Downloaded from Blogs on 28.11.2026 15:21

By PwC Deutschland | 09 January 2011

Taxation of capital gains - changeover

The finance ministry has ruled on a court case holding the increased capital gains scope to be unconstitutional inasfar as the gain could have been realised tax free on promulgation of the new law.

Downloaded from Blogs on 28.11.2026 15:21

Under an act promulgated on March 31, 1999, the minimum holding period for tax-free gains on the sale of property was raised from two to ten years. At the same time the minimum holding for taxing the gain on the sale of all or part of a significant holding was lowered from over 25% to at least 10%. These changes took effect for the tax year 1999, that is for all gains realised in that calendar year. Subsequently, they were challenged before the Constitutional Court on the grounds of retrospective taxation. On July 7, 2010, that court held that the taxation was indeed retrospective in so far as the gain had been, or could have been, realised tax-free under old law on, or before March 31, 1999. Its thinking was that an existing qualification for tax exemption was a right protected by the constitution, whilst the mere expectation of being able to qualify later was not. Gains realised in 1999 and later years that would have been exempt under old law but were taxable under the new must therefore be split, so that only the portion falling under the new law is actually taxed. The finance ministry has issued two decrees, one on property and one on significant shareholdings allowing this split to be by time over the holding period, unless obviously (or in the view of the taxpayer) inappropriate in the circumstances. In particular:

- Gains realised on or before March 31, 1999 that would have been exempt under old law are exempt in their entirety.
- Gains realised on or after April 1, 1999 that would have been taxed under old law had the sale been made on March 31, 1999 are taxable in their entirety.
- Gains realised on or after April 1, 1999 must be split over the holding period if a sale on March 31, 1999 would have led to a tax-free gain under old law.
- The split is generally to be by the number of months for which the asset was held before and after the March 31, 1999 cut-off date. Fractions of a month are to be ignored.
- The taxpayer may request a different split if he can justify it.
- The tax office may apply a different split if a time basis is clearly inappropriate.
- Losses are not to be split. If realised at any time in 1999 or later they are fully deductible (though property losses may only be offset against capital gains on the sale of privately held assets).

Neither these decrees nor the legal provisions here at issue apply to assets held within a business. Gains and losses on the sale of business assets are, and always have been, part of business income. (AM)

Keywords

Capital gains taxation, minimum holding, sale of property, tax free capital gains