TAX INFORMATION

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NON-HABITUAL AND TEMPORARY RESIDENTS

Administrative Order ("Order") no. 12/2010 was published on 7 January 2010. This Order approves the table of so-called "high added value" activities for the purposes of the provisions of the Portuguese *Código IRS* or, Personal Income Tax Code ("the Code"). Indeed, following the approval of the new tax system applicable to non-habitual residents, which came into being under Decree-Law no. 249/2009 of 23 September, and has been in force since January 2009, certain alterations were made to the Code. It was altered to provide that class A (salaried worker) and class B (business and professional) income derived from "high added value" activities of a scientific, artistic or technical character – such activities to be defined in an administrative order from the member of the government responsible for the revenue area (precisely the Order in question) - is to be taxed at the rate of 20% for those who are not habitually resident in Portuguese territory.

The law provides that "non-habitual residents" are those taxpayers who have not been taxed in Portugal in the last five years and who have worked in scientific professions or professions of "high technical value" for an uninterrupted period of ten years. Some countries have set up a system for "temporary non-residents" with special taxation rules for income earned by habitual residents of those countries, but who, for a fixed period - which as a general rule does not exceed five years – become residents of another country. This residence in another country is often the result of a work transfer where the taxpayer later returns to their previous country of residence (as happens, for example, in the United Kingdom).

With the coming into force of the new system, the Code now provides that non-habitual residents in Portuguese territory who earn business and professional income abroad derived from activities involving the provision of "high added value" services of a scientific, artistic or technical character, (in accordance with the table set out in the above-mentioned Order), amongst other income, benefit from the application of the exemption, in the elimination of double taxation on the said income and since, as an alternative, they may be taxed in another contracting country in accordance with any

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convention to eliminate double taxation made between Portugal and such country. Alternatively, when there is no convention, they may be taxed in another country, territory or region in accordance with the OECD's model tax convention on income and capital, as long as they do not appear on the "blacklist" (Administrative Order no. 150/2004, of 13 February) and, also, provided that the income is not considered to have been earned in Portuguese territory.

The table of activities of high added value now published includes professions from various branches of activity: architects and engineers, artists, actors and musicians, auditors and financial consultants, doctors and dentists, university professors, liberal professionals, investors, directors and managers.

From an analysis of the various professions embraced by the legislator, we can conclude that a decision was made not to include sportsmen and women. This differs from what happened in Spain where these professionals benefitted from a special taxation system which, in the end, was repealed. In effect, Spain introduced a special taxation system for foreign workers (called "the Beckham Law" because it coincided with this player being hired by a Spanish club). This system was aimed at attracting qualified professionals. The system provided for foreign workers with tax residence in Spain to benefit from a reduction in income tax, with provision being made for a tax rate of only 24% on the gross salaries of such workers. The result of this was that the rate of taxation applied to foreign workers was significantly lower that that applied to Spanish nationals doing the same work.

In terms of requirements, the Spanish system had similarities with the current Portuguese system applicable to non-habitual residents in that it required the foreign worker not to have resided in Spain in the previous ten years, to be doing salaried work in this country and also that the employer be Spanish or be a non-resident with permanent establishment in Spanish territory.

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It seems appropriate to assume that the Portuguese legislator chose not to include professions linked to sport in the table of activities in the Order now published specifically in order to avoid such criticisms. However, the doubt remains as to whether, even so, this system does not amount to effective state aid for the professions covered by it, thus operating as a "subsidy" for the respective exercise of that profession in Portugal. What is certain is that, up to now, no action has been started by the European Commission against Portugal in relation to this matter.

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