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Chapter 22

PORTUGAL

Tiago Marreiros Moreira and João Riscado Rapoula[1]

I INTRODUCTION

Portugal has cemented its status as one of the most interesting jurisdictions for high net worth individuals (HNWI) in recent years.

The flexibility of the residence permit regimes for non-EU citizens (in particular the residence permit for investment activity, commonly known as the Golden Visa programme), together with the non-habitual tax resident regime (NHR), provided for a significant push to foster the attractiveness of Portugal. Moreover, the fact that Portugal remains a jurisdiction that does not levy wealth taxes, imposes taxes on donations on a territorial basis (e.g., only assets located in Portugal may trigger tax) (although an exemption applies for free transfers between spouses, ascendants and descendants) and does not levy succession taxes still contributes decisively to the significant flow of HNWI who see Portugal as the perfect jurisdiction to relocate to.

In addition to the above, perhaps one of the most interesting – and less known – features of the Portuguese legal system is the legal certainty on which it relies. Indeed, with regard, for instance, to the NHR, there was a relevant change to the rules, which went from providing for an exemption to foreign-source pension income to establishing a flat tax rate of 10 per cent. However, the law that amended this rule (the Portuguese Budget Law for 2020) has expressly safeguarded the situation of those individuals who were already under the NHR by establishing that this amendment would only be applicable to those who would relocate to Portugal upon the enactment of the new law. This example illustrates how stable Portuguese tax law has been in recent years, which is undoubtedly an invaluable feature of a jurisdiction that needs to attract foreign investment and, in particular, HNWI.

The uncertain international setting triggered by the covid-19 pandemic and aggravated by the conflict in Ukraine, along with the safety and quality of living in Portugal, its geographical location, the opportunities that the Portuguese real estate market still offers and the openness of the country to investors on the agricultural sector and clean energies, keep the jurisdiction as one of the top-ranked places to live and to invest in in a sustainable manner, allowing us to look at the future of Portugal as a top destination for HWNI with clear optimism.

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II TAX

i Overview

Portuguese personal income tax (PIT) relies on tax residence as the most relevant criterion. Portuguese tax-resident individuals are subject to PIT on a worldwide basis, whereas Portuguese non-resident individuals are only subject to tax on Portuguese-sourced income.

An individual is deemed to be resident in Portugal if he or she can satisfy one of the following conditions:

a the individual remains in Portuguese territory for more than 183 days (consecutive or not) in any 12-month period commencing or ending in the relevant calendar year;
b although remaining for less than 183 days, the individual has, in any 12-month period of the relevant year, accommodation under circumstances that indicate an intention to keep and occupy it as a habitual residence;
c on 31 December of any given year, the individual is a crew member of vessels or aircraft operated by entities with residence, head office or place of effective management in Portuguese territory; and
d the individual performs public duties for the Portuguese state abroad.

The NHR applies to any individual taxpayer who transfers its tax residence to Portugal, on the sole condition that such taxpayer did not qualify as a Portuguese tax resident in any of the five years prior to the application to this regime. The NHR does not require the individual to be professionally active; nor does it require minimum personal wealth or income thresholds. Moreover, this regime applies for a 10-year period counted from the year of arrival in Portugal (included).

PIT applies to specific items of income that are expressly set forth under the Personal Income Tax Code (PIT Code): employment income, business and professional income, capital income (e.g., dividends, interest, royalties), real estate income, net worth increases (e.g., gains from the sale of real estate or securities, proceeds from the liquidation of companies, non-compete compensations) and pensions.

For 2023, for regular tax residents, income will be taxed at a general progressive tax rate ranging from 14.5 to 48 per cent, depending on the amount of income obtained by the taxpayer in the given tax year. For individuals whose income exceeds €80,000 but remains below €250,000, a solidarity surcharge of 2.5 per cent will also be due on income that exceeds the mentioned threshold. Income in excess of €250,000 will also be subject to the solidarity surcharge at 5 per cent.

Certain items of income, such as capital income (such as dividends, interest and royalties) and capital gains derived from the sale of financial assets, will be subject to PIT at a flat rate of 28 per cent, except if taxpayers opt to include these items of income in their general income that will be subject to PIT under the progressive rates (such option would only make sense, of course, if the effective progressive tax rate of the individual would be lower than 28 per cent). However, from 1 January 2023 onwards, the positive balance between capital gains and capital losses arising from the transfer for consideration of shares and other securities is mandatorily aggregated and taxed at progressive rates if the assets have been held for less than 365 days and the taxable income of the taxpayer, including the balance of the capital gains and capital losses, amounts to or exceeds €78,834.

With regard to resident individuals under the NHR, the applicable benefits range from a full exemption on certain types of foreign-sourced income and a reduced flat tax rate of 20 per cent to other types of Portuguese-sourced income.

In particular, passive income derived outside Portugal (e.g., dividends, interest and rental income) from non-blacklisted jurisdictions is fully exempt in Portugal. This exemption applies irrespective of the taxation applicable at source. Capital gains resulting from the sale or redemption of securities remain, as a general rule, taxable at a rate of 28 per cent (or at progressive rates, if assets have been held for less than 365 days and the taxable income of the taxpayer exceeds €78,834), and pension income is taxable at a rate of 10 per cent.

Active income (e.g., income from employment and also from self-employment derived in connection with high value-added activities) may also be fully exempt provided specific conditions are met. The activities qualified as high value-added are identified in a statutory shortlist (published in Ministerial Order No. 230/2019) that includes certain teachers, science and engineering technicians and professionals, general directors and executive managers of companies and IT professionals, among others. Portuguese-sourced active income derived in connection with high value-added activities will be subject to a flat rate of 20 per cent (instead of the general progressive tax rates).

In the specific case of fiduciary structures (e.g., trusts), note that regular distributions qualify as capital income, whereas proceeds resulting from the liquidation of foreign structures whose settlor is a third party are not subject to PIT.

It is also relevant to consider that Portugal does not impose an exit tax when a tax-resident individual leaves. However, Portuguese tax residents who exchange shares or own shares in a company that was subject to a merger or a division, and subsequently transfer their place of residence abroad, must include any capital gain or loss arising from the share exchange, merger or division in their taxable income for the year in which they cease to be resident in Portugal, and, consequently, subject to tax.

The extensive network of double tax treaties (DTT) concluded by Portugal with other jurisdictions ensures that in the vast majority of cross-border transactions and income flows, an individual's income will not be subject to double taxation either through a tax exemption or a tax credit conferred by Portugal or the other relevant jurisdiction.

ii Current status of new investment trends

The Portuguese State Budget Law for 2023 has approved the tax regime applicable to income derived from cryptoassets by individuals, which was previously not subject to taxation in the majority of cases. In the wake of the establishment of cryptoassets as a growing component of the global economy, the application of this regime will also have significant implications for the development of the Portuguese digital economy.

To determine the items of income that will effectively be subject to taxation under the new set of rules, the PIT Code starts by defining the concept of cryptoasset, which includes any digital representation of value or rights that can be electronically transferred or stored by resorting to blockchain or similar technologies will be deemed to be a cryptoasset.

In addition, the PIT Code expressly excludes from the concept of cryptoassets all cryptoassets that are unique and not fungible with other cryptoassets. As such, non-fungible tokens (NFTs) are not covered by the new set of rules.

Issuance and mining of cryptoassets

Under the new rules, income derived from carrying out activities related to the issuance of cryptoassets, such as the mining of cryptocurrency or the validation of transactions concluded with cryptoassets via consensus mechanisms, will be qualified as business income derived from the performance of an independent professional activity, which means that such items of income will have a tax treatment akin to that of the professional income received by independent service providers. As such, under the general regime, the taxable income derived from such an activity shall be liable to PIT by application of the progressive tax rates.

If the taxable income in question is determined by the simplified method (which is possible as long as the beneficiary does not obtain gross income in excess of €200,000 for the performance of such activities in each relevant year), a 0.15 coefficient will be applicable if the income does not derive from the mining of cryptoassets, which implies that only 15 per cent of the gross income obtained will effectively be subject to taxation. If the income in question is derived from the mining of cryptoassets, a 0.95 coefficient will be applicable, which means that 95 per cent of said income will be subject to taxation.

However, if the organised accounting method is used for the determination of the taxable income for PIT purposes, such income will consist of the difference between the gross income obtained for the performance of the activities in question and the necessary expenses borne by the taxpayer in order to pursue such economic activities.

As a final note it is relevant to consider that this provision is only applicable to income derived from the aforementioned activities and not from the trading of cryptoassets, even if they have been obtained as compensation for such activities, which shall be taxed as capital gains, as explained below.

Trading of cryptoassets

The State Budget Law for 2023 establishes that income derived from the sale of cryptoassets shall qualify as capital gain income for PIT purposes. As such, the positive or negative balance between the purchase price (including trading platform commissions and other relevant costs for the acquisition of the asset) and the proceeds from the sale of cryptoassets held by the taxpayer will generate a relevant capital gain or loss for PIT purposes. After the offset of capital losses, the capital gains in question will be subject to PIT at a flat rate of 28 per cent.

However, gains and losses derived from the disposal of cryptoassets that have been held by the taxpayer for a period that is longer than 365 days are not relevant PIT purposes; therefore, no capital gain or loss shall be deemed to have been obtained in such scenario.

Relevant capital losses resulting from transactions performed with entities domiciled in blacklisted jurisdictions will not be considered for the purposes of determining the overall balance of capital gain income derived from the trading of cryptoassets that will be subject to PIT.

When the overall balance between relevant capital gains and losses derived from the transaction of cryptoassets is negative, this amount can be offset to positive balances of such operations obtained in the following five years, but only if the taxpayer opts for this type of income being taxed under the general progressive rates system (and solidarity surcharges) and not by application of the 28 per cent flat rate.

Differently, cryptoassets that are received in exchange of other cryptoassets will not qualify as capital income for PIT purposes and shall only be subject to taxation once they are sold, as capital gain income, under the above-described terms. However, the cryptoassets received will keep the original purchase price for the purposes of the determination of a future taxable gain.

Other income derived from cryptoassets

The PIT Code includes a residual provision according to which all other gains obtained by individuals strictly by holding cryptoassets, which are not covered by any of the already mentioned provisions (e.g., interests obtained from cryptocurrency deposits), shall be qualified as capital income for PIT purposes and, therefore, shall have a tax treatment akin to that of dividends and interests. Hence, this item of income shall be subject to PIT at a flat rate of 28 per cent, unless the taxpayer opts to subject such income to taxation via the application of the progressive rates system.

Commissions charged by cryptoasset service providers

It is also relevant to consider that commissions charged by cryptoasset service providers that are based in Portugal, or by foreign entities of the same nature when their clients are Portuguese tax residents, shall be subject to stamp duty determined by application of a 4 per cent rate on the amount of the charged commission.

Additionally, gratuitous transmissions of cryptoassets, as is the case of donations, shall be subject to stamp duty at a 10 per cent rate applicable to the value of the transmitted assets, which shall be determined through their official market value or, if this amount is not possible to determine, by the amount declared by the beneficiary, which should be as close as possible to the market value of the assets. In this scenario, stamp duty is only due when the beneficiary of the transmission is a Portuguese tax resident, or when the author of the transmission was a Portuguese tax resident, in the case of a transmission by inheritance.

Gains with NFTs

According to Portuguese tax law, income is only subject to PIT provided that it falls under one of the categories of income. Hence, no taxation will be levied on income that is not qualified as taxable income pursuant to the PIT Code.

To date, NFT transactions are not subject to a clear tax regime, as the PIT Code does not provide for specific rules on this matter. Given that taxation depends on the qualification of an item of income under a specific category, note that, as a starting point, it is important to define whether NFTs may be deemed as a financial investment or if their sale shall be considered a regular sale of goods.

Taking the above into consideration, the Portuguese tax authorities (PTA) may only consider NFTs a financial asset if the investment is made typically via an exchanged-traded fund (ETF) (or investment fund oriented to invest in NFTs). That being the case, any gains resulting from the sale of the ETF or the units of the investment fund would qualify as capital gains.

On the other hand, the sale of NFTs as a regular sale of goods will not be subject to tax in Portugal because of the absence of a specific rule governing this type of gain.

However, if the sale of NFTs is carried out on a recurrent basis (i.e., with a habitual nature and a profit-oriented manner), this may lead to the qualification of this type of income as a business income derived from a commercial activity.

With regard to NFTs, it is also worth mentioning that Portuguese domestic tax law does not include any specific rules to address taxation of artworks. Indeed, as a general rule, capital gains derived from the sale of artworks are not subject to PIT, and there is no obligation of declaring or disclosing private artworks to any Portuguese authority.

However, should an individual engage in a professional activity related to the sale of artworks, any capital gains derived from the sales will be qualified as business income.

III SUCCESSION

There has been no inheritance and gift tax regime in Portugal since 1 January 2004. However, the transfer of assets by way of inheritance or gift may be subject to stamp duty if the assets are located in Portugal. In particular, the free transfer of assets (inheritance and gifts) may be subject to a 10 per cent tax rate (if the transfer refers to real estate, an additional stamp duty at 0.8 per cent will also be due (Stamp Duty Code)). There is an exemption applicable to free transfer of assets made between spouses or unmarried partners, descendants and ascendants.

Successions are governed by the law of the last residence of the deceased (Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation)). However, resident individuals can choose to regulate their succession in accordance with the law of the state of where they are nationals.

When the Succession Regulation is not applicable, the Portuguese domestic conflict rule determines that the applicable law on succession matters is the personal law of the deceased (which is usually the nationality law).

The Portuguese succession regime has remained unchanged for the past few years. Under Portuguese law, succession may qualify as:

a mandatory;
b testamentary (i.e., through a will); or
c legal (residual succession, which applies when there is no mandatory legal succession and the testamentary succession does not deal with all the assets of the deceased).

Under a mandatory legal succession, half or two-thirds of the inheritance must be granted to the spouse and the direct descendants and ascendants. The remaining assets can be disposed of by means of testamentary succession or will be distributed to the following heirs entitled to the legal succession:

a spouse and descendants;
b spouse and ascendants;
c siblings and their descendants;
d other relatives; and
e the Portuguese state.

Portuguese domestic civil law allows for the recognition of foreign wills under the general rule in the Portuguese Civil Code, which states that legal documents or transactions taking place in other countries may be recognised in Portugal if they are legal in the country in which they occurred. However, the Civil Code requires foreign wills to have a minimum solemn form (for example, made before a notary). According to Portuguese case law, if a will complies with the formal rules in force in the foreign country in which it was made, it should in principle be accepted in Portugal.

The key takeaway is that because of the mandatory rules established by the Portuguese legislation on the distribution of assets (e.g., only half or one-third of the estate can be available to other individuals or entities, because the remainder is reserved to the legal heirs of the deceased), whenever Portuguese law applies to a succession there might by incompatibilities between a given structure that ought to manage a given estate for the benefit of a group of individuals and the entitlement to such assets of the mandatory legal heirs.

IV WEALTH STRUCTURING AND REGULATION

Any foreign structure held by a Portuguese resident individual that is located outside the Portuguese territory may raise challenges, taking into account some specific provisions of Portuguese domestic law.

The first set of rules to note relates to controlled foreign company (CFC) legislation, which aims at avoiding the deferral (or even elimination) of taxation of income by means of the use of entities that are either located in low-tax jurisdictions or that are not subject to tax on their profits.

CFC rules apply to resident individuals that hold, directly or indirectly, a significant interest in non-resident entities subject to a more favourable tax regime. For this purpose, the non-resident entity is deemed to have a favourable tax regime not only when located in a blacklisted jurisdiction, but also when such entity is either fully exempt or subject to an income tax rate lower than 10.5 per cent (i.e., less than 50 per cent of the Portuguese corporate income tax due if the company was Portuguese).

According to this set of rules, the income derived by the foreign entity is allocated to the Portuguese-resident shareholder irrespective of any distribution. In particular, the profits of the foreign company may not consist in more than 25 per cent of:

- *a* royalties or any other income generated from intellectual property, image rights or similar;
- *b* dividends and income from the disposal of shares;
- *c* income from financial leasing;
- *d* income from insurance, banking (even if not performed by credit institutions), insurance and other financial activities contracted with entities with special relationships;
- *e* income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value; and
- *f* interests or any other income generated by financial assets.

Another rule to highlight relates to the presence of entrepreneurs who manage their international business from the Portuguese territory. Under the Corporate Income Tax Code, companies are taxed in Portugal on their worldwide profits in the event they are resident for tax purposes in Portugal. A company is deemed to be resident in Portugal if it has its corporate seat or (alternatively) its place of effective management in Portugal. Although there are no legal criteria to define where the place of effective management is located, according to Portuguese case law, the place of effective management might be defined as the place where the most relevant decisions are taken (e.g., where the board meetings take place) and where adequate substance (e.g., people and buildings) is present.

For instance, depending on the structure of the board of directors of companies, if the sole shareholder and the CEO of a given company is the sole presence of that company in Portugal, while the relevant decisions are taken in board meetings that take place abroad, we take the view that the place of effective management rule should not apply. On the other hand, if no board of directors exists or if no relevant decisions are being executed from abroad, that company may indeed be deemed as Portuguese-resident, which would lead to corporate taxation in Portugal based on the aforementioned rule.

Moreover, the presence of a CEO in Portugal may also raise questions as to whether the foreign company may have a permanent establishment (PE) in the Portuguese territory, which would also lead to corporate taxation of the companies in Portugal to the extent there were profits attributable to such PE.

Finally, it is also important to point out that Portuguese tax law includes a general anti-abuse rule that allows the PTA to disregard corporate entities without proper economic substance (i.e., that were created having as their sole or main purpose the obtaining of tax advantages).

The above remarks regarding CFC legislation, place of effective management and the general anti-abuse clause aim at pointing out that any wealth structuring that includes a foreign corporate structure without proper substance or an economic rationale behind it may raise challenges.

In addition, the proposal for the implementation of the EU's Anti-Tax Avoidance Directive 3 will bring another layer of challenges to corporate or fiduciary structures, which may ultimately lead to situations where these entities are denied tax-residence certificates, preventing them from having access to DTTs.

At the internal level, the PTA have issued a recent ruling regarding the tax treatment of distributions made by any *société d'investissement à capital variable* (SICAV funds).[2]

The ruling in question analyses how distributions made by SICAV funds to Portuguese tax residents who benefit from the NHR should be taxed and considers the possibility of treating this type of income as a dividend for the purposes of the application of DTTs. Should this type of income be treated as a dividend, then, in principle, it would be subject to taxation at the source state as determined by the DTT concluded between Portugal and Luxembourg, which would imply that this item of income should not be subject to PIT in Portugal under the NHR rules.

In the ruling, the PTA resorted to the Commentaries to the OECD's Model Convention to Avoid Double Taxation to determine if this type of distribution should be treated as a dividend for the purposes of applying the Portugal–Luxembourg DTT. Because the Commentaries do not provide a closed definition of what types of income should be included in the concept of dividends, and considering that the Commentaries also mention that such definition is impossible, considering the disparities in the various internal legislation of OECD jurisdictions, the PTA concluded that distributions made by investment funds should not be comparable to profit distributions made by companies to shareholders and, therefore, should have a different tax treatment and not be regarded as dividends for the purposes of application of the DTT. As such, the PTA claimed that these distributions should be treated as 'other income' under the applicable DTT and be exclusively taxed on the jurisdiction where the taxpayer is resident. Therefore, the exemption under the NHR rules would not be applicable in Portugal, and these distributions should be subject to PIT at a 28 per cent rate.

The conclusions expressed in the above-mentioned ruling are difficult to justify considering that the ruling seems to ignore the broad concept of dividends under the applicable DTT, which includes income from shares, privileged shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights that are subject to the same taxation treatment as income from shares under the laws of the state of which the company making the distribution is a resident. Not only does the ruling fail to address the nature of the SICAV to assess whether the holder of the units has a

2 Ruling No. 755/2018, published on 2 May 2022.

corporate right, but it also does not include any reference to the treatment in Luxembourg of distributions made by these entities or whether such distributions are subject to a similar tax treatment to that applicable to dividends.

The position expressed on this ruling by the PTA should probably trigger litigation, as it is far from being well-grounded and it seems not to be aligned with the correct application of the concept of dividends in DTTs.

This highlights that any individuals who relocate to Portugal and benefit from the NHR may enjoy an exemption on foreign-source dividends and interest provided the income is not sourced in a blacklisted jurisdiction. These features of the NHR and the challenges raised by foreign corporate structures that may be used for wealth planning purposes seem to imply that for HNWI relocating to Portugal, holding assets at the personal level – at least for the 10-year period the NHR lasts – may not be a bad idea.

However, it is surprising that, in the context of US LLCs (tax-transparent entities), the tax treatment of transparent entities has already been clarified by the PTA in (at least) two tax rulings.[3]

The PTA have considered that profit distributions from US LLCs – to their shareholders who are resident for tax purposes in Portugal – should be qualified as investment income, even though the distributions are not an actual dividend for tax purposes (given the tax-transparent treatment provided by US domestic law).

Regarding the income qualification for double tax convention (DTC) purposes, in both cases the PTA considered that the distribution of revenues accrued at the level of the US LLC should fall within the 'other income' provision of the DTC celebrated between Portugal and the United States, which provides for shared taxing jurisdiction, hence triggering the exemption of tax for individuals under the NHR.

In addition, no CFC rules were raised by the PTA on the LLC structure, which makes it attractive for HNWI who have their estate based in the United States, in view of a relocation to Portugal, despite all the reserves that may result from the anti-abuse provisions established by Portuguese domestic law.

V CONCLUSIONS AND OUTLOOK

Considering the topics discussed above, and in spite of the internal and international tax landscape becoming more complex and aware of potentially abusive situations, Portugal remains an interesting jurisdiction to HNWI who intend to relocate or to structure their wealth. Mainly, the possibility of benefiting from the NHR regime and its consequences has benefits that outweigh any negative impacts that may result from the discussed legislative trends or tax authorities' positions.

While the future remains uncertain, especially with regard to current international uncertainty and looming financial hardship (with increasing inflation and recession on the horizon), we anticipate that the features that make Portugal an attractive jurisdiction for the purposes of wealth planning and for HNWI should persist.

3 For example, Tax Ruling of 20 December 2017, DSIRS Proc.: 2360/2016.

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