



Portuguese Supreme Administrative Court clarifies concept of tax residence

The Supreme Administrative Court case no. 3/2020 of 6 October 2020 clarified the concept of tax residence putting aside dissenting opinions of some Courts.

According to this case, the residency by dependence will only prevail if all the connecting elements are linked to Portugal or if there is no double taxation treaty.

The Portuguese Supreme Administrative Court recently ruled on the concept of tax residence when applied to taxable persons whose activity, employment and income are not connected to the Portuguese territory, in Case no. 3/2020 of 6 October 2020.

Until now, Portuguese Tax Authorities and some Courts considered that it would be sufficient that one of the members responsible for the household had his/her residence in Portugal for all the other members to be considered tax residents in Portugal, even if they did not have any other link with this territory.

The criteria for the definition of residence was discussed based on two theories: the prevalence of the principle of "residence by dependency", implying the residence of the taxable person when the family members resided in Portugal or the prevalence of the criteria defined by the international treaties entered into by Portugal.

The Supreme Administrative Court has ruled that conventional rules of international law should prevail over domestic law, by virtue of the supremacy of international law, in accordance with the Portuguese Constitution and the Portuguese General Tax Law.

The Court also considered that the meaning conferred to the concept of "residence by dependence" in the Portuguese Personal Income Tax could not override the concept of residence resulting from conventional provisions which follow Article 4 of the OECD Model Convention, given the supremacy of international law over domestic law.

Although article 4 refers the definition of the concept of residence to the internal legislation of the contracting States, the Supreme Administrative Court considers that this should not be done unconditionally, since it assumes that the question of residence is examined individually, on a person by person basis, without reference to the family situation of the taxable person.

Thus, the concept of residence for the purpose of applying domestic law will only apply in situations where there are only elements of connection with the Portuguese legal system or in situations where, if there are connections with other legal systems, there is no convention entered into between Portugal and the State with which that connection occurs.

Now that this dispute has been resolved, there is no doubt that the conventional concept of residence in the Conventions for the Avoidance of Double Taxation entered into by Portugal takes precedence over the rules of domestic law, with the result that tax residence cannot be determined exclusively by the taxpayer's family situation.

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