



Sérvulo & Associados | Sociedade de Advogados, SP, RL

Update

Tax

January 2023

Tax framework of expenses incurred in the context of remote working

Teresa Pala Schwalbach | tps@servulo.com
Isabel Guimarães Salgado | mis@servulo.com

The recent legislative amendments regarding the legal regime of remote work – foreseen in Law no. 83/2021, of December 6th, which amended the Labour Code in this respect – raised doubts regarding the tax framework of the expenses incurred with remote work, both from the employees' and the employer's point of view.

Therefore, the Portuguese Tax Authority issued, on 18 January last, the Circular Letter (“*Ofício-Circulado*”) no. 20.249, which intends to answer the outstanding questions on this topic.

Legal regime of remote work

In accordance with article 168 (2) of the Labour Code, as amended by Law no. 83/2021, “[t]he employer shall fully compensate all the additional expenses demonstrably incurred by the employee as a direct consequence of the acquisition or use of equipment and computer or telematic systems necessary for the performance of the work, (...), including the increased costs of energy and the network installed at the workplace in conditions of speed compatible with the service communication needs, as well as the maintenance costs of the same equipment and systems”.

To this end, article 168 (3) of the Labour Code establishes that “additional expenses” are those corresponding to the acquisition of goods or services which the employee did not have before the existence of a remote work agreement, as well as those determined by comparison with the employee’s homologous expenses in the same month of the last year prior to the implementation of that agreement.

The compensation to be paid by the employer is calculated by reference to the costs incurred by the employee in the same month of the last year prior to the implementation of that agreement, upon presentation of the supporting documents relating to that month and to the month to which the increase of costs relates to. The documentation submitted by the employee should unequivocally indicate, as the Tax Authority understands it, that it relates to the place of work that was identified in the remote work agreement, although it is not required that the employee appears as the holder in the documentation (e.g. invoices) presented.

Special tax regime

With relevance for tax purposes, paragraph 5 of the same article 168 provides that the compensation for *additional expenses* "is considered, for tax purposes, a cost for the employer and does not constitute taxable income for the employee".

This rule addresses two distinct tax perspectives: on one hand, it allows the deductibility of these expenses for Corporate Income Tax ("CIT") purposes at the employer's level, and, on the other hand, it provides that these expenses will not constitute taxable income for Personal Income Tax ("PIT") purposes at the level of the employees.

However, this rule should be analysed in coordination with the conditions required by the remote work regime, and in particular, with the definition of "*additional expenses*", since, only if these conditions are met, will it be possible, especially for employees, to benefit from this special tax regime.

CIT

The deductibility of these expenses for the employer implies that they are duly supported by the documents listed above.

It should be noted that the Circular Letter under analysis also clarifies a pertinent question that was being raised until now, confirming that these expenses will be deductible, for the employer, even if the employee is not the holder of the documentation/invoices (for example, if the invoices are issued in the name of the spouse).

Nonetheless, in our view, even when this is not the case, for example if the employer opts – as it has been the market practice – to pay a fixed monthly amount to employees (instead of the compensation for the exact amount of extra expenses incurred), these expenses should still be considered deductible for CIT purposes as they qualify as employment income.

PIT

In parallel, if the conditions of the remote work regime are met and if there is a direct reimbursement of the proven additional expenses with remote work, the amounts received by the employees will not constitute income subject to PIT.

However, if the employee does not prove the additional expenses incurred in the terms explained above or if the employer opts to pay a fixed monthly amount, then such amounts may not benefit from this beneficial regime.

To this extent, they will be qualified as employment income and, as such, subject to PIT.

Procedures to be adopted by employers

Depending on the framework of the compensation paid to the employees in terms of PIT, there are different procedures to be adopted by the employer:

- In the case of payments made as reimbursement for additional expenses duly proven by the employee, the employer must have the following information:
 - Agreement established between the employee and the employer regarding the remote work regime;
 - Evidence of the increase of expenses of the employee, with documentation/invoices presented by the latter that compares the homologous expenses in the same month of the last year prior to the application of this agreement and that unequivocally indicates that it refers to the place of work that was identified in the remote work agreement, although it is not required that the employee appears as the holder in the documentation/invoices;
 - The supporting document shall be verified through salary processing or an identical document, being this the tax relevant document for the employer, that will reflect such compensation paid for *additional expenses* to the employee in the Monthly Remuneration Statement ("DMR"), as non-taxable employment income (code A23);
- On the other hand, the payment of a pecuniary compensation to face the increase of expenses due to the remote work without any direct link with the effective additional expenses incurred by the employee, should be reflected by the employer in the DMR as taxable employment income.