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Capital gain on sale of "garden house" used by taxpayer for residential purposes not subject to income tax

Where real estate is sold within ten years of acquisition, the gain realized is subject to taxation. Real estate that was used exclusively for the taxpayer's own residential purposes in the period between acquisition and sale is exempt. According to the Supreme Tax Court in its ruling of 26.10.2021 (IX R 5/21) such privileged use also occurs where the taxpayer permanently occupies a "garden house" (fully connected to the relevant utilities) in violation of building law.

In the case in dispute, the plaintiff sold land within the ten-year period located in a garden allotment area. On the allotment land was a "garden house" which he occupied himself. The former owner had received planning permission for the construction of the "garden house" only on the condition that the building was not to be used for the permanent residence of individuals. The tax office considered that the gain made on the sale was subject to income tax; the lower tax court was also of this view.

The Supreme Tax Court disagreed with this. The statutory characteristic "use for own residential purposes" requires, inter alia, that a property is actually suitable for permanent habitation; this relates above all to the condition of the building. The use of a building contrary to building law may also be considered privileged. In reaching this view, the Supreme Tax Court was guided by the purpose of the privilege: The standard serves to prevent unjustified taxation of capital gains in the event of a change of residence, e.g. due to a change of job. This purpose of the law is fulfilled both in the case of use of residential property contrary to building law as well as in the case of use in accordance with building law.

Source:

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