

By PwC Deutschland | 29 January 2024

# Sale of spare plot of land used as garden not exempt from income tax

**In a most recent decision the Supreme Tax Court held that the sale of a separate undeveloped (garden) property is not exempt from income tax on the grounds that it was not before used for personal residential purposes.**

## Background

Sec. 23 Income Tax Act (ITA) deals with the taxation of private sales. In general, capital gains from the sales of privately held property are exempt from income tax if the property was held for more than ten years when sold. Exemption from taxation also applies for „assets that were used exclusively for own residential purposes in the period between acquisition or completion and sale or were used for own residential purposes in the year of sale and in the two preceding years“ (Section 23 (1) No. 1 sentence 3 ITA).

The taxpayers acquired a plot of land with an old farm building. They lived in the building themselves. The building was surrounded by a plot of land measuring almost 4,000 square meters which the taxpayers used as a garden. Some years later, the taxpayers separated the property into two plots. They continued to live in the house on one part of the land and sold the other - undeveloped - part of the property. The taxpayers claimed exemption from income tax on the capital gain on account of a use for their own residential purposes. The tax court of Lower Saxony had rejected the claim.

## Decision

The conclusion of the Supreme Tax Court was unambiguous and clear when denying the appeal brought by the taxpayers.

An exception from taxation is only possible if the real estate is personally inhabited and used for a living by the taxpayer himself. In the absence of a building on the property sold, this was not the case here. Undeveloped land cannot be occupied. This also applies if a part of the property previously used as a garden is separated and then sold.

The segregated properties are treated independently and distinct from each other with regard to their "use for own residential purposes" for the purposes of Section 23 ITA.

## Source:

Supreme Tax Court judgement of 26 September 2023 (IX R 14/22), published on 25 January 2024.

**Note:** In another case in connection with a private sale the Supreme Tax Court held that the provision of use for own personal residential purposes within the meaning of the exemption clause of Section 23 (1) sentence 1 no. 1 sentence 3 ITA is not fulfilled if the right of use is granted to the taxpayer's mother-in-law. In the case of dispute, the plaintiffs had given their apartment (condominium) to the plaintiff's mother-in-law free of charge before selling it. - Reference: Supreme Tax Court judgment of 14 November 2023 (IX R 13/23), published on 25 January 2024.

## Keywords

private sale, sale of property