CAPITAL GAINS AND HEREDITARY SHARE: REVISITED

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"(...) ALTHOUGH «THE GAINS ARISING FROM THE SALE OF THE RIGHT TO INHERIT OR THE SALE OF THE RIGHT TO THE HEREDITARY SHARE [...] ARE NOT SUBJECT TO IRS TAXATION», THIS EXCLUSION FROM TAXATION DOES NOT APPLY TO ANY AND ALL SALES OF IMMOVEABLE ASSETS THAT ARE PART OF UNDIVIDED INHERITANCES."

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Much has been written and said about the Uniform Judgement of the Supreme Administrative Court that we had the opportunity to publish here.

Given the general importance of the decision in question, which is concerned with possible tax refunds, it is important to revisit this issue in order to clarify the limits of the exemption from taxation of real estate capital gains that the court has standardised.

Of particular relevance in this regard is Circular Letter no. 20281/2025 from the Tax Authority (which can be consulted here). It clarifies, in short, that although «*the gains arising from the sale of the right to inherit or the sale of the right to the hereditary share [...] are not subject to IRS taxation*», this exclusion from taxation does not apply to any and all sales of immoveable assets that are part of undivided inheritances.

Firstly, the Tax Authority clarifies that this exclusion from taxation «*applies only when it is clear from the public deed or similar document that the right of one or more heirs to the inheritance or to the hereditary share as a whole is being transferred.*»

To this extent, we believe it is pertinent to demystify what is meant by hereditary share. Under the terms of Article 2030(2) of the Portuguese Civil Code, "*An heir is one who succeeds to the whole or to a share of the deceased's estate, and a legatee is one who succeeds to specific assets or values*". Well, it is this share that each of the heirs succeeds to in the deceased's estate that is called the hereditary share.

The hereditary share is made up of the ideal share that each heir will have in the universal assets and liabilities of the estate. With the assets being collectively responsible for the costs of the inheritance. Therefore, we cannot speak of a hereditary share in relation to specific assets, but only when we refer to the inheritance as a whole, as an autonomous estate, with all the rights and obligations that make it up.

In fact, the sale of a hereditary share is subject to some special rules, set out in articles 2124 et seq. of the Civil Code. These include the first part of article 2128: "*The purchaser of an inheritance or hereditary share succeeds to the respective charges*". Herein lies an important peculiarity of the sale of a hereditary share, which helps explain why this business is exempt from IRS taxation, even if it generates a capital gain.

Something different is the sale of one or more assets belonging to an undivided inheritance by several heirs. In this legal transaction, a certain asset of the inheritance is transferred, but the other assets and charges remain undivided in the legal sphere of the estate.

In these situations, the AT's understanding has not changed, nor does the STA's judgement oblige it to do so: «*in these cases, where the heirs dispose of a specific and determined immovable asset of the undivided inheritance, we are no longer dealing with the disposal of the right to the inheritance or the right to the hereditary share, but rather with the transfer of a specific asset whose gains from the sale constitute capital gains taxable under category G of IRS, in general terms*» *(see the above referenced Circular Letter).*

In other words: the key to assessing whether the transaction, by which one or more properties were transferred, may be exempt from capital gains tax, lies in realising whether the intention of the transferor(s) was to transfer their position as heir(s), with all the rights and duties that this entails, or only to sell certain assets belonging to the estate.

"(...) WE CANNOT SPEAK OF A HEREDITARY SHARE IN RELATION TO SPECIFIC ASSETS, BUT ONLY WHEN WE REFER TO THE INHERITANCE AS A WHOLE, AS AN AUTONOMOUS ESTATE, WITH ALL THE RIGHTS AND OBLIGATIONS THAT MAKE IT UP."

In the first case, the exclusion from taxation will apply. In the second case, the sale of immovable property continues to be subject to IRS taxation, with the capital gain being attributed to each heir in proportion to their respective share of the estate.

In view of the above, the sale of real estate belonging to undivided estates will not give rise to a review of the personal income tax already calculated and/or paid in the past, and the sales that take place during the current year of 2025 will continue to entail that each heir declares the property sale in the annual IRS Form 22, who will have to declare their respective share of the sale price and of the applicable deductions.