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Taxation of capital gains obtained on the sale of real estate properties located in the Portuguese territory by non-resident investors: application of the 50% reduction taxation regime

The Portuguese Personal Income Tax («PIT») Code establishes that capital gains obtained on the sale of real estate property by residents are only considered on 50% of their value.

This implies that, under applicable law, capital gains obtained from the sale of real estate property are considered on 50% if allocated to residents and, in principle, on 100% if allocated to non-residents.

The establishment of a different tax regime based on the holder's residency raises an illegitimate discrimination under the European Union Law (Principle of Free Movement of Capital).

In fact, under article 63 of the Treaty on the Functioning of the European Union ("TFEU"), all restrictions on the movement of capital or payments between Member States and between Member States and Third countries shall be prohibited.

It is worth recalling that the European Union Court of Justice ("ECJ") previously recognized the sale and purchase of real estate property as part of the material scope of the Free Movement of Capital. In particular, the ECJ considered the Portuguese 50% reduction taxation regime as a restriction of the Free Movement of Capital Freedom, prohibited under the TFEU. Furthermore, the ECJ has recently reaffirmed the same thesis in cases where the gain is obtained by a resident of a non-EU country (the case, now, of the UK).

In conclusion, capital gains obtained on the sale of real estate property located in Portugal by investors resident in other European Union Estates or in Third countries, like the UK, should be considered, for taxation purposed, on only 50% of their value.

Notwithstanding the fact that the PIT Code's tax provision disregards European Union Law, the Portuguese Tax Authorities continue to consider for taxation purposes 100% of the capital gains obtained by non-resident investors.

In light of such significant violation of the TFEU, which has been confirmed by ECJ case law and, more recently, by the Portuguese arbitration courts case law, investors resident abroad can challenge any tax assessments issued by the Portuguese tax authorities which wrongfully consider for taxation purposes 100% of their capital gains.

This matter is especially relevant for the non-resident real estate investors' market, as it brings forth the possibility of reducing tax charges in Portugal by half in the aforementioned operations.

Investors interested in reclaiming the overpaid tax amount, plus indemnity interest (4% per year), may initiate an arbitration procedure or judicial proceedings before the Portuguese tax courts. Depending on the circumstances, other mechanisms may also apply, such as the request for an administrative officious review of a tax assessment.

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