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NEWSLETTER

THE PORTUGUESE TAX HAVENS BLACK LIST (2020 UPDATE)

SUMMARY

In the context of the tackling against international tax evasion and fraud, States have adopted several anti-abuse measures aimed at restricting abusive operations in the purview of income and wealth taxation.

After several years of an unchanged Portuguese tax haven "black list", an updated analysis of the European and national panorama is due.

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FRAMEWORK

With the aim of tackling international tax evasion and tax fraud, countries have adopted several anti-abuse measures designed to restrict abusive operations related to income and wealth taxation.

In this context, several countries established lists - commonly known as "black lists" - of countries, territories and regions that have been considered as "tax havens" or as having a privileged tax regime.

In this respect, Portugal adopted a dual system, consisting in the implementation of a closed list of "tax havens", which is occasionally revised by the Government and updated through a governmental Ordinance and, simultaneously through the institution of a legal open clause, which broadens the scope of the current tax havens regime.

According to the information available on this subject, the Portuguese "black list" is one of the most extensive within the EU.

The decision regarding the qualification of a country, state or region as a "black listed" jurisdiction is unilateral, and the revision of its status can be made spontaneously, by the Portuguese Government, or triggered by the competent entity of such jurisdiction through a request to the Portuguese Government, indicating that it no longer falls under the criteria used to qualify as jurisdiction a "tax heaven, namely:

a) Corporate income tax (CIT) rate inferior to 60% of the Portuguese CIT rate or inexistence of an identical or similar tax;
b) The rules for determining the tax base on which income tax is levied differ significantly from internationally accepted or practiced standards;
c) The existence of special regimes or tax benefits that result in a substantial reduction in taxation; and
d) Legislation or administrative practice that do not allow access and effective exchange of relevant information for tax purposes;

Further to the abovementioned criteria, since 2017 the Portuguese legislation foresees an open clause that allows the Tax Administration to consider a country, territory or region as a "tax heaven" despite not being included in the "black

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list". Said mechanism contains a safeguard clause for EU and EEA countries and for jurisdictions that have signed with Portugal an exchange of information agreement that meets the EU standards

Under the open clause regime, in addition to the "black list" of jurisdictions considered as tax havens at any given time, the Tax Administration is allowed to consider, on a case by case basis, other jurisdictions as "tax havens". Such consideration is based on the jurisdiction's tax rate being inferior to 60% of the tax rates applicable in Portugal and also on two additional criteria:

i) the law of that territory expressly promotes this taxation; and;
ii) When there are special relationships between tax residents of that jurisdiction and tax residents in Portugal.

Concerning the open clause, it should be noted that international tax transparency is a factor which may result in the exclusion of the application of the aforementioned clause by the Tax Administration.

In fact, for the Tax Administration to be unable to use the discretion arising from the open clause it is sufficient the existence of binding instruments of interstate administrative cooperation equivalent to that existing within the framework of the European Union

The legislation currently in force in Portugal results in some uncertainty as to the protection of taxpayers' legal certainty and international tax policy, particularly what is the true definition, for the Portuguese authorities, of a "tax haven", what importance can be attributed to information exchange agreements and what are the effects on national taxation of international negotiations.

As mentioned before, there is yet another requirement for the classification of a given territory as a tax haven: international tax transparency. In this context, it is necessary to determine which instruments of interstate administrative cooperation are considered equivalent to the existing framework in the European Union and sufficient to trigger the safeguard clause. In fact, if this requirement is sufficient for EEA Member countries, should it not also be sufficient for third countries which are signatories to the OECD Convention on Mutual Administrative Assistance in Tax Matters and comply with OECD / Global Forum ratings? This issue is particularly relevant in the context of the application

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of fundamental freedoms that are partially applicable to third countries.

In practice, this standard is influenced by several factors, in particular, the existence of Double Taxation Conventions (DTC) which provide rules regarding the exchange of information, the existence of Information Exchange Agreements, the adoption of the Convention on Mutual Administrative Assistance in OECD Tax Matters, in which 108 jurisdictions participate, having been in force in Portugal since 1 March 2015, and compliance with Council Directive 2011/16 / EU, of 15 February 2011, on administrative cooperation in the field of taxation (with subsequent changes). It should be stressed that it is not absolutely clear which factors, in particular, are taken into consideration when qualifying the administrative cooperation set forth by a certain jurisdiction as "equivalent" to the administrative cooperation allowed by the EU Directive. However, on this topic, the European Court of Justice's case law offers relevant clues.

Regarding the previously mentioned issue of the qualification of a State as cooperating or non-cooperating according to the OECD's cooperation standards and fiscal transparency ratings, it should be noted that there are a number of jurisdictions included in the Portuguese tax havens "black list" which are considered "largely compliant" by the Global Forum, the same rating achieved by Portugal on this date.

In what regards to the exchange and retention of information, it seems that data security and privacy is an emerging issue. Although the various mechanisms formally ensure confidentiality and data protection, it is important that this confidentiality and protection are effective and real, in line with what has been reiterated by independent international entities, such as the Article 29 Data Protection Working Party, namely in the framework of the European Union and the European Convention on Human Rights.

The exchange of information can lead to a chain dissipation of the information held by the various Tax Administrations, concerning the tax, personal, banking or business information of its taxpayers.

THE RELEVANCE OF THE QUALIFICATION AS A TAX HAVEN

When a territory is classified as a tax haven, it follows that it represents a threat to the taxation and tax income of the taxpayer's residence State (as a general rule).

In this sense, whenever a territory of residence, which imposes taxation on a worldwide basis, feels that its source of tax income is being threatened, it finds ways to discourage taxpayers from adopting tax evasive behavior, such as using tax havens to avoid taxation, through the implementation of more aggressive taxation rules.

In Portugal, these rules translate into aggravated fixed tax rates, such as a 35% tax rate on capital income paid by entities resident in tax havens (Personal Income Tax and Corporate Income Tax); as is the case with Municipal Property Tax (MPT), Real Estate Transfer Tax (RETT) and Municipal Property Tax surcharge rates; aggravated taxation is also found through the imputation of gross capital (as in the case of MPT, where the tax payable will amount to 1/15 of the equity value of the real estate property); restrictions on the deductibility of tax losses, as is the case of losses arising from the sale of shareholdings in tax havens; among other highly disadvantageous conditions.

THE RELEVANCE OF THE ADOPTION OF A DOUBLE TAXATION CONVENTION BY A TAX HAVEN

Considering what has been said so far, it is now crucial to emphasize the importance of a tax haven celebrating a DTC with Portugal. Regarding DTC's Portugal follows the OECD Model Convention (CMOCDE). This convention establishes, as a general rule, taxation on the taxpayer's State of residence, however, it bestows, regarding some types of income, the exclusive right of taxation to the income source State.

This translates into an advantage for the taxpayer insofar as, when there is a DTC in force, national tax rules (which overlap in the same matter) do not apply and the ensuing result is several possible situations of double non-taxation.

Furthermore, if the State of residence (Portugal) assigns the State of source (of low taxation) the right to fully tax certain types of income and that same State of source chooses not to tax such income, or taxes them at a symbolic rate, in the end the taxpayer will be neither taxed at the residence nor at the source.

When these Conventions exist alongside the classification of the jurisdiction as a

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"tax haven", it can be questioned whether this classification is in violation of the entered into DTCs.

NON-COOPERATIVE JURISDICTIONS (THE "BLACK" LIST OF THE EUROPEAN UNION)

Furthermore, the European Union has established two lists of jurisdictions considered to be "non-cooperative", a "black list" that includes jurisdictions which do not meet the criteria established by the European Union and a "grey list" that includes jurisdictions which have committed themselves to align their practices, rules, transparency and tax governance in accordance with international standards.

The inclusion of a jurisdiction in any of the lists is dependent on an assessment conducted by the Commission and based on 3 principles:

a) Fiscal transparency;
b) Good governance; and
c) Actual economic activity.

In addition, the existence (or not) of a "zero" rate corporate tax is also taken into account.

Finally, it should be noted that the creation by the European Union of the "black list" and the "grey list" has shown results as a mechanism to encourage the adoption, by third States, of measures aimed at fiscal transparency and good governance. According to information from the EU, since the introduction of the "black list", 60 countries have taken steps to address the Commission's concerns and more than 100 harmful regimes have been suppressed.

CONCLUSIONS

The focus at both the international and national levels has gradually focused on the issue of transparency and less on the level of taxation achieved.

The Tax Administration is now equipped with extensive mechanisms for control and exchange of information, covering most countries in the world, including those usually considered as tax havens.

Finally, it should be noted that the Portuguese international tax policy in this respect is not entirely clear.

Portugal has a network of 78 Conventions to avoid Double Taxation, which paradoxically includes jurisdictions considered "tax havens" and jurisdictions that obtain the "largely compliant" classification according to the OECD.

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ANNEX - LIST OF TAX HAVENS

Jurisdiction [Alphabetical order]	Included in the List of Tax Havens	Convention to avoid double taxation with information exchange	Agreement for the Exchange of Information
American Samoa	x		
Andorra	x	x	x
Anguilla	x		
Antigua and Barbuda	x		Pending
Arab Republic of Yemen	x		
Aruba	x		
Ascension	x		
Bahamas	x		
Bahrain	x	x	
Barbados	x	x	
Belize	x		Pending
Bermuda Islands	x		x
Bolivia	x		
British Virgin Islands	x		Pending
Brunei	x		
Cayman Islands	x		x
Channel Islands (Alderney, Guernesey, Great Stark, Herm, Little Sark, Brechou, Jethou, Jersey and Lihou)	x		Pending in Guernesey Effective in Jersey since 2011
Christmas Island	x		
Cocos and Keeling Islands	x		
Cook Islands	x		
Costa Rica	x		
Djibouti	x		
Dominica	x		Pending
Falkland or Falkland Islands	x		

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Fiji Islands	x		
French Polynesia	x		
Gambia	x		
Gibraltar	x		x
Grenada	x		
Guam Island	x		
Guyana	x		
Honduras	x		
Hong Kong	x	x	
Isle of Man	x		x
Jamaica	x		
Jordan	x		
Kiribati Island	x		
Kuwait	x	x	
Labuan	x		
Lebanon	x		
Liberia	x		Pending
Liechtenstein	x		
Maldives Islands	x		
Marshal Islands	x		
Mauritius	x		
Monaco	x		
Montserrat	x		
Nauru	x		
Netherlands Antilles	x		
Niue Island	x		

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Norfolk Island	x		
Northern Mariana Islands	x		
Other Pacific Islands	x		
Palau Islands	x		
Panama	x	x	
Pitcairn Island	x		
Puerto Rico	x		
Qatar	x	x	
Queshim Island	x		
Republic of Vanautu	x		
Saint Kitts and Nevis	x		Pending
Saint Lucia	x		x
Saint Pierre and Miquelon	x		
Saint Vincent and the Grenadines	x		
San Marino	x	x	
Seychelles	x		
Solomon Islands	x		
St. Helena Island	x		
Sultanate of Oman	x	x	
Svalbard Islands (Spitsbergen Archipelago and Bjornoya Island)	x		
Swaziland	x		
Tokelau Island	x		
Tonga	x		
Trinidad and Tobago	x		
Tristan da Cunha Island	x		
Turks and Caicos Islands	x		x
Tuvalu Island	x		
United Arab Emirates	x	x	
Uruguay	x	x	
Virgin Islands of the United States of America	x		
Western Samoa	x		

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