

Understanding Informação Vinculativa (Binding Information): Disposal of a property designated as a secondary residence - Application in the acquisition of the dependent's main residence - Inapplicability of Article 50

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: Disposal of a property designated as a secondary residence - Application in the acquisition of the dependent's main residence - Inapplicability of Article 50

Details of the Scenario:

The applicant seeks Binding Information on the possibility of applying the provision set forth in Article 50(1) of Law No. 56/2023, of October 6 – exclusion of taxation on the gain obtained from the disposal of a property not designated as a primary residence – in the case where the proceeds are used for the acquisition of a property designated as the main residence of a descendant.

In June 2023, the applicant and their spouse sold a property designated as a secondary residence and decided to donate part of the proceeds to their daughter to help her pay for a property designated as her main residence, which she purchased in June 2023, as evidenced by the attached deed of purchase and sale with a mortgage.

The applicant requests clarification on whether the gains from the disposal of the secondary residence can be (partially) excluded from taxation based on the provisions of Article 50 of Law No. 56/2023, of October 6.

Response and Guidance:

1 - Law No. 56/2023, of October 6th, approved a set of measures in the field of housing, which make up the More Housing Program, and enacted legislative changes with an impact on the IRS (Income Tax).

2 - In order to clarify the legislative changes impacting the IRS, specifically in the area of Category G - Capital Gains, the Tax Authority (AT) issued Circular Letters No. 20262/2023, dated November 27th, and No. 20266/2024, dated February 23rd.

3 - Article 50 of Law No. 56/2023, of October 6th, later amended by Law No. 82/2023, of December 29th - the State Budget Law for 2024 - which contains a transitional tax provision, through its paragraph 1, allows for the exclusion of taxation on gains arising from the onerous transfer of land for construction or residential properties that are not intended for the primary and permanent residence of the taxpayer or their family household, provided that:

- a) The sale proceeds, after deducting any outstanding loan for the purchase of the property, are applied towards the repayment of mortgage debt related to the primary and permanent residence of the taxpayer, their family household, or their descendants;
- b) The repayment referred to in the previous paragraph is made within three months from the date of the sale.

4 - According to paragraph 2, "Whenever the sale proceeds, after deducting any outstanding loan for the purchase of the sold property, are partially reinvested in the repayment of mortgage debt related to the primary and permanent residence of the taxpayer, their family household, or their descendants, the remaining amount is subject to taxation according to the general provisions of the IRS Code."

5 - According to paragraph 4, the provisions of the previous paragraphs (1, 2, and 3) apply to transfers made between January 1, 2022, and December 31, 2024.

6 - The objective of the measure enshrined in paragraph 1 of Article 50 of Law No. 56/2023, of October 6th, was to assist citizens in meeting the financial obligations arising from loans taken out for the purchase of properties intended for primary and permanent residence, in light of rising interest rates and inflation. The objective was not to encourage the acquisition of properties or the assumption of more debt related to such acquisitions.

7 - As such, paragraph 1 of Article 50 of Law No. 56/2023, of October 6th, explicitly states that in the case of the exclusion of taxation on gains derived from the sale of a property, the sale proceeds must be applied towards the repayment of mortgage debt related to the primary and permanent residence of the taxpayer, their family household, or their descendants.

8 - Therefore, it is understood that the situation referred to by the applicant falls outside the scope of the tax exclusion provision provided for in paragraph 1 of Article 50 of Law No. 56/2023, of October 6th, as the proceeds from the sale of the second home were not used to repay mortgage debt related to the primary and permanent residence of their descendant, but rather to pay part of the price for the purchase of a property intended for primary and permanent residence, which clearly goes beyond both the letter and the spirit of the law.

Conclusion:

Binding information serves a crucial role by offering authoritative and precise guidance on intricate tax issues. In the present case, the requestor sought clarity regarding the potential tax exemption for gains from the sale of a secondary residence, specifically concerning their intention to use the proceeds to purchase a property for their dependent's primary and permanent residence. It is evident that according to Article 50 of Law No. 56/2023, the exemption applies only when the proceeds are used for the acquisition of the taxpayer's own and permanent residence. Therefore, the gains from the sale of the secondary residence, even if used to support the dependent's purchase of their primary residence, do not qualify for the tax exemption. It is essential for taxpayers to adhere strictly to these provisions to ensure compliance with tax laws and to avoid unintended tax liabilities or penalties. This ensures clarity in tax obligations and supports taxpayers in making informed decisions regarding their financial activities under the applicable legal framework.

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