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Transfer of property to personal sphere followed by disposal within a period of less than 3 years - minimum quotas of amortization (Transferência de imóvel para a esfera pessoal seguida de alienação em prazo inferior a 3 anos - quotas mínimas de amortização)

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: Transfer of property to personal sphere followed by disposal within a period of less than 3 years - minimum quotas of amortization

Details of the Scenario:

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

- Owns an urban property in Portugal, which was used for local lodging in 2017;
- Ceased the activity in 2021 and withdrew the property from its business use;
- In the IRS income tax return (Model 3) for the year 2021, opted for the new capital gains taxation rules regarding the allocation/deallocation of property from the activity;
- Acquired 50% of the property in 2004 and the remaining 50% was acquired due to the death of the spouse in 2016;
- According to article 31, paragraph 9 of the IRS Code, in determining capital gains in Category B, minimum amortization quotas must be calculated.

Given the facts, the applicant questions whether, upon selling the property within 3 years after its withdrawal, only the depreciations during the activity period (2017 to 2021) should be considered in the determination of capital gains in Category B, or if they should be calculated from the acquisition date in 2004 and 2016 until the date of sale.

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Response and Guidance:

1. The regime for allocation and deallocation of properties was altered by Law No. 75-B/2020, of December 31 (State Budget Law for the year 2021).

2. Under the current regime, gains related to properties allocated are only taxed when they fall under one of the taxable events provided for in the rules of incidence, namely, in the onerous alienation of real estate.

3. Therefore, if at the time of property alienation it is still allocated for business or professional use, the capital gain is classified under Category B, in accordance with article 3, paragraph 2(c) of the IRS Code, "where the acquisition value corresponds to the value of the asset at the date it was acquired by the taxpayer, in accordance with the rules set out in articles 45 or 46, as appropriate," as stipulated in article 29, paragraph 2 of the IRS Code.

4. On the other hand, if the property is no longer allocated for business or professional use (since it has been transferred to the personal assets), the capital gain falls under Category G, in accordance with article 10, paragraph 1(a) of the IRS Code.

5. However, if the alienation occurs within three years after the transfer to the personal assets of the taxpayer, the gains obtained are taxed according to the rules of Category B, in accordance with article 10, paragraph 16 of the IRS Code.

6. In other words, although the capital gain is categorized as obtained under Category G, the rules for taxation of Category B apply.

7. In this specific case, the applicant queries which depreciations should be taken into account in determining the capital gain if the property is sold within 3 years after its withdrawal.

8. In terms of Category B income, article 3, paragraph 2(c) of the IRS Code provides "capital gains calculated within the framework of activities generating business and professional income, as defined in article 46 of the IRC Code."

9. In turn, article 46, paragraph 2 of the IRC Code establishes that "capital gains and losses are determined by the difference between the realization value, net of inherent charges, and the acquisition value, reduced by depreciations and amortizations accepted for tax purposes, impairment losses, and other value adjustments provided for in articles 28-A and 31-B, and also by amounts recognized as fiscal expenses under article 45-A, without prejudice to the provisions of the final part of paragraph 3 of article 31-A."

10. Since the applicant was under the simplified regime, the determination of taxable income in Category B was made under article 31 of the IRS Code, and its paragraph 9 establishes that "in calculating the capital gains referred to in paragraph 2(c) of article 3, minimum amortization quotas are used, calculated on the definitive value, if higher, considered for the purposes of stamp duty on property transfers."

11. Therefore, in determining the taxable gain in accordance with the rules of Category B, minimum amortization quotas related to the period during which the property was allocated for business use are taken into account.

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12. Based on the above, it is concluded that if the property is sold within three years after its transfer to personal assets, the gain will be taxed according to the rules of Category B, and thus, in its determination, minimum amortization quotas related to the period during which the property was allocated for business use are considered, under the provisions of article 31, paragraph 9 of the IRS Code.

Conclusion:

Binding information is crucial as it provides taxpayers with official, authoritative guidance on specific tax-related questions. In this case the binding information provided clarifies the tax treatment applicable to the capital gains arising from the sale of a property that was previously used for local lodging and subsequently transferred to personal ownership, with a sale occurring within three years of its withdrawal from business use. According to the IRS Code, specifically Article 10 regarding capital gains, if the property is sold within this three-year period, the gains are subject to taxation under Category B rules, despite originally falling under Category G due to its change in use.

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

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