

Non-habitual resident - Professional income earned in Portugal for an entity based in the USA - Application of the exemption method (RNH - Rendimentos profissionais prestados em Portugal para entidade sediada em EUA - método de isenção)

What is Informação Vinculativa (Binding Information)?

Binding Information, refers to an official response issued by tax authorities in Portugal, addressing specific queries from taxpayers regarding the interpretation or application of tax laws in particular situations. These rulings hold legal authority and must be followed by both the taxpayer and the tax authority, provided that the circumstances remain unchanged.

Importance of Binding Information:

Formality: They provide an official and authoritative interpretation of tax legislation.

Obligation: Both the tax authority and the taxpayer must adhere to the ruling, provided the facts presented remain unchanged.

Legal Certainty: Binding rulings offer taxpayers clarity and legal certainty regarding their tax obligations. By outlining how tax laws apply to their specific circumstances, taxpayers can plan and conduct their financial activities with confidence.

Procedure: Taxpayers must formally request binding information by detailing their specific circumstances for accurate analysis.

Facilitating Planning: Provides confidence for taxpayers in planning their financial activities.

Avoiding Disputes: Ensures compliance with tax laws, thereby reducing potential disputes with tax authorities.

Ensuring Fairness: Promotes fairness in tax treatment by providing consistent interpretations of tax laws.

Example Scenario:

Law: Personal Income Tax Code

Article/Item: Art. 81 - Elimination of International Double Taxation

Subject: Non-habitual resident - Professional income earned in Portugal for an entity based in the USA - Application of the exemption method

Details of the Scenario:

Request for Binding Information:

The applicant seeks binding information regarding the application of the exemption method provided for in Article 81(5) of the IRS Code to income derived from the exercise of her activity, which is considered to be obtained in the United States of America.

It further clarifies the following:

- The applicant has been registered under the non-habitual resident status since 2019.
- She is registered for VAT/IRS purposes, specifically for the consultancy activity she has been conducting since January 1, 2019, a high value-added activity according to the list approved by Ordinance No. 12/2010 of January 7, under code 704.
- The aforementioned activity is carried out online, providing IT consulting services to the company XXXX, based in the United States of America, through a computer platform owned by the American acquirer.
- Her income, taxable under IRS Category B, was taxed at a rate of 20% for the year 2019, as per Article 72(10) of the Personal Income Tax Code (CIRS).
- Despite this, the applicant believes that her income derived from the aforementioned activity should be considered as income earned abroad, since she performs it from an online platform owned by the entity to which she provides services, which is based in the United States of America, with no connection to the national territory.

Response and Guidance:

1. According to the provisions of Article 13 of the IRS Code (CIRS), individuals who reside in Portuguese territory and those who, although not residing therein, obtain income here are subject to income tax.
2. Considering that the applicant is a tax resident in national territory by meeting the residence requirements provided for in Article 16 of the CIRS, in accordance with Article 15(1) of the CIRS, the IRS applies to the total income, including income obtained outside this territory.
3. As stipulated in Article 3(1)(b) of the CIRS, income from professional activities is considered to be earned through the exercise, on one's own account, of a service provision activity, including those of a scientific, artistic, or technical nature, regardless of their nature, which applies to the present case since the applicant is registered for the activity of "Consultants."
4. Given that, under Article 18(1)(f) of the CIRS, income derived from professional activities and other service provisions carried out in Portuguese territory are considered to be obtained in this territory.
5. Now, considering that the applicant is a resident in Portugal and that services are provided from national territory (the fact that services are provided through an IT platform located in the United States of America being irrelevant), income is obtained in Portugal.
6. Consequently, the holder of these incomes is required to issue an invoice, receipt, or invoice-receipt in an official format for all amounts received, as established in Article 115(1) of the CIRS, or to issue an invoice in accordance with Article 29(1)(b) of the VAT Code and to issue a receipt for all amounts received.
7. In the situation under consideration, where services are provided to entities located in the USA, it is important to assess the competence to tax these incomes in accordance with applicable international law, the Convention for the Avoidance of Double Taxation concluded between Portugal and the United States of America (CDT).
8. Article 15 of the CDT establishes that income earned by a resident of a Contracting State from the exercise of a liberal profession or other independent activities may only be taxed in that State. However, this income may be taxed in the other Contracting State if: i) the resident has a habitual fixed place of business in that State and only in relation to income attributable to that fixed place of business, or; ii) if the resident stays in that State for a period totalling or exceeding 183 days and only with respect to income earned from the exercise of that activity.
9. Therefore, in the absence of the aforementioned exceptions, the taxation of incomes paid by the foreign entity falls under the exclusive competence of the Portuguese State as the resident's State of residence for liberal professionals or independent workers. The applicant may present in the USA a certificate of tax residence in Portugal, which can be obtained through the Internet by accessing the website of the Tax and Customs Authority at www.portaldasfinancas.gov.pt, selecting Citizens/Obtain/Certificates/Tax Residence/Request/Confirm.
10. Thus, the incomes obtained must be fully declared in Annex B of the IRS Model 3 declaration, bearing in mind that the determination of income is made based on the simplified regime, as the applicant has been doing.
11. Regarding the application of the exemption method provided for in Article 81(5) of the CIRS, it is a condition that the non-habitual resident earns income abroad from Category B, derived from high value-added service activities, and that, with a convention for the avoidance of double taxation in place, the incomes may be taxed in the other Contracting State. However, as explained earlier, the incomes earned by the applicant

- are considered to be earned in national territory, and the exclusive competence for taxation lies with the Portuguese State, making the exemption method not applicable.
12. Therefore, the application of the exemption method under Article 81(5) of the CIRS requires that the non-habitual resident earns income abroad in category B, derived from high value-added service activities and, with a convention for the elimination of double taxation in place, the incomes may be taxed in the other Contracting State. As previously explained, the incomes earned by the applicant are considered to be earned in national territory, and the exclusive competence for taxation lies with the Portuguese State, making the exemption method not applicable.

Conclusion:

Binding information clarifies that the Portuguese tax regulations (CIRS) stipulate that individuals residing in Portugal or earning income within its territory are subject to Portuguese income tax. The applicant meets the residency criteria, making all income, including that earned abroad, taxable in Portugal. Professional income from services rendered, regardless of nature, is subject to Portuguese taxation if performed from Portuguese territory. Compliance requires issuing official invoices or receipts for all earnings. International taxation, governed by the CDT with the USA, clarifies that income earned by residents from liberal professions abroad is primarily taxed in Portugal. Therefore, all earnings must be fully declared in the IRS Model 3 declaration under the simplified regime. The exemption method for non-habitual residents does not apply since the applicant's income is sourced within Portugal, falling exclusively under Portuguese tax jurisdiction.

For more detailed guidance and to ensure compliance with tax laws, please contact AFM at info@afm.tax