxation of certain expenses without prejudice of their potential deductibility for the determination of profits, according to (CIRC 2015, art 88th) and (CIRS 2015, art 73)
- ***"Autonomously Taxed"* –** A regimen applicable to certain types of income that are not included in the tax return for purposes of computing the applicable

tax rate. These types of income do also need not to be included in the individuals' tax return, according to art (CIRS 2015, art 71 and 22,3,b))

- ***Company*** **–** An enterprise that has been voluntarily subject to a registry of incorporation by its founders.
- ***Corporations*** **–** An enterprise that has received a charter of incorporation from a public authority. The distinction between companies and corporations is presently deemed immaterial.
- ***"Partnerships held by shares"*** **–** The term we deemed to be the most truthful translation of the Portuguese business type: *"Sociedades em comandita por acções"* and which are roughly similar to Limited Partnerships although these last never had shares issued.

Remarks regarding quotations:

English statute quotation remark: Given their specificity, the English Statutes when quoted along the text were referenced according to the Oxford Quotation Rules as approved by (OSCOLA 2006, B,1,a)). As such in our references the following details are shown:

1. Name of the Act
2. Year of Enactment
3. Section (the first number)
4. Subsection (the second number)
5. Paragraph (usully the letter or number in the end)

e.g. Human Rights Act 1998,s15(1)(b)

Along the text statute quotation remark: Although quotations are usually made by reference to the author, be it an individual or a collective entity, and the year of enactment, as we have used the "author-data" referencing in order to keep the text light regarding references, we deem it much more useful to the reader to be informed of the legislative act. As such the Cross-citation and cross-reference method was used, as suggested by such document (OSCOLA 2006, 3.).

Total number of characters of this dissertation: 195.613

ABSTRACT

The need people had to develop businesses together, allied to the intense historical control and limitations on incorporation from governments over the last 5 centuries, have led to the proliferation of *"partnerships"*. In time these will eventually be mostly replaced, in Continental Europe, by limited liability companies. However, in the United Kingdom, not only will they majorly keep as they will suffer mutations in result from the need to adapt to evolving times. Corporate bodies lie at the very soul of the tax transparency problematic. In fact, tax transparency firstly develops due to the disregard of the "company" as a separate entity from its members. The radically different way in which corporate entities developed in the United Kingdom and in Continental Europe explains the present gap in tax transparency regimens between the United Kingdom and Portugal. The tax transparency regimen is a system through which a corporate body with or without legal personality is disregarded for tax purposes being, instead, the profits allocated to the partners or members and taxed in their own personal sphere. The types of entities to which this regimen applies greatly differ between the Portuguese and the English regimen, as well as the purposes behind the regimens and the motivations that lead the legal drafter to the design of such systems. In Portugal the verification of a pre-set number of requisites leads to the automatic application of the tax transparency regimen, potentially to every company, only attaining to the qualities of the members or partners. On the contrary, in the United Kingdom, tax transparency is only applicable to partnerships in an absolutely objective way. This potential difference makes the United Kingdom partnerships perfect investment structures and, consequently, attracts investment through the avoidance of taxation in the country of registration/incorporation, regarding income that is not connected to that territory. Conversely the Portuguese regimen not only completely fails to achieve all the objectives that it was conceived to, as it presents extremely unattractive and even an unfair for both residents and non-residents, hence negatively preventing investment.

RESUMO

A necessidade sentida pelos indivíduos de se unirem no desenvolvimento de atividades comerciais, aliada ao intenso e histórico controlo por parte dos governos dos últimos 5 séculos, levou à proliferação de *"partnerships".* Com o passar do tempo estas serão progressivamente substituídas, na Europa Continental, por empresas de responsabilidade limitada. No entanto, no Reino Unido, não só se irão maioritariamente manter, como irão sofrer transformações em virtude da necessidade de adaptação à evolução social. As sociedades comerciais encontram-se no núcleo duro da problemática que cerca a transparência fiscal. De facto, a transparência fiscal tem o seu desenvolvimento primário pela desconsideração das sociedades comerciais enquanto entidades autónomas dos seus membros. O modo radicalmente diferente como as sociedades comerciais se desenvolveram no Reino Unido e na Europa Continental explica a presente diferença nos regimes de transparência fiscal entre o Reino Unido e Portugal. O regime da transparência fiscal é o regime por via do qual uma sociedade com ou sem personalidade jurídica é desconsiderada para efeitos de tributação sendo, ao invés, os seus lucros imputados diretamente aos sócios e tributados na sua esfera pessoal. Os tipos de entidades às quais este regime se aplica diferem grandemente do regime Português para o regime Inglês, bem como as motivações e objetivos que levaram o legislador à construção dos respetivos regimes. Em Portugal, a verificação de um conjunto de requisitos leva à aplicação automática do regime de transparência fiscal, potencialmente a qualquer sociedade, só tendo em atenção as características dos sócios ou membros. Pelo contrário, no Reino Unido, a transparência fiscal só é aplicável às *"partnerships"* de um modo totalmente objectivo. Esta potencial diferença faz das *"partnerships"* inglesas estruturas de investimento perfeitas e consequentemente, permite a atração de investimento pela não tributação no país de incorporação/registo dos rendimentos não obtidos naquele território. Em sentido contrário, o regime português não só falha completamente em atingir os objetivos que se propõe, como se revela extremamente pouco atrativo e mesmo injusto quer para residente, quer para não residentes, assim atuando como obstáculo ao investimento.

Introduction

The objective of this dissertation is to establish a critical comparison between the Portuguese and the English Tax transparency regimens. In fact, we shall discuss the application of the tax transparent regimen to companies constituted by professionals to which the nearest equivalent in English statute are partnerships. A brief initial note to highlight the fact that in England a partnership may exist for the purpose of developing any activity, conversely to what happens in Portugal, whether it is one traditionally developed by practitioners of some activity or not. As such a true direct terminological comparison may not be established between the term: *"Sociedade de profissionais"* as we find it in the Portuguese Law and the term: "Partnership" as we find it in the English Law.

In Portugal there is no such distinction, as in England, between partnerships and companies in what concerns the application of the tax transparency regimen. The only parallelism that may eventually be established between these types of business is if we consider the *"Sociedade de profissionais"* as an equivalent to the English partnerships.

Even though in the Portuguese regimen the tax transparency regimen is applicable to some other types of companies that are not *"Sociedade de profissionais"*, for the purposes of our essay, our discussion will focus on its application only to these, the reason being that they are actually the most important type of entities subject to the regimen (SANCHES 2007, 296) and this happens for two reasons:

The first and most evident reason for our analysis is that the *"Sociedade de profissionais"* are prone to be the most numerous type of entities among those that are subject to this regimen in Portugal, as every practitioner that develops an activity through a company will make it to be considered as a *"Sociedade de profissionais"*. Secondly because we deem the other two societal types, that are subject to this regimen in Portugal, these being unincorporated companies and the asset management companies, to be intrinsically and conceptually different from the

English partnerships. This happens due to different reasons in each case. On the former case, to tax unincorporated companies on their own would equal to subject to tax an entity that formerly does not exist and hence does not have an autonomous contributory capacity. In such entities a contributory capacity does only exist in the members' sphere as it is related to these individuals' wealth.

In the latter case, the case of assets management companies that fill the requirements and are hence subject to this regimen, the application of the regimen is understandable given the easiness that exists in relating certain assets to predetermined individuals that are unequivocally the ultimate beneficiary owners. Again in such cases we are talking about assets that belong to specific and determined individuals and the setting of a company is only meant to administer these assets whose owners are, In any case, the members, without prejudice of the second part of the art. 6th,, nbr 4 and nbr 2, a) of the (CIRC 2015)[1], case in which the problematic arises in similar contours as those we find in partnerships.

The problem with partnerships that we believe to be relevant of discussion, and that is shared by the assets management companies in peculiar situations that we have addressed above, is a problem related to the fairness of taxation and the disregard of an autonomous body as a subject liable for tax.

In a general perspective activities are whether developed by Companies/Partnerships or individuals as sole traders. Companies and Partnerships are usually structures used to group people. In the first case they usually develop similar but correlated activities hence contributing to a final result. In the second case they usually develop the same activities or at least very similar ones.

Companies are traditionally seen as being constituted mainly by capital whereas partnerships are traditionally seen as being constituted mainly by people. In Portugal, there is a traditional perspective that the activities developed by the *"Sociedade de*

---

[1] *"…as well as the one that in addition develops other activities and whose profits from that concern those assets, capital or estate come to be, in the average of the last three years, over 50% of the average, over the same period, of the total of its income." See attachment 4 for the original text in Portuguese*

profissionais" are usually specifically related to the individuals that constitute the company usually or essentially without the need of a considerable infrastructure (which would require capital) whereas the ones developed by other types of companies are usually the result of a settled infrastructure where individuals develop their activities and the material component, this is, the one that requires capital do build is usually more evident.

However, the above definitions are not tight ones, they are instead built on an economic traditional view where the separation between the holders of capital and those who supplied labour was quite evident. Historically in English companies it was not evident the distinction between capital and labour as these use to have a considerable dimension and demand a significant investment, whereas in partnerships, only existent in England, which used to be small businesses, this distinction used to be evident and the predominant element would indeed be the individuals that composed it and not the capital.

The distinction, however, between companies constituted by capital and those constituted be people is not an evident one, rather, a thin line marks this distinction as nowadays it is possible to constitute a partnership formed essentially by capital or a company that may develop activities that require no capital but merely labour from individuals.

In both cases, however, a profit is made and in any case the final beneficiaries of this profit are individuals. These individuals may be grouped in two types: Those who contribute with labour and these are the ones who effectively work and develop activities and those who invest in the company and expect to have a return of their investments hence benefiting from the activities developed by the company in the shape of capital gains.

In English partnerships this distinction is not a fundamental one as it is possible to have partners of both types in the same partnership.[2] The bottom line question that

[2] Being the former named active or salaried partners and the latter named dormant or equity partners.

lies to be answered is how the money flows from the business structure, be it a company or a partnership, into the sphere of individuals. In both models there can be workers that develop activities for the company and don't have a share in the "business". In the said case the company will pay those wages and these, besides being deductible as an expense will be taxed in the private sphere of the employees as an individual return and will be subject to all the applicable laws and regulations concerning individual's returns.

Ii is also possible, however, that those who made capital investments in the company (or partnership) do work for the company (or partnership) developing some sort of activity that is fundamental for its business. In this case it Is also possible that they also earn wages, which will be taxed in the same condition as those previously mentioned, without prejudice of their right to share in the profits.

Furthermore, companies distribute profits or pay dividends, whereas partnerships or *"Sociedade de profissionais"* do simply allocate profits. In the former, members or share-holders will only be liable for tax to the extent that profits are effectively distributed. If they are not and the company chooses to retain profits, then not tax will arise in the members' sphere and only the company will be liable for tax but never its members or share-holders. In partnerships or *"Sociedade de profissionais"*, the allocation of profits is automatic which means that all the profit that the partnership or the *"Sociedade de profissionais"* makes will presumably be allocated to the partners and only these will liable for tax, (FALCON Y TELLA 1984) being the partnership transparent for tax purposes and hence being considered a flow-through entity as the profits simple flow-through the company and end up in the partners' sphere. (SANCHES 2007, 294) referring to the tax transparency regimen, applicable to the *"Sociedade de profissionais"*, states that: *"With this regimen, the member – and only the member – will be taxed with a transformation of the income of the company in an income that is allocated to himself. An option is made for disregarding the companies as tax payers…"*

A catch that partnerships and *"Sociedade de profissionais"* suffer from is the fact that regardless of the intention of the partners of reinvesting the profits in the business, hence receiving no profits at all in their private sphere, they will always be taxed as if they had received such profits. This is a result that naturally derives from the tax transparency regimen.

In England Partnerships are deemed transparent for tax purposes whereas companies are deemed opaque for such purposes. This hence means that tax transparency intrinsically results from the type of business adopted and not from any other facts such as the gathering of certain requirements that will force the applications of the tax transparency regimen.[3] This is then the case of the Portuguese tax system.

The difference however lies in the fact that in Portugal the tax transparency regimen disregards the type of business adopted and relies only on a pre-set of requirements to be applicable whereas in England partnerships are always subject to tax transparency even if the partners are companies.

In order to highlight the true differences between the two systems a summary of the historical evolution of companies and partnerships in Europe and especially in England and Portugal should be made, with an emphasis to legal evolution in the Portuguese tax regimen applicable to these type of entities. We find significant differences in the way business structures evolved in the United Kingdom on the one hand and in Continental Europe on the other.

Conversely to what happens in Portugal that the tax transparency regimen as such was only born in the 1989 reform with the adoption of the CIRS, in England, tax transparency is not a recent phenomenon. The evolution of business types in England helps us, however, to understand the basic intrinsic differences in the tax transparency

[3] On a curious note, in the United States of America, partnerships are also subject to the same tax transparency regimen whereas companies may or may not be subject to this regimen and the subjection or non-subjection depends solely on an option made by the shareholders at the moment of incorporation.

regimens between these two countries, reason why we shall make an analysis on the historical evolution of companies and partnerships in the United Kingdom.

In every academic essay a determined methodology of investigation must be adopted. In our case a comparative methodology of investigation was adopted. In fact, concerning this essay a comparison concerning a determined tax regimen between the English and the Portuguese system, the first obstacle we face is the language. It was our option to adopt the English language in this essay given both the fact that we will be analysing the English regimen and its universality.

According to (ALMEIDA 2000, 120-121), the comparability between legal systems presents two main problems: What to compare and how to compare. Furthermore, the ability of comparison lies in finding a common denominator. In the case of our essay the common denominator is the tax transparency itself which takes place, as mentioned by the same author, at a level of micro-comparison.

According to the same author this process of comparison involves two nuclear phases: The analysis which consists in the analysis of the regimen in each of the legal systems and the synthesis that consists in the effective comparison (ALMEIDA 2000, 125). Believing in the effectiveness of such method we have, in this essay, made a thorough description and analysis of the regimens in both legal systems and ultimately critically compared them.

This author makes reference to three recommendations that derive from the previously mentioned phases of the process: To use the original legal sources; Consider the whole system of legal sources being able to choose the most representative; and to seek the “real law”, the “living law”. In this essay we have primarily used the legal statutes and other legal documents from official sources which we have thoroughly analysed, secondarily we have analysed the historical evolution and, being the English legal system a common law based system, it perfectly led us to the understanding, as we have explained, on how the legal statute came to evolve from situations that became an everyday reality. Lastly we have analysed the evolution of the types of businesses subject to the tax transparency regimen and the way they have adapted to the evolving reality. In what concerns the Portuguese system the historical evolution is not that relevant as the regimen is a very recent one. As such we have analysed the original regimen from the original statute and the changes made to such statute at a later time.

Following up this authors method, on a second moment, the analytical moment the similarities and differences between regimens are stressed out and lastly a comparison is established between systems in a critical commentary (ALMEIDA 2000, 129-131). In fact, our essay starts in an analytical moment seeking the similarities and ends up emphasising the differences between regimens.

As such our dissertation will develop according to this structure and will seek to emphasize both the similarities and the differences, notwithstanding the fact that these two regimens are intrinsically different, as we will show.

On what concerns linguistics we also find some obstacles when establishing comparisons between legal systems, especially when the source language in each of them is different. According to (ALMEIDA 2000, 143) *"... a translation of a legal text express in the legal language L1' to the legal language L2' generally demands the intermediation of the corresponding meanings in the mother tongues L1' and L2'."* This author (ALMEIDA 2000, 144) also ads up the fact that: *"In the majority of the cases, the legal translation will have to rely on equivalent meanings (...) The functional and systemic equivalence is a necessary condition but not an enough one because, more than a simple comparability, the meanings should present a significant similarity."* Our object of study is comparison between tax transparency regimens. As such there is both a functional equivalence and a semantic one.

A similar conceptual difference can, however, be focused: In Portugal the tax transparency is indeed seen as a regimen whereas in England it is not expressly considered a regimen, instead existing as a "mechanism of taxation". Tax transparency in England, conversely to what happens in Portugal, was not artificially created to find a solution to an alleged "problem", but instead because the legal drafter naturally deemed that to be the natural consequence of a determined *status quo*.

In what concerns terminology, in order to avoid what (ALMEIDA 2000, 144) names of *"homonymy"* we have opted not to translate. As such we shall consider, a company that fills the requirements to be deemed in the Portuguese terminology a *"Sociedade de profissionais"*, to be equivalent to the English Partnership in what concerns taxation, as both entities are transparent for tax purposes.

1. Historical evolution of corporations in the United Kingdom and in Continental Europe.

To find the true purpose which lies behind the statute of incorporation is far from a straight forward task. Corporations in the sense of unified bodies of people go back to ancient times such as the Roman Empire and the *"corpus juris civilis"* (DUFF 1938) and (BLACKSTONE e CHRISTIAN 1803). Although the Roman Empire has given an unequivocal contribution to the development of trade and commerce it is commonly accepted that the government of commerce was not systematized in Roman Laws. It was, instead, built around the specific necessities that trade and commerce gave birth to and which the rulers tried to solve by developing a number of flexible contracts that could be adapted to give answer to specific needs of the commercial activity as well as some specific commercial institutes similarly conceived to give answer to specific needs of the trade. (CORDEIRO 2012, 51)

The birth of commercial societies in the Roman Empire is related to the roman *"societas".* This institute permitted two legal constructs under which partners could join together for the purpose of developing commercial activity: the *societas* and the *collegium.* The former could be formed for any purpose be it commercial or not, according to the partners wills, whereas the latter could only be formed with the objective of developing certain social or public functions. (MALMENDIER s.d.)

The *"societas"* developed from the ancient *consortium ercto non cito* (partnership by undivided inheritance) among heirs who decided to administer their inheritance jointly rather than distributing it amongst them. The roman "*societas*" could be formed for some limited duration or otherwise with a view of perpetuity. In any case they had no separate legal personality as well as no limitation on the liability of the partners with the evident consequence that could also not hold property being this, instead, jointly owned by all the partners. In this type of society each partner should make its contribution with capital, work or other goods or rights in a very similar manner to what generally occurs in commercial societies in the present. (MALMENDIER s.d.)

Among the different types of "societas" that exist in the Roman Empire, one ought to be stressed out: The "*societas publicans"*, societies created with the objective of charging tributes and with the most complex structure among all societies composed by the investors, managing bodies and heads of office. However, the characteristic that Is prevalent in these societies is its' autonomous legal personality. This aspect becomes evident from both the Justinian Digest text which contains a rule enacted by Pomponius that states that these kind of societies are not dissolved by the death of one of its members (which would happen in any other type of society) and by another rule enacted by Paul stating that the issuing of a law suit against one of the partners with the objective of preventing its permanence in the society (*actio pro socio*) did not lead to the dissolution of the society. (DUFOUR 2012)

By the time of Justinian (527-565), Roman Law recognized a diverse variety of corporate entities under diverse names such as *universitas, corpus or collegium.* These included the state itself, municipalities and other private associations such as sponsors of religious cults, political groups and guilds of craftsmen and traders. These bodies usually had the ability to own property, make contracts, receive gifts and legacies, to sue and be sued, and, in general, to perform legal acts trough representatives. (BERMAN 2011, 215-216) These are again signs of the existence of a separate entity with an autonomous legal personality, even though such thing was not, at the time, acknowledged as such.

Later, in the period that went from about the 6th century up to the 14th century and which become known as the Middle Ages, societies and corporations have grown around the Roman institute that gave birth to them in the first place. As Edward Grant states:

> *"During the Middle Ages, it was commonplace for similar-minded and similar oriented individuals to come together to form corporations. They came from all walks of life: business, Church, education, and the professions. Merchants of a certain kind, wool merchants, for example, would organize themselves into a guild, or corporation, as would craftsman, suchs as weavers, millers, bakers and masons. The most common Latins term designating such corporate organisations was "universitas" (less often, "collegium" or "corpus"). "In the end" as Toby explains, "it was but an accident of history that the Latin universitas (corporation or whole body) came to refer exclusively to the places of higher learning and retain the name universities."* (GRANT 2001, 99).

Our intention by quoting this paragraph was acknowledging that corporations were actually born by the gathering of people who use to develop a common activity.

This author also points out the advantages related to incorporation of a business, advantages which are parallel to the ones existing today when incorporating a business:

> *"A corporation could own property, draw up contracts, and engage in court actions by suing, or being sued. It was also a prototype of representative government, since the members of a corporation elected officers, who could act on their behalf. Indeed, the actions taken by corporate officers were decided by a majority of the members in accordance with an old Roman maxim that "What touches all should be considered and approved by all"* (GRANT 2001, 99).

In a similar perspective Maitland (2000) suggests that the origins of corporations is related to middle-ages, around the 14th and 15th centuries and the emergence of the great trade centres in Europe. (F. W. MAITLAND 1898)[4] Strongly related to this

[4] On this matter see also: (SCOTT 1912, 3-6)

phenomenon of trade expansion and growth around this time and later, (HARRIS 2000) proposes that the birth of corporations as we know them presently is, instead, profoundly related to sixteenth-century England. As this author suggests, in this period, corporations of various sorts were widespread. The king himself, cities, boroughs, guilds, universities and colleges, hospitals and other charitables, bishops, deans and chapters, abbots and convents, and other ecclesiastical bodies were organized into corporations.

Furthermore, (BLACKSTONE e CHRISTIAN 1803) makes evident the purpose for which corporations were constituted. This author entitles them artificial bodies named bodies politic, bodies corporate, (*corpora corporate*) or corporations and considers them as naturally needed structures in the organisation of social groups. This author attributes the existence of corporations to its advantages which, according to his perspective account to 5: Perpetuity; Organisation; Holding Property; Management and Control; Privileges and Immunities.

Another division made by this author, that is of the utmost relevance to the theme herein being developed, is the distinction between aggregate and sole corporations. The former type is composed by more than one individual, whereas the later are composed by one single individual. For the upper mentioned reasons, it becomes evident the advantages of aggregate corporations when a diverse number of individuals aggregate to develop a common function.

However, these arguments are not enough, and even in some cases inapplicable, to explain sole corporations. The only objective advantage strived with sole business incorporation, pointed out by this author, is that of perpetuity, this is the possibility of an individual to pass on to his successors a certain *status quo*. He then gives some examples which in the present are not commonly seen as sole corporations, as this author chooses to call them, but instead as institutions:

> *"In this sense a king is a sole corporation: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very*

apparent, if we consider the case of a church. (...) The freehold was vested in the parson; and, if we supposed it vested in his natural capacity, on his death it might descend to his heir, and would be liable for his debts and encumbrances: or at the best the heir might be compellable, at some trouble and expense, to convoy these rights to the succeeding incumbent. The law therefore was wisely ordained, that the person 'quantenus' [as) parson shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given the other also."

Naturally the above mentioned status of incorporation could also be given to a sole businessman carrying on his trade and this status of incorporation could eventually lead his business to perpetuity. In modern history of mankind there are a few good examples of family businesses5 that have an ancestral existence even though they were not formally incorporated when they first appeared. But has a family business carrying on the same activity, they have kept a certain *status quo* and became known for developing a certain activity meaning that regardless of his successors, they shall always be looked at as pursuing that same activity.

All the other advantages associated to an aggregate corporation are rather immaterial in a family business context as the number of individuals is limited to the family members, the hierarchy, organisation, the management and control functions are primarily established in a family context, the property is directly owned by the family and the privileges and immunities are directly attributed to the family being mainly heritable.

[5] Such is the example of Richard Balson, pertaining to a family of Butchers operating in Dorset since the 16th century, the kingdom of Richard VIII, making it Britain's oldest family business. (BURN-CALLANDER 2014)

However, it should be dully noted that a corporation in the historical sense, this is to say as a position that is rather perpetual an is occupied by an individual but does not cease to exist with the death of that individual, being, instead replaced by other, should not be confused with the status of incorporation of a business. The status of incorporation of a business is the result of the official recognition by the authorities of a specific territory of the existence of a collective entity which has determined peculiarities that differ from those of the members that actually take part in it. In England this was no different except to the extent that the approval of the king or the parliament, as previously mentioned, was always necessary.

1.1. The end of the English Crown's Monopoly on Incorporation

According to (HARRIS 2000, 40) from the companies that existed in the 17th century England only a few were involved in the domestic market, with the majority involved in overseas trade. During this period, the establishment of corporations required State authorization, which normally meant a royal charter. In addition to explicit incorporation clauses, the charters of overseas trading corporations also included clauses which granted the corporation a monopoly over English trade with a specified territory abroad. As this author suggests: *"In these early days of the business corporation, monopolistic privileges were seen as almost integral do the act of incorporation because of the nature of the companies' activities"* These activities were, as referenced above, essentially limited to overseas commerce hence justifying the advantages of monopolistic privileges.

To help the reader understand this phenomenon we would like to make a very brief note related to the status of incorporation: The difference between a company and a corporation rests precisely on its formal status. The process of incorporation is the official recognition by the state that a company exists as a separate independent body. This status is now achieved through registration at the registrar but was, in the past, only possible with a charter of the king or parliament as we mentioned and will further reference. As such any individual may establish a company today but the charter of incorporation, hence giving it the name of "corporation" was only traditionally given by the king.

As (HARRIS 2000, 42) also suggests, the monopoly related to incorporation was intentionally supported by the crown as an attempt to close the gap between its declining land revenues and its growing military expenses, this is to say, as a means of ensuring a source of permanent revenue. Other authors (HALEY February, 1936) and (EKELUND e TOLISSON 1981) support different theories behind this proneness from the English crown to control commerce but they all seem to agree that this control was related to finding ways of financing expenses or alternatively finding new sources of revenue whether through taxation of activities or through monopolising trade.

By the end of the 17th century we can observe paradigm change. In fact, around 1689 there will be a significant proliferation of unincorporated companies. This phenomenon is explained to us by (HARRIS 2000, 52) that suggests that:

> *"the positive incentive found in the emergence of a booming stock market. On the negative side, it can be explained by the unwillingness of the newly organized Orange administration to fiercely enforce its prerogative* (on the exclusivity on incorporation) *over evaders of incorporation because such enforcement was identified with the absolutist Stuart tendencies of the seventeenth century. Attempts of the new monarch to prosecute unincorporated companies after the famous Stuart trial over revoking the charter of the Corporation of London in 1682 could prove highly unpopular"*

This historical evolution we have been developing is intended to demonstrate how companies came to be formed without the need of an official incorporation process which is to say authorisation of the king.

From this moment onward, the English monarchy enters a phase of strong financial dependence from companies, especially those that will become known as the "moneyed companies" which, will at this point enter an endless spiral of loans to the state. As (HARRIS 2000, 55) states:

> *"Established in 1964, the Bank of England joined the East India Company in playing a central role in national finance. The two become known as the moneyed companies. They not only had enormous stock (...) but also had continuous involvement in national finance. (...) These long term loans laid the foundation for a continuing financial relationship between the State and the companies (...)*

This dependence of the State from financing by private companies, allied to a booming speculative stock market would lead to a financial bubble caused by the speculation around the growth potential of these companies and especially to that of the South Sea Company:

> *"The South Sea Company joined the moneyed companies club with its incorporation as a join-stock corporation in 1711 and followed the path of the East India Company in an attempt to establish overseas trade as its primary business. The company hoped to capture some the legendary wealth of that continent by entering both the general and the slave trade (...). However, the hopes were not realized (...).*
>
> *Thus, a few years after it was founded, the South Sea Company's ambitions (...) to become an overseas trading company came to an end. (...) The company then focused its activities on the field of public finance in which it had been involved since its inception.*
>
> *The company's original capital, according to its Act of Incorporation, was to be exchanged for a portion of the national debt. (...)"* (HARRIS 2000, 56). *The involvement of the South Sea Company increased toward the end of the decade, and reached its profound and infamous apex in 1720 with the scheme of converting much of the national debt into its stock, in an episode that came to be known as the South Sea Bubble."* (HARRIS 2000, 55)

It appears that this spiral of growing debt was so intense that by 1714, 39 percent of the national debt was owned to the three moneyed companies, these being the Bank of England, the East India Company and the South Sea Company and this debt continued to grow in the following years. (HARRIS 2000, 56) In 1719 the total government debt was £50 million, of which £18.3 million were held by the three moneyed companies and of these £11.7 million were held by the south sea company alone. (CARSWELL 1960, 102-107)

The south sea company appeared in a wave of formation of new companies that boomed in a moment previous to the Glorious Revolution of 1688 and in a time where supervision on incorporation was prone to leniency, notwithstanding the fact that the South Sea Company was officially incorporate. Additional companies were formed in the 1680s than had been in the previous five decades and they were flocking from different and the most diverse areas of the trade. (HARRIS 2000, 57)

When analysing this subject one should bear in mind some previous concepts about incorporation and the reasons for incorporation. Several reasons may be appointed by people to support the need for a business to seek incorporation in the present. However, between the 17th and the middle 19th centuries, the only reason why people would seek incorporation, formally or informally, depending on the time frame being analysed, would be for purposes of attracting investment from the stock market, which is to say, to sell stocks in the market hence obtaining financing.

This aspect is absolutely crucial as when there was no need to seek financing and people’s intents were, instead, to simply pursue a small business activity, then they would not seek to incorporate a company but instead set a partnership. The point we intend to make is that partnerships were a type of business that ended up being used, between the 17th and middle 19th centuries, for the development of most domestically commercial activities that neither intended to attract investment nor to obtain any sort of privileges.

Furthermore, it should also be noted that the privileges obtained by a charter of incorporation that could be obtained from the king or the parliament were often related to the monopoly on trade over a specific England overseas territory and, especially after the Glorious Revolution of 1988, usually implied an assumption of part of the national debt which meant that the granting of the status of incorporation was actually being used as a tool of financing by the state.

1.2. Reaffirming the English Crown's monopoly on incorporation

The South Sea Company would go bankrupt in the middle of 1720 in an event that became known as the South Sea Bubble and that would cause this company stock's to plunge, which lead to one of the largest economic crisis in the history of England. However, as (CARSWELL 1960, 102-107) supports the South Sea Company was not an isolated event. Instead, and as we mentioned before, several new joint stocks companies were being created and were trading stocks in the market around this time.

Several companies were being created at this time making exaggerated and sometimes even fraudulent claims about their potential to make profit. These were nicknamed "Bubbles" and more than damaging to the market were a threat to the South Sea Company as they diverted investment. As such the problematic around the existence of irregular companies that damaged the market ad investors, under a veil of good intentions, was raised on the 22nd of February 1720 by John Hungerford in the House of Commons and persuaded the lords to set up a committee. Hungerford had previously been expelled from the Commons for accepting a bribe. (CARSWELL 1960, 116-117)

This enquiry led to the enactment of the bubble act which required that a joint stock company could only be incorporated by Act of Parliament or Royal Charter which prevented the development of joint stock corporations. As (HARRIS 2000, 61) suggests:

> *"...the South Sea Company, which organized the national debt conversion scheme, also instigated the Bubble Act, but (...) it did so because small bubble companies had become an annoying factor in the stock market of 1720."*

The idea Harris is supporting here is that, conversely to what other authors suggest (F. W. MAITLAND 1936, 208); (DuBOIS 1936, 437) and (SCOTT 1912, 438), the Bubble Act was a tool used to limit the pulverisation of investment by the people that was taking place in an open market, instead of taking the Bubble Act as a remedy to the crisis. As such the Bubble Act is deemed by this author not as a consequence of the bankruptcy of the South Sea Company, but as an intentional decision made to boost and concentrate investment in the said company.

In order to understand what was the South Sea Company and the major crisis it gave origin to when the south sea bubble burst, we advise the reading attachment 1, from the Harvard Business School article that addresses and depictures this major episode in England's economy.

According to (KINDLEBERGER 1984, 204), this limitation on the incorporation of businesses would be in force until the enactment of the Joint Stock Companies Act in 1856 which would later be consolidated in the Companies Act 1862. As this author states, that former act introduced both limited liability and the general right of incorporation without a precedent Act of Parliament. Furthermore, as stated by (VERMEULEN 2003, 108):

> *"By 1890, all states had adopted statutes providing for incorporation with limited liability by simple registration. The introduction of relatively simple incorporation procedure in France in 1867 entailed the rapid proliferation of general incorporation statutes throughout continental Europe, which already embraced the corporate limited liability doctrine since the enactment of the Napoleonic Code de Commerce in 1807."*

As we will see when addressing the evolution of partnerships in history, particularly in England, the first partnership bearing limited liability was unveiled in 1890 with the limited liability partnership act 1890, making it coincident with the upper mentioned quotation. Moreover, the creation of the incorporation procedure in France of 1867 took place only four years after the Companies Act 1862 in England, again showing it coincident and intrinsically related with the Napoleonic Code. This author continues stating that:

> *"The principle of limited liability was acclaimed as an industrial breakthrough by some, but it was stridently vilified by others. The proponents usually pointed to the wealth-increasing role limited liability corporations played in the economy. The defenders of unlimited liability argued that limited liability would only entail wealth transfers from creditors to shareholders, which could eventually lead to corporate inactivity. (...) it seems that the ultimate triumph of limited liability came with the general acceptance of the use of limited liability corporations by closely held firms. (...) the Companies Act (1862) purportedly only granted limited liability to enable passive shareholders to invest in businesses without shouldering the burden of personal liability. A decision of the House of Lords in Salomon vs Salomon Co. Ltd. overturned this assumption by clarifying that the Companies Act also covered closely held firms in which no particular business risk was involved, and which required no outside capital."* (VERMEULEN 2003, 108-109)

This quote marks the turning point in the acceptance of limited liability. In fact, we now take the idea of limited liability for granted and something that is absolutely natural. However, a general principle of conscientious development of business seems to clash somehow with the idea of limiting an individual's liability, grounds in which critics supported and which lead to the non-application of this principle to closely held firms in a first moment. This, again, resulted from the idea that a business man acting in good faith would not manage his own business in a disastrous way and the only ones that could be excused from the mismanagement of a business were those that even bearing in interest in the business were not closely related to it, this is to say, the investors.

Curiously enough in a later moment the concept of limited liability was rethought as to include closely held companies, as it was the case of Salomon vs Salomon Co. Ltd. In such case the only true investor was Mr Salomon baring 20.001 shares and their family members only held one share each, meaning one share for his wife and 5 shares for each of his 5 children, making it a company with 7 members, the minimum number of members that a company could be incorporated with. In such case even though the creditors have tried to deem this as scam to avoid Mr Salmon's liability, the court deem him not liable for his companies' debts and hence establishing limited liability as a general rule for every company.

1.3. Partnerships: An alternative to incorporation

As we discussed in a former section of this dissertation, the origins of partnerships go back to Roman Times. In particular, from roman times this evolution results from the roman "societas" which organisation was very similar to the one found in early partnerships and even in present times partnerships with some necessary changes. Particularly similar to what appears to be a partnership were the Institutes of Justinian, 3, 25, which also regulate the form "societas" which can be considered the closest ancestor in Roman Law to the present day partnerships. (HARRIS 2000, 19)

Partnerships are viewed as legally enforced contracts whose origin is closely related to several categories of agreements recognized by Roman law, the *lex mercatoria* or medieval law merchant. (COLLYER 1861, 1)

These partnerships suffered several mutations as a consequence of the evolution of times and ways of trading. (COLLYER 1861, 2) puts it, writing in the beginning of the 19th century:

> *"Persons in trade may be view in the situation either of partners as between themselves, or partners 'quoad' third persons.*

> *Partnership as between the parties themselves is a voluntary contract between two or more persons for joining together their money, goods, labour, and skill, or any or all of them, under an understanding that there shal be a communion of profit between them, and for the purpose of carrying a legal trade, business or adventure."*

This description of partnership both matches the Roman Law idea that partnerships were established for the development of a specific business or trade, as it matches, as we shall see, the idea embedded in the *lex mercatoria* and later the structuring for English partnerships. This author also states that:

> *"A learned writer has observed that, under the Romans, the social contract or partnership needed no other solemnity but the consent of the parties, without any writing at all; and that, according to the civilians, a partnership is contracted sometimes tacitly. (...)*
>
> *The same observations are applicable to the law of England. To constitute a private unincorporated partnership, no contract in writing is necessary; the acts and words of the parties are alone sufficient for that purpose."* (COLLYER 1861, 2-3)

This quotation is intended to support the perspective that, unlike corporations private unincorporated partnerships needed no approval of the king to be formed, which means anyone could freely set up a partnership with the objective of conducting business but no one could set up an incorporated company without the consent of the king, parliament or by prescription, depending on the époque, as we have stated above. This is hence the reason why partnerships would later proliferate in such an intense way in the English common law system.

But the mode of creation of a company was not the only peculiar aspect related to English partnerships. Other aspect that are peculiar to English partnerships, according to the principles that are embedded in the common law system, was the inexistence of limited liability, an idea that conflicted with most common law principles, and the equality between partners in all aspects of the business. In a traditional partnership, such as those who existed in the beginning of the 19th century in England there was no difference between partners that could bind the partnership and those that could not. As (COLLYER 1861, 5-6) states:

> *"The contract of partnership, as existing between the parties themselves, gives them a right of action in their character of partners against third persons. It also enables any one of them to file his bill in equity against the others for a dissolution of the partnership, a sale of the partnership effects, and a division of the proceeds amongst the partners.*
>
> *Persons become liable as partners to third persons, wither by contracting the legal relation of partners 'inter se' or by holding themselves out to the world as partners. For, by the law of England, not only he who is actually a partner, but he who lends his name and credit to the firm, is liable for the debts and engagements of the body. No restriction of liability, except by charter, is permitted to any of the partners; all are liable not only to the extent of their interest in the joint stock, but also to the whole extent of their interest in the joint stock, but also to the whole extent of their separate property."*

As previously mentioned this reflects an equality between all partners in all aspects of the partnership, namely in representing the partnership towards third parties, presenting bills for the dissolution of the partnership, division of proceeds and most of all, liability for debts. Not only was there no limitation on the liability, with the exception of a limitation upon royal or parliamentary charter, as all the partners were jointly responsible for all the partnership's debts.

It should also be stressed out that the same principles that applied then are also applicable today as a general rule only susceptible of being modified upon inclusion on the articles of incorporation of the partnership or other document that is deemed valid as an internal agreement between the partners. As usual in common law systems, most of the general rules may not be applicable to specific situations as long as there is a contract between the parties that expressly states differently. This proceeds without prejudice of the new rules relating to limited partnerships and limited liability partnership that came to promote significant changes to the general principles and rules to which partnerships used to be ruled in the 19th and 20th centuries.

Two raw models of partnerships are especially relevant and they are both emphasized by (HARRIS 2000, 19-20). These models have evolved in different ways in the world and especially, in what concerns this dissertation, in Europe: These are the continental unlimited business partnership and, *sociéte general* or general partnership that descended from the Italian *compagnia* and the *commenda*.

As the referred author states, in its origin the *compagnia* was a closed family business and the family members were its partners for all purposes:

> "*The invested capital and labor, based on ability; shared profits, based on needs and customs; and took part in its management according to a generational hierarchy. In fact the early compagnia was less a formal partnership in internal affairs than a legal organisation in its relationship with third parties."*

At the exception of the formal or informal attributes of the society, this opinion was also supported by (COLLYER 1861, 8) nearly two centuries before. As this author states:

> *"Again the parties must join together their money, goods, labour, or skill, for the purposes of trade. One partner, therefore, may bring into the trade money, another goods, and a third labour or skill; and they will thenceforth be partners as between themselves, provided they share proportionally the profit and loss of the concern."*

However, by the late 18th century and the beginning of the 19th, in England, these partnerships were merely informal as there was not a formal registration, reason why we purport these were so largely used as business vehicles as a suitable alternative to incorporated companies that required numerous formalities.

The later type of partnership, the *commenda* had one more ephemeral purpose which was the equivalent to what is known today as a *joint venture*, the difference being that this last type of partnership may be set for a undetermined period of time without a specified subsequent conditions that ultimately leads to its dissolution. As (HARRIS 2000, 20) states:

> *"Another type of partnership, the commenda (...) was developed in maritime italian cities with the revival of trade in the eleventh century. It was used as a partnership between merchants and ship masters for the purpose of conducting a specific voyage to an overseas destination. This type of partnership was characterized, due to its unique use, as the cooperation among a small number of partners for a specific and short-time purpose.*

Once again these structures reflect a spirit of cooperation. However, unlike the formerly quoted ones, the *compagnia,* the *commenda,* were not partnerships between individuals carrying on a similar trade but instead partnerships between individuals supplying different means and with a very specific and time limited purpose. This partnership that resulted from the dependence between individuals with different means is also mentioned by (HARRIS 2000, 20) : "*It was an asymmetric partnership in which one partner contributed capital while the other partner contributed labor."*

As the same author refers, the line of evolution of this type of business led to the creation of the French Limited Partnerships by Colbert's ordinance, as the *societé en commandite*, which later entered England via the, already mentioned, law merchant, being gradually absorbed. However, a very relevant distinction this author makes between the English vision and the general continental vision regarding the limitation of liability is that:

> *"The unlimited partnership, which was recognized throughout the continent, was not adopted by English law. By the time the general partnership was absorbed, the common law had already been formalized and rejected the limited partnership. The concept of a partner immune to claims conflicted with basic common-law forms of action and with tort, contract, and agency doctrines, and*

> *was therefore blocked by the common law from entering England. It was recognized by English law by statute only in 1907."* (HARRIS 2000, 20)

This paragraph outlines the evolution of partnerships in England, it explains why it took so long for the limitation of liability to be accepted in these partnerships at least in formal terms. Although the limited partnerships act was enacted a few decades after the partnerships act, we are assuming that the existence of partnerships surpassed by centuries the act that formally approved their existence and constitution.

Furthermore, and of the utmost importance to one of the main points we are trying to make in this dissertation, is the statement made by this author in an attempt to justify the common usage of partnerships:

> *"A partnership, unlike a corporation could be created voluntarily, by way of agreement between the would-be partners, and did not require permission of the State. Unlike the corporation, which had constitutional law bearings, the partnership was a private law and a commercial law conception, mainly involving elements of contract and agency law. Another significant difference which should be reiterated is that until the sixteenth century, the corporation had been employed for public and semi-public purposes, whereas only the partnership served as a viable form of business organisation."* (HARRIS 2000, 21)

This is the paramount reference that demonstrates why partnerships came to grow up so much when compared to corporations in the UK. Once again it shows how constrained the liberty of individuals was in what concerns the creations of incorporated companies and hence explains the proliferation of partnerships as an understandable alternative.

This reason, however, is not the sole reason that explains why partnerships proliferated so much. In fact, for small businesses in which all the partners are involved, it is hard to accept the idea of limiting the partners' liability. As a matter of fact, it may even, under some circumstances, sound perverse. According to (VERMEULEN 2003, 106)

> *"Although the principles of partnership law have been embedded in various ways in different national codifications, most jurisdictions base their partnership laws on the same fundamental principles and ideas. The traditional general partnership forms are designed to cater for the needs and circumstances of small firms with only a few owners, all of whom are involved in the operation of the business. Typically, partnerships are the basic form of business association in which more than one person is involved. They have their origin in express or implied consensual agreement to engage in an economic activity for profit. (...) human capital (e.g. the knowledge and abilities of of the owners) is often the most valuable contribution to a partnership..."*

In this excerpt this author emphasises some relevant points which we have made previous reference to. Among them we stress out the special relevance of the human capital versus the material capital, the appetence of this type of structure for small businesses and finally, and intrinsically associated with the relevance of the human capital, the idea that in generically and traditionally, in most partnerships, most of the partners were actively involved in the development of the business. Furthermore, this author states that:

> *"Around the same time,* (1890) *the lawmakers in England endeavoured to introduce legislation based on the limited partnership form that already played an important role in the continental Europe economy. This new act was supposed to be the counterpart of the Companies Act (1862)."* (VERMEULEN 2003, 109)

Limited liability showed up and was worldwide adopted for the same similar reason that concerned the need to promote investment as shown above. However, it was senseless to allow such protection through incorporation and not extend it to the already commonly accepted and largely existent forms of business such as the partnerships.

As for the appearance of LLP's (Limited Liability Partnerships), the reasons behind their adoptions is related to the need, shown by certain practitioners, to limited their liability, practitioners which have legal limitations in developing their activities through corporate structures. According to (PUGH 2013), *"The LLP structure is commonly used by accountants, as a company may not act as auditor to another company. LLP's are also becoming more common among firms in the legal profession such as solicitors and patent attorneys that by law are prohibited from incorporating as companies."*

Some critics are made to the creation and usage of such structure by accountancy firms, especially as an abusive was to avoid liability for their actions. Please check attachment 7 to this dissertation for further information and references on this topic. Still, even though many critics are made, the fact is that an LLP is not a liability free pass as all the assets of the firm will still be liable by a negligence claim.

2. Partnerships taxation in England

Partnerships' taxation in England is regulated by the (LP's Act 1907), the (LLP's Act 2000), the (ICTA 1988) and by the (TCGA 1992)

Both the (LP's Act 1907) and the (LLP's Act 2000) make reference to the stamp duty alone. As for the former it makes reference the stamp duty on the contributions made by partners to the partnership with a tax, *ad valorem*, of *"five shillings*[6] *for every one hundred pounds, and any fraction of one hundred pounds over any multiple of one hundred pounds, of the mount so contributed, or of the increase of that amount, as the case may be"* (LP's Act 1907, s11). No reference to any other tax is made in this act. As for the later, it actually makes reference to the stamp duty but, this time, conversely, to exempt from this tax all the contributions made by partners to a limited liability partnership as long as certain requirements are filled (LLP's Act 2000, s12).

[6] 1 Shilling to be equal to 6 pence before the 15th of February 1971 or 5 pence thereafter.

In what concerns taxation of the distributions made by partnerships, this is regulated by the (ICTA 1988, s111) that states that: *"Where a trade or profession is carried on by two or more persons jointly, income tax in respect thereof shall be computed and stated jointly, and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnerships name."*. As such not only must the partnership itself make an income return as must the partners make a return themselves declaring this income separately from all others.

Furthermore, a partnership may have companies for partners and not necessarily individuals. In this context the partnership ends up working as a Complementary Group of Companies or Consortium. As such, taxation lies on the companies to which the income is distributed to. This topic is developed (ICTA 1988, s14(1)) that states that: *So long as a trade is carried on by persons in partnership, and any of those persons is a company, the profits and losses (including terminal losses) of the trade shall be computed for the purposes of corporation tax in like manner, and by reference to the like accounting period, as if the partnership were a company, and without regard to any change in the persons carrying on the trade…"*

As a result of the application of this subsection we can conclude that when, in a partnership, at least one of the partners is a company, then the applicable rules for determining the taxable income will be those applicable to companies, this is to say all the legislation that is by virtue of this act applicable to companies and, particularly, the (CTA 2010), in case the partners are companies domiciled in the UK for tax purposes.

The (LLP's Act 2000, s10) promoted some changes to the (ICTA 1988) as to include certain provisions specifically regarding taxation of LLP's. As such the newly introduced section 118ZA states that:

> *"For the purposes of the Tax Acts, a trade, profession or business carried on by a limited liability partnership with a view to profit shall be treated as carried on in partnership by its members (and not the limited liability partnership as*

> *such); and, accordingly, the property of the limited liability partnership shall be treated for those purposes as partnership property."*

This subsection once again highlights the difference between these partnerships and general and limited partnerships. The two former ones could not hold property whereas the latter can.

However, in what regards taxation, similarly to the former, the latter are also considered pass through entities which means they are transparent for tax purposes. (HADNUM 2014, v) states that: *"Despite the fact that an LLP is effectively a corporate vehicle, it is generally treated for tax purposes as though it is transparent. That is, the LLP is not subject to tax on its profits. Instead its members are subject to tax on their share of the profits. This tax "transparency" applies provided the LLP is carrying on a trade or profession (or business) with a view to profit."*

Corroborating this last statement, (LLP's Act 2000, s10(3)) came to add (TCGA 1992, s59A(1)) that states that:

> *"(1) Where a limited liability partnership carries on a* trade with a view of profit-
>
> *(a) assets held by the limited liability partnership shall be treated for the purposes of tax in respect of chargeable gains as held by its members as partners, and*
>
> *(b) any dealings by the limited partnership shall be treated for those purposes as dealings by its members in partnership (and not by the limited liability partnership as such),*
>
> ***and tax in respect of chargeable gains accruing to the members of the limited liability partnership on the disposal of any of its assets shall be assessed and charged on them separately****."*

This subsection that we have quoted is of paramount importance as it reinforces the idea of transparency for tax purposes. Again in such case the partnership is disregarded as a separate entity and the partners are taxed on its own sphere. However, one should regard the fact that this section is applicable only to the extent ***"Where a limited liability partnership carries on a trade with a view of profit"***, this hence being a crucial requisite. Should a partnership be constituted with any other objective that not with a view of profit, then this section will cease to apply and tax transparency is replaced by opacity. As such (TCGA 1992, s59A(2)) states that:

> *"(2) Where subsection (1) ceases to apply in relation to a limited liability partnership with the effect that tax is assessed and charged-*
>
> *(a) on a limited liability partnership (as a company) in respect of chargeable gains accruing on the disposal of any of its assets, and*
> *(b) on the members in respect of chargeable gains accruing on the disposal of any of their capital interests in the limited liability partnership,*
>
> *it shall be assessed and charged on the limited liability partnership as if subsection (1) had never applied in relation to it."*

Furthermore, according to (HADNUM 2014, v)

> *"Despite the fact that an LLP is effectively a corporate vehicle, it is generally treated for tax purposes as though it is transparent. That is, the LLP is not subject to tax on its profits. Instead its members are subject to tax on their share of the profits. This tax "transparency" applies provided the LLP is carrying on a trade or profession (or business) with a view to profit."*

This transparency does not apply exclusively to profits but it is, instead, also applicable to capital gains and as such, according to (HADNUM 2014, vi) *"…any gains made on the sale of capital assets will generally only be assessed in the hands of the members, not the LLP itself."* Consequently, although the LLP has legal personality and can hold assets on its legal sphere, which means that when transferred to the LLP these assets will cease to belong to the partners and cannot equally be used to settle individual partners' debts, when sold, the revenue that result from such sale will be deemed as partners revenue and taxed in its own sphere accordingly.

2.1 Purposes of the tax transparency regimen in England

Ascertaining the purposes of the flow-through or pass through tax regimen in the English system is not as evident as it is in other legal systems. In the Portuguese system, for instance, the creation of the tax transparency regimen was justified by the legal drafter based on aspects emphasized by lecturers. As we shall number further down this dissertation.

In the English system tax transparency is instead the result of a *"de facto"* situation resulting from an historical background in which the business was deemed to be developed by the individuals that had a direct interest in the business instead of being developed by individuals other than those who held a stake in the business.

As such there is not a direct justification behind the application of this regimen to English partnerships as its application is just a natural consequence of this business type. Even though it is evident that it eliminates double taxation, this aspect is not particularly emphasized as a purpose for the existence of such entities. Corroborating this perspective (McCAHERY, RAAIJMAKERS e VERMEULEN 2004, 299) state that:

> *"(…) while it is clear in the United States that the LLP and LLC have major tax advantages for small firms over incorporation, the UK tax position is quite different. The double taxation of corporate profits experienced under the pure classical system of corporate tax in the United States means that tax transparent business forms bring serious tax savings. In the United Kingdom, corporate distributions are not subject to such extensive double taxation as in the United*

States, due to the availability of tax credits for shareholders on dividends in many cases."

Even though the avoidance of a double taxation is frequently highlighted as an advantage of this structure given its tax transparency (BLICK ROTENBERG s.d., 1), (HW Fisher & Company December 2012, 2) and (GRANT THORNTON s.d., 2), the fact is that given the tax brackets in the UK and the mechanisms for minimizing double taxation, the usage of such structures with such intent does not appear to be of great advantage as seen on the comments above.

To talk about "reasons" or "purposes" for the tax transparency regimen is even something that appears not to be focused, exposed or studied by lecturers. Tax transparency is, instead, focused as an "advantage" that is sometimes highlighted by some authors or advisers but the reasons that gave were behind its creation is something that can hardly be determined.

2.2. Foreign Partnerships

For the purposes of this chapter we consider a partnership as foreign when all the members, the central management and control and any existent permanent establishment of the partnership are located abroad

Two main criteria that will trigger liability to tax by a State are generically accepted: A former criterion is residence, this is when a company or individual is deemed to be resident of a State (Model Tax Convention 2014, art 4th, nbrs 1 and 3) and specifically, in the case of individuals, it relates to the place of domicile, residence or other criterion of similar nature and in the case of companies it relates to the place of Management of the Said Company. A latter criterion relating to companies or the individual development of business activities is the existence of a Permanent Establishment under art 5th of the aforesaid convention in a State which reflects the principle of the source, this is to say that when there is a permanent establishment in a State and the profits are related to the activities developed in such establishment then the profits are deemed to have their source at that state. Any of these criteria will trigger liability to tax (ICTA 1988, s6(1)(2)).

In what concerns individuals, (ICTA 1988, CH v, s334(a)(b)) do reflect these criteria and, in what concerns companies, (ICTA 1988, s6(1)(2)) do also reflect these criteria in order to tax companies' profits. However, a partnership is an irregular reality between an individual and a company acting very much like an hybrid structure. As such, unless the partnership has a permanent establishment in the UK, case in which the income of the partners will be deemed to be in the scope of the upper mentioned (ICTA 1988, s334(b)), or the partner is resident in the UK for tax purposes, the income resulting from the activities developed by the said partnership will not be subject to UK tax.

Making reference to the Limited Partnership Act 1907 (GRUNDY e THOMAS, 2002, 69-70) state that:

> *"The draftsman does not appear to have contemplated that a limited partnership would in practice carry on all its business outside the United Kingdom, but nothing in the Limited Partnership Act prohibits it from doing so.[7] It is considered, therefore, that the principal place of business specified in the statement lodged with the Registrar is the place at which, if any business were to be carried on in the jurisdiction, such business would be carrier on. This is, of course, an important point, because – as appears from what is said above the tax position – if a limited partnership if it were to carry on a trade in any part of the United Kingdom, a liability to UK tax would arise."*

Furthermore, (LLP's Act 2000, s112(1)) states that:

[7] Although this quotation was made having the Limited Partnership in mind, it is also applicable to general partnerships of limited liability partnership. The legislation concerning all these types of business makes no limitation on having any of them performing all of its business outside the United Kingdom.

"Where a trade or business is carried on by two or more persons in partnership, and the control and management of the trade or business is situated abroad, the trade or business shall be deemed to be carried on by persons resident outside the United Kingdom, and the partnership shall be deemed to reside outside the United Kingdom, notwithstanding the fact that some of the members of the partnership are resident in the United Kingdom and that some of its trading operations are conducted within the United Kingdom."

In this section the legislator clearly emphasises the fact that a partnership's residence for taxation purposes is to be determined by the place where its central control and management is located. As such, if the central and control management of a partnership is located outside the United Kingdom than the partnership is to be deemed non-resident for UK tax purposes, not disregarding the fact that the partner or partners' resident in the UK shall be subject to UK tax and that the trading operations that take place in the UK through a permanent establishment or an agent will also be subject to UK tax (LLP's Act 2000, s112(2)(3)).

These legal provisions will then lead us to conclude that the only aspects that could trigger liability for UK tax on partnerships income are the residence of the partners in the UK or, the fact that such partnership is trading in the UK via a permanent establishment or, ultimately, that its central management and control are located in England. According to (HADNUM 2014, 20):

"As a non UK resident you are generally outside the scope of UK tax provided you aren't engaged in a UK trade via a UK permanent establishment.

One of the two circumstances in which there can be a permanent establishment is where there is a fixed place of business in the UK through which the trade is carried on."

Aspects such as the place of incorporation or registration of the partnership are considered immaterial for triggering taxation in the UK. Even the fact that that partnership may have its registered office in a UK address is not enough to trigger taxation as this is not considered equivalent to a permanent establishment according to the (Finance Act 2003, s148) by remittance of (INTM264050 2016).

Regarding partnership's taxation another relevant legal source is the (HS380: Partnerships: Foreign Aspects 2015, §2). This document states that: *"UK resident partners are liable to UK tax on their share of the worldwide profits of the partnership."*, this is to say that the partners are liable for tax on all the income of the partnership regardless of where it arises, which corroborates what we have stated above.

This paragraph furthermore states that: *However, where a partnership is managed and controlled abroad, UK resident partners may be entitled to be taxed on the remittance basis for their share of the profits that arise overseas. This will be so if they aren't ordinarily resident in the UK and/or not domiciled in the UK and they can claim the remittance basis of taxation."8* Again emphasis is given to the residence and the location of the central control and management, but especially to this last one. As such all the profits that arise from the partnership will be deemed to be obtained outside the UK even though one of the partners is a UK resident.

Some exceptions are also mentioned in this document, such as when: *"profits arise in the UK, although a corporate partner will be liable on overseas profits which relate to a UK permanent establishment"* (Guidance HS380 2016, §3). In such case emphasis is given to the location of the source of income or the location of the permanent establishment.

The obligations related to the tax return do also reflect these aspects and as such, the tax return should show the profits that are distributed to resident partners only or, in the case where no partner is UK resident, the profits that arise from the UK. In this case relevance is given to the previously mentioned criteria.

[8] For further information on the remittance basis please consult attachment 5 of this dissertation.

Corroborating our interpretation on section 111 regarding taxation of the partnership and according to (GRUNDY e THOMAS, 2002, 67):

> *"The partnership is not treated as an entity which is separate and distinct from the partners, and liability to tax only arises if the partners are chargeable to income tax by reference to their share in the partnership income. If therefore the partners are all non-resident and the income does not have a UK source, no liability to tax arises."*

Again in this quote emphasis to <u>residence and source</u> is given. The income derived from a partnership will only be liable for tax if its partners are deemed resident or if the source is located in the UK.

In what concerns the last requisite – source – a further remark is made by these authors: *"The test is, "Where do the profits really arise?" and an important fact is where are contracts really made: in this circumstances contemplated the partnership should be prepared to offer evidence that the contracts it makes are made outside the United Kingdom."* (GRUNDY e THOMAS, 2002, 67)

This aspect is naturally related to the idea of the permanent establishment. Should the contract be made in the UK, revenue services may determine for the existence of a permanent establishment in such country and deem the partnership resident for UK tax purposes.

Another aspect that should be regarded is the fact that there is no limitation in partnerships' statute regarding corporate partners. As such it generally accepted that a partnership may be composed partly or exclusively by corporate partners. In such case the allocation of profits is made to these partners and they are taxed in their country of residence according to the statute therein applicable. No tax is withheld in the UK as, again, no profits are deemed to be related to a permanent establishment in the UK.

2.3. VAT on Partnerships

Like all business entities, companies or sole traders, partnerships should be registered for VAT purposes. According to (HADNUM 2014, vi) *"Only for VAT purposes is an LLP never regarded as tax transparent. The LLP must be registered as a separate VAT entity (as must ordinary partnerships). Nevertheless, HMRC has confirmed that the members will not be considered to be supplying services to the LLP, so that they will not have obtain registrations individually."*

Registration for VAT purposes is not of paramount importance in our essay and so we will not analyse this aspect in-depth. The reason why we will make a very brief reference to VAT concerns the location of the partnership for tax purposes.

As it is known European VAT is an *ad valorem* European tax that is added to the price of every good or service meant to be consumed or used in the European territory hence being levied on most business transactions that take place in Europe. The VAT paid for by business is ultimately repassed to consumers as these are those effectively liable for this tax.

Common Sense would probably dictate the need of every registered business in the UK to register for VAT purposes. However, in what concerns partnerships, this is not always true. As we have analysed in a previous chapter a partnership is a hybrid entity that although being registered in the United Kingdom it does not necessarily "belong" to the United Kingdom. A document published by the International Tax Planning Association back in 2001 give us the starting point to this topic:

> *"Some practitioners outside the European Union have been concerned that the use of a limited partnership formed in accordance with the Limited Partnership Act for the supply of services may expose the partners to value added tax on the grounds that the partnership "belongs" in the United Kingdom – Value Added Tax 1994, s.7(10). But for a partnership to be treated as belonging in the United Kingdom it must have a business establishment or some other fixed establishment in the United Kingdom – see Value Added Tax Act 1994, s.9(2),*

and this will not be the case in the circumstances contemplated." (GRUNDY e THOMAS, 2002, 71)[9]

The relevance of this quote relates the idea of belonging. As we have upper analysed a partnership is not deemed to belong to the UK simply because it is registered in such territory. The idea of belonging for VAT purposes helps us to reinforce this idea of non-belonging to the UK in what concerns certain partnerships in which the no transactions take place in the United Kingdom

3. The Portuguese Tax Transparency regimen

3.1. Legal evolution

The tax transparency regimen appeared in Portugal in 1988 (to be applied from the 1st of January onwards), together with a general revision of the tax system at the same time individuals' income tax statute was being modified. At the time the regimen was provided by (CIRC 1988) and that regimen kept its validity until the approval of the new tax transparency regimen in 2014.

The grounds on which the regimen settled were the allocation of companies' profit directly to the individuals that held the shares in such companies hence ignoring the company as a separate entity at least in what concerns the taxation of profits.[10] The preamble also mentioned the application of this regimen[11] to both Complementary

[9] Please see s.7(10) and s9(2) in attachment 6

[10] A similar explanation for the regimen is given by (NABAIS 2013, 501-502)

[11] The application of this regimen to these types of societies was also a consequence of the stated in (CIRC 1988, art 5th, 2), that stated that: "the profits and losses, determined in accordance to this code, of the complimentary groups of companies and the economic European interest groups, whose headquarters or the central control and management are located in Portuguese territory, that are incorporated or subject according to the law, are also directly imputable to the respective members, making part of their taxable income"

Groups of Companies[12] and to Economic European Interest Groups[13], entities which we will not address in this dissertation.

At the time the regimen was created it was disposed in article 5th under the title: "Tax transparency regimen" [14]. This article stated that:

"Article 5th
Tax Transparency

1 – The taxable income of the corporations mentioned bellow, whose headquarters are located in the Portuguese territory or whose central and control management is here located, are deemed to be profits of its members even if no distribution of profits as occurred and shall be considered as their individual taxable income and taxed accordingly as individuals' revenues (IRS) or companies' revenues (IRC):

a) Unincorporated associations[15]
b) Partnerships[16]
c) Assets management companies, in which the majority of the shares are held, directly or indirectly, over 183 days of the accounting period, by a family group or whose shares are held by 5 or less members in any day of the accounting period and none of them is an entity governed by public law.

2 – The profits and losses of the period, determined according to this Code, of the Complementary Groups of Companies and European Interest Groups, whose headquarters or the central management and control are located in Portuguese territory, that are incorporated and regulated under law, are deemed to be directly related to their members, being considered their own taxable income.

[12] This type of association was created in Portugal by the (Law 4/73)

[13] Which was already a natural consequence of the (REGULATION No 2137/85) that stated on the beginning of ground 14th that goes as follows: *"Whereas this Regulation provides that the profits or losses resulting from the activities of a grouping shall be taxable only in the hands of its members"* as well as in article 21st, nbr 1: *"The profits resulting from a grouping's activities shall be deemed to be the profits of the members and shall be apportioned among them in the proportions laid down in the contract for the formation of the grouping or, in the absence of any such provision, in equal shares."* and lastly article 40th that states that: "*The profits and losses resulting from the activities of a grouping shall be taxable only in the hands of its members."*

[14] Freely translated from art 5th of the CIRC, original version, as enacted (CIRC 1988). The original text and subsequent modifications can be consulted in attachment 4.

[15] This is a peculiar type of society existent under Portuguese law. All the activities that article 151st of the CIRS makes reference to are considered civil activities as opposed to commercial activities. These activities may, however, be developed through the intermediate of a company under commercial form in which case the commercial code shall be applicable. Nonetheless these activities are considered civil activities and not commercial or industrial ones. Furthermore, these activities are numbered in (Portaria nº 1011/2001)

[16] We are hereby considering partnerships as an equivalent to the Portuguese "Sociedade de profissionais". This similarity between types of societies is also present in (NABAIS 2013, 171, footpage note nbr 64).

3 – The allocation of profits referred in the previous numbers is made to the members[17] *or partners*[18] *according to the articles of incorporation*[19] *or in the lack thereof in equal shares.*

4 – For the effect of interpreting what is stated in number 1 the following terms should be considered as meaning:

a) "Sociedade de profissionais" – The one constituted for the development of one of the activities presented in the list attached to the IRS code in which all the members are practitioners of that activity and as long as, if individually considered, these members would be taxed as sole traders according to the IRS code.

b) Assets management corporation – The corporation whose purposes are limited to the management of assets or capital kept as reserve or fruition or to the purchasing of estate to be used as dwellings for its members, as well as the one that in addition develops other activities and whose profits from that concern those assets, capital or estate come to be, in the average of the last three years, over 50% of the average, over the same period, of the total of its income.

c) The family group formed by people united by marriage or adoption and likewise those who share the same family line in straight or collateral line up to the 4^{th} *degree, inclusive."*

As to the writing of number 1, in the initial part, it is clear that the legal drafter wanted to privilege the elements of connection, place of incorporation or, in alternative, the location of the central and control management. Furthermore, it also left explicit that a *de facto* increase on the wealth of an individual is no necessary prerequisite for the taxation of the profits of the corporation in the sphere of its members hence taxing them regardless of any distribution of profits.

Number 2, besides applying this regimen to the above mentioned Complementary Groups of Companies and to Economic European Interest Groups, also helps figuring the mechanics behind the tax transparency regimen for it, besides mentioning the allocation of profits, also mentions the consideration of losses in their own sphere.

[17] Freely translated from the Portuguese word "sócios" attending to its meaning in this specific commercial law context.

[18] Freely translated from the Portuguese word "membros" attending to its meaning in this specific commercial law context.

[19] Also referred as Certificate of Incorporation or Corporate Charter in the English terminology.

Number 3 provides an explanation as to how the allocation is made, remitting its' rules to the articles of incorporation and establishing an equal sharing in such distribution in the lack thereof.

Number 4 provides the meaning for each term that appears in the general definition in number 1.

As for the meaning of *"Sociedade de profissionais"* it is clearly stated in paragraph a) that, for a company to be considered as such, it must be composed by members of the same activity alone and to the extent that such activity comes referenced in the activities listing attached to the (CIRS 2015). This hence meant that no commercial or industrial activities could be subject to this regimen and only civil activities. Furthermore, this also meant that any corporation composed by practitioners of different activity fields would be automatically excluded from this regimen. Such regimen made sense in a social context in which multidisciplinary partnerships were utmost rare making them residual and hence not relevant for the effectiveness of this provision.

In paragraph b) the legal drafter defines asset management company through a number of factors that fundamentally define this entity, an asset management company, as one in which the majority of the income is related to asset management and not to the development of any other activities. Other additional requisites for the application of this regimen to such companies are also required.

Nothing relevant is there to be said about paragraph c) as it merely defines family group and it does it in a very straight forward way as it can be easily read in the article itself.

In 2000 some modification are made to this article.[20] Therefore the reference to the attachment to the IRS code concerning the activities which was mentioned in article

[20] As stated by (Law 30-G/2000) which can be consulted in attachment 4.

5th, 4, a) is replaced by the reference to an attachment mentioned by article 141st. In practical terms nothing has changed but the arrangement of the articles.

In 2002 the text that used to be under article 5th has been transferred to article 6th and the nbr 4, a) was rewritten as a consequence of article 141st of the IRS code being changed to article 151st.[21] However, nothing was changed in its content. Article 12th of the IRC code was also replaced by a new writing that concerned the tax transparency regimen and stated: *"Corporations and other entities to which, under article 6th, the transparency regimen may be applicable are not taxed under the companies' revenue code at the exception of autonomous taxation"*[22]

The fact that transparent companies are subject to this type of taxation was clarified in this legal modification as a consequence of the doubts presented by some individuals that, being partners or members of a company subject to this regimen and hence exempt of IRC, came to support the idea that not being subject to taxation according to the IRC code they would consequently not be subject to autonomous taxation on their expenses.

The issue was solved through the inclusion of this new writing of article 12th and the legal drafter made clear that all transparent corporations are subject to autonomous taxation in the same way that any other corporations and so the exemption from IRC is only limited to the main tax.

The state budget for 2002[23] did also promote some changes to the CIRC. This time the legal drafter decided to make a slight change to the writing of article 6th, 4, a), as to include the words: *"…that are individuals…"*[24] and eliminate the final part of the

---

[21] Both of these changes were brought into effect by the (Decree-Law 198/2001)

[22] Autonomous taxation refers to the taxation of certain expenses that are deemed necessary for the development of the companies' activity and yet the legal drafter considers them somehow hard to be regarded as indispensable and especially hard to differentiate from individuals own private expenses. As a consequence, the legal drafter opts to tax these expenses although it generally accepts them as expenses of the accounting period. Autonomous taxation rates and incidence basis are mentioned in (CIRC 2015, art 88th) and (CIRS 2015, art 72nd).

[23] (Law 109-B/2001)

[24] Freely translated from the Portuguese original text: "pessoas singulares", of the 2002 CIRC as amended by the: (Law 109-B/2001, art 6th, 4, a))

article that stated that: "…*and as long as, if individually considered, these members would be taxed as sole traders according to the IRS code."* The writing of this paragraph was changed as follows:

> *"a) Partnership – The one constituted for the development of one of the activities presented in the list attached to the IRS code in which all the members* ***that are individuals*** are *practitioners of that activity* *and as long as, if individually considered, these members would be taxed as sole traders according to the IRS code."*

This change is particularly relevant as it suggests that from this moment onwards the legal drafter started to expressly contemplate the possible existence of *"Sociedade de profissionais"*, in the Portuguese terminology, in which the members are corporations and not solely individuals.

Furthermore, the previous writing of number 4 is vague, as a result of the last part which demands a consideration on knowing whether the partners could theoretically be taxed individually or not, which would, in this instance, vary according to the activity developed. In a sense and theoretically the legal drafter predicted the possibility of not disregarding the corporation for tax purposes on all situations but only on specific occasions. This clearly raised doubts in enforcing the law. We will, however discuss this subject in depth on another chapter.

Not only does this writing seem to unveil some incoherence as it appears somehow contradictory with the principles behind the tax transparency regimen, namely the tax neutrality. This principle becomes affected by this new writing as in the "end of the chain" there may be a corporate entity that is taxed just like it would have been the first entity should it not be applicable any tax transparency. However, these changes seem to approach the Portuguese tax transparency regimen, or at least the interpretation that the legal drafter makes of the regimen, in the perspective we are analysing it, to the English tax transparency one.

Moreover, the disappearance of the final part of the previous writing strengthens the notion that the legal drafter wanted to step away the exclusive participation of individuals in entities subject to the tax transparent regimen and to include the participation of companies in them.

As for (REGULATION No 1606/2002) it intended the adoption of the international accounting standards and promoted some changes in the writing of the law. However, changes performed to the text of the law by this statute were not significant and were only limited to technical aspects in the legal text.

In 2014 significant changes were made to the CIRC by the (Law 2/2014), particularly to art 6th, 4, a). This paragraph was subsequently divided into two different subparagraphs. Subparagraph 1 kept the writing that previously was in nbr 4. As for subparagraph 2, it brings the real news, being applicable alternatively to nbr 1 and stating that it shall be deemed a *"Sociedade de Profissionais"* (and hence be applicable the tax transparency regimen):

> *"2) The company whose income are the result, in over 75%, of the combined or individual development of a professional activity, to which article 151st of the IRS code concerns, as long as, cumulatively, in every day of the accounting period, the number of members is not superior to five, none of them is an entity governed by public law and at least 75% of the shares are held by professionals that develop the previously mentioned activities, totally or partially through the company."*[25]

This new nbr 4, 2), revolutionized, and at the same time clarified, the interpretation that was made of the article, although not necessarily in a positive or desired way. The fact is that until 2014 professionals were prone to seek incorporation as an alleged way of reducing their liability for tax as it was already mentioned. However, this new writing came to prevent such usage through the inevitable application of the regimen through numerous objective criteria. In the previous writing it was enough to have a

[25] Freely translated from (CIRC 2015, art 6th, 4, a)) with the writing given by the (Decree-Law 162/2014). The original text can be consulted in attachment 4.

member that was a practioner of a different activity in order to avoid the application of the tax transparency regimen according to the writing of the law.

With the new writing, in order to avoid the application of this regimen, it becomes necessary to have more than 5 partners or, alternatively, one partner that has a different activity that not one of the ones mentioned in article 151st of the (CIRS 2015) or even eventually to ensure that the partners do not old more than 75% of the shares or that more than 25% of income derives from activities that not the ones described in article 151st of the (CIRS 2015). As such one may conclude that one more step was taken in overriding the individual's will which ultimately empties the law of any sense.

On a latter note we should make reference to one last fundamental article relevant to this subject: Article 20th of the (CIRS 2015). In its nbr 1, first part, this article literally mirrors article 6th stating that: *"It is deemed profit of the members or partners of the entities mentioned in article 6th of the CIRC, that are individuals, the resultant from the imputation made in the terms and conditions there mentioned…"*[26].

The second part of this nbr 1 states that: *"…or, when higher, the amounts that, on advanced payment of profits, have been paid or made available to those individuals during the concerning year"*[27]. This last part naturally is intended to ensure that by no means any profit is given to the members that end up not being taxed.

Furthermore, an aspect that is emphasized by nbr 2 of this article is that all these amounts that are received by the partners are to be deemed as net income being subject to no further deductions.

[26] Freely translated from the Portuguese original text of art 20th, nbr 1, first part of the CIRS, with the writing in force until 2015.
[27] Freely translated from the Portuguese original text of art 20th, nbr 1, first part of the CIRS, with the writing in force until 2015.

3.2. Description of the regimen and its purposes

The central problem behind tax transparency begins with the question about which entities should be liable for tax. The opinions of diverse authors vary on this matter. According to (PEREIRA 2009, 100) the questions lies on knowing if companies should, or not, be considered as entities distinct from their members. This author also leaves no room for doubts regarding which companies may be subject to this regimen and which may not. As such he automatically excludes companies held by shares[28], limited companies[29] and partnerships held by shares[30] as in general authors consider that these are logically subject to separate taxation.[31] However, in practical terms, these companies are not excluded from the tax transparency regimen by the legal drafter.

This separate taxation is, however, embedded in some artificiality as (NABAIS 2013, 171) states, opinion with which we agree:

> *"… the splitting between the former, taxed in IRS and the second, taxed in IRC, is not as tight as, at first glance, one could think of. In truth, the distribution of companies' taxation between IRS and IRC is, in a sense, quite artificial. (…)"*

(PEREIRA 2009, 100-101) also points out the several justifications that have been given for the existence of a tax on companies' profits. Among these we find the limited liability that incorporation gives to its members, the additional expenses caused by the necessity of existence of certain public services, the contributory capacity of companies that should not be confused with that of their members. This author lastly points out the need to collect taxes and the need to tax undistributed companies gains as two additional justifications for the existence of an autonomous tax.

[28] Freely translated from the Portuguese term: *"sociedades anonimas"*
[29] Freely translated from the Portuguese tem: *"Sociedade de responsabilidade limitada"*
[30] Freely translated from the Portuguese term: "*Sociedade em comandita por acções"*
[31] On a diverse opinion which we also support see (MARTINEZ 2000, 239)

None of the mentioned arguments seem strong enough for us to justify the double economic taxation promoted by the existence of an independent tax on companies' profits on certain types of companies especially considering that these companies that are autonomously taxed are, considering the upper mentioned arguments, in no practical way different from companies that are subject to the tax transparency regimen.

The third argument pointed out by this author could, in a sense, be used to support the opinion that the tax transparency regimen shouldn't then exist for if a company has a separate contributory capacity that should not be confused with that of its members then, according to this argument, partnerships shouldn't be excluded from this equation for even though they are intrinsically related to the activities developed by their partners, they still have an autonomous contributory capacity until the profits have finally been distributed to its members or reinvested in (or simply left in the economic sphere of) the partnership.

As previously stated in the historical evolution, according to the Portuguese (CIRC 2015)[32] there are three main fundaments for the application of the transparency regimen. These are:

1. Tax neutrality
2. Elimination of double economic taxation
3. Fighting tax evasion

These purposes are very different from each other and it is misleading to consider them in equal weight as reasons for enforcing the regimen. Tax neutrality and the elimination of double economic taxation are aspects related to the way the tax system works. However, the idea of fighting tax evasion is, in our own interpretation, a whole different subject that is related to law enforcement and abiding and the prosecution

[32] As mentioned in the preamble of the (CIRC 2015)

of law infringers. This should not be considered as an objective of the tax transparency regimen.

As we have already discussed previously in this essay, the tax transparency regimen finds its fundaments in the fact that, under some circumstances, corporate personality is disregarded for tax purposes. In a company where all the activities are developed by practitioners it was traditionally accepted that the production of wealth lies with the members themselves and not with the company hence transforming the company a mere frontage for the activities that are, in fact, developed by the members themselves. For this reason, and for tax purposes alone, the corporate veil is lifted and the profits are allocated to the members and taxed as their personal income. Regarding this matter (BRÁS CARLOS 1990, 9) states that: *"It is of the essence of the tax transparency regimen that the company functions, in the end of the accounting year, as a mere entity where the profits are originated. This is the true nature of the companies subject to the tax transparency regimen."*

Developing the reason that lies behind the three upper mentioned main fundaments of the tax transparency regimen that were, nevertheless, mentioned above and further developed in the 1990 commented CIRC[33], these are:

3.2.1. Tax neutrality

This principle is generally related to the idea that similar types of income should be taxed regardless of the form adopted for the development of the activity related to the production of the income, e.g. In practical terms if an individual chooses to develop an activity thorough a corporate body instead of doing so individually, this should have no impact in terms of the amount of tax that he is to be liable for as the activity being developed is no different in one case or the other. According to (VALE e PEREIRA 1995, 40) *"taxation should not, as a principle, be conditioned by the*

[33] Check attachment 3 for the original commentary.

juridical form of the entities subject to tax, being instead considered the tax applicable to individuals that, for some authors, are the only that have a contributory capacity and should therefore be considered the main protagonist of any tax system."

(SANCHES 2007, 158) also gives a valuable contribution to what concerns the problematics around the principle of neutrality stating that: *"If the system was as clear and organized from a systematic point of view that it was entirely neutral in what concerns tax options of the tax payer, tax planning would be unnecessary"*

When addressing this matter, Sanches was focusing on a theoretically ideal abiding of the principle of neutrality. Such a perfect system would not, naturally, allow, an undesired result such as different taxation on different types of developing a same business or activity. Such system does not, however, in practical terms, exist. Legal systems are naturally fallible and a complete prediction of all situations is simply not possible. However instead of trying to find means to ensure that ultimately all the capital is equally taxes in the hands of those who benefit from it at the end of the chain, it opts to deem some structures tax transparent while others not hence contributing to the violation of the principle of neutrality through the remedy itself. This is, however, a point we will address further down this dissertation.

This issue is especially notorious in what concerns companies essentially constituted by people as opposed to companies essentially constituted by capital. This is also the reason why in certain countries, tax transparency appears essentially related to companies constituted essentially by people, being this the case of the Portuguese *"Sociedade de Profissionais"*. According to (SANCHES 2007, 292):

> *"Side by side with companies constituted by capital that are characterized by the pooling of capital by the members (...) as a condition for the exercise of a certain activity we also find companies constituted by people in the sense of an association between people that constitute a "Sociedade de Profissionais" as a means of jointly developing their activities.*

These companies constituted by people (…) are companies in which capital as a minimal relevance and hence a secondary importance. (…)"

The central idea on the perspective of this author on these companies is, as was already mentioned, that a *"Sociedade de Profissionais"* is mostly dependent on the work developed by the partners themselves. They constitute the core elements of the company. This does not, theoretically, happen in companies mostly constituted by capital. Therefore, and being the activities of the company mostly developed by the partners, to tax these activities in the sphere of the company as if they were developed by the company as a whole and hence taxing them differently (usually at a much lesser burden tax) from the way these would be taxed in the sphere of individuals developing them could, according to the legal drafter, lead to a violation of the neutrality principle.

This tax neutrality objective is therefore achieved through the tax transparency regimen. This notion lies in the fact that the wealth is actually produced by individuals and not by companies and hence on them lies the sole liability for tax falls on companies. This argument does not, however, withstand as this could be said about most companies. Being true that there are activities developed by companies more inherently related to the nature of the individuals that work for those companies it is, nonetheless, also true that the majority of the activities demand human intervention and it's that human intervention that makes it possible for a company to labour. Besides even those who develop no activity and simply invest their money in a company expect to profit from the money they invest, meaning that at a certain point they expect to withdraw revenues (in the shape of dividends or other) from the companies they have invested in, regardless of the activity developed by the company.

The individuals have the choice to develop their activities through corporate structures or individually as sole traders. Certain activities are subject to the tax transparency regimen whereas others are not and the individuals do not even have the possibility of opting by this regimen hence violating the main pillar of the systematic construction of the legal system: The will of the individual.

This makes one wonder about the higher legitimacy or rationality of applying the tax transparency regimen to individuals that meet certain conditions or develop specific activities and not generally to every individual that has received their income from companies. This topic will, however, be further developed in this dissertation.

3.2.2. Eliminating double economic taxation

If companies are taxed on their profits in their own sphere and then the individuals to whom those profits are to be distributed to, are later going to be taxed for the same profits, this will lead to a double economic taxation. This situation takes place when the same capital is taxed twice in the sphere of different economical entities, the company on the one hand and the individual on the other. As (PEREIRA 2009, 100) puts it: "*It's all about knowing how the* ***double economic taxation of the distributed profits is faced:*** *Profits are formerly taxed on the society sphere and, when distributed, on the members sphere."*

According to (PALMA 2013, 13) the regimen then intends to be a radical method in promoting the integration between the IRS and IRC and through it solve, at a primary stage, the problem of double economic taxation.

This author also makes reference to two other relevant arguments regarding double economic taxation. The first disregards the problem of double economic taxation stating that the number of times the same capital is taxed is irrelevant, being instead, relevant the final rate to which that capital is subject to. The second argument, professed by some is that, generally, the holders of income that derives from profits are usually in the highest tax bands and an autonomous tax on the profits of companies contributes to the increasing of the "global progressiveness" of the tax system.

As to what concerns the first argument we do partially agree with it to the extent that, the utmost relevant aspect is not how many times wealth is taxed but, instead, the final tax rate it is subject to. However, it must be noted that the existence of different steps of taxation contributes negatively to tax transparency as a principle as it makes harder for individuals to understand what it is the effective tax rate they are paying on their income. Furthermore the existence of several steps of taxation increases the complexity of the system by creating new report obligations for individuals and hence burdening them.[34]

As for the second argument it holds, in our perspective, in no effective grounds. To simply state that those individuals whose income derives from profits are the same that usually have higher incomes is embedded in prejudice and should be considered a stereotypical argument with no evidence to support it. It is the prejudicial idea that those who invest in businesses don't need such wealth to live, instead of facing it e.g. as an investment of savings.

Furthermore, even if there were evidences to support the previously quoted statement, a fair progressive system would consider the effective income of the payer. Yet a system that chooses to tax profits of companies on the grounds that this taxation contributes to the progressiveness of the tax, without having effective knowledge of the income of the individuals that make those profits, is in frontal violation of this principle.

(PEREIRA 2009, 102-103) also points two relevant distinctions concerning the double taxation problem: The distinction between systems that tax companies as separate entities, from those that make a coordination between taxation of companies and taxation of the members of such companies on the distributed profits. On this last system a final distinction can be made between systems in which that coordination takes place at the companies' taxation level and those in which it takes place at the members' taxation level. Several methods are pointed out by this author and we won't

[34]NABAIS, 2009, 502 and PEREIRA, 2009, 104, also make references to the additional burden generated by the complexity of the tax system and the need to declare this income twice.

go into these methods in depth. Besides, among the ones we will refer to, this author mentions the tax transparency regimen, the double tax system, and the tax exemption mechanism35. All the other methods we will identify through a simpler structure.

This phenomenon of double economic taxation is usually present in international tax law, particularly when the state in which the source of the income is deemed to be located, differs from the state where the beneficial owner is deemed to reside. Is such case both states will claim the ability to tax the same capital hence leading to a situation of International double taxation.[36] We won't deepen this topic as it steps away from the object of our dissertation. However, the same mechanisms that are used to prevent this phenomenon from happening are also used to prevent a situation of domestic double taxation.

Legal systems do usually have different mechanisms to avoid this phenomenon from taking place. The elimination of international double taxation (and in a parallel way of domestic double taxation) may take place through three methods[37]: The **deduction method,** the **exemption method** and the **credit method**.

The first is the deduction of a tax paid in the foreign-source of income from the total of tax to be paid. The second corresponds to the total or partial disregard of a certain amount of capital that is merely being transferred from the sphere of the company to the sphere of the individual and it has already been taxed in the company's sphere. As for the third method it consists of a credit that is granted to the individual for the amount of tax paid in the companies' sphere and that is going to be deducted from the amount of tax to be paid by the individual.

The meaning of the expression "company" as mentioned in the previous paragraph should be interpreted broadly in order to include all economic activities pursued by a

[35] This autonomous taxation must not be understood in the sense that is given by article 88th of the CIRC, but instead as a taxation that exempts the individual from including them in their tax return or making any further payments concerning taxes.
[36] See attachment 2 for further information on the topic.
[37] See attachment 2 for further information on the topic.

company in the strict sense of the word or by individuals not necessarily grouped in corporations.

If we are talking about the distribution of profits or dividends, this elimination may take place through a tax credit that corresponds to a withholding tax that was previously held by the company on behalf of the revenue services towards the tax payer, and that is posteriorly handed in to these services, or through a partial exemption that takes into account the fact that there was a previous taxation of profits. As (BASTO 2007, 265) puts it: *"The fact is that we frequently find cases of minimisation of the effects of double economic taxation in international tax law, step by step with other cases in which this elimination is sought through systems of a total tax credit of the tax that was paid through the companies' income tax."*

In Portugal, according to article 71st, nbr 1, of the CIRS, distributed profits are taxed at a 28% withholding tax rate, arising no additional liability for tax or even the need to report these profits according to art 58th, nbr 1, a) of the CIRS. In this case this tax works as a final tax settle.

However, according to article 71st, nbr 6 of the same statute, it is possible to include them in the individuals' tax return and subject them to the IRS bands together with the remaining income. In this case the withholding amount retained by the paying entity is to be considered as a payment on account to tax. Should this be the choice of the tax payer then article 40th-A of the same diploma provides for a partial exemption which corresponds to regarding that income in only 50%, equally granting the possibility to deduct the amount that was already paid in the individuals' sphere (the "autonomous"[38] tax rate), in the shape of payment on account to tax from the final tax bill.[39]

[38] In the sense of our glossary it refers to the idea of being "autonomously taxed".
[39] Germany presents a similar system. In fact, until 2008 before the approval of the new German Income Tax Code *"Einkommensteuergesetz" (EStG)* provided, in §3, nbr 40, that only 50% of the income was taken into account when calculating the tax applicable to such income. With the 2008 reform this partial exemption was eliminated and a new flat rate of 25% applies to the totality of the income should the shareholder be an individual.

It should be noted that in Portugal the term dividends refer to profits distributed by anonymous companies whether they are publically trade or not, named as *"Sociedades Anónimas"* or "S.A." whereas the distribution of profits by limited companies, named *"sociedades por quotas de responsabilidade limitada"* or *"Lda"* are referred to as capital gains. This is merely a distinction in terminology for they are both taxed at the same rate.

3.2.3. Fighting Tax Avoidance:

This is a third purpose that is related to the creation of this regimen. This third purpose is intimately related to the tax neutrality principle and to tax planning. Individuals are prone in finding complex and structured means of maximizing their tax savings and this may imply creating artificial entities, mainly companies, as a means of avoiding the burdensome tax rates that are applicable to individuals. The traditional "trick" lies in keeping the savings in the company hence being taxed at corporate rates instead of being subject to individuals' income bands. In Portugal these bands start at 14.5% and go up to 48% being the band frames income very small which means that with great easiness and individuals is taxed at a very high rate.

Furthermore there is also an additional "overcharge" according to (Law 82-B/2014, art 191st), of 3.5% for all the individuals whose gains exceed the minimum wage which is of €5540, meaning that the large majority of the tax payers are liable for this overcharge.

Lastly it should also be noted that the top rated individuals that make over €80.000 or €250.000 per year are liable to an "additional solidarity tax" (CIRS 2015, 68th-A, 1) of 2.5% on the former and 5% on the latter.

[40] According to (Decree-Law 144/2014, art 2nd)

According to the upper exposed tax rate band, any gains that an individuals' obtains that exceed €7000 per year[41] are to be taxed at a minimum of 28,50%. However, company's taxation rates are much lower than those that are applicable to individuals. Furthermore and on an opposite extremity, an individual whose gains exceed €250.000 per year will be subject to a 56,5%[42] rate on part of his income.

Companies' taxation is, however, much less burdensome. According to (CIRS 2015, art 87th, 1, 2 and 5) the general rates applicable to resident companies, to which profits are to be taxed at are of 17%, 21% and 21,5%. The former rate limit is of €15.000 which means that all other profits that exceed this limit are to be taxed at a rate of 21%[43], at the exception of those from companies whose profits do not result from commercial, industrial or agricultural activities, case in which the profits are to be taxed at the 21,5% rate according to the above mentioned statute.

There is an additional tax on companies' profits that exceeds €1.500.000 per year and the additional tax rates vary between 3% and 7% according to the bands presented in (CIRS 2015, art 87th-A) and a council tax on companies' which profits exceed certain amounts.[44] However as it is evident the amplitude of the rate bands is much less significant in companies' profits than it is in individuals' profits which takes us to conclude that companies' taxation is generally much lighter than that of individuals, this being the reason why individuals are prone to incorporate and develop their activities through a corporate entity instead of developing them individually as sole traders. The company invoices clients instead of the sole trader. The majority of the

[41] One should take into account the fact that even those that only gain the minimum wage are, at least partially, included in the second band of 28,50% for the minimum annual wage is €7070 hence exceeding the first band limit of €7000.

[42] This effective rate is the product of the sum of the last band (48%) with the "overcharge" (3,5%) and the "additional solidarity tax" (5%).

[43] Other tax rates are exceptionally applicable to other types of profits or profits distributed to companies or individuals that meet certain requirements according to nbr 3

[44] According to (Ofício Circulado 20186/2016).

profit is withdrawn from the company through expenses[45] and the remaining is taxed at the companies' taxation rates.

The intent of constraining individuals from recurring to corporate structures as a way of minimizing their tax liability is then another reason (possibly one of the major) why the legal drafter created this tax transparency regimen: To refrain individuals from using corporate structures as an instrument to limit their liability for tax or, in other words, as a tax avoidance scheme. According to (SANCHES 2007, 294) this is actually the main reason why the legal drafter opted by the introduction of this regimen: *"The adoption of the regimen clearly results from its original intent to avoid the usage of corporate structures with the intention of reducing the liability for tax hence being its application scope directed to partnerships, unincorporated associations and assets management companies…"*

3.3. Entities covered by the regimen and the 2014 reform.

3.3.1. Comparing regimens

Until the 2014 legal reform, the entities covered by this regimen were objectively indicated in the text of the law as we have mentioned previously and were the following:

a) Unincorporated associations
b) Partnerships
c) Assets Management Companies
d) Complimentary Groups of Companies
e) European Interest Groups

[45] Without prejudice of the application of "autonomous taxation" rates as stipulated by art 88th of the CIRC which are, in any case, considerably lower than the rates applicable to individuals' taxation rates and in most cases even the general companies' taxation rate.

However, with the legal reform of 2015 and specifically the changes in nbr 4 of article 6th, the regimen became potentially applicable to all partnerships that fill specific cumulative requirements as indicated in nbr 4, b) of the (CIRC 2015), that are as follows:

a) All the partners must develop any activity that is indicated in the statute referred to by article 151st of the CIRS;
b) More than 75% of the partnership's income must derive from the activities developed by those partners;
c) Over 183 days of the accounting period:
    a. The number of partners doesn't exceed 5;
    b. None of the partners is a public law company;
    c. At least 75% of the share are held by those partners.

As it is notorious the regimen did become more intricate and difficult to understand by individuals hence not contributing to transparency but instead adding more obstacles to it.

The previous writing did not include multidisciplinary companies whereas the new one does. This new writing is also deemed to attain to the company substance and make it prevail over the company's form hence tackling some tax avoidance that would take place through incorporation. In fact, it was relatively simple to avoid the application of the tax transparency regimen in the way it was provided by the previous writing. It was enough to have a member in the company that developed an activity that was different from the activities developed by all the other members.

With this new writing however the regimen will applicate the tax transparency even if all members develop different activities, as long as they are less than 5 at any time of the accounting period. Moreover, according to the present writing it is not enough that all members of the company develop an activity as predicted in article 151st of the CIRS, it is necessary that 75% of the company's profits are the result of the development of those activities and at least 75% of the share are held by professional that are practitioners of those activities even if they don't develop those activities through the company directly.

This new writing highlights the idea that, it is not enough to have an entity composed by individuals that develop those activities to deem it a pass-through entity. For this to happen it is also necessary that the profits derive from the development of those activities. If these conditions are not met, then the tax transparency regimen will not apply. This new regimen allegedly deems to make substance over form prevail in a more thorough way then the previous did. However the fact that the writing of nbr 1 was kept unchanged[46] does not sustain a hypothetical general idea of making substance prevail over form. Number 2 seems to try make this idea prevail and yet nbr 1 still deems as tax transparent a company in which all the members develop the same activity disregarding the source of the profits of the company.

We can then conclude that the legal drafters' sole intention with the enactment of this new regimen was to increase the tax burden over individuals without a true concern about the protection of substance over form as it will still apply different tax burdens to similar situations and that will happen merely because certain requisites are not filled. These changes are not the result of an attempt to tackle tax avoidance but instead a mechanism the legal drafter found to increase the tax burden hence collecting more revenues.

The objectiveness that existed in the previous regimen was somehow distorted with the changing in the writing of nbr 4, a). In fact, the legal drafter widened the scope of application of this article in an abstract way as to consider as a *"Sociedade de Profissionais"*, and hence subject to the tax transparency, all the entities that filled these requirements. This is obviously an aspect that decreases the degree of transparency of the law *vis-à-vis* the tax payers as the regimen ceased being constrained to a specific number of entities and is potentially applicable to all and every existing entity regardless on the adopted form or type of business structure.

[46] It adopted the writing that belonged to paragraph a) of the previous provision.

3.3.2. Partners and taxation

(AZEVEDO 2005, 30) makes reference to an utmost relevant fact of the regimen which is that, according to an interpretation of the scope of article 6^{th}, 4, a), a *"Sociedade de Profissionais"* in Portugal may theoretically be constituted by partners that are not individuals, but instead companies. He lies his statement on the writing of article 6^{th} with the changes in its writing that were promoted by the state budget of 2002 and which indirectly made reference to the possibility of having companies as partners.

This author's essay was written before the deep change promoted to the tax transparency regimen by the 2014 reform. This author believes that the legal drafter's intent was not to radically change the conceptual meaning behind *"Sociedade de Profissionais"* but instead to promote investment through the participation of investing companies in partnerships. (AZEVEDO 2005, 31)

This author supports the idea that the intent of the legal drafter was to promote investment but still ensure that the majority of the capital belonged to the individual partners that are practitioners of the said professional activity. This author supports his theory in the Portuguese denomination of the society: *"Professional's company"* (Sociedade de Profissionais).

We do, in a sense, agree with this author to the extent that the very definition of a "*professional"* always leads us to the idea of an individual that develops a certain activity hence making him a practitioner of some sort. However, attending to the letter of the law, nothing seemed to prevent corporate partners from holding the majority of the shares, at least not until the 2014 changes. With the writing which was in force until then, one may assume that the legal drafter intended to ensure the tax transparency in what concerns individual partners, not showing much concern in what regards corporate partners.

3.3. Entities covered by the regimen and the 2014 reform.

As we have previously mentioned, the writing of the law as it was amended in 2001 suggests that in such company's there may exist corporate and individual partners. Even with this major reform that took place in 2014, this aspect was not changed which suggests that the legal drafter intentionally wanted to keep the existence of transparent societies in which partners may be individuals or companies.

However, one must bear in mind that, according to the 2014 reform, if more than 25% of the profits of the partnership derive from activities developed by the corporate partners or more than 25% of the shares are held by these partners or there are more than 5 partners, then the partnership will cease to be considered as such in what concerns tax transparency and will be taxed in IRC. This was one of the main aspects that has changed with this reform hence making it impossible for the majority of the shares to be held by corporate partners.

In what concerns the principles behind the regimen, the existence of corporate partners seems irrelevant as these partners would always be taxed in IRC when formed by companies or in IRS should they be constituted by individuals through the application of the tax transparency regimen. The natural mechanics of the system would ensure tax neutrality, prevent tax avoidance through incorporation and ensure the elimination of double economic taxation. The profits passing through the partnership would always be taxed in Portugal whether the partners were individuals[47] or companies[48] domiciled abroad, at least to some extent and without prejudice of what is stated by articles 14th, 51st and 98th, all of the (CIRC 2015) and article 101st-C of the (CIRS 2015).

In what concerns corporate profits tax exemption, article 14th, nbr 3 of the CIRC, in special, states that all the profits and reserves that an entity domiciled in Portugal distributes to an entity domiciled in another state may be exempt if the conditions of application of this number are filed. One of these conditions is that the entity is not

[47] The individuals are taxed according to articles 15th nbr 2; 17th-A, nbr 5; 71st, nbr 1, a) and nbr 4; 72nd, nbr 1, a) and b), and nbr 2, all of the CIRS 2015

[48] The companies are taxed according to articles 2nd, nbr 1, c); 15th, nbr 1, c) and d); 55th; 56th, nbr 1; 66th and 87th, nbr 1, all of the CIRC 2015

subject to article 6th, this is, to the tax transparency regimen hence making it inapplicable to *"Sociedade de Profissionais"* that are resident in Portugal.

As for article 51st of the CIRC, it works the other way round, this is, it is meant to prevent a double economic taxation of foreign profits distributed to entities domiciled in Portugal that receive any sort of income derived from entities domiciled abroad. Once again the application of this article demands the verification of several requirements, one of them is that that income is taxed in the country of source.

Investors could question why Portugal would demand the previous taxation of those profits in the country of source as a condition for the application of this participation exemption regimen. Considering that, according to this authors' opinion, the regimen is meant to attract capital and promote foreign investment and that any capital cannot be taken out of the Portuguese company to the individuals' sphere without taxation on the latter sphere, it doesn't make much sense to demand a previous taxation of the said capitals.

As for article 98th of the CIRC it predicts the possibility of exempting from taxation, partially or totally, the profits obtained by a company when, as a result of a double taxation agreement, the competence to tax belongs to another state. This is, however, only applicable to entities subject to IRC and as we have seen tax transparent entities are exempt from this tax, which lastly means this exemption is not applicable to *"Sociedade de Profissionais"*. Moreover, according to article 13th, nbr 1, of the CIRS, the subjection to IRS lies on the individuals that are domiciled in Portuguese territory and those that, not being, herein obtain any income. When a partner has profits allocated to him by a *"Sociedade de Profissionais"* that is registered in Portugal these profits are likely to be deemed obtained in Portugal even if they derive from a payment made by a foreigner entity related to a product or service that was sold or took place abroad and which did not involve the participation of a permanent establishment. However, in Portugal it is not possible to register or incorporate any company or business structure in general, even being a *"Sociedade de Profissionais"* without a permanent establishment in Portugal, conversely to what happens with English partnerships.

As such the partner may be liable for Portuguese IRS tax even if he is domiciled abroad as such income will be deemed to be connected with a permanent establishment in Portuguese territory. In such circumstances his income is to be taxed at an autonomous flat rate of 25% according to article 72nd, 2, a) of the (CIRS 2015). According to this article: *"A 25% tax rate applies to income earned by individuals that are not domiciled in Portuguese territory, which derive from a permanent establishment located in this territory."*[49] This problem, naturally, only arises if the company is subject to a tax transparency regimen hence being the profits allocated to the individual member.

If, on the other hand, the individual develops an activity individually and does it without using a company then this article shall not be applicable and yet his income is still to be taxed at the same rate of 25% on grounds of arts 72nd, 2, b) and 71st, 4, a).

On a third option, if an individual develops his activity through a company that is not subject to the tax transparency regimen and this company then distributes profits or dividends to the individual, then it becomes irrelevant to known whether this individual is, or not, domiciled in Portugal as these distributions are subject to a withholding tax that exempt the individual from declaring such income or paying any extra tax for that matter, at least in Portugal, according to the quoted legal grounds above.

Furthermore, in what concerns individuals, arts 17th-A, 5; 81st and 101st-C, 1 of the (CIRS 2015) state that gains obtained by individuals are exempt from withholding taxes in the cases where the competence to tax belongs to the state of residence

[49] See attachment 4 for the original text in Portuguese.

according to a convention to prevent double taxation that has been signed with the state of residence.

As of the 2014 changes, the legal drafter, appearing discontent with the existing regimen, decided to change it in order to limit the participation of corporate entities in partnerships as we have stated above. Nothing else changed in the way individuals or corporations taking part in a partnership are taxed. The only change was to the percentage of participation that a company can held in a partnership. According to the new provision a company shall only be deemed to be a *"Sociedade de Profissionais"*, hence subject to the tax transparent regimen, if at least 75% of the shares are held by practitioners that develop the activities referred to by article 151st of the (CIRS 2015). This hence means that conversely to the regimen that used to exist, a company may not hold more than 25% of the shares in a partnership under penalty that this partnership will cease to be considered as an entity subject to the tax transparency regimen.

4. Discussion:

4.1. Substance over form

According to (KARAYAN, SWENSON e NEFF 2002, 42), the doctrine of substance over form states that "…*even when the form of a transaction complies with a favourable tax treatment, if the substance of the transaction hass the intent to avoid taxes, the form will be ignored, and the transaction recast to reflect its real intent.* (AVY-YONAH, SARTORI e MARIAN 2011) give us a similar definition of this doctrine through numerous examples. These authors, however, do not merely try to define this concept but deepen it and present several other relevant doctrines that will be relevant to our discussion.

According to the same authors some doctrines derived from this previous are the step transaction doctrine and the economic substance or business purpose doctrines. This author hence states that this doctrine *“provides that a taxpayer’s form will generally be respected as long as it has legal and economic substance, even where a different route would have resulted in more tax. (…)”* (AVY-YONAH, SARTORI e MARIAN 2011, 104)

As such, the step transaction doctrine, economic substance and the business purpose doctrines, are all developments of the general doctrine of substance over form. All these doctrines, however, seem to balance the application of the substance over form doctrine. They all work as mechanisms that are meant to balance the application of the substance over form doctrine and prevent abusive steps in the one hand, and over-taxation of the individuals through a reckless and abusive application of the said doctrine of substance over form, in the other.

In Portugal the step transaction doctrine has no doctrinal or statutory development and the economic substance and business purpose doctrines are developed to the extent that they are intrinsically related to the substance over form doctrine and not as a means of protecting the individuals *vis-à-vis* an abusive application of the substance over form doctrine, which is to say, towards abuses from the tax administration. Although it is true that the courts take into account the economic substance of transactions, it is not so certain that the legal drafter takes this principle into account when building statutes just as it is not certain that the tax administration applies such principle.

Furthermore, in Portugal, if an individual or a company opts to reorganize its assets in a manner from which results a tax optimization, this is to say a lower tax burden, even if there is economic substance, there is a very strong probability that the legislator will disregard this reorganization and reconduct the business structure to its original shape from which a higher burden of tax result of.[50] This outcome does not take place in the UK as long as there is an effective business purpose for the reshaping of the business. As such we come to conclude that business purpose is of paramount importance in the UK whereas in Portugal it may be taken into account by courts but

[50] A very good exemple of this outcome is the provisiono of article 66th of the (CIRC 2015).

not necessarily by the tax administration. And even in what concerns its application by courts, it may be disregarded to the extent that the individual uses schemes that although having economic substance, were in the first place only conceived with the sole motivation of reducing the liability to tax.

The principle of substance over form is meant to be used to dismantle situations in which tax payers build elaborate structures in order to avoid the incidence of a tax that would, otherwise, take place. The step transaction doctrine one the other hand is meant to ensure that even when there are elaborate structures that have tax minimizing impacts that would otherwise be achieved through “simpler” structures with a heavier tax burden, but in which there is an economical purpose and not merely a façade to minimize taxation, then this structure should be taken into account as there was not merely a tax minimizing purpose.

Therefore, we find to be relevant the analysis of the Portuguese Tax transparency regimen in the light of such facts. According to the purposes of the regimen which we have exposed above, its objective is to ensure the prevalence of substance over form as all the three objectives of the regimen, stated by the legal drafter, e.g. tax neutrality, eliminating double economic taxation and fighting tax avoidance, seem to have this purpose as a common goal.

When the legal drafter, however, makes the application of the regimen dependent of numerous requisites, it is making the form prevail over the substance as it is, through statute, explicitly stating that the application of the regimen depends not on the activities that will substantially be developed but instead on the filling of those requisites.

This is particularly notorious attaining to the letter of nbr 1 when the legal drafter disregards the source of income, expressly colliding with the purpose of nbr 2 that explicitly gives relevance to the source of income. (CIRC 2015, art 6th, 4)

But more than the letter of the article, the disregard of the substance is especially evident when it comes to the distribution of the profits, or the lack thereof. The fact is that, as we have analysed, the legal drafter disregards an effective distribution of profits in order to tax. Taxation takes place whether the partners choose to distribute profits or instead opt to reinvest them in the company. This is an obvious violation of the principle of substance over form as it disregards the intent of the partners and a taxation by the real profit. By doing so the legal drafter, once again, gives prevalence to substance over form and taxes recklessly even if it is evident and it is proved that such capital was effectively reinvested in the partnership.

As this essay is a comparative one, between the Portuguese and the English tax transparency regimens, it would be rather predictable at this point that, having we so furiously criticized the Portuguese regimen, there was a different solution in the English one. In fact, there is not. The difference lies instead with the free choice of regimens.

In the English system the individuals have the freedom of choosing the type of business through which they develop their activities. This is to say that all and every activity may be developed by individuals as sole traders, through the incorporation of a company or through the establishment of a partnership. In any case the tax transparency regimen is only applicable to partnerships regardless of its type. This hence means that when individuals choose to develop their activities through a partnership they are automatically agreeing to the taxation regimen under which these fall, which means that although they cannot tailor made business types and taxation regimens, they can choose the type of business and according type of taxation regimen, which best suits their needs.

We have highlight the fact that in England, conversely to what happens in Portugal, the tax transparency regimen is related to the corporate structure and not the activity being developed. Attaining to this aspect alone, in England freedom of choice and the protection of the citizen is of paramount importance, whereas in Portugal the tax system is built not to ensure balance of both parties but instead to ensure revenues at all cost.

The choice of the individual is a crucial element in what concerns the effective substance of the business. The substance of the business is not attained merely on what the legal drafter believes it to be but instead on what the individuals deem it to be.

It is not the fact that the individuals opt to develop a business through a corporate structure or through a partnership that changes the substance of the business. In fact, it is from the choice of the individual that results the substance of the business. Every time the legal the application of the law biases the choice of the individual it potentially violates his will.

4.2. Contributory capacity

According to (MARTINEZ 2000, 239), to tax *"Sociedade de Profissionais"* where the individuality of the partners is never disregarded, contrary to what happens in other companies where paramount importance is given to the corporate entity, is to tax the same profits twice, one in the sphere of the individual and another in the sphere of the partner. The same author extends this problem to companies and not only *"Sociedade de Profissionais"* stating that:

> *"This double taxation (...) takes place (...) not only in "Sociedade de Profissionais" but also in what concerns corporations, having already been supported by doctrine makers, the irrelevance of the legal personality of all corporations in tax matters for this doesn't reveal an autonomous contributory capacity which does only belong to the members."* (MARTINEZ 2000, 239)

This point is of paramount relevance in helping us taking our conclusions. Theoretically the profits made by a company belong to the company and not to the members which would hence invalidate any worrisome that the legal drafter could have about the usage of companies as a means of avoiding taxation.

(BASTO 2007, 262-263) points out an extreme lack of coherence in facing companies as having an autonomous contributory capacity. Not only does this author appear to support an idea that is contrary to that of companies having an autonomous contributory capacity, but also to the general incomparability of a hypothetical contributory capacity between that of companies and that of individuals:

> "*The theoretical difficulty of this conception lies in the idea of companies' autonomous contributory capacity, which does not seem compatible with a tax system that is meant to distribute the burden of pubic expenses by the citizens in an equitable manner, this is, in accordance with each individual's ability to spend."* (BASTO 2007, 262-263)

The fact is that theoretically for any capital to go from the sphere of the company to the sphere of the members it must be taxed as an income of the members, through one of the means that we have presented upper in this essay, eventually benefitting from any credit given the fact that it was already taxed. (BASTO 2007, 266-267) also adds in this instance:

> *"From a conceptual perspective, the correction of double economic taxation should take place in the individuals' income tax, this is to say that the objective should be that the distributed profits are taken into account in the worldwide income of the members and be taxed according to the progressive tax bands of individuals' income tax. We hence ensure a taxation of dividends in equality with other sources of income"*. (BASTO 2007, 266-267)

We believe this statement to be particularly relevant to the extent that it reflects the idea of eliminating companies' taxation and the adoption of universal taxation on the individuals' income. As we have shown above taxation of individual's income in Portugal is not unique and varies according to the type of income still reflecting much of the previous model used until 1989 when the IRC and IRS were adopted in Portugal. Distributed profits or dividends are two paramount examples of income that are not taken into account when calculating the applicable tax bands in Portugal.

Income from these sources is taxed at a flat rate and does not take into account the true contributory capacity of the individual.

> *"One must bear in mind that it is the individuals' income tax and not the companies' income tax that is to be considered as the corner stone of a tax system settled on the principle of the contributory capacity. If one of the steps of taxation is to be eliminated, in order to avoid a "double taxation" then it is the taxation at the companies' level that should give in over the taxation on the individuals' income. In this sense, the tax credit system – that, when complete, eliminates, at least in what concerns distributed profits, the tax burden sustained by the company that distributes dividends, paid as tax on its income – sustains higher grounds than alternative systems that, in order to eliminate or minimize double economic taxation, weaken the progressive impact of the tax on personal income. This is the case of the taxation of dividends through an autonomous tax rate that is lower than the general top tax rates of the individuals' income tax. The progressivity of individuals' income tax hence becomes jeopardized".* (BASTO 2007, 266-267)

On such assertive statement it becomes hard to make any comments or developments. Incurring the risk of repeating ourselves we ought to say that individual's taxation is, according to this author, opinion that we sustain, the corner stone of a tax system, because the real contributory capacity lies with these and although companies have a distinct sphere of ownership and wealth they do not truly hold a contributory capacity as they are mere instruments of the members or partners that manage them. To tax a company on profits means to tax an entity that holds no will, earning ability or spending ability for this matter. The people that are behind it are indeed the true owners of such abilities and the existence of these is determinant for the evaluation of a hypothetical contributory capacity.

The contributory capacity is a concept that is intrinsically related to the law of diminishing marginal utility, principle in which the whole taxation system is anchored to. The higher an individuals' income is, the lower is the marginal utility for each additional unit of income and so the higher is its contributory capacity and hence the applicable income tax rate.

As it is easily understandable this model cannot be transposed to companies in the same manner that it is applied to individuals. The concepts of marginal utility and contributory capacity cannot be applied to companies as these do not have a will of their own and cannot take advantage of funds in the same manner that individuals can. Companies are, as stated above, mere tools that individuals make use of with the intent of pooling efforts for the better development of their activities and, as such, ought not to be deemed autonomous taxable entities.

We must necessarily agree with (BASTO 2007) that double economic taxation should take place at the individuals' level and not at the companies' level. As such and as this author suggests, a system of tax credit granted at the individuals' tax level ensures the elimination of double taxation and not merely a minimization of its effects as the present system of autonomous taxation or partial consideration of the income does. The system whose adoption this author suggests does, in fact, correspond to a method of credit as the tax paid by the company is deducted from the tax that is to be paid, in the end, by the individual.

In England, conversely to what happens in the Portuguese Tax system, the contributory capacity is taken into account when taxing distributed profits/dividends. In fact, even though they are taxed at different rates from all other income, the tax rate that is applied to them takes into account the tax band of the tax payer and taxes them accordingly. As such we will briefly describe how income is taxed in the UK.

In the United Kingdom the Tax year starts on the 6th of April and ends on the 5th of April of the following year, according to (ITA 2007, s. 4, 3). For the topic here being analysed there are, in the UK, 3 different types of income to which correspond 3 different groups of tax bands, depending on whether the income derives from labour (income tax), savings[51], dividends[52], trusts and dividend trusts or from capital gains[53]. These rates and limits are as follows:

<u>Income tax:</u>[54]

1. Basic rate at 20%[55] for an amount of up to £31.78556
2. Higher rate at 40%57 for an amount of up to £150.00058
3. Additional rate at 45%59 for income that exceeds gains over the £150.000 bracket.

<u>Savings:</u>

1. Taxation at 0%60 – This rate is limited to the first £5000.61
2. Savings rate at 20%62 - On income that exceeds £5000.

<u>Dividends:</u>

1. Basic rate at 10%63 - £31.78564
2. Higher rate at 32.5%65 with a limit of £150.00066
3. Additional rate at 37.5%67 for all dividends over £150.000.

---

[51] For purposes of the Portuguese legislation these gains are roughly equivalent to: "planos poupança reforma" or "PPR's"
[52] For purposes of the Portuguese legislation these gains are roughly the equivalent to: "incrementos patrimoniais"
[53] For purposes of the Portuguese legislation these gains are roughly the equivalent to: "ganhos de capital"
[54] These rates are applicable after deduction of the personal allowance of £10.600
[55] According to the (Finance Act 2015, s1,2,(a))
[56] According to the (Finance Act 2014, s2,2,(a)) (not amended for the tax year 2015-2016)
[57] According to the (Finance Act 2015, s1,2,(b))
[58] Introduced by the (Finance Act 2009, s4,4,(5A)) (not amended for the tax year 2015-2016)
[59] According to the (Finance Act 2015, s1,2,(c))
[60] According to the (Finance Act 2014, s3,1)
[61] According to the (Finance Act 2007, s20,1) as amended by (Finance Act 2014, s3,2)
[62] According to the (ITA 2007, s20,1)
[63] According to the (ITA 2007, s8,1)
[64] According to the (Finance Act 2014, s.2,2,(a)) of the Finance Act 2014 (not amended for the tax year 2015-2016) by remittance of the (ITA 2007, s13,1)
[65] According to the (ITA 2007, s8,2)
[66] Introduced by the (Finance Act 2009, s4,4,(5A)) by remittance of the (ITA 2007, s13,2)
[67] Introduced by the (Finance Act 2009, s3,2) and amended by (Finance Act 2012, s1,3)

The distributed dividends include a notional[68] 10% tax credit which, in fact, corresponds to the dividend ordinary rate according to the (ITA 2007, s8,1). As such basic rate payers do not need to pay additional tax. We will further develop this notional tax credit in the next chapter. There are no exceptions to the obligation of declaring this income in the tax return unless an individual is excluded from the obligation of filling a tax return, case in which, these profits will not need to be declared.

If an individual fills a return in which these gains are included, then he will be entitled to a tax credit of 10% on the amount of the distribution, according to the (ITTOIA 2015, s397,1 and 2). This credit is both given to UK residents and non-UK residents which means that a non-UK resident will not have to pay any tax on the dividends.

Furthermore, there are no partial exemptions and the individuals who receive this income may have to pay additional tax depending on the amount of their annual income and the applicable rates.

This will take us to conclude that conversely to what happens in Portugal, in the UK, contributory capacity is effectively taken into account regardless of the source of income.

4.3. Eliminating Double Economic Taxation

The non-adoption of a system that effectively eliminates double taxation in Portugal is most likely related to the fact that it potentially decreases collection of revenues. With the system presently in force, companies' income stands at a 21% rate which means that all the dividends and profits that are to be distributed have already been

[68] The "notional tax credit" is in fact a credit that does not correspond to any tax paid in advance by the company when making the distribution. In fact, this tax credit probably results from the old ACT (Advance corporation tax) that was charged on distributions of dividends made by a company before 1999, year in which was abolished. However, the notional tax credit remained unchanged. For further information on this subject please read the consultation document by HMRC: *"A modern system for Corporation Tax payments"* available at: http://webarchive.nationalarchives.gov.uk/20070506100544/hmrc.gov.uk/consult/consult_2.htm

taxed at this rate in the companies' sphere[69]. When they are distributed to individuals they are subject to an autonomous tax of 28% or to the general tax bands. If the individuals makes a choice for the application of the autonomous tax rate the total tax rate to which that income is subject in the end is going to be of 45%.[70] However if an individual opts for the inclusion of such income on the total of its' income than the minimum total tax rate to which that income is going to be subject to is 31,5%.[71]

(BASTO 2007, 268) states different reasons for the non-adoption of such system by the Portuguese legal drafter: On the system that used to be in force before the one that is presently used, what happened is that the effective tax rate that companies were subject to varied greatly according to the benefits that such companies could make use of. As a consequence it was impossible to predict fore hand the effective tax rate that would be applied to dividends and most of the times the dividends ended up undertaxed, an outcome which was not deemed by the legal drafter. This problem could, however, be solved by the adoption of a credit method based, not on the theoretical rate that had been applied to the capital but, instead on the effective amount paid in tax on that capital. This amount would then be deducted from the tax that would have to be paid by the tax payer. With the evolution of information technology systems in the last decade this is actually a very simple operation that does not even require human intervention.

If a tax credit was granted in full for the total amount paid by the company in tax, amount which would be deducted from the final tax to be paid by the individual, then the effectively applicable tax rates would be those indicated in article 68th of the IRS code referring the different tax bands, would start as low as the minimum band of 14,5% and would go all the way up until the 56.5% rate as explained above.[72] Yet the

[69] Without prejudice of the application of a reduced rate of 17% according to the (CIRC 2015, nbr 2).
[70] Corresponding to the sum of the minimum tax rate applicable to companies' income, plus the 28% autonomous taxation rate.
[71] Corresponding to the sum of the minimum tax rate applicable to companies' income, which is of 17%, with the minimum tax rate applicable to individuals' income, which is 14,5%
[72] This corresponds to the sum of the individuals' income rates top band with the overtax and the solidarity tax applicable for the 2015 tax year.

application of such regimen would ensure the respect for the contributory capacity of each individual.

Alternatively, the legal drafter could apply a system similar to the one used in the UK in which, regardless of the effective tax that a dividend had been previously subject to in the UK, it would be taxed at a progressive rate in the ultimate beneficiary sphere and taking into account all the other income.

As such our conclusion points to the fact that the application of an effective tax credit method would ensure a fairer distribution of the burden of taxation, burdening lighter those individuals with smaller incomes and heavier those with larger ones, not to mentioned the evident contribution to the principle of neutrality of taxation that would ensure that a corporate entity would not be used as a tax planning scheme to avoid the application of higher taxes at the individuals' sphere of taxation.

(BASTO 2007, 269) also makes reference to the partial consideration of income, in 50%, should the individual decide to include on his global income, distributed profits or dividends that were subject to an autonomous tax as stated above. About this subject the author states that, at least, this inclusion subjects to the progressive tax bands the whole income of the individual, instead of the system that used to be in force until 2001,[73] that we have already mentioned, in which it was assumed that such distributions had already been taxed at the companies' tax rate when, in many cases, such companies were subject to tax benefits that resulted in a taxation lower to the one that was assumed by the legal drafter and hence violated an horizontal equality principle. According to the same author the adoption of such system is the result of the acknowledgment that such profits were being taxed at a rate that was inferior to what was deemed by the legal drafter and, simultaneously, of the need to have a system that is easy to apply.

This issue pointed by the 2001 legal changes presents, according to (BASTO 2007), a growing trend in the adoption of a system to minimize double economic taxation,

[73] This new regimen was introduced by the Law (Law 109-B/2001).

instead of a credit one. This author even mentions a report by Ernst and Young dated October 2002 that depictures these trends.[74] However again we argue that this report is outdated and depictures the need to adopt a system that was adequate to the time in which it was issued. In the last 15 years the use of technology has a means of verifying information and automatically filling tax returns has taken much of the load that the revenue services had in checking information declared by the individuals and opened a whole new world of possibilities hence making possible the use of an effective tax credit on a case by case basis, grounded on the effective amount of tax paid respectively by that income on the companies' sphere.

As an alternative to this autonomous taxation the statute allows for the possibility of including this income to the totality of the income made by the individual. In such case, and as previously mentioned above, this income will only be partially regarded, by 50%. The great advantage that this possibility brings and that is pointed by (BASTO 2007, 269) is the fact that its adoption ensures the fairness of taxation for the inclusion of such income will ensure the "personalization" of the tax and hence a fairer distribution of the tax burden, intent that is deemed by the legal drafter. In theoretical terms we could not agree more with such statement. However, in practical terms this mechanism of inclusion is rarely used. The fact is that, as we have presented above, all the income that surpasses €7000 per year is covered by the 28,5% band, a tax rate that already exceeds the autonomous tax rate of 28% to which dividends are taxed. As such what happens is that all the individuals whose income surpasses €7000 per year will opt for the non-inclusion of all the income which may alternatively be subject to the 28% autonomous rate.

According to what we have just been arguing, if it is left in the option of the individuals the inclusion or non-inclusion of such income, then, from a conceptual perspective this alternative makes no positive contribute to ensure the fairer distribution of the tax burden.

[74] (ERNST & YOUNG 2002)

It is undeniable that the Portuguese tax transparency regimen eliminates the double taxation of profits. However, the Portuguese regimen does so with no regard to the will of the tax payer or the fair distribution of the tax burden. As for the will of the individual, it is totally and completely disregarded. In general, a benefit or advantage is something that the individual may choose to adopt or not adopt. As such this elimination of double taxation is definitely not an advantage or benefit. It may turn advantageous or disadvantageous but in any case is not in the hands of the individual to choose or deny its application. Freedom of choice is completely violated in this instance.

In what concerns the UK tax regimen, particularly the double taxation of dividends in the UK, there used to be a tax credit system that corresponded to the amount of ACT (Advance Corporation Tax) paid forehand when the dividends were distributed, and this tax abolished in 1999. The abolishment of the ACT did not, however, jeopardized the tax credit that came to be named as “notional tax credit” given its lack of correspondence with a tax paid forehand.

As such, when dividends are distributed, a 10% notional tax credit is given to basic tax rate payers and hence these need not to pay additional tax on the dividends even though they are “theoretically” taxed at a 10% rate. As such at least for basic rate payers, double taxation is in fact eliminated.[75]

The tax rate to which all other income that surpasses the “exemption”/ “basic rate” is going to be subject will vary according to the total income of the tax payer. As such, in this instance, the UK tax system actually shows a more disadvantageous outcome then the Portuguese tax system to the extent that it burdens the tax payer more heavily and completely disregards the fact that the income as already been taxed in the

[75] The state budget for 2016-2017 (Finance Bill 2016) will introduce significant changes on the taxation of dividends. As such the notional tax credit will be abolished and a new dividends allowance of £5000 per year will be introduced. On all income above that allowance a 7.5% tax will be charged for basic rate payers, 32,5% for higher rate payers and 38,1% for additional rate payers, according to the policy paper, Budget 2016, by HMRC.

company's sphere. As such the total amount of tax to which the income is going to be subject to (companies' tax plus individuals' tax) is as follows:

If the dividends are within the personal allowance (the first £10.600) or the basic rate (the second £31.785) then the profits will only be subject to the companies' tax rate, which is of 20% regardless on the amount of profits made by the company.[76]

In the UK the elimination of Double Economic Taxation in Partnerships is in fact pointed as the great advantage of this type of business structure. The non-subjection to tax twice on the same capital is in fact undeniable in this type of structure. Conversely to what happens in Portugal, and as we have already mentioned, the application of tax transparency results from an option made by the individuals when they choose to organize their business in Partnership instead of using a Company. In the English tax system, no speculation is made on the level of investment required by certain activities when compared to others.

4.4. Fighting Tax avoidance

As for the abusive use of companies as a means of evading taxation, especially those constituted essentially by professionals/practitioners, its existence cannot be denied and according to (BASTO 2007, 167) the tax transparency regimen minimizes the abusive use of these companies as a mean of "hiding" their real income behind a "corporate veil". As we have previously mentioned in this essay, individuals could make use of company's profits to finance personal expenses. However, and disregarding the hypothesis we made above, in such case, the expense would not be accepted as deductible. Furthermore, it ought to be said that, as it is widely known, allowed deductible expenses have been diminishing along the years. But not only have the deductible expenses been diminishing but also the burden of proof (of the

[76] According to the (Finance Act 2014, s6,1,(a)) that sets companies' small profits rates in 20% for non-ring fencing companies and to the (Finance Act 2015, s6,2) that sets the main rate of corporation tax in 20% as well.

said expense as indispensable and necessary to the activity being developed) has been increasing, making it each time harder for individuals to abuse of such deductions even through the use of a fraudulent imputation of such expense to the company.

Moreover, the tax transparency regimen does not prevent individuals from defrauding the system into deducting personal expenses as theoretical business related expenses. Fraud is in no way prevented by the regimen. The tax transparent company benefits from the deduction of expenses in the same way that a normal company does being regulated by the same code, the CIRC. It is only the allocation of the capital at the end that is made to the individual instead of staying in the company, but the mechanics used to determine the taxable income are precisely the same not being made any distinction by the CIRC between tax transparent companies and non-tax transparent ones. The same method is also used for sole traders. The allowable deductions to their income are also regulated by the CIRC by remittance of the IRS code to that former one.[77]

With or without the tax transparency regimen individuals may still make use of abusive deductions as a means of reducing their liability to tax. As for the idea of being taxes at the 21% corporate tax rate instead of the general individual income tax rates, as we have shown above it is good to the extent that this capital is kept inside the company, not being usable by the ultimate beneficiaries. Any distribution will trigger a liability to tax. If such capital is used to sponsor personal expenses of the members instead of the company than a fraudulent usage of the company is being made and not only are not the expenses deductible as their members may still incur of crime for tax fraud.

As such we believe that the reason for the legal drafter to opt for the usage of this regimen in fighting tax avoidance results from the acknowledgment of the inability to control fraudulent usage of companies as a means of promoting tax evasion and not tax avoidance. We come to conclude that the legal drafter uses a regimen to

[77] According to the (CIRS 2015, art 32) on situations in which the tax payer chooses, or is obliged to, have an organized accountancy regimen.

pursuit objectives that should be attained by the usage of other mechanisms such as general law principles and law enforcement mechanisms among which, substance over form or the prevention of tax fraud are prevalent in this matter.

In both cases we are talking about taxing by the effective income and that is why in both cases the rules for the determination of this effective income, which is coincident with the taxable income, are the same. We are hence forced to conclude that the tax transparency regimen has no implication in this instance.

The real implication of the tax transparency regimen lies in the final link of the chain, the ultimate beneficiary as we have mentioned before. The corner stone of the tax transparency regimen is about considering that the member (or partner as we have been naming in the case of tax transparent companies) does always receive the capital, even if he doesn’t and decides, instead, to reinvest in the company.

As such we are forced to conclude that the tax transparency regimen itself ends up not contributing to any of the objectives that the legal drafter and the doctrine have numbered, roundly failing its purposes.

As we have mentioned not all companies are subject to tax transparency and finding ways of dodging the application of the regimen is not a very hard task. As such tax neutrality through tax transparency is assured up to the point where there are companies not subject to this regimen meaning that globally it is not assured. Tax neutrality could be assured if there was no taxation on the company’s sphere and only in the individuals’ sphere.

Furthermore, the principle of taxation by the effective income is also disregarded with the application of the tax transparency regimen as it taxes the members or partners by the allocation of the company’s revenues to them even if they have decided to reinvest those revenues or have decided to keep them allocated to the company as a management fund hence increasing the company’s financial liquidity. Again this would be attained if an effective distribution was taken into account and not automatically assumed.

As a consequence of what was just said, the tax transparency regimen ends up working as a factor of disincentive for investment as the members or partners will be taxed on a hypothetical income regardless of reinvesting it or not. As such, neutrality is not assured as it continues to exist a clear difference between making an investment through a corporate structure deemed as opaque or through a corporate structure deemed as transparent.

As for the distinction between companies constituted by capital and companies constituted by people we ought to say that even though theoretically this is an evident distinction, in real life this distinction is not so evident especially if we consider that no company is entirely constituted by capital nor by people. It is the mixture between these two elements that allow companies to function.

The tax transparency regimen simply assumes that certain activities (civil activities as opposed to commercial activities) do demand a much smaller amount of capital and a much larger amount of people in their development. Again our comment is that being theoretically true it should not be applied as a general rule as it is an assumption and disregards the true percentage of participation between capital and people on the development of a certain activity.

In the UK the rule regarding deduction of expenses[78] is exactly the same that we find in Portugal, which means that a potential abuse of corporate structures could still take place in the same terms it can in Portugal, which means that the existence of the tax transparency regimen is in no way related to a potential prevention of an abnormal deductions of expenses such system avoids.

In a similar manner to that that happens in the Portuguese regimen, it seems fairly possible that in the UK companies can be used abusively to deduct expenses without any connections with the trade. However, the tax transparency regimen is not used to fight this abuse as it naturally does not prevent it in any way, as we have previously

[78] According to the (ICTA 1988, s74, (a)), *a contrario sensu*, that states that: *"…in computing the amount of profits or gains charged (…) no sum shall be deducted in respect of - any disbursements or expenses, not being exclusively laid out or expended for the purposes of the trade, profession or vocation"*

proved. Again, partnerships must abide the same rules concerning deductions that companies do.

Naturally all the other problems that we have pointed above to Portuguese tax transparency regimen do also happen with the UK regimen. The difference, however, is that the individual assumes them as a consequence of their choice, which does not happen with the Portuguese regimen that is applied regardless of the will of the individual. As such neutrality is also an issue in the English regimen, but again, it is a consequence assumed by the individual when making the choice.

The distinction between companies majorly constituted by people or capital is one that is not relevant in this instance. A partnership in the UK may be constituted for the development of any activity related to trading or not and it may be constituted for the development of both trading and services providing activities and it will still obey the same tax transparency rules.

In what regards investment the tax transparency regimen in the UK, should not be considered an obstacle to investment as again, the adoption of such regimen depends solely on the individuals' options. As such, again in such regimen individuals' options are taken into account.

4.5. Constitutionality and discrimination

Moreover, in what concerns constitutionality, the conformity to the constitution of the differences in taxation, according to the development of a business as a sole trader or by means of a corporate structure, that may or may not be subject to the tax transparency regimen, is highly questionable. Concurrent to this perspective, (NABAIS 2013, 173) states that:

> *"...the constitution does not impose the taxation in IRS of sole traders, a solution that, not only is not imposed by the constitution, but it may even be unconstitutional when brought to practical application (...) it may lead to a*

> *discriminatory differentiation of the income made by a sole trader and that made by a company."*

This disparity in the way businesses are taxed can be seen in the application of the tax transparency regimen as well, but in an even more prominent way: Companies that fill the requirements are to be subject to the regimen. Similar companies that do the exact same trade but do not file the requirements are taxed at much lower rates, the IRC rates, according to the calculations we've shown above.

However, quoting (RIBEIRO 1985) and showing his disagreement, (NABAIS 2013, 170) states that:

> *"…contrary to the general idea that prevailed, the imposition of a unicity on the taxation of personal income, as stated in article 104th, nbr 1, does not imply the taxation on IRS of sole traders.*
>
> *On our own perspective, it makes no sense the idea, as adopted by Prof. Teixeira Ribeiro, according to which, the exclusion of taxation on IRS of the income of sole traders would be unconstitutional by violation of the principle of unicity of individuals income*[79]*, imposed by that article. Hence the inclusion of taxation of income of sole traders on IRS."*

We are prone to agree with NABAIS (2013) perspective. The taxation of sole traders' income as individuals' income is the result of an interpretation of the constitution that is made by this individual. This interpretation although being a legitimate one as no legal grounds. Moreover, this article mentions that individuals should be subject to a single tax and yet it makes no reference to how taxation should be levied upon companies (with no disregard by what is stated in nbr 2, that they should be taxed on their real income). (NABAIS 2013, 173-174) concludes his analysis by stating that:

[79] The principle of unicity is a constitutional principle of taxation that derives from art 104th, nbr 1 of the CPR and it appears as an antithesis contrasting with the previously existing cedular tax system that consisted on the existence of a variety of taxes that burdened sources of income at different rates.

> *"Concluding, article 104th of the constitution demands that the tax on personal income should be unique, progressive e non negatively discriminatory of the family. It does not, consequently, demand any tax with such characteristics on companies' income. The contraposition between nbr 1 and nbr 2 of this article is between "tax on personal income" and "companies' taxation" and not between "income tax on the income of individuals" and "income tax on the income of companies".*

What (RIBEIRO 1985) does on his interpretation is to look at every individual in the same way and disregard their source of income which is basically the same as to assume that an individual working on a wage bears the same settling costs as a sole trader that needs to invest to settle his own business. This is, in our opinion, a wrongful interpretation as it disregards the cost of settling a business regardless of an official incorporation taking place or not.

Furthermore, this interpretation of the constitution could potentially lead to a violation of article 13th of the constitution to the extent that it is treating similar situations in different ways. To tax an individual that has no financial burdens on setting up his own business and bears no risk on its' success in the same way that one who does, is to force an equal application of the law, instead of an equitable application if it, that will necessarily lead to a different outcome.

Still, regardless of its constitutionality, we do deem it as being in violation of the neutrality principle, instead of ensuring it, as it regards as similar situations that are essentially different hence burdening them similarly in what concerns taxation and ultimately leading to a discrimination. (BASTO 2007, 263) supports a concurrent perspective addressing double economic taxation and stating that:

> *"Double taxation does, in any case, penalize the choice of the type of business structure when, what is asked to the tax system is that it remains neutral vis-a-vis the option between types of business.*

> *We hence find prominent technical reasons to ensure the integration instead of treating the two taxes as separate parts of the tax system. Recent trends clearly point to integration and the so called "classical system", in which both taxes are conceived as separate and autonomous, is manifestly withdrawing."*

The upper statement is made by reference to the distinction between sole traders and companies. We do, however, deem it applicable to the theme we are here discussing as the members of companies that are subject to the tax transparency regimen end up being taxed almost like sole traders. This comparison emphasises the importance related to the differentiation of treatment. Furthermore, this differentiation is also applicable to companies that could be subject to the tax transparency regimen due to the activities developed by their members but that end up not being due to the not filing of the requisites for the application of the regimen.

In the UK problems related to constitutionality and discrimination in regards to the way the same activity is taxed differently, only due to the fact that the type of business entity developing it is different, do not arise. In fact, neutrality does not seem to be a concern of the English legal drafter. As a matter of fact, this difference seems to be accepted as something natural that, once again, results from an option made by the individual based on its choice of the legal type of business entity.

In the English system the legal drafter appears to avoid interfering with the individuals' options. These may choose to freely adopt whichever legal type of business structure they prefer with the inherent consequences of such choice be it a lighter or heavier tax burden. In any case an alleged justice or equality is not sought by means of statute or regimen.

Conclusions:

To make some conclusions about this comparison seems one rather ungrateful task. In fact, we are comparing systems with different intents and as such the grounds that motivated the legal drafter are in each case different. Consequently, the outcome would have to be necessarily different. The general outcome is the same: This is to say that no entity other than the individuals is taxed. However, the English regimen was built without any specific intentions whereas the Portuguese system was built allegedly to solve specific needs of the system according to the objectives that we have upper numbered and, as we have discussed, it does not solve them. Moreover, not only does it not solve them as it completely disregards the will of the individual and offends several legal principles such as equality or equity.

As for the objective of elimination of double economic taxation that the Portuguese regimen is meant to attain, it is also not accomplished to the extent that the regimen is not applicable to all and every companies but simply to some companies that fill certain requirements that the legal drafter considered as relevant to the intents he was trying to achieve. This could be avoided if the application of the regimen was made to a single type of entities regardless of the filing of any requisites, or if the legal drafter simply decided to eliminate the double tier tax and taxed only the profits in the individuals' sphere as they arise.

In England such problem is present with different contours as the tax transparency regimen applicable to partnerships does apply regardless of the individuals that compose such partnership or the activities that such individuals develop. As such and contrary to what happens in the Portuguese system, in the English system, tax transparency cannot be dodged by artificially including new façade or corporate members.

Furthermore, in the Portuguese system, depending on the number of members that compose the company, it may or may not be tax transparent which means that in some cases the elimination of double economic taxation may be assured and in some others it may not. In the cases in which double economic taxation is not eliminated, there exist mechanisms to minimize this double taxation. However, to minimize is not the same as eliminating and this different treatment of income derived from similar activities leads to a discrimination of treatment. This is a central issue addressed by several authors, among which we find (BASTO 2007, 259-260). This author states that:

> *"These are the so called distributed profits (dividends in anonymous companies) by companies or other entities subject to IRC, income that has been 'taxed' by this tax. (...)*
>
> *Before having been distributed to the members, companies' income has been subject to taxation on companies' income tax, on the Portuguese system, the IRC. Once distributed to members that are individuals they will be subject to taxation on individuals' income tax. We are hence talking about double economic taxation on distributed profits."*

The next issue addressed by (BASTO 2007, 260-261) is if whether this should be accepted by the system or not. This author presents two interpretations: To face these two taxes as a complement of each other or to face them as totally individual taxes. This vision leads us, on the one hand, to the idea shared by some authors that we have previously mentioned in this essay, that in the end, the bottom line lies in the effective final rate which the income is subject to. On the other hand, the second interpretation leads us to inevitably face a situation of double economic taxation in which, as also stated by this author, opinion which we share, companies are truly autonomous and subject to tax on its own.

In the English system this problem does also arise but no similar theoretical question is posed. When choosing the business type, the individuals that adopted it had a choice and they made it with all the consequences it carries. A much higher tax burden may result and yet it was a choice made by the members or founders when they chose to incorporate.

Furthermore, there is another striking concern regarding the tax transparency regimen and the predictability of the law. The Portuguese tax transparency regimen presents a significant complexity and its objectives are in such way undecipherable that it is nearly impossible for an average tax payer to be able to understand if he will be subject or not to the regimen. Again such problem does not take place in the English system as the subjection or not to such regimen depends on a conscientious option of the individual.

On what concerns tax transparency as a principle and not as a regimen, it must be said that the regimen that exists in Portugal does not contribute to such principle. Tax transparency as a principle reports to the relation between tax payers and the State and it concerns the degree of easiness in understanding tax law by tax payers. The harder it is for tax payers to understand tax law then the less transparency will exist in the system. According to (EVERSON 2006) the predisposition of the tax payer to pay its taxes is directly related to the understanding this has of the tax law. Considering the complexity of our tax transparency regimen and the almost null understanding of the system or the motivations behind it, drastically reduce the willingness to abide and hence jeopardize tax transparency as a principle. The system on itself is not transparent and easy to understand. Regarding this issue (EVERSON 2006, 1-2) states that:

> "*Clearly, if the IRS provides appropriate service to taxpayers, they will be more willing to pay what they should. By service, we mean helping people to understand their tax obligations and making it easier for them to participate in the tax system. Adam Smith (…) believed that the "tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid."*

A regimen which application is dependent of the verification of several requisites and which will not be applicable to similar situations in which those requisites are not gathered – such as the existence of one partner with a different area of activity - cannot be considered a system of easy understanding by the tax payers and hence becomes totally contrary to what is desirable from a tax system. Again such problem does not arise in the English system as the regimen is applicable by choice of the individual and clearly individuals are more prone to face consequences that result from a conscientious choice.

Lastly, in what concerns fighting tax avoidance, once again the Portuguese regimen roundly fails its purposes, not to mention the perversity associated to using a tax regimen to enforce law abiding.

The usage of the tax transparency regimen to tackle tax avoidance or evasion is devious and does not conform with the intentions of the regimen. Individuals or companies may deduct the same amount of expenses as long as they are related to the activity being developed. All the expenses that are not strictly related to the activity are disregarded when determining the taxable income. Lastly all the taxable income, also known as profit, is to be taxed and the rates to which it is taxed will, in fact, vary on the business structure used by individuals and if that structure is subject or not to the tax transparency regimen, which increases the level of entropy in the system by itself.

If an individual makes use of a company not subject to the tax transparency regimen that is taxed on its own and he wishes to make use of those profits for personal expenses, not related to the activity being developed, then he will have to transfer that capital to his personal sphere hence making him liable for tax and equalling the situation to a company that is subject to the tax transparency regimen.

The difference then is that in the first situation the individuals may choose not to transfer that income to their personal sphere hence not triggering liability for tax but then they will not be able to make use of that income. In the said case the capital will stay in the company's sphere hence promoting investment or deferring taxation to a later moment when the members decide to withdraw that capital off the company.

In the second case that income is straightforwardly allocated to the individual and is taxed in his own personal sphere even if he decides to leave it in the company for reinvestment or for purposes of increasing the liquidity as we have previously made reference to. Needless to say that this outcome makes very little sense as it disregards the effective distribution of capital and does not, by any means, contribute positively to fight tax avoidance.

A similar problem may be said to arise in the English system. The difference, however, once again lies in the option made by the individual: This consequence was accepted as inevitable and even preferred by the individual when he chose to establish a partnership instead of establishing a company. Lastly it was not the purpose of the English legal drafter to fight tax avoidance when the regimen was enacted and as such it cannot be criticized as a failed solution to a problem, conversely to what happens to the Portuguese regimen.

Lastly, the argument that the activity being developed by the partnerships does not demand the creation of corporate entities is to be deemed ungrounded. Truth be said there isn't a single activity that demands the creation of corporate entities and that can't, instead, be developed individually. Even those activities that demand the concurrence of capital and labour or those that demand the joint effort of diverse individuals can be developed without the need to incorporate which means that in the end all companies could be tax transparent being the share-holders or members taxed in their personal sphere. A similar problem does not arise in the English system as no grounds for the existence of the tax transparency regimen are sought for.

As we have previously discussed, incorporation is merely an option that serves both purposes of limiting the liability of the individuals developing an activity and simultaneously, sometimes, the "business card" of those individuals developing that activity. The reality is that regardless of the activity being developed, credibility is higher when a corporate image is presented instead of an individual one regardless of any "secondary intents" their members may speculatively have.

Furthermore several firms that are historically considered to be eminently constituted by people are starting to have a growing biased transformation: Firms of lawyers or accountants are very good examples of this: The emergence of monstrous law and accountancy firms in the debut of the 20^{th} century, firms that require major investments given the infrastructures in terms of material goods and people (workers) is distorting the traditional concept that certain activities demanded an almost exclusive participation of people and minor, non-significant investment in what concerns capital. These new large firms are very good examples and the proof that the traditional idea of associating certain activities to companies that are majorly constituted by people is no longer a viable and true one.

Moreover, examples can be found in which medium size companies, having between twenty to thirty workers, in which 60% to 70% of the income is used to cover expenses both with the employees and with the infrastructure needed for its operations, even if its operations are exclusively related with intellectual and administrative tasks performed by those workers, are deemed as tax transparent solely because all the partners (or members of the company) develop the same activity and are less than 5. Such examples are amazing demonstrations as to show that the tax transparency regimen is embedded in an enormous lack of substantive purpose or rationale.

The Tax transparency regimen should, instead, be a tool at the service of the individuals that are to be free to adopt it or not should they seem fit whether through the adoption of an entity that is subject to it, such as that that happens in the English system, or through the adoption of the regimen regardless of the type of entity chosen, such as that that happens in the American system. If the individuals choose to have an opaque structure taxed on its own, then that option should be respected. One may, presumably, find other motivations for such choice. Still it is an option that the individual should have. The law grounded in the individual's choice is, indeed, the general principle behind the legal system as a whole: To respect the liberty and options of the people. Tax evasion or any other outcomes must not be sought through the castration of individual liberties such as that that happens in the Portuguese system.

On a further note it should also be stressed out that one of the requirements of application of the Portuguese regimen, as we have mentioned above, is that the company is whether an unincorporated association, an assets management company or, the one that is paramount to our essay, a *"Sociedade de Profissionais"*. Also, according to the Portuguese law, companies are deemed partnerships only if they fill the requirements pointed by article 6th, nbr 4, a) and b). Among the requirement, that vary from a) to b), one that is equal in both cases, is that all the individual members are practitioners of one of the activities to which article 151st of the CIRS makes reference to. None of these is a commercial activity. This will take us to conclude that if, in a company that meets all the requirement to be considered a partnership, one of its members develops an economic activity, then the company will fail to be regarded as a *"Sociedade de Profissionais"* subject to the tax transparency regimen and will be taxed, instead, as a regular company at companies' tax rates, as we have mentioned above. As such it appears that the legislator is, in fact, increasing the level of complexity of the system, in order to allow individuals to find ways of dodging the law. If the law was simple, clear, of straightforward application, such as the application of the tax transparency regimen to a type of business entity, instead of seeking requirements of application, the legal loopholes would be drastically reduced preventing the individuals from distorting the application of the legal regimens.

This natural consequence of the Portuguese regimen leads to major violations of the principle of equality and perpetuates a discrimination between types of businesses and, even worse, the possibility for companies that develop the same activity to be taxed differently only because of certain legal requirements that, may be, artificially distorted to bias the legal outcome.

Last but not least it should be said that the English system works as a promotor of the English economy. In fact, the non-existence of a withholding tax on partnerships from profits that arise overseas allied to the fact that the UK is part of European Community, makes it an indeed very attractive location for the settling of entities which business is related, or not, with the UK territory. This establishment of overseas businesses in the UK although evidently does not give rise to direct tax revenues works as a mean of promoting services provided by UK established agents, banks and other services providers and gives rise to the obligation of paying registration and annual government fees which are to be deemed immaterial when compared to the saving in taxes that such structures promote.

Could the English partnership be considered as an active promoter of harmful tax competition? Being this the mother of all questions we must say that conversely to what happens in several other countries such structures cannot directly be deemed to have been created with the intention of promoting harmful tax competition. In fact, the idea that lies behind the tax transparency regimen to which these entities are subject is that the structure through which the partners trade is deemed immaterial and as such the partners are the ones truly responsible for the development of the trade as we have previously explained. So in fact we could say to exist a purpose for the regimen that should not be confused with tax competition.

On a latter note the English legal drafter should be congratulated for its honesty in drafting such statute. In fact, the drafter acknowledges that the registration of a business entity in the UK is not necessarily a synonym of UK source. As such it looks, in fact, to the substance of the business and will only tax it if there is a direct relation with the UK territory. Being true that such system is prone to be used as a tax avoidance scheme, the English drafter cannot be blamed by such abuse, as clearly that cannot be said to have been his intent when creating it, and such abuse does not directly result in a loss of revenue to the UK as the "source criterion" will safeguard taxation on income derived from UK sources.

For all the above mentioned aspects we believe that, on the one hand, the Portuguese Tax Transparency Regimen deems to be modified and with it the base ideas behind the legislators' intent. On the other hand the English Tax Transparency regimen looks a very good alternative presenting numerous advantages such as those we discussed above-

Bibliographical references

BLICK ROTENBERG. *International Business Review - UK corporate structure Limited Liability Partnership.* Consulted Online on the 28th of April, 2016 at: http://www.blickrothenberg.com/getmedia/e5a30320-d16a-4980-ac44-4f635170147f/Limited-liability-partnership.pdf.aspx, n.d.

ALMEIDA, Carlos Ferreira de. *Direito Comparado Ensino e Método.* Lisbon, Portugal: Edições Cosmos, ISBN 972-762-187-2, 2000.

ARNOLD, Brian, and Michael MCINTYRE. *International Tax Prime.* 2nd edition. Netherlands: Kluwer Law. ISBN 90-411-8898-3, 2002.

AVY-YONAH, Rueven S., Nicol SARTORI, and Omri MARIAN. *Global Perspectives on INCOME TAX LAW.* New York, United States: Oxford University Press. ISBN 978-0-19-532-136-4, 2011.

AZEVEDO, Pedro. *O regime da transparência fiscal em Portugal - Breve Análise - Tese de Pós-Graduação em Direito Fiscal.* Porto, Portugal: Faculdade de Direito da Universidade do Porto - Centro de Investigação Jurídico Económica, Online Edition, 2005.

BASTO, José Guilherme Xavier de. *IRS: Incidência Real e Determinação dos Rendimentos Líquidos.* 5th edition. Coimbra, Portugal: Coimbra Editora. ISBN 97232115217, 9789723215212, 2007.

BERMAN, Harold Joseph. *LAW AND REVOLUTION: The Formation of the Western Legal Tradition.* 1st Volume, Cambridge, Massachusetts, United States of America: Harvard University Press. ISBN 0-674-51776-8, 2011.

BLACKSTONE, Sir William, and Edward CHRISTIAN. *Commentaries on the Laws of England in Four Books,.* London, United Kingdom: A. Strathan, Book the 1st, Chapter 18th, consulted online on the 17th of April 2015 at: http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-118/, 1803.

BRÁS CARLOS, Américo F. *Sociedades de Profissionais: Nota sobre a circular 8/90 da DGCI,.* Revista Fisco, Lisboa, Portugal: Universidade Lusiada Editora, ISSN 2236-9295. April, 1990.

BURN-CALLANDER, Rebecca. *Meet the family business about to turn 500 years old.* London, United Kingdom: The Telegraph, consulted online on the 20th of May, 2015 at: http://www.telegraph.co.uk/finance/festival-of-business/11197709/And-the-oldest-family-business-in-the-South-West-is....html, 2014.

CAMBRIDGE UNIVERSITY PRESS. *Cambridge Dictionaries Online.* Cambridge, United Kingdom: Cambridge University Press, n.d.

CARSWELL, John. *The South Sea Bubble.* 1st edition, London, United Kingdom: The Cresset Press, ISBN 080470421X, 9780804704212, 1960.

CIRC. *CIRC 1988: CÓDIGO DO IMPOSTO SOBRE O RENDIMENTO DAS PESSOAS COLECTIVAS, attached to Decreto-Lei 442-B/88 de 30 de Novembro.* Diário da República nbr 277/1988, (30-11-88), 1º Suplemento, Série I, 4754-(41) - 4754-(71), 1988.

—. *CIRC 2015: CÓDIGO DO IMPOSTO SOBRE O RENDIMENTO DAS PESSOAS COLECTIVAS, attached to Decreto-Lei 442-B/88 de 30 de Novembro.* Diário da República nbr 277/1988, (30-11-88), 1º Suplemento, Série I, 4754-(41) - 4754-(71) with all the ammendments in force until 2015, 2015.

CIRS 2015. *CÓDIGO DO IMPOSTO SOBRE O RENDIMENTO DAS PESSOAS SINGULARES, attached to Decreto-Lei 442-A/88 de 30 de Novembro,.* Lisbon, Portugal: Diário da República nbr 277/1988, (30-11-88), 1º Suplemento, Série I, 4754-(2) - 4754-(41) with all the ammendments in force until 2015, 2015.

COLLYER, John. *A practical treatise on the the Law of Partnership; with an appendix of forms.* 5th american from the 2nd english edition, Boston, United States of America: Little Brown and Company, consulted online on the 2nd of April 2016 at: https://books.google.pt/books?id=iTxHAQAAMAAJ&pg=PR1&dq=john+collyer,+a+practical+treatise+on+the+law&hl=pt-PT&sa=X&ved=0ahUKEwjFqPepxqLNAhUH8RQKHY20B-UQ6AEIHjAA#v=onepage&q=john%2, 1861.

CORDEIRO, António Menezes. *Direito Comercial.* 3rd edition, Coimbra, Portugal: Almedina, ISBN 9724030946, 9789724030944, 2012.

CTA. *Corporation Tax Act 2010: An Act to restate, with minor changes, certain enactments relating to corporation tax and certain enactments relating to company distributions; and for connected purposes.* London, United Kingdom: CH 4, 2010.

Decree-Law 162/2014. *É aprovada a revisão do Código do Imposto sobre o Rendimento das Pessoas Singulares, aprovado pelo Decreto-Lei n.º 442-A/88, de 30 de Novembro.* n.d.

Decree-Law 198/2001. *É aprovada a revisão do Código do Imposto sobre o Rendimento das Pessoas Singulares, aprovado pelo Decreto-Lei n.º 442-A/88, de 30 de Novembro.* Lisbon, Portugal: Diário da República, nº 152, Série I-A of the 30th of July, 2001,, n.d.

DGI. *Código do IRC, Comentado e Anotado.* Lisbon, Portugal, 1990.

DICKSON, Peter George Muir. *The financial revolution in England: a study in the development of public credit, 1688-1756.* University of California, United States of America: Gregg Revivals, ISBN 0751200107, 9780751200102, 1993.

DuBOIS, Armand B. *The English Business Company after the Bubble Act, 1720-1800.* 1st edition, Cambridge Massachusetts: Harvard University Press, ISBN 0-374-92362-0. 08/34.50, 1936.

DUFF, Patrick W. *Personality in Roman Private Law.* Cambridge, United Kingdom: The Cambridge Law Journal, nbr 7, pp 159-160, ISSN 1469-2139, 1938.

DUFOUR, Geneviève. *Les societas publicanorum de la République romaine: des ancêtres des sociétés par actions modernes?* Montréal/Genève: Éditions Thémis/Schulthess, ISBN 978-2-89400-309-1, 2012.

Einkommensteuergesetz. Bundesgesetzblatt Jahrgang 2009 Teil l Nr. 68, ausgegeben zu Bonn am 13. Oktober 2009, : consulted online on the 15th of April 2016 at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl109s3366.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl109s3366.pdf%27%5, 2009.

EKELUND, Robert Burton., and Robert D. TOLISSON. *Mercantilism as a rent-seeking society: economic regulation in historical perspective.* 5th edition, California, United States of America: Texas A&M University Press, ISBN 0890961204, 9780890961209, 1981.

ERNST & YOUNG. *International Trends in Dividend Taxation: Implications for Australian Companies and Tax Policy. Report Prepared for the ASX.* Australia: Ernst & Young Australia, consulted online at: http://taxboard.gov.au/files/2015/07/052a.pdf, 2002.

EVERSON, Mark, W. *Remarks of Comissioner of Internal Revenue Mark W. Everson at the City Club of Cleveland on Friday, February 24th.* Cleveland Ohio: Consulted online on the 29th of October, 2015 at: https://www.irs.gov/uac/remarks-of-irs-commissioner-mark-w-everson-at-the-city-club-of-cleveland-ohio, 2006.

FALCON Y TELLA, Ramon. *Analisis de la trasparencia tributaria.* Madrid, Spain: Ministerio de hacienda y administraciones públicas, ISBN 9788471964823, 1984.

Finance Act. *Finance Act 2003: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue,* *and to make further provision in connection to finance.* London, United Kingdom: CH 14, 2003.

—. *Finance Act 2007: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue, and to make further provision in connection to finance.* London, United Kingdom: CH 11, 2007.

—. *Finance Act 2009: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue, and to make further provision in connection to finance.* London, United Kingdom: CH 10, 2009.

—. *Finance Act 2012: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue, and to make further provision in connection to finance.* London, United Kingdom: CH 14, 2012.

—. *Finance Act 2014: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue, and to make further provision in connection to finance.* London, United Kingdom: CH 26, 2014.

—. *Finance Act 2015: An Act to grant certain duties, to alter other duties, and to amend the law relating to the National Debt and the Public Revenue, and to make further provision in connection to finance.* London, United Kingdom: CH 11, 2015.

GRANT THORNTON. *Limited Liability Partnerships.* United Kingdom, consulted online on the 28th of April, 2016 at: http://www.grant-thornton.co.uk/Global/Publication_pdf/FSG-Limited-Liability-Partnerships.pdf, n.d.

GRANT, Edward. *God and Reason in the Middle Ages.* Cambridge, United Kingdom: Cambridge University Press, ISBN 0-521-80279-2, 0-52100337-7 (pb.), 2001.

GRUNDY, Milton, and Michael THOMAS. *THE LIMITED PARTNERSHIP: A UK vehicle for non-residents with no-UK income (GITC Review).* London, United Kingdom, Volume II, Number I, consulted online on the 12 of December 2015 at: http://taxbar.com/wp-content/uploads/2016/01/gitc_review_v2_n1.pdf: Gray's Inn Tax Chambers, (November 2002) 67-72.

Guidance HS380. *Guidance HS380: Partnerships - Foreign Aspects (2015), update on the 6th of April 2016.* London, United Kingdom: HMRC, consulted online on the 13th of April 2016 at: https://www.gov.uk/government/publications/partnerships-foreign-aspectshs380-self-assessment-helpsheet/hs380-partnerships-foreign-aspects-2015, 2016.

HADNUM, Lee. *Tax Lanning With LLP's.* London, United Kingdom: CreateSpace Independent Publishing Platform, ISBN-10 1495426483, ISBN-13 978-1495426483, 2014.

HALEY, B. F. *Hecksher, Marcantilism, The Quarterly Jounral of Economics, Vol. 50 , Nbr 2.* Oxford, United Kingdom: Oxford University Press, pp 347-354, consulted online on the 17th of May, 2015 at: https://www.jstor.org/stable/1885028?seq=1#page_scan_tab_contents, February, 1936.

HARRIS, Ron. *Industrializing English Law: Entreprenership and Business Organisation, 1720-1844.* Cambridge, United Kingdom: Cambridge University Press, ISBN 0 521 66275 3, 2000.

HM TREASURY (Her Majesty's Treasury). *Policy paper: Budget 2016, updated on the 16th of March , 2016.* title 7.14 "Other personal tax changes", 2nd paragraph, London, United Kingdom: HM TREASURY, consulted online on the 11th of May, 2016, 2016.

HS380: Partnerships: Foreign Aspects. *HS380: Partnerships: Foreign Aspects.* London, United Kingdom: HMRC (Her Majesty's Revenue and Customs), 2015.

HW Fisher & Company. *Limited Liability Partnership (LLP) versus Limited Company.* London, United Kingdom: HW Fisher & Company, consulted online on the 28th of April, 2016 at: https://www.hwfisher.co.uk/wp-content/uploads/imported/images/docs/llpvlimitedcompany.pdf, December 2012.

ICTA. *Income and Corporation Taxes Act 1988.* London, United Kingdom: CH 1, 1988.

INTM264050. *Non-residents trading in the UK: domestic law permanent establishment/branch or agency.* London, United Kingdom: HMRC, consulted online on the 15th of May 2016 at: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm264050, 2016.

ITA. *Income Tax Act 2007: An Act to restate, with minor changes, certain enactments relating to income tax; and for connected purposes.* London, United Kingdom: CH 3, 2007.

ITTOIA. *Income Tax (Trading and Other Income) Act 2005: An Act to restate, with minor changes, certain enactments relating to income tax on trading income, property income, savings and investment income and certain other income; and for connected purposes.* London, United Kingdom: CH 5, 2015.

KARAYAN, John E., Charles W. SWENSON, and Joseph, W. NEFF. *Strategic Business Tax Planning.* 2nd edition. New Jersey, United States of America: John Wiley & Sons, ISBN 0471430765, 9780471430766, 2002.

KINDLEBERGER, Charles P. *A financial history of Wetern Europe.* London, United Kingdom: George Allen & Unwin, Ltd, ISBN 0-04-332105-4, 0-04-332088, 1984.

Law 109-B/2001. *Orçamento de Estado para o ano de 2002, Law nbr 109-B/2001 of the 27th of December.* Lisbon, Portugal: Diário da República nbr 298, I Série-A, 8496-(280) - 8496-(781), n.d.

Law 2/2014. *Procede à reforma da tributação das sociedades, alterando o Código do Imposto sobre o.* Lisbon, Portugal: Diário da República, 1ª Série, - nbr 11 - 16th January, 2014, 253-346, n.d.

Law 30-G/2000. *Reforma a tributação do rendimento e adopta medidas destinadas.* Lisbon, Portugal: Diário da República, Iª Série-A, nº299 of the 29th of December, 2000, 7492-(653) - 1492-(692), n.d.

Law 4/73. *Law 4/73 de 4 de Junho.* Lisbon, Portugal: Presidência da República, Diário do Governo nº131/1973, Série 1 de 1973-06-04, n.d.

Law 82-B/2014. *Lei do Orçamento de Estado para 2015.* Lisbon, Portugal: Diário da República, nbr 252/2014, 1º Suplemento, Série I of 2014-12-31, n.d.

LLP's Act. *Limited Liability Partnerships Act 2000: An Act to make provision for limited liability partnerships.* London, United Kingdom: CH 12, 2000.

LP's Act. *Limited Partnerships Act 1907: An Act to establish Limited Partnerships.* London, United Kingdom: 7 EDW, CH. 24, 1907.

MAITLAND, Frederic W. *Trust and Corporation: Selected Essays.* Cambridge, United Kingdom: Cambridge University Press, ISBN 9780511810435, 9780521820103, 1936.

MAITLAND, Frederick W. *Township and Borough: The Ford Lectures 1897.* Cambridge, United Kingdom: Cambridge University Press, ISBN 978-0-521-05660-1 (hb.), 978-0-521-17628-6 (pb.), , 1898.

MALMENDIER, Ulrike. *Societas.* California, United States of America: University of California Berkeley, consulted online on the 18th of April 2015 at: http://eml.berkeley.edu//~ulrike/Papers/Societas_Article_v3.pdf, n.d.

MARTINEZ, Soares. *Direito Fiscal.* Coimbra, Portugal: Almedina, ISBN 9724009610, 9789724009612, 2000.

McCAHERY, Joseph A., Theo RAAIJMAKERS, and Erick, P.M. VERMEULEN. *The governance of close corporations and partnerships: US and European* *perspectives*. New York, United States of America: Oxford University Press, ISBN 0-19-926435-X, 2004.

Model Tax Convention. *Model Tax Convetion on Income and on Capital (Full Version).* OECD Publishing, ISBN 978-92-64-23902-9; 978-92-64-23908-1; 978-92-64-21115-5; 978-92-64-21937-3, consulted online on the 15th of May, 2016 at: http://dx.doi.org/10.1787/9789264239081-en, 2014.

NABAIS, José Casalta. *Direito Fiscal.* 5th edition, Coimbra, Portugal: Almedina, 7th edition, ISBN 078-972-40-5043-0, 2013.

Ofício Circulado 20186/2016. *IRC - TAXAS DE DERRAMA LANÇADAS PARA COBRANÇA EM 2016 - PERIODO DE 2015.* Lisbon, Portugal: Direcção dos derviços do imposto sobre o rendimento das pessoas coletivas, 2016.

PALMA, Ana P. de A. *O regime de transparência fical: Análise da eficácia do regime em Portugal e Perspetivas de Evolução (Tese de Mestrado em Contabilidade, Fiscalidade e Finanças Empresariais).* Lisbon, Portugal: ISEG - Lison School of Economics and Management, 2013.

Partnership Act. *An Act to declare and amend the Law of Partnership.* London, United Kingdom: CH 39, 53 & 54 VICT., 1890.

PEREIRA, Manuel Henrique de Freitas. *Fiscalidade.* 2nd edition, Coimbra, Portugal: Almedina, ISBN 978-972-40-3876-6, 3rd edition, 2009.

Portaria nº 1011/2001. *Tabela de atividades do art 151º do Código do IRS (CIRS).* Lisbon, Portugal: Diário da República nº193, Série I-B, n.d.

PRICE WATERHOUSE COOPERS, LLP. *Mergers and Acquisitions: A global tax guide.* New Jersey, United States of America: John Wileu & Sons, Inc, ISBN-13: 978-0-471-65295-0, ISBN-10: 0-471-65395-0, 2006.

PUGH, Peter. *The Price Bailey Story.* London, United Kingdom: Icon Books Ltd, ISBN 1785780859, 9781785780851, 2013.

PUYRAVEAU, Paul. *La fiscalité des societés de personnes: Pratique et solutoins nouvelles.* Paris, France: Nouvelles Editions Fiduciaires ISBN 2-7057-0390-X, 1986.

REGULATION No 1606/2002. *Council Regulation (EEC) No 1606/2002 of 19th July 2002 on the applicatoin of international accounting standards.* Brussels, European Comission: Official Jounral of the European Communities (11/09/02) L 243/1 - 243/4, n.d.

REGULATION No 2137/85. *Council Regulation (EEC) No 2137/85 of 25th July 1985 on the European Economic Interest Grouping (EEIG).* Brussels, European Commission: Official Journal of European Communities (31/07/85), No L 199/1 - 199/9, n.d.

RIBEIRO, Teixeira, J. J. *As opções fiscais da Constituição.* Coimbra, Portugal: Universidade de Coimbra: Boletim de Ciências Económicas, XXVIII, 1985.

SANCHES, Saldanha J. L. *Manual de direito fiscal.* 3rd edition, Coimbra, Portugal: Comibra Editora, ISBN 972321511X, 9789723215113, 2007.

SCOTT, William Robert. *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720, The general development of the joint-stock system to 1720.* Cambridge, United Kingdom: Volume I, Cambridge University Press, 1912.

TCGA. *Taxation of Chargeable Gains Act: An Act to consolidate certain enactments relating to the taxation of chargeable gains.* London, United Kingdom: CH 12, 1992.

VALE, Maria de Lourdes, and Manuel H. Freitas PEREIRA. *Não aplicação do regime de transparência fiscal às sociedades gestoras de participações sociais (SGPS).* Lisbon, Portugal, nbr 17: LEX-Edições Jurídicas, Lda, Revisa Fisco, nº17, 40-48, 1995.

VATA. *Value Added Tax Act: An Act to consolidate the enactments relating to value added tax, including certain enactments relating to VAT tribunals.* London, United Kingdom: CH 24, 1994.

VERMEULEN, Erik, P. M. *The Evolution of Legal Business Forms in Europe and the United States.* Hague, Netherlands: Kluwer Law International, ISBN 90 411 2057 2, 2003.

WALBERT, David. *Digital Text Book for Colonial North Carolina, Subchapter 3.3: Who owns the land.* North Carolina, United States of America: LEARN NC (Learn North Caronlina), consulted online on the 30th of April, 2016 at: http://www.learnnc.org/lp/editions/nchist-colonial/2027, s.d.

ATTACHMENTS

ATTACHMENT 1

"SOUTH SEA BUBBLE SHORT HISTORY

The South Sea Bubble was a complex event, the product of intersecting financial, legal, political, and cultural factors. This short history is just an overview, intended to provide a context for research in the South Sea Bubble Collection.

The South Sea Company was formed in 1711, supported by Robert Harley as a Tory competitor for the Whig Bank of England. The company was promised a monopoly of all trade to the Spanish colonies in South America in exchange for taking over and consolidating the national debt raised by the War of Spanish Succession (1701-1714). The value of this promise, however, was closely tied to the outcome of the war.

While the Treaty of Utrecht effectively ended the war in 1713, it curtailed the scope of trade opportunities for the South Sea Company by confirming Spain's sovereignty over its new world colonies. The South Sea Company was left with limited options in the slave trade, the interest to be paid by the government on the loan from the South Sea Company, and narrowing trade opportunities in the Spanish colonies in South America. The South Sea Company did not even engage in its first trade voyage to the South Seas until 1717, and the potential for South Sea fortune slipped even further from grasp when the fragile relationship between Spain and Britain weakened in 1718.

Although unsuccessful in South Sea trade, the company did effectively persuade the British government to approve the conversion of successive portions of the national debt into South Sea Company shares. Building on the war debt conversion of 1711, Parliament authorized the South Sea Company in 1719 to assume an additional portion of the national debt.

In January of 1720, South Sea Company stock was trading at a modest £128. In an effort to stir up popular interest in the company's stock, the directors circulated false *claims of success and fanciful tales of South Sea riches. The share price rose to £175 in February. Interest in the company was furthered along in March when the government endorsed a proposal from the company to assume yet more of the national debt in exchange for shares of South Sea Company stock. The South Sea Company's proposal was chosen over that of its chief competitor, the Bank of England. With investor confidence mounting, the share price climbed to approximately £330 by the end of March.*

The South Sea Bubble was not an isolated bubble event in 1720. As the South Sea Bubble was developing, a general interest in joint-stock investment opportunities was also picking up pace. By the middle of 1720, sometimes known as the "Bubble Year," the market was flooded with a remarkable range of new ventures, each creating smaller bubbles as the speculative frenzy mounted. South Sea Company stock benefited from the investor mania and by May it was at £550.

The Bubble Act was passed in June, requiring all joint-stock companies to receive a royal charter. The legislation had been introduced by the South Sea Company, presumably as a means of controlling competition in the burgeoning market. The South Sea Company received its charter, perceived as a vote of confidence in the company, and by the end of June its share price had spiked to a peak of £1050.

Investor confidence began to wane, however. The sell-off began by early July and the collapse occurred quickly. By the end of August stock was valued at less than £800. By September the share price had plummeted to £175, devastating institutions and individuals alike. In 1721 formal investigations exposed a web of deceit, corruption, and bribery that led to the prosecution of many of the major players in the crisis, including both company and government officials." (HARVARD BUSINESS SCHOOL 2016)

ATTACHMENT 2

The meaning of international double taxation and the corresponding elimination methods

""International Double Taxation" has been defined as the imposition of comparable income taxes by two or more sovereign countries on the same item of income (including capital gains) of the same taxable person for the same taxable period. (…) The legal definition of international double taxation should be distinguished from the broader economic concept of double taxation. Under the latter definition, double taxation occurs whenever there is multiple taxation of the same items of economic income. Under the legal definition, taxation of a subsidiary company by one country and the taxation of the parent company on a dividend from that subsidiary by another country is not international double taxation because the two companies are separate legal entities. In the economic sense, however, the parent and the subsidiary constitute a single enterprise. Economic but not legal double taxation also may arise when income is taxed to a partnership and to the partners or when it is taxed to a trust and to the beneficiaries of the trust." (ARNOLD e MCINTYRE 2002., 29)

As mentioned in our essay the elimination of international double taxation may take place through three methods: The **deduction method,** the **exemption method** (OBERSON e HULL 2011, 173) and the **credit method**. (OBERSON e HULL 2011, 173)

1. **Deduction method –** *"As per the deduction method, foreign-source of income is subject to income tax in the state of residence. However, any taxation levied in the state of source is deducted from the basis of taxation in the state of residence. It is therefore the net income received from the state of source (after tax) which is taxable in the state of residence."* (OBERSON e HULL 2011, 172)

2. **Exemption method -** *"Under the exemption method, the state in which a person is resident shall exempt the foreign source income from income tax.*

Hence, such income shall only be subject to taxation in the state of source.” (OBERSON e HULL 2011, 173)

3. **Credit method -** *“Under the credit method, any foreign*-source taxes paid on *foreign-source income reduce the income tax levied by the state of residency by the amount of the foreign tax. The principle of credit may be applied by two main methods:*

(1) the state of residence allows the deduction of the total amount of tax paid in the other state in income which is may be taxed in the that state (full credit); and

(2) *the deduction given by the state of residence for the tax paid in the other state is restricted to that part of its own tax which is appropriate to the income which may be taxed in the other state (ordinary credit).”* (OBERSON e HULL 2011, 173)

See the table (OBERSON e HULL 2011, 173) below for an exemplification on the application of the three methods:

4.4.1.4. Comparative chart

	Deduction method	Exemption method	Credit method
foreign-source income	100	100	100
foreign tax at source (20%)	20	20	20
net foreign-source income	80	80	80
taxable income	80	0	100
domestic tax before credit (40%)	32	0	40
tax credit	0	0	(20)
domestic tax liability	32	0	20
total tax liability	*52*	*20*	*40*

ATTACHMENT 3

Commentaries on article 5th of the 1990 CIRC (DGI 1990)

"3 – The objectives that the legislator aimed to achieve with the adoption of this regimen of tax transparency are those of neutrality, fighting tax avoidance and the elimination of the so called double economic taxation of the profits distributed to the members.

- *The objective of tax neutrality demands that, in taxation, the form of the society adopted by the tax payers be disregarded, being instead the partners or members taxed as if the activity developed by the society was instead being directly developed by them. The purpose is to attain to the contributory capacity of the partners or members, indirectly represented through the income obtained by the society or transparent entity.*

- *The objective of fighting tax avoidance is equally present in the adoption of this regimen of tax transparency to the extent that is sought that, through the adoption of such regimen, individuals seek to incorporate businesses with the sole purpose of evading tax.*

There are effectively situation in which the development of that same economic activity could take place directly through the members, being the corporation a mere scheme that stand between the members and the revenue services so that it is possible to reduce or postpone the liability for tax.[80]

[80] "3 – Os objectivos propugnados pelo legislador com a adopção deste regime de transparência fiscal são os de neutralidade, combate à evasão fiscal e eliminação da designada dupla tributação económica dos lucros distribuídos aos sócios.

− O objectivo da neutralidade fiscal implica que na tributação não seja tida em conta a forma jurídica adoptada pelos sujeitos passivos, sendo tributados os respectivos sócios ou membros como se exercessem directamente a actividade prosseguida pela sociedade. Procura-se assim atender tão só à capacidade contributiva daqueles sócios ou membros, manifestada indirectamente através dos rendimentos obtidos pela sociedade ou entidade transparente.

− O objectivo do combate à evasão fiscal está igualmente presente na adopção do regime de transparência fiscal, na medida em que se procura obviar, com tal adopção, a que sejam constituídas sociedades apenas com a finalidade de fuga aos impostos.

Tax transparency, aiming a direct imputation of the gains obtained by the society, regardless of its distribution, prevents this type of schemes from taking place.

- *The last objective is that of the elimination of double taxation of the profits distributed to the members, being the only that, eventually, is fully attained by the tax transparency regimen.*[81]

Effectively, considering partnerships and other entities are excluded from IRC taxation, the prevention of double taxation is hence ensured: In the sphere of the company or transparent entity and in the sphere of the members themselves.

Companies' taxation code regulates, side by side with tax transparency, other means of elimination or attenuation of double economic taxation of distributed profits such as:

- *the exclusion of taxable income that as already been taxed as such (article 45th);*[82]
- *taxation by the consolidated profit (article 59th)*[83]
- *tax credit method (article 72nd)*[84]

Há casos, com efeito, em que a prossecução da mesma actividade económica poderia ser feita directamente pelos respectivos sócios, aparecendo a forma societária como um mero subterfúgio que se interpõe entre eles o Fisco, para assim se alcançar uma diminuição ou dilação da carga tributária.

[81] A transparência fiscal, propugnando uma imputação directa dos resultados obtidos pela sociedade, independentemente da sua distribuição, obvia a esta situação.

− O último objectivo é o da eliminação da dupla tributação dos lucros distribuídos aos sócios, sendo o único que, quiçá, é plenamente atingindo pelo regime de transparência fiscal.

Com efeito, na medida em que se afasta da tributação em sede de IRC, as sociedades e outras entidades abrangidas por esse regime, obsta-se a que o resultado por elas apurado seja duplamente tributado: na esfera da própria sociedade ou entidade transparente e na esfera dos respectivos sócios ou membros.

O CIRC prevê, a par da transparência fiscal, outros mecanismos tendentes à eliminação ou atenuação da dupla tributação económica dos lucros distribuídos, como sejam:

− A exclusão da base tributável do IRC de rendimentos já tributados neste imposto (artigo 45.º);
− A tributação pelo lucro consolidado (artigo 59.º);
− O método do crédito de imposto (artigo 72.º)

[82] Presently article 46th of the CIRC

[83] Presently articles 63rd and 65th of the CIRC

[84] That became article 72nd, meanwhile revoked by law number 109º-B/2001 of the 27th of December which approved the State's budget for 2002.

This last mechanism works by a deduction to the taxable income and it intends to minimize double economic taxation of profits that are distributed to the members.[85]

The members of a transparent company, however, are not entitled to this tax credit in what concerns distributed profits by the company as the tax transparency regimen completely eliminates that double economic taxation. However, if the company itself has received dividends originated in participations held in other companies, the members themselves will be able to deduct to their personal taxable income of IRS or IRC, depending on whether it is an individual or company that is receiving the income (check articles 80th, number 3 of the CIRS and article 71st of the CIRC respectively), the tax credit corresponding to the share that results from those dividends."[86]

[85] Este último mecanismo actua por dedução à colecta e visa atenuar a dupla tributação económica dos lucros que sejam distribuídos aos sócios.
Os sócios de uma sociedade transparente, porém, não terão direito a este crédito de imposto relativamente aos lucros distribuídos pela sociedade uma vez que o regime de transparência elimina totalmente aquela dupla tributação económica, mas, se a própria sociedade transparente tiver recebido dividendos provenientes da sua participação noutras sociedades, os respectivos sócios poderão deduzir à sua colecta de IRS ou de IRC consoante o caso (vide respectivamente artigo 80.º, n.º 3 do CIRS e artigo 71.º do CIRC), o crédito de impostos correspondente á parte dos resultados imputados relativamente àqueles dividendos.".

[86] Presently not applicable as a consequence of number 5th of article 83rd of the CIRC.

ATTACHMENT 4

The legislative evolution of the tax transparency regimen:

Writing in force in 1989

"Artigo 5.º
Transparência fiscal

1- É imputada aos sócios, integrando-se, nos termos da legislação que for aplicável, no seu rendimento tributável para efeitos de IRS ou IRC, consoante o caso, a matéria colectável, determinada nos termos deste Código, das sociedades a seguir indicadas, com sede ou direcção efectiva em território português, ainda que não tenha havido distribuição de lucros:

a) Sociedades civis não constituídas sob forma comercial;

b) Sociedades de profissionais;

c) Sociedades de simples administração de bens, cuja maioria do capital social pertença, directa ou indirectamente, durante mais de 183 dias do exercício social, a um grupo familiar ou cujo capital social pertença, em qualquer dia do exercício social, a um número de sócios não superior a cinco e nenhum deles seja pessoa colectiva de direito público.

2 - Os lucros ou prejuízos do exercício, apurados nos termos deste Código, dos agrupamentos complementares de empresas e dos agrupamentos europeus de interesse económico, com sede ou direcção efectiva em território português, que se constituam e funcionem nos termos legais são também imputáveis directamente aos respectivos membros, integrando-se no seu rendimento tributável.

3 - A imputação a que se referem os números anteriores é feita aos sócios ou membros nos termos que resultarem do acto constitutivo das entidades aí mencionadas ou, na falta de elementos, em partes iguais.

4 - Para efeitos do disposto no n.º 1, considera-se:

a) Sociedade de profissionais a constituída para o exercício de uma actividade profissional constante da lista anexa ao Código do IRS, em que todos os sócios sejam profissionais dessa actividade e desde que estes, se considerados individualmente, ficassem abrangidos pela categoria dos rendimentos do trabalho independente para efeitos do IRS;

b) Sociedade de simples administração de bens a sociedade que limita a sua actividade à administração de bens ou valores mantidos como reserva ou para fruição ou à compra de prédios para a habitação dos seus sócios, bem como aquela que conjuntamente exerça outras actividades e cujos proveitos relativos a esses bens, valores ou prédios atinjam, na média dos últimos três anos, mais de 50% da média, durante o mesmo período, da totalidade dos seus proveitos;

c) Grupo familiar o constituído por pessoas unidas por vínculo conjugal ou de adopção e bem assim de parentesco ou afinidade na linha recta ou colateral até ao 4.º grau, inclusive." (CIRC 1988)

Writing in force from 2000 onwards

"Artigo 5.º

Transparência fiscal

1-...

2-...

3-...

4 - Para efeitos do disposto no n.º 1, considera-se:

a) Sociedade de profissionais a constituída para o exercício de uma actividade profissional constante da lista de actividades a que alude o artigo 141.º do Código do IRS, em que todos os sócios sejam profissionais dessa actividade;" (Law 30-G/2000)

Writing in force from 2002 onwards.

"Artigo 6.º

Transparência fiscal

1 - ...

2 - ...

3 - ...

4 - Para efeitos do disposto no n.º 1, considera-se:

a) Sociedade de profissionais - a sociedade constituída para o exercício de uma actividade profissional especificamente prevista na lista de actividades a que alude o artigo 151.º do Código do IRS, na qual todos os sócios pessoas singulares sejam profissionais dessa actividade;

b) ...

c) ..."

"Artigo 12.º

Sociedades e outras entidades abrangidas pelo regime de transparência fiscal

As sociedades e outras entidades a que, nos termos do artigo 6.º, seja aplicável o regime de transparência fiscal não são tributadas em IRC, salvo quanto às tributações autónomas." (Law 109-B/2001)

Writing in force from 2002 onwards:[87]

"Artigo 6.º
Transparência fiscal

1 - É imputada aos sócios, integrando-se, nos termos da legislação que for aplicável, no seu rendimento tributável para efeitos de IRS ou IRC, consoante o caso, a matéria colectável, determinada nos termos deste Código, das sociedades a seguir indicadas, com sede ou direcção efectiva em território português, ainda que não tenha havido distribuição de lucros:

a) Sociedades civis não constituídas sob forma comercial;
b) Sociedades de profissionais;
c) Sociedades de simples administração de bens, cuja maioria do capital social pertença, directa ou indirectamente, durante mais de 183 dias do exercício social, a um grupo familiar, ou cujo capital social pertença, em qualquer dia do exercício social, a um número de sócios não superior a cinco e nenhum deles seja pessoa colectiva de direito público.

2 - Os lucros ou prejuízos do exercício, apurados nos termos deste Código, dos agrupamentos complementares de empresas e dos agrupamentos europeus de interesse económico, com sede ou direcção efectiva em território português, que se constituam e funcionem nos termos legais, são também imputáveis directamente aos respectivos membros, integrando-se no seu rendimento tributável.

[87] This change in the writing of the legal text concerns terminology alone and it does not regard the meaning of the law.

3 - A imputação a que se referem os números anteriores é feita aos sócios ou membros nos termos que resultarem do acto constitutivo das entidades aí mencionadas ou, na falta de elementos, em partes iguais.

4 - Para efeitos do disposto no n.º 1, considera-se:

a) Sociedade de profissionais — a sociedade constituída para o exercício de uma actividade profissional especificamente prevista na lista de actividades a que alude o artigo 151.º do Código do IRS, na qual todos os sócios pessoas singulares sejam profissionais dessa actividade;

b) Sociedade de simples administração de bens — a sociedade que limita a sua actividade à administração de bens ou valores mantidos como reserva ou para fruição ou à compra de prédios para a habitação dos seus sócios, bem como aquela que conjuntamente exerça outras actividades e cujos rendimentos relativos a esses bens, valores ou prédios atinjam, na média dos últimos três anos, mais de 50% da média, durante o mesmo período, da totalidade dos seus rendimentos;

c) Grupo familiar — o grupo constituído por pessoas unidas por vínculo conjugal ou de adopção e bem assim de parentesco ou afinidade na linha recta ou colateral até ao 4.º grau, inclusive.”[88]

Writing in force from 2014 onwards:

“Artigo 6.º

Transparência fiscal

[88] Writing as amended by (Decree-Law 159/2009) which corresponded to the transposition of (REGULATION No 1606/2002 s.d.). This regulation intended to introduce the international accounting standards.

1 - É imputada aos sócios, integrando-se, nos termos da legislação que for aplicável, no seu rendimento tributável para efeitos de IRS ou IRC, consoante o caso, a matéria coletável, determinada nos termos deste Código, das sociedades a seguir indicadas, com sede ou direção efetiva em território português, ainda que não tenha havido distribuição de lucros:

a) Sociedades civis não constituídas sob forma comercial;

b) Sociedades de profissionais;

c) Sociedades de simples administração de bens, cuja maioria do capital social pertença, direta ou indiretamente, durante mais de 183 dias do exercício social, a um grupo familiar, ou cujo capital social pertença, em qualquer dia do exercício social, a um número de sócios não superior a cinco e nenhum deles seja pessoa coletiva de direito público.

2 - Os lucros ou prejuízos do exercício, apurados nos termos deste Código, dos agrupamentos complementares de empresas e dos agrupamentos europeus de interesse económico, com sede ou direção efetiva em território português, que se constituam e funcionem nos termos legais, são também imputáveis diretamente aos respetivos membros, integrando-se no seu rendimento tributável.

3 - A imputação a que se referem os números anteriores é feita aos sócios ou membros nos termos que resultarem do ato constitutivo das entidades aí mencionadas ou, na falta de elementos, em partes iguais.

4 - Para efeitos do disposto no n.º 1, considera-se:

a) Sociedade de profissionais:

1) A sociedade constituída para o exercício de uma atividade profissional especificamente prevista na lista de atividades a que *se refere o artigo 151.º do Código do IRS, na qual todos os sócios pessoas singulares sejam profissionais dessa atividade; ou,*

2) A sociedade cujos rendimentos provenham, em mais de 75 %, do exercício conjunto ou isolado de atividades profissionais especificamente previstas na lista constante do artigo 151.º do Código do IRS, desde que, cumulativamente, em qualquer dia do período de tributação, o número de sócios não seja superior a cinco, nenhum deles seja pessoa coletiva de direito público, e pelo menos 75 % do capital social seja detido por profissionais que exercem as referidas atividades, total ou parcialmente, através da sociedade;

b) Sociedade de simples administração de bens - *a sociedade que limita a sua atividade à administração de bens ou valores mantidos como reserva ou para fruição ou à compra de prédios para a habitação dos seus sócios, bem como aquela que conjuntamente exerça outras atividades e cujos rendimentos relativos a esses bens, valores ou prédios atinjam, na média dos últimos três anos, mais de 50 % da média, durante o mesmo período, da totalidade dos seus rendimentos;*

c) Grupo familiar - *o grupo constituído por pessoas unidas por vínculo conjugal ou de adoção e bem assim de parentesco ou afinidade na linha reta ou colateral até ao 4.º grau, inclusive.*

5 - *Para efeitos da alínea c) do n.º 1, não se consideram sociedades de simples administração de bens as que exerçam a atividade de gestão de participações sociais de outras sociedades e que detenham participações sociais que cumpram os requisitos previstos no n.º 1 do artigo 51.º"* [89]

[89] Writing as amended by the (Decree-Law 162/2014)

ATTACHMENT 5

9. The remittance basis of taxation (Guidance Note: Residence, Domicile and the Remittance Basis 2016, 55-56)

What is the remittance basis?

9.1 If you are UK resident you will normally be taxed on the arising basis. This means that you are liable to pay UK tax on your worldwide income and gains, wherever those arise or accrue.

9.2 The remittance basis is an alternative tax treatment available to people who are UK resident but not domiciled in the UK and who have foreign income and gains.

9.3 This section gives you an overview of how the remittance basis operates and includes the changes which came into effect from 6 April 2012, and from 6 April 2013. This guidance will help you if you have straightforward tax affairs: if your tax affairs are more complex, or you require more detailed information about the remittance basis, you can refer to the RDRM. You may also want to take advice from a professional adviser.

9.4 If you need information about the operation of the remittance basis before the changes introduced from 6 April 2012 and 6 April 2013, you should refer to our booklet Residence, Domicile and the Remittance Basis. Who can use the remittance basis?

9.5 To use the remittance basis for your foreign income and foreign gains you must be UK resident and be either:

- not domiciled in the UK
- for years up to 2012-2013, not ordinarily resident in the UK. In this case
  - you can use the remittance basis in respect of foreign income
  - you cannot use it in respect of foreign gains unless you are also not domiciled in the UK

9.6 If you have used the remittance basis in earlier years and you bring any of those earlier years' foreign income and gains to the UK at a later date, you will still be liable to UK tax on this remittance even if you do not claim the remittance basis in the later year. How does the remittance basis work?

9.7 When you are eligible and choose to use the remittance basis, you will be liable to UK tax on:

- all of your UK income and gains as they arise or accrue each year
- your foreign income and gains if and when you bring (remit) them to the UK, including any property which derives from those income and gains

There are some exceptions to what constitutes a remittance and these are explained in paragraph 9.53 of this guidance.

9.8 Even if you are eligible to use the remittance basis you do not have to use it. You can use the arising basis and pay UK tax on your worldwide income and gains. If you choose to use the remittance basis, you will not normally qualify for:

- personal allowances and reliefs for Income Tax
- the annual exempt amount for Capital Gains Tax

ATTACHMENT 6

Value Added Tax Act 1994 (VATA 1994, s7, s9)

"7 Place of supply.

(10) A supply of services shall be treated as made—

(a) in the United Kingdom if the supplier belongs in the United Kingdom; and

(b) in another country (and not in the United Kingdom) if the supplier belongs in that other country.

9 Place where supplier or recipient of services belongs.

(2) The supplier of services shall be treated as belonging in a country if—

(a) he has there a business establishment or some other fixed establishment and no such establishment elsewhere; or

(b) he has no such establishment (there or elsewhere) but his usual place of residence is there; or

(c) he has such establishments both in that country and elsewhere and the establishment of his which is most directly concerned with the supply is there."

ATTACHMENT 7

LIMITED LIABILITY PARTNERSHIPS (SIKKA 2000)

The Limited Liability Partnership (LLP) Act 2000 received its Royal Assent in July. It is likely to come to into force later this year and the first raft of LLPs are expected to be formed in early 2001. The Limited Liability Partnership is a new business vehicle. It is the first new business vehicle to be introduced in Britain since the introduction of the Limited Liability Partnership Act of 1907. This article discusses the salient features of the LLP legislation.

The Genesis of Limited Liability Partnerships

The campaign to form LLPs has been led by major accountancy firms who have been keen to limit their liability in a variety of ways. Historically, audit firms have been required by law to trade as partnerships. Since the 1970s audit firm partners demanded the right to trade as limited liability companies and thus limit the liabilities. The Companies Act 1989 (subsequently part of the Companies Act 1985) removed the legal constraint and finally enabled accountancy firms, like other enterprises, to trade as limited liability companies. The limited liability company vehicle has a potential to limit the liabilities of audit firm partners, but most firms showed little enthusiasm for the change in law. Some were concerned that as limited liabilities companies they would need to publish audited financial statements, be liable to the more onerous corporation tax regime rather the Schedule D Case I and II regime and generally be subjected to a raft of corporate legislation. With the exception of KPMG most major firms failed to incorporate and continued to trade as partnerships.

In the early 1990s accountancy firms, with considerable support from major accountancy bodies, campaigned to secure proportional liability, a 'cap' on their *liabilities and an end to the 'joint and several liabilities' of partners, a central feature of partnership structures. (...)*

In this climate, two major accountancy firms, Ernst & Young and PricewaterhouseCoopers spent around a million pounds to privately draft a LLP Bill. (...) The action by accountancy firms (...) placed LLPs on the UK political agenda and in 1996 the Department of Trade and Industry issued a consultation paper. After many revisions, this eventually became the Limited Liability Partnership Act 2000

The UK Legislation

The LLP Act creates a new legal person that can trade, borrow money, sue and be sued in its own name. LLPs are neither partnerships nor limited liability companies. Rather they are a combination of the two previously well-established business vehicles. Any two or more persons carrying on a lawful business with a view to profit can form a LLP. The limited liability partnership and its membership must be registered at Companies House. All businesses trading as limited liability partnerships need to have the abbreviation "llp" after their name. Their business letters, order forms and other stationery need to say that they are trading as a limited liability partnership. All LLPs must keep 'proper accounting records'.

Internally, LLPs will be organised as partnerships. The LLPs will be owned by their members (or partners) rather than shareholders. The LLP will continue to exist independent of the changes in its membership. The partners will be free to reach any agreements for the administration, internal organisation and profit sharing of the LLP. They are not obliged to publicly file such arrangements. All members will be agents of the LLP and the limited liability partnership will be bound by the action of its members, except in some specified circumstances (e.g. fraud, wrongful acts). Each LLP must have at least two designated members (i.e. named administrators) who will carry out a number of administrative functions: these include filing the annual return, the approval and signing of accounts, notifying Companies House of *changes in membership and of any change to the address of the registered office. If no designated members are specified in the registration document, then all the members will be considered to be designated members.*

Externally, the LLPs will have most of the attributes of a limited liability company. They need to file audited financial statements about their affairs, equivalent to those filed by limited liability companies. Small and medium-sized LLPs will be granted appropriate exemptions from audits and filing requirements. Unlike limited liability companies, LLPs are not required to publish information about director remuneration. However, the LLPs in which the amount of profit before member remuneration and profit share exceeds £200,000 will have to state the amount of profit attributable to the member with the largest share.

There is no legal requirement to maintain any minimum issued or paid-up capital. The LLP is not required to maintain adequate insurance cover to meet any legal claim against itself or its partners. However, the LLP itself can be pursued for wrongful or fraudulent trading. Any litigant would have to issue a lawsuit against the LLP. The first port of call for any redress would be assets of the LLP. Should they be inadequate then the assets of the so called 'negligent' partner would come under threat. There would be no recourse against the assets of the partners not involved in the alleged negligent decision. (…) The LLPs would be subjected to most of the provisions of the Insolvency Act 1986. This includes making LLPs partners personally responsible for wrongful trading or trading with the knowledge that an LLP was insolvent. The affairs of a LLP can also be investigated by the Department of Trade and Industry (DTI) and its members can be disqualified from being a member of an LLP and from being a director of a company.

For tax purposes, the LLP Act 2000 specifically states that LLPs will be taxed as partnerships. Thus the usual rules of Schedule D Case I and II will apply. Hence, in comparison to limited liability companies, the deduction of expenses for LLP partners will be easier. The transfer of assets from partnerships to LLPs will be tax neutral. (…)

ATTACHMENT 8

QUOTATIONS IN THE ORIGINAL PORTUGUESE LANGUAGE

Author	**QPN** [90]	**Original text in Portuguese**
(SANCHES 2007)	13	*"Com este regime, o sócio – e só o sócio - vai ser tributado com uma transformação do rendimento da sociedade num rendimento que lhe é imputado. Opta-se pela não consideração das sociedades como sujeitos passivos do imposto no que diz respeito à divida de imposto, ou seja, pela não participação destas na relação obrigacional fiscal…"*
(ALMEIDA 2000)	16[91]	*"… a tradução de um texto jurídico expresso na linguagem jurídica L1', para a linguagem L2' exige geralmente a intermediação dos sentidos denotados correspondentes nas línguas naturais L1 e L2."*
(ALMEIDA 2000)	16[92]	*"Na maioria dos casos, a tradução jurídica terá de satisfazer-se com significações equivalentes (...) A equivalência funcional e sistémica é condição necessária, mas não condição suficiente, porque, mais do que simples comparabilidade, se exige que os significados, embora não coincidentes, apresentem entre si uma razoável semelhança."*
(NABAIS 2013)	55	*"… a separação entre as primeiras, tributadas em IRS, e as segundas, tributadas em IRC, não é tão estanque quanto, à primeira vista, se possa pensar. Na verdade, a distribuição da tributação das empresas entre o IRS e o IRC é, a seu modo, bastante artificial."*
(BRÁS CARLOS 1990)	57	"*É da essência da transparência fiscal, que a sociedade funcione, no final do exercício, como um mero ente imputador de resultados. Esta é a verdadeira natureza das sociedades sujeitas ao regime de transparência."*
(VALE e PEREIRA 1995)	57	*"a tributação não deverá, em princípio, ser condicionada pela forma jurídica dos entes sujeitos a imposto, devendo tomar-se, para o efeito, como padrão, o imposto sobre o rendimentos das pessoas singulares, que, para alguns autores, são as únicas que têm capacidade contributiva e, por isso, devem ser consideradas as grandes protagonistas de qualquer sistema fiscal."*

[90] Quotation Page Number
[91] 1st quotation of page 10
[92] 2nd quotation of page 10

(SANCHES 2007)	57	*"Só que, ao lado das sociedades de capitais, caracterizadas pela existência de meios financeiros postos em comum pelos sócios (...) como condição para o exercício de uma certa actividade, encontramos também sociedades de pessoas, no sentido de uma associação entre pessoas que formam uma sociedade para pôr em conjunto as suas aptidões profissionais."*
(SANCHES 2007)	58	*"Só que, ao lado das sociedades de capitais, caracterizadas pela existência de meios financeiros postos em comum pelos sócios (...) como condição para o exercício de uma certa actividade, encontramos também sociedades de pessoas, no sentido de uma associação entre pessoas que formam uma sociedade para pôr em conjunto as suas aptidões profissionais.* *Estas sociedades de pessoas… São sociedades em que o capital tem uma expressão mínima e, por isso mesmo, uma importância secundária."*
(PEREIRA 2009)	60	*"Trata-se de ver como é encarada a chamada* **dupla tributação económica dos lucros distribuídos:** *os lucros são tributados primeiro em imposto sobre as sociedade e, quando distribuídos, no imposto sobre o rendimento dos respectivos sócios."*
(BASTO 2007)	63	*"O que é certo é que são frequentes os casos de atenuação da dupla tributação na fiscalidade internacional, a par de outros casos em que se procede à eliminação, através de sistemas de crédito total do imposto suportado a nível societário."*
(SANCHES 2007)	65	*"O regime entre nós acolhido ficou claramente marcado pela sua intenção originária de evitar o recurso a formas societárias apenas com a intenção de reduzir a carga fiscal, sendo, por isso, o seu âmbito de aplicação para as sociedades de profissionais, para as sociedades civis não constituídas sob forma comercial e para as sociedades de simples administração de bens…"*
(MARTINEZ 2000)	76	*"Esta dupla tributação (...) tem lugar (...) não apenas ao nível das sociedades de profissionais mas também no que concerne as demais sociedades, tendo sido já suportado pela doutrina, a irrelevância da personalidade jurídica de todas as sociedades em matéria fiscal, porquanto tal não revela uma capacidade contributiva autónoma, a qual só pertence aos membros.*
(BASTO 2007)	77[93]	*"A dificuldade teórica da concepção está no conceito de capacidade contributiva autónoma das sociedades, que não parece enquadrar-se com um sistema fiscal destinado a*

[93] First quotation of page 71

		distribuir os encargos das despesas públicas pelos cidadãos de um modo equitativo, ou seja, de acordo com a respetiva capacidade de gastar. Consegue-se assim um tratamento dos dividendos em condições de igualdade em relação aos demais rendimentos."
(BASTO 2007)	77[94]	*"De um ponto de vista conceitual, a correcção da dupla tributação deve ser efectuada no imposto pessoal, ou seja, o objectivo deve ser o de que os lucros distribuidos sejam integrados no rendimento global dos sócios e sejam atingidos pelas alíquotas progressivas do imposto pessoal."*
(BASTO 2007)	78	*"Relembre-se que é o imposto pessoal de rendimento, e não o imposto sobre os lucros societários, que constitui a pedra angular de um sistema tributário assente no princípio da capacidade contributiva. Se há que eliminar uma das tributações, para evitar que haja uma "dupla tributação", então é a tributação ao nível societário que deverá ceder o passo à tributação pessoal dos sócios. Neste sentido, o sistema do crédito do imposto – que, quanto integral, elimina, pelo que toca aos lucros distribuídos, o encargo fiscal suportado pela sociedade distribuidora a título de tributação dos seus lucros – tem melhor fundamento do que sistemas alternativos que, para eliminar ou atenuar a dupla tributação, enfraquecem o impacto progressivo do imposto pessoal de rendimento. É o caso do tratamento dos dividendos por taxas liberatórias mais baixas do que as taxas marginais máximas do imposto pessoal do rendimento. A progressividade do imposto pessoal fica logo posta em causa."*
(NABAIS 2013)	91[95]	"*…a constituição não exige a tributação em IRS do rendimento das empresas singulares. Uma solução que, para além da constituição a não exigir, pode revelar-se, em algumas das suas concretizações, mesmo inconstitucional. (...) pode conduzir a um tratamento discriminatório do rendimento empresarial dos empresários individuais face ao rendimento dos empresários colectivos ou societários."*
(NABAIS 2013)	91[96]	*"...ao contrário da ideia que prevaleceu, a exigência de unicidade da tributação do rendimento pessoal, constante do nº1 do art 104º da Constituição, não implica a tributação em sede de IRS das empresas individuais.* *A nosso ver, não tem razão a ideia segundo o qual (SIC) se entendeu, no seguimento da posição adptada pelo Prof. Teixeira Ribeiro, que a exclusão da tributação em IRS do rendimento empresarial das empresas singulares seria inconstitucional por violação da unicidade da tributação*

[94] Second quotation of page 71
[95] First quotation of page 85
[96] Second quotation of page 85

		das pessoas singulares que esse preceito imporia. Daí a inclusão da tributação do rendimento dos empresários individuais no IRS. Pois bem, vários argumentos são invocáveis a favor da não exigência constitucional da tributação das empresas individuais ou singulares em IRS."
(NABAIS 2013)	92	*"Em suma, o art. 104º da Constituição prescreve que o imposto sobre o rendimento pessoal seja único, progressivo e não discriminatório negativamente da família. Não exige, por conseguinte, qualquer imposto com tais características sobre o rendimento empresarial. Pois a contraposição do nº1 com o nº2 desse preceito é entre "o imposto sobre o rendimento pessoal" e "a tributação das empresas" e não entre "o imposto sobre o rendimento das pessoas singulares e "o imposto sobre o rendimento das pessoas colectivas."*
(BASTO 2007)	93	*"A dupla tributação é, em todo o caso, penalizadora da escolha de uma organização societária, quando o que se pede a um sistema fiscal é que seja neutro perante as opções organizativas."*
(BASTO 2007)	95	*"Trata-se pois dos chamados lucros distribuídos (dividendos, nas sociedades anónimas) pelas sociedades ou outras entidades sujeitas a IRC, rendimentos, portanto que foram tributados por este imposto (...)* *Antes de distribuídos aos sócios, os lucros das sociedades foram sujeitos à incidência do imposto sobre o rendimento das pessoas colectivas, no nosso caso, o IRC. Uma vez distribuídos a sócios que sejam pessoas singulares vão ficar sujeitos à incidência do IRS. Fala-se então de dupla tributação económica dos lucros distribuídos"*