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Update

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Taxation of crypto-assets in the 2023 State Budget Law: main impacts on individual taxpayers

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The State Budget Law for 2023, approved on November 25th, foresees the introduction of a comprehensive and friendly tax framework for crypto-assets related transactions.

According to the same, the concept of crypto-asset comprises "*any digital representation of value or rights that can be transferred or stored electronically using distributed ledger or similar technology*". However, unique crypto-assets that are not fungible with other crypto-assets (*i.e.*, NFTs) are expressly excluded from this concept, for tax purposes.

From the range of tax measures with a direct impact on individuals, we highlight the following:

1. Taxation of capital gains related to crypto-assets

Income obtained from non-professional sales of crypto-assets will be included in the exhaustive list of capital gains subject to Personal Income Tax (IRS). Notwithstanding, one should bear in mind that, as **NFTs** are excluded from the concept of crypto-asset adopted for tax purposes, the non-professional capital gains obtained with their sale **will not be subject to tax**.

According to the Tax Authorities' understanding, released in 2016, the non-professional capital gains are currently excluded from taxation due to the lack of a specific provision in the IRS Code. To overcome this limitation, the 2023 State Budget Law expressly foresees the taxation of capital gains generated from the sale of crypto-assets that do not constitute securities (the latter will have the same tax treatment as securities).

A **full exemption scheme** is foreseen for income obtained from the sale of **crypto-assets held for 365 days** or more and, to this end, we highlight that the period prior to the entry into force of the State Budget Law will be taken into account (i.e., the exemption will apply to the sale of crypto-assets held for more than one year, even if that period elapsed before 2023).

Moreover, when the consideration received takes the form of another crypto-asset, there will be a **tax deferral** the moment the income is actually realised (e.g. exchange of crypto-assets for fiat currency) or when the taxpayer changes his tax residence (exit tax).

The above-mentioned exemption as well as the tax deferral will not apply, however, when the taxpayer or the counterparty is not resident in a member state of the European Union, European Economic Area or other country that does not have an agreement with Portugal to exchange information for tax purposes.

Capital gains subject to tax will be calculated through the difference between the sale value and the acquisition value, being possible to deduct some expenses incurred with the acquisition of the crypto-assets sold. Furthermore, it is foreseen (i) a first in/first out rule; (ii) no loss deduction if the counterparty is based in a blacklisted country; (iii) capital losses generated in a given tax period may be carried forward for 5 years, if taxpayers opt for the progressive tax rates.

If taxpayers do not opt for the progressive tax rates, the positive balance of capital gains from the sale of crypto-assets will be subject to a 28% tax rate.

2. Taxation of capital income

Any forms of remuneration deriving from crypto-assets transactions that are not qualified as professional income or capital gains will also be subject to tax, as capital income. This amendment aims to tax **staking** or **off-chain** operations, although its wording is broad enough to cover other realities.

Capital income will be subject to a 28% tax rate, with no withholding tax required.

3. Taxation of business income related to crypto-assets

Capital gains generated from the sale of crypto-assets as well as any transaction related to their emission, including mining or validation of crypto-asset transactions through consensus mechanisms, obtained on a regular basis and as part of a professional activity, will qualify as business income.

If such income is obtained by a taxpayer subject to the simplified regime for determining taxable income, only 15% will be subject to tax, with 85% being deemed to be business expenses (i.e., only € 15 of each € 100 will be effectively taxed). When the taxpayer exceeds the € 200,000 limit in the previous

year, the net income will be calculated according to the accounting records, which will require proof of the expenses actually incurred.

However, in the case of income obtained from mining, the taxable base will correspond to 95% of the total amount (i.e., € 95 of each € 100). There is a clear intention to increase the tax burden on mining activities due to their environmental impact.

The business income will be subject to the progressive tax rates, regardless of the method used to calculate the taxable income.

4. Taxation of the gratuitous transfers of crypto-assets

On the other hand, it is also foreseen that the disposal of crypto-assets through gratuitous transfers (e.g., by inheritance, donations, etc.), which do not generate any taxable capital gains, may be subject to stamp duty, at a 10% rate.

The stamp duty will be levied on gratuitous transfers whenever (i) the crypto-assets are deposited in institutions with registered office, effective management or permanent establishment in Portuguese territory; or (ii) the deceased was domiciled in Portugal, in inheritance cases; or (iii) the beneficiary is domiciled in Portugal, in the remaining operations.

The stamp duty should be paid, in principle, by the beneficiary of the gratuitous transfers. Notwithstanding, some exemptions from stamp duty (e.g., transfers in favour of spouse, descendants, and ascendants) may apply.

5. Taxable value for property transfer tax purposes

In case of an exchange of crypto-assets for real estate, the taxable value of the transaction for property transfer tax purposes – to determine the applicable tax rates – will be, in principle, the market value of the crypto-assets on the date of the transaction.

6. Stamp Duty on commissions charged by crypto-asset service providers

As regards the acquisition and maintenance of crypto-assets, commissions and any type of consideration charged by crypto-asset service providers will be subject to stamp duty at a 4% rate.

Even though the legal obligations related to the assessment and payment of the tax fall on the crypto-asset service providers, we highlight the tax shall be borne by their customers. Thus, one may anticipate that crypto-asset service providers will pass on the burden of this tax to their customers.

The State Budget Law is expected to be published in the official gazette in late December, to enter into force on January 1st.