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Taxation of non-residents for capital gains derived from immovable property situated in Portugal after the state budget law for 2023

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Currently, the regime for non-residents is the same as that for residents, which means only 50% of capital gains are taxable and the taxable amount is subject to progressive tax rates.

Portuguese legislation had long been under the scrutiny of the European Court of Justice (ECJ). The first version of the rule in question foresaw that capital gains for non-residents is 100% taxable, unlike tax residents that was only 50% taxable.

With the ECJ Hollmann case, Portugal had to resolve this unjustified discrimination. Thereafter, the law was amended to foresee an optional regime (but only applicable to EU taxpayers). Non-residents could choose between being taxed on 100% of their capital gains at a fixed rate of 28% or, alternatively, on only 50% at progressive tax rates.

Subsequently, this new rule was again subject to the analysis of the ECJ in the MK case, where the Court ruled that this optional regime still did not eliminate the EU law violation.

With the State Budget Law for 2023, the law was again amended, and now foresees one single mandatory regime for all taxpayers (both resident and non-resident, from EU and third countries), where 50% of capital gains is taxed at progressive tax rates.

At first glance, it would seem that the EU Law violation has been eliminated. However, the principle of non-discrimination and the principle of equality are not to be perceived in absolute terms.

The mandatory subjection of non-residents to progressive tax rates implies a forced disclosure of their worldwide income, as if they were tax residents, with the sole purpose of ascertaining the tax rate applicable to capital gains from immovable property located in Portugal. This means that non-residents, that should only be taxed in accordance with the profit from the sale of the property situated in Portugal, will have to disclose their worldwide income.

This not only implies an excessive tax burden on non-residents (compliance and proof wise) but is also inconsistent (to say the least) with the ability-to-pay principle and the rules of international taxation.

The application of fixed rates to source income derived by non-residents is explained by the fact that non-residents don't benefit (at least not like tax residents) from State Welfare. On the other hand, some types of income are usually subject to fixed tax rates, due to their extraordinary nature, for example. Perhaps this should apply to capital gains from immovable property (that, unlike income from employment, only occurs occasionally).

According to the OECD Model Tax Convention and most of the Double Taxation Treaties, capital gains from immovable property is subject to tax in both jurisdictions (residence and source states). If the non-resident is subject to progressive tax rates in both states, the Portuguese rule may seriously limit the possibility to eliminate double taxation.

In short, in our opinion, the State Budget for 2023 worsens situations of discrimination between residents and non-residents, by treating what is different in an equally manner, or by, for example, imposing an excessive tax burden on non-residents in Portugal.

Finally, it is relevant to assess how the Tax Authorities will look at these cases and how non-residents will handle it and what the ECJ will decide.

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