THE TAXATION OF CRYPTOASSETS

Cryptoassets are tokens created using distributed ledger technologies (DLTs), and have become the most remarkable investment vehicle since the beginning of this decade.

Although they are not a new technology, their large-scale commercialisation and speculation have led to their exponential growth over the last five years. In addition, their volatility has made it possible to organise complex investment strategies with high returns.

Although there was a legal gap that made the Portuguese legal system a legislative vacuum for cryptoassets, the State Budget Law for 2023 ensured the existence of a framework in the Portuguese legal system, through Law no. 24-D/2022, of 30 December.

Today, the Personal Income Tax Code (hereinafter referred to as the 'CIRS') provides for the taxation of crypto-assets, designed to ensure the framework for cryptocurrencies.

For this reason, they are taxable under IRS categories E, G and B, thus corresponding to income from capital, capital gains and self-employed workers.

Under the terms of Article 5(1) of the CIRS, Category E income is considered to be the following '(...) fruits and other economic advantages, whatever their nature or denomination, whether pecuniary or in kind, arising directly or indirectly from a property, goods, rights or legal situations of a movable nature, as well as from their modification, transmission or cessation (...).'.

Paragraph 2(u) of the same article clarifies that 'any form of remuneration arising from operations relating to cryptoassets' is considered to be an economic advantage covered by the previous paragraph.

This means that if it doesn't fall under another type of income, it will fall under Category E, which appears to be the alternative tax base for cryptoassets, since it covers any and all income obtained that doesn't fall under another IRS tax category.

In this sense, since income derived from holding an asset is taxable, the allocation of capital to cryptoassets is enough to trigger tax obligations.

However, since the management of this capital and its investment tends to be carried out by third parties, this category of taxation will be applied in a similar way to the taxation of other securities, such as when investing in a fund.

Thus, income will only become taxable income if the remuneration is made in a way other than through cryptoassets. If there are only movements in crypto-assets, this will not be considered capital income (Category E), but rather increases in assets (Category G).

In the meantime, and as part of the taxation of capital income from cryptoassets, it is currently envisaged that it will be taxed at 28 per cent of gross income, without prejudice to the option of aggregation, in which case the progressive rate will apply.

If there is a sale of cryptoassets, and thus an increase in assets, Category G taxation will apply, which will be based on the increase in assets due to the positive fluctuations in the value of the cryptoassets at the time of their sale by the taxpayer, under the terms of Article 5(11) and Article 10(1)(k) of the CIRS.

As such, this income will be taxed at 28 per cent, without prejudice to the option of aggregating it, as provided for in the CIRS.

It should be noted, however, that when cryptoassets are sold, are not considered to be securities, and have been held by the taxpayer for at least 365 days, they are exempt from Category G taxation, under the terms of Article 10(19) of the CIRS - a rule designed to encourage long-term investment, while disposals made prior to this period, i.e. in the short term, are taxed at the above-mentioned rate.

Finally, Category B income may also be generated, i.e. if it is earned in the exercise of a habitual activity, characterised by the frequency, regularity and intention of obtaining income, generated by activities such as mining, validation and transactions (proof-of-work or proof-of-stake) or frequent trading of crypto-assets. In these cases, progressive rates will apply to this type of income.

It should also be noted that transactions in cryptoassets are subject to Stamp Duty, under the terms of Article 1(3)(i) of the Stamp Duty Code (hereinafter referred to as 'CIS').

Under the terms of the Stamp Duty Code, Stamp Duty is payable whenever there are gratuitous or onerous transfers of cryptoassets.

If cryptoassets are transferred gratuitously, Stamp Duty will be payable at the rate of 10 per cent (item 1.2.) when the cryptoassets are deposited with an entity with its registered office, effective management or permanent establishment in Portugal (see Article 4(4)(e) of the CIS).

Thus, when there are gratuitous transfers, due to death, in which the author of the succession is domiciled in Portugal, or, if the transfer is not due to death and the beneficiary is domiciled in Portugal, Stamp Duty will be levied at a rate of 10 per cent.

In the case of the provision of cryptoasset services, with the payment of commissions and/or consideration charged by or with the intermediation of cryptoasset service providers, whenever the cryptoasset service provider or the client of such services is domiciled in Portugal, Stamp Duty at the rate of 4 per cent (Item 30) will be payable.

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