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LEGAL ALERT

TAXATION OF CAPITAL GAINS OBTAINED BY NON-RESIDENT INDIVIDUALS FROM THE SALE OF REAL ESTATE ASSETS LOCATED IN PORTUGAL

The Portuguese Personal Income Tax (PIT) framework applicable to capital gains obtained by non-resident individuals with the transfer of real estate located in Portugal is surrounded in Court disputes for more than a decade. Nevertheless, there are some recent developments in the courts decisions trends that justify a highlight.

In a nutshell, the controversy surrounding this regime results from the different tax regimes applicable to capital gains made with the sale of real estate located in Portugal when the same are obtained by tax resident individuals or by non-resident individuals. While the first are subject to PIT at the general and progressive rates (up to 48% or 53% considering the solidarity surcharge) on 50% of the capital gain, being subject to a maximum effective tax rate of 24% (or 26,5%), in their turn, non-resident individuals are subject to tax on the global amount of such capital gains at a flat rate of 28%, thus being subject to a higher tax burden.

In 2007, this discrimination was judged by the European Court of Justice (ECJ), which has recognized that this regime is contrary to the free movement of capital. In order to comply with this decision, the 2008 Portuguese State Budget Law included an amendment to this framework, according to which non-resident individuals were granted the right to choose between: *(i)* being subject to this standard non-residents' regime; or *(ii)* being subject to the same regime that applies to individuals resident in Portugal.

Based on this amendment, the Portuguese Tax Authorities tried to sustain since then that in a scenario where the non-resident taxpayer did not choose to be subject to the regime applicable to tax residents he should be subject to taxation at 28% on the whole amount of the capital gains.

Nevertheless, Portuguese Courts based on the decisions of the ECJ have clearly stated that the introduction of this option does not eliminate the discriminatory nature of this standard regime, recognizing that the same continues to violate the free movement of capital, whether the capital gains are obtained by resident in other European Union (EU) Member-State or in third countries outside the EU.

Therefore, based on these Court decisions, non-resident individuals may be entitled to be taxed at the 28% flat rate on 50% of the amount of the relevant capital gain, being subject to an effective tax rate of 14%, which should be taken into consideration by non-resident individuals that have sold real estate in Portugal in the past four years and/or envisage to sell real estate located in Portugal in the future.

Our team is available to clarify any specific questions and to provide assistance with any related subject.

The tax team