

The non-habitual tax resident regime - Portugal

1. The fundamentals of the regime

Decree-Law nr. 249/2009, of September 23, created a new Personal Income Tax (“*Imposto sobre o Rendimento das Pessoas Singulares*”, hereinafter “IRS”) regime that targets non-resident individuals who are likely to establish a permanent or a temporary residence in Portugal – the “non-habitual tax resident regime”.

The regime is applicable to individuals who become resident for tax purposes in Portugal without having been so in the five years preceding its acquisition. Non-habitual resident individuals may enjoy such status for a ten-year period, after which they will be taxed under the standard IRS regime.

How can an individual become a resident for tax purposes in Portugal? Portuguese tax residence for IRS purposes, in a given fiscal year, may be acquired through a number of different ways, such as:

- a) Staying for more than 183 days in the Portuguese territory, whether these days are consecutive or not;
- b) If staying for a shorter period, having in the Portuguese territory, on the 31st of December, a dwelling under circumstances that allow the presumption of an intention to hold and occupy it as a place of habitual abode;
- c) Being, on the 31st of December, a crew member of a ship or aircraft at the service of an entity with residence, head office or effective management in Portugal; or
- d) Being a member of a household where one of the spouses is, on the 31st of December, a Portuguese tax resident.

The regime includes two different sets of rules, one of them applicable to **foreign-sourced passive**

income¹, similar to non-domiciled taxation regimes such as the ones of the United Kingdom and Switzerland, and the other to **active income**, in this case encompassing income derived both from foreign and domestic sources, following “impatriate” taxation regimes such as the ones existing in Spain and France.

Passive income derived by non-habitual residents will be IRS exempt (with progression) in Portugal, provided that it may be taxed in the source State under the rules of a tax treaty entered into by Portugal or, if no treaty exists, that (i) it may be taxed in the source State according to the rules of the OECD Model Tax Convention on Income and on Capital, as interpreted in the light of the Portuguese reservations on its articles and of the observations on its commentary; (ii) it is not considered to arise from a Portuguese source under the IRS Code territoriality rules; and (iii) the source State, region or territory is not included in the Portuguese tax havens’ blacklist. **The regime requires only a potential liability to taxation in the source State under the rules of a tax treaty or of the OECD Model Tax Convention, no effective taxation being thus required.** In respect of pension income, actual taxation under the rules of a tax treaty or, alternatively, no connection of the income with the Portuguese territory under the territorial scope rules of the IRS Code is required in order for the exemption to be applicable.

¹ The passive income included in this regime comprises interest, dividends, capital gains (in theory all capital gains; in practice and in most cases only capital gains on immovable property or on movable property which is part of the business assets of a permanent establishment, as one of the requirements for exemption is the liability to tax in the source State under the rules of a tax treaty or of the OECD Model Tax Convention and under both the vast majority of existing treaties and article 13 of the OECD Model only these may be taxed at the State of source) and other income from capital, income from immovable property and pensions.



Active income deriving from employment, independent personal services and royalties is subject to a different set of rules. Under it, foreign-sourced employment income will be exempt (with progression) from IRS, provided that it is taxed in the source State according to the rules of a tax treaty entered into by Portugal or, if no treaty is in place, that it is taxed in the source State and that it is not considered to arise from a Portuguese source under the IRS Code territoriality rules. Income from independent personal services and royalties will be exempt (with progression) if it may be taxed in the source State according to the rules of a tax treaty entered into by Portugal or, if no treaty is in place, that (i) it may be taxed in the source State according to the rules of the OECD Model Tax Convention on Income and on Capital, as interpreted in the light of the Portuguese reservations on its articles and of the observations on its commentary; (ii) it is not considered to arise from a Portuguese source under the IRS Code territoriality rules; and (iii) the source State, region or territory is not included in the Portuguese tax havens' blacklist. Effective taxation is therefore only required in regard of employment income. However, the independent personal services exemption will only be applicable to income derived from certain high value added activities of a scientific, artistic or technical nature, as defined by a Ministerial Order.

Income deriving from employment or independent personal services of a domestic or foreign source, but, in the latter case, not qualifying for the mentioned exemptions, will be liable to autonomous taxation at a special 20% flat rate and not to the general and progressive IRS rates (whose higher bracket is of 48% for tax year 2014 plus, for taxpayers with taxable income above the limit of the higher bracket - € 80.000 - an additional rate of 2,5% on income exceeding such amount and of 5% on income exceeding € 250.000 during the current tax

year), provided that it derives from high value-added activities of a scientific, artistic or technical nature². The State Budget Law for 2013 (Law nr. 66-B/2013, of December 31) has introduced an extraordinary surtax of 3,5%, applicable in 2013 and extended to 2014, which applies to all income obtained by non-habitual residents which is not exempt in Portugal according to the above described rules, including the employment or independent personal services' income deriving from high value-added activities of a scientific, artistic or technical nature which is liable to an autonomous taxation at a special 20% flat rate, and not to the general and progressive IRS rates. In the case of employment income deriving from high value-added activities of a scientific, artistic or technical nature, the 3,5% surcharge will be added to the 20% withholding tax rate introduced by the State Budget Law for 2012. In the case of independent personal services income of the same nature it is clear that the surcharge will only be levied upon the submission of the yearly tax return.

Non-habitual residents deriving foreign-sourced income that is IRS exempt under both these sets of rules will be allowed to opt, in its regard, for the credit method, which is the standard method for the elimination of international double taxation in Portugal. Whenever this option is exercised, the income will be taxed under the standard IRS regime, being liable either to progressive rates of up to 48% (plus 2,5% on taxable income above €80.000 and 5% on taxable income above €250.000 during 2014) or to special lower flat rates, depending on its nature.

Additionally, non-habitual residents deriving income taxed at the special 20% flat rate may also opt for the standard IRS regime in its regard. However, individuals exercising this option and also earning

² Law nr. 64-B/2011, of December 30, which approved the State Budget Law for 2012, has introduced the 20% withholding tax rate for domestic source employment or independent personal services income deriving from high value-added activities of a scientific, artistic or technical nature.



foreign-sourced income eligible for the above mentioned exemptions should be aware that it implies that all of their income will be, in this case, taxed under the standard IRS progressive rates (no flat rates whatsoever being applicable), and that the credit method will switch-over (the exemptions therefore being lost).

2. The high value added activities of a scientific, artistic or technical nature

Ministerial Order nr. 12/2010, of January 7, defined the “high value added activities of a scientific, artistic or technical nature” qualifying for the regime encompassing a wide range of professions and activities, as follows:

1 - Architects, engineers and similar technicians:

- 101 - Architects;
- 102 - Engineers;
- 103 - Geologists.

2 - Visual artists, actors and musicians:

- 201 - Theater, ballet, film, radio and television Artists;
- 202 - Singers;
- 203 - Sculptors;
- 204 - Musicians;
- 205 - Painters.

3 - Auditors:

- 301 - Auditors;
- 302 - Tax Consultants.

4 - Doctors and dentists:

- 401 - Dentists;
- 402 – Analyst Doctors;
- 403 - Surgeons;
- 404 – Board doctors in ships;
- 405 - General Practitioners;
- 406 - Dentists;
- 407 - Dentist Doctors;
- 408 - Psychiatrists;
- 409 - Gastroenterologists;
- 410 - Ophthalmologists;

- 411 - Orthopaedists;
- 412 - Otorhinolaryngologists;
- 413 - Paediatricians;
- 404 - Radiologists ;
- 405 - Doctors in other specialties.

5 - Teachers:

- 501 - University professors.

6 - Psychologists:

- 601 - Psychologists.

7 - Professional services, technicians and similar:

- 701 - Archaeologists;
- 702 - Biologists and experts in life sciences;
- 703 - Computer Programmers;
- 704 - Software consultancy and activities related to information technology and information technology;
- 705 - Computer programming activities;
- 706 - Computer consultancy activities;
- 707 - Management and operation of computer equipment;
- 708 - Activities of information services;
- 709 - Activities of data processing, hosting information and related activities; Web portals;
- 710 - Activities of data processing, hosting information and related activities;
- 711 - Other information service activities;
- 712 - Activities of news agencies;
- 713 - Other information service activities;
- 714 - Scientific research and development;
- 715 - Research and development of science physical and natural;
- 716 - Research and development in biotechnology;
- 717 - Designers.

8 - Investors, administrators and managers:

- 801 - Investors, administrators and managers of companies promoting productive investment, if allocated to eligible projects under tax benefits contracts awarded under the Tax Code for Investment, approved by Decree-Law No. 249/2009, of 23 September;
- 802 - Senior employees of companies.



3. Practical aspects of the regime

The Portuguese tax authorities issued a first ruling on May 6, 2010 (Administrative Ruling nr. 2/2010) and a second one on August 3, 2012 (Administrative Ruling nr. 9/2012).

After some legal issues regarding the application of the first ruling, the second one clarified that it is sufficient that a taxpayer annexes to its application to the regime a statement under which he solemnly declares that he or she did not fulfill the conditions to be considered a Portuguese tax resident in the five preceding tax years, either under our domestic law or by effect of a tax treaty entered into by Portugal.

Also, it must be noted that vis-à-vis investors, directors and managers of companies and “company’s senior personnel” ruling nr. 2/2010 has adopted a very restrictive view, which has remained unchanged by ruling nr. 9/2012. Regarding the first category, the ruling establishes that it is only applicable to those investing or employed in companies fully or partially owned by the Portuguese State (which is awkward since state-owned companies are clearly not the target of tax relief contracts regime; as referred above, only investors, directors and managers of companies under such contracts are included in the list of activities approved by Ministerial Order nr. 12/2010) and those in charge of a Portuguese permanent establishment of a non-resident company (which is also not understandable, as it implies that investors, directors and managers of a subsidiary are not encompassed by the regime, creating a discrimination between forms of investment). Regarding “company’s senior personnel”, the ruling established that only persons with management roles and powers to bind companies may fit into this category, which is also difficult to accept since usually only members of corporate bodies (maxime, members of the board) have such powers and the

concept of “company’s senior personnel” must naturally differ from that of “investors, directors and managers”.

Law nr. 20/2012, of May 14 - the Amended State Budget Law for 2012 -, introduced a term for the submission of applications to the non-habitual resident regime which means that applications must now be submitted until March 31 of the tax year following that in which Portuguese tax residence is acquired.

4. Procedure to register as tax resident in Portugal

Decree-Law nr. 14/2013, of January 18, has changed the rules applicable to the registration of taxpayers. One of the changes introduced by it is that non-Portuguese nationals are required to obtain a valid residence permit or residence card in order to register as tax residents in Portugal, something which was previously not required, at least in theory (the practice of most tax offices was however already aligned with that requirement).

Registering as a tax resident in Portugal is a requirement to be granted the non-habitual resident status, which means that those wishing to apply for the regime must now: (i) register as non-resident taxpayers; (ii) obtain residence permits (for non-EU nationals) and residence cards (for EU nationals); (iii) in order to register as tax residents; and (iv) only then apply for the non-habitual resident status.

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