"STA" DECISION GOES AGAINST THE TAX ADMINISTRATION AND CONSIDERS REGISTRATION AS NHR MERELY DECLARATIVE

The Supreme Administrative Court ("STA") finally considers that the act of registration as a Non-Habitual Resident (NHR) does not have constitutive effects, but merely declarative.

Thus, once the substantive requirements for granting the benefit of the special taxation regime as NHR have been met, taxpayers will be able to benefit from this status from the moment they register as tax residents in Portugal, regardless if the period defined by law (March 31 of the year following registration as a resident) may have been exceeded.

In fact, since the creation of the Non-Habitual Residents regime, the Tax Administration has argued that, once the deadline defined by law for registration as such has passed, the taxpayer is prevented from benefiting from the NHR tax regime.

Now, this decision by the STA finally confirms an understanding contrary to that of the Tax Administration and which has been defended by the doctrine and arbitration jurisprudence of the CAAD (Administrative Arbitration Board), which maintains that such registration duty has merely declarative and not constitutive effects.

The ruling in question originates from the refusal by the Tax Administration to apply the NHR regime to a taxpayer who submitted the application for registration as NHR after the expiry of the legally stipulated period, that is, after March 31st of the year following the one in which he became tax resident in Portugal.

Within the scope of the aforementioned process, the taxpayer maintained that registration as an NHR is merely declarative and that the right to access the NHR regime depends only on the fulfilment of two legal requirements: (i) that the taxpayer becomes a tax resident in Portugal and (ii) has not been considered a tax resident in the Portuguese territory in the previous five years.

On the other hand, the Tax Administration claims that the NHR constitutes a special regime with benefits of an exceptional and temporary nature, and that to benefit from them it is necessary to fulfil its requirements and choose to enrol in that regime within the legally established period.

Finally, the STA considered that the status of NHR does not depend on recognition by the Tax Administration and, therefore, the deadline for registration as such (until March 31st of the following year) is not a preclusive period for the right to benefit from the RNH regime.

In this sequence, the Court considers that the law only establishes a deadline for compliance with the additional obligation that burdens the taxpayer, upon which the duty to register their status as NHR is imposed. Therefore, this act of registration is a condition for the application of the respective tax regime, and through this act the Tax Administration has the possibility of verifying and controlling the legal assumptions for the attribution of such status.

However, the Supreme Administrative Court clarified that registration as an NHR is merely an act of a declaratory nature, not producing any constitutive effects, contrary to what has been defended by the Public Treasury.

Consequently, in view of this understanding, the submission of the application for registration as an RNH after the stipulated deadline – after March 31st of the year following the one in which the Applicant became a tax resident in Portugal – results in the regime only being applicable for the future , therefore, from the year of registration as a Non-Habitual Resident, the benefit being lost in the years that have already elapsed.

Therefore, as the STA maintains, the assumptions for applying the regime under analysis are, solely, that the taxpayer needs to become a tax resident in Portugal and not be considered resident in national territory in any of the five immediately preceding years.

Therefore, it can be concluded that, even if the taxpayer does not register as a Non-Habitual Resident by March 31st of the year following the year in which he became a resident in Portugal, if all requirements are met, it would still be possible to benefit from the NHR status, even that it is still unknown what the practice of the Tax Administration will be in the future in this specific case.

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