



SOCIEDADE DE ADVOGADOS, SP,RL
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 & ASSOCIADOS



Nº 25/22

NEWSLETTER

REGARDING THE NEW
 INCLUSION OF SHORT-TERM
 (SO-CALLED "SPECULATIVE")
 CAPITAL GAINS
 AT MARGINAL TAX RATES

SUMMARY

The State Budget Law for 2022 (no. 12/2022, of June 27) establishes an amendment to the Personal Income Tax (IRS) Code with a view to making it compulsory to aggregate income from capital gains on securities when the assets in question are held for less than 365 days and the taxpayer has a taxable income equal to or greater than the value of the last tax bracket.

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1. The state budget law for 2022 (n.º 12/2022, 27th of June) establishes a change to the Personal income tax code (PIT) which aims to make it compulsory to aggregate the capital gains when the assets in question are held for a period of less than 365 days and the taxpayer has a taxable income equal to or greater than the value of the last taxable bracket. The taxpayer under these conditions will no longer be able to opt for the 28% tax rate and will be subject to a rate of 48% on profits from shares and bonds (plus a surcharge of 2.5% or 5% if it is applicable).

With the purpose of simplifying the calculation of capital gains, the state budget law for 2022 established that the financial institutions resident in Portugal and involved in the transactions responsible for the calculation and for subsequently delivering to the taxpayers, until January 20th of the following year, a document identifying the quantity, date and historical acquisition value of the securities traded. Is thus restored the draft for the 2002 State Budget Law in this topic.

The State Budget Law for 2022 also foresees that the revenues resulting from the mandatory aggregation of

capital gains will be assigned to the Social Security Financial Stabilization Fund.

2. In this sense, it seems to result from the State Budget Law for 2022 that all income qualified as movable capital gains under the PIT Code will be liable to be included in the scope of application of this rule (aggregation) once the other requirements therein are met. However, there is income that will not have to be declared, because it has already been taxed previously, such as share dividends, interest on deposits or savings and Treasury certificates, income from national investment funds and redemptions of national funds and respective capital gains.

Regarding this last income, we can already mention that the Statute of Fiscal Benefits (EBF) foresees that income from the redemption of units in investment funds - which are qualified as capital gains for the purposes of the PIT Code - are taxed by definitive withholding at a rate of 28%. However, since there is no change to the taxation regime provided for in the EBF, and the EBF is a special law in relation to the PIT Code, it seems that capital gains derived from the redemption of units in investment funds may not be covered by the compulsory inclusion, even though, by

their nature, they may be covered by the proposal that provides for taxation by means of compulsory aggregation.

On the other hand, in relation to income from the redemption of units in investment funds located outside Portugal, which are not subject to the EBF regime, it can always be held that, if the income derived from the redemption of units in foreign investment funds is not paid through entities with registered office, effective management or permanent establishment in Portugal, such income, being qualified as capital gains under the terms of the PIT Code, is likely to fall under the scope of the rule of the 2022 State Budget Law and, to this extent, be subject to compulsory aggregation, insofar the other legal requirements are met.

3. It should be noted, however, that such amendment will only enter into force as of the 1st of January 2023, so, as the State Budget Law for 2022 does not provide for any transitional rule regarding its application in time, the application of the regime can only be made in relation to events (transfers) occurring after its entry into force, under penalty of retroactivity, prohibited by the Constitution of the Republic. This means that the (new) approved capital gains tax regime could only be

applied to the disposal of movable assets occurring after 2023, since the relevant fact for the taxation of capital gains, for purposes of determining the applicable law, is the moment of disposal, i.e., the moment in which the individual transfer is considered (transaction), even if the tax is only assessed at the end of each tax year.

In our view, such an understanding has always resulted from the PIT Code, where, in terms of incidence, it is stated that "gains obtained from (...) the onerous disposal of shares and other securities are considered capital gains" and that "the gains are considered obtained at the time of disposal". In other words, it is the systematic organization of the Code that supports this position: the legal reference to the positive balance between capital gains and capital losses arising from the disposals in question is inserted precisely in the chapter dealing with the determination of taxable income, and not in the chapter dealing with the incidence of the tax.

In effect, the taxable event giving rise to the tax must be placed in time according to the respective incidence rule, and not according to a rule determining the taxable income. If these were the rules applied for the determination of the income, defining the moment of formation

and verification of the taxable event - which is in the case at hand "instantaneous" (since it results from one or more isolated acts and does not presuppose, by nature, any activity), all PIT and CIT taxable events would occur at the end of the year (or even upon the tax returns submission, as only in such moment it is ascertained the final balance). This is not the case, particularly in the case of autonomous taxation, in which the facts subject to taxation are not, as is the case here, complex or of successive formation, but rather autonomous, temporally precise transactions.

CONCLUSION

4. In short, as of 2023, the inclusion of capital gains will no longer be optional but compulsory for taxpayers with taxable income equal to or greater than foreseen amount in the last taxable bracket. However, certain income, such as capital gains from the redemption of units in Portuguese investment funds, may not be subject to mandatory inclusion, even if the criteria laid down for this purpose are met, given that the EBF governing their taxation is a special law in light of the provisions of the PIT Code.

Capital gains from the redemption of units in foreign investment funds earned by Portuguese tax residents, since such funds are not subject to the tax regime provided for in the EBF, will, in principle, be covered by the rule providing for taxation by means of compulsory aggregation. Otherwise, the autonomous rate of 28% will be applied, which remains in force for cases in which the taxpayer receiving the income is not included in the last income bracket and the period the assets have been held for more than one year.

Finally, on the issue of the application of the law in time, since the State Budget Law for 2022 did not establish any transitory rule, the (new) approved capital gains tax regime may only apply to disposals of movable assets occurring after 2023. Since the relevant event in the taxation of capital gains, for the purposes of determining the applicable law, is the moment of disposal, i.e., the moment in which the transfer occurs individually considered (transaction), even if the tax is only assessed at the end of each tax year.

Lisbon, 3rd November 2022

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Regarding the new inclusion of short-term
(so-called "speculative") capital gains at marginal tax rates

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