

PORTUGUESE BUDGET LAW FOR 2023: REAL ESTATE TRANSFER TAX DEVELOPMENTS

The Portuguese State Budget Law for 2023 – in force since 1 January 2023 – brought a set of legal updates with significant impact on the real estate sector. With this in mind, we now highlight the new conditions for the application of the Real Estate Transfer Tax (“RETT”) exemption to the purchase of properties for resale and the new rules on the assessment of the taxable value of properties in real estate exchanges.

- **Conditions for the application of the exemption on purchase for resale**

The current provisions of the RETT Code provide that the purchase of real estate property for resale may benefit from a tax exemption provided: (i) the purchaser engages in the commercial activity of purchasing properties for resale; and (ii) the property is resold within three years of its purchase.

However, the material requirements for applying the RETT exemption have become more restrictive following the Budget Law for 2023, as follows:

- a) The purchaser is now required to have engaged in the activity of purchasing properties for resale purposes in the previous two years; and
- b) The scope of the concept of “real estate purchasing activity” has been narrowed to encompass only the actual resale of real estate properties purchased with that purpose (the purchase of properties for resale in previous years is no longer relevant).

The RETT exemption may be claimed: (i) by way of a refund requested from the Portuguese Tax Authority after the property is resold; or (ii) by immediately applying for the exemption upon the purchase of the property, provided that it is purchased within the regular course of the company’s purchasing and reselling activity. For these purposes, upon request of the taxpayer, the Portuguese Tax Authority must issue annually a certificate demonstrating that the taxpayer has resold properties purchased for resale in each of the past two years.

In stark contrast with the previous regime, these new conditions add more complexity to any claim for the RETT exemption, as it is no longer immediately effective if the purchaser has acquired (at least) one property for resale in the previous year, or if (at least) one property has been resold in the previous year.

Due to the absence of any transitional provisions and the procedural (and automatic) nature of the certificates issued by the Portuguese Tax Authority, we anticipate that companies that have not sold properties acquired for resale in 2021 and 2022 will be unable to benefit from the RETT exemption on purchases for resale made in 2023.

If the implementation of the new rules is confirmed, one may question the legality of enforcing these rules against companies which, in view of the activity carried out in 2022, had a legitimate expectation of benefiting from an immediate RETT exemption on purchases made in 2023.

- **Assessment of the taxable value of properties in real estate exchanges**

When there is an exchange of real estate, the taxable amount results from the difference between the reported value or, if higher, between the tax value of the properties exchanged. Only the taxpayer receiving the property of greater value will be subject to RETT, which will be levied on the above difference.

In other words, the RETT due in connection with property exchanges is not assessed as if there were two separate transactions. Therefore, it provides a tax advantage to the parties involved.

With the amendment now introduced by the State Budget Law for 2023, this rule ceases to be effective when the exchanged property is subsequently transferred within one year

of the date of exchange. In this case, the original exchanger who subsequently transferred the property must report the latter transaction to the Portuguese Tax Authority within 30 days in order to pay the remaining RETT.

This provision is anti-abuse in character and is meant to penalise what are known as “technical exchanges” for RETT purposes. Technical exchanges are real estate transactions in which the parties involved in successive sale and purchase transactions choose to exchange properties between each other, instead of carrying out the envisaged purchase and sale transactions. By doing so, they reduce the RETT taxable basis.

The government has recognised that real estate exchanges have become a major source of tax evasion and tax base erosion. Therefore, taxpayers acting as purchasers in the prior real estate exchange transactions are now required to report to the Portuguese Tax Authority if they sell the exchanged property within a year. Taxpayers that, when applicable, do not comply with this new obligation will still be subject to the Portuguese Tax Authority inspection and tax assessment powers.

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Lisbon, 10 January 2023
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