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LEGAL ALERT - High value-added activities under the NHR regime ruled unconstitutional: what now?

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LEGAL ALERT - NHR: high value-added activities ruled unconstitutional

(Under the former Non-Habitual Resident regime, NHR)

In Judgment No. 366/2026 (Case No. 145/2025), the Portuguese Constitutional Court ruled unconstitutional a provision of the Personal Income Tax (IRS) Code that applies to Non-Habitual Residents (NHR).

The provision concerns the special 20% rate on self-employment income (category B) earned from high value-added activities of a scientific, artistic or technical nature. Article 72(10) of the IRS Code did not define those activities and left that definition to an administrative regulation.

Breach of the principle that taxes must be set by law

The decision was based on a breach of Articles 103(2) and 112(5) of the Portuguese Constitution. The Court held that the essential elements of a tax, such as who it applies to and at what rate, must be set by Parliament or by the Government with parliamentary authorisation. The Government cannot define them by regulation or ministerial order where the law does not.

The law gave no clear criteria to identify the activities covered. In practice, it was the ministerial order that decided who could benefit from the 20% rate.

Practical effects

This decision exposes a weakness in the legal architecture of the NHR tax regime: the list of professional activities eligible for the special 20% IRS rate rested on a ministerial order, when the essential elements of that list should have been set out in the law itself.

In this context, the Tax and Customs Authority (AT) faces a legal framework that raises doubts about the validity of the regulatory criteria used to grant or refuse access to the special rate.

Although the judgment was handed down in a specific case, its constitutional reasoning may have implications beyond it:

→ On the one hand, questions arise as to the legal certainty of IRS assessments made under this regime and the protection of situations already established.

→ On the other, taxpayers who were refused classification under a high value-added activity on the basis of the criteria in the ministerial order may now have an additional argument to challenge those decisions, notably in court.

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What now?

The Council of Ministers has approved a legislative proposal to incorporate directly into the IRS Code the activity tables set out in Ministerial Order No. 230/2019 and the earlier Ministerial Order No. 12/2010. The aim is to set out in the law itself the activities covered by the regime, remedying the constitutional deficiency identified and strengthening legal certainty.

One of the most relevant aspects of the proposal is its temporal scope. The new framework is set to apply to taxpayers already registered under the NHR regime whose ten-year taxation period is still running, with a view to strengthening legal certainty and protecting their expectations and the rights acquired under the previous regime.

Important note

The proposal is not yet in force. It is currently before Parliament and must still go through debate and voting in general and in detail, a final overall vote, promulgation by the President of the Republic and publication in the Official Gazette (Diário da República).

How MATLAW can help

Are you, or were you, under the NHR regime? Were you refused access to the special 20% rate? MATLAW will review your situation, assess the impact of this judgment and of the legislative proposal, and support you in defending your rights before the Tax Authority or the courts.

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