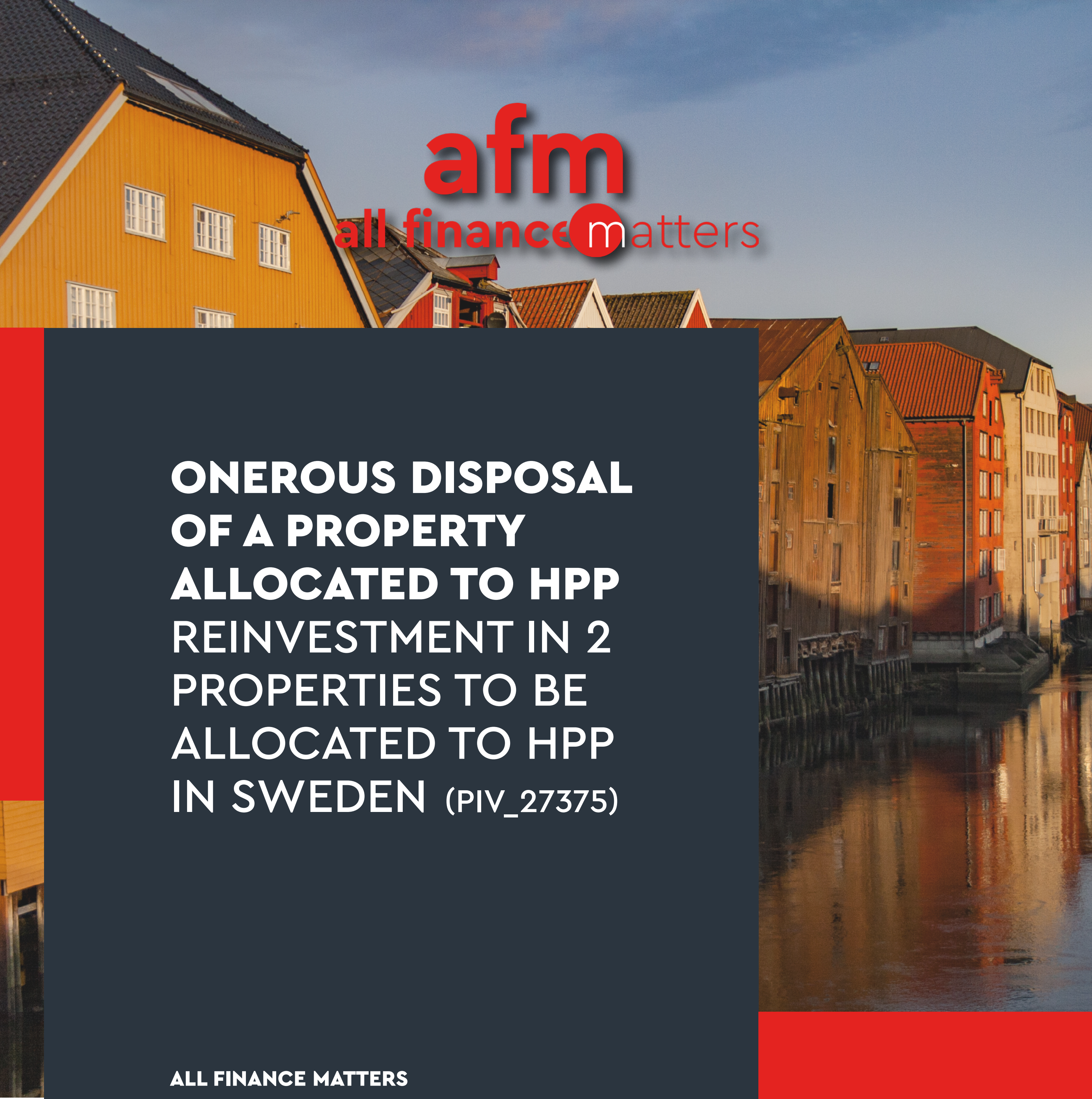

ONEROUS DISPOSAL OF A PROPERTY ALLOCATED TO HPP REINVESTMENT IN 2 PROPERTIES TO BE ALLOCATED TO HPP IN SWEDEN (PIV_27375)

ALL FINANCE MATTERS

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Onerous disposal of a property allocated to HPP – Reinvestment in 2 properties to be allocated to HPP in Sweden
Alienação onerosa de imóvel afeto a HPP – Reinvestimento em 2 imóveis a afetar a HPP na Suécia (PIV_27375)

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: The applicant seeks binding information regarding the following situation:

– He is the owner, together with his wife—whom he is married to under the general community of property regime—of a property that serves as their main permanent residence (HPP), located in Portugal.

– They have lived in this property for more than 12 years and are considering selling it, with the intention of later moving to Sweden and reinvesting the proceeds from the sale into new HPPs in that country.

– Due to family circumstances, they are considering the possibility of residing in separate new HPPs in Sweden, each reinvesting their respective share—or different percentages—of the proceeds from the sale of the property.

The applicant, therefore, seeks clarification on the following points:
a) Whether they can reinvest the proceeds—or part of the proceeds—from the sale into new HPPs in Sweden.
b) If so, in the case of reinvestment into two separate HPPs, whether they must adhere to the 50% share rule—each reinvesting their respective share of the property sold—or whether it would be possible to use different percentages, provided that each new HPP serves as the domicile and social center of life for each individual in Sweden.
c) Whether, in either case, opting for reinvestment would require submitting a personal income tax (IRS) return under the "married – separate taxation" option.

Information:

1. According to Article 10(1)(a) of the Portuguese Personal Income Tax Code (Código do IRS), capital gains are defined as gains obtained from the onerous disposal of real estate rights, provided they are not classified as business and professional income, capital income, or rental income.

2. However, paragraph 5 of the same article allows for an exemption from taxation, provided the following conditions are met:

a) The sale proceeds, after deducting the repayment of any loan contracted for the purchase of the property, must be reinvested in:

– The purchase of another property;

– The purchase of land for construction of a property;

– The construction, expansion, or improvement of another property, exclusively intended for the same purpose, located in Portugal or another EU or EEA member state (provided the latter has a tax information exchange agreement with Portugal).

b) The reinvestment must be made within a period of 24 months before or 36 months after the date of the sale.

c) The taxpayer must declare their intention to reinvest, even if partially, by stating the respective amount in their income tax return for the year of the sale.

d) The property sold must have been used as the primary and permanent residence of the taxpayer or their household, as evidenced by their fiscal domicile, for at least 12 months before the date of sale or, if earlier, before the date of the reinvestment mentioned in point a).

Exceptions may apply in extraordinary circumstances, as per Article 10(23).

3. In addition to these requirements, other conditions may prevent the taxpayer from benefiting from the tax exemption:

a) If the reinvestment consists of purchasing another property, but the taxpayer fails to use it as their primary residence or that of their household within 12 months after the reinvestment.

b) In other cases, if the taxpayer does not register the property or the alterations in the land registry within 48 months from the sale date. The property must be designated as their primary residence by the end of the fifth year following the sale.

c) If the taxpayer or their household does not establish their fiscal domicile in the property.

Reinvestment in Sweden

4. The first issue to clarify is whether the applicant can reinvest the proceeds from the sale of a property located in Portugal into a property in Sweden.

5. Since Sweden is an EU Member State, the applicant can reinvest the proceeds from selling a property in Portugal into a property in Sweden. Provided all other conditions are met, they can benefit from the capital gains tax exemption outlined in Article 10(5) of the IRS Code.

6. However, the applicant intends to purchase not just one, but two properties in Sweden. The applicant and their spouse plan to use these properties as their respective primary residences, stating that each one will serve as the domicile of each spouse, with separate social and living centers.

7. To analyze this request, it is necessary to understand two key concepts.

8. The first is the concept of a household unit, which is defined in Article 13(4) of the IRS Code as follows:

"4 – A household unit consists of:

a) Spouses who are not legally separated or unmarried partners, along with their dependents.

b) Each spouse or ex-spouse, in cases of legal separation, annulment, or dissolution of marriage, along with their dependents.

c) A single parent and their dependents.

d) A single adoptive parent and their dependents."

9. In this case, since the applicant and their spouse are married under a regime of community property, they fall under point (a) of the definition, which is a strict classification under the law.

10. As a result, they form a single household unit for tax purposes.

11. The second concept that needs to be analyzed is that of tax domicile, as provided for in Article 19 of the General Tax Law, which states that the taxpayer's tax domicile is, unless otherwise specified, and for individuals, the place of habitual residence.

12. Furthermore, Article 13(12) of the IRS Code establishes that the tax domicile presumes the taxpayer's primary and permanent residence, although the taxpayer may, at any time, provide evidence to the contrary.

13. It is important to note that the two previous points must be considered in conjunction with one of the conditions associated with the reinvestment regime, specifically Article 10(6)(e) of the IRS Code, which generally states that taxpayers or their household members who do not establish their tax domicile in the acquired property cannot benefit from the reinvestment regime.

14. However, the presumption set out in Article 13(12) of the IRS Code is rebuttable, meaning that the taxpayer may prove that their primary and permanent residence (HPP) is in another property. In such cases, there is a discrepancy between the address declared as the tax domicile and the actual residence where the taxpayer's center of interests is located.

15. In other words, the tax law has been adjusted to allow, in certain specific scenarios, for another property—and its respective address—to be designated as the taxpayer's primary and permanent residence. However, this does not imply the possibility of having two primary and permanent residences for the taxpayer or their household.

16. Therefore, it is acceptable that, in light of new emerging social realities, a member of the household may, for valid reasons, reside in a different location.

17. Nevertheless, if accepted, such situations will generally be temporary and should not undermine the principal center of interests of that household member, which must be the property where the rest of the household resides.

18. Given this, it is now important to revisit the legislation and conduct a detailed analysis of the main issue under discussion.

19. The first condition established in the regime states that capital gains derived from the sale of real estate intended for the primary and permanent residence of the taxpayer or their household are exempt from taxation, provided that the proceeds, after deducting any outstanding mortgage on the property, are reinvested in the acquisition of another property, a plot of land for construction, the construction of a property, or the expansion or improvement of another property exclusively intended for the same purpose.

20. It should be noted that the legal text initially refers to properties—plural—before subsequently referring to property—singular.

21. In other words, it begins with a general reference and then immediately moves to a specific one—albeit in abstract terms—to a property being sold, which may be subject to an outstanding mortgage. In a reinvestment scenario, this corresponds to an acquired property, a plot of land for construction, the construction of a property, or the expansion or improvement of a property.

22. Article 9(3) of the Civil Code, titled "Interpretation of the Law, "states that when determining the meaning and scope of a law, the interpreter must presume that the legislator adopted the most appropriate solutions and was able to express their intent in suitable terms.

23. Applying this provision to the case under analysis helps to understand that, since the legal text consistently refers to only one property and nothing more, extending the possibility of reinvestment to two properties would create an unsustainable broadening of what can be considered possible in the interpretation of tax law by the Tax and Customs Authority.

24. It is important to recall here the principle of tax legality, as established in Article 103(2) of the Constitution, which requires that taxes be created by law, specifying their incidence, rate, tax benefits, and taxpayer guarantees.

25. Based on this, it must be concluded that, for the purposes of the reinvestment regime under Article 10(5) of the IRS Code, the sale of a property previously designated as the taxpayer's or their household's primary and permanent residence must correspond to the purchase of another property for the same purpose, a plot of land for construction, the construction of a property for the same purpose, or the expansion or improvement of a property, which must also be designated for the same purpose.

Conclusion:
For the purposes of the reinvestment regime under Article 10(5) of the IRS Code, the sale of a property previously designated as the primary and permanent residence of the taxpayer or their household must correspond to the purchase of another property for the same purpose, a plot of land for construction, the

construction of a property for the same purpose, or the expansion or improvement of a property, which must also be designated for the same purpose.
Consequently, as the applicant and their spouse constitute a single household, if they sell the property they own in national territory, which serves as their primary and permanent residence, the taxation of any potential gains from the sale can only be avoided if the total proceeds are reinvested in the purchase of another property, which must be designated as their primary and permanent residence within twelve months after the reinvestment.
In terms of tax declarations, as residents in national territory, they may choose between joint or separate taxation. Regardless of the option chosen, the sale must be reported in Annex G, ensuring the separation of the respective ownership rights of both spouses—one entry for 50% of the applicant's share and another for 50% of the spouse's share.
This means that if they opt for separate taxation, each must submit their own Annex G, declaring the sale at a 50% share.
Finally, it is important to note that, in accordance with Article 57(4) of the IRS Code, both individuals must indicate their intention to reinvest in the tax return for the year of the sale, specifying the reinvestment in that return and/or in the returns for the following three years.
They must also provide proof, when requested, that the property is designated as their permanent residence, through a declaration issued by an official entity of the Kingdom of Sweden.

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."