

CAPITAL GAINS AND HEREDITARY SHARE



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“THE STA'S REASONING IS THAT, AS LONG AS THE INHERITANCE HAS NOT BEEN DIVIDED, THE HEIRS ONLY HAVE AN ABSTRACT RIGHT TO A SHARE IN THE UNIVERSALITY OF THE INHERITANCE, AND NOT A REAL PROPERTY RIGHT OVER SPECIFIC ASSET. ”

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The Supreme Administrative Court (STA) has ruled, following an appeal to standardize case law brought by the Director General of the Tax and Customs Authority, that the sale of a hereditary share does not constitute an onerous sale of rights in rem in immovable property.

The disputed issue was the sale by an heiress of her share of a portion of an inheritance that consisted of just one property.

The understanding of the Tax Authority (AT) in this situation was that the onerous sale of a right in rem over real estate should be taxed under IRS, namely Capital Gains.

The heiress and head of the estate challenged the tax assessment at CAAD (Administrative Arbitration Centre), which ruled that the sale of the share did not constitute a taxable event, contrary to the interpretation of the AT and CAAD itself in another case from 2017, which has already become final.

In its 2017 ruling, CAAD held that the sale of an heir's share in a property before it is divided corresponds to the transfer for consideration of a right in rem in immovable property, which generates a capital gain subject to IRS, and that the transferor, by accepting the inheritance and, consequently, his share in the property sold, is liable for the rights and duties arising from that right of ownership.

Now, it must be clarified whether the gain obtained from this sale, in which the inheritance only consisted of one property, and prior to the division, constitutes a capital gain subject to IRS under the terms of Article 10, (1) of the CIRS.

The STA's reasoning is that, as long as the inheritance has not been divided, the heirs only have an abstract right to a share in the universality of the inheritance, and not a real property right over specific asset.

The STA considers that real rights over specific assets, such as property over real estate, only come into existence when the inheritance is divided up, since before this moment, what is transmitted is a right to an ideal share in a universality of assets, and not a real right.



“THE STANDARDIZATION OF CASE LAW THAT HAS NOW BEEN ACHIEVED HAS CLEAR IMPLICATIONS FOR TAXPAYERS AND LEGAL PROFESSIONALS. THE SALE OF HEREDITARY SHARES, EVEN THOUGH THE INHERITANCE ONLY CONTAINS REAL ESTATE, DOES NOT GIVE RISE TO IRS TAXATION ON CAPITAL GAINS AS LONG AS THE ESTATE HAS NOT BEEN DIVIDED.”

The standardization of case law that has now been achieved has clear implications for taxpayers and legal professionals. **The sale of hereditary shares, even though the inheritance only contains real estate, does not give rise to IRS taxation on capital gains as long as the estate has not been divided.**

This decision gives legal certainty to heirs who wish to sell their inheritance before the estate is divided up, avoiding undue tax burdens, and for the AT, an interpretative step backwards in terms of tax inspection and assessment, since adherence to standardized case law is mandatory.