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Contents

WAIVE OF BANKING SECRECY

UNJUSTIFIED ASSET INCREASES

LAW NR. 94/2009 OF SEPTEMBER 1ST

Law 94/2009 of September 1st has approved measures for waiving the banking secrecy, as well as the taxation at a special rate of unjustified asset increases higher than € 100.000,00, with alterations to the IRS Code (taxation of individuals), to the General Tax Statute (LGT) and to the General Regimes of Credit Institutions and Financial Companies.

There are four areas of changes introduced by the Law:

- Taxation of asset increases over € 100.000,00;
- Waive of banking secrecy;
- Duty of identification of foreign bank accounts;
- Duty of information by financial institutions on transfers to countries, territories or regions with privileged and more favorable taxation.

We will analyze the main points of the alterations and the new dispositions.

1) Unjustified asset increases over € 100.000,00

The regime of indirect evaluation of the taxable income was already in force for cases of asset increases, which would reveal a disproportion higher than 50% for less in relation to a standard income defined in a table foreseen in nr. 4 of article 89º A of the LGT, and related to the acquisition of properties, cars, pleasure boats, private airplanes and loans.

It was now added the asset increase of € 100.000.00, having paragraph f) of article 87º of the LGT been modified, which has now the following wording:

"The indirect evaluation may only be made in case of:

f) Increase of assets or expenses made, including donations of a value higher than € 100.000,00, which take place with the lack of presentation of the declaration of income or with the existence in the same period of taxation of an unjustified divergence with the declared income."

Therefore, it is necessary, either the absence of the declaration of income, or the existence of an unjustified divergence, being both related to the same tax period.

The previous regime in force before this paragraph f) already foresaw the indirect evaluation, if there was a non justified divergence of at least 1/3 between the declared income and the increase of assets or evident spending.

There was a difficulty in applying the criteria which regulated the divergence in the previous wording, which definitely exists with the present modification, once such criteria is defined in the new wording of number 11 of article 89º A of the LGT, which establishes that when there is an indirect evaluation, in case of f) of number 1 of article 87º, the same must be made in the scope of a procedure, which includes the investigation of bank accounts, and within the procedure the tax payer may regularize his tax situation, identifying and justifying the nature of the non disclosed income, and correcting the declaration of the respective periods.

It is not clear whether the case of voluntary correction of the declaration, through which the asset increase becomes justified, the same is taxed at the IRS tax rate considered for the total income of the year of the correction, or if it is taxed at the special rate of 60%, which should not be applied once the income after its correction becomes justified.

2) Waive of banking secrecy

Article 63º B of the LGT is substantially modified, allowing now the access to bank accounts by the tax authorities in the following cases:

a) When there are suspicions of commitment of tax crimes (already in force);

b) When there are suspicions of the untruthfulness of what has been declared, or the tax declaration legally required is missing;

c) When there are suspicions of the existence of unjustified asset increases, according to f) of number 1 of article 87º;

d) When necessary, for the verification of conformity of accounting support documents of tax payers (IRS individuals and IRC corporation tax payers), who are subject to organized accounts;

e) When there is the need to control the assumptions of the privileged tax regime that the taxpayer benefits from;

f) When it is impossible to prove the direct and exact quantification of the taxable income, according to article 88º, and in general, when the assumptions to resort to the indirect evaluation are met.

The tax authorities also have the right to have access directly to bank documentation in case of refusal of their presentation or consultation, when they concern family members or third parties who have a special relation with the tax payer.

The decisions of the tax authorities have to be justified, with an express mention of the concrete motives that justify such decisions and must be notified to the interested parties within 30 days, being possible to appeal of such decisions, with non suspensive effects in relation to those respecting the tax payers and with suspensive effect related to those of family members and third parties.

The decisions must be issued at the level of director general (of taxes and of customs), delegation not being allowed.

Lastly, article 79º of the General Regime of Credit Institutions has been modified, including a new paragraph e) to cover the tax authorities in the scope of the waiving of the banking secrecy.

3) Obligation of informing on the foreign accounts

A new ruling contains the obligation of individual tax payers mentioning in their income declaration the existence and identification of accounts of deposits or of securities opened in financial institutions, non-resident in the Portuguese territory.

Such measure is also included in the modification introduced in article 63º A of LGT, and aims at an easiness of information in relation to declared income and request of detailed and individualized information, as required in many jurisdictions.

4) New obligation of informing on international transfers

A new regime of information on international transfers is also introduced in article 63º A of the LGT, to countries, territories or regions with a more favorable tax regime, which are those listed in Ministerial Decree nr. 150/2004 of February 13th.

The new rule of article 63º A nr. 2 of the LGT establishes that the credit institutions and financial companies are obliged to inform the Director General of Taxes, until the end of July of each year through a declaration of official model, to be approved by Ministerial Decree of the Minister of Finances, the financial transfers remitted to entities located in countries, territories or regions with a more favorable privileged tax regime, and which are not related to payments of income subject to any other regime of information foreseen in the law for tax purposes, or operations executed by entities of public law nature.

It also becomes compulsory the identification of the accounts, tax number and the yearly value of the deposits and other information, to be defined in the declaration of official model, in case of automatic information and in relation to foreign transfers, as already foreseen in article 63º A nr. 1 of the LGT.

Jorge de Abreu
Founding Partner

The New Social Security Contributions Code

What will Change in the Portuguese Social Security Contributions Regime

The Contributions to the Social Security Act (hereinafter the "Contributions Act") was published in September and shall enter into force on the 1st of January 2010.

The Contributions Act comprises in a single document, for the first time in Portuguese Social Security history, the rules that govern all obligations to the social security regime. The Act also introduces substantial amendments to the regime still in force today that, pursuant to the Act's preamble, aim to end deprivation and reinforce system sustainability. When the present Act comes into force about 40 other laws will be repealed.

The Contributions Act with the amendments introduced seeks to construe a new social security regime that partially mirrors the tax regime in force.

Considering the amendments introduced to the social security regime presently in force we underline the following:

1. Employees
Contribution Rate Basis of Assessment

A novelty introduced by the Contributions Act is the augment of the contribution rate basis of assessment approaching its terms to the personal income tax regime. This change may be a significant burden to employers as it increases the number of employees' income that are now subject to social security contributions.

To determine employer's social contributions and employees' fees the basis of assessment is the net income due for work rendered or income derived from termination of a labour agreement. It is important to notice that for the purposes of determining the basis of assessment both cash benefits and kind benefits are considered to be income when they are due for work rendered pursuant to a labour agreement, the rules that govern such agreement or commercial uses.

In comparison to the regime presently in force, the following incomes have been added to the basis of assessment:

– Meal subsidies, both in cash or in meal tickets*;
– Representation costs when the amounts are predetermined*;
– Amounts due regarding per diem allowance, travel expenses, transport expenses and other equivalent amounts*;
– Allowances for cashier mistakes*;
– Amounts granted to employees on the company's profit participation, when the employee does not have pursuant to a labour agreement a fixed, variable or mixed income deemed adequate to the work rendered*;
– Expenses regarding the personal use of an automobile supported or partially supported by the employer*;
– Transport expenses, in cash or otherwise, supported by the employer to pay for travelling expenses in benefit of the employee*;
– Amounts due under labour agreement terminations with the agreement of the employee in situations where the latter is entitled to receive unemployment benefits*;
– Amounts expended by the employer, mandatory or otherwise, in financial products benefiting the employees, namely, life insurance, pension funds and saving plans or any other private retirement schemes, when the said rights are repaid, anticipated, remitted or in any other way, the capital is paid before the employee retirement date*;
– Amounts received by the use of a personal automobile in the service of the employer*.

The following incomes, among others, are not included in the basis of assessment:

– Amounts due for compensation on not granting holidays or days off;
– Amounts granted to an employee as compensation for an unlawful dismissal;
– Compensation for termination of the labour agreement in case of a collective dismissal, extinction of work position or for employee unsuitability.
– Compensation paid to the employee in reason of the termination of a term labour agreement before such agreement expires.

When one reads the dispositions regarding the basis of assessment in the new Contributions Act one easily understands that it will raise several questions and at a first glance will not promote social justice which was, according to the legislator, one of the main objectives to be achieved with the new Act.

The integration into the basis of assessment of the new incomes will be gradually made pursuant to the following percentages:

a) 33% of the value in 2010;
b) 66% of the value in 2011;
c) 100% of the value as from 2012.

Mandatory Communications

Other relevant changes impose new obligations to the employer **(i)** to declare on hiring an employee if the labour agreement is a term or permanent agreement; **(ii)** to declare the termination and suspension of the labour agreement and the motives that gave rise to the said termination or suspension; **(iii)** to declare changes in the type of labour agreement. If the employer does not file the above declarations the existence of a labour relation is presumed and all social contributions obligations remain in force.

Social Contribution Rates

The Contributions Act foresees the introduction of the "adequate employer's contribution rate principle" regarding the labour agreement entered into. Pursuant to that principle, the employer's contribution rate is reduced in one percent in permanent labour agreement while, on the other hand, it is increased in three percent in fixed-term labour agreements. The above will only enter into force on the 1st of January 2011 and the Act does not mention which fixed-term labour agreements are included in this provision: only the fixed-term labour agreements entered after the Act comes into force or all the fixed-term labour agreements?

It is also foreseen that if an employer files a declaration with the Social Security stating that a labour agreement entered into is permanent when, in reality, it is fixed-term, that agreement shall be converted into a permanent labour agreement. The conversion of the agreement is intended to be a punitive measure against false statements from employers' aiming to secure reduced social contribution rates.

2. Self Employed Workers
Main Amendments

The self employed regime includes all individuals that maintain a professional activity without a labour agreement or legally equivalent agreement or undertake to render a service to a third party.

The basis of assessment is determined pursuant to the relevant income as follows:

– 70% of the total value of the services rendered in the previous civil year;
– 20% of the income regarding the production and sale of goods in the previous civil year.

With the new social contributions regime the self employed will now be officially integrated by the Social Security Office in a social contribution bracket, calculated pursuant to the relevant income and the minimum wage index (IAS). The worker is dully notified of the bracket and legal implications. The obligation to contribute starts with such notification and comprehends the payment of social contributions and the obligation to file the annual services rendered declaration.

Presently, self employed workers may choose the relevant income bracket and the level of social contributions as well as to choose between a normal regime or a wider protection regime. However, the Contributions Act foresees severe changes to such regime, namely waiving the possibility to choose between a normal and wider regime, establishing a sole regime that integrates disease, parenthood, professional hazard, invalidity, old age and death.

Contribution Rates

With the new Act the contribution rates for self employed workers are the following:

– 29,6% to producers or traders;

– 24,6% to service providers;

– 28,3% to agricultural producers or traders, and their spouses, boat owners which income comes from fishing activities.

Furthermore, aiming to promote quality and stabilization of labour relations, it is established, for the first time in Portugal, that burdens with the social protection of self employed workers that render services are levied in 5% (over 70% of the value of the service rendered) on the entity that contracts such services and every time it contracts such services.

3. Final Comments

The compilation and systematization of the several existing disperse diplomas on social security was long awaited and due. We therefore have only to congratulate the initiative. The Act introduces some innovating and courageous measures that will certainly cause manifestations against it and social unrest. One has to question if in the midst of a financial crises it is realistic to ask an additional effort from employers and employees to reinforce the social security system, but only time will shed some light on this and other issues.

The new Contributions Act establishes the gradual change to contribution rates and fees in order to provide an adaptation period to companies and we wait with expectation the application of such rules and social issues that may arise.

Maria Barbosa
Associate

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*Income subject to the social contributions regime in the same terms enacted in the Personal Income Tax Code.

PAYMENT OF INDEMNITIES TO MANAGERS AND DIRECTORS OF COMPANIES

Law nr 100/2009 published on the 7th of September 2009 introduced a new taxation regime to indemnities paid to managers and directors of companies, both on personal income tax and on companies income tax.

Below we explain the main differences between the new regime and the previous regime in force since the approval of the Personal Income Tax Code by Decree-Law nr 442-A/88, of November, 30th.

1. PREVIOUS REGIME – DECREE-LAW NR. 442-A/88, OF NOVEMBER 30TH WHICH APPROVED THE PERSONAL INCOME TAX CODE

Redundancy payments received when employment contracts and contracts of acquisition of services or contracts of similar nature are terminated, as well as when termination of public functions takes place, or termination of the functions of managers and directors are taxable when exceeding 1,5 of the regular monthly payments (based on the average monthly payments of the last 12 months), multiplied by the number of years or fraction of years of work. If on the following 24 months a new professional or business relationship is created with the same entity, the amounts paid are fully taxable (cfr. nr. 4 of article 2.º of Personal Income Tax Code (CIRS), approved by Decree-Law nr. 442-A/88 of 30 November).

Indemnity payments are not subject to social security contributions.

The amounts received as exempt indemnity payments do not have to be reported on the annual tax returns.

2. CURRENT REGIME – CHANGES INTRODUCED BY LAW NR. 100/2009, OF SEPTEMBER 7TH

The new regime introduced relevant changes to the regime above explained.

Currently indemnities received by managers and directors of companies, for termination of their functions become fully taxable at personal income tax.

If a director receives an indemnity for the termination of their functions of € 1.000.000, has to pay € 420.000 (top marginal tax rate of 42% applies) of income tax to the State.

The new law has also introduced an autonomous taxation of 35% of corporate income tax on payments of indemnities or other compensations not related with productivity goals previously defined on the contract when termination of the functions of manager or director takes place.

Thus, additionally to the amount of personal income tax of € 420.000, paid by the manager or director, the company has, in this example, to pay an additional amount of corporate income tax of € 350.000 upon the indemnity payment.

This change should be understood as a measure introduced in a context of economic crisis with the objective of implementing policies of social responsibility by the companies. The aim is to tax top managers and directors.

However, this change has a general and abstract character meaning that is applicable to managers and directors in general.

Cidália Conceição
Senior Associate

Tourist Facilities Regime Amendments

The present article analyses, manifestly from a general perspective, the amendments introduced to the Tourist Facilities Regime hereinafter RJIFET) by Decree-Law nr. 228/2009 of September 14th.

I. Tourist Complexes *(Conjuntos Turísticos)*

On the matter of tourist complexes the new diploma aims to clarify the use of the commercial designation *"resort"*. In doing so the new diploma now allows tourist facilities that are not tourist complexes, but that have the equipments and infra-structures required for the latter, to use, together with their denomination, the expression *"resort"* (article 16 as per express reference of article 43 nr. 3).

The new diploma further amended RJIFET as to allow the construction and use of one-family autonomous buildings, with permit for touristic use, in tourist complexes when the following requisites are met (article 15, number 7): **a)** the touristic development of such buildings is secured by the entity that develops the tourist complex (which, on the other hand, means that it is necessary to previously obtain the permit to use for touristic ends the tourist complex); **b)** the construction and services requirements for the lodging units of the tourist complex are also met for the autonomous buildings; **c)** the lodging units are an integral part of the tourist complex title deed and therefore subject to the payment of the periodical benefits due as per the mentioned title deed and pursuant to the rules therein established; **d)** to be allowed by the territorial management instruments.

II. Tourist Facilities in the Rural Area

On this matter the new diploma has amended the wording of article 18, number 2, in order to clarify the concept of "recovering" existing constructions – a central piece in the definition of the applicable regime – as to include the reconstruction, rehabilitation or the enlargement of constructions that already exist.

III. Tourist Facilities with Plural Owners

Article 59 of the new diploma, in light of the present financial crises and, probably, some initial exaggeration, diminishes the amount of the collateral of good administration and maintenance that the entity developing the facility needs to give in favour of the owners of the autonomous fractions or plots, being now mandatory to give collateral in the amount of the annual value of the periodical benefits due, which compares to the previous regime where collateral should correspond to five times that amount.

IV. Final Comments

Lastly, it is important to underline, that the

deadline established for the reconversion of tourist facilities licensed under the previous RJIFET regime into the new types and categories foreseen in the diploma in force was extended until the 31st of December, 2010.

Henrique Moser
Partner

Conferences and Publications

Jorge de Abreu and Afonso Barroso, took part in the International Bar Association, (IBA) annual conference, which took place in Madrid in the first days of October present.

The Annual Conference, of the IBA is the largest gathering of this organization which is the world biggest of its type. The Madrid, conference merited from the largest attendance of all times, since the foundation of the IBA in the mid 40's of the past century. More than 5 500 delegates were registered from all continents. Itemized conferences and events were carried out in the Madrid Congress Palace, for a period of five consecutive business days.

Lisbon Law School is organizing a small museum in a room of its premises to exhibit part of documentation of Professor Paulo Cunha, in praise of the great law Professor and his outstanding personality.

Such documentation originates from diversified personalities of the legal and political world.

Professor Paulo Cunha, besides having being an outstanding academic, was Minister of Foreign Affairs for over a decade, and was Dean of Lisbon University.

Abreu & Marques participated in this initiative.

New Legislation

Decree-Law nr 122/2009 of May 21st: Reduces the necessary notifications to be filed by individuals and companies amending several legal diplomas. Among others the Decree-Law amends the Companies Income Tax (IRC) waiving the obligation to file a statement when a relevant change in the tax payer status occurs if such change is subject to mandatory registration with the Companies Commercial Registry. The said amendment entered into force on the 1st of October.

Law nr 99/2009 of September 4th: Approves the infractions regime of the telecommunications sector.

Law nr 102/2009 of September 10th: Labour protection and health regime.

Decree-Law nr 222/2009 of September 11th: Establishes protective measures for consumers entering into life insurance agreements linked with mortgage credit.

Bank of Portugal Notice nr 7/2009 of September 16th: Prohibits credit facilities to companies registered in a non cooperative offshore jurisdiction or with an unknown ultimate beneficiary.

National Statistic Bureau Notice nr 16247/2009 of September 18th: Pursuant to number 2 of article 24th of Law nr 6/2006 of February 27th announces that the 2010 leasing agreements update coefficient is 1,000.

Decree-Law nr. 249/2009 of September 23rd: Approves the Investment Tax Code ("Código Fiscal do Investimento). This Decree-Law will be analysed in the next number of our Newsletter.

Decree-Law nr 306/2009 of October 23rd: First amendment to Decree-law nr 157/2006 of August 8th that approved the legal regime of construction works in rented properties.

Should any reader wish to obtain a copy of any of the mentioned or other laws please contact this Office.
Traslations can be supplied at cost.
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