CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | TAX

NEWSLETTER TAX | April, 2014

NEWSLETTER TAX

I NATIONAL LEGISLATION

Ministry of Finance
Ordinance No. 77-A/2014, of 31 March

Regulating the form of attribution to the Autonomous Regions of Azores and Madeira of their income from Value Added Tax ("VAT"), determined through a *per capita* regime, adjusted by means of the differential between the regional and the continental VAT rates, in accordance with the provisions of Article 28 of Organic Law No. 2/2013, of 2 September.

A transfer on a monthly basis is maintained, based on the provisional value determined in accordance with the formula established, which will be subject to the adjustments to be made in the following year, after the closure of the State General Account, and which correspond to the balance between the provisional and the effective values of the year to which the tax respects.

Ministry of Foreign Affairs
Notice No. 48/2014 of 3 April

Making known that the formal requirements for the entry into force of the Convention between the Republic of Portugal and the Republic of Peru to avoid double taxation and prevent tax evasion in respect of income ("CDT"), signed in Lisbon on 19 November 2012 have been complied with.

The CDT entered into force on 12 April 2014, and will take effect:

- with regard to Portugal:

- In respect of withholding taxes, where the taxable fact occurs on or after 1 January 2015;

- In respect of remaining taxes, with regard to income produced in any tax year starting on or after 1 January 2015;

- with regard to Peru:

- In respect of Peruvian taxes and amounts paid, credited to the account or accounted for as charges, on or after 1 January 2015.

II ADMINISTRATIVE INSTRUCTIONS

Tax and Customs Authority
Personal Income Tax Services
Circular-Letter No. 20171/2014 of 25 March 2014

The Circular-Letter above indicates the rates applicable and the scope of exemption from the additional local tax (*Derrama Municipal*) charged in respect of 2013 in the Councils of Vale de Cambra and Viana do Castelo, to replace the data showing on the table attached to the previous Circular-Letter, with No. 20170, of 14 March 2014.

For the purpose of the application of the same table and in order to dispel possible doubts, it further reaffirms that:

- The rate of additional local tax applicable to taxpayers whose turnover in the previous period exceeds €150,000.00, is the normal rate;

- The rate of additional local tax applicable to taxpayers whose turnover does not exceed €150,000.00, but is higher than the scope of exemption referred to in the corresponding table, is the reduced rate;

- Taxpayers whose turnover in the previous period does not exceed the amount indicated in the column "scope of exemption" are exempt from the additional local tax.

Tax and Customs Authority
Binding Information
Case No. 5684, with agreeing ruling of 6 March 2014, published on 27 March 2014
Rates – Preparation of applications and follow up of investment projects relating to agricultural production, made under the PRODER

In this binding information, the Tax Administration ("AT") clarifies that the provision of services of preparation of applications and follow up of investment projects relating to agricultural production, made under the PRODER, does not fall within List I attached to the Value Added Tax Code ("CIVA").

The AT considered that, for the services provided by taxpayers to be regarded as technical assistance for the purpose of the application of the reduced rate provided for in item 4.2(f) of List I of the *CIVA*, it is not enough that the recipients are agricultural producers, or that the services translate into the preparation of applications and the follow up of investment projects relating to agricultural production. The AT clarified that those services must necessarily, directly and unequivocally contribute to "*agricultural production*".

Accordingly, the AT considered that the applicability of the reduced tax rate does not cover any services that contribute in any way to the "*agricultural activity"* of the taxpayer as a whole, albeit possibly considered by the latter to be technical assistance.

On the contrary, the AT considered that its applicability is limited to technical assistance services that contribute to "*agricultural production*", and does therefore not cover, for instance, according to the understanding of the above-mentioned AT, a whole set of financial and agricultural management services, such as the services relating to the application of projects relating, in particular, to investment, aids or agricultural projects (afforestation, clearance, etc.).

However, the AT warned that it is important to establish, on a case-to-case basis, whether the technical assistance services are normally used in the agricultural production and contribute directly and unequivocally to the "*agricultural production*", making a distinction with other services that, although they can contribute to the *"agricultural activity"* of the taxpayer, only contribute to the "*agricultural production*" indirectly.

In this manner, the AT considered that the services mentioned by the taxpayer, should be taxed at the normal 23% rate, provided for in Article 18(1)(c) of the *CIVA* on account of their not being provided for in any item of List I or II, attached to the *CIVA*.

Tax and Customs Authority
Instruction Sheet (*Ficha Doutrinária*)
Case No. 8153/2012, with agreeing ruling of 20 of March 2014, published on 16 April 2014
Residence certificate for tax purposes of a partnerships with legal personality

In this Instruction Sheet, the AT analysed the form in which exemption from withholding tax is documented where the entity that receives the income is a *partnership* with legal personality, known as "limited liability partnership" ("LLP").

In the case under consideration, the English Tax Authorities, in their reply to a request for the certification of the Mod. 21-FRI form, for the purpose of documenting the application for exemption from withholding tax, claimed that the residence certificate for tax purposes could not be issued for a United Kingdom law firm, on account of the latter having the characteristics of a *partnership*, subject to the tax transparency regime, but identified all of its partners and confirmed their residence for tax purposes in the United Kingdom.

Considering that the Portuguese law does not have any special rule to prove that the requirements for the application of the provisions of a CDT when we are dealing with this type of entities, the AT stated, in this connection, that the way to prove that the said requirements are fulfilled, in accordance with the provisions of Article 98 of the Corporate Income Tax Code and Article 18 of Decree-Law 42/91, of 22 January, for LLPs, is by producing a single mod. 21-RFI form, with the information common to all the recipients of the income, attaching:

- A list with the identification details of the beneficial owners of the income;

- A declaration to the effect that the beneficiaries identified in the list attached are partners of a LLP and stating the percentage held by those partners in the capital of the LLP (this declaration may be issued by the competent authorities of the United Kingdom or, as an alternative, it may be supplied by the taxable person him or herself and, in case of doubt, its truthfulness may be proved by means of the mechanism for the exchange of information provided for in the DTC between Portugal and the United Kingdom;

- A certificate issued by the competent authorities of the United Kingdom, certifying that for the purposes of the CDT between Portugal and the United Kingdom, the LLP is not considered a UK resident and that the beneficiaries identified in the list attached are UK resident for tax purposes, in accordance with Article 4 of the CDT between Portugal and the United Kingdom, and are subject to income tax there.

Tax and Customs Authority
Instruction Sheet (*Ficha Doutrinária*)
Case No. 794/2010, with agreeing ruling of 20 March 2014, published on 16 April 2014
Residence certificate for tax purposes of a partnerships without legal personality

In this Instruction Sheet, the AT expresses its understanding that, in the case of a partnership without legal personality ("ordinary partnerships" and "limited partnerships"), the way to prove that the requirements of application of the provisions of a CDT are fulfilled, for the purposes of Article 98 of the Corporate Income Tax Code and Article 18 of Decree-Law 42/91, of 22 January, is by producing a Mod. 21-RFI for each partner of the company.

However, considering that the there can coexist in the partnership partners that are resident and partners that are not resident, the proof cannot be made solely by producing the form by each resident partner, rather it will be necessary to know the situation of all the partners.

Thus, the AT expresses the understanding that the certification of the residence for tax purposes of the partners residing in that State by means of a document (declaration) issued by the corresponding tax authorities, identifying all the partners and mentioning those that are considered to be resident and those that are not, should be accepted.

With regard to partners that are not resident, their percentage in the partnership must be indicated, since the exemption from withholding tax can only be applied pro rata to the percentage held by the resident partners in the overall partnership.

Finally, this procedure must be completed with the partners delivering the Mod 21-RFI form duly filled in, but certification by the tax authorities is not required.

III NATIONAL CASE LAW

Constitutional Court
Judgment No. 281/2014, published on 25 March 2014
Case No. 204/14

In this Judgment, the Director General of the Tax and Customs Authority, pursuant to Article 76(4), of the *Lei da Organização, Funcionamento e Processo do Constitutional court ("LTC")*, objected to the ruling issued by the Administrative Arbitration Centre, which did not admit the appeal it had lodged to the Constitutional Court.

The question settled by the Arbitration Tribunal was which is the taxable value to be taken into account to establish whether properties not divided into horizontal property but consisting of several floors and rooms used independently are subject to item 28 of the General Stamp Duty Scale: the sum of the taxable value of the asset attributed to the various parts or floors of the property (global taxable value of the asset) or, rather, the taxable value attributed to each part or floor capable of being used independently.

The Arbitration Tribunal considered that the criterion sought by the Tax authority, to consider the value of the sum of the taxable values attributed to the parts, floor or rooms used independently, on the grounds that the property is not divided into horizontal property, has no legal support and is contrary to the criterion applicable in the scope of Municipal Tax on Real Property and, by reference, in connection with Stamp Duty.

The Arbitration Tribunal further considered that the adoption of the second criterion sustained by the Tax Authority violated the principles of tax legality and equality, as well as the principle of prevalence of material truth over the formal legal reality.

It should be noted that, in the case of this process, the property in question is divided into vertical property and has 10 floors and rooms used independently, a large part of which are for residential purposes, and none of the floors has an asset value of €1,000,000.00 or more, whereupon the Arbitration Tribunal concluded that the legal requirement for the application of the stamp duty set out in Item 28 of the Stamp Duty Scale was not met.

In the appeal in question, the Constitutional court eventually considered that the requirements for a review of the constitutionality in the concrete case were not met. Thus, the Constitutional court did not issued a material ruling on the matter.

On the one hand, the subject of the appeal lodged by the Tax Administration did not have a legislative nature, and the review of the constitutionality must necessarily focus on legal provisions and is not an appeal against decisions.

On the other hand, the appeal in question did not comply with the specific pre-conditions set out in Article 70(1)(a) of the *LTC*, pursuant to which it had been brought.

Therefore, since the decision appealed against had not refused to apply any provision on the grounds of its unconstitutionality, the appeal could also not be upheld for that reason.

North Central Administrative Court
Judgment of 27 March 2014
Case No. 00493/13.6BEVIS

The North Central Administrative Court ("TCAN") was requested to rule, among other matters, on the specific reasons that could justify the decision of the Tax Administration to gain access to bank information or documents, regardless of the consent of the taxpayer, in accordance with the provisions of Article 63-B(4) of the General Tax Law ("LGT").

In the case under consideration, the court considered that it was a sign that the income declared by the taxpayer was not real, and, consequently, that it was a reason for the Tax Administration gain access to the bank information and documents of the taxpayer, a variation of the income from interest earned from deposits that could not be justified with the income declared for the year in question, with the investment income in the previous year and with the variation of the remuneration conditions of those deposits.

Accordingly, the North Central Administrative Court concluded that the fact that the value of the income from capital could not be justified through the facts referred above is a sufficient sign of the untruthfulness of the income declared and, accordingly, it justifies gaining access to the bank information or documents regardless of the consent of the taxpayer.

North Central Administrative Court
Judgment of 27 March 2014
Case No. 00798/09.0BEBRG

The court analysed whether it is possible to deduct from the Personal Income Tax, alimony paid to children of age, where the ratifying sentence provided for alimony while the child was still a minor.

Despite the fact that Article 1880 of the Civil Code provides that the obligation to pay alimony to the child of age should be maintained until the latter has finished his or her vocational training, the court considered that the interested party should have to prove the pre-conditions on which recognition of the alimony depends, that is, prove that he or she had not finished his or her vocational training, substantiating his or her need and the means of the parents.

The court considered that alimony paid to children above the age of 18 is only deductible for tax purposes where there is a ratifying sentence or agreement that so declares expressly, since the pre-conditions on which the compliance with the alimony obligations depends are different in the case of minors or children who are of age.

Accordingly, the TCAN clarified that the above mentioned alimony agreement is not enough, nor does it have any automatic effect, as the same comes to an end when the child becomes of age, unless the child applies for the same to be maintained and provides evidence of the corresponding pre-conditions.

The court also highlighted that this interpretation does not in any way violate the constitutional principles of the legal security and the protection of trust, both embodied in Article 2 of the Constitution of the Portuguese Republic, since the agreement in question had come to an end once the child had become of age, and for that reason, it could not produce any legal effects.

South Central Administrative Court
Judgment of 27 March 2014
Case No. 06447/13

The South Central Administrative Court ("TCAS") ruled on the calculation of the additional pay, consisting in the acquisition by the employee or by a member of the corporate body, for a price lower than the market price, of any vehicle that originated costs for the employer.

On the date of the facts of this specific case (year 2001) the income arising to the employee or the member of the corporate body from the acquisition of vehicles that had originated costs for the employer corresponded, in accordance with the provisions of Article 24(6) of the Personal Income Tax Code, to the positive difference between the average market price of the vehicle considered by the associations of the motor vehicle sector and the sum of the annual incomes subject to tax as income arising from the granting of the use plus the amount paid by the employee as purchase price.

The court thus considered that the legislator made a clear choice for an economic equivalence criterion and, therefore, if, when determining the income arising from such specific pay in kind it is not possible to use the criterion for that purpose, since, in this case, the associations of the motor vehicle sector had no data on the market value of the vehicle, the Tax Authority had to accept such impossibility and refrain from imposing the tax.

The court clarified that the Tax Authority cannot resort to criteria that the legislator clearly did not choose and could have chosen. Thus, since the correction underlying the assessment challenged was based on a criterion devoid of any legal support – the Tax Authority had compared the devaluation of the car taken into account by the party that had brought the challenge, of 89%, with the one established in the devaluation table of Decree-Law No. 214/97 of 16/08, in conjunction with the provision of the Insurance Institute of Portugal No. 14/97-R, of 50% - the court concluded that the Tax Authority had breached the provisions of article 24(6) of the Personal Income Tax Code (with the then applicable wording).

It should be noted that, at present, the criterion for the calculation of this income, provided for in Article 24(6) of the Personal Income Tax Code, no longer requires that the average market value be the one taken into account by the associations of the motor vehicle sector, and the tax legislator has clarified that the market value to be taken into account must be the one that corresponds to the difference between the purchase value and the product of that value by the devaluation coefficient set out in the Ordinance of the Ministry of Finance.

Administrative and Tax Arbitration Centre
Decision of 19 December 2013, published on 11 April 2014
Case No. 83/2013

The Tax Arbitration Tribunal ruled on whether the tax neutrality regime of a division-merger operation can include the transfer of a tax benefit relating to the net creation of jobs.

In the case under consideration, the Tax Authority had considered that, in a division-merger operation, the acquiring company could not be entitled to the increase of the costs borne with the employees resulting from the net creation of jobs in the split company and who had been transferred to the acquiring company.

The Arbitration Tribunal argued that a company that receives from another company, either by hiring out or through the transfer of the establishment, employees in respect of whom increased employment costs were being deduced, on account of their having been hired in accordance with the requirements provided for in Article 19 of the Tax Benefit Code ("EBF"), cannot continue to deduct employment costs relating to the employees in question by applying the same increase scheme that was being applied and for the period of validity of the benefit to which the split company was entitled.

The court considered that the fact that the transfer of employees had taken place in the context of a division-merger operation, carried out under the tax neutrality regime, has no influence whatsoever on the solution, because the legal framework provided for in Article 19 of the Tax Benefit Code does not accompany the employee, regardless of whether he or she continues in the same post and in the same establishment. The Arbitration Tribunal clarified that this is a benefit that aims to create new jobs, and its purposes is not to benefit the transfer of employees between companies.

Accordingly, the court concluded that the employee does not carry the benefit with him or her, and that any other company to which he or she is transferred must, in turn, comply the preconditions established by the Tax Benefit Code concerning the net creation of jobs, if it wants to be entitled to the same benefit.

IV OTHER

Clarification concerning the benefit of the E-invoice (15% of the VAT) for personal income tax purposes
Published on *Portal das Finanças* on 1 April

The deduction of the amount corresponding to 15% of the VAT borne in the invoices of the sector of maintenance and repair of cars, of motorcycles, its parts and accessories, accommodation, catering and similar sectors and the activity of hairdressers and beauty salons, provided for in Article 66-B of the Tax Benefit Code, is automatically assumed in the personal income tax assessment, no amount being recorded in the Mod 3 return, since the Tax Administration already has all the information necessary for that purpose.

CONTACT

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL
Sociedade de Advogados de Responsabilidade Limitada

LISBOA
Praça Marquês de Pombal, 2 (e 1-8º) I 1250-160 Lisboa I Portugal
Tel. (351) 21 355 3800 I Fax (351) 21 353 2362
cuatrecasas@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com

PORTO
Avenida da Boavista, 3265-7º I 4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com

---
