Reinvestment - Disposal of a property that serves as the primary residence alternating with use for local accommodation activities (Reinvestimento - alienação de imóvel que constitui HPP em alternância com afetação à atividade de AL)

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 - Disposal of a property that serves as the primary residence alternating with use for local accommodation activities

Details of the Scenario:
Request for Binding Information: The applicant requests binding information on the following situation:

- They own a property acquired in 2014 and have been residing in Portugal since then.
- They intend to sell this property and purchase another one for their own permanent residence.
- However, the property they reside in is used for local accommodation, being rented out entirely for a short period during the summer.

Given these facts, they request clarification on the requirements to benefit from the reinvestment regime, asking the following:

- If they sell their current apartment and buy another one to live in, will it be considered a reinvestment?
- Or do they need to cancel the local accommodation, wait some time, and then reinvest?
- If so, how long do they need to wait?
- In other words, if they cancel the local accommodation in 2022 and continue to reside in the property, when can they sell it so that the reinvestment is tax-accepted?

Response and Guidance:

1. With Law No. 75.º-B/2020, of 31/12 (State Budget Law for 2021), the allocation of real estate from private assets to business and professional activities carried out individually by the owner, as well as the transfer of these assets back to private ownership, no longer constitutes a taxable event.
2. Under the current regime, the taxable event generally occurs when the property is sold, resulting in a change in ownership.
3. Consequently, the respective qualification and taxation are determined according to the nature of the domain, private or business/professional, in which the real estate is located at the time of sale, thus category G or category B, respectively, ensuring fiscal neutrality in the interim operations of allocation and/or transfer of the property mentioned above. Therefore, the general rules should be applied for calculating the respective capital gains or losses.
4. As an exception to the rule, there are properties that have been allocated to the taxpayer's business and professional activities that have returned to their private sphere and are sold before three years have passed since the transfer to private assets. In this situation, the sale is qualified as obtained under category G but, nonetheless, the taxation rules of category B apply (as stipulated in paragraph 16 of article 10 of the IRS Code).
5. However, article 369 of Law No. 75.º-B/2020, of 31/12, established a transitional regime, according to which, notwithstanding capital gains that are suspended from taxation due to the application of subparagraph b) of paragraph 3 of article 10 and paragraph 9 of article 3 of the IRS Code, if the new taxation regime is applied, taxpayers who had, on January 1, 2021, real estate allocated to business and professional activities, can opt for the previous regime for determining capital gains and losses resulting from the allocation of real estate, under the terms of paragraph 2 of the mentioned article.
6. For this purpose, they should indicate this option in the tax return referred to in article 57 of the IRS Code, relating to the year 2021, as well as identify the properties allocated to business and professional activities and the date of their allocation.
7. Under this previous regime, despite the qualification and taxation of income resulting from the sale also being determined according to the nature of the domain, private or business/professional, in which the real estate was located at that time, the operations of allocation/deallocation also constituted a taxable event.
8. Thus, gains resulting from the allocation of real estate from private assets to the business and professional activities carried out individually by the owner constituted capital gains income, under category G (according to the previous wording of subparagraph a) of paragraph 1 of article 10 of the IRS Code).
9. These gains were considered obtained at the time of the subsequent onerous sale of the properties in question or the occurrence of another event that determined the determination of results under similar conditions, except in the case of return to private assets of residential property that was allocated to obtaining category F income, maintaining the deferral of taxation as long as the property maintained that allocation (under the previous wording of subparagraph b) of paragraph 3 of the same article).
10. It is important to note that, in the case of return to private assets of residential property that was allocated to obtaining category F income, there would be no taxation of any gain if, as a result of that allocation, the property generated income for five consecutive years (under paragraph 15, which has since been revoked).
11. The gain subject to IRS, resulting from the allocation, was constituted by the difference between the realization value and the acquisition value, under paragraph 4 of article 10 of the IRS Code (category G), considering for this purpose:

- As the realization value, the market value at the date of allocation, prevailing, when available, the value resulting from the correction referred to in paragraph 4 of article 29 of the IRS Code (according to subparagraph c) of paragraph 1 and paragraph 4 of article 44 of the IRS Code);
- As the acquisition value, the value that served for the purposes of liquidation of the municipal tax on the onerous transfer of real estate (IMT), if the property was acquired for consideration (according to paragraph 1 of article 46 of the IRS Code).

12. On the other hand, capital gains resulting from the transfer of these assets to private assets were considered category B income, under the previous wording of subparagraph c) of paragraph 2 of article 3 of the IRS Code, except in the case of residential property that was immediately allocated to obtaining category F income (under paragraph 9 of article 3 of the IRS Code, which has since been revoked).
13. According to the previous wording of paragraph 2 of article 29 of the IRS Code, in the case of allocation, the acquisition value to be considered corresponded to the market value at the date of allocation, and according to paragraph 3, in the case of transfer, the value of the asset corresponded to the market value at the date of transfer.
14. It should be noted that, under paragraph 4 of the same article, the market value assigned by the taxpayer at the time of allocation or transfer of the assets can be corrected whenever the Tax Authority considers, with justification, that it does not correspond to what would be practiced between independent persons.
15. Furthermore, under the previous wording of article 47 of the IRS Code, in the case of transfer to private assets of real estate allocated to business and professional activities, the acquisition value was considered to be the market value at the date of transfer.
16. In the present case, a consultation of the Tax Authority and Customs' (AT) computer system shows that the taxpayer:

- Started the activity of furnished accommodation for tourists, CAE 55201, in 2015, and ceased it in 2022;
- In the IRS model 3 declaration, for the year 2021, indicated that as of January 1, 2021, they had real estate allocated to business and professional activities and opted for the previous regime for determining capital gains and losses resulting from the allocation of real estate, having identified the urban article, in table 8B of annex B, as well as the date of the respective allocation, 2015 (although they did not declare the allocation in annex B of the tax return for that year);
- Proceeded with the sale of the property in question in 2022.

17. Therefore, considering that they opted for the previous regime and that the transfer of the property to private assets occurred before the respective sale, the taxpayer should:

- Determine the capital gains or losses, under category B, resulting from that transfer;
- Declare the elements related to the allocation of the property, in annex G of the tax return for the year of the sale (table 4B3), so that the capital gains or losses that were suspended from taxation at the time of that allocation can be determined.

18. As for the gains obtained from the onerous sale of the property (in the private sphere), these fall under category G, under subparagraph a) of paragraph 1 of article 10 of the IRS Code, with the taxation rules of this category being applied (since, as the taxpayer opted for the previous regime, paragraph 16 of that article does not apply).
19. Accordingly, under paragraph 5 of article 10 of the IRS Code, in the wording applicable at the date of sale, gains from the onerous transfer of properties intended for the principal residence of the taxpayer or their household are excluded from taxation, provided that the following conditions are cumulatively met:

- The realization value, less any loan amortization contracted for the acquisition of the property, is reinvested in the acquisition of another property, land for building a property and/or its construction, or in the expansion or improvement of another property exclusively with the same destination located in Portuguese territory or in the

territory of another European Union Member State or the European Economic Area, provided that, in the latter case, there is an exchange of information in tax matters;

- The reinvestment is made between the 24 months prior and the 36 months after the realization date;
- The taxpayer declares the intention to proceed with the reinvestment, even partially, stating the respective amount in the tax return for the year of the sale.

20. Furthermore, paragraph 6 of the same article, in the applicable wording, establishes that there will be no such exclusion when:

- In the case of reinvestment in the acquisition of another property, the purchaser does not allocate it to their or their household's residence, within twelve months after the reinvestment;
- In other cases, the purchaser does not request the registration in the property tax records or the changes within 48 months from the realization date, and the property is not allocated to their residence until the end of the fifth year following the realization.

21. That is, for the referred tax exclusion to occur, the law requires that the sale is of a property intended for the taxpayer's or their household's principal residence (starting property), and that the reinvestment is made in another property exclusively with the same destination (destination property), meeting all the legal requirements established for this purpose.
22. The referred norm, at the time of the facts, did not establish a minimum period of exclusive use of the property as the principal residence before the respective sale (wording prior to Law No. 56/2023, of October 6).
23. However, the concept of residence (permanent residence) is understood to be the place where domestic life is centered with stability and for a lasting period, the place where one sleeps, takes meals, receives friends, where, in short, one has established a home with all the rituals and ties that are associated with it and are its own.
24. The essential and indispensable characteristics of permanent residence are habituality, stability, and the fact that it constitutes the center of the organization of domestic life.
25. Thus, it is concluded that there can only be a tax exclusion for gains obtained from the onerous sale of the property if it is exclusively allocated to the taxpayer's permanent residence, as previously mentioned, and the realization value is reinvested in another property exclusively with the same destination (without resorting to credit), provided that all legal requirements established for this purpose are met.
26. However, there should be no situation of abuse of right in the deallocation of the property from the activity and its allocation to the taxpayer's principal residence, solely with the objective of benefiting from the regime provided for in paragraph 5 of article 10 of the IRS Code. This is a situation that cannot be assessed in this context.

Conclusion:

Binding information plays a crucial role in providing clear guidance on tax matters. In this context, the inquiry focused on the application of Law No. 75.º-B/2020, which changed the tax treatment regarding the allocation of real estate between personal and business use. The conclusion confirms that tax events now occur primarily upon the sale of the property, with specific conditions for properties transitioning from business to personal use within three years of sale. This clarity helps taxpayers understand how property transactions are taxed under current regulations, emphasizing the importance of compliance to avoid unintended tax liabilities.

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