



Taxation of capital gains from the transfer of real estate located in Portugal by a resident of a Member State of the European Union

Infringement of the principles of non-discrimination and free movement of capitals foreseen in the Treaty on the Functioning on the European Union

Capital gains generated by non-residents in Portugal resulting from the transfer of real estate are currently being taxed at flat rate of 28% over the whole amount of the gains obtained by seller with the transaction (i.e. selling price *minus* acquisition price), in accordance with article 72.º, n.º 1, subparagraph a) of the Personal Income Tax Code (CIRS).

On the other hand, capital gains generated by residents in Portugal are, for tax purposes, considered in only 50% and are subject to the general progressive tax rates referred in the CIRS.

It has been discussed whether capital gains obtained by non-resident taxpayers in Portugal, when subject to a different regime is likely to violate the principle of free movement of capitals, by leading to a discrimination between residents and non-residents, the latter being subject to a less favorable tax treatment in comparison to residents in Portugal.

The subject under discussion is within article 43, no. 2, subparagraph b) of the CIRS, which states that: *“The balance stated in the previous number, regarding transfers made by residents under subparagraphs a), c) and d) of no. 1 of article 10, whether positive or negative, is only considered in 50% of its value, in other cases.”*

This subject, rather discussed in arbitration case law, has equally been submitted to the evaluation of Portuguese and European judicial courts.

The **Administrative Arbitration Board (CAAD)**, in particular, has taken many decisions regarding this matter, having the latest – case no. 67/2019-T – from August 27th 2019, under ruled that the regime provided in article 43, no. 2, subparagraph b) of the CIRS, which entails that Personal Income Tax only applies over 50% of the value of capital gains generated by the transfer of property located in Portuguese territory, should also apply to non-residents.

In parallel, the **European Court of Justice (ECJ)** has also expressed its understanding of this subject, namely under the Ruling of October 11th 2007, case n.º C-443/06 (“**Hollman Rulling**”).

In this case, the ECJ considered that the difference of treatment between residents and non-residents – in the advent of a less favorable tax treatment of the former – provides an arbitrary discrimination of non-resident EU, such provision should be treated as a violation of article 18 of the Treaty of) since it is a restriction to the free movement of capitals (forbidden by article 63 of said Treaty), resulting in the loss of attractiveness national markets for real estate investments.

Also, the Portuguese **Administrative Supreme Court** already ruled over this subject, namely on Rulling no. 0439/06, of January the 14th 2008, adopting the ECJ’s position. The Court stated that the settlement of a real estate investment constitutes a movement of capital in itself, according to that Court’s jurisprudence, and, consequently, is covered by the scope of article 63 of the Treaty of Lisbon. Thus, it can be concluded that, prevailing EU provisions over national ones, pursuant to the Portuguese Constitution, the rule that violates those said provisions incurs in an illegality.

Additionally, until the issue of Decree 361/2007, of November the 2nd 2007, there was the debate if the reinvestment of real estate capital gains under article 10, no. 5 of the CIRS, should only apply when a occurred under a property located in Portugal, as a main permanent dwelling. This case constituted a restriction to the free movement of capitals and people and,

therefore, in violation of EU Law, as the ECJ concluded under the Ruling of October 26th 2006, case no. C-345/05. The discussion was finally settled with the amendment to the said Decree, which altered article 10, no. 5, specifically envisioning the possibility to reinvest in a property located in Portuguese territory or in a territory of another European Member State.

In the light of European and Portuguese case law, we believe that the rules that provide the tax base of real estate capital gains obtained by non-residents, as it was for the referred matter of reinvestment, may be in the future subject to by the legislator.

However, until a legislative amendment is due, all acts of settlement of Personal Income Tax referring to the periods of 2015 and forward may be subject to annulment. In the case of acts of settlement referring to the fiscal year of 2018, an administrative appeal may be presented up to 120 days after the deadline of the period for voluntary tax payment, usually set at August 31st 2019, that is, until December 29th 2019, or a judicial claim, until November 30th 2019. In the case of all legal deadlines for presenting an administrative appeal or a judicial claim have been passed, an officious review request may be presented, pursuant to serious and notorious injustice, if specific suppositions have been verified.

We are available to provide any clarifications about the matter in hand.

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