Judgement of the Supreme Administrative Court

Case: 0120/12.9BEBJA 01224/16
Date of judgement: 10/02/2024
Court: 2 SECTION
Rapporteur: Mr ROTHES
Descriptors: TRANSFER PRICES, SPECIAL RELATIONSHIPS, BACKGROUND, RATE OF JUSTICE

Summary: I - The court cannot assess the validity of the contested assessment in the light of grounds other than those contained in the contextual reasoning integral to the act itself, and is prevented from assessing reasons of fact and law that are not contained in that reasoning.
II - The relevant moment for the purposes of verifying special relationships as a requirement for the application of the transfer pricing regime is when the deal is concluded.
III - Payment of the remainder of the court fee should be waived, under the terms of Article 6(7) of the CPR, if the amount to be paid in this regard, given the value of the case, could constitute a violation of the constitutional principles of access to the law and effective judicial protection, proportionality and necessity.

Conventional No: JSTA000P32692
Document No: SA2202410020120/12
Appellant: A..., S.A.
Defendant 1: AT - TAX AND CUSTOMS AUTHORITY
Vote: UNANIMOUS

Addition:

Full text

Judicial appeal against the judgement of the South Central Administrative Court in case no. 120/12.9BEBJA

1. REPORT

1.1 The company identified above has appealed to this Supreme Administrative Court, under the provisions of article 285(1) of the Code of Procedure and Tax Procedure (CPPT), against the judgement of 24 March 2022, by which the Central Administrative Court of the South dismissed the appeal against the judgement handed down by the Administrative and Tax Court of Beja (Available at https://www.dgsi.pt/jtca.nsf/-/50cfd47d020052058025881000041c137.), insofar as it dismissed the legal challenge brought against the additional assessment of Corporate Income Tax (IRC) made against it for 2008 on the grounds of the correction of the capital losses declared on the sale of a wash plant (See definition in point V) of the proven facts).

1.2 The Appellant presented arguments, with the following conclusions:

‘A. This appeal is brought against a judgement of the Southern Court of Appeal which dismissed the appeal brought by A..., the Appellant, on the grounds that the sale of the ... mine's washing plant by the Appellant to the B... Company for the sum of €1 did not comply with the transfer pricing regime (article 58 of the CIRC in force at the time). The Appellant firmly believes that this interpretation and application of the law is manifestly incorrect, because in the specific case the purchase and sale of the wash plant took place between completely independent entities and because the result of this (i.e. the legal, economic and fiscal effects) were reflected in non-binding entities and groups (section I).

B. In this specific case, the intervention of this Venerable Supreme Court is called for because the situation is even more unusual, given that the court under appeal decided to apply the transfer pricing rules despite proving that there was no special relationship between the seller and buyer of the wash plant on the date of the purchase and sale (31/12/2008) - (section I).

C. Basically, the court a quo bases its decision on the fact that such relationships existed when the terms of the sale were negotiated - even though they were part of a deal between the Appellant and the C... Group, on the one hand, and D... SGPS and the E... Group, on the other hand - and to believe that this fact is sufficient to allow the application of transfer pricing rules and, in particular, to require a review of the operation in the light of those same rules, which, as we shall see, is manifestly wrong (section I).

D. Furthermore, the Court under appeal also wrongly held that a comparable market price for the purchase and sale price of the wash plant between A... and B... on 31/12/2008 was the value of 'a valuation' used in a transaction between the same entities when they were related entities, which also appears to be manifestly wrong (section I).

E. And so, also disregarding the overall deal - which included this transaction - between the Appellant and Grupo C..., on the one hand, and Grupo E... and its subsidiaries, on the other (a deal which had already required recourse to the tax courts and, in particular, the consideration and decision of this Supreme Court - cf. STA Judgement 6.11.2019, Case 427/141.1BEBJA, which was dealt with by the STA under No. 2618/17-30), the Court of Appeal manifestly misapplied the law on such a relevant matter - transfer pricing (section I).

On the admissibility of the appeal:

F. As mentioned in section II of the pleadings, under the terms of article 285 of the CPPT, a review to the Supreme Administrative Court of decisions handed down at second instance by the Southern Court of Appeal must be admitted in two situations: (i) when it concerns the assessment of an issue which, due to its legal or social relevance, is of fundamental importance; or (ii) when the admission of the appeal is clearly necessary for a better application of the law (section II.1).

G. In the case at hand, both of these situations apply.

H. On the one hand, and as demonstrated in section II.1.1 of the pleadings, it must be considered that an issue of fundamental importance is at stake, due to its legal relevance.

I. Firstly, because what is at stake in these proceedings is the application of a system (transfer pricing) which is of the utmost importance in national and international tax law and which is, by its very nature, complex, since it involves assessing the fulfilment of various requirements and the application of legal rules and economic concepts embodied in national law but anchored in international guidelines from the United Nations, the OECD and the European Union, as illustrated in the examples presented, as well as in international doctrine and statistics (see section II.1.1).

J. Indeed, as the United Nations points out in its Practical Manual of Transfer Pricing Rules for Developing Countries: 'a significant part of international trade consists of the transfer of goods and services, capital (including money) and intangibles (such as intellectual property) between multinational enterprises; these transfers are called "intra-group transfers". Data shows that intra-group transactions have been growing consistently since the mid-20th century' (see section II.1.1. above), which has necessitated the development of increasingly comprehensive and complex transfer pricing regimes around the world.

K. This has also led to numerous disputes between taxpayers and tax administrations over the assumptions and effects of these regimes in various jurisdictions, including Portugal (as the OECD statistics presented in section II.1.1 above show).

L. Secondly, because, in this case, the legal and practical relevance of re-examining the contested decision, which upheld the AT's unusual and manifestly illegal correction in terms of transfer pricing, based on the assessment of various international contracts and operations involving very specific assets under concession - in particular, the sale of an 'industrial wash plant' - is crucial because the court bases its decision and application of the law on the existence of special relationships that do not exist, and on a comparable market that does not (section II.1.1. above).

M. Special relationships which the court recognises did not exist on the date of the contract, but suffices itself with the allegation that they existed on the date the contract was negotiated (section II.1.1. above) ...

N. The assessment of this issue alone is of the utmost importance in the context of transfer pricing, not only for the realisation of justice in the case, but also to avoid future serious inaccuracies in the application of this regime. An issue which, as far as the Appellant is aware, has never been dealt with by national case law (see section II.1.1).

O. What is at issue in this specific case is the assessment of two of the essential prerequisites for the application of the transfer pricing regime: (a) the (in)existence of special relationships; and (b) the appropriate use of methods for determining the 'market price' and, in particular, the comparative market price method (see section II.1.1).

P. These assumptions are particularly complex in the factological framework and in the business world, and are therefore often the source of doctrinal and jurisprudential doubts and discussions, and will certainly constitute a relevant precedent for future cases (see section II.1.1).

Q. On the other hand, and as argued in section II.1.2 of the pleadings, it should also be considered that the case in question and the issues discussed in it are of fundamental importance, due to their social relevance, since, in addition to the repercussions they will have on other cases (which will mean that the decision on it will undoubtedly constitute 'a guideline for the assessment of other cases' and future proceedings, including as a guideline for the AT in order to prevent and avoid them), the business in question had a lot of social repercussions.

R. In fact, as these are concession activities of public interest, with a considerable impact on the national economy, they were subject to various government authorisations, were negotiated and carried out under its aegis, and the activity of the ... mine obtained various supports and incentives from the State. mine has obtained various state support and incentives, which as a whole has even led to the government's actions being scrutinised in Parliament, as shown by the resolutions and statements referred to in section II.1.2 of the allegations. In addition, due to the social impact that these activities had, they were reported and discussed publicly and politically on several occasions, as shown by the news items referred to in section II.1.2 above.

S. Finally, and as argued in section II.2 of the pleadings, in this case it must also be understood that the admission of the review is necessary for a better application of the law, since the decision of the Court suffers from a serious error, presupposing an ostensibly incorrect and unjustified interpretation and application of the transfer pricing regime, which gives rise to a legally unacceptable result, for two reasons.

T. Firstly, for considering that the regime applies to an operation carried out between independent entities, which clearly and clamourously violates the transfer pricing regime, as detailed in section II.2. of the pleadings and also in section III.3.2. on the merits of this appeal.

U. Next, because it considers it legitimate to use as a comparable market price the value of a valuation used as a reference in a tied transaction, which constitutes a blatant error in the application of the transfer pricing regime, since a comparable market price is, by definition, a transaction carried out on the market, between non-tied entities, as further demonstrated in section II.2. and also in section III.3.3. relating to the merits of this appeal).

V. In short, the contested decision fails to determine in which situation there are special relationships and the decisive moment for assessing this; and it fails again, assuming the existence of such relationships, in determining the method to be used and its application to determine the market price (in this case, the MCP) and in its practical application (see section II.2).

W. Therefore, and given the importance of the issues and at the same time the obvious need to apply the law correctly, the intervention of this Supreme Court is essential, and this appeal should be admitted, in accordance with the provisions of Article 285(1) of the CPPT.

The relevant factology and the judgement under appeal

X. The facts considered proven by the contested decision and the grounds invoked by the same decision (sections III.1 and III.2) are reproduced, and we will simply give a brief extract below:

Facts (...):

- QQ) On 23/12/2008, S... and I... - SPGS, SA entered into a credit assignment agreement whereby the former assigned to the latter, for €2, the credits it held over ... (see document no. 20 attached to the initial application);

- RR) On the same date, Z..., LTD. and I... -S.A. entered into a share purchase agreement, whereby the former sold 99.8336% of the share capital of ... to the latter for the total amount of €1. for a total of €1. The condition of this contract was the acquisition of the ... wash plant by P... by P...for €1 (see document no. 18 attached to the initial petition);

- SS) The sale of the industrial wash plant in ... by S... to ... took place on 31/12/2008 (see witness statements ..., ... and ...);

Grounds for the decision (...):

- ‘although the sale of the industrial wash plant to B... formally took place on 31/12/2008, a date on which the parties to the deal were no longer in a situation of special relations (terminated with the sale on 23/12/2008 of B... to D... SGPS, a company in the E... Group), the fact is that the conditions and terms of the deal had already been agreed prior to the formalisation of the operation’ (see page 54).

- ‘In selecting the Comparable Market Price method and in choosing the comparable operation, given the understandable difficulty in identifying comparable non-binding operations, given the very specific object of the sale (industrial washing plant for the treatment of zinc ores), the AT ended up using the book value of the industrial equipment, valued the previous year by an independent entity at 16,931,947.09 euros, a value recognised by A... and B..., which had a buy-back option on the equipment’ (see page 56).

On the merits of the appeal:

Y. Moving on to an assessment of the substance of the contested decision, which is the subject of the review, and which the Appellant has already set out above, it is important to begin by emphasising that, under the terms of the law and the repeated case law of this Supreme Court, the following are conditions for the application of the transfer pricing regime (set out in article 58 of the IRC Code, now article 63):

‘(i) the existence of special relations between the taxpayer and another person;
(ii) that different conditions have been established between them from those normally agreed between independent persons;
(iii) that such special relations are the proper cause of the said conditions;
(iv) that those conditions led to a different profit being calculated than would have been the case in their absence’ (cf. judgement of the Supreme Administrative Court, in case no. 0766/11.2BEAVR, of 12/05/2021) - section III.3.1.

Z. As mentioned in section III.3.2 of these pleadings, the Appellant, from the outset, claimed that, as far as the sale of wash plant was concerned, there were no special relationships between the parties that would legitimise recourse to article 58 of the IRC Code.

AA. Firstly, because, as is clear from the evidence produced in the case file, and in particular from paragraphs QQ), RR) and SS) of the ‘factual grounds’ of the judgement under appeal, cited in section III.1, at the time of the sale of wash plant, the shares in B... had already been sold and, therefore, this company was no longer part of the C... Group, to which the Appellant belongs;

BB. The wording of Article 58(1) is clear in referring to transactions ‘carried out’ and, consequently, to the date on which transactions are concluded and produce their legal and economic effects (and not when they are negotiated) between bound entities (section III.3.1).

CC. On the other hand, if we take into account the ratio underlying the entire transfer pricing regime, it is easy to conclude that it only makes sense to apply it if, at the time the transaction takes place, there are special relationships (section III.3.1).

DD. In fact, if the parties are not related at the time the transaction takes place and its legal, economic and tax effects are produced in the sphere of the parties involved, there can be no intra-group transfer of profits or losses that could justify the application of the transfer pricing regime (section III.3.1).

EE. In fact, and in line with the positions that this Supreme Court has adopted and referred to in section III.3 .1 of these pleadings, the transfer pricing regime, in addition to being intended to protect competition and parity between bound and unbound entities (which in this case is not in question), is essentially intended to prevent entities within a group, while maintaining control over transferred assets, from transferring those same assets between themselves at prices different from those practised on the free market and, if necessary, reversibly, in order to divert profits or create losses subject to a more advantageous tax regime.

FF. Now, if at the time wash plant was ‘transferred’ to B... this transfer was not intra-group, then no profit or loss could have been transferred from one company to another with the aim of obtaining any tax saving within the group. On the contrary, the Appellant effectively and definitively sold the Laundrette out of its group, completely losing control of that asset, at the price it obtained on the market, and merely calculating the corresponding loss (section III.3.2.).

GG. The fact that the sale of the shares in B..., which took place previously, to an independent group, was conditional on the sale of wash plant to that same group (through the company sold), does not alter this conclusion, since since both transactions took place together, it is clear that their effects did not occur intra-group, but in the sphere of two entities integrated into two different economic groups, the Appellant and Group C... on the one hand, and B..., D... and Group E... on the other (section III.3 .2.).;

HH. The loss made by A... on the sale of the Laundrette and included, for IRC purposes, in the company's taxable profit on 31 December 2008, remained in the sphere of the Appellant and the C... Group (as well as the losses made on the sale of the Laundrette). (as well as the losses from the sale of the B... loans, as decided by this Supreme Court - see STA judgement 6.11.2019, Proc. 427/141.1BEBJA, which was dealt with by the STA under no. 2618/17-30), while the B... shares, as well as its assets, including the right to the concession, the loans on it, and wash plant, all acquired for €1, remained in the sphere of Grupo E... (section III.3.2.).

II. And finally, even in a scenario in which one wanted to prioritise substance over form and value the moment of negotiation, to the detriment of the moment in which the sale operation took place - which is not conceded - one would always reach the same conclusion with this exercise, not ignoring the fact that the negotiation took place precisely between the Appellant and Grupo C..., on the one hand, and the purchaser (Grupo E...) and the State, as demonstrated in the course of the testimonies of those who were involved in the negotiations (see section III.3.2.).

JJ. In fact, even if this is the relevant moment, then it has to be taken into account that the negotiation of the sale of the wash plant was part of a larger deal - the sale of the concession and the entire mining complex of the ... mine. - which was undoubtedly negotiated and agreed between unrelated entities, as proven in the case file, A... and the other entities of the C... Group involved on the selling side, on the one hand, and B..., D... and the E... Group, on the other, on the buying side, with this deal, as a whole, and the sale of wash plant, specifically, having also been authorised by the Portuguese state (section III.3.2.).

KK. And this fact illustrates with crystal clarity and transparency that, even if at the time of the negotiations there were still special relations between A... and B..., it was obviously not these relations that determined the conditions for buying and selling the wash plant, but rather the fact that Grupo E... was only available to take over the mine and the wash plant for the price of €1 each (section III.3.2.).

LL. For this purpose, the existence of an option for B... to buy back the wash plant is irrelevant, since this option (and not obligation) was agreed, on the one hand, at a time when the parties were bound, and, on the other hand, and above all, at a different economic moment and with a different business strategy, so this circumstance cannot have the virtue of demonstrating or even indicating that the final price agreed, having been different, was determined by special relationships (section III.3.2.).

MM. In conclusion, it must be said in this regard that such a conclusion, apart from not being possible due to what has been said above, cannot be accepted either, as it actually presupposes a judgement that has already been made, as it should have been, with regard to article 23 of the IRC Code and which was the primary basis for the contested assessment. In fact, it was on the basis of this precept that AT claimed that the price of €1 was only possible because, since group relations were involved, it was they and not its own interests that determined this price. But since it was concluded in the various courts that have already considered the issue that this was not the case, the same analysis cannot now be repeated on the basis of article 58 of the IRC Code, which has different assumptions and grounds (section III.3.2.).

NN. It must therefore be concluded, with regard to the sale of the Laundrette, that there were no special relationships between A... and B... (see section III.3.2.), since:

a) at the time of the sale of wash plant, B... did not belong to A...'s group and therefore no special relationship existed at that time (31/12/2008);

b) even if the time of negotiation were taken into account - which it is not - the price charged was negotiated and charged in the context of a larger deal, between two unrelated groups (the C... Group, Canadian, and the E... Group, Portuguese) and was not influenced by any special relationships that would allow the Appellant or the C... Group to obtain any gain, either directly or indirectly.

c) the legal effects of the purchase of the wash plant took place in the sphere of B..., controlled by the E... Group, while the legal effects of the sale took place in the sphere of the Appellant, part of the C... Group;

d) the economic and financial effects of the purchase took place in the sphere of B..., controlled by Group E..., while the economic and financial effects of the sale took place in the sphere of the Appellant, part of Group C...;

e) Thus, A... and indirectly Group C... made a loss and should be taxed accordingly;

f) B... and indirectly Group E... acquired the wash plant for €1; if they sell it for more in the future they will have a gain and should be taxed accordingly.

OO. Therefore, and given that (a) the existence of special relationships is an essential prerequisite for the application of the transfer pricing regime and that (b) this is not the case here, it must be concluded that the correction made by the AT on the basis of that regime and consequently the contested assessment (section III.3.2.) is unlawful.

PP. This Venerable Court should therefore revoke the decision under appeal and replace it with another decision to uphold the request made by the appellant in this case regarding the correction relating to the sale of the wash plant, with the necessary revocation of the 1st instance judgement then under appeal and consequent reversal. With the necessary revocation of the 1st instance judgement then under appeal and consequent annulment of the 2008 CIT assessment and compensatory interest, contested insofar as it included the aforementioned correction, on the grounds that, under the terms of article 58 of the CIT Code (in the version in force at the time of the facts), the assumption of special relations between the parties was not met, nor was there any - even the slightest - transfer of profits between companies in the C.... Group.

WITHOUT GRANTING,

QQ. Even in the (unusual) case of considering that special relations existed between the Appellant and B... for the purposes of the sale of the Laundrette, which is not granted, the Appellant believes that the Court under appeal also made a wrong decision because, on the one hand, no ‘gain’ or transfer of profits from the Appellant to another company in the group or an inaccuracy in the price charged was demonstrated and, on the other hand, it did not recognise the erroneous and illegal application of the ‘market comparable’ on which the AT relied to maintain that the price charged in that sale did not correspond to that normally charged on the free market, as argued in section III.3. .3. of the pleadings.

RR. In fact, to support its conclusion that the price of the wash plant was not a market price, the AT used the ‘market purchasable price’ method, relying on two elements: (i) the sale of the wash plant a few years earlier by B? to the Appellant a few years earlier, with the establishment of a buy-back option by the latter; and (ii) the fact that, for the purposes of this option, the parties had accepted the result of an independent ‘valuation’ carried out in 2007, which set the value of wash plant at around 17 million euros, understood by the AT as a ‘comparable market price’ (section III.3 .3.);

SS. The TCA Sul fully supported the AT's opinion, in clear violation of the provisions of article 58 of the IRC Code (section III.3.3.).

TT. Firstly because, whatever the method of determining transfer prices in accordance with the arm's length principle, but especially in the case of the market comparable method, the comparison required by article 58 of the IRC Code to determine whether or not a given price is in line with the market must obviously be established between: (i) a tied transaction; and (ii) a non-tied transaction (section III.3.3.).

UU. This is what emerges from Article 58(1) of the IRC Code when it states that in tied transactions ‘terms or conditions must be contracted, accepted and practised which are substantially identical to those which would normally be contracted, accepted and practised between independent entities in comparable transactions’ and is repeated in paragraph 2 of the same article, which states that: ‘the taxable person must adopt, in determining the terms and conditions that would normally be agreed, accepted or practised between independent entities (...)’ (emphasis added) - (section III.3.3.).

VV. We come to the same conclusion if we recover the concept of comparable method from the OECD Report, and from Ministerial Order no. 1446-C/2001, of 21 December, which stipulates that the comparison must be made between a tied transaction and a market transaction, made by one of the parties to the tied transaction or by two (non-tied) parties other than those involved in the tied transaction (see article 6 of Ministerial Order no. 1446-C/2001, of 21 December) - (section III.3.3.).

WW. In fact, it couldn't be any other way, because if what you want to determine is the market price, there's

no point in comparing an alleged transfer price with another transfer price - (section III.3.3.).

XX. Now, it is clear that both the sale and purchase operation carried out in 2005, which resulted in a buy-back option, and the amendment made in 2007, which incorporated the revaluation of wash plant, are operations that are linked, since they were concluded at a time when B... and A... were part of the same group and were undoubtedly based on this relationship, since they were intended to take advantage of synergies and put wash plant at the service of both entities (section III.3.3.).

YY. And it goes without saying that the 'comparable' in question here is not the price of the tied operation in 2005 or 2007, but the valuation made by an independent expert in 2007 (section III.3.3.).

ZZ. In fact, a valuation is not a price (although it can serve, for example, in the context of a negotiation or a financing, as a point of reference) - (section III.3.3.).

AAA. On the other hand, and according to the grounds of the contested liquidation, this valuation only became comparable because, in the AT's words, 'the value of 16,931,947.09 Euros was accepted and recognised by both parties (... e. ...), within the scope of the "Amendment to the Equipment Use Contract"', i.e. the value of this valuation was integrated and treated as a price, in a contract entered into by the parties (emphasis added) - (section III.3.3.).

BBB. Which leads us to the same conclusion as above: since this contract is concluded and executed between bound entities, its price, based on the valuation, is not a market comparable (section III.3.3.).

CCC. Furthermore, even if it were admitted, which it is not and only out of a mere duty of patronage, that this price could, in theory, act as a market benchmark, it could never, in this specific case, act as a market comparable to the price charged for the sale of the wash plant in 2008 (section III.3.3.).

DDD. In fact, and even though the object of the two operations is the same, the differences in the economic context and strategy of the companies involved, which are comparability factors enshrined in Ministerial Order no. 1446-C/2001, of 21 December (in line with the OECD Recommendations) show that such a comparison is manifestly inappropriate (section III.3.3.).

EEA. In fact, this figure was set in a different group context and at a different economic moment. It was based on the assumption that zinc mining would be profitable to the extent that B... to recover the wash plant it had sold to A..., with the equipment remaining within the group and at the disposal of both entities. In contrast, the sale made in 2008, which is now being syndicated, took place in a loss-making context, in which B...'s concession (for which the wash plant was used) was in jeopardy. concession (for which the wash plant was dedicated) was making brutal losses and the only available buyer would only accept to take on the costs arising from it, but no longer pay a price of more than €1 for it (all facts proven in the case file), and in which the Appellant did not want to maintain its commitments to the wash plant, as has been duly proven (section III.3.3.).

FFF. And since there is no comparison between the transaction under scrutiny and the transactions that the Tax Authorities submitted to the case file, it must be concluded that one of the essential conditions for the application of the provisions of article 58 of the IRC Code has not been demonstrated (section III.3.3.).

GGG. Furthermore, the conclusion that the price of 17 million euros is not a market price is based on another more important and substantive conclusion: that there is no market comparable for the sale of wash plant (apart from the sale itself) - (section III.3.3.).

HHH. In fact, the specificities of the transaction make its uniqueness evident and demonstrate that the price charged was not only a market price, but was the only market price (section III.3.3.).

III. The absence of a market comparable cannot, as is clear, be judged against the Appellant, as the TCA Sul seems to claim, when it states that 'if the Appellant believes that the Tax Administration did not apply the appropriate method, nor did it make the best choice of the non-binding comparable operation, the results obtained not being reliable, the truth is that it has failed to demonstrate, as was its burden (art. 74/1 of the LGT), error or manifest over-quantification' (section III.3.3.). .3.).

JJJ. In fact, not only is it up to the AT, under the terms of that provision of the LGT, to prove the market comparable and give reasons why the price charged by the parties is not the same as the market price, but the court cannot prove the various specifics of the transaction and then fail to draw the logical conclusion that,

if there is no comparable, it is not possible for the Appellant to prove a price other than the one charged (section III.3.3.).

KKK. In these terms, and once it has been shown that: (i) the figure of 17 million euros did not constitute a legitimate comparable market price; plus the fact that (ii) such a comparable does not actually exist; (iii) the AT did not even want to use any of the other legal methods provided for in the transfer pricing regime, despite the lack of a comparable market price; the contested decision becomes absolutely incorrect, since the correction proposed by the AT is totally unjustifiable and illegal, and the court has misapplied the law (see section III.3. .3.).

LLL. This Supreme Court should therefore revoke the decision under appeal and replace it with another decision to uphold the request made by the appellant in the present case regarding the correction relating to the sale of the wash plant, with the necessary revocation of the 1st instance judgement then under appeal and consequent reversal. The 1st instance judgement appealed against and the consequent annulment of the 2008 CIT assessment and compensatory interest contested in the part in which it included the aforementioned correction, on the grounds that, under the terms of article 58 of the CIT Code (in the wording in force at the time of the facts), the assumption that a price different from that which would normally be charged between independent entities was not met.

MMM. It is further requested that the remainder be waived in the present instance (and in the second instance, should this court deem the present appeal to be the proper place for such an assessment), given the conduct of the parties and taking into account that considering that the setting of the amount of the court fee must respect the principle of proportionality and cannot hinder access to the courts and, thus, to justice (for further developments, see section IV).

VI. ORDER

In these terms, and in accordance with the rest of the law, which you will duly fulfil, this appeal for review should be admitted, as the necessary conditions for this purpose have been met and, in the end, it should be granted, with the legal consequences, namely by revoking the decision of the TCA Sul in the part relating to the correction of the capital loss calculated from the sale of the wash plant and replacing it with another that revokes the 1st instance judgement and annuls the liquidation. It is also requested that the AT be ordered to return the tax and interest unlawfully assessed, plus any compensatory and late payment interest that may be due.
It is further requested that, in view of the conduct of the parties, the parties be exempted from paying the court fee due at the end, under the terms of Article 6(7) of the CPR in the event of a review appeal (and an appeal to the TCA if applicable)'.

1.3 The Defendant did not file a counter-appeal.

1.4 By judgment of 7 December 2022 of the Tax Litigation Section of the Supreme Administrative Court, handed down by the formation referred to in Article 285(5) of the CPPT, the review was admitted (Judgment available at https://www.dgsi.pt/jsta.nsf/-/f9219e55829b875680258913005186b0.). This, after stating the issues that the Appellant wishes to see re-examined by this Supreme Court as being '[w]hether the legal regime of transfer pricing can be applied to a business deal concluded between two companies, where there is a special relationship between them when the contract is negotiated, and '[w]hether it complies with the same legal regime to use as a comparable market price the value of a valuation used as a reference in a tied transaction, since a market comparable is, by definition, a transaction carried out on the market, between non-tied entities', with the reasoning of which we would like to highlight the following segment: '[...]

The issues identified above, and which the appellant wishes to have reviewed by this Supreme Court, are wide-ranging issues within a legal regime that gives rise to great conflict between the Tax Administration and taxpayers, and therefore require this Supreme Court to make a judgement in order to establish the best interpretation of the Law.
It is therefore necessary for this Supreme Court to clarify precisely the specific legal regime applicable to the case in question, in order to determine when the special relationships between companies that are part of a business should occur and what the benchmark should be for the purposes of 'comparable price', given the specific facts of the situation under review.
The appeal is therefore legally entitled to be admitted.'

1.5 The Deputy Attorney General of the Supreme Administrative Court has issued an opinion to the effect that the appeal should be granted and the judgement should be overturned in the contested section, i.e. the part in

which it 'assessed and decided to maintain the correction made by the AT to the value of the tax loss calculated and recorded by the Appellant on the sale of the ... industrial wash plant ('wash plant')'. This, after emphasising the relevant facts, with the following reasoning:

'As is clear from the RIT, the AT questions the price at which the wash plant was sold by the Appellant to the company B..., S.A. on 2008-12-31, taking the view that a price was contracted and practised that was not substantially identical to that which would normally be contracted, accepted and practised between independent entities in comparable transactions.
Article 58(1) of the CIRC (applicable at the time of the facts) states:
'In commercial transactions, including, in particular, transactions or series of transactions concerning goods, rights or services, as well as financial transactions, carried out between a taxable person and any other entity, whether or not subject to IRC, with which it is in a situation of special relations, terms or conditions must be contracted, accepted and practised that are substantially identical to those that would normally be contracted, accepted and practised between independent entities in comparable transactions.'
What emerges from analysing the facts set out above in the ruling is that the impugnant decided to sell the wash plant at a price of €1 by resolution of its Board of Directors, a sale and price that F..., LTD (the group to which the Impugnant and B... belonged) agreed/accepted in the contract it signed with the company D... SGPS, SA (an independent entity) on .../.../2008 - under the terms of which the sale by the former to the latter of 99.836% of the shares it held in the share capital of B... for a total of €1, is subject to the condition that B... acquires the ... wash plant... for the price of €1 - see RR) of the evidence.
From the outset, it can be seen, unless there is a better judgement, that these combined facts, although they fall within the series of transactions referred to in Article 58(1) of the CIRC, are insufficient to meet the requirements of that legal provision ('terms or conditions must be contracted, accepted and practised...').
However, those facts combined with the commercial operation carried out on 31/12/2008 and included in SS) of the evidence, in which A... sold the wash plant to B... for the price of €1, already comply with and complete the sequence of operations referred to in no. 1 of the aforementioned legal precept, since it is in this last operation that the conditions contracted and accepted in relation to the acquisition by B... for the aforementioned price are practised.
However, it is important to assess whether the Impugnant and B..., when they entered into the contract on 31-12-2008, were no longer in a special relationship due to the latter's sale on 23/12/2008 to D... SGPS (a company belonging to the E... Group), as the judgement under appeal held and as the appellant also holds.
It should be noted that neither the judgement under appeal nor the appellant call into question the fact that A... and B... were in a special relationship at the time of the contract signed on .../.../2008 between F..., LTD (the group to which they belonged) and D... SGPS.
In order to assess the issue in question, we must look at the content of the contract signed on .../.../2008 between F..., LTD (the group to which they belonged) and D... SGPS .
This was proved in OO) of the evidence:
'RR) On that same date, F..., LTD. and D... SPGS, S.A. entered into a share purchase agreement, whereby the former sold 99.8336% of B...'s share capital to the latter for the total sum of €1. The condition for entering into this agreement was the acquisition of the ... wash plant by B... by B... for €1 (see document no. 18 attached to the initial application);'.
It can thus be seen that in the contract signed on .../.../2008 between F..., LTD and D... SGPS, the parties established a conditional clause for the purchase and sale of the shares in B... which consisted of B... acquiring the wash plant from its owner, and this clause required another commercial operation to be carried out between B... and the owner of the wash plant, companies which were not directly involved in that contract, so at the time of the contract signed on .../.../2008 D.... SGPS had not yet acquired the right of ownership of the shares it was seeking, since the legal effectiveness of the legal transaction only came about with the acquisition of the wash plant by B.....
It was only with the sale of the washing plant by the Impugnant, owner of the equipment, to B... on 31-12-2008 that the deal, the terms and conditions of which had previously been contracted and accepted, was carried out, and on that date the sale price of €1 was paid.
On the date the aforementioned contract was signed, the same special relationship existed between B... and A... as existed on the date of the contract signed on .../.../2008 because, by virtue of the conditional clause in the latter contract, the sale of the shares was subject to the fulfilment of a condition, i.e. the signing of a contract for the purchase and sale of the wash plant between its owner and B.....
The legal effects of the contract concluded on .../.../2008 were only produced when the contract was concluded on 31-12-2008, i.e. only after the purchase of the wash plant was concluded, and these are considered to have been produced from the conclusion of the contract.
For the reasons set out above, even if they do not entirely coincide with the reasons set out in the judgement under appeal, one would always have to conclude that there was a special relationship between A... and B..., as the judgement in question held.
Once the condition of the existence of a special relationship between the parties involved - A... and B... - has

been met, it will be necessary to ascertain whether the transaction involved a special relationship between A... and B... - it will be necessary to ascertain whether an arm's length price was practised in the operation to sell the wash plant, and whether terms or conditions were contracted, accepted and practised that were substantially identical to those that would normally be contracted, accepted and practised between independent entities in comparable operations, as provided for in paragraph 1 of the aforementioned article 58 of the CIRC.
In this respect, it seems to us, except in the best judgement, that the appellant is right.
As stated in the judgement under appeal and as the Supreme Administrative Court has repeatedly stated, 'The burden of proving the existence of these special relationships, as well as the terms under which operations of the same nature normally take place between independent persons and in identical circumstances, is on the AT, and the act must be annulled if such proof is not provided, which means that the correction referred to in Art. 58 of the CIRC cannot be cancelled. This means that the correction referred to in art. 58 of the CIRC cannot therefore be based on indications or presumptions, and the AT must prove the aforementioned legal requirements in order to correct the taxpayer's taxable amount under this regime' (see, in particular, the esteemed judgement of the STA handed down on 10-11-2021 in case 01209/11.7BELR).
In the case in question, the AT used a valuation of the wash plant carried out in 2007 on the following grounds:
'... Now, as already mentioned, A... acquired the Industrial wash plant equipment in 2004 for 36,112,950.00 Euros (VAT excluded), and subsequently, in 2007, it was valued by an independent entity at 16,931,947.09 Euros, to the extent of the incorporation of value in the equipment, by B..., through the replacement of obsolete components.
The value of 16,931,947.09 euros was accepted and recognised by both parties (A... and B...), within the scope of the 'Amendment to the Equipment Use Contract', signed on ../../2007, which did not alter the aforementioned buy-back clause (Clause 3 of the 'Equipment Use Contract'). Therefore, the value of the option to repurchase the industrial wash plant equipment corresponds to the aforementioned value of its valuation, in the absence of its supervening devaluation...'
However, the nature of an asset valuation operation, even if it concerns the same equipment whose sale price is being questioned, is not comparable to a purchase and sale contract between independent entities, carried out much later, even if it concerns identical equipment.
On the other hand, the AT appealed to the terms and conditions arising from operations carried out in 2004 - under which A... acquired the aforementioned equipment from B... and the terms of the buy-back were agreed - and in 2007 - the 'Amendment to the Equipment Utilisation Contract', signed on .../.../2007, between them, which did not alter the aforementioned buy-back clause (Clause 3 of the 'Equipment Utilisation Contract').
However, in the commercial operation carried out on 19-10-2007 - which resulted in the valuation being recognised as the price of the option to buy back the washing plant - A... and B... were already in a special relationship, as can be seen from the combination of the valuation value and the price of the option to buy back the washing plant. there were already special relationships between A... and B..., as can be seen from the combination of Q) and S) of the evidence, so it cannot be considered an operation carried out under the same conditions as those that would occur between independent entities.
It therefore seems to us, except in the best judgement, that the contested decision cannot be upheld as regards the segment in which it concluded 'Thus, the correction to the taxable profit of 16,931,946.26 euros - which represents the difference between the value of the comparable operation based on the valuation of the industrial equipment specifically for the purposes of repurchase by B... (16,931,947.09 euros) and the price charged of 0.83 euros - is not unlawful, nor does the judgement that validated it suffer from the aforementioned error of judgement, in fact and in law, which should be confirmed in this appeal.' '.

1.6 It is necessary to assess and decide the issues, as defined by the judgement handed down by the formation referred to in article 285(5) of the CPPT (cf. 1.4), and which will be set out below in point 2.2.1.

* * *

2. BACKGROUND
2.1 FACT
The judgement under appeal found the following facts to be proven:

'A) A... is engaged in mining and holds CAE 7290 (see document no. 7 attached to the initial application and the tax inspection report attached as document no. 4 to the initial application);

B) In terms of Corporate Income Tax (IRC), the Impugnant is covered by the general regime and in terms of Value Added Tax (VAT) it is covered by the normal monthly regime (see tax inspection report attached as document no. 4 to the initial application);

C) In compliance with Service Order no. ...03, of 08/07/2010, the Impugnant was subject to an external tax inspection, partial in scope for the 2008 financial year (tax inspection report attached as document no. 4 to the initial petition);

D) On 14/12/2010, the tax inspection report was drawn up, the conclusions of which are as follows:
'(...)
II - 3.2 Capital structure
In the financial year under review, A... was 100 per cent owned by G... Limited (a Cypriot company), which in turn was 100 per cent owned by C... Corporation (a Canadian company).
(...)
III - Description of the facts and grounds for the purely arithmetical corrections to the tax base
The procedures carried out, with the depth deemed appropriate in the circumstances, resulted in the following corrections:
III - 1 CORRECTIONS TO THE TAX BASE - IRC
III - 1.1 Capital losses on the disposal of tangible fixed assets: 16,970,726.18 Euro
A... deducted 16,631,850.60 euros (included in the amount entered in field 230 of the model 22 tax return) as tax losses on tangible fixed assets for the purposes of determining taxable profit under the terms of article 17 of the IRC Code.
From the initial analysis of the statement of tax gains and losses that is part of the tax documentation process organised and submitted in compliance with article 121(3) of the CIRC, we have the following breakdown of tax losses:

wash plant capital losses
-16.931.946,26

Capital gains and losses on vehicles with V. Aq. > 29.927,87
-67.195,72

Other tax gains and losses
367.291,38

16.631.860,60
(...) (...)
III - 1.1.2 On the sale of equipment at the ... launderette
In determining its taxable profit, A... recognised a tax loss of 16,931,946.26 euros on the sale of a piece of equipment called the .... wash plant.
(...)
Having analysed the information presented, we realise that this equipment was sold to the company B..., S.A. on 2008-12-31 (...) for a total of 0.83 cents plus VAT at the legal rate.
(...)
From the analysis carried out
Framework of the situation identified as a capital loss
The Industrial Washing Plant equipment acquired by A... for its own use within the scope of its mining activity and/or for income through remunerated transfer to another company, in this case B..., fulfils all the requirements to be classified as tangible fixed assets (at the time of acquisition), which is what happened.
The loss calculated results from the difference between the value of the asset and its transfer value, so we are dealing with a capital loss analysed in the light of article 43 of the CIRC.
However, in order for the capital loss to be recognised for tax purposes, it must meet the requirements set out in article 23 of the IRC Code, i.e. proof, indispensability and a link to gains subject to tax, and the absence of one of these requirements jeopardises the tax deductibility of the cost.
As for the burden of proof
(...)
It is therefore A..., SA's burden to demonstrate full compliance with the assumptions required by Article 23(1) of the CIRC, pursuant to Article 74(1) of the LGT.
Thus
Regarding proof
In view of the elements presented, the proof of the cost is not questioned since it corresponds to the difference between the realisation value and the value of the equipment resulting from the valuation carried out in 2007.
Indispensability
Reading the justifications presented in Minutes no. ...3 of A..., relating to the meeting of that corporate body on 2008-12-19, it can be concluded that legal requirements are invoked for the sale of that equipment to take

place. See the terms used in the text transcribed above: 'within the framework of the ongoing negotiations for the sale of the company B... (...), the Board assessed the interest of selling the ... washing plant, given that this equipment, as a mining annex, could not be removed from the mining concession held by B... and that A... did not wish to continue to assume responsibility for this equipment.

In view of these considerations, taking into account these legal constraints and the potential obligations arising from maintaining ownership of equipment assigned to a third-party operation, the Board decided to approve the sale to B..., for the total price of €1'.

Although A... and B... were part of the C... group during the period in which the former was repurchased, they are autonomous legal entities and hold different mining concessions. This autonomy did not prevent the operation by which A... bought that equipment in 2004, and so it has not been shown that the change in the shareholder position in B... implied a legal obligation to sell the equipment.

It should also be noted that under the contract for the transfer of use signed between the two entities, B... held a set of rights over the wash plant's equipment which included priority use of it, which could be exclusive if the volume of production justified it.

Given that the rights allowing the effective allocation of that equipment to the concession held by B... were guaranteed by contract, there are no 'legal constraints' on maintaining an existing situation approved by the Ministry of the Economy as part of the monitoring of concession contracts.

This reinforces the conviction that there are no legal constraints that prove the indispensability of the operation in this way and, as such, the existence of the loss corresponding to the capital loss realised.

On the other hand, even if, as a result of the C... Group's intentions to sell its stake in B..., A... were legally obliged to transfer ownership of that equipment - a fact which, as we have argued above, is neither proven nor verified - the indispensability of this cost would always be linked to the sale price and given the reasons justifying that price.

In this sense, and as will be shown in more detail below, the sales price leads to a cost that is not indispensable because:

> There is an agreement between the parties which provides for the option for B... to repurchase the equipment at the exact sale price. of the equipment at the exact initial sale price to A..., corrected for the book value of the maintenance carried out;

> Both parties, A... and B..., accepted in 2007 that the value of the asset, calculated in those terms, totalled 16,931,946.26 euros;

> A... was entitled to one Euro per tonne of mining that used the equipment - following the amendment to the assignment of use contract.

It can therefore be concluded that the charge that A... made on the sale of the wash plant equipment, a capital loss of 16,931,947.09 euros, has not been proven to be indispensable for the realisation of A...'s income, and therefore does not meet the requirements of Article 23(1) of the CIRC.

Regarding the relationship with the realisation of income

As can be seen from the minutes of A...'s Board of Directors no. ...3, the sale of the wash plant for the price of one Euro is the result of "ongoing negotiations for the sale of the company B...", which will be carried out by C... Corporation /F... Limited to H.../D... SGPS, SA, resulting in the 'exit of B... from the C... Group'.

It should be emphasised that the C... Group's stake in B... was, at the time, held through F... Limited (Cyprus). The contract for the purchase and sale of B... shares confirms that the company F..., Ltd. (based in Cyprus) sells the stake that the C... Group held in B.... Group held in the company B... which at the time was held through F... Limited (Cyprus).

Confirms the contract for the purchase and sale of B... shares that the company F..., Ldt. (based in Cyprus) sells the stake that the C... Group held in the company B.... and in this contract the sale of the equipment owned by A... appears as one of the preconditions for the sale of the shares.

Clause 6.1 f) of the contract states that 'wash plant: equipment currently used by B... in 'wash plant' shall have been acquired for € 1 (one Euro) and paid by B..., before closing', "Closing" being understood as the date of transfer of the shares being negotiated.

The contract also reinforces the evidence that the sale of the wash plant for one Euro is a necessary condition for the sale of the shares that the C... Group held in B... held in the company B... when, in point 6.3.3, the C... Group and D... SGPS expressly define that if the conditions of point 8.1. (except b), d) and n)) are not met by .../.../2009, the agreement terminates and there is no compensation for this fact for either party.

It is therefore clear that if there is a link between the loss calculated from this operation and the realisation of profits, these are not located in A... but in the Cypriot company of the Group that at the time held the shares in B..., since the sale of the equipment under the agreed conditions is the result of a previous agreement in which the interested party is not A... but F..., Ltd.

As mentioned above, Article 23(1) of the CIRC defines that 'costs or losses are considered to be those which are demonstrably indispensable for the realisation of the income or gains subject to tax or for the maintenance of the source of production', and does not identify any circumstances in which this type of cost, when inherent to other companies, even if they are part of the same economic group, may receive exceptional tax treatment.

However, the benefit associated with the cost incurred in this operation occurred in the legal sphere of F... Limited (based in Cyprus), and in this respect the assumption contained in Article 23(1) of the CIRC is extremely important, which must lead to 'individualised consideration of each company or institution, and reasoning that appeals to group management criteria...' is not admissible.
In fact, it is imperative to 'distinguish between the cost actually incurred in the collective interest of the company and that which may result only from the individual interest of a shareholder, a group of shareholders or their group as a whole and which cannot therefore be considered a cost either from the point of view of company law or tax law', The requirement that costs be indispensable for the formation of income must be judged by criteria of economic rationality in relation to the statutory objectives and, therefore, taking into account the reasonableness and justification of management decisions at the time and in the circumstances in which they are taken'.
In this sense, we still have to revisit a series of facts that have already been summarised above.
The wash plant equipment was owned by A... but its use was contractually ceded to B... which had to compensate A... by one Euro per tonne of ore treated in it. In other words, A... forgoes future income corresponding to 1 Euro / tonne of ore extracted in ... by B... for the remainder of the concession, and does not recognise any gain subject to tax in its sphere.
In the same vein, it should be emphasised that, when A... signed the contract to transfer the use of the wash plant to B... of the wash plant's equipment, the latter was given the option to repurchase the equipment for the same price it sold it for, i.e. 36,112,950 euros. Assuming, as the same parties expressly admitted in the addendum to the assignment agreement, that the equipment in February 2007 was valued at 16,931,947.09 euros, the value of the repurchase option could be revised to the same amount. However, despite this repurchase option, which was admittedly reduced to the value of the valuation, A... was required to sell the same equipment for one Euro, thus taking on a cost which is reflected in the valuation of the shares sold by other Group companies.
It should also be noted that the costs of maintaining the equipment have been borne by B..., a fact which meant that the value of the equipment was reduced when it was valued, so the allusion to the savings to be made by selling the equipment is not in line with reality.
It can therefore be seen that the costs incurred in the sale of the Industrial wash plant bear no relation to the realisation of taxable income and, as such, do not comply with the provisions of Article 23(1) of the CIRC.
Regarding the existence of a capital loss in an operation between independent entities
Even if the disputed cost is attributed tax relevance, the operation will have to be analysed in the light of the Principle of Full Competition laid down in Article 58(1) of the IRC Code.
Subordination of the sale of the Industrial wash plant equipment to the Principle of Full Competition
(...)
In accordance with Article 58(4)(b) of the CIRC, special relationships are considered to exist between two entities in situations where one has the power to exercise, directly or indirectly, a significant influence on the management decisions of the other, which is considered to be the case, in particular, between entities in which the same owners of their capital, or their spouses, ascendants or descendants, hold, directly or indirectly, in these entities, a shareholding of not less than 10% of the capital or voting rights.
According to the information provided by the taxable person for the 2008 financial year, the C... Group held, as at 2008-12, a stake of not less than 10 per cent in these entities. Group held, on 2008-12-31 (the date of the sale of the Industrial wash plant equipment), an indirect holding of 100 per cent in the capital of A..., as well as a direct or indirect holding of 99.86 per cent in the capital of B.....
It can therefore be concluded that A... and B... are in a situation of special relations, under the terms of Article 58(4)(b) of the CIRC, and that the commercial operations carried out between the former and the latter must be practised, accepted and contracted on terms and conditions that are substantially identical to those that would be contracted,
accepted and practised between independent entities in comparable operations.
As such, the sale of industrial washing equipment described above, carried out by A... to B..., constitutes a binding commercial operation, under the terms described in article 1(3)(b) of Ministerial Order 1446-C/2001, in conjunction with the provisions of article 1(d) of the same regulation, and in article 1(4)(b) of Ministerial Order 1446-C/2001. b) of no. 4 of article 58 of the CIRC, which is subject to the Principle of Full Competition set out in no. 1 of article 58 of the CIRC, whereby the terms and conditions contracted and accepted must be identical to those that would have been contracted, accepted and practised by independent entities in comparable operations.
The aforementioned sale of industrial equipment was made to B... at a price of 0.83 euros (VAT excluded), generating an accounting and tax loss of 16,931,946.26 euros for A..., entered in field 230 of the Modelo 22 declaration for 2008.
Had A... and B... been independent entities, the terms and conditions contracted and accepted between them within the scope of this operation, with an impact on the pricing of the same, would have dictated a higher sale price, to the extent that A... and B... were independent:
i. The stipulations of clause 3 of the 'Equipment Utilisation Contract' signed on .../.../2005 between A... and

B..., i.e. the option for B... to buy back the equipment, whereby A... undertakes to resell the equipment at the exact price at which it was bought, plus the accounting price of the other equipment that has since been incorporated into the said industrial unit by A...; and
ii. The Industrial Washing Plant equipment had been valued, on 2007-02-20, by an independent entity (I...), at 16,931,947.09 euros, and there was no evidence of any fact that determined a subsequent devaluation of the equipment. This amount was taken as a reference by B... and A..., within the scope of the Amendment to the Equipment Utilisation Contract, signed on .../.../2007, which did not alter clause 3 (repurchase), referred to in i. above.
Thus, the price charged by A... in the aforementioned sale of industrial washing equipment to B..., i.e. the price of 0.83 euros (VAT excluded), goes against the terms and conditions that would be contracted, accepted and practised by independent entities in comparable operations, and thus violates the Principle of Full Competition.
B - Selection of the most appropriate transfer pricing method
(...)
In this case, the application of this method is made possible by the possibility of comparing the sale price charged by A..., in the commercial operation in question (0.83 Euros), with the value at which the Industrial wash plant equipment was sold by B... and A..., under the 'Amendment to the Equipment Utilisation Contract', signed on .../.../2007 (16,931,947.09 Euros).
In view of the above and the characteristics of the comparable information available, the Comparable Market Price Method is the most appropriate in accordance with the provisions of Article 4(2) of the Ordinance, and will therefore be used to search for conditions that would be practised between independent entities in operations similar to the one analysed here.
C - Selection of the comparable operation
(...)
As already mentioned, A... acquired the Industrial wash plant equipment in 2004 for 36,112,950.00 Euros (VAT excluded), and subsequently, in 2007, it was valued by an independent entity at 16,931,947.09 Euros, to the extent that B... added value to the equipment by replacing obsolete components.
The value of 16,931,947.09 euros was accepted and recognised by both parties (A... and B...), within the scope of the 'Amendment to the Equipment Use Contract', signed on .../.../2007, which did not alter the aforementioned buy-back clause (Clause 3 of the 'Equipment Use Contract'), so the value of the option to buy back the industrial washing equipment corresponds to the aforementioned value of its valuation, in the absence of its supervening devaluation.
And there is no evidence, according to the information provided by the taxable person, of any fact that would give rise to a subsequent devaluation of the Industrial wash plant equipment.
On the contrary, the increase in value of the use of the equipment by B... is evident from the fact that its acquisition was one of the necessary, prior conditions for the transfer of B... shares by the C.... Group.
Therefore, the value at which the Industrial wash plant equipment was valued by an independent entity, i.e. 16,931,947.09 Euros, is the arm's length price at which A... would have sold it to B..., had these entities been independent.
D - Quantifying the effects of non-compliance with the arm's length principle
In accordance with the above, the Industrial wash plant equipment was sold to B... on 2008-12-31 at a price of 0.83 euros (VAT excluded), generating an accounting and tax loss of 16,931,946.26 euros in A...'s sphere, entered in field 230 of the Model 22 Declaration for the 2008 financial year, and therefore deductible for the purposes of determining taxable profit.
According to the comparable operation identified above, had A... and B... been independent entities, the Industrial wash plant equipment would have been sold for the market value of 16,931,947.09 euros, and not 0.83 euros, in favour of compliance with the Full Competition Principle.
Thus, if the Principle of Full Competition had been complied with in this operation, the accounting and tax loss would not have occurred, as the realisation value (sale price) would have equalled the net book value of the asset.
In view of the above, and given that the requirements for justification set out in article 77 of the LGT are met, due to a violation of the Principle of Full Competition set out in article 58(1) of the CIRC, even if the disputed cost had tax relevance, a positive adjustment would be due to A..., S.A.'s taxable profit, for the year in which the Industrial wash plant equipment was sold, i.e. 2008, in the amount of 16,931,946.26 euros, by taking into account the arm's length sale price (with an impact on income).
Furthermore, if it were understood that the equipment could only be sold, due to any legal restrictions, to B..., and that the price charged was the price agreed between F..., Ltd. and D... - SGPS, S.A., it will always be said that the sale of the equipment was only carried out, and under the conditions in which it was carried out, out of the interest of F..., Ltd. in carrying out the sale of the shares, so, also under the terms of article 58(1) of the IRC Code, it would be said that if we were dealing with a transaction between independent entities, these costs would be charged to F..., Ltd., the entity that carried out the deal with D... - SGPS, S.A and not to A....
In conclusion, with regard to the capital loss realised on the sale of the wash plant, the capital loss realised of

16,931,946.26 euros is added to the taxable profit, calculated under the terms of article 43(2) of the CIRC, as it does not meet the requirements to be eligible as a tax cost under the terms of article 23(1) of the CIRC, since it is not demonstrably indispensable for the realisation of income in the legal sphere of A... but of other Group companies.
On the other hand, in view of the above, even if the disputed cost had tax relevance, a positive primary adjustment of 16,931,946.26 euros would be due to A..., S.A.'s taxable profit.
III - 1.2 Capital losses on the sale of financial fixed assets: 1,732,990.56 euros
A... made a capital loss of 3,552,342.10 euros on the sale of financial investments, broken down as follows:
J... shares 3,465,981.12 Euro
Financial investments (Mine Closure Fund) 86,360.98 Euro
3,552,342.10 Euro
For the purposes of determining taxable profit under the terms of article 17 of the IRC Code, the company deducted 1,776,171.05 euros in field 230 of Table 07 of the IRC Form 22, corresponding to 50 per cent of the total calculated.
Tax framework
(...)
From the analysis carried out
A... sold two lots of J... shares,
- One, totalling 7,211,878 shares, was acquired on .../.../2007 as part of the consideration received for the sale of silver to the J... group. (...)
- The other lot sold consists of 12,444,372 shares which 'In December 2007 A... bought the shares held by B... at market price, through the Toronto Stock Exchange'.
A - With regard to the 7,211,878 shares acquired from J... (Barbados)
In June 2007, the C... Group signed a contract with the J... Group whereby they agreed to sell the silver mining operations of the C... Group's companies in Portugal, A... and B..., to J... Corp, based in Barbados. As part of the consideration for the sale of the silver, A... received 7,211,878 shares in J.... Corp, based in British Columbia, which owns 100 per cent of the share capital of J.... Barbados.
Clause 3(b) of the purchase and sale agreement of June 2007 ('Silver Purchase and Licence Agreement') refers to the delivery of the shares to A... by J.... Barbados and states that it is this company in Barbados that is the purchaser of all of A...'s silver production....
In view of the above, this batch of 1,211,878 shares in J..., Corp (Canada) was acquired in June 2007 by A... from a company based in Barbados, which, according to Ministerial Order no. 15012004, is classified as a 'tax haven' or subject to a privileged taxation regime (line no. 9 of the list approved by the aforementioned Ministerial Order).
On the other hand, having bought the shares in June 2007 and sold them in May 2008, they were held for around nine months.
(...)
It is therefore clear that the capital loss realised on the sale of the 7,211,878 shares in J.... Corp. shares is not fully deductible under Article 23(5) of the CIRC, and the 50 per cent deduction considered by the company in determining its taxable profit is undue.
B - With regard to the 12,444,372 shares acquired from B... (B...)
A... acquired 12,444,732 shares from B... on 31 December 2007, representing the share capital of J... Corp., a company based in British Columbia, which owns 100 per cent of the share capital of J.... Barbados.
These shares had been acquired by B... following the sale of silver by the C... group to the J... group, under the same contract under which A... acquired the shares referred to in A.
It is clear from the aforementioned 'Silver Purchase and Licence Agreemet' that at the time of the agreement, June 2007, A... and B... were both indirectly owned by C... Corporation (based in Canada), with A... being 100 per cent owned and B... held 99.86 per cent.
Under the terms of Article 58(4) of the CIRC, 'Special relationships are considered to exist between two entities in situations where one has the power to exercise, directly or indirectly, a significant influence on the management decisions of the other, which is considered to be the case, in particular, between: (...); b) Entities in which the same owners of the capital, (...), hold, directly or indirectly, a stake of not less than 10% of the capital'.
In the same vein, it is important to mention the classification given by A... in its accounts to the commercial relations it has with the company B... by including it, in accordance with Portuguese GAAP, in 'note 16 - Group companies' of its Notes to the Balance Sheet and Profit and Loss Account.
On the other hand, having bought the shares in December 2007 and sold them in May 2008, they were held for around five months.
(...)
It is therefore clear that the capital loss on the sale of the 12,444,732 shares in J.... Corp shares is not fully deductible under Article 23(5) of the CIRC, and the 50 per cent deduction considered by the company in determining its taxable profit is undue.

In conclusion:
The capital loss realised on the sale of two lots of shares in J.... Corp. totalling 3,465,981.12 Euros is not deductible under the terms of Article 23(5) of the CIRC by applying subparagraph a) to the 12,444,732 shares acquired from B... and subparagraph b) to the 7,211,878 shares acquired from the company resident in Barbados.
Therefore, the deduction of the capital loss of 1,732,990.56 euros considered by A... in field 230 of table 07 of the IRC Mod.22 declaration is undue.
(...)
VII - OFFENCES FOUND
The situations described in points III - 1 of this inspection report took the form of inaccuracies or omissions in the IRC Model 22 declaration, and constitute infringements provided for and punishable under the terms of Article 119 of the General Tax Infringements Regime (RGIT), approved by Law no. 15/2001, of 5 June, and the corresponding Notification Notice was issued.
(...)
IX - RIGHT TO BE HEARD
(...)
IX - 1.2 Capital losses on the sale of the wash plant de ... equipment
16,931,946.56 Euro
(...)
From analysing the arguments presented and comparing them with the other elements collected above, we must mention the following aspects:
1. A... claims that the stake held by the C... group in B... (B...) was sold in 2008, which is why it considers that the transfer of the wash plant equipment to that company does not correspond to a linked operation, and the inspection thus incurs an error in its reasoning;
2. However, it does not present any evidence regarding the alleged facts. On the contrary, later on in his presentation (in point 16) he confirms that the shareholder of B... agreed with the purchaser of the shareholding that the sale of the launderette by A... to B... (for the price of one Euro) would be prior to the transfer of the
shares, and was even an indispensable condition for the realisation of this operation;
(...)
5. However, we must emphasise that the existence of these special relationships, which have been unequivocally demonstrated, does not constitute a basis for the proposed correction, but only complements the understanding that the loss calculated is not indispensable for the realisation of profits or the maintenance of A...'s source of production;
6. On the other hand, when the taxable person states that this operation (and naturally its price) was defined by the shareholder of B... and the purchaser of the stake, and considering that, as the grounds clearly show, there are special relationships between A... and that company, it is indirectly confirming that this operation does not reflect its individual interest (as a legally autonomous entity of the C... group company that held the stake);
7. In fact, only in this sense can we understand the reason for this sale at this price;
8. Restrictions on the sale of equipment that is part of a mining complex and qualifies as a mining annex exist in the legislation that regulates mining concession contracts, but this fact does not prevent the sale, and the acquisition by A... of the equipment from B... is an example of this. of the equipment from B...;
9. Although it considers it impossible to demand payment of the value of the equipment, given B...'s financial situation, it confirms that this equipment is indispensable for its operation and that for this reason D... SGPS made the acquisition of the group's stake in B... conditional on the prior sale by A... of the wash plant;
10. Since it is indispensable for the operation of the concession granted to B... and there is an entity interested in acquiring that company with a view to mining, it would not be expected to devalue the equipment to a value substantially lower than the value guaranteed by the buy-back option that B... had over it;
11. In its arguments, despite arguing that the loss is related to maintaining the company's activity, A... does not provide any proof of this fact;
(...)
14. It should be noted that if the operation of ... operation goes into a ‘care & maintenance’ regime, for reasons of the price of zinc on the market, any maintenance costs incurred by A... incurred would be reflected in the fee to be invoiced at a later date;
However, with regard to the equipment in question, its maintenance has been incurred in recent years on behalf of B..., a fact that justified the revaluation study of the equipment;
16. On the other hand, the interest of the C... group in reaching an agreement with D... SGPS for the sale to the latter of its stake in B... forced A... to sell at a price much lower than the book value a piece of equipment it owned and from which it could derive future income either from its use by B... and for which it had to pay 1€/Ton, or from its own use in addition to its own (when zinc prices recovered on the market).
17. A... was forced to suffer the loss under analysis so that the C... group could sell the B... shares, so it

cannot be said that this loss contributes to maintaining the source of production.
In view of the above, the taxable person's claim is not accepted and the correction initially proposed in the draft corrections is maintained in full.
IX - 1.3 Capital losses on the sale of financial fixed assets: 1,732,990.56 euros
(...)
In opposition to the arguments put forward by the taxable person we have:
1. The batch of shares that A... received as payment for part of the silver sold to a company based in Barbados, and contrary to what the taxable person claims, constitute an acquisition of shares from a company resident in a region with a more favourable tax regime (under the terms of Ministerial Order 15012004 of 13 February, Barbados qualifies as such);
2. Just as the silver rights were sold, even though part of the consideration received was not money, the shares received as payment for part of the rights sold must also be considered to have been acquired;
3. The operation by which the shares in question came into the possession of A... thus corresponds to an exchange, and it should be emphasised that for IRC purposes exchanges constitute a form of transfer for consideration and therefore fall under the regime of capital gains and losses defined in article 43 of the CIRC;
4. (...)
5. Regarding the aforementioned fact that the calculated loss results from exchange differences recorded in the devaluation of the Canadian Dollar (CAN) against the Euro and not from a capital loss on the shareholding which, during the period held by A... recorded a stock market appreciation, does not influence the classification of the loss under the provisions of Article 23(5) of the CIRC;
6. And it doesn't influence it because this rule has a broader impact than the taxable person attributes to it. The rule expressly extends the exclusion, as a negative component of taxable profit, of 'losses arising from the onerous transfer of shares' and does not limit them to realised capital losses calculated under the terms of articles 43 and 44 of the CIRC;
7. There is therefore no distinction as to the nature of the losses to be considered for the purposes of that rule, the only relevant factor being whether or not they are connected to the transfer of shares that fulfil the conditions set out therein;
8. In this case, however, even if it were accepted that the loss on the batch of shares acquired from J.... de Barbados qualified as exchange differences, the loss realised is always related to the sale of those shares and, as such, is covered by the rule applied;
9. At no point in the reasoning presented in the draft report was the application of the provisions of Article 23(5) of the CIRC made dependent on the existence of fraudulent attempts by the company to generate tax losses on the sale of shares acquired from entities with which it was in a special relationship;
10. The acquisition or disposal price was never even questioned;
11. And this is because the application of the rules in Article 23(5) of the CIRC does not depend on the presumption of any fact but on facts that are perfectly identified in the rule, namely:
12. These facts were fully verified in the sale of J... shares, both those acquired with the sale of the silver rights and those acquired from B..., as the draft report clearly shows;
13. There is therefore no recourse to any presumption, rebuttable or not (...).
(...)' (see tax inspection report attached as document no. 4 to the initial petition);

E) On 15/12/2010, the Team Coordinator drew up an opinion confirming the content of the tax inspection report (see tax inspection report attached as document no. 4 to the initial application);

F) On 20/12/2010, the Head of Division drew up an opinion confirming the conclusions set out in point I.4 of the report (see tax inspection report attached as document no. 4 to the initial application);

G) On 20/12/2010, the Director of Services issued an order agreeing with the content of the inspection report (see tax inspection report attached as document no. 4 to the initial petition);

H) On 20/12/2010, by letter with reference ...49, with the subject 'CORRECTIONS RESULTING FROM INTERNAL ANALYSIS - ART. 77 OF THE GENERAL TAX LAW (LGT) AND ARTICLE 62 OF THE COMPLEMENTARY REGIME OF THE TAX INSPECTION PROCEDURE (RCPIT)', the tax inspection report was sent to the Impugnant (see tax inspection report attached as document no. 4 to the initial petition);

I) The Impugnant was sent the corporate income tax settlement statement for 2008, with clearing no. ...05, dated 11/02/2011 and settlement no. ...68, dated 29/02/2011, resulting in an amount payable totalling Eur. 5,217,594.44 (see document no. 1 attached to the initial petition);

J) The statement of assessment of interest was sent to the Appellant, which shows the following:

[IMAGE]

(see document no. 2 attached to the initial application);

K) The statement of settlement of accounts was sent to the Challenger, which shows the following:

[IMAGE]

(see document no. 3 attached to the initial application);

L) On 23/03/2011, the Impugnant paid the amount of Eur. 5,217,594.44, relating to the additional CIT assessment for 2008 and the respective compensatory interest (see document no. 5 attached to the initial application);

M) On 14/07/2011, the tax office in Castro Verde received the administrative claim submitted by the Impugnant (see document no. 6 attached to the initial application);

N) On 29/03/2012, the initial application for judicial review was sent by registered post (see folio 321 of the case file);

O) A... is engaged in mining in the mines of ... (cf. document no. 7 attached to the initial application and statements by witnesses AA, BB and CC);

P) The company 'B...' (B...) was the concessionaire of a zinc mining operation in ..., located around 50 kilometres from the mines of ... (see statements by witnesses AA, BB and CC);

Q) Since 2002, the share capital of B... was held by the 'K... CORPORATION' Group since 2002 (see agreement between the parties, documents 8 and 9 attached to the initial application and statements by witnesses AA, BB and CC);

R) At the time of the takeover, B... was insolvent and, in production terms, had suspended care and maintenance work (see the parties' agreement; document no. 8 attached to the initial application and the statements of witnesses AA, BB and CC);

S) On 04/03/2004, the Portuguese State, through L..., S.A. (owned by it), sold to 'K... CORPORATION' and to 'M... Unipessoal, Lda.' 51% of the share capital of A..., by means of a "Share Purchase and Sale Agreement and Assignment of Loans" (agreement between the parties, document no. 9 attached to the initial application);

T) In 2004, the N... Group sold the remaining 49% of its shares to 'K... CORPORATION' the remaining 49% of the share capital of A... (see parties' agreement, document no. 10 attached to the initial application);

U) The company M... Unipessoal, Lda. was part of the 'K... CORPORATION' Group (see parties' agreement; document no. 8 attached to the initial application);

V) A washing plant is an industrial installation designed to separate the minerals contained in ore and produce saleable metal concentrates (e.g. copper, zinc, lead), separating them from other minerals and waste (cf. agreement of the parties, testimony of witnesses AA, BB and CC);

W) In 2005, A... had two washing plants in operation in ..., one prepared to treat copper and the other prepared to treat tin (see witness statements BB and CC);

X) B...'s industrial plant, located in ..., was prepared to treat zinc (see statements by witnesses AA, BB and CC);

Y) In 2005, A... had plans to start mining zinc in ..., and for this purpose it needed a plant to process the ore (see statements by witnesses AA, BB and CC);

Z) On 01/03/2005, A... sent a letter to the Minister of Economic Activities and Labour, requesting authorisation to buy B...'s industrial plant (see document no. B...). (see document no. 11 attached to the initial application and statements by witnesses AA and BB);

AA) On 01/03/2005, B... asked the Minister of Economic Activities and Labour for authorisation to sell B...'s industrial wash plant to A... (see document no. 12 attached to the initial application and statements by witnesses AA and BB);

BB) On 17/11/2005, the DGGE sent a letter to B... authorising the sale of the wash plant to A... (see document no. 13 attached to the initial application);

CC) A... bought from B... the industrial washing plant located on the latter's premises in the ... mine, for the price of €36,112,950 (see tax inspection report attached as document no. 4 to the initial application);

DD) On 18/11/2005, B... and A... signed an Equipment Utilisation Contract for the industrial washing plant (see tax inspection report attached as document no. 4 to the initial application and testimony of witnesses AA, BB and CC);

EE) In 2006, 'K... CORPORATION' merged with C... Corporation, with the result that A... and B... became part of this Group (see agreement of the parties; document no. 14 attached to the initial application);

FF) The evolution of the price of zinc on the international markets in 2006 made it possible to realise that the conditions would be met for B... to resume operating the ... mines. mines by B... (see document no. 15 attached to the initial petition and the testimony of witnesses AA, BB and CC);

GG) From the end of 2007, B... began to work and receive income from this zinc extraction activity (cf. testimony of witnesses AA, BB and CC);

HH) At the end of 2007 and in 2008, there was a sharp fall in the price of minerals on the international market, in particular the price of zinc (see document no. 15 attached to the initial application and the testimony of witnesses AA, BB and CC);

II) The losses at B..., caused by the fall in the price of zinc between 2007 and 2008 and the deterioration of its financial situation, specifically led the C... Group to suspend work on the mines. Group ordered the suspension of work at the ... mines (cf. (see testimony of witnesses AA, BB and CC);

JJ) On 13/11/2008, B... placed the ... mine in a care & maintenance situation. mine in a care & maintenance situation, having communicated this fact in due course to the competent state authorities (see document no. 17 attached to the initial application);

KK) On the same date, zinc production at the ... mines was suspended by A... (see testimony of witnesses AA, BB and CC);

LL) A... can no longer use or make any use of the industrial plant at ..., which was solely intended and prepared for zinc processing (see testimony of witnesses AA, BB and CC);

MM) The Portuguese government favoured the continued operation of the ... mine (see testimony of witnesses AA, BB and CC);

NN) The Portuguese government informed C... and A... of the existence of an interested party in the acquisition of the B... business, D... - SGPS, S.A., part of the E... group. (see testimony from witnesses AA, BB and CC);

OO) D... - SGPS, S.A. established as a condition of the deal the full acquisition of the capital of B... and the simultaneous acquisition of the credits and other assets related to mining (see document no. 18 attached to the initial petition and testimony of witnesses AA, BB and CC);

PP) On 19/12/2008, a meeting of the Board of Directors of A... was held, at which, in the context of the 'Sale of B..., S A. (B...)', the 'Sale of A...'s loans to B... and the commercial paper subscribed by A...' were approved, the content of the respective minutes being as follows:

'(...)
c) Also in the context of ongoing negotiations for the sale of the company B... and the aforementioned credits, the Board assessed the interest of selling the ... washing plant, given that this equipment, as a mining annex, could not be removed from the mining concession held by B... and that A... did not wish to continue to assume

responsibility for this equipment.
In view of these considerations, taking into account these legal constraints and the potential obligations arising from maintaining ownership of equipment used by third parties, the Board decided to approve the sale to B..., for the price of €1, on the understanding that it would not take on any other commitments, of the parts, components and other equipment installed in the industrial washing plant in ... and which until then formed part of A...'s assets, under the equipment purchase and sale contract signed between A... and B... on 27 December 2004, amended by the additional contract of 4 October 2006' (see document no. 21 attached to the initial application);

QQ) On 23/12/2008, A... and D..., SA entered into a credit assignment agreement whereby the former assigned to the latter, for €2, the credits it held over B ... (see document no. 20 attached to the initial application);

RR) On the same date, F..., LTD. and D..., S.A. entered into a share purchase agreement, whereby the former sold 99.8336% of B...'s share capital to the latter for a total of €1. The condition for entering into this agreement was the acquisition of the ... wash plant by ... by ... at €1 (see document no. 18 attached to the initial application);

SS) The sale of the industrial wash plant in ... by A... to B... took place on 31/12/2008 (see testimony of witnesses AA..., BB... and CC...);

TT) In January 2009, A... and B... agreed to revoke the contract for the use of the industrial wash plant in ..., a revocation 'based on the fact that A... no longer owns any part, component or element of the Industrial wash plant' (see document no. 25 attached to the initial application);

UU) In September 2007, A... and B... signed a contract with the companies J... CORP. and J... BARBADOS, CORP. under which the former agreed to grant J... (BARBADOS) CORP. a licence to acquire all the silver contained in the minerals exploited in the mines of ... e ... and agree to sell to J... CORP and J... (BARBADOS) CORP. all the silver contained in the minerals exploited in the mines of ... and ... mines, with A... and B... agreeing that the price be paid through the allocation of two lots of shares in J... CORP., a company listed on the Toronto Stock Exchange, Canada (see document no. 26 attached to the initial application);

VV) In December 2007, A... acquired from B... the batch of shares in J... CORP. which had been allocated to it in return for the contract signed in September 2007 with the companies J.... CORP. and J... (BARBADOS) CORP. (see testimony of witnesses DD, EE and CC);

WW) This acquisition was made at the market price quoted on the Toronto Stock Exchange (see testimony of witnesses DD, EE and CC);

XX) In 2008, A... sold, on the Toronto Stock Exchange, the two lots of shares it held in J... CORP. (see testimony of witnesses DD, EE and CC)'.

*

2.2 FACT AND LAW
2.2.1 THE ISSUES TO BE ASSESSED AND DECIDED

In the context of a tax inspection of the Appellant for the financial year 2008, the AT took the view, in addition to what is of interest to us here, that the capital losses declared in relation to the sale of the ... wash plant, which the Appellant sold to the company known as 'B...' (hereinafter also referred to as 'B...'), had not been realised. (hereinafter also referred to as 'B...'), could not be recognised for tax purposes, either because the requirement of indispensability, as provided for in Article 23 of the CIRC, was not met, or because the parties involved in the operations that generated the capital losses were in a situation of special relationships, as defined by the transfer pricing regime, which at the time was regulated by Article 58 (now Article 63) of the same Code.
Following this inspection, the AT made the relevant corrections, including the one resulting from the disregard of these capital losses as tax costs, with the aforementioned double reasoning, and the consequent additional CIT assessment.
The appellant challenged the additional assessment in court, specifically with regard to the aforementioned correction, and the Beja Administrative and Tax Court ruled against it. On appeal against the judgement of the Beja Administrative and Tax Court, the South Central Administrative Court ruled that the disregarding of capital losses on the grounds of the lack of the indispensability requirement was unlawful (The judgement

under appeal expressly stated the following: 'By disregarding the cost accounted for by the appellant with the capital loss realised on the sale of the industrial wash plant on the basis of the concept of indispensability, instead of making use of the 'general anti-abuse clause' by initiating the special procedure provided for by law, the AT incurred a breach of law due to an error in the assumptions, and the correction cannot be maintained on that particular ground.'), but upheld the legality of the correction on the grounds of the existence of a special relationship situation.
This exceptional review appeal has been lodged against the judgement of the Central Administrative Court South, which was admitted by a judgement of this Supreme Court, handed down by the formation referred to in Article 285(6) of the CPPT, in order to re-examine the following issues:

i) whether the legal system of transfer pricing can be applied to a deal concluded between two companies, where there is a special relationship between them when the contract is negotiated, but no longer when it is concluded and

ii) whether it complies with the same legal regime to use as a comparable market price the value of a valuation used as a reference in a tied transaction.

2.2.2 THE MOMENT AT WHICH THE EXISTENCE OF SPECIAL RELATIONSHIPS MUST BE ESTABLISHED FOR THE PURPOSES OF APPLYING THE TRANSFER PRICING REGIME

2.2.2.1 The Appellant argues that the allegation of the existence of special relationships on the date the terms of the deal were established (sale of the wash plant) is irrelevant for the purposes of Article 58 of the CIRC, when, as the Court itself recognises, such relationships did not exist on the date the contract was concluded. It therefore considers that, contrary to what the South Central Administrative Court ruled, the transfer pricing regime was incorrectly and unjustifiably applied to a transaction between independent entities.
In fact, the judgement under appeal considered that 'although the sale of the industrial wash plant to B... formally took place on 31/12/2008, the date on which the parties to the deal were no longer in a situation of special relations (which ceased with the sale on 23/12/2008 of B... to D... SGPS, a company in the E... Group), the fact is that the conditions and terms of the deal had already been agreed before the operation was formalised'.

2.2.2.2 Before moving on to ascertain when the existence of a special relationship between two entities should be situated for the purposes of applying the transfer pricing regime, it is necessary to recall, as established by the courts (see fact proved under point D) of the facts proved), the reasoning used by the AT to apply, as it did, the aforementioned transfer pricing regime to the aforementioned sale of the wash plant. Having read this reasoning, two observations should be highlighted: i) the correction in question - disregarding the declared capital loss on the sale of the wash plant - was based, in the first instance, on the lack of the indispensability requirement laid down in article 23 of the CIRC, and only in the alternative (as is clear from the use of the expression 'Even if the disputed cost is attributed tax relevance, the operation will have to be analysed in the light of the Full Competition Principle laid down in article 58(1) of the IRC Code'). º of the IRC Code' after concluding: "It is therefore considered that the costs incurred with the sale of wash plant Industrial are not related to the realisation of taxable income and, as such, do not comply with the provisions of paragraph 1 of article 23 of the CIRC") the AT used the argument of the existence of special relationships between the parties involved in the deal; ii) in relation to this argument, the AT never based it on the existence of special relationships at the time of the negotiation, but rather expressly stated that "the C... Group held, at the date of 2008-12, a stake in the company". Group held, on 2008-12-31 (the date of the sale of the Industrial wash plant equipment), an indirect holding of 100 per cent in the capital of A..., as well as a direct or indirect holding of 99.86 per cent in the capital of B...' (emphasis added). (emphasis added), from which the conclusion on the existence of special relationships is drawn: 'It is therefore concluded that A... and B... are in a situation of special relationships, under the terms set out in Article 58(4)(b) of the CIRC, and that the commercial operations carried out between the former and the latter must be practised, accepted and contracted on terms and conditions that are substantially identical to those that would be contracted, accepted and practised between independent entities in comparable operations'.
In other words, the reasoning on which the judgement under appeal based the legality of the contested correction - the existence of a special relationship at the time of the negotiation - was never invoked by the AT. Nor can it be said that the essential - and therefore relevant - core of the reasoning (reasoning seen here only in its formal aspect, of indicating the reasons for the decision) refers exclusively to the alleged existence of special relationships and that the moment at which these should be assessed does not matter.
In fact, we must not forget that the reasons given by the AT refer to the existence of special relationships at a certain point in time ('on the date of 2008-12-31 (the date of the sale of the Industrial Washing Plant)') and that the South Central Administrative Court, having concluded that this reason, as a precondition for the liquidation, had not been verified, upheld the legality of the liquidation on the basis of the existence of special

relationships at another point in time, namely the negotiations that led to the subsequent conclusion of the deal.
It is therefore unequivocal that the South Central Administrative Court concluded that the contested assessment was legal on a basis that the AT did not invoke when it carried out that act.
This is enough for us to consider that the Central Administrative Court for the South made an error of judgement, which requires its ruling to be overturned.
In fact, the legality of the act is assessed in the light of the reasons given in the act, and the reasons that the AT or the court may consider to justify the decision, but which were not expressly given as reasons for the act, are irrelevant for this purpose (See in this regard,
- MARCELLO CAETANO, Manual de Direito Administrativo, Coimbra Editora, volume I, 10th edition, p. 479, states that it is 'irrelevant that the Administration comes, already during the litigation appeal, to invoke as determining reasons other reasons, not stated in the act', and in volume II, 9th edition, p. 1329, states that 'the appealed authority cannot (...), in its response to the appeal, justify the practice of the appealed act for reasons other than those contained in its express motivation';
- MÁRIO ESTEVES DE OLIVEIRA, Direito Administrativo, Almedina, volume I, page 472, says that 'objectively existing reasons that are not expressly stated as grounds for the act cannot be taken into account when assessing its legality'.
Specifically in the context of tax proceedings, see JORGE LOPES DE SOUSA, Código de Procedimento e Processo Tributário, Anotado e Comentado, Áreas Editora, 6th edition, 2011, vol. II note 2 d) to art. 124, p. 327, where the aforementioned authors are cited). In the context of mere legality litigation, the legality or illegality of the contested act must be assessed as it occurred, with the grounds that were used in it, and other possible grounds that could serve as support for other acts, whose decision-making content totally or partially coincides with the act practised, are not relevant. The court, having verified the illegality of the grounds invoked, cannot assess whether the AT's actions could have been based on other grounds and fail to declare the illegality of the specific act carried out because, possibly, there is the abstract possibility of a hypothetical act with totally or partially identical decisional content, with other grounds, which would have been legal but was not carried out.
The Central Administrative Court for the South could not, therefore, after finding that an unlawful basis had been invoked to support the assessment - it should be remembered that the judgement under appeal stated that 'the sale of the industrial wash plant to B...' took place 'formally on 31/12/2008, the date on which the parties to the deal were no longer in a situation of special relations (which ceased with the sale on 23/12/2008 of B... to D... SGPS, a company in the E... Group)' (emphasis added) - to assess whether the AT's action could have been based on another ground, namely the verification of special relationships at the time of the negotiations that culminated in the deal, and therefore failed to declare the contested additional assessment unlawful.
In the same way that the AT is prohibited by law from being able to justify in the judicial phase what it should have justified when it issued the contested act, the court is also prohibited from being able to scrutinise the legality of the act in the light of grounds other than those invoked by the AT, under penalty of violating a structuring principle of the democratic rule of law, namely the separation of powers (cf. arts. 2 and 111, no. 1, of the Constitution of the Portuguese Republic).
The case law of this Supreme Court is along these lines (see, among many others, the following judgements of the Tax Litigation Section of the Supreme Administrative Court:
- of 1 June 2011, handed down in case no. 58/11, available at https://www.dgsi.pt/jsta.nsf/-/0dbc7b8e491f0e77802578a700375368;
- of 22 March 2018, handed down in case no. 208/17, available at https://www.dgsi.pt/jsta.nsf/-/e4e9b828c0e68e98802582750037e3f3;
- of 11 December 2019, in case no. 859/04.2BEPRT, available at https://www.dgsi.pt/jsta.nsf/-/6d7b4730f3aa66b6802584d3004034cb;
- of 28 October 2020, in case no. 2887/13.8BEPRT, available at https://www.dgsi.pt/jsta.nsf/-/e0c207951f4981868025861600442 7dc.).
The judgement under appeal cannot therefore stand and must be overturned and the legal challenge upheld, as we will decide at the end.

2.2.2.3 But even if it could be considered that the South Central Administrative Court did not assess the legality of the contested assessment in the light of grounds that were not used by the AT to make the assessment, this judgement could not stand either. Let's see:
In order to demonstrate that the conditions and terms of the deal were agreed when there were still special relationships between the parties involved in the operation (the appellant and 'B...'), the judgement under appeal lined up the following chronology based on the inspection report: '

Ø 19/12/2008 - 'Meeting of the Board of Directors of A...'

According to minute no. ...3 of the Board of Directors meeting, it was decided on this date to sell the Industrial wash plant equipment to B... for the total price of one Euro.

Ø 23/12/2008 - 'Share Purchase Agreement'

The contract for the sale of B... shares by the company F..., LTD (Cyprus) to the company D... SGPS, SA (Portugal), signed on .../.../2008, stipulates that the Industrial wash plant equipment is to be sold by A... to B... for one Euro.
This transaction (at the price set therein) is a prior transaction to the transfer of the shares (see clause 6 f)) and the contract expressly mentions this condition by stating 'Equipment currently used by B... in 'wash plant' shall have been acquired for 1€ (one Euro) and paid by B..., before Closing''.
Let's also recall another pertinent factual matter:
- the Appellant company, through the company called 'F..., Ltd.', is part of the so-called C... Group;
- until .../.../2008, 'B...' was also part of this group, also through the company called 'F..., Ltd.';

'QQ) On 23/12/2008, A... and D..., SA signed a credit assignment agreement whereby the former assigned to the latter, for €2, the credits it held over B... [...];

RR) On the same date, F..., LTD. and D..., S.A. entered into a share purchase agreement, whereby the former sold 99.8336% of B...'s share capital to the latter for a total of €1. The condition for entering into this agreement was the acquisition of the ... wash plant by B... at €1. by B... for €1 [...];

SS) The sale of the industrial wash plant in ... by A... to B... took place on 31/12/2008 [...];'.
In other words, it is true, as the judgement under appeal held, 'that the parties involved in the sale of the industrial wash plant were in a situation of special relations when they agreed on the terms of the sale', as both were part of the C.... group.
It is also true that the sale of the plant by the appellant to 'B...' took place on 31 December 2008 and that, on that date, these companies should be considered independent entities, since 'B...' ceased to be part of the C... group on 28 December 2008 and became part of the E.... group.
It should be noted that, contrary to what the Deputy Attorney General before this Supreme Court has argued (cf. 1.5), it cannot be considered that the share purchase and sale deal - whereby 'B...' ceased to be part of the C... group and became part of the E... group - only took place on 31 December 2008. - only took place on 31 December 2008 due to the existence of a condition in the respective contract, namely the acquisition of the wash plant by 'B...', which only took place on 31 December 2008. Let's see:
It is clear that, unless the contrary results from an express provision or the very nature of the business, the parties can make the legal business subject to a condition, as is clear from Article 270 of the Civil Code (CC), which states: 'The parties may make the production of the effects of the legal transaction or its resolution subject to a future and uncertain event: in the first case, the condition is said to be suspensive; in the second, resolutive'.
As long as the condition is not met, there is a situation of pendency, which ceases at the moment the condition is met or at the moment it is certain that the condition will not be met (cf. art. 275(1) of the Civil Code).
As is clear from the provisions of articles 270 and 276 of the Civil Code, once the condition has been met, and with the exception of a different solution resulting from the nature of the business or the will of the parties, the effects of the legal business are deemed to have taken place from the beginning (suspensive condition) or never to have taken place (resolutive condition).
As PRIES DE LIMA and ANTUNES VARELA emphasise, 'The law intentionally speaks of the resolution - and not just the cessation - of the effects of the business, since the verification of the condition has, as a rule, retroactive effect' (Código Civil Anotado, Coimbra Editora, 3rd edition, note 3 to art. 270, p. 250).
In this case, if it is not disputed that the condition has been met, the effects of the act (acquisition of the shares resulting in a change of ownership of 'B...') must therefore be retroactive to the date the contract was signed, i.e. to .../.../2008.
We therefore don't see how we can maintain, as the Public Prosecutor's Office before this Supreme Court maintains, that '[o]n the date the aforementioned contract was signed, the same special relationships existed between B... and A... as existed on the date of the contract signed on .../.../2008'. The fact is that the effects of the contract signed on .../.../2008, having verified the condition to which the parties subjected it, must be considered to have been produced on the date on which it was signed, and the date on which the condition was verified is irrelevant for this purpose.
But, having ruled out the argument put forward by the Public Prosecutor's Office, could it be the case, as the judgement under appeal held, that in order for the essential requirement for the application of the transfer pricing regime to be verified, namely the existence of special relationships, it is sufficient for these to exist when the deal was agreed, but no longer at the time it was concluded?

In this regard, it must be recognised that the Central Administrative Court for the South does not clarify the reasons why it considered that the relevant moment for the verification of this requirement was when the deal was negotiated and not when it was concluded, when it existed at the first moment, but no longer at the second. In fact, it merely stated, as we have already said, that 'although the sale of the industrial wash plant to B... formally took place on 31/12/2008, the date on which the parties to the deal were no longer in a situation of special relations (which ceased with the sale on 23/12/2008 of B... to D... SGPS, a company in the E... Group), the fact is that the conditions and terms of the deal had already been agreed prior to the formalisation of the operation'.
For its part, the Appellant maintains that the relevant moment cannot be any other than that of the conclusion of the deal. Let's see:
Article 58(1) (now Article 63) of the CIRC states: 'In commercial transactions, including, in particular, transactions or series of transactions concerning goods, rights or services, as well as financial transactions, carried out between a taxable person and any other entity, whether or not subject to IRC, with which it is in a situation of special relations, terms or conditions must be contracted, accepted and practised that are substantially identical to those that would normally be contracted, accepted and practised between independent entities in comparable transactions.'
First of all, let's remember the legal concept of special relationships, which was provided to us by Article 58(4) (now Article 63) of the CIRC: 'Special relationships are considered to exist between two entities in situations where one has the power to exercise, directly or indirectly, a significant influence on the management decisions of the other'. This legal concept is followed, in the same provision and throughout its nine paragraphs, by a list of situations in which the legislator presumes the 'power to exercise, directly or indirectly, a significant influence on the management decisions of the other'.
We can't find in the text of the law any indication or explicit reference to the moment when the existence of the special relationship must be ascertained.
However, as the appellant rightly pointed out, 'the wording of Article 58(1) [of the CIRC, which today corresponds to Article 63] is clear in referring to transactions "carried out" and, consequently, to the date on which the transactions are entered into and produce their legal and economic effects (and not when they are negotiated) between related entities'.
In fact, it is a general rule that the legal regime applicable and in the light of which the validity of the assessment act must be assessed is that in force on the date on which the taxable event occurs (in obedience to the tempus regit actum principle), which also means that the requirements for the application of that regime must be verified on that date, i.e., in this case, that the situation of special relations must be verified on the date on which the transaction that generated the capital loss was concluded. In the absence of any indication to the contrary, that time cannot be considered to be any other.
The rationale of the system is the same, as the appellant has also pointed out.
In fact, as stated in the conclusions of the appeal, the transfer pricing regime aims to protect competition and parity between bound and unbound entities, 'seeking to prevent entities within a group and maintaining control over transferred assets, from transferring those same assets between themselves at prices different from those practised on the free market and, if necessary, in a reversible manner, in order to divert profits or create losses subject to a more favourable tax regime' and "if the parties are not related at the time the operation takes place and its legal, economic and tax effects are produced in the sphere of the parties involved, there can be no intra-group transfer of profits or losses that could justify the application of the transfer pricing regime".
We therefore believe that the best interpretation of the transfer pricing regime requires that the existence of the special relationship be assessed at the time the deal is concluded.
Therefore, even if it could be considered - and it can't, as we said in 2.2.2.2 - that the reasoning given by the AT in support of the assessment includes the reasoning used by the Central Administrative Court of the South to decide on the legality of that act, we would always have to conclude that it could not remain in the legal order because one of its legal preconditions, namely the existence of special relationships at the time the deal was concluded, has not been verified.

2.2.2.4 Finally, a brief note to point out that, as the judgement under appeal pointed out, if the AT believed that there was reason to disregard the tax effects of the sale of the wash plant, either because it considered the price to be manifestly unjustified, or because it believed that the operation, with the purpose of elucidation, was carried out 'with abuse of legal forms' or that it could not be considered genuine, perhaps it should have made use of other mechanisms at its disposal, namely the so-called 'general anti-abuse clause', provided for in Art. 38(2) of the Tax Code. 38(2) of the General Tax Law.
What it could not have done, as it did, was to consider that there were special relationships between the parties involved in the business, justifying the application of the transfer pricing regime.

2.2.3 THE SECOND ISSUE RAISED

As the appeal will be upheld on the first ground, the second question set out in 2.2.1 will not be considered.

2.2.4 COSTS

The unsuccessful Defendant is liable for costs (Article 527 of the Code of Civil Procedure).
Under the terms of Article 6(7) of the CPR, '[i]n cases with a value of more than (euro) 275,000, the remainder of the court fee shall be taken into account in the final account, unless the specific nature of the situation so justifies and the judge, in a reasoned manner, taking into account in particular the complexity of the case and the procedural conduct of the parties, waives payment'.
In other words, as this Supreme Administrative Court has stated, waiving the remainder of the court fee is exceptional in nature and presupposes a less complex case and a simplification of the procedural process measured by the specific nature of the case and the behaviour of the parties.
In the case in point, although the decision cannot be considered, for the purposes intended, to be of less than ordinary complexity, the amount to be paid by way of the remainder, given the value of the case, seems to us to be high in view of the service provided, justifying the waiver of the payment of the remainder as a way of avoiding the violation of the constitutional principles of access to the law and effective judicial protection, proportionality and necessity.
Therefore, in view of the value of the case file and the provisions of Article 6(7) of the CPR, considering the behaviour of the parties, it is considered that the remaining court fee should be waived.

2.2.4 CONCLUSIONS

In preparation for the decision, we have drawn the following conclusions:
I - The court cannot assess the validity of the contested assessment in the light of grounds other than those set out in the contextual grounds integral to the act itself, and is prevented from assessing reasons of fact and law that are not included in those grounds.
II - The relevant moment for the purposes of verifying special relationships as a requirement for the application of the transfer pricing regime is when the deal is concluded.
III - Payment of the remainder of the court fee should be waived, under the provisions of Article 6(7) of the CPR, if the amount to be paid in this regard, given the value of the case, may constitute a violation of the constitutional principles of access to the law and effective judicial protection, proportionality and necessity.

* * *

3. DECISION
In view of the above, the judges of the Tax Litigation Section of this Supreme Administrative Court agree, in conference, to uphold the appeal, revoke the contested judgement and uphold the legal challenge in the contested part.

Costs for the Defendant, with the remainder of the court fee waived.

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Lisbon, 2nd October 2024. - Francisco António Pedrosa de Areal Rothes (Rapporteur) - Anabela Ferreira Alves e Russo - José Gomes Correia.