

# Property Transfer Tax in assignment of promissory contracts to sell real estate in Portugal

The Municipal Property Transfer Tax typically applies to transfers for consideration of real estate located in Portugal. This article analyses situations which, although they do not involve the transfer of property ownership, are legally treated as equivalent to a sale and are subject to Transfer Tax.

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**T**he Property Transfer Tax (“IMT”) typically applies to transfers for consideration of real estate located in Portugal. The most common and widely known situation is the contract of sale, in which case the IMT must be assessed and paid before the deed (or authenticated private document) of sale and purchase.

However, there are situations that, although not involving the transfer of property rights in real estate, are treated as such by the tax law, for IMT purposes. Paradigmatic examples of this equivalence are:

- a) The mere execution of a promissory contract to sell (“CPCV”) that provides (either in the original wording, in an addendum,

or in a subsequent stipulation) the possibility for the promissory-buyer to freely assign its contractual position.

- b) The effective assignment by the promissory-buyer of its contractual position in a CPCV that includes a free assignment clause.
- c) The effective assignment of the promissory-buyer's position in a CPCV that does not include a free assignment clause (situations of "resale adjustment").

We will address each of these situations individually.

### 1. CPCV with clause of free assignment

IMT is due when a CPCV is executed having the parties agreed that the promissory-buyer is authorised to freely assign its contractual position, meaning that the promissory-seller's authorisation is not required at the time of the assignment. In this case, the IMT is due by the promissory-buyer and must be settled and paid immediately, i.e., before the execution of the CPCV, even if no assignment of the contractual position occurs.

In this case, the IMT will be levied on the part of the price paid by the promissory-buyer at the time of the CPCV execution (the amount corresponding to the "down-payment"), with the applicable rate corresponding to the total price set in the CPCV, that is, no reduced rates or exemptions will apply.

### 2. IMT due at the time of assignment under a CPCV with a free assignment clause

IMT is also due when, under a clause in the CPCV that authorises free assignment,

the promissory-buyer effectively assigns its position to a third party. In this scenario, the tax will be due by the acquirer of the promissory-buyer's position (the assignees) and must be assessed and paid before the assignment of the contractual position. In this case, the IMT will be levied on the part of the price to be paid by the assignee to the assignor in the context of the assignment, with the applicable rate corresponding to the total price set in the CPCV, that is, no reduced rates or exemptions may apply.

Once the final contract of sale is concluded, where the buyer has already paid IMT under one of the previously mentioned regimes, the IMT to be assessed and paid at that moment — i.e., at the conclusion of the final contract of sale — will only be levied on the difference between the final price and the value on which the (now) buyer has already paid IMT, IMT reduced rates or exemptions (e.g., acquisition of property as one's own permanent place of abode) applying as appropriate.

### 3. IMT due at the time of assignment under a CPCV without a free assignment clause

The third situation we address is the IMT incidence in cases where the promissory-buyer assigns its contractual position to a third party despite the CPCV not including a free assignment clause. This context includes "resale adjustment" situations, where the original promissory-buyer is likened to a "reseller agent" who, although not acquiring the property to resell it, "commercialises" its position as a promissory-buyer, with the property being acquired by a third party.

These situations generally result in two IMT assessments:

- a) One assessment for the assignment, with the IMT being due by the original promissory-buyer who assigns its position (the “assignor”).
- b) Another assessment for the execution of the final purchase and sale agreement, with the IMT being due by the third party who acquired the promissory-buyer position and completes the transaction with the promissory-seller (the “assignee”).

Focusing only on the first situation (IMT due in the context of the assignment, which, as mentioned, must be assessed and paid by the assignor), the taxation will be levied on the price agreed in the CPCV or on the VPT, whichever is higher. However, the tax will not be due at the time of the assignment, but only when the assignee effectively acquires the property, with the IMT to be paid within 30 days from the date of the deed (or authenticated private document) of sale and purchase.

Given this framework, it is important to note that the assignment of the promissory-buyer’s contractual position in a CPCV that does not have a free assignment clause may, however, not be subject to IMT if one of the following three situations occurs:

**a) *Absence of economic advantage***

If the assignment of the promissory-buyer’s position did not involve the assignor receiving any amount (other than the amounts paid to the promissory

seller as down payment and on account of the purchase price), the assignor will not be subject to IMT. To this effect, the assignor must notify the Tax Authority (AT) within 30 days from the date of the assignment, proving that it did not receive any amount other than the value paid to the promissory seller as a down payment and initial payment in the CPCV. This proof of absence of economic advantage must be served providing appropriate documentation (e.g., bank statements) or granting access to banking information to the Tax Authorities.

**b) *Assignment to a Company in process of incorporation***

IMT is also not due in cases where the original promissory-buyer assigns its contractual position to a commercial company that is in the process of being incorporated at the time of conclusion of the CPCV, provided that, cumulatively:

- The company is already in the process of being formed at the time of conclusion of the CPCV. Although the law does not establish criteria for this purpose, it is advisable that, by that date, there is at least an approved firm request (certificado de admissibilidade de firma) or the reservation of a pre-approved firm request (empresa na hora).
- The assignor is a shareholder of the company that will sign the final contract of sale, although no minimum percentage of capital

participation or minimum prior holding period is required.

c) *Assignment to a third party named in the CPCV*

Finally, the law provides for an IMT exemption in cases where the CPCV is concluded with a named third party. In this scenario, the assignor will be exempt from paying IMT for the assignment if the property is acquired by a third party named by the former, provided that such nomination is included in the CPCV. In other words, the third-party assignee must be ex-

pressly identified and individualised in the CPCV.

Nevertheless, considering the lack of legal clarity regarding this type of situations — especially considering that there are similar situations with different tax treatments, such as the assignment to a person to be named (for which the law provides a specific regime) or the reservation of nomination — we recommend that each modality is considered with due caution, to avoid being likened to resale adjustment situations and, as such, potentially subject to IMT.