



THE NEW EXTRAORDINARY SURTAX (III)

THE CHARACTERISTICS OF THE NEW TAX

The new extraordinary surtax on personal income tax (IRS) for budgetary adjustment created by Law no. 49/2011 of 7 September falls upon income earned in the current year, 2011 by those resident in Portugal for tax purposes, including non-habitual residents. The reason behind the surtax is the economic and financial crisis and the national emergency which Portugal is facing.

The features of this new extraordinary surtax mean its impact is different to that of its historic predecessor from the 80s, the “special contribution for budgetary adjustment”. It was the responsibility of companies to pay a tax of 6% on taxable income subject to corporate income tax, while a rate of 2.8% was applied to workers’ income with the exception of those on the minimum salary.

Besides its extraordinary character, the new surtax has the characteristics of an accessory tax which is close in nature to an addition, as it falls in part on IRS taxable income. It should be added that, as it is applicable with a rate, earned income allowance and its own deductions at source and varies according to the number of dependents, the new surtax is also, in this sense, an “autonomous” tax. Despite this, the question of the unity of IRS which is laid down in

the Constitution will probably be overcome by its extraordinary nature.

The new surtax has a proportional rate of 3.5%, and the progressiveness of the tax (on personal income) that the Constitution requires ends up resulting, in a way, from the application of a base exemption corresponding to the value of the national minimum salary (which means that the lower the income, the greater the impact of the deduction) and from the earned income allowance itself (proportionally greater for lower income).

This extraordinary surtax applies to all income from the categories of IRS subject to aggregation and also to all income subject to special rates, to the extent they exceed the annual value of the guaranteed minimum monthly remuneration.

For salaried employees (*trabalhadores dependentes*) and those on pensions, the new extraordinary surtax applies

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The application of the surtax before the end of 2011 and its application to income earned in the first half of the year makes it “retrospective” (in the third degree). This situation also frustrates the expectations of those who had been counting on a lower rate which will be easier to justify in the case of income that is not a capital gain.

right away in 2011 through a deduction made at source with the nature of a payment on account. The deduction is made in December and an adjustment is made when the tax return for IRS is delivered in 2012.

In the case of self-employed workers (*trabalhadores independentes*), both those using the simplified system for determining taxable income and those using the system of organised accounting will only be affected by the application of the extraordinary surtax in 2012 after delivering their tax return for 2011. This means they will not suffer any increase in tax this year as a result of tax being withheld at source. All this means that salaried employees and pensioners end up being penalised because they have to pay their income to the State even though they may be reimbursed in the following year if the amount withheld at source exceeds the extraordinary surtax that is actually due.

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We should also not neglect the principle that requires all taxes to be proposed in a Government budget and approved by Parliament. This means that – as we are dealing with a new tax with its own rules, independent from IRS – an “amending” budget must be passed for the tax to be charged right away this year.

SOME PRACTICAL ISSUES

The new extraordinary surtax on IRS will fall on the part of the taxable income – that is, before earned income allowances but after specific deductions – that results from aggregation, plus the following income:

- bonuses earned for work when they are not paid by the employer or by any entity in a group, control or holding relationship with the employer;
- the positive balance from capital gains and losses resulting either from the transfer for value of corporate holdings, including redemption and amortisation with reduction of capital, and from other securities. This also includes the value attributed to associates as a result of sharing which, under the IRC (corporate income tax) Code, is considered to be a capital gain either from operations related to derivative financial instruments (except for earnings from operations exchange swap, interest rate swap, interest rate and currency swap and foreign exchange forward contract operations which are considered to be capital income) and also from operations relating to autonomous warrants and to certificates that give the holder the right to receive a value of a specific underlying security (with the exception of income arising from certificates that guarantee the holder the right to receive a minimum value greater than the value of the subscription);
- net income from categories A (salaried employment) and B (self-employment) earned from high added value activities or a

scientific, artistic or technical nature by persons not habitually resident in Portugal; and

- unjustified increases in wealth with a value greater than €100 000.

This means that, although the fact that the new extraordinary surtax does not apply to income from non-aggregated capital reveals some consideration for savings and bank financing, it is certain that the reduction in finances for families with the increase in the tax burden accompanied by the increase in spreads and interest rates may, even so, have an impact on mortgage credit and, ultimately, the financial system.

As we have already mentioned, the extraordinary surtax is 3.5%. An amount corresponding to 2.5% of the value of the guaranteed minimum monthly remuneration (€485 in 2011) is allowed against earned income for each dependant or child who is not a taxable person for IRS purposes. This means that the amount deductible for each dependent or child will be €12.13. The amounts previously withheld at source (in December) will also be deducted and when they

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exceed the surtax owed by the taxpayer in question, that taxpayer will have the right to a refund of the difference.

In operational terms, provision is also made for entities that have to pay salaries to employees and pensions to be required to withhold an amount corresponding to 50% of the part of the Christmas bonus, or the additional payment corresponding to the thirteenth month which, after the deduction of IRS at source and the mandatory deductions for social security are made, exceeds that value of the guaranteed minimum monthly remuneration. For this purpose, when the social security is responsible for the payment or making available of the Christmas bonus or the additional payment corresponding to the thirteenth month, it is deemed to be covered by the scope of application of the extraordinary surtax.

Let us imagine, for example, a salaried employee living in mainland Portugal, married with one dependant, who earns a Christmas bonus of €1000.00. Considering that the Christmas bonus is always subject to an autonomous deduction at source for IRS, a value of €80.00 will be withheld in accordance with the tables in force. €110.00 must also be deducted for the mandatory social security contribution. This means that the amount of the Christmas bonus net of the IRS deduction at source and the mandatory social security contributions will be €810.00 which exceeds the value of the guaranteed minimum monthly remuneration for 2011 by €325.00 and considering that the deduction at source on account of the extraordinary surtax corresponds to 50% of this value, the amount at issue will be €162.50.

At the end of the day, in other words, when the tax authorities deal with the settlement of the IRS due, and after delivery of the income tax return for 2011 (to be delivered in 2012) the final calculation will be made. The surtax of 3.5% will be applied to the taxable income subject to aggregation and to the special rates for the household after specific deductions less the guaranteed annual minimum remuneration relative to each taxable person. The earned income allowance for the extraordinary surtax will be applied to the amount

calculated above in accordance with the number of dependants in the household and the amount withheld at source with reference to December 2011 on account of the extraordinary surtax eventually due will also be considered and this may even result in a rebate in favour of the salaried employee.

Despite the controversy, salaried workers and pensioners, and the entities that pay them must count on this measure for the coming month of December. It is important for the said entities to bear in mind not only the obligation incumbent on them to withhold the tax at source - which implies adjustments in terms of processing of salaries for the last few months of the current year but also the other accessory obligations they must meet and which, as we have seen, extend into 2012.

CIRCULAR N.º 23/2011, OF 3/10 (DEDUCTION AT SOURCE)

In this context and, in particular, as regards accessory obligations applicable to the entities that pay the income in question, the tax authorities have recently published Circular no. 23/2011 which clarifies some relevant points.

In the Circular the tax authorities make it clear that the deduction at source of the extraordinary surtax for IRS must be made by the entities that pay income to salaried workers and pensioners, whether or not those entities use the organised accounting system or not, at the moment at which such income becomes due. This means the deduction must be made even if the income has not been paid or made available under the terms

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of the applicable legislation and the Circular specifies that this will occur in November for public workers and pensioners covered by the Caixa Geral de Aposentações, and in December, for employees covered by the Employment code and the remainder of pensioners.

However, it should be added that if the income in question is paid or made available to the persons to whom it is due prior to the moment at which it becomes due under the terms of the law, the deduction at source should be made at the moment this income is paid or made available.

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Considering that the payment of the amounts withheld must be made within the special period of eight days from the date on which the deduction is made and, in any event, no later than 23 December 2011, the tax authorities have also made it clear that, if the payment of the Christmas bonus is made between 16 and 30 December, the calculation of the deduction of the surtax and the payment of the respective amount to the State must be made before the payment of the bonus at the time the right to receive the Christmas bonus takes effect (15 December under the Employment Code). In the same way, if the Christmas bonus is not paid in 2011, the calculation of the deduction surtax must still be made at the moment the right takes effect, that is, on 15 December 2011.

In light of the above, we can see that the tax authorities are now communicating the understanding under which, in any of the situations foreseen, including the cases in which the Christmas bonus is not paid by 23 December or even in 2011, the total or partial failure to pay the amounts in question by the above deadline amounts to an administrative offence or a tax crime under the general regulations on tax offences. However, this understanding seems to give rise to some difficulties in terms of conforming with the Constitution, because it goes beyond the true scope of the crime of abuse of trust and of a tax offence, in that, in situations

in which the Christmas bonus is not actually paid and, consequently, the deduction at source is not actually made by the paying entity, there can be no question of having appropriated the tax.

The Circular also makes it clear that for the purposes of paying the amounts withheld, the item "112 – sobretaxa extraordinaria" has been added to the declaration for payment of IRS deductions at source.

Finally, the tax authorities have pointed out that the amounts deducted for the extraordinary surtax must also appear in the declaration form "modelo 10" to be filed by the entities paying the income in question by the end of February 2012. These amounts must also appear in the documentary evidence - in respect of amounts paid and amounts retained on any basis - given to the taxpayers (that is, to the employees themselves) by 20 January 2012.

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