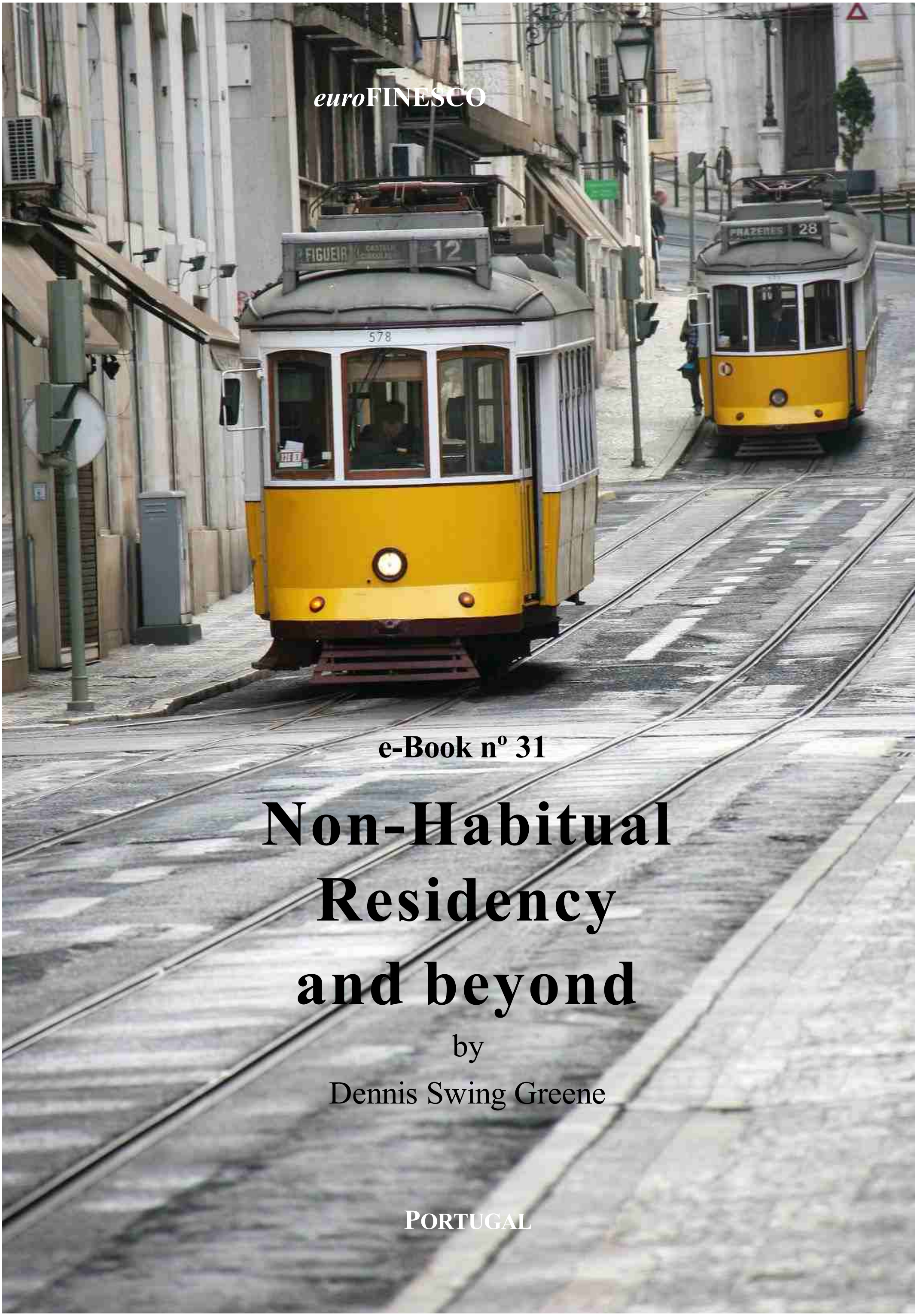

*euro*FINESCO

e-Book nº 31

Non-Habitual Residency and beyond

by

Dennis Swing Greene

PORTUGAL

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The Portuguese tax system offers surprising opportunities to the foreign resident. When properly prepared, Portugal can prove to be a "tax haven within Europe" for you.

PORTUGUESE "*IRS*" INCOME TAX RETURNS

euro**FINESCO** specializes in helping foreign residents by preparing their annual Portuguese *IRS* Income Tax Returns.

Nominee Companies for Portuguese Property

- Meeting basic compulsory compliance commitments;
- Liaison between *Finanças* and Company Owners.
- Resourcing information to Owners;

Fiscal Representation

- Protecting your Valuable Investment
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We can assist you by cutting through the bureaucracy:

- *“Residências”*
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Small Business Formation

We can help expatriates launch new businesses in Portugal:

- Choosing the right structure
- Accountancy Services
- Social Security & VAT
- Local Lodging Plan

To understand Non-Habitual Residency, it is useful to study the various concepts of residency. In conflict of laws, *Habitual Residency* is the standard used to determine the law which should be applied to resolve given legal disputes. It can be contrasted with the law on *Domicil*e, traditionally used in common law jurisdictions to serve the same function.

Habitual Residency is less demanding than *Domicile*. The focus is more on past experience rather than future intention. There is normally only one habitual abode where the individual usually resides and routinely returns to after visiting other places. It is the geographical place considered "home" for a reasonably significant period of time.

Domicile

Domicile is either a *Domicile of Origin* (i.e. principally a parent's domicile at the time of birth) or a *Domicile of Choice* (a new centre of interests where you chose to live out your days). *Domicile is* not always easy to determine.

To establish a *Domicile of Choice*, it is necessary to have a clear factual base in one state and that must be accompanied by an intention to reside there indefinitely. Although it is not so difficult to produce evidence that an individual has established a home in a state, it can be difficult to prove that someone has no intention of ever establishing a home in another state.

The test for *Habitual Residency* is less demanding. The focus is on the recent experience of the individual and not so much on future intention.

Since *Habitual Residency* is a test of fact, it is not a purely legal concept per se. There are different views about the factual situation which it is supposed to denote. Some believe that the sole criterion should be purely objective, seeking evidence of physical presence over a considerable period of time. Others assert that the test should have both objective and subjective elements: the physical presence in a given place as well as the expressed intention to continue to stay there.

The Hague Conference on Private International Law has deliberately refrained from offering a definition so that the concept may be flexible and adaptable to practical requirements. Thus, *Habitual Residency* may be interpreted differently in different situations. However, the core of the test tends to be based on evidence of a long-term stay accompanied by other evidence of the individual's personal and professional life to demonstrate the continuity of the connection between that person and the place of residence. To that extent, the intention of the individual may have some weight.

But it may be difficult to determine where a person has an *habitual residency* if constantly on the move with no real or continuing connection with any of the countries through which passed. This could be resolved by reference to the individual's intention, but although the test of intention is well-defined in the case law for the purposes of *Domicile*, there is no consensus of the strength of intention that would have to be shown to establish "habit". There is no consensus on the length of time a person should have a home for it to become *"habitual"*.

To understand the components that comprise Domicile and how to move towards a Domicile of Choice, please consult our leaflet **L2: The 12 Badges of Domicile**.

Non-Habitual Residency

The European Court of Justice held that “the concept of ‘the Member State in which he resides’ must be limited to the state where the citizen, although occupied in another Member State, continues habitually to reside, and where the habitual centre of his interests is also situated.”

Furthermore, “the addition of the words ‘or who returns to that territory’ implies merely that the concept of residency, such as defined above, does not necessarily exclude *non-habitual residency* in another Member State.” (Case 76/76 Di Paolo [1977] ECR 315) The Court thus seems to refer to the notion of “habitual” or “usual” residence. This was later confirmed in two other judgments in the area of social security.

Civil Residency *(temporary)*

For the first 90 days, EU citizens are considered temporary visitors. In the fourth month of residing in Portugal, *civil residency* is established through registration at the Town Hall in the municipality where you are live. All that is needed is valid identification, such as a passport or a national identity card. You will be asked to sign a declaration stating that you will take care of your own housing, provide sufficient means to live and be responsible for health care. No proof, other than your word, is required. You will be issued a *resident permit* called a "*Residência*" on the spot which remains valid fora period of 5 years.

Fiscal Residency

Rather than a registration as with *Civil Residency*, *Tax Residency* is established factually. The following are the criteria defined by the OECD used by most countries:

Living in Portugal for more than 183 days of the fiscal year (January - December).

- If this standard cannot be met, the next criterion is having your permanent home (*habitual abode*) available to you in Portugal.
- If this is also not the case, you will be deemed resident of the state where your personal and economic relations are closest (centre of vital interests). This is a wide expression intended to cover the full range of social, domestic, financial, political and cultural links.
- All matters being equal, you will be considered to be resident in your state of nationality.

Certificate of Fiscal Residency

If you are resident in your country of origin under domestic law and subsequently become resident in Portugal, then you may need to obtain a Certificate of Fiscal Residency from the Portuguese Tax Authority confirming that you are regarded as tax resident under domestic law for the period in question, which must be stated on the certificate.

Dual Tax Residency

It is possible to be resident for tax purposes in more than one country at the same time. This is known as *dual residency*. If you are resident in Portugal and another country, you have to look at the Double Taxation Agreement between the two countries to find out where you should pay tax. The Double Taxation Agreement should prevent you from being taxed twice on the same income. If you are *dual resident* in Portugal and a country that does not have a double taxation agreement, then you can usually offset tax paid in one country against tax due in the other country. Dual Residency usually occurs in one of 2 sets of circumstances.

Example nº 1: ***Split Tax year***

The first occurs in a split tax year where you begin the year as tax resident in one country and end the year resident in another. The split year concept was only introduced into Portuguese law in 2015 and was not applicable before.

Example nº 2: ***Resident in both countries***

John D. is a dual resident in UK, where he spends more than 90 days per year for the past few years, and in Portugal, where he spends more than 183 days per year. According to Article 4 of Double Taxation Agreement *, he is fiscally resident in UK on account of having an "habitual abode" available in both countries but having his centre of vital interests in the UK (family, income from managed rental properties in the UK, etc). Consequently he pays tax in the UK as a UK resident and as a non-resident in Portugal.

* The UK-Portugal Treaty entered into force on 17 January 1968. This very early treaty – almost a half century old – does not include the number of days spent as one of the criteria for residency. This contrasts with the current OECD Model Treaty which lists 183 days as the principle standard for residency.

Habitual Residency

To be considered an habitual resident ("*residente permanente*" in Portugal; "ordinarily resident) in the UK), you must hold a temporary residency permit for a least five years and have proof of fiscal compliance over the period. After living in Portugal for 5 years, your Permanent Residency Card (a credit-card style photo ID) may be obtained at the *Serviço de Estrangeiros e Fronteira*s Office ("*SEF*"). Valid identification and your original *Residência* Certificate are required. This card does not expire and only needs renewal if you move address.

The status of *Non-Habitual Residency* can be obtained if you become resident for tax purposes in Portugal without having had fiscal resident status in Portugal in the five years prior to application. This status may be enjoyed for a maximum period of ten consecutive years, after which you will become ordinarily regular tax resident, subject to the standard IRS tax regime.

The Non-Habitual Resident Individuals' special tax regime previews the following exemptions/benefits:

A) **Professional Income from Portugal**

Income generated in Portugal classified under the IRS code as derived from categories A (employment) and B (self-employment, royalties), linked with "high value-added activities" of a scientific, artistic or technical nature, as defined by the Portaria no. 12/2010 of 7 January (see summary below) will be taxed at a special flat rate of 20%.

Professional Activities with high added-value

1 - Architects, engineers and the like;
2 - Visual artists, actors and musicians;
3 - Auditors;
4 - Physicians and dentists;
5 - Teachers;
6 - Psychologists;
7 - Professional services, technicians, etc.
8 - Investors, administrators and managers.

B) Salary from Abroad

Income generated outside Portugal from category A (employment) will be exempt in Portugal if such income is taxed in the source jurisdiction and it is possible to establish a tax credit under an existing tax treaty for the elimination of double taxation or in the absence of such treaty, if taxed in the source jurisdiction and such income cannot be considered as taxable in Portugal under the IRS Code's rules.

C) Other Income

Income generated outside Portugal from category B (within high value added activities, as mentioned above) or categories E (capital income), F (letting income) or G (capital gains) will be exempt in Portugal if this income may be taxed in the source jurisdiction and it is possible to establish a tax credit under an existing Tax Treaty for the elimination of double taxation or equivalent provided that such source jurisdiction is not included on the tax havens' black-list (Ministerial Decree Decree n.º 150/2004 of 13 February).

D) Pensions

Income generated outside Portugal, classified under the IRS code as derived from category H (pensions), will be exempt in Portugal if this income is, alternatively:

1) Taxable in the source jurisdiction whereby a tax treaty for the elimination of double taxation is in place allowing for a tax credit;
2) Under the criteria of the Portuguese “IRS” Code, this income cannot be considered as taxable in Portugal.

Despite being tax exempt under the conditions described above, this income must be aggregated in order to determine the tax rate applicable to the remaining taxable income.

Finally, because this status does not allow for a double exemption, it should be mentioned that the Decree-Law gives Non-Habitual Residents the possibility to waive the right to exemption in favour of the tax credit method.

International Pension Plans

The Non-Habitual Resident regime has proven popular with beleaguered taxpayers throughout the EU and beyond. Enticed by the promise of a 10-year tax holiday, many thousands have signed up for the programme only to discover that there is a "*fly in the ointment*". The guidelines state that most sources of foreign income are exempt from tax in Portugal provided that they may be subject to taxation in the Source Country as defined in the appropriate Double Tax Treaty. In fact, this means that most streams of revenue "may be taxed" or are exclusively taxed at source prior to being considered for assessment in Portugal, as illustrated in the following income categories detailed in Double Tax Treaties:

Business Profits	Capital Gains - Movables	Dividends
Employment	Capital Gains - Immovables	Interest
Independent Services	Teachers and Students	Royalties
Government Service	Director's Fees	Rental income

In conclusion, one of the few categories eligible for full exemption from assessment in Portugal is Pensions. That's not much of a "holiday" if first you must pay tax before any income arrives in Portugal. This is specially true because protection already existed from double taxation under these Double Tax Treaties.

AN ALTERNATIVE

However a solution exists. Investment-related income can be transferred into a qualifying pension vehicle, thereby turning tax-free an otherwise taxable portfolio. An International Pension Plan is ideally suited for this purpose.

Pensions and Portugal

While most people believe that the only way to meet the prerequisites of a pension is via regular contributions throughout a working career, many do not realise that a compliant plan can be created on a lump-sum basis. Unlike annuities and most conventional onshore retirement plans, often implying a labyrinth of restrictive do's and don'ts, an International Pension Plan can be characterised by simplicity, flexibility and tax-efficiency, all on a fully compliant EU-recognized platform. Perhaps the most attractive part of International Pension Plans is the opportunity to take full advantage of the opportunities intrinsic in the Non-Habitual Resident Status.

The status of *Non-Habitual Resident*, in force in Portugal since 2009, offers both opportunity and risk to the potential migrant to Portugal. On the one hand, there is the promise of an attractive tax rate for professional income and exemption from other income earned outside of Portugal. On the other, there is a great deal of ambiguity and uncertainty, both in the drafting of the legislation and its subsequent interpretation and implementation both in Portugal and around the European Union.

Retaliation

The NHR regime requires only a potential liability to taxation in the source State under the rules of a tax treaty or of the OECD Model Tax Convention. After your registration as a *non-habitual resident* in Portugal, you must request an International Certificate of Fiscal Residency from the Portuguese tax authorities. This document then has to be sent to the tax authorities in the country of the source of income. In principle, this should enable you to be exempt from tax in that jurisdiction.

However, this narrow interpretation is not necessarily shared by all tax authorities around EU. In the Netherlands, for example, the NHR status is under hostile attack from the *Belastingdienst* with Portugal accused of being a "Tax Haven" inside Europe. Under current practice, withholding tax exemptions that were formerly granted without difficulty are being systematically rejected by the Dutch tax authorities.

Eventual EU ruling

Given the European Union Commission's active stance against tax competition between member states, it seems likely that the Commission and/or the Court of Justice of the European Union will eventually issue a ruling on the admissibility of the NHR status. What impact such a decision might have on the 10-year tax holiday is anyone's guess.

Deferred capital tax exemption

Under *Brussels IV*, the EU Directive that governs estate successions within the European Union which came into effect in August 2015, you may now choose either for the Law of the country of your *nationality* or the Law of the country of your last *habitual residency* for determining succession rights to your cross-border estate.

If you have elected *Non-Habitual Resident* status in Portugal, you will likely only to be seen as *habitually resident* after the 10-year period has passed plus the usual five years to qualify for "*permanent resident*" status.

Given the fact that Portugal has no Inheritance Tax between immediate relatives (and no Wealth Tax at all), high net worth individuals will find themselves opting out of eligibility for capital tax exemption in exchange for their income tax holiday under NHR. Fifteen years may prove too long for many to wait.

The Non-Habitual Residency (NHR) programme has been successful in attracting freelancers to Portugal from around the world. While this plan offers pensioners a 10-year tax-free holiday and wealthy executives, a modest 20% flat assessment on six-figure salaries, this solution can leave much to be desired for the self-employed. In fact, a better option already exists for "gig economy" freelancers in the Simplified Regime, the standard means of assessment used by 99% of entrepreneurs in Portugal.

The "Simplified Regime"

The Simplified Regime offers freelancers a simple, cost-effective alternative to the traditional profit/loss method of tax accounting. With assessment based on a fixed percentage of gross invoicing, small independent businesses can simplify record keeping, reduce taxes and increase productivity. Entrepreneurs qualify when their annual turnover does not exceed €200,000.

> ***Example:***
> *John recently moved to Portugal and operates a freelance business, billing clients in his home country. Last year, his invoicing totalled €75,000. As a freelancer in the Simplified Regime, he is taxed on just 35% of his income. 65% is automatically allotted to cover operating expenses. No further accounting is required. His annual tax is €7,160: just 9.5% of his gross income, far less than the 20% flat rate charges under NHR.*

Other Benefits

In the first year of business in Portugal, freelancers are entitled to a 50% exclusion on their income tax. In John's case, his tax goes down to €2,812 on his gross income of €75,000. A reduction also extends in year two at the rate of 25% before normalising in the 3rd year and beyond.

Social Security

Embracing National Healthcare, old-age retirement pensions, disability insurance, maternity & paternity leave and unemployment benefits, Social Security contributions are both expensive and mandatory. For self-employed individuals in the Simplified Regime, the basic contribution rate is 29.6% of taxable earnings.

Since contributions are based on the previous year's earnings, Freelancers are exempt in their initial year of business. Monthly payments only begin in the 13th month of business activity.

VAT

When annual gross earnings exceed €10,000, Freelancers become subject to VAT reporting in the following year. In the case of invoicing outside of Portugal, most billings are VAT exempt. Since an entrepreneur both pays VAT on necessary business expenses and potentially collects VAT from customers, an opportunity arises for ongoing tax refunds.

While Non-Habitual Residency can be appealing for some people in certain circumstances, the Simplified Regime usually turns out to be the more beneficial method for most freelancers. When correctly registered as self-employed, Freelancers can meet their new tax obligations in Portugal in what most will find to be a very acceptable manner.

TAX TABLE

"IRS" + "SS" for Freelancers in the Simplified Regime

	IRS annually	IRS as % of income	SS monthly	SS annually	SS as % of income	total taxes	taxes as % of income
€10,000	€507	4.4%	€124	€1,488	14.9%	€1,995	20.0%
€20,000	€1,015	5.0%	€186	€2,016	10.1%	€3,031	15.1%
€25,000	€1,501	6.0%	€248	€2,976	11.9%	€4,477	17.9%
€30,000	€2,000	6.7%	€310	€3,720	12.4%	€5,720	19.0%
€40,000	€2,997	7.5%	€ 72	€4,464	11.2%	€7,461	18.7%
€50,000	€3,995	8.0%	€496	€5,951	11.9%	€9,946	19.9%
€60,000	€5,171	8.6%	€620	€7,440	12.4%	€12,611	21.0%
€70,000	€6,497	9.3%	€620	€7,440	10.6%	€13,937	19.9%
€80,000	€7,823	9.8%	€744	€8,928	11.1%	€16,751	20.9%
€90,000	€9,149	10.2%	€922	€11,064	12.3%	€20,213	22.4%
€100,000	€10,474	10.5%	€922	€11,064	11.0%	€21.538	21.5%
€125,000	€14,719	11.8%	€922	€11,064	8.9%	€25,783	20.6%
€150,000	€18,898	12.6%	€992	€11,064	7.4%	€29,962	20.0%
€175,000	€23,075	13.2%	€992	€11,064	6.3%	€34,139	19.5%
€200,000	€27,254	13.6%	€992	€11,064	5.5%	€38,318	19.1%

Note: additional 50% IRS exemption in year one, reducing to 25% in year 2; full SS exemption in year one.

Note: Based on fiscal year 2015, this chart is still proportionally representative.

While Non-Habitual Residency can be appealing for some people in certain circumstances, the Simplified Regime usually turns out to be the more beneficial method for most freelancers. When correctly registered as self-employed, Freelancers can meet their new tax obligations in Portugal in what most will find to be a very acceptable manner.

SALES

Specific rules apply when you buy or sell goods or services to or from the European Union.

SALES: *Countries within the EU*

Selling to Businesses

- If you sell goods to another business and these goods are sent to another EU country, you do not charge VAT if the client has a valid VAT number.
- You may still deduct the VAT that you have paid on your related expenses (goods/services bought to make those sales).

If the client does not have a VAT number, you must normally charge VAT on the sale at the applicable rate in Portugal.

Selling to Consumers

- If you sell goods and send them to consumers in another EU country, you need to register there and charge VAT at the rate applicable in that country unless the total value of your sales to that country in the year falls below the limit set by the country (€35,000 or €100,000).
- If you are selling excise products or new means of transport (car, boat or aircraft), there are special rules.

Buying

- If you buy and receive goods for business purposes from another EU country, you must account for the VAT on the transaction as if you had sold the goods yourself, at the applicable rate in your country.
- Later, you can deduct this amount. (*Reverse charge procedure*)

SALES: Countries outside the EU

There are several exceptions to these basic rules.

Selling

- If you sell goods to consumers outside the EU, you do not charge VAT, even though you may still deduct the VAT that you have paid on your related expenses.

Buying

- If you buy goods for your business from a supplier outside the EU, you must pay VAT at the point of import (and may deduct this in your next VAT return if you make taxed sales).

SERVICES

You normally charge VAT at the applicable rate in Portugal except for electronic services, telecommunications and broadcasting. If you buy and receive services from another EU country, you must account for the VAT on the transaction as if you had sold the services yourself, at the applicable rate in Portugal (using the reverse charge procedure). You will later be able to deduct this amount.

There are several important exceptions to these basic rules. The VAT rules must be applied throughout the EU, although there are some territories linked with member countries where, because of specific circumstances, the rules may not apply.

There are also places outside the EU where the EU VAT rules apply such as Monaco, Isle of Man and UK bases in Cyprus

Countries within the EU

Services to businesses

- You do not normally charge VAT. Your clients report VAT on services received using the reverse charge procedure.
- You may still deduct the VAT that you yourself have paid on your related expenses.
- If the client is the final consumer and does not have a VAT number, you must normally charge VAT on the service at the applicable rate in Portugal.

Reverse Charge Procedure

(*This procedure only applies when VAT registered*)

The *reverse charge* is the amount of Value Added Tax that would have been paid on services had they been performed in Portugal. You add this amount to the total VAT to be paid in that quarter. You also report the amount as VAT to be reclaimed in that quarter. In effect, the dual reporting cancels out the transaction.

Countries outside the EU

Selling

If you provide services to clients outside the EU, you normally do not charge VAT though you may still deduct the VAT that you yourself have paid on your related expenses.

Services for Businesses

If you receive services for the purposes of your business from a supplier based outside the EU, you must generally pay VAT at the rate that applies in Portugal as if you had supplied the service yourself (using the *reverse charge procedure)*. Normally, you will later be able to deduct this amount, eliminating the charge.

ESSENTIAL SUPPORT SERVICES
from
*euro*FINESCO

The issues surrounding short term letting continue to generate confusion amongst Owners wanting to rent their properties and Agents wishing to serve the growing need for *self-catering accommodations*.

At ***euro*FINESCO**, we can help you take the right steps:

Comprehension: Facilitating the understanding of the key requirements and how they apply to you.

Clarity: Providing qualified Fiscal Representation Services; Linking you to specialised lawyers to prepare *protective contracts*.

Compliance: Completing *Local Lodging* Registrations; Preparation of "*IRS*" Tax Declarations.

For those familiar with the Portuguese Tax System, ample ways already exist to minimize taxation without the need for further incentives. Let's look at a few:

- ***No Wealth Tax***
  In contrast, France, Spain, Holland, Luxembourg, Norway, Switzerland and Italy all have an annual assessment on one's worldwide assets.
- ***No Inheritance Tax***
  Portugal abolished Inheritance Tax as of 2004. Transfers to immediate relatives (spouse, children, grandchildren, parents and grandparents) are tax exempt. All others pay only 10% Stamp Duty.
- ***Tax Exclusions***
  Many tax exclusions ranging from 33% to 85% running across almost every category of income. For example, holiday let income is taxed at <9% after an 65% exclusion;
- ***Fiscal Territoriality***
  Many taxes are only domestic in scope. The corollary to this principle is that many forms of investments from abroad are tax exempt.
- ***Pensions***
  Each pensioner is entitled to a pension allowance of over €4,100. This means that a retired couple, after personal allowances, typically receives the first ±€15,000 of pension earnings free of tax.

Many foreign pensions are entitled to an 85% exclusion, applying basic principles of elimination of Double Taxation. If eligible, an occupational pension of €60,000 should have little or no tax to pay.

- ***Disabilities Benefits***
  Sometimes the common consequences of aging qualify taxpayers for 60% or greater disability status and still not hurt your golf game. If you are eligible, you will enjoy enhanced deductions.

- ***Income from Portuguese holiday lets***
  When reported as Portuguese-sourced business income, final tax rates are 9% or less with no further tax liability in the home jurisdiction for Non-Residents.

- ***Dividends***
  Dividends paid by Portuguese companies as well as those from any country within the European Union are entitled to a 50% exclusion and are taxed on the other half at marginal rates with withholding on national dividends.

- ***Roll-Over Relief***
  If you sell your principal residence and fully reinvest the proceeds in a new home, the capital gain is exempt. This is extended to new home reinvestment anywhere in the EU.

- ***Nominee Companies***
  If you purchase property for investment purposes, using a Portuguese Nominee Company may provide many benefits including simplified bureaucracy and tax efficiency.

These and other benefits are entitlements under legislation. It is your right as a citizen and taxpayer to take maximum advantage of these tax breaks. Who knows? Even without Non-Habitual Residency, Portugal may prove to be a legal "*tax haven*" for you within Europe.

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