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# NEWSLETTER

## TAXATION OF THE SOCIAL MEDIA INFLUENCERS

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Legal 500 – Band 1 Tax “Portuguese Law Firm”/ Band 1 Tax “RFF Leading Individual” and highlighted in “Hall of Fame”, 2013, 2014, 2015, 2016, 2017, 2018, 2019  
Chambers & Partners – Band 1 Tax “RFF Ranked Lawyer”, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and Band 1 “Private Wealth Law” - HNW “RFF Ranked Lawyer”, 2018, 2019, 2020  
International Tax Review – “Best European Newcomer” (shortlisted) 2013 / “Tax Controversy Leaders”, 2014, 2015, 2016, 2017, 2018, 2019, 2020 / “Indirect Tax Leaders”, 2015, 2016, 2017, 2018, 2019, 2020 / “Women in Tax Leaders Guide”, 2015, 2016, 2017, 2018, 2019, 2020 / “European Best Newcomer”, 2016 / “Tax Firm of the Year”, “European Tax Disputes of the Year” and “European Indirect Tax Firm of the Year”, (shortlisted) 2017  
Best Lawyers – “RFF Tax Lawyer of the Year”, 2014 / “Recommended Lawyers”, 2015, 2016, 2017, 2018, 2019  
Who’s Who Legal – “RFF Corporate Tax Adviser of the Year”, 2013, 2015, 2016 / “RFF Corporate Tax Controversy Thought Leader”, 2017 “Corporate Tax: Advisory and Controversy”, 2017, 2018, 2019  
Legal Week – RFF was the only Portuguese in the “Private Client Global Elite Lawyers” 2018, 2019  
STEP Private Clients Awards - RFF “Advocate of the Year 2019” (shortlisted)  
IBFD Tax Correspondent Angola, Mozambique and East-Timor, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020  
Bloomberg Tax and Accounting Author, 2020

### SUMMARY

The development of Information Technologies in a global world has given rise to new business models, which escape a clear and direct tax regulation. The digital economy, in particular, has, moreover, promoted, at a racing pace, the erosion of tax bases and the creation of situations of tax immunity, which should be avoided, from the outset, in the name of the sustainability of tax systems.



## INTRODUCTION

The development of Information Technologies, in a global world, gave rise to new business models, which escape from a clear and direct fiscal regulation.

The digital economy, in particular, has promoted, at a racing pace, the erosion of tax bases and the creation of situations of tax immunity, which should be avoided, from the outset, in name of sustainability of the tax systems, as it raises inconvenience and concerns, not only because it translates into loss of tax revenue, but also because it contradicts principles and other basic values, such as the payment of taxes based on the contributory ability of the taxpayers (a corollary of the fundamental principle of equality).

The so-called digital influencers are, today, a good example of that reality. These are personalities, more or less known to the general public, or who become known through social media networks and who, in recent years, have taken on a role in the stage of dissemination and promotion of products and services. Many times, they are true online advertisers, and one of the most common manifestations of e-commerce.

Brands establish contacts with these influencers, who have a great public exposure and reach a considerable number of consumers, aiming to obtain profits through contractual instruments or mere occasional partnerships.

It is common for digital influencers to be paid for the services they provide either in cash or in kind, as, for example, when they accept to make a post in exchange for the product or the services they are advertising. There are even cases, such as affiliate programs, in which influencers accept to receive a percentage of the sales that their code, associated with a certain brand or product, generates, as well as other income, depending on the engagement that their post generates.

Being an influencer is already a professional activity that involves relevant amounts. Thus, it is important to understand how such income is (or can be) taxed in Portugal.

## TAXATION OF INFLUENCERS AS INDIVIDUALS UNDER PIT

Individual taxpayers who qualify as tax residents in Portugal are taxed, within Personal Income Tax (“PIT”), upon their worldwide income. On the other hand,

non-residents are only taxed upon their Portuguese sourced income.

Thus, influencers who are considered as tax residents in Portugal will be taxed upon their Portuguese sourced income and their foreign sourced income. On the other hand, taxpayers who are considered as non-residents still have tax obligations towards the Portuguese tax authorities, namely reporting obligations, if they receive Portuguese sourced income.

In both cases, if the activity is performed in Portugal, the amounts that are earned by the influencer may be taxed under PIT in category A (employment income), if earned under a working contract, or in category B (self-employment income), if earned as an independent professional.

It should be noted that what separates one type of income from the other is, respectively, the existence or non-existence of a contractual relationship that encompasses the subordination of the provider. Since most influencers provide their services to more than one brand and that, as a rule, they are free to determine how they are going to advertise the product or to promote the service in question, it seems to us that there will not be, in most cases, a true

legal subordination. Thereafter, as a general rule, their income shall be taxed under category B.

This also means that those service providers have the obligation to register their activity with the Tax Authorities and to issue invoices for the services they provide, being taxed under PIT at the general and progressive tax rates, plus the additional solidarity rate (up to 48% more 5%).

It should also be noted that, depending on their annual business volume, such professionals may be subject to the simplified regime (where income is determined based on coefficients) or to the organized accounting regime (where the income is determined based on accounting rules and all profits and expenses are computed).

It is relevant to note that any of the forms of payment mentioned above, including, therefore, payments in kind, are subject to taxation under PIT, since the Code itself provides rules for the taxation of cash or payments in kind, prescribing methods for the determination of the amounts to be considered in the latter case.

Nevertheless, certain “gifts” may be excluded from taxation, in case it has a

reduced economic value or is considered an “offer”, as per the standard social and commercial uses.

Furthermore, depending on the entities to whom they provide said services, namely the respective place of tax residence, the income may be considered as Portuguese or foreign sourced, and such entities, paying the influencer, may also be required to withhold tax, according to the Portuguese PIT rules.

## VAT

As it happens with other services providers, influencers may also be subject to other tax obligations, namely under VAT.

In fact, under the terms of the respective Code, an exemption or a tax exclusion of VAT should only be verified when the transfer of goods occurs free of charge, when it is an offer of low value, or when it is an offer of a sample. Any other cases should be qualified as situations of onerous provision of services, thus VAT shall be assessed and paid.

## SOCIAL SECURITY CONTRIBUTIONS

Influencers may also be subject to the payment of **Social Security contributions**, over their self-employment income, and it should be noted that, currently, the rate for self-employed workers is fixed at 21.4%, which increases to 25.2% in the case of self-employed entrepreneurs and holders of limited liability individual businesses and their spouses.

## STAMP DUTY

Finally, it should be noted that when brands offer other assets with greater value to digital influencers (the paradigmatic case is jewelry), if such transmission cannot be considered as income (in kind), nor as standard as per the general uses, such transfer shall be taxable under Stamp Duty, at a 10% tax rate.

Notwithstanding, this position can be considered controversial, as it only covers situations of true donations to the influencer, i.e., without any return (such as advertising). Thus, it only includes cases of actual donations. As it can be easily concluded, such situations will be, of course, very difficult to occur, since brands donate certain goods with a latent interest and the expectation that the influencer will show it to the respective public.

## TAXATION INFLUENCERS' COMPANIES

Influencers often decide to incorporate companies (e.g., single shareholder companies) instead of providing their services themselves, as independent professionals.

Nevertheless, as it happens with individual taxpayers, who qualify as tax residents in Portugal, that are taxed under PIT over their worldwide income, companies that are considered tax residents in Portugal (i.e., which have their registered office or place of effective management in Portuguese territory) will be taxed under CIT, upon their worldwide profits.

Also, in addition to the costs of setting up and maintaining a company, the company will also have to pay CIT upon its taxable profits (at the general rate of 21%, plus municipal and state surcharges and autonomous taxation) determined based on the rules of organized accountancy.

In fact, companies are subject to the organized accounting system (*regime de contabilidade organizada*), which implies the existence of, at least, one separate bank account, exclusively allocated to the company's activity, to

avoid any type of confusion between the amounts that belong to the influencer and those owned by the company, and it is also mandatory to appoint a certified accountant.

Furthermore, when transfers from the sphere of the company to the sphere of the natural person occur, either through an employment contract (category A) or through the distribution of profits (category E), such income will be taxed in accordance with PIT legislation, within the sphere of the individual taxpayer, and the company must also comply with its declarative and withholding obligations.

Additionally, if certain requirements are verified, the Tax Administration may disregard the corporate structure and directly impute such income to the shareholder, under the tax transparency regime, provided for by the CIT Code, thus taxing those amounts within the shareholder's personal sphere (as per the rules of PIT's category B).

It should also be said that the personal and the "business" assets are the same, when the influencer opts to be considered as self-employed, thus all assets are responsible for the debts incurred. However, if a limited liability company is

incorporated, the liability of the shareholder is limited to the amount of the share capital, which entails a greater risk for its creditors.

## FINAL CONSIDERATIONS

In short, digital influencers working in Portugal are subject to taxation, namely to support PIT upon their income, whether it is in monetary values or in kind.

In case they opt to incorporate a company, said company will also be subject to CIT and the income distributed (salaries or dividends) to the shareholder will also be subject to PIT.

One way or another, these professionals are not exempt from taxation, having the obligation to pay taxes according to their income.

In fact, if a taxpayer tries to hide income, the Tax Authorities have mechanisms to control anomalous tax situations, including administrative and criminal procedures, as the possibility to tax unjustified manifestations of wealth and unjustified assets additions, based on indirect evaluation methods.

In such cases, the burden of proof is shifted to the taxpayer, who will have to demonstrate that he has not earned the

income that the law allows the Tax Authorities to presume he did.

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