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By PwC Deutschland | 26. April 2012

Supreme Tax Court doubts on 1999/2000 "significant holding"

The Supreme Tax Courts has expressed serious doubts on the definition of a “significant holding” leading to an income tax charge on a gain on sale in 1999 and 2000.

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For decades the gain on sale of shares held as a private asset for longer than one year by a natural person was only charged to income tax if the shares sold were part of a “significant holding” at any time during the previous five years. Up to the end of 1998, a significant holding was defined as “over 25%” of the issued share capital of the company in which the investment was held. In 1999 and 2000, the definition fell to “at least 10%”. A case is currently before the Supreme Tax Court brought by an investor who sold his remaining investment of less than 10% in a company in 1999 after having reduced his holding in 1997 from 13.5%. The investor claims that he never held 10% or more in the company during 1999, or more than 25% at any time during the previous five years. Thus he never held a significant holding according to the definition of the moment. The tax office maintains that the taxable gain should be defined under the rules valid on the date of sale, so there is a chargeable gain, as at least 10% was held in 1997 and earlier years.

The Supreme Tax Court has now passed a resolution granting the taxpayer a stay of execution of the assessment notice and payment demand pending its final judgment on the substance of the case. It sees telling reasons in support of both points of view and thus is in serious doubt as to which is right. It also points out that a gain on sale reflects the appreciation of the asset over the entire period in which it was held. Deferral of taxation until realisation does not defer the value appreciation as such. If this value accumulated during a period in which the holding was not considered significant, it does not seem reasonable to tax it later under a different definition. This argument follows from a Constitutional Court judgment on the same issue limiting the chargeable gain to the value appreciation since March 31, 1999, the promulgation of the new law.

In 2001 a different definition applies. The amount has been reduced to at least 1% and the term significant holding has been dropped altogether. Thus, the final outcome of the present case may, or may not, have repercussions for the future. The Supreme Tax Court mentioned the possibility, though, in its resolution.

Supreme Tax Court resolution IX B 146/11 of February 24, 2012 published on March 21

Schlagwörter

capital gain, gain on sale, significant holding