SOCIEDADE DE ADVOGADOS, SP,RL
ROGÉRIO FERNANDES FERREIRA
& ASSOCIADOS

Nº 13/22

NEWSLETTER

THE TAX HAVEN LIST (UPDATE 2022)

This Information is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Information may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact contact@rfflawyers.com.

*

This Information is sent in compliance with articles 22 and 23 of Decree-Law no. 7/2004, of 7 January, regarding unsolicited e-mails. If you wish to be removed from our mailing list and avoid similar future communications, please send an email with "Remove" to the email address newsletter@rffadvogados.com.

***

Legal 500 – Band 1 Tax "Portuguese Law Firm"/ Band 1 Tax "RFF Leading Individual" and highlighted in "Hall of Fame", 2013, 2014, 2015, 2016, 2017, 2018, 2019
Chambers & Partners – Band 1 Tax "RFF Ranked Lawyer", 2013, 2014, 2015, 2016, 2017, 2018, 2019 and Band 1 "Private Wealth Law" - HNW "RFF Ranked Lawyer", 2018
International Tax Review – "Best European Newcomer" (shortlisted) 2013 / "Tax Controversy Leaders", 2014, 2015, 2016, 2017, 2018, 2019 / "Indirect Tax Leaders", 2015, 2016, 2017, 2018, 2019 / "Women in Tax Leaders Guide", 2015, 2016,2017, 2018, 2019 / "European Best Newcomer", 2016 / "Tax Firm of the Year", "European Tax Disputes of the Year" and "European Indirect Tax Firm of the Year", (shortlisted) 2017
Best Lawyers – "RFF Tax Lawyer of the Year", 2014 / "Recommended Lawyers", 2015, 2016, 2017, 2018
Who´s Who Legal – "RFF Corporate Tax Adviser of the Year", 2013, 2015, 2016 / "RFF Corporate Tax Controversy Thought Leader", 2017 "Corporate Tax: Advisory and Controversy", 2017, 2018, 2019
Legal Week – RFF was the only Portuguese in the "250 Private Client Global Elite Lawyers" 2018
STEP Private Clients Awards - RFF "Advocate of the Year 2019" (shortlisted)
IBFD Tax Correspondent Angola, Mozambique and East-Timor, 2013, 2014, 2015, 2016, 2017, 2018, 2019

SUMÁRIO

In order to tackle international tax evasion and fraud, Governments around the world have been adopting several anti-abuse measures that seek to restrain abusive operations when it comes to income and wealth taxes.

As such, and similarly to the European Union and the other Member States, Portugal has an official "blacklist" of jurisdictions whose tax regimes are deemed as clearly more favourable.

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

BACKGROUND

In order to tackle international tax evasion and fraud, Governments have been adopting several anti-abuse measures that seek to combat abusive operations in the field of income and wealth taxes, namely, the creation of *blacklists* of countries, territories or regions that have tax regimes that are clearly more favourable, commonly known as *tax havens*.

The decision to include a country, territory, or region in one of these *blacklists* is unilateral and subject to review, either by the Government's decision or through a formal request from the competent authority of the jurisdiction in question, stating that it no longer fulfils one or more of the criteria by which inclusion in the list is determined.

THE REGIME IN FORCE

In the context of international tax evasion and fraud prevention, Portugal has a double prevention system in place. On the one hand, there is an official *blacklist* of countries deemed as *tax havens*, which is occasionally reviewed by the Government and updated by decree.

On the other hand, the Portuguese legislation foresees an open clause that allows for the extension of the *tax havens* regime to other jurisdictions that, despite not being on the *blacklist*, still fail to comply with its criteria.

The Portuguese legislation also foresees a safeguard clause, by which these rules do not apply to European Union (EU) Member States, to countries that are a part of the European Economic Area (EEA) and to countries with whom there are international administrative cooperation systems in place that are similar to those in effect within the EU.

As previously mentioned, the decision to include a country, territory, or region in the *blacklist* is unilateral, but this decision can be reviewed either by the Government's initiative or by a formal request from the competent authority from the jurisdiction in question, stating that it no longer fulfils one or more of the criteria by which inclusion in the list is determined, which are:

a) inexistence of a tax that is similar to the Portuguese CIT or, if it does exist, the applicable rate is not 60% lower than the general CIT rate in Portugal;
b) the rules by which taxable income is calculated are not substantially different from the international standards;

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

c) the existence of special regimes or tax benefits that substantially reduce taxation; and
d) the applicable legislation and administrative practices do not allow for an effective information exchange when it comes to tax matters.

Besides these criteria, and as previously mentioned, the Portuguese legislation foresees an open clause under which the Portuguese Tax administration may, on a case-by-case basis, consider another jurisdiction as a *tax haven*.

In order to be considered a *tax haven* under the open clause, the jurisdiction in question must apply a CIT rate that is at least 60% lower than the Portuguese CIT rate, and two additional criteria will apply:

a) this low rate is expressly sanctioned by law; and
b) there are special relations between people or entities in that jurisdictions and people or entities that reside in Portugal.

When applying the open clause, and as previously mentioned, international tax transparency systems in place could be an excluding factor, functioning as a safeguard clause, as long as they are deemed to be equivalent to those in place in the context of the EU. If that is the case, the Portuguese Tax administration will not be able to apply the open clause.

However, there is uncertainty regarding the protection of taxpayers and matters of international fiscal policy arising from the currently applicable legislation in Portugal, namely, the true definition of a *tax haven* in the eyes of the Portuguese Government, what trust can be placed in information exchange conventions and how national taxation can affect international negotiations.

As such, it becomes necessary to determine which international administrative cooperation systems can be considered as equivalent to those in place within the EU and thus trigger the safeguard clause.

For example, if being a part of the EEA satisfies this requirement, perhaps the safeguard clause should also be triggered with regards to countries that have signed the Organisation for Economic Co-operation and Development's (OECD) Convention on Mutual Administrative Assistance in Tax Matters – with 108 signing countries, including Portugal, since March 1st, 2015 – and that

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

comply with the OECD/Global Forum ratings.

This question could arise regarding other situations, like the existence of Double Tax Treaties (DTT) that include information exchange, proper Tax Information Exchange Agreements (TIEA) or situations which fall under the scope of the Council Directive 2011/16/EU, from February 15th, 2011, which relates to administrative cooperation in tax matters.

As such, it is not clear what constitutes an administrative cooperation that is equivalent to the one in place within the EU, although jurisprudence from the EU Justice Court has shed some light on this issue.

In addition, regarding the qualification of a country as being cooperative or non-cooperative, under the international transparency and cooperation standards set forth by the OECD, it should be noted that there are some jurisdictions that Portugal qualifies as *tax havens* that are qualified as "largely compliant" by the Global Forum, which is the same rating that Portugal currently has.

It is also relevant to point out that when it comes to the exchange and storage of personal information, data security and privacy are growing concerns. As such, and even though there are formal mechanisms in place regarding personal data protection and confidentiality, it is important to also guarantee this protection and confidently in practical terms, under the rules set out by the EU and the European Human Rights Convention, as pointed out by the *Article 29 Data Protection Working Party* and other independent organizations.

On the other hand, it should be mentioned that there are concerns that information exchange agreements may lead to an uncontrollable spreading between Tax administrations of the taxpayers' fiscal, personal, banking and business information.

THE RELEVANCY OF BEING DEEMED A "TAX HAVEN"

When a jurisdiction is qualified as a tax *haven*, it means that it is considered to be a threat to the taxation and wealth of the country of which the taxpayer is a resident.

If the country in which the taxpayer is a resident taxes this individual's worldwide income, and feels that its revenue source is under threat, it will find means to influence the taxpayer's behaviour –

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

usually, through more aggressive taxation rules.

In Portugal, these rules consist of aggravated fixed rates, such a 35% rate on investment income derived from entities located in *tax havens* (PIT and CIT). The applicable legislation also foresees aggravated real estate taxes, in which tax is levied on the property's gross taxable value (in the case of the annual real estate tax, the tax will be 1/15 of the property's global value). There are also limitations on the deductibility of tax losses in a number of situations, such as the sale of shares held in companies based in *tax havens*, among other measures.

THE RELEVANCY OF A TAX HAVEN HAVING SIGNED A DDT

In light of the above, it is important to further detail the situation in which a *tax haven* and Portugal have a DTT in force between them.

When it comes to DTTs, Portugal follows the OECD Model Tax Convention, which leans towards residency-based taxation, which means that taxation rights are granted to the country of which the taxpayer is a resident. Only in a few exceptional cases are taxations rights granted to the country in which the income is sourced.

This concept is advantageous to the taxpayer because whenever a DTT is in force, any national tax rules that could overlap and lead to double taxation will not apply.

In addition, if the country of residency (Portugal) grants the right to tax certain types of income to the (low taxation) country in which the income is sourced, and that country chooses not to tax or to only residually tax those same types of income, the taxpayer could benefit from a double tax exemption, in which the income will not be taxed in the country of residency or the country of source.

When a DTT coexists with a *tax haven* qualification, questions arise regarding the possibility of said qualification being in violation of the DTT's terms.

NON-COOPERATIVE JURISDICTIONS (THE EUROPEAN BLACKLIST)

The EU has two classification levels for "non-cooperative" jurisdictions: a *blacklist*, for the jurisdictions that do not comply with the international criteria in any way, and a "grey list", for jurisdictions that, despite not complying with

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

international standards, have made promises to change their laws, administrative practices, and transparency rules to be more in line with those standards.

The decision to include a country on one of these lists is made by the European Commission, after an evaluation based in three criteria:

a) fiscal transparency;
b) good governance; and
c) effective economic activity.

In addition, the existence (or lack thereof) of a zero-rate CIT is also taken into account.

As a final note, it should be mentioned that the creation of these lists by the UE has shown results as an effective way to influence countries to adopt improved tax transparency and governance rules. According to official information from the EU, since the *blacklist* was introduced, at least 60 countries have taken measures to address the Commission's concerns, and over 100 harmful tax regimes have been changed.

The EU's *blacklist* currently lists the following jurisdictions:

a) Samoa;
b) American Samoa;
c) Fiji;
d) Guam;
e) Panama;
f) Trinidad and Tobago;
g) American Virgin Islands; and
h) Vanuatu.

RECENT DEVELOPMENTS

After committing to changing its laws, administrative practices, and tax transparency rules to be more in line with international OECD tax standards, the Principality of Andorra was removed from the EU's "grey list" in 2018.

It is worth noting that Portugal's had already signed a TIAE with the Principality of Andorra, which has been in force since December of 2016, followed by a DTT, which has been in force since April of 2017.

In this context, the Principality of Andorra presented a formal request to the Portuguese Government to be removed from its *blacklist*. After finding that Andorra now largely met the criteria set forth by the Portuguese legislation to be removed from the list, Andorra's request was given a favourable ruling by the Portuguese Tax administration and the country was removed from the *blacklist*.

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com

Andorra's general CIT rate is currently 10%, despite the fact that it should be at least 12.6%, under the Portuguese General Tax Law's rule that in order to not be blacklisted, a country's general CIT rate cannot be 60% lower that Portugal's general CIT rate, which currently stands at 21%.

In light of this, through Decree no. 309-A/2020, from December 31st, which enacted changes to Decree no. 150/2004, from February 13th, by which Portugal's *blacklist* was first created, Andorra was officially excluded, effective January 1st, 2021.

Considering the conventions signed between Portugal and the Principality of Andorra, as well as recognition from the EU that this jurisdiction has made relevant developments to align its administrative practices and transparency rules with current international standards, the Portuguese Tax administration's decision to remove Andorra from its *blacklist* was commendable.

However, even after the removal of Andorra, Portugal's blacklist still raises some questions.

Portugal's blacklist is still one of the longest in the EU, as 78 of the original 83 jurisdictions included in Portugal's original *blacklist* still remain, and some EU countries don't even have official *blacklists* in their legislation, like Austria, Germany, Denmark, or Sweden.

It is also worth noting that in October of 2021, the EU decided to remove Anguilla, Dominica, and Seychelles from its blacklist.

Despite the fact that these exclusions have met some criticism within the EU, the fact remains that they are currently still listed in the Portuguese *blacklist*.

The growing globalization, and the fact that our economy has become increasingly based around foreign investment, all indicate that the Portuguese *blacklist* warrants a deep review, as it still includes jurisdictions that the international community have long since considered as being largely compliant.

***

Lisbon, March 22nd, 2022

Rogério M. Fernandes Ferreira
Marta Machado de Almeida
Soraia João Silva
Inês Tomé Carvalho

www.rfflawyers.com
Avenida da Liberdade, 136, 3.º/ 4.º (Reception)
1250-146 Lisbon – Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com