DISPOSAL OF A SHARE IN A SMALL BUSINESS LOCATED IN THE UNITED KINGDOM

TAXATION AT 50%

(PIV_26949)

ALL FINANCE MATTERS

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Disposal of a share in a small business located in the United Kingdom – taxation at 50%
Alienação de parte social de pequena empresa situada no reino unido – tributação (PIV_26949)

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 43 – Capital Gains
Subject: The applicant requests binding information regarding the possibility of applying the tax exclusion provided in Article 43(3) of the IRS Code to the sale of a portion of the share capital he holds in a micro or small business based in the United Kingdom.

In summary, he presents the following:

– He is a British citizen residing in Portugal.

– He holds 30% of the share capital of the company T... Limited (hereinafter TXL).

– TXL's turnover was €2.1xx.xxx,xx (in 2021), €2.0xx.xxx,xx (in 2022), and €1.5xx.xxx,xx (in 2023).

– TXL's assets were valued at €6.8xx.xxx,xx (in 2023), and the net asset value and equity capital were €4.7xx.xxx,xx (in 2023).

– In the 2023 fiscal year, TXL had an average of five (5) employees, including directors.

– TXL is not listed on the stock market.

– He intends to sell 5% of TXL's share capital to another company based in the United Kingdom.

– Article 43(3) of the IRS Code states that when the transferred shareholdings relate to micro and small businesses, only 50% of the capital gain, when positive, is considered for taxation.

– According to Article 2(1) of the annex to Decree-Law No. 372/2007, of November 6, micro, small, and medium-sized enterprises are those that employ fewer than 250 people and have an annual turnover not exceeding €50 million or a balance sheet total not exceeding €43 million, with reference to the last closed accounting period.

– Based on these criteria, TXL qualifies as a micro or small business.

– Although TXL is headquartered in the United Kingdom, Article 43(3) of the IRS Code does not explicitly state that the tax exclusion applies only to companies based in Portugal.

Thus, the applicant seeks confirmation that he can benefit from the tax regime provided in Article 43(3) of the IRS Code if he proceeds with the sale of shareholdings in TXL, a company located in the United Kingdom, while being a tax resident in Portugal.

Information:

1. According to Commission Recommendation 2003/361/EC, a micro-enterprise employs fewer than 10 people, and its annual turnover or total annual balance sheet does not exceed €2,000,000.00. A small enterprise employs fewer than 50 people, and its annual turnover or total annual balance sheet does not exceed €10,000,000.00.
Finally, a medium-sized enterprise employs fewer than 250 people, and its annual turnover or total annual balance sheet does not exceed €50,000,000.00. This recommendation was transposed into national legislation through Decree-Law No. 372/2007, of November 6.

2. Article 3 of the annex to Decree-Law No. 372/2007 introduces the concepts of autonomous enterprise, partner enterprise, and associated enterprise, with Article 6 adding the following regarding the determination of a company's data:

a) In the case of an autonomous enterprise, the determination of data, including workforce size, is based solely on the accounts of that company.

b) The data, including workforce size, of a company that has partner or associated enterprises is determined based on the company's accounts and other financial information, or—if available—on the consolidated accounts of the company or the consolidated accounts in which the company is included. These figures must also incorporate data from any partner companies directly upstream or downstream of the considered enterprise.

3. Based on the presented values, and assuming that TXL is an autonomous enterprise (a fact that cannot be confirmed in this procedure), it may be classified under the criteria defined in Article 43(4) of the IRS Code, meaning that it qualifies as a micro or small enterprise for the potential application of Article 43(3) of the same code.

4. Currently, the Portuguese Tax and Customs Authority (AT), in line with European Court of Justice (ECJ) jurisprudence, acknowledges that Article 43(3) of the IRS Code also applies to capital gains arising from the sale of shareholdings in micro, small, and medium-sized enterprises (SMEs) that are not listed on regulated or unregulated stock markets, even if they are located outside Portugal.

5. This interpretation ensures compliance with Article 63 of the Treaty on the Functioning of the European Union (TFEU), which prohibits all restrictions on the movement of capital between Member States and between Member States and third countries.

6. However, similar to the control applied to capital gains from transactions involving companies based in Portugal, any taxpayer wishing to benefit from this tax reduction (50% taxable base) must provide evidence that the foreign company meets the material requirements to qualify as an SME.

7. Specifically, this refers to fiscal and accounting documents, preferably authentic in nature, that clearly and unequivocally prove that the company located outside Portugal meets the conditions to be classified as an SME.

8. As the burden of proof regarding the SME status falls on the taxpayer, all legally admissible forms of evidence should be considered and accepted, particularly authentic documents, to verify the SME status of a non-resident company without a permanent establishment in Portugal.

Conclusion:

In the present case, the applicant, as a tax resident in Portugal, may benefit from the regime provided for in Article 43(3) of the IRS Code, if they proceed with the sale of shareholdings in Taylor Williams Limited, a company located in the United Kingdom, and if this company is classified as an SME, in accordance with the criteria mentioned in points 1 and 2 above.

However, during the capital gains control process, the applicant must provide evidence that the foreign company meets all the material requirements necessary to qualify as an SME.

For any inquiries or support with tax compliance for businesses or individuals, our team is here to assist you.
From understanding tax obligations to ensuring full compliance with the latest regulations, we provide expert guidance tailored to your needs.
Feel free to reach out to us at info@afm.tax or call us at +351 281 029 059.

"YOU MUST PAY TAXES, BUT THERE'S NO LAW THAT SAYS YOU NEED TO LEAVE A TIP."