

Mandatory inclusion of capital gains from financial assets held for a period of less than 365 days (Englobamento obrigatório de mais valias mobiliárias de ativos detidos por um período inferior a 365 dias)

What is Informação Vinculativa (Binding Information)?

Binding Information, refers to an official response issued by tax authorities in Portugal, addressing specific queries from taxpayers regarding the interpretation or application of tax laws in particular situations. These rulings hold legal authority and must be followed by both the taxpayer and the tax authority, provided that the circumstances remain unchanged.

Importance of Binding Information:

Formality: They provide an official and authoritative interpretation of tax legislation.

Obligation: Both the tax authority and the taxpayer must adhere to the ruling, provided the facts presented remain unchanged.

Legal Certainty: Binding rulings offer taxpayers clarity and legal certainty regarding their tax obligations. By outlining how tax laws apply to their specific circumstances, taxpayers can plan and conduct their financial activities with confidence.

Procedure: Taxpayers must formally request binding information by detailing their specific circumstances for accurate analysis.

Facilitating Planning: Provides confidence for taxpayers in planning their financial activities.

Avoiding Disputes: Ensures compliance with tax laws, thereby reducing potential disputes with tax authorities.

Ensuring Fairness: Promotes fairness in tax treatment by providing consistent interpretations of tax laws.

Example Scenario:

Legislation: Personal Income Tax Code

Article/Item: Art. 72º - Special taxes

Subject: Mandatory inclusion of capital gains from financial assets held for a period of less than 365 days

Details of the Scenario:

Request for Binding Information: The applicant seeks binding information on the interpretation of Article 72(10) of the IRS Code, as amended by Law No. 12/2022, of June 27 - State Budget for 2022, which establishes the mandatory inclusion of the balance of capital gains from operations referred to in Article 10(1)(b) of the IRS Code, when resulting from assets held for less than 365 days and the taxpayer has a taxable income, including this balance, equal to or greater than the amount of the last bracket of Article 68(1).

The applicant, considering the provisions of Article 72(14) of the IRS Code, seeks clarification on the methodology for determining taxable income, particularly when two taxpayers opt for joint taxation. The taxpayers A and B expect to receive the following incomes in 2023 (indicative values):

- Taxpayer A expects to earn a total of €70,000 from employment;
- Taxpayer B expects to earn a total of €15,000 from employment;
- Taxpayer A expects to receive capital gains of €20,000 in 2023.

If the taxpayers opt for joint taxation, they request clarification on:

a) How to determine the taxable income of each taxpayer for the purposes described in Article 72(14)?

- b) In this specific case, what is the taxable income of each taxpayer for the purposes described in Article 72(14)?
- c) If the expected capital gains of €20,000 associated with taxpayer A were instead associated with taxpayer B, would there be any changes in the IRS amounts calculated for both taxpayers, assuming they opt for joint taxation?
- d) If mandatory inclusion of capital gains applies, would the rate for determining the tax be calculated by dividing the total income of €105,000 by 2, applying the respective rates provided in Article 68 for that income bracket, and then multiplying the resulting amount by 2 to determine the tax?

Response and Guidance:

1. Law No. 12/2022, of June 27, amended Article 72 of the IRS Code. One of these changes is in paragraph 14, which now states: "Notwithstanding the provisions of paragraph (c) of paragraph 1, the balance between capital gains and losses resulting from operations referred to in paragraph (b) of paragraph 1 of Article 10, including the incomes referred to in paragraphs (b) and (c) of paragraph 18, are mandatorily included when resulting from assets held for less than 365 days and the taxpayer has a taxable income, including this balance, equal to or greater than the amount of the last bracket of paragraph 1 of Article 68." According to Article 280 of Law No. 12/2022, of June 27, this change applies only to incomes received from 01-01-2023.
2. To clarify the applicant's inquiry, it is necessary to interpret this provision, particularly the phrase "the taxpayer has a taxable income, including this balance, equal to or greater than the amount of the last bracket of paragraph 1 of Article 68."
3. According to Article 22(1) of the IRS Code, under the heading "Inclusion," "The taxable income in IRS is the one resulting from the inclusion of incomes from various categories, earned each year, after the deductions and abatements provided in the following sections."
4. Therefore, it appears that the phrase "the taxpayer has a taxable income, including this balance, equal to or greater than the amount of the last bracket of paragraph 1 of Article 68" should be understood as referring to the taxable income of the taxpayer holding the capital gains, calculated according to that provision.
5. In the specific case, as the taxpayer holding the capital gains expects to earn, in 2023, net employment income of €65,896 (gross income of €70,000 - €4,104 corresponding to the specific deduction provided in Article 25(1)(a) of the IRS Code), which, added to the positive balance of capital gains of €20,000, totals €85,896, this is the taxable income of the taxpayer for the purpose of determining whether or not there is an obligation to include the balance of capital gains.
6. Considering that the taxpayer's taxable income, including the balance of capital gains, amounts to €85,896, which is above the €78,834 corresponding to the value of the last bracket provided in Article 68(1) of the IRS Code (rates in force for 2023), the taxpayer is required to include that balance in the income tax return.

Conclusion:

Binding information is critical as it provides official and precise guidance on specific tax matters. In this case, the applicant sought clarification on the mandatory inclusion of capital gains from financial assets held for less than 365 days if the taxpayer's taxable income exceeds a certain threshold. The conclusion is clear: if the taxable income, including the balance of capital gains, exceeds the threshold set in Article 68(1) of the IRS Code, the taxpayer must include the balance of capital gains in their tax return. This ensures that taxpayers receive accurate information, helping them comply with tax regulations and avoid potential penalties or errors in their tax filings.

For more detailed guidance and to ensure compliance with tax laws, please contact AFM at info@afm.tax