

TAX INFORMATION

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THE NEW STATE AND REGIONAL SURTAXES

A new tax was created with the entry into force on 1 July of Law 12-A/2010 of 30 June. This Law approved a set of additional measures for budget consolidation and the new tax established is known as State Surtax ("Derrama Estadual").

We must also draw attention to the fact that, unfortunately, the said piece of legislation does not contain any provision on the duration of the measure at issue. The legislature simply stated that it approves a set of additional measures for budget consolidation that aim to accelerate the reduction in the deficit that is set out in the programme for stability and growth. Unlike what happened at the time the programme itself was published, no reference is made to the duration of the corresponding measures. Regardless of the fact that it would be legitimate for the taxpayer to expect a time limit on the measure up to 2013, the legislature made no such commitment. This means that the measures will remain in force until they are repealed.

The State Surtax that has been introduced amounts to an accessory tax and not merely a dependent tax (as the principal tax on which it is based is not a dependent tax either). This is because, as the legislation in question provides, the State Surtax falls upon (part) of the taxable profit of the principal tax.

The law refers to an "additional rate" rather than to an "addition". In our opinion the latter would be more appropriate as, strictly, with additional rates the tax is assumed to fall upon the total of all the main taxes (as was the case in the previous Municipal Surtax system), while additions are assumed to be charged on the respective basis of assessment / taxable profit (as is the case with this

State Surtax and also the current Municipal Surtax system, which remains unchanged).

The State Surtax is a tax with the characteristics described above that is charged on the part of the taxable profit that exceeds €2 000 000 and which is subject to - and not exempt from - corporate income tax (known in Portuguese as IRC). The Surtax applies to taxpayers resident in Portugal whose main activity is commercial, industrial or agricultural in nature and also to non-residents with a permanent establishment in Portugal.

If the special tax framework for groups of companies (RETGS) is applicable, the State Surtax is charged on the taxable income set out in the individual periodic tax return of each of the companies in the group including the controlling company. The Surtax is not, therefore, charged on the taxable income of the group. The legislator also made it clear that the effect of any possible tax losses that arise individually in the companies at the perimeter of the group taxed in the RETGS will not be taken into account.

The State Surtax is settled in the periodic tax return on income known as "Modelo 22" and payment is made by three payments on account in July, September and December of the year in which of the taxable income in question arises. This means the total value of the additional payments on account will be 2% but split into the said three equal amounts rounded up to the nearest euro.

If there is a positive difference between the total value of the State Surtax calculated in the periodic tax return and the amounts paid on account in the return, the taxpayer must

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pay the State Surtax which is charged on this difference. The payment must be made by the last day of the period for the submission of the said return. In cases where the total value of the State Surtax established in the periodic return is lower than the total value of the payments on account, the amount of the difference calculated will be repaid to the taxpayer. In turn, if it is necessary to submit an amended return, the taxpayer must pay the State Surtax for any difference there is between the total value of the State Surtax calculated in the return and the amounts previously paid.

The State Surtax will apply to all taxable income earned in 2010, insofar as, for IRC, the taxable amount is earned in the annual period. It should be noted that although the payment of the State Surtax for the tax year 2010 will only be made in 2011, the respective payments on account are made in July, September and December of 2010 by companies that have earned taxable income exceeding €2 000.000 in the 2009 tax year. Of course, this may raise problems of retroactivity (third degree or improper) for those who consider that the taxable event does not occur at the end of the period, even though such an understanding is difficult to support in the light of the provisions of the IRC Code, which provides that the taxable event is deemed to take place on the last day of the tax period which, as a rule, is 31 December.

In the meantime, a binding notice dated 19 July 2010 has already been published by order of the Secretary of State for Tax Affairs. The notice clears up a number of doubts, particularly in relation to the period of time during which the State Surtax will apply, the calculation of the additional payment

on account to be made and the possibility of limiting the additional payments on account.

As regards the application of the State Surtax to taxpayers that have adopted a tax year that does not correspond to the calendar year, the above notice makes it clear that the State Surtax may only be applied when the tax period begins in 2010. As an example, a taxpayer whose tax year begins on 1 November 2009 will only be subject to the new provisions from the tax year that begins on 1 December 2010.

As regards the calculation of the additional payment on account to be made by entities obliged to make such payments, the binding notice also makes it clear that the amount of the said additional payment on account is 2% of the part of the taxable income that exceeds €2 000 000, relating to the previous tax period and split into three equal amounts.

Finally, since the rules for payment of IRC apply to payment of the State Surtax, the notice also makes it clear that (i) despite the fact that the first payment is obligatory, as is the case for payments on account themselves, the second and third additional payments on account may be dispensed with if the taxpayer can establish through the available documentation that the amount of the additional payment on account already made is equal to or greater than the rate of the State Surtax that will be due, on the basis of the application of a rate of 2.5% of the taxable income exceeding €2 000.000; (ii) the payment may be limited if the taxpayer can establish by the available documentation that the additional payment on account to be made is greater than the difference between the amount of the State Surtax considered due and the payments already made. In this case, the payment is limited to the said difference; and (iii) if by virtue of the non-payment or reduction in payment established under the terms of (i) and (ii) above, the taxpayer ceases to pay an amount greater than 20% of that, which in normal circumstances would have been paid, compensatory interest will be payable from the end of the period in which each payment should have been made until the time limit for sending the tax return or until the date of self-assessment payment, whichever is the earlier.

In turn, companies with their registered offices in the Independent Region of Madeira will, by virtue of the entry into force of

Regional Legislative Decree 14/2010/M of 5 August, also be subject to a new Regional Surtax. This framework for this Regional Surtax is identical to that of the State Surtax described above.

Bearing in mind the special taxation systems that exists in the Madeira Free Zone, it is natural that the question will be raised as to whether this Regional Surtax will also be payable by companies established and licensed there as from 1 January 2003 and also by companies licensed before that date that enjoy a total exemption from IRC.

In effect, the result of the Decree-Law (165/86 of 26 June) - that established the system of regional tax and financial benefits to promote and attract investment in the Madeira Free Zone is that companies in the Madeira International Business Centre indefinitely benefit from the exemption from special taxes on profits and spending. Accordingly, considering the character of this new addition and in the light of the principle of prevalence of rules of a special character over those of a normal character, it appears that companies established in the Madeira Free Zone will not be required to pay this addition to IRC.

This issue has recently been cleared up by Ministerial Order 46/2010, published in the Official Journal the Independent Region of Madeira of 18 August. The order made it clear that the regional surtax does not apply to entities licensed and operating in the Madeira Free Zone that benefit from either the exemption under article 33 of the Statute of Tax Benefits or the IRC rate reduction provided for in article 35 and 36 of the same statute.

Rogério M. Fernandes Ferreira
Mónica Respício Gonçalves
Marta Machado Almeida
Pedro Saraiva Nércio

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