

Sale of property affected by local accommodation activity and residential rental - application of the exceptional exclusion regime provided in article 50 of law 56/2023 of 06/10 (more housing program). Venda de imóvel afetado à atividade de alojamento local e arrendamento habitacional - aplicação do regime avulso de exclusão previsto no artigo 50º da lei 56/2023 de 06/10 (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: Art. 10 – Capital Gains

Subject: Sale of property used for local accommodation and residential rental - application of the exceptional exclusion regime provided in article 50 of law 56/2023 of 06/10 (housing program)

Details of the Scenario:

Request for Binding Information: The applicant seeks binding information regarding the future sale of a property previously used for local accommodation and now used for residential rental, particularly its treatment concerning capital gains.

In summary:

- The query concerns capital gains related to the sale of the property, as well as those associated with the local accommodation activity.
- The property has not been, and was not, the primary residence of the taxpayer in the last 36 months.
- The property was previously used for local accommodation, which ceased in/12/2021.
- The property is currently rented, with the lease expected to end within the next 30 days.
- The sale proceeds will be fully used to pay off the mortgage on the primary residence of a family member, the daughter.
- The daughter resided in the property to be sold between December 2021 and March 2023.
- Given these circumstances, clarification is sought on the possibility of exemption from capital gains tax related to the sale of the property, as well as from the local

accommodation activity, as provided by the "Mais-Habitação" program, with the sale expected to occur before ..12/2024.

FACTS

Querying the computer system of the Tax and Customs Authority (AT) informed us of the existence of fraction B of the urban property XXXX, titled by the applicant.

From the access to the IRS declaration for the year 2021, we concluded that Annex B was submitted, with the activity holder being taxpayer A of the declaration (with the applicant being taxpayer B). In this annex, it is indicated that the property was removed from the activity, effective as of ..12/2021. The taxpayer filled out box 8C, thus opting to be taxed under the regime in force after 2021.

Further, consultation of lease contract No. yyy reveals that the mentioned property was rented between 2023/07/01 and 2024/04/30 to a different taxpayer.

Finally, the mentioned daughter was listed as a dependent in the family unit composed of the already indicated taxpayers for the years 2010 to 2014. Consultation with the TMENU application from the Institute of Registries and Notaries (IRN) confirms her status as a direct descendant of those same taxpayers.

Response and Guidance:

In this situation, we are dealing with a taxpayer seeking to understand the tax implications of selling, in 2024, a property that was used for local accommodation until 2021-12-.., as well as whether applying the proceeds from this sale to pay off a mortgage for the primary and permanent residence of another person, a descendant, would qualify for the tax exclusion provided in Article 50 of Law No. 56/2023, of 06/10.

1. In general terms, with the new regime approved by the State Budget Law for the year 2021, transfers of real estate assets from the taxpayer's business and professional activity to their personal property no longer constitute gains or losses attributable to Category B—due to the amendment to point (c) of No. 2 of Article 3 of the IRS Code. Additionally, the transfer of real estate from personal property to business activity no longer constitutes a taxable event—due to the amendment to point (a) of No. 1 of Article 10 of the IRS Code.
2. Consequently, the operations of allocation and/or transfer of real estate from the taxpayer's personal sphere to the business/professional sphere, and vice versa, no longer constitute taxable events. Taxable events occur only when the property is sold and there is a change in ownership.
3. Thus, when a taxable event occurs, its qualification and taxation are based on whether the real estate falls within the personal or business/professional scope at the time of sale—thus, Category G or Category B, respectively. There is tax neutrality for intermediate operations of allocation and/or transfer of the property as mentioned above.
4. As an exception to this rule, properties that were used for the taxpayer's business and professional activity but have returned to their private sphere, and whose sale occurs before three years have elapsed since the transfer to personal property, are treated differently. In this situation, the sale is considered as falling under Category G, but the Category B taxation rules apply, as stated in No. 16 of Article 10 of the IRS Code, taxing the gain in its entirety.
5. Nevertheless, Article 369 of the State Budget Law for the year 2021 established a transitional regime. Although, according to its No. 1, new tax rules applied to capital gains suspended from taxation under point (b) of No. 3 of Article 10 and No. 9 of Article 3 of the IRS Code, No. 2 of the same article allowed taxpayers who, as of January 1, 2021, had real estate assets used for business and professional activities, to opt for the

- previous regime for determining capital gains and losses from real estate allocation, indicating this option in the periodic income declaration for the year 2021.
6. Given the initial context, according to point (c) of No. 2 of Article 3 of the IRS Code, capital gains arising from business and professional activities, as defined in Article 46 of the IRC Code, are considered Category B income, including those resulting from the transfer of any property to the taxpayer's personal property, except for real estate assets used in the company's assets.
 7. In this context, for the respective calculation, Article 29(2) of the IRS Code states that in the case of allocating any assets from the taxpayer's personal property to their business and professional activity, the acquisition value for which these assets are considered is the market value at the date of allocation. This does not apply to real estate, where the acquisition value corresponds to the value of the asset at the time it was acquired by the taxpayer, according to the rules established in Articles 45 or 46, as applicable.
 8. Furthermore, Article 29(3) specifies that in the case of transferring assets from the taxpayer's business and professional activity to their personal property, the value of the assets corresponds to their market value at the date of the transfer. Additionally, Article 31(1)(d) of the IRS Code provides that the coefficient to apply to the positive balance of gains and losses is 0.95.
 9. However, as previously mentioned, when dealing with real estate, there is tax neutrality concerning the allocation and deallocation of such properties with respect to the activity carried out. The taxable event occurs only when the property is transferred, which determines its value.
 10. As an anti-abuse measure, Article 10(16) of the IRS Code stipulates that gains obtained from the onerous transfer of real rights over real estate that were used for the taxpayer's business and professional activity are taxed according to the rules of Category B if the transfer occurs within three years after the property is moved to the taxpayer's personal property.
 11. The regime described, which is currently in effect, was precisely the one chosen by the taxpayer during the completion of their income tax return for the year 2021, the year in which the property was deallocated from the business activity sphere and returned to personal property.
 12. Therefore, according to Article 10(16) of the IRS Code, if the anticipated sale occurs by 2024-12-..., the capital gains generated by this sale, although declared in Annex G, will be taxed according to the rules of Category B, meaning a coefficient of 0.95 will be applied to the total value.
 13. On the other hand, if the transfer occurs after 2024-12-..., the generated capital gains will be taxed under the general regime, within Category G, according to the rules stipulated therein.
 14. Regarding the applicability of the specific, temporary regime provided in Article 50 of Law No. 56/2023, of 06/10, it is important to recall its content:

"1 - Capital gains from the onerous transfer of land for construction or residential properties that are not intended for the taxpayer's own and permanent residence or that of their family are excluded from IRS taxation, provided that the following conditions are cumulatively met:

- a) The sale value, minus any repayment of a loan taken out for the acquisition of the property, is applied to the repayment of the principal of a mortgage loan for the taxpayer's own and permanent residence, or that of their family or descendants;
- b) The repayment referred to in the previous point is completed within three months from the date of sale."

2 - Whenever the sale value, minus any repayment of a loan taken out for the acquisition of the transmitted property, is partially reinvested in repaying the principal of a mortgage loan for the taxpayer's own and permanent residence, or that of their family or dependents, the remaining amount is subject to taxation according to the general provisions of the IRS Code.

3 - The Tax and Customs Authority may require taxpayers to present supporting documents, after submitting the IRS model 3 tax return for 2023 and 2024, proving the repayment of the principal on a mortgage loan for the taxpayer's own and permanent residence.

4 - The provisions in the preceding numbers apply to transfers made between January 1, 2022, and December 31, 2024.

5 - For transfers made before the enactment of this law, the repayment referred to in point b) of paragraph 1 must be completed within three months of the enactment of this law.

15. Looking at the case in question, and without any comments from the legislator regarding the situations covered by the allocation/deallocation of real estate to the activity, there is a clear divergence between the purposes outlined in the transitional rule and those in Article 10(16) of the IRS Code.
16. This means that if the applicant benefits from the tax exclusion regime under Article 50 of Law No. 56/2023, of October 6, the objective outlined in Article 10(16) of the IRS Code would be thwarted. This objective is to avoid taxing only 50% of the capital gains generated during the first three years after deallocating the property from the activity, as stipulated in the general regime.
17. In fact, applying such a regime would result in not paying any tax, given a scenario where the sale value is fully applied and all other conditions of the rule are met.
18. It is also noted that the exclusion regime, by specifically referring to gains from the onerous transfer of land for construction or residential properties, places these gains in Category G. This is reinforced by the content of paragraph 2.
19. Therefore, if Article 10(16) of the IRS Code provides a period during which taxation must follow Category B rules, and this category is not covered by the exclusion regime, the conclusion is that, while this period is ongoing, gains from the sale of properties falling under the anti-abuse rule cannot benefit from the tax exclusion regime under Article 50 of Law No. 56/2023.
20. Thus, based on the aforementioned, the applicant can only benefit from the tax exclusion regime after the end of the period specified in Article 10(16) of the IRS Code.
21. Another issue to consider is that the legislator decided to extend the possibility of excluding capital gains from taxation to a broader group, including the descendants of the taxpayers within the group of people where the exclusion mechanism may apply. This possibility is not dependent on whether they are part of the taxpayer's family.
22. In this regard, the letter of the law is clear: if the mention of the household, in the general regime, implies the exclusion of descendants who are no longer part of it, the explicit reference to descendants in the specific rule, immediately following the mention of the household, indicates the legislator's intention to consider all descendants. This reflects a policy of supporting families and providing assistance between families, particularly in terms of credit contracts and mitigating the adverse effects caused by the pandemic period.
23. It is also important to highlight Article 50(2) of Law No. 56/2023, of October 6, which states that whenever the sale value, minus any repayment of a loan taken out for the acquisition of the transmitted property, exceeds the outstanding mortgage debt for the acquisition of the property intended for the taxpayer's own and permanent residence

- or that of their household, the remaining amount is subject to taxation according to the general provisions of the IRS Code.
24. Consequently, applying the sale value, minus any repayment of a loan taken out for the acquisition of the property, to repay the outstanding mortgage debt for the taxpayer's own residence of a descendant will allow for the exclusion of the corresponding capital gains taxation, provided that this repayment is completed within three months from the sale date and that the transfer of the property occurs by December 31, 2024.
 25. It is also important to note that, since the purpose of the regime is to expedite situations related to difficulties in meeting existing credits, the outstanding capital to be repaid must pertain to a mortgage loan for the taxpayer's own and permanent residence, or that of their household or descendants, existing at the date of entry into force of Law No. 56/2023, of October 6.

Conclusion:

In the situation at hand, taxation on capital gains follows the rules of category B if the sale occurs by December 2024, and category G if it happens after that date, according to Article 10(16) of the IRS Code.

Therefore, the benefit of the exclusion regime provided in Article 50 of Law No. 56/2023, of October 6, will only be possible, subject to the respective conditions, if the property transfer occurs between December 2024 and December 31, 2024.

On the other hand, applying the sale value, minus any repayment of a loan taken out for the acquisition of the property, to repay the outstanding mortgage debt for a descendant's own and permanent residence will allow for the exclusion of the corresponding capital gains taxation, provided that the mortgage contract was entered into before the law came into effect (i.e., before October 6, 2023), and that this repayment is completed within three months from the date of sale. Partial taxation may still apply if the conditions specified in Article 50(2) of Law No. 56/2023, of October 6, are met.

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