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NEWSLETTER

THE NEW TAXATION OF CRYPTO IN THE 2023 PORTUGUESE STATE BUDGET

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SUMMARY

The amendments included in the 2023 State Budget Law Proposal aim to fill in the legal gap in the taxation of crypto assets in Portugal, promoting a new tax framework, especially regarding personal income tax (PIT).



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THE CONCEPT OF "CRYPTOACTIVE"

The introduction of a legal of cryptoactive concept within Personal Income Tax Code ("PIT Code") is proposed, under which a cryptoactive is defined as follows: *"A cryptoactive is any digital representation of value or rights that can be transferred or electronically stored using distributed recording or similar technology"*.

The concept is vague and seems to diverge from the conceptualization previously introduced by the Portuguese Securities Market Commission ("CMVM"), which defined crypto-assets as follows: *"Crypto-assets are digital representations of assets based on blockchain technology, which are not issued by a central bank, credit institution or e-money institution and which can be used as a form of payment in an accepting community or have other purposes such as granting the right to use certain goods and services or to a financial return"*.

TAXATION UNDER CATEGORY B

Within the scope of the PIT, taxation is suggested in two different income categories: Category B (business and professional income) and Category G

(movable and immovable property capital gains).

In Category B, it is intended that income arising from "cryptoactive assets issuance operations, including mining, or the validation of cryptoactive assets transactions through consensus mechanisms" will be considered as income derived from a commercial and industrial activity.

To the income deriving from such business activities, the general and progressive PIT rates shall apply, as a result of the general rules already applicable to the income included within Category B.

For income deriving from such operations and falling within the simplified taxation regime, it is proposed a coefficient of 0.15 to be applied.

The intention here is to "professionalize" the activity related with the issuance of crypto, as it is presumed that only 0.15 of the gross income obtained is effectively taxable profit, not depending the application of this coefficient on any proof of expenses incurred with the activity.

This presumption will therefore lead to the non-taxation within Category B of 85% of the income obtained.

Notwithstanding, the understanding that the intention of this rule is to include any operations related to the issuance of cryptoactives as an activity subject to the 0.15 coefficient, if we look only at the letter of the law, it seems that only the income obtained from the sale of cryptoactives fits within the provision to be amended.

We understand the more extensive approach to be the legislator's intention, as can be concluded from the framework also proposed for the Corporate Income Tax ("CIT"), in terms of the simplified regime, where it is specified that the intention is to include income from cryptoactive assets in the 0.15 coefficient (not limited just to sales, as might seem to occur in the PIT proposals).

However, we believe that the possibility of applying other coefficients, such as the 0.95 coefficient, could also be considered in the case of investment income or capital gains resulting from treasury operations and/or financial investments in cryptoactive assets.

TAXATION UNDER CATEGORY G

The 2023 State Budget Law Proposal also introduces the inclusion of a new sub-paragraph in the PIT Code, under which it is proposed to unfold the concept of capital gains, considering as such income deriving from the sale of

cryptoactive assets which do not constitute securities.

A special rate of 28% will be applied to this type of income.

It is important to note, however, that a tax exemption is proposed regarding income resulting from the disposal of cryptoactive assets held for a period of 365 days or more.

Therefore, as with the regime imposed on capital gains derived from transactions with shares, bonds, and other securities, which aimed to increase the taxation of speculative capital gains held for a period of one year or less, the same is now being applied to the taxation of capital gains arising from transactions with cryptoactive assets.

Notwithstanding, in the speculative capital gains regime, the 28% rate is applicable on gains realized on the disposal of securities held for a period of more than one year and the marginal rates (up to 48%) are applicable on gains deriving from securities held for a period of less than one year, provided that the taxpayer's taxable income is equal to or higher than the last bracket foreseen for the marginal and progressive rates.

With regard to this topic, it is important to highlight the transitional provision proposed, under which terms the considered holding period of cryptoactive assets, for purposes of the above PIT exemption on capital gains, starts being counted from the original acquisition date, even if before this legislation enters into force.

In effect, the legislator intends that the full holding period of cryptoactive assets is considered as of 2023, even if this period started before. Again, it should be noted that when the crypto asset is held for a period exceeding one year, the legislator will apply the exemption of the capital gain derived from this income.

It is also proposed that the negative balance assessed in a given tax year, related to transactions deriving from the sale of cryptoactive assets, may be carried forward to the following five tax years, insofar as the taxpayer opts to aggregate the taxable income.

As regards the calculation of the capital gain arising from the disposal of crypto assets, it is proposed that the capital gain be computed "by the difference between the sales value and the acquisition value, net of the part qualified as

investment income", being proposed as sales value the market value at the time of the sale.

Finally, the possibility of deducting expenses inherent to the acquisition and disposal of cryptoactive assets is proposed to be considered for capital gains calculation purposes.

TAXATION UNDER CATEGORY E

In what concerns the income resulting from crypto assets, it is also important to highlight the supplementary and inclusive residual rule, foreseen for income qualified as investment income (Category E).

Investment income is deemed to be the fruits and other economic advantages, whatever their nature or denomination, whether pecuniary or in kind, deriving directly or indirectly from patrimonial elements, assets, rights or legal situations, of a movable nature, as well as from their respective modification, transfer or termination, with the exception of gains and other income framed within other categories.

In view of the above, it results clear that the above PIT Code rules on this topic

are so broad that they lead to the consideration that potential gains arising from any asset can be taxed, if such income does not fall under any other Category.

It should be noted in this regard that no amendment has been introduced to the rule at hand in order to expressly include income deriving from crypto assets. However, we believe that the current wording of this residual rule allows for the taxation of economic income and benefits derived from cryptoactive assets under Category E, qualifying them as investment income, when it is not likely that they fit into another income category.

In the latter case, the tax rate on this income should be of 28%, except if the taxpayer, qualifying as tax resident herein, does not opt for the aggregation of this income.

Therefore, if the taxpayer opts to aggregate his income, the general and progressive PIT rates shall apply, and the taxation of these amounts may rise to 48% (to which a surtax of 2.5% or 5% may be added).

REPORTING OF THE OPERATIONS

As a complement and for monitoring purposes, it is proposed to add a new reporting obligation, which will apply to natural and legal persons, bodies and other entities without legal personality providing cryptoactive custody and administration services on behalf of third parties or managing one or more cryptoactive trading platforms.

Therefore, these entities will now have the obligation to communicate to the Tax Authorities and until the end of January of each year, the operations carried out with their intervention, regarding cryptoactive assets, in respect of each taxable person, by submitting an official form to be approved for this purpose.

It should also be noted that on October 10 last, the OECD published the "[Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard](#)", being expected that in the near future and within the scope of the adoption and enforcement of this document by the various OECD member countries, the exchange of information on cryptoactive transactions between them, for tax purposes, will be mandatory.

CONCLUSIONS

The 2023 State Budget Law Proposal reflects the intention of the Government to move forward with a framework for the taxation of income from cryptoactive assets, more specifically by including this type of income within PIT, namely under Categories B (business and professional income) and G (movable and immovable property capital gains).

We note that there may also be a potential taxation of income generated by cryptoactive assets under Category E (investment income), given the broad scope and the definition of investment income already provided for in the PIT Code.

It is also important to note that all natural or legal persons, bodies and other entities that provide cryptoactive assets custody and administration services on behalf of third parties, or that manage one or more cryptoactive trading platforms, will now be required to notify the Tax Authorities by the end of January of each tax year of any transactions carried out with their intervention.

Lastly, it should be mentioned that, in the meantime, and as reported by the

social media, amendments to the 2023 State Budget Law Proposal were already presented, namely aiming for the application of the 0.95 coefficient within Category B, to income resulting from the mining activity.

Such proposed amendments were not, however, subject to approval yet, being that we will monitor and report developments on this topic and on any other relevant different proposals to be included within the 2023 State Budget Law Proposal.

Lisbon, November 18th, 2022

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