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Capital gain from transfer of property and assumption of underlying debt

In the case of the transfer of assets for partial consideration, the gain is from a private sale and must be allocated into a transaction for consideration and a gratuitous part based on the ratio of the consideration to the market value of the transferred asset. According to the Supreme Tax Court, this also applies if the consideration is below the initial (acquisition) costs.

Background

The parties are in dispute on the taxation of the capital gain resulting from a private transfer of property pursuant to Sec. 23 (1) Sentence 1 No. 1 of the German Income Tax Act (ITA). Sec. 23 ITA deals with the taxation of private sales of assets and - as in the case of dispute – of property. The capital gain from the sale of a property within 10 years after its acquisition is subject to income tax. In the case of an acquisition free of charge Sec. 23 (1) Sent. 3 ITA provides that “the acquisition or transfer of the asset to private assets by the predecessor shall be attributed to the sole successor for the purposes of this provision”.

Based on the market value at the time of the transfer, the tax office split the transaction into *one for consideration and a gratuitous part*. Insofar as the property had been transferred from the plaintiff to his daughter for consideration together with the takeover of liabilities, the capital gain was subject to income tax as a private sale in the hands of the father.

Decision

The Supreme Tax Court confirmed the tax office's approach to tax the capital gain from property transfer if it also involves the assumption of debts.

From a tax point of view a transaction for partial consideration takes place if an asset is transferred and the underlying liabilities are taken over at the same time. In this case, the transaction must be split into a transfer for consideration and a gratuitous part.

If the property is transferred within ten years following its acquisition, the transaction is subject to income tax as a private sale with respect to the part transferred against consideration.

This conclusion is not affected by the fact that the assumption of liabilities by the daughter as legal successor was below the historical acquisition costs of the plaintiff as legal predecessor, the Supreme Tax Court said. A loss on the sale would arise here, at best, by taking account of the disposal costs. However, this is contrary to Section 23 (1) sentence 3 ITA whereby the acquisition costs of the legal predecessor are decisive in the event of a gratuitous acquisition. Furthermore, increases in the market value from the historical acquisition date to the relevant transfer date would then not be

considered at all.

Source:

Supreme Tax Court decision of 11 March 2025 IX R 17/24 - published on 22 May 2025.

Keywords

capital gain, sale of property