

# Business income taxation in Portugal: a brief analysis of the simplified regimes

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## Os regimes simplificados tributação dos rendimentos empresariais em Portugal

The taxation regime for corporate income in Portugal is not truly unitary. These revenues can be taxed under the Personal Income Tax or Corporate Income Tax. Additionally, in each case, the taxable income can be determined basing either on the general regime rules or on the simplified regime ones. This coexistence of legal regimes poses – or may pose – questions of compatibility with the Portuguese constitutional norms, especially with Article 104.

O regime de tributação dos rendimentos das empresas em Portugal não é verdadeiramente unitário. Para além de estes rendimentos poderem ser tributados em sede de Imposto sobre o Rendimentos das Pessoas Singulares e de Imposto sobre o Rendimento das Pessoas Coletivas pode, em cada um dos casos, a coleta a entregar nos cofres do Estado pode ainda ser determinada com base um regime geral ou com base num regime simplificado. Esta coexistência de regimes coloca – ou pode colocar – questões de compatibilidade com as normas constitucionais, sobretudo com o art.º 104.º da Constituição da República Portuguesa.

**Keywords:** simplified taxation regimes; Personal Income Tax (IRS); Company Income Tax (IRC); taxation of enterprise income; ability to pay.

SUMMARY: 1. Introduction – 2. Business income taxation – 3. The simplified Personal Income Tax regime – 4. The simplified corporate income tax regime – 5. Simplified taxation regimes, the principle of equality and the principle of ability to pay – 5.1. The framework for a simplified regime – 5.2. Determination of the taxable amount and the collection of the tax – 6. Final remarks

## 1. Introduction

The tax phenomenon is very complex and multifaceted, and the design of tax systems obeys to different rules from country to country. Those rules are a result of the interaction between the general principles of taxation, as they are recognised on the national constitutions, and other normative principles or norms that bind States at a national or supranational level. At the level of direct taxation, the principle of tax equality, the principle of fiscal neutrality and the principle of ability to pay stand out due to their importance. These and other principles contribute to ensure a neutral, fair, non-discriminatory, simple and efficient tax system.<sup>1</sup>

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1. A system that, in the words of Adam Smith, would correspond to a non-arbitrary system, which considers the most convenient time for the collection of tax revenue and chooses the way that minimizes collection costs. This idea is taken

In Portugal, article 104, nrs. 1 and 2 of the Portuguese Constitution (Constituição da República Portuguesa) set out the main characteristics of income taxation either of individuals or legal entities: the personal income tax needs to be based on a single, progressive and personal tax, while the taxation of corporate income must consider the real income. The implementation of these principles is then completed by the Personal Income Tax Code (CIRS)<sup>2</sup> and by the Corporate Income Tax Code (CIRC).<sup>3</sup>

As we will have the opportunity to discuss further, the business income taxation in Portugal does not follow a uniform regime. In addition to the differentiation between the CIRS or CIRC it is necessary to consider taxation under the general regime or the simplified regime. It is mainly the substantial differences of those regimes that we will analyse on the next pages. It is very important to mention that we will use a broad concept of enterprise which, is based on objective considerations and relegates other aspects to an insignificant level.<sup>4</sup>

## 2. Business income taxation

The taxation of business income in Portugal can be done either on Personal Income Tax (IRS) or by applying the rules on Corporate Income Tax (IRC). The submission to one or another set of rules is based on the (in)existence of an autonomous legal structure – commonly a commercial company – with legal personality and dedicated to the practice of acts that may fall within the scope of business activity.<sup>5</sup>

This duality is further complemented by the possibility of applying simplified taxation regimes on specific situations. These rules were established to comply with the principle of fiscal neutrality and equality in a vertical and horizontal sense, starting from the prevalence of substance over form.<sup>6</sup>

The creation of two general income taxes – the Personal Income Tax (IRS) and the Corporate Income Tax (IRC) – in 1998 substituted, at a personal income taxation level, the partial taxes and

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up by J. Mirrlees, A. Stuart, A., T. Besley, R. Blundell, S. Bond, R. Chote, and J. Poterba, *The Economic Approach to Tax Design*, in Institute for Fiscal Studies (IMF), & J. Mirrlees (Edits.), *Tax by Design*, Oxford University Press, Oxford, 2017, 21-45 and J. Casalta Nabais, *Direito Fiscal*, 11th ed., Almedina, Coimbra, 2019, 455. A. Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations*, 5th ed., 1776, E. Cannan, Methuen & Co., Ltd., London.

2. Código do Imposto sobre o Rendimento das Pessoas Singulares - Decree-Law nr. 442-A/88, of 30 November, as amended.
3. Código do Imposto sobre o Rendimento das Pessoas Coletivas - Decree-Law No. 442-B/88, of 30 November, as amended.
4. We fully accept the broad notion of company followed by J. Casalta Nabais, *Introdução ao Direito Fiscal das Empresas*, 3rd ed., Almedina, Coimbra, 2018 a notion that is also widely adopted by the OECD. On the reasons for the existence of a corporate income tax, see, in general, R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice*, 5.<sup>th</sup> ed., McGraw-Hill International Editions, New York, 1989, 369 e ss. e G. Colm, *The corporation and the corporate income tax*, in G. Colm, *Essays in Public Finance and Fiscal Policy*, Oxford University Press, Oxford, 1955, 96 e ss.
5. Even so, not all income obtained by commercial companies is taxed under IRC, and it is worth highlighting those that are subject to taxation in the legal sphere of the partners, under the tax transparency regime under the terms of article 6 of the CIRC. On this issue, see M. A. Pires, *Fiscal transparency: contribution to the understanding of article 6 of the CIRC*, Vida Económica, Lisbon, 2018.
6. On the reasons justifying the adoption of simplified tax regimes, see A. Martins, *Tax Reform and Simplified Tax Regimes for Small Business: The Case of a Developing Country*, in Revista de Finanças Públicas e de Direito Fiscal, III, 2010, 1, 113-129, J. Loeprick, *Small Business Taxation: reform to encourage formality and firm growth*, Working Paper No. 10571, World Bank, 2019, J. S. Ribeiro, *Reflexões sobre o regime simplificado: a sua suspensão no domínio do IRC*, Sciencia Iuridica, LVIII, 2010, 669-685, K. Tipke & J. Lang, *Direito Tributário (Steuerrecht)*, 18th ed., (English edition of Steuerrecht, 18th edition, Cologne, Verlag Dr Otto Schmith, 2005), Porto Alegre, Sergio Antonio Fabris Editor, 232 et seq., World Bank, *Designing a Tax System for Micro and Small Businesses*, 2007, C. Crawford & J. Freedman, *Small Business Taxation*, in T. B. Stuart Adam (ed.), *Dimensions of Tax Design*, Oxford University Press, Oxford, 2008, 1028-1099, N. Aguiar, *Regimes Simplificados de Tributação do Rendimento Empresarial (I parte)*, in Fiscalidade - Revista de Direito e Gestão Fiscal, 28, 2006, 93-108, W. Gale, *Tax simplification: issues and options*, in Tax Notes, 92, 2001, 11, 1463-1483, C. Lopes A *Fiscalidade das Pequenas e Médias Empresas – Estudo comparativo na União Europeia*, Vida Económica, Porto, 1999 and M. McKerchar, *Understanding Small Business Taxpayers: Their Sources of Information and Level of Knowledge of Taxation*, in Australian Tax Forum, 12, 1995, 1, 25-42.

the complementary tax<sup>7</sup> and replaced, at an income company taxation level, the schedular company taxes<sup>8</sup> and the single tax. The IRC coexists with other taxes or unilateral public revenues, often disguised under designations that do not clarify their legal nature and usually of sectorial application.<sup>9</sup>

In the original version of the two Codes, the possibility of taxing the enterprise income under IRS or IRC norms was already visible, but the option for a simplified taxation regime was not considered. It is only in 2000, with the amendments introduced of the Law no. 30-G/2000, of 29 December – usually known as the Tax Reform Law, that this would come to happen.

Until then, the taxation of enterprise income in terms of IRS was based on the data form accounting records or, when they did not exist, on the data from the mandatory books of records required by Value Added Tax Code. Although there was not truly a simplified regime, it was already possible to waive the need for organized accounting in situations not covered by article 119 CIRS.<sup>10</sup> In cases where the legal regime under the CIRC applied, there was no possibility of deviating from the (sole) regime for determining the taxable amount. The tax treatment given to taxpayers earning taxable business income under this law was unrelated to the volume of income or considerations concerning the scale of the activity.

The income tax reform mentioned created a new model for taxing companies' and, by certain procedures, allowed for the adaptation of the legal regimes to the specificities of Small and Medium-sized Enterprises (SMEs).<sup>11</sup>

Simplified taxation regimes arise as a response to some compliance issues arising from the application of sophisticated and elaborated tax rules.<sup>12</sup> These difficulties are especially visible when we are dealing with micro, small and medium-sized enterprises which, although their intensive contribution to the economic growth on the European Union, have some difficulties in responding effectively to the requirements of complex legal tax systems.<sup>13</sup> This simplification is, above all, a

7. The Professional Tax, Capital Tax, Industrial Tax, Property Tax, Agricultural Industry Tax, Complementary Tax, Capital Gains Tax and Stamp Duty of article 134 of the General Table of Stamp Duty were abolished. These changes made it possible to bring the Portuguese tax system closer to that of other countries and to truly introduce a progressive taxation of personal income, even though it is only a formally single tax.
8. Industrial Tax, Agricultural Industry Tax, Capital Gains Tax, Property Tax, Capital Tax, Complementary Tax and, in part, Stamp Duty.
9. Judgment No. 149/2024 of the 1st Section of the Portuguese Constitutional Court, delivered in Case No. 638/2022, of 27 February 2024
10. Article 109 of the CIRS provided, in its original wording, that the following were required to have organised accounting: taxpayers whose average income in the last three years from self-employment was greater than twenty times the highest national minimum wage (excluding remuneration paid to employees) and taxpayers who carried out a commercial activity, industrial or agricultural and that, in the aforementioned three-year period, had a turnover of more than 30000 escudos (approximately €149 643). Subjection to the organized accounting regime would then be mandatory for all those who exceeded those limits, and the others could adhere, if they so wished.
11. We can question whether the introduction of these regimes allowed full compliance with the announced simplification objective. J. Casalta Nabais, *Algumas reflexões sobre a recente reforma fiscal*, in *Fiscalidade – Revista de Direito e Gestão Fiscal*, 10, 2002.
12. R. Awasthi & N. Bayraktar, *Can Tax Simplification Help Lower Tax Corruption?*, in *Eurasian Economic Review*, 5, 2015, 297-330.
13. On the importance of SMEs in the economic activity of the European Union, see European Commission, *Annual Report on European SMEs 2023/2024 SME Performance Review 2023/2024*, GROW and Joint Research Centre, 2024. The *Small Business Act – COM (2008) 0394 final*, with the main objective of creating a framework that integrates the various instruments that concern SMEs in close cooperation with the Member States, enshrines as one of the main lines of intervention measures related to the reduction of administrative costs related to tax management and ranging from the simplification of accounting standards to invoicing. Aspects related to diversification and access to finance, competition policy and networks for SMEs should also be highlighted. Considerations relating to sustainability and competitiveness and European industrial policy in the field of artificial intelligence and robotics have not been left out. In Portugal, the Resolution of the Council of Ministers no. 14/2014, of 13 February, published in the daily newspaper A República I series, of 20 February 2014, assigned to the Economic Affairs and Investment Coordination Meeting (RCAEI) the function of Follow-up Committee in Portugal of the *Small Business Act* (SBA) for Europe.

minimal pass to introduce tax equity notes on the regulation and to contribute to the timely and adequate compliance with tax obligations, avoiding situations of tax evasion and fraud.

As we will see, the option followed by the Portuguese legislator was the creation of optional simplified regimes instead of mandatory inclusion ones. Although both are optional, when it comes to income subject of taxation under CIRS it is up to the taxpayer to inform that he wants to be excluded – it is an *opting-out* system; on the other hand, the taxation under IRC code, it is up to the taxpayer to declare that he wishes to be included on the simplified regime – it is an *opting-in* system.<sup>14</sup>

### 3. The simplified Personal Income Tax regime

The tax framework for business income under the Personal Income Tax (IRS) is established in category B income adjoining to all other business and professional incomes.

Although we are dealing with a fairly diverse set of incomes, they all stem from the exercise of an economic or professional activity by the taxpayer. It is mandatory the existence of a note of recurrence in the exercise of the activity in order to permit the classification of these acts as entrepreneurial, ruling out the possibility of including those revenues in one of the other categories of income provided for in the CIRS, namely in categories E, F or G.

As we briefly mentioned above, these incomes can be taxed according to the general regime rules – which the law designates as organised accounting regime – article 32 and article 33 of the CIRS – or based on the simplified taxation regime – article 31 of the CIRS. The option for one or the other set of rules can only be exercised under the terms and conditions referred to in paragraph 2 of article 28 of the CIRC. It should be kept in mind that article 28(8) of the CIRS allows, in specific situations, the taxation of income – including business income – in category A as revenue derived from dependent work. It can also be questioned if the Portuguese legislator's option to allow that income obtained by taxpayers who perform isolated acts can always be taxed under the simplified regime, conflicts with the principle of equality – cfr. 30 of the CIRS,

Taxpayers whose gross annual business and professional income – excluding the income attributed to them under the terms of article 20 of the CIRS – for the previous year exceeds € 200 000,00 are required to comply with the requirements of the general regime. Other taxpayers will be taxed based on the rules relating to the simplified regime, unless they expressly declare to oppose to it within the deadlines provided for in paragraph 4, article 28.<sup>15</sup>

The main divergence between the two enterprise income tax regimes lies in the formula that is used to gauge the amount of tax. Differently, on the simplified regime, the determination of taxable income is quite simple and results from the application of a differentiated factor depending on the type of income obtained under the terms of article 31, paragraph 1 of the CIRS.

This model for calculate the value that will serve as the basis for determining the collection eliminates, on the one hand, the need to prove the expenses and charges incurred to obtain that income, if these expenses and charges do not exceed 15% of the gross income in question; on the other hand, it makes it impossible to carry forward losses.<sup>16</sup> The inclusion in the simplified regime also rules

14. The simplified corporate income tax regime is a departure from the one created in 2000 and repealed in 2010.

15. The option for the organised accounting regime remains valid until the declaration relating to the request for subjection to this regime is amended. Regarding the framework in the simplified regime, it should be noted that it can be maintained if the aforementioned inclusion requirements are met and, even if the income limit is exceeded in two consecutive periods or, if it is exceeded, in a single period of more than 25% - cfr. Article 28, paragraph 6 of the CIRS.

16. The deduction of losses ascertained by reference to the application of the simplified regime is allowed in cases where there is a transition to the organised accounting regime, under the terms of paragraph 4 of article 55 of the CIRS.

out the non-subjection to autonomous taxation of the costs of vehicles (cars), allowances and travel expenses in the employee's own vehicle.<sup>17</sup>

#### 4. The simplified corporate income tax regime

The business income will be taxed under the Corporate Income Tax Code rules when all the requirements where met. But it can be applied the rules of the general regime or, in some situations, the simplified regime ones.<sup>18</sup> It should be noted at the outset that this is not a simplified regime for determining taxable income, but only a simplified regime of taxation.<sup>19</sup>

Unlike the taxation of business income under IRS, the taxation of business income on IRC in an *opting-in* regime, an is available to entities that, being *resident taxpayers, not exempt or subject to a special tax regime and that carry out as their main activity of a commercial nature, meet* the following requirements; cumulatively (a) have obtained in the immediately preceding tax period an annual gross amount not exceeding € 200 000.00 (two hundred thousand euros); (b) the total balance sheet for the immediately preceding tax period does not exceed € 500 000.00 (five hundred thousand euros); (c) they are not legally required to audit statutory accounts; (d) its share capital is not held in more than 20%, directly or indirectly, under the terms of paragraph 6 of article 69, by entities that do not meet any of the conditions referred to above, except when they are venture capital companies or venture capital investors; (e) adopt the accounting standardization regime for micro-entities<sup>20</sup> and (f) have not waived the application of the regime in the previous three years, with reference to the date on which the application of the regime begins.

In the case of the simplified corporate income tax regime, the taxable amount will be calculated by the application of coefficients to objective indicators and not by taking as a reference the accounting profit as on the general corporate income tax regime. Those indicators are planned by reference to the accounting registries organized in accordance with the accounting regulations in force and slightly by reference to some accounting indicators other than the former, in accordance with the rules contained in paragraph 1 of article 86-B of the CIRC. These rules allow the determination of a mitigated real income, meaning that, although the concept of taxing real income remains valid, the normalisation of the expenses (indirectly) allocated to each income categories enables us to state that this simplified regime contains notes that bring it very close to the taxation of normal income.

#### 5. Simplified taxation regimes, the principle of equality and the principle of ability to pay

The specific characterization of the simplified taxation systems leads us to the need to determine whether they respect the principle of equality and the principle of ability to pay as they are established on the Portuguese Constitution. The answer appears evident and positive.

17. Cf. article 73, paragraph 8 of the CIRS.

18. Among the divergences between the legal regimes of simplified taxation in terms of CIT, the elimination of a minimum collection and the special payment on account stands out. J. S. Ribeiro, , *Reflexões sobre o regime simplificado: a sua suspensão no domínio do IRC*, cit., 669-685.

19. J. Casalta Nabais, *Direito Fiscal*, op. cit., p. 147.

20. The reference made by Article 86-A(1)(e) of the CIRC to the accounting regime for micro-entities approved by Decree-Law No. 36-A/2011 of 9 March 2011 should be understood as referring to the accounting regime applicable to micro-entities and which is currently regulated in the Accounting Standardization System approved in annex to Decree-Law No. 158/2009, of 13 July, as amended by Decree-Law No. 98/2015, of 2 June (which repealed paragraphs 1 and 2 of Article 1 and Articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19 and 20 and Annexes I and II of Decree-Law No. 36-A/2011), of 9 March, amended by Law No. 66-B/2012, of 31 December, and by Decree-Law No. 64/2013, of 13 May. For these purposes, micro-entities are *those* which, being classified as entities under the terms of article 3 of the same law, do not exceed, at the balance sheet date, two of the following limits: (a) balance sheet total € 350,000.00; (b) net turnover: € 700 000.00 and (c) average number of employees during the period: 10.



From a constitutional point of view, there are no obstacles to the existence of differentiated tax regimes. What is already obvious is to know whether, in practice, they allow the constitutional purposes in terms of taxation to be fulfilled without undermining the other legal principles. Only under these conditions it is possible to state that the validity and the effectiveness of the infra-constitutional tax rules are guaranteed.

The starting point for our analysis will be Article 104 of the Constitution, which establishes the ability to pay as the index for taxing business income<sup>21</sup> determined by reference to real income. According to this rule the Portuguese legislator can elect models based on normal income<sup>22</sup>, whether this is the income corresponding to a series of years or a certain year. Likewise, it is also compatible with the aforementioned constitutional rule to choose a taxation system directly in the sphere of companies, as entities endowed with the ability to pay, instead of taxing them only in the legal sphere of the partners (individuals).

It is also very important to mention the principle of equality and the principle of fiscal neutrality. Without those principles it is not possible to ensure the fulfilment of the principles of the Portuguese Economic Constitution and, in particular, with the freedom of organization and business management, also recognised by the Portuguese Constitution.

The specificities of each of the simplified taxation regimes make it difficult to analyse them together but, since it is a question of analysing their compatibility with constitutional principles and norms, we believe that this can be done. The problems will be allotted to two major groups: issues related to the framework of the simplified regime and issues related to the determination of the taxable amount and the amount of tax to be paid.

## 5.1. The framework for a simplified regime

We now recall that the application of the rules relating to the simplified corporate income tax regime on the personal income tax has always been optional, but this characteristic became more evident with the elimination of the minimum period of permanence by Law No. 42/2016, of 28 December. Consequently, we are dealing with a supplementary regime which is subject to the fulfilment of an objective requirement related to the gross annual amount of income obtained by the taxable person. Once this framework is determined by the Tax Authority, it is up to the taxpayer to declare that he does not wish that the business income is taxed according to the simplified regime rules.<sup>23</sup>

As far as the simplified corporate income tax regime is concerned, it must be considered that it is an *opt-out system*, which is also optional, except in the cases of paragraph 5 of article 86-A of the CIRC<sup>24</sup> and waiver at all times. That waiver is not, however, innocuous, since it prevents the taxpayer from reapplying for the application of the scheme before three years have elapsed since the exclusion request.

21. On the importance of the principle of ability to pay for Tax Law and its evolution since the work of Adam Smith, see K. Tipke & J. Lang, *Direito Tributário (Steuerrecht)*, op. cit., 200 et seq., and, among us, J. Casalta Nabais, *O Dever Fundamental de Pagar Impostos*, Almedina, Coimbra, 1998, in particular 437 et seq. and *idem*, *Problemas Nucleares de Direito Fiscal*, Almedina, Coimbra, 2020, 15 et seq.

22. J. Casalta Nabais *Direito Fiscal*, op. cit., 456, J. J. T. Ribeiro, *Lições de Finanças Públicas*, 5th edition recast and updated, Coimbra Editora, Coimbra, 1995, 306-307 and J. E. Stiglitz & J. K. Rosengard *Economics of the Public Sector*, 4th ed., W. Norton Company, Inc., New York, 2015, 516.

23. This option can be communicated as soon as the declaration of commencement of activity or until the end of March of the year in which you wish to change the tax regime. On the period within which the option can be exercised, see the innovative Judgment – at the time it was handed down – of the Central Administrative Court – North on Case No. 01570/04, of 13-01-2005.

24. The original wording of article 46-A of the CIRC enshrined an *opting-out* regime for taxable persons, residents and those who carried out, as their main activity, a commercial, industrial or agricultural activity, not exempt or subject to any special tax regime, whose annual income volume reached 30 000 000\$00 (€149 639.37).

## 5.2. Determination of the taxable amount and the collection of the tax

The differentiation between the general taxation regime for business income under IRS and the simplified regime in terms of determining the tax base has been significantly reduced the changes that were introduced by the Law that approved the State Budget for 2018. While it can be said that there has been a convergence of regimes, some specificities remain active. It is on this point that the greatest challenges arise.

The duality of regimes is justified both by the need to adopt a regime that is understandable by taxpayers, encourages compliance with tax rules, and that removes the difficulties inherent to the calculus of the real income when a certain type of activity is involved.

Despite the differentiation, it must always be said that in the general corporate income tax regime, which is based on organized accounting, there are many normal profit tax notes, evidenced by accounting records based on *fair value* and exponentiated by tax rules.<sup>25</sup> The divergence between the tax treatment and the accounting treatment of certain income and costs ends up making this approximation even more evident.

The legitimacy for the creation of differentiated taxation regimes for similar incomes, in order to be valid, must be based on objective objectively justifiable reasons, rather than arbitrary ones. Among these, particular importance is given to the requirement of adequate and correct compliance with tax rules – including those relating to ancillary duties – and the avoidance of excessive burden of the tax payment process, preventing excessively high compliance costs. In this way, business activity is encouraged and tax evasion linked to issues of tax complexity and indirect tax costs is mitigated.<sup>26</sup>

Strictly speaking, the main differences in the regime stem from the different treatment given in one regime and the other to tax losses and autonomous taxation. In these two cases, the option for the simplified taxation regime prevents taxpayers from deducting the costs and losses incurred, which may generate situations of disadvantage compared to the organized accounting regime where both are considered in their entirety value. What article 55(4) of the CIRC allows, as far as tax losses are concerned, is the deduction of those that have been determined in periods prior to the one in which taxation begins under the simplified regime and provided that the taxable amount has not been determined from the application of indirect assessment, pursuant to arts. 87 et seq. of CRIS. A different situation occurs in the case of autonomous taxation, in which is a departure from the general regime, under the terms of article 73 of the CIRS, for taxpayers who are not required to have organised accounting.

As for the taxation of business income under the simplified regime under IRC, the termination of the taxable amount, being made based on the coefficients provided for in paragraph 1 of article 86-B of the CIRC, makes unnecessary to apply the deductible costs individually.<sup>27</sup> It is not even possible for the taxpayer to demonstrate that the costs incurred were higher than those that have been determined by the setting of the coefficients in reference.<sup>28</sup>

Among the specificities of the simplified regime of this tax, those relating to autonomous taxation, deductions from collection, exemption from payment of municipal surcharge and exemption from

25. V. our *Transparency in financial statements: a 'true and fair view' and 'fair value' in corporate taxation*, PhD Thesis, Coimbra, 2013.

26. OECD, *Rethinking Tax Services: the changing role of tax service providers in SME tax compliance*, OECD Publishing, Paris, 2016 and C. Lopes, *Simplicidade e complexidade do sistema fiscal: algumas reflexões*, in *Fiscalidade*, 13/14, 2003, 51-83.

27. R. D. Morais, *Sobre o IRS*, 3rd ed., Almedina, Coimbra, 2014.

28. This assumption should not be considered as a legal presumption in the strict sense and, therefore, the regime provided for in article 73 of the LGT is not applicable to it. What is at stake is a standardization of costs – a note of the taxation of normal income – known to the taxable person who, in view of the analysis of his business model and his cost structure, understands that he has advantages in not implementing an organized accounting system, but rather conforms to the consideration (only) of those costs.

special payment on account should be highlighted, but it can't be forgotten the specific treatment given to capital gains – article 46, paragraph 9 of the CIRC, as well as the limitation on deductions from collection – article 90, no. 8 CIRC.<sup>29</sup>

Both exclusions – the payment of the municipal surtax<sup>30</sup> and the relief from making special payments on account – are related to the need to simplify the taxation of business income earned by entities subject to the CIRC regime. Even so, it should be borne in mind that only the (generic) exemption from the payment of the surcharge is related to the existence of a decision by the competent municipal body in this regard.

As far as the exemption from special payments on account is concerned, there is little to say, because we are dealing with a mere change in the timing of the payment of the tax. Instead of being paid in stages and in a partially anticipated manner as is the case in the general regime, the fulfilment of the obligation to pay the tax is relegated to a later time.<sup>31</sup> In this way, it contributes to the maintenance of liquidity throughout the economic period by these entities.

One of the issues that forces us to reflect more carefully is, precisely, the specificities regarding the taxation of capital gains and losses when entities are subject to the simplified taxation regime. There is not exactly a deviation from the capital gains rule regime, but rather from the depreciation and amortization regime. Although the possibility of opting for other depreciation quotas is foreseen, it is verified that, in these cases, only those amounts resulting from the application of the minimum depreciation quotas (cfr. Article 46(9) of the CIRC). A limitation with some similarity to the one just mentioned is that contained in paragraph 8 of article 90 of the CIRC, an article that prohibits the possibility of making any other deductions from the tax than those provided for in paragraph 2 of the same article.

What we have just mentioned leads us to conclude that the taxation of real income should be excluded, even partially, in cases where business income is taxed in accordance with the simplified regime. The determination of taxable income, on the one hand, and the collection, on the other hand are, thanks to the specificities of the regime, based on a set of assumptions that end up being irrebuttable presumptions<sup>32</sup> of income or costs.<sup>33</sup> And it is this set of normalization of income and costs that are considered relevant for tax purposes that leads us to conclude that, in the abstract, these regimes should be considered as hybrids, representing a dizzying approximation, but not necessarily in accordance with the Constitution of the Portuguese Republic or dangerous, with a normal income taxation model.

## 6. Final remarks

As we have already pointed out, the corporate income tax regime in Portugal is not truly unitary. In addition to the fact that this income may be taxed under Personal Income Tax and Corporate Income Tax, in each case, the collection to be delivered to the State coffers may also be determined based on a general regime or according to a simplified regime. This coexistence of regimes poses –

29. These divergences from the general regime should lack a more consistent dogmatic reasoning, although the case law, namely that of the Portuguese Supreme Court of Justice, has already ruled that in the aspects not regulated in the simplified and non-exceptional regime, the rules of the general regime continue to apply. See, for example, the reference to the application of monetary devaluation coefficients to calculate the value of capital gains under the simplified regime, no. Judgment of the STA on Case No. 0232/15, of 12-12-2018.

30. The municipal surcharge is an addition to the Corporate Income Tax that can be created by Local Authorities under article 18 of the Financing Regime for Local Authorities and Intermunicipal Entities, approved by Law No. 73/2013, of 3 September.

31. Special payments on account are nothing more than the anticipation of the payment of part or all the tax due at the end.

32. Naturally, since the simplified regime of optional adhesion is available, the taxpayer can always submit the income to taxation in accordance with the general regime, provided that the legal deadlines for exercising this option are met.

33. J. L. Sanches, *O conceito do rendimento do IRS*, in *Fiscalidade*, 48, 2001, 33-61.



or may pose – questions of compatibility with constitutional norms, especially with Article 104 of the Portuguese Constitution.

It is important to determine whether the comparison of these specificities withstands the scrutiny of the rule of article 104 of the CRP and the other principles of the Portuguese Tax Constitution. We would say, from the outset, that because these are optional membership regimes – although differentiated by one being *an opt-out* and the other *opting-in* – it is at the disposal of the taxable person to exclude or be included in it. For this reason, and even if there were no others, we could rule out the possible reason(s) for the unconstitutionality of some aspect(s) of the simplified regime(s). That possibility gives rise to a tax choice attributable only to the taxpayer.<sup>34</sup>

The simplified corporate income taxation regimes in Portugal, based on article 104 of the CRP, require only and only that the regime – and therefore also the special regimes – be based on real income as an index of the ability to pay,<sup>35</sup> but it is perfectly compatible with the mitigation of this index, if it is <sup>36</sup>duly justified. It should be noted that this is also what happens in cases where the Tax Administration, in compliance with a legal command, determines the taxable amount of companies through the application of indirect methods.<sup>37</sup>

It should be noted, moreover, that in the simplified corporate income taxation regimes in terms of IRS and IRC, the design of the rules is based on the construction of indices of real ability to pay based on the increased income. Therefore, the conditions are created to obtain a very approximate measure of the real effective income. This will only be the case if the indicators chosen are not adequate or if the coefficients or indices provided for also prove to be inadequate or mismatched, and it may be questioned (then) whether the constitutional rule might require their amendment to restore adequacy.

The taxation of corporate income based on one of the simplified taxation regimes is based on an ability to pay determined from the actual real income and that the deviations from this are of little relevance. There is, at least on this point, no significant divergence from the general income tax regimes, since also in cases where data from accounting is used, the rules of tax law enshrine a specific treatment for certain situations.

The adjustments made to the contributory capacity indices, which determine a differentiated treatment of the income of companies taxed under the special IRS and IRC regimes are not truly discriminatory and, precisely for this reason, do not conflict with the principle of equality or the principle of fiscal neutrality. Even if this were not the case, we could always invoke the need to create models for determining the tax quantum that do not place taxpayers in situations of true impossibility of compliance or that demand excessively onerous behaviors.<sup>38</sup>

These regimes, in fact, help to ensure the reliability of the tax system itself, by providing objectivity in situations where the knowledge of the results of business activities is more difficult, due to the challenges and high costs associated with determining the ability to pay based on the general taxation regimes. They also contribute to ensuring the effectiveness of the principle of tax neutral-

34. J. L. Sanches, *O conceito do rendimento do IRS*, ..., 49.

35. In case law, Ruling no. 84/2003 on case no. 531/99 and Ruling no. 348/97 on case no. 63/96, all of the Portuguese Constitutional Court, should be highlighted.

36. Also with this opinion, Casalta Nabais, *Introdução ao Direito Fiscal das Empresas*, Almedina, Coimbra, 2018, 33 et seq.

37. The use of indirect methods of taxation aims to allow the determination of the ability to pay of certain entities, avoiding the erosion of tax revenues and the slimming of the state coffers, contributing to an equitable distribution of the tax burden.

38. In fact, tax simplification has been pointed out as a solution to solve problems of tax inequality. OECD, *Addressing the Tax Challenges of the Digitalisation of the Economy - Public Consultation Document*, O. B. Project, 2019, OECD Publishing Paris and V. Tanzi, *Termites of the State: why complexity leads to inequality*, Cambridge University Press, Cambridge, 2017.

ity, minimizing economic distortions and, to some extent, simplifying taxation and promoting *tax* compliance.<sup>39</sup>

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39. S. Casal, C. Kogler & E. Kirchler, *Tax compliance depends on voice of taxpayers*, in *Journal of Economic Psychology*, 65, 2016, 141-150, OCDE, *Tax Compliance by Design: achieving improved SME tax compliance by adopting a system perspective*. 2014, OECD Publishing, Paris, E. Kirchler, H. Hoelzl & I. Hoelzl, *Enforced versus voluntary tax compliance: the "slippery slope" framework*, *Journal of Economic Psychology*, 29, 2008, 210-215 e I. Ajzen, *The Theory of Planned Behavior*, *Organizational Behavior and Human Decision Processes*, 50, 1991, 2, 179-211.