TAX INFORMATION

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THE NEW SPECIAL REGIME FOR TAX REGULARISATION (RERT III)

As with the 2005 "Rectification Budget" (RERT I) and the 2010 State Budget Law (RERT II), the 2012 State Budget Law provides for a new Special Regime for Tax Regularisation (RERT III) covering assets held outside Portugal. RERT III applies a new special rate of 7.5% - in place of the 5% rate in RERT II –along identical lines to the earlier regime but providing that it is no longer necessary to repatriate the regularised assets to Portugal.

Individuals and legal entities owning assets – that consist of deposits, deposit certificates, capital holdings, securities and other financial instruments, including life insurance policies linked to investment funds and capitalisation operations in the life field - that were not in Portuguese territory on 31 December 2010 can benefit from this regime.

The regulations for RERT III have just been revealed with the publication of Order in Council no. 17 – A/2012 of 19 January, which approved the model form for the Tax Regularisation Declaration together with the respective instructions on completing it. Such Order in Council also clarified some aspects of the new regime.

The declaration form can be obtained by printing on A4 paper from the site of the Tax and Customs Authority (*Autoridade Tributária e Aduaneira*) (www.portaldasfinancas.gov.pt), and must be presented in triplicate with one copy for the Bank of Portugal, another for the credit institution involved and the third for the taxpayer after authentication by the said credit institution.

The Tax Regularisation Declaration, together with the documents proving ownership by the taxpayer in question or their capacity as beneficial owner and of the deposit or registration of the assets appearing in the declaration now approved, must be filed by 30 June 2012 with the Bank of Portugal or another bank established in Portugal. After confirmation of the payment, the declaration has the following effects in relation to the assets appearing in it and the respective income from those assets: (i) the extinction of any tax obligations in relation to the said assets and income for taxation periods that have ended by 31 December 2010;

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(ii) the exclusion of liability for any tax offences that result from unlawful conduct connected to the said assets or income. The regularisation declaration may not be presented as a relevant indication or element of proof for the purposes of any tax, criminal or administrative proceedings;
(iii) The establishment of definitive proof for the purposes of excluding the application of indirect methods when the taxpayer displays indications of wealth that call into question the truthfulness of the income they have declared.

It should be noted that the consequences provided for in the event of tax regularisation of assets held abroad as referred to above do not take effect when, at the date of presentation of the declaration, inspection proceedings or any other type of proceedings to establish the tax situation of the taxpayer have already been started. The same applies when criminal or administrative proceedings have been started under the applicable law in respect of assets that can benefit from RERT III and the taxpayer is already aware of these proceedings.

The payment associated with the tax regularisation in this exceptional regime corresponds, as we have said, to a rate of 7.5% and must be made at the moment of and simultaneously with the presentation of the declaration referred to above or within 10 days of it being filed.

The assessment of the amount to be paid by application of the said rate to the value attributed to the assets declared will, in turn, be made in the regularisation declaration itself (Table 3). An assessment should be carried out for each declaration presented.

The value of the assets appearing in the Tax Regularisation Declaration to which the said rate of 7.5% applies must be determined in accordance with the following rules, with reference to the date of 31 December 2010: (i) for deposits in financial institutions, the amount of the respective balance, (ii) for capital holdings, securities and financial instruments quoted on a regulated market, the value of the latest quotation, (iii) for units held in collective investment undertakings not quoted on a regulated market, as well as life insurance policies linked to investment funds, the cash surrender value, (iv) for life capitalisation operations and other capitalisation instruments, the capitalised value and (v) in other cases, the value that results from the application of rules for determining the tax value as set out in the Stamp Duty Code or the respective acquisition value, whichever is the greater.

When the said Declaration is filed, original documents or certified copies must be presented to provide evidence of the following: (i) direct or indirect ownership, as beneficial owner, of the assets in question as at 31 December, 2010; (ii) details of the value of the declared assets (calculated in accordance with the above rules); and (iii) identification of the deposit, contracting or issuing institution including the registered office, central management or permanent establishment to which the deposits, contracts or issues are attributable.

It should also be noted that the failure to file the Tax Regularisation Declaration for the said assets, as well as any omissions or inaccuracies in it, imply, in relation to any assets not declared or any omissions or inaccuracies in relation to them, an increase of 60% – rather than the 50% provided for in RERT II – in the tax that would be due for the income corresponding to the said assets.

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It is important to note that – unlike RERT II - RERT III does not require the repatriation of the capital as a condition for the application of the Tax Regularisation Regime. This means it is no longer necessary to transfer the declared assets to an account open in the name of the person making the declaration at a credit institution domiciled in Portugal if those assets were in countries outside the European Union and the European Economic Area.

The Order in Council referred to above also confirms that the ownership of the assets that can be subject to regularisation under RERT III may be direct or indirect. The regime covers assets that the taxpayer has the right to use and enjoy, specifically assets held through a trust, a fund, investment instrument or contract (for example, a beneficial ownership contract), regardless of its legal form. RERT III also cover assets held by an entity acting as a proxy, fiduciary agent or nominee.

The tax identification numbers of the owner and, if appropriate, the representative, are required to identify the person making the declaration and the assets in the declaration must be described individually.

Furthermore, any documents proving the assets declared that are issued by the depositary or contracting entities in English may be presented in that language which is the only language accepted besides Portuguese.

The declaration must be signed by the taxpayer or their representative, failing which it may be refused.

The Bank of Portugal is named as the proper institution to keep all tax regularisation declarations and respective documents presented under RERT III in its archives for a minimum period of ten years. As all other banks involved in those processes, the Bank of Portugal must ensure the confidentiality of the information provided.

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This means that, until the publication of a new legislative instrument, the instructions that must be followed are those appearing in Circular Letter no. 13/2010/DET of 11 June which was issued to govern the operation of the previous regime, RERT II.

In the said Circular Letter, the Bank of Portugal determined, in compliance with the legislation referred to, that all amounts paid to credit institutions must be transferred exclusively to the Bank of Portugal within a period of 10 business days of the amount being received.

The Bank of Portugal had also determined that in situations in which the taxpayer opts to file the Tax Regularisation Declaration with a credit institution, that institution must send the original declaration as well copies of the supporting documentation to the Bank of Portugal, by post or by hand, within 10 business days of the date the declaration was received.

A list of purely operational procedures to be followed upon receipt of the Tax Regularisation Declaration and the corresponding payment was published as an annex to the circular. This list makes it clear that as there is no classification list of “countries and territories deemed to be non-cooperative” by the Financial Action Group (Grupo de Acção Financeira /GAFI), no limit will be set in this context. In face of the elimination under RERT III of the demand for repatriation of capital located in States that are not members of the European Economic Area, the provisions that govern the way in which repatriation should be carried out (in particular, the definition of the countries that make up the European Economic Area) no longer have any practical application.

It should be recalled that under RERT II the Secretary of State for Tax Affairs (“SSTA”) issued Legislative Order 1014/2010-XVIII with a view to clearing up the various doubts that had been raised in respect of that regime. This Order continues to apply to RERT III, as approved in the 2012 State Budget Law, with the exception of the provision on repatriation of capital for the reasons already mentioned.

This means, in particular, on the question of determining the value of the acquisition to be taken into consideration for the purposes of future capital gains for tax purposes at the time of the transfer for value of the assets that are subject to RERT III, it is deemed that this value corresponds to the one that served as the basis for this regularisation and was subject to a rate of 7.5%. Furthermore, the date of acquisition for the purpose of calculating future tax results is deemed to be 31 December 2010.

The SSTA’s Legislative Order also makes it clear that in valuing assets covered by the regime for the purposes of regularisation, any costs the taxpayer has incurred in acquiring the assets to be regularised are irrelevant. In the absence of any later provision, this rule remains in place and is fully applicable to the regime defined in RERT III.

Moreover, it should be noted that most of the clarifications appearing in the said Legislative Order have already been incorporated both into the RERT III regime and Order in Council no. 17 – A/2012 of 19 January.

This means that, besides what is said above on indirect ownership of the assets, a subject that is explained in the Order in Council in exactly the same way as the SSTA’s Legislative Order, the Order in Council also regulates - again in the same terms as the SSTA’s Legislative Order - the issue of co-ownership of assets. It distinguishes the rules that apply, depending on whether it is a question of deposits or of capital shares or other indivisible financial instruments, in the following terms: (i) in the first case, these assets must be declared by the co-owners in their respective share and the document proving ownership must expressly mention that the assets are held in this capacity; (ii) in the second case, any individual or legal entity that is a co-owner wishing to benefit from this regime must first of all divide the asset that is held in common.

It should also be noted that, in addition to the advantages associated with the effects and implications of using the regime mentioned above, the decision to regularise the assets held abroad by the taxpayer on 31 December 2010, seems, to the best of our knowledge, to prevent the tax authorities from questioning the origin of those assets. Nevertheless, duties are imposed on credit institutions by the Scheme for Prevention and Suppression of Laundering of Benefits of Illicit Origin (i.e. the duties of identification, investigation, refusal, conservation, examination, communication, abstention, collaboration, confidentiality, control and training), with a view to preventing the use of the financial system for money laundering and the financing of terrorism.

If the taxpayer elects not to use this scheme and has assets abroad and does not declare the income earned to tax authorities when this income should be declared and taxed in Portugal under domestic tax law, the taxpayer will be liable to tax authorities not only for the taxes that were not paid to the State, but also for late-payment interest calculated on a daily basis from the end of the deadline for filing a tax return until the date on which the unpaid tax is finally paid.

In this respect, of special significance is the new limitation period of twelve years on the right to tax assessment approved by the 2012 State Budget Law, whenever that right refers to chargeable events connected to a country, territory or region subject a more clearly favourable tax regime, appearing on the list approved by the Order of the Minister of Finance (currently Order in Council no. 292/2011), which should be declared to the tax authorities but are not.

It should be added that any unlawful act in respect of taxes that is committed by the taxable person can give rise to criminal and administrative

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liability under the General Regime of Tax Offences, especially for tax fraud, punishable by imprisonment up to three years or fine of up to 360 days (this is not punishable under criminal law if the unlawful advantage in terms of assets is less than €15 000).

If the conduct in question does not amount to a tax crime, the taxpayer will be liable for an administrative offence for the failure to pay the tax due to the tax authorities. This type of offence is punishable by a fine ranging from the value of the missing payment to double that value. However, if the said offence is attributable to negligence, a fine of between 15% and half of the tax due will apply (in the case of an individual), or between 30% and the whole of the tax due (in the case of a legal entity).

Finally, it should be noted that since the right of the tax authorities to assess additional taxes expires under the General Tax Law if the assessment is not properly notified to the taxpayer within four years, the failure of the taxpayer to pay tax to the State in the financial years before 2008 cannot, in principle, now be called into question by the tax authorities.

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