

Onerous transfer of a residential property not intended for permanent residence through exchange with another property that will be intended for permanent residence - Law No. 56/2023 (More Housing Program) (Alienação onerosa de imóvel habitacional não destinado a HPP por permuta com outro imóvel para HPP (programa mais habitação))

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: Article 10 - Capital Gains

Subject: Onerous disposal of residential property not intended for permanent habitation through exchange with another property intended for permanent habitation - Law No. 56/2023 (Mais Habitação Program)

Details of the Scenario:

Request for Binding Information: The applicant requests binding information regarding the transfer of residential property not intended for permanent habitation, through an exchange with another residential property, framing the said transfer within the scope of Article 50 of Law No. 56/2023, dated 06/10, and under Category G of the IRS Code - capital gains. For this purpose, the applicant clarifies:

- That they will sell an apartment they own in XXX;
- That they intend, under Articles 1 and 2 of Article 50 of Law No. 56/2023, dated 06/10, to amortize the capital debt they have on the loan contracted to acquire the residence where they live;
- Mentions that the transaction will be carried out through an exchange for another property, which has a lower value;
- Indicates as relevant values to consider a realization value of 17x.xxx,00, a value of the property to be received of 15x.xxx,00, and an amortization in the credit of their own permanent residence of 8x.xxx,00;

- Therefore, asks what value the Tax Authority should consider for taxation purposes, in a scenario where, in exchange for their property, which will be attributed a value of 17x.xxx,00, they plan to receive a property worth 15x.xxx,00, with the remaining 2x.xxx,00 to be paid in cash.

Response and Guidance:

In the situation under analysis, we have a taxpayer who seeks clarification regarding the framing of a real estate swap for residential purposes under the temporary and ad hoc regime, regarding the exclusion of capital gains taxation, provided for in the transitional and final provisions of Law No. 56/2023, dated 06/10 - Article 50, a regime that allows the possibility of applying the gains obtained from the sale of building land and residential properties not intended for the taxpayer's and their family's own and permanent habitation, in the amortization of debt capital in credit intended for the taxpayer's and their family's own and permanent habitation. The analysis of this issue leads us to understand what are ad hoc rules and, in contrast, what are systematized rules, as well as an analysis of the legal transaction of exchange and its fiscal framework.

1. Article 10(5) of the IRS Code provides in its introduction: "Gains from the onerous transfer of properties intended for the taxpayer's or their family's own and permanent habitation are exempt from taxation, provided that the following conditions are cumulatively met:";
2. Article 50(1) of Law No. 56/2023, dated 06/10, provides: "Gains from the onerous transfer of building land or residential properties not intended for the taxpayer's or their family's own and permanent habitation are exempt from IRS taxation, provided that the following conditions are cumulatively met:";
3. Furthermore, Article 50(4) of Law No. 56/2023, dated 06/10, adds that: "The provisions of the preceding paragraphs apply to transfers made between January 1, 2022, and December 31, 2024.";
4. Therefore, in the IRS Code, we have the general regime of exemption from capital gains taxation, and in Law No. 56/2023, dated 06/10, we have an ad hoc and temporary regime - because it is not systematized;
5. It is important to consider that, in everything that is omitted, the ad hoc regime must be complemented by the general regime, including all rules regarding capital gains taxation provided for in the IRS Code, as well as other applicable tax rules;
6. Now, the first issue to address is whether the exchange of residential real estate constitutes a transfer for the purposes of applying the regime provided for in Article 50 of Law No. 56/2023, dated 06/10;
7. The regime provided for in Law No. 56/2023, dated 06/10, although restricting the objects of transfer to building land and residential properties, does not differ from the general regime in that the exchange of real estate consists of an onerous and reciprocal transfer of real rights over two or more real properties, applying to it the rules regarding purchase and sale, considering the provisions of Article 939 of the Civil Code;
8. For this reason, this is a legal transaction provided for in the Property Transfer Tax Code - under paragraph b) of Article 2(5);
9. In parallel, Article 44 of the IRS Code stipulates that, for the purposes of determining gains subject to IRS, the realization value in the case of exchange (read: swap) is considered to be the value attributed in the contract to the property or rights received, increased or decreased, either by the amount in money to be received or paid;
10. Therefore, it can be concluded that an exchange of residential real estate constitutes a transfer for the purposes of the ad hoc and temporary regime of exemption from capital gains taxation under IRS provided for in Article 50 of Law No. 56/2023, dated 06/10;
11. As already perceived in point 9, the realization value in the case of exchange is the value attributed in the contract to the property received, increased by the money to be

- received, in cases where the property received is of lower value than the property delivered in the exchange made;
12. Consequently, subparagraph a) of Article 50(1) of Law No. 56/2023, dated 06/10 provides that "the realization value, deducted from the amortization of any loan contracted to acquire the property, shall be applied to the amortization of capital debt in credit for own and permanent habitation of the taxpayer, their family or descendants;"
 13. Furthermore, paragraph 2 of the aforementioned provision adds that "whenever the realization value, deducted from the amortization of any loan contracted to acquire the property transferred, is partially reinvested in the amortization of capital debt in credit for own and permanent habitation of the taxpayer, their family or descendants, the remaining value is subject to taxation according to the general provisions of the IRS Code;"
 14. Therefore, in the case of a transfer made using a swap, the benefit of the regime provided for in Article 50 of Law No. 56/2023, dated 06/10, is only possible through the use of the surplus in money obtained as a complement to the building land or residential property received, and of lower value than the one delivered;
 15. In the specific case, this amounts to 2x.xxx,00;
 16. Given that the property to be received in exchange (valued at 15x.xxx,00) does not materially allow for the amortization of the debt (nor is that the intention);
 17. Therefore, considering the content of Article 50(2) of Law No. 56/2023, dated 06/10, with only an amortization of 2x.xxx,00, the capital gain exempt from taxation will only be proportional to this amount, with the capital gain corresponding to the remaining 15x.xxx,00 being subject to taxation, a value that, effectively, remains within the taxpayer's sphere (as stated in the provision: "the remaining value is subject to taxation according to the general provisions of the IRS Code");
 18. Lastly, from everything that has been said, it can also be concluded that the use of any other money values for debt amortization, external to the legal transaction carried out, is not relevant for the purposes of the exemption from capital gains taxation provided for in the regime of Article 50 of Law No. 56/2023, dated 06/10.

Conclusion:

Binding information serves a crucial role in providing authoritative guidance on tax matters. In this case, the inquiry pertained to the application of the temporary and ad hoc regime outlined in Law No. 56/2023, Article 50, concerning the exclusion of capital gains taxation in residential property swaps.

The analysis confirms that under the provisions of Law No. 56/2023, exchanges of residential properties qualify as transfers subject to specific conditions. While the regime exempts gains up to the amount applied towards debt amortization, any surplus cash involved in the transaction remains liable to capital gains taxation under the general provisions of the IRS Code.

This conclusion ensures clarity for taxpayers, enabling them to understand the tax implications of property exchanges under the temporary regime and to accurately comply with tax obligations.

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