

Reinvestment - Acquisition of the usufruct (right to use and enjoy) of a property in which one already holds bare ownership (Reinvestimento - Aquisição do usufruto de imóvel em que já detém a nua-propriedade)

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: Reinvestment - Acquisition of the usufruct (right to use and enjoy) of a property in which one already holds bare ownership.

Details of the Scenario:

Request for Binding Information: The applicant requests binding information regarding the following situation:

- The applicant, married under the regime of separation of property, acquired in 2012, for the amount of 3XX,000.00, the urban property registered in the urban property matrix (Property 1);
- Sold the aforementioned property in 12/2018, for the amount of 1.XXX.000,00;
- In 09/2020, received by donation the bare ownership of another urban property (Property 2), with the donor (her mother) reserving the lifelong usufruct;
- Using the gains obtained from the sale of the first property, intends to acquire the usufruct of the second property from her mother, consolidating full ownership rights;
- Intends to carry out renovation works on this property.

The applicant requests that the Tax and Customs Authority (AT) issue a ruling on the following:

- Whether the acquisition of usufruct, as a means to consolidate full ownership rights, qualifies as property acquisition for the purposes of Article 10(5) of the IRS Code;
- Whether the expenses incurred for renovation works carried out on Property 2, both before and after the acquisition of usufruct, can be considered (in their entirety) as reinvestment in the expansion or improvement of the property;

- Whether the expenses incurred for the acquisition of usufruct on Property 2 and the expenses incurred for renovation works on the same property can be cumulative, for the purposes of applying the tax exemption regime on gains from the onerous transfer of properties intended for own and permanent housing, even if only partially.

Response and Guidance:

1. Pursuant to Article 10(5) of the IRS Code (current wording at the time of the sale), gains from the onerous transfer of properties intended for the taxpayer's own and permanent housing, or their household, are exempt from taxation, provided that:
 - The sale proceeds, net of any loan repayment used for the property acquisition, are reinvested in the acquisition of another property, land for construction, or the construction itself, or in the expansion or improvement of another property, exclusively for the same purpose;
 - The reinvestment is made between 24 months before and 36 months after the date of transfer; and
 - The taxpayer expresses the intention to reinvest, even partially, stating the respective amount in the income tax return for the year of the transfer.
2. Furthermore, Article 10(6) states that the exemption does not apply when:
 - In the case of reinvestment in the acquisition of another property, the buyer does not allocate it to their own housing or their household's until twelve months after reinvestment;
 - In other cases, the buyer does not request registration in the property registry or its changes within 48 months from the date of transfer, and must allocate the property to their housing by the end of the fifth year following the transfer.
3. Therefore, for the aforementioned tax exemption to apply, the law requires that the sale proceeds of a property intended for the taxpayers' own and permanent housing (starting property) be reinvested in another property with the same purpose (destination property) within a specified timeframe and subject to all requirements.
4. In this case, the applicant sold the starting property (Property 1) in 12/2018, for the amount of 1.XXX.000,00.
5. The applicant declared this sale, as well as the intention to reinvest the sale proceeds, in the corresponding IRS Model 3 declaration for the year 2018.
6. According to the donation deed attached to the request, executed on 09/2020, the applicant's mother detached a portion from urban property registered under matrix number XXXX, with the remaining portion constituting another urban property.
7. In the same deed, the applicant's mother donated to her, with usufruct reservation, the amount corresponding to the mentioned remaining portion.
8. According to the urban property tax document of Property 2, also attached to the request, it derived from the aforementioned article XXXX, with the mother of the applicant being the owner as usufructuary, and the applicant being the owner of the bare ownership.
9. Using the gains obtained from the sale of Property 1, the applicant intends to acquire the usufruct from her mother and carry out renovation works on the property (Property 2), hence querying whether acquiring the usufruct (as a means of consolidating full ownership rights) qualifies as property acquisition under Article 10(5) of the IRS Code.
10. It is first important to determine if the applicant is still within the timeframe to reinvest, as until 03/2022, this had not yet occurred, as clarified by the taxpayer in a prior interaction in the process.
11. Having sold Property 1 in December 2018, the applicant had 36 months from that date to reinvest, meaning that by 22/03/2022, this deadline had passed.

12. However, Article 50(6) of Law No. 56/2023, of 06/10, establishes a suspension of the reinvestment period deadline provided for in item b) of Article 10(5) of the IRS Code, for a period of two years, effective from 01/01/2020.
13. This means that, in this case, instead of considering the deadline ending in December 2021, it should only be considered ending in December 2024, allowing the applicant to still proceed with the intended reinvestment as declared in the income tax return for the year 2018.
14. Moving on to the first question, we must note that the Civil Code does not define ownership but establishes its content in Article 1305, determining that the owner enjoys fully and exclusively the rights to use, enjoyment, and disposal of their belongings, within the limits of the law and subject to the restrictions imposed by it.
15. Therefore, there exists a broader real right, the right of ownership, a real right of enjoyment where sovereignty over the thing is maximal, provided it is within the limits of the law and subject to the restrictions imposed by it.
16. There are also lesser real rights, including the right of usufruct, a real right of enjoyment that compresses the right of full ownership, with this right being restricted between the right of usufruct and the bare ownership.
17. Therefore, Article 1439 of the Civil Code states that usufruct is the right to temporarily and fully enjoy someone else's thing or right without altering its form or substance.
18. Note that the right of usufruct does not include the right to dispose of the thing, as the usufructuary is not the owner (they can only enjoy), although they can transfer their right of usufruct, which remains, however, always conditioned by the life of the original usufructuary, under Article 1443 of the Civil Code.
19. On the other hand, the holder of bare ownership can dispose of and transfer the thing, even with the right of ownership compressed, merging the two rights into full ownership in the new holder, once the usufruct is extinguished.
20. Therefore, in the situation presented, the legal situation of the applicant regarding the property in which reinvestment is intended does not correspond to what the legislator foresees in item a) of Article 10(5) of the IRS Code.
21. This is precisely because the text of the norm is clear in referring to the acquisition of ownership as a key point for the benefit of the exemption, and in this case, the applicant has already acquired, at an earlier date and through a gratuitous act, this same property (albeit compressed).
22. Therefore, the applicant cannot claim to acquire something they already possess, as acquiring the usufruct of the property in which the applicant already holds the bare ownership constitutes the acquisition of a lesser real right that compresses their right of ownership, and if it occurs, it only implies the extinction of this usufruct, according to item b) of Article 1476(1) of the Civil Code, with the consequent expansion of the ownership right that already belongs to them.
23. Therefore, reinvestment is considered effectively carried out when acquiring the ownership right of a property in a single acquisition act through a purchase and sale contract, and this must be allocated to own and permanent housing within 12 months after acquisition, which did not occur in this case.
24. As for expansion or improvement works, it is worth noting, in purely generic terms (since the nature of the interventions to be carried out is unknown), that they can only be considered as reinvestment if the following conditions are met simultaneously:
 - They occurred between 24 months before and 36 months after the date of transfer;
 - They are duly documented with legally issued documents, namely invoices/receipts showing unequivocally that they are related to the said works on the property and meet the legal requirements established for this purpose;

- The changes made to the property are requested/communicated by the taxpayer within 48 months from the date of transfer, and the property is allocated to their housing by the end of the fifth year following the transfer.
25. However, under Article 8 of the Municipal Property Tax Code (CIMI), the taxpayer for the tax, in cases of usufruct, is the respective usufructuary. In the situation under review, and in the period before acquiring the usufruct from her mother, there is no identity between those who intend to benefit from the tax exemption and those who have the obligation to subsequently report changes made to the property.
 26. Therefore, only the amount spent on improvement/expansion works carried out on a property in which the taxpayer has full ownership can be considered as reinvestment, subject to the conditions set out in point 24 of this information.
 27. In this scenario, the amounts actually spent and supported by legally issued invoices, relating to a period where the applicant already has full ownership - assuming the acquisition of usufruct from her mother by the deadline of xx/12/2024 (see points 11, 12, and 13 of this information) - may be accepted as reinvestment.
 28. It should also be added that, due to the suspension period indicated in points 12 and 13 of this information, the deadline for allocating the property to the housing of the taxpayer and their household, in cases of improvement/expansion, extends to xx/12/2026, under Article 50(6) of Law No. 56/2023, of October 6, combined with the final part of item b) of Article 10(6) of the IRS Code.

Conclusion:

The binding information provided clarifies the tax implications concerning the applicant's request regarding the reinvestment of proceeds from the sale of Property 1 and subsequent actions related to Property 2.

1. The acquisition of usufruct by the holder of bare ownership, aimed at consolidating full ownership rights, does not qualify as property acquisition under Article 10(5) of the IRS Code. Therefore, it does not meet the conditions required for the tax exemption on gains from property transfers intended for own and permanent housing.
2. Expenses incurred for improvement or expansion works on Property 2 can only be considered as reinvestment if they are carried out after the applicant has acquired full ownership of the property. Such expenses must comply with specific documentation requirements and timelines as outlined in the IRS regulations.

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