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Current legislation and jurisprudence

03 | 2024

For all taxpayers

Private sales transactions: four judgments in Connection with inheritance and personal use

| A private sale transaction (Section 23 of the Income Tax Act [EStG]) does not exist if the person involved in a community of heirs acquires an inheritance share in the inheritance to which a property belongs and sells the property at a profit within ten years. The Federal Finance Court made this positive decision. Good news also comes from the Münster Finance Court, according to which the waiver of a right of usufruct for a fee does not constitute a sale in the sense of. S. of Section 23 EStG. Less positive are two rulings by the Federal Finance Court, which dealt with tax exemption for self-use of the property. |

Background: Private sales transactions involving real estate where the period between purchase and sale is no more than ten years are subject to taxation.

However, according to Section 23 Paragraph 1 Sentence 1 No. 1 Sentence 3 EStG, assets that are excluded are:

- in the period between purchase and sale exclusively for your own residential purposes or
- were used for residential purposes in the year of sale and in the two preceding years.

Acquisition of a share of a community of heirs with property

The judgment of the Federal Finance Court was based on the following (simplified) issue:

ÿ Example

> The genetic material of those consisting of A and B The existing community of heirs consists of one from the testator to his Death of self-used property. In 2020, A acquires half of B's community share for EUR 250,000 and sells the property in 2023 for 600,000 EUR. The question now is whether the sale of the property results in a taxable profit in accordance with Section 23 EStG in relation to the share of the inheritance acquired for EUR 250,000.

Note | According to the Federal Ministry of Finance, the sale creates a capital gain that is subject to tax in accordance with Section 23 EStG - and the Munich Finance Court also accepted this

In the event of a dispute, this is based on a taxable transaction. It's good that the appeal was filed, because the Federal Finance Court rejected Section 23 EStG.

In a nutshell, the new decision means the following: Anyone who, as a participant in a community of heirs, has an inheritance share in one

inheritance, which also includes a Property belongs to him below

Data for the month April 2024

ÿ TAX DATES

Due date:
- VAT, LSt = April 10, 2024

Transfers (payment grace period):
- VAT, LSt = April 15, 2024

Check payments:
If paying by check, the check must be submitted to the tax office at least three days before the due date!

ÿ SOCIAL SECURITY CONTRIBUTIONS

Due date for contributions 4/2024 = April 26, 2024

ÿ CONSUMER PRICE INDEX

(Change compared to previous year)

1/23	6/23	9/23	1/24
+ 9.2% +	6.8% + 4.3% + 3.1%		

sold within ten years does not trigger a transaction according to Section 23 EStG.
To the extent that the Federal Finance Court took a different view in its judgment of April 20, 2004, it no longer adheres to this opinion.

Note | It remains to be seen how the tax authorities will react to the new decision and whether they will change their previous opinion.

Waiver of a right of usufruct for a fee

In the dispute before the Münster Finance Court in 2008, the taxpayer was granted a usufruct right to a property through a bequest.

In 2012 she left the property to a limited partnership in which she was involved as a partner. The rental income represented special operating income.

After she left the limited partnership in 2018, she transferred the usufruct with a value of EUR 0 to her private assets and from then on recorded the rental income as income from rental and leasing. In November 2019, she waived her right of usufruct in exchange for a compensation payment.

The tax office now took the view that the replacement of the usufruct should be taxed according to Section 23 EStG, since the withdrawal of the usufruct from the special business assets led to an acquisition. The payment waiver was therefore made within the ten-year sales period - which was extended due to the use as a source of income in accordance with Section 23 Paragraph 1 Sentence 1 No. 2 Sentence 4 EStG. The taxpayer countered that the usufruct right was not sold, but rather - as a non-transferable right - only replaced. She subsequently filed a lawsuit – successfully.

A right of usufruct is a real right of use that is independent of the ownership of the encumbered thing and is therefore an economic asset (capable of being deposited and withdrawn). S. of Section 23 Paragraph 1 Sentence 1 No. 2 EStG. The taxpayer therefore took over the usufruct right in 2018 by withdrawing it from his private assets.

However, the right of usufruct was due to the waiver for payment in 2019 not been sold. A sale not only requires the transfer process to be paid for, but also a change of legal entity for the asset being sold.

NOTE | The waiver of a usufruct does not result in this asset being (returned) to the

property owner is transferred,
but rather to its extinguishment. In this respect it is about
the final abandonment of an asset in its substance and thus a transaction similar to a sale, which is not covered by Section 23 EStG.

Note | The Federal Finance Court has not yet decided in the context of Section 23 EStG whether the waiver of a usufruct right is a sale transaction or merely a sale-like transaction. The Münster Finance Court therefore allowed the appeal.

No tax exemption for the sale of a garden plot

In the case of the dispute, the taxpayers acquired a property 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. The taxpayers used this as a garden.

They later divided the property into two sections. They continued to live in one section of the house.

They sold the other – undeveloped – part of the property within the ten-year sales period.

The tax office saw this as a taxable transaction and taxed the capital gains. In contrast, the taxpayers claimed an exemption from income tax due to use for their own residential purposes (Section 23 Paragraph 1 Sentence 1 No. 1 Sentence 3 EStG) - but wrongly, as the Federal Finance Court has now found.

He clarified that an exception to taxation only applies if the property is occupied by the taxpayer. However, due to the lack of a building on the property, undeveloped land cannot be inhabited, so the exemption does not apply. This also applies if a part of the property previously used as a garden is separated and then sold.

NOTE | With the division, the previously uniform economy was created
The two new economic assets (land) are two new assets, the use of which for residential purposes must be considered separately.

No own residential purposes Use by (mother-in-law).

Spouses left an apartment that belonged to them to their (mother-in-law). After their death, they sold the apartment within the ten-year period and claimed a tax exemption for self-use on the profit from the sale, since the use of the apartment by their (mother-in-law) was attributed to them as their own use.

In this case too, the Federal Fiscal Court decided against the taxpayer. The expression “use for personal residential purposes” basically presupposes that the property is inhabited by the taxpayer. The taxpayer must at least use the building himself; is harmless if he lives in it together with his family members or a third party.

A building is also used for residential purposes if the taxpayer gives it free of charge to a child who is taken into account for income tax purposes for residential purposes.

However, there is no use for personal residential purposes if the transfer is not exclusively to a child who is taken into account for income tax purposes, but also to a third party (e.g. the child's mother).

NOTE | The Federal Finance Court has rejected the assessment of Section 4 Sentence 2 of the Home Ownership Allowance Act, according to which use for one's own residential purposes also exists if an apartment is given to a relative i.e. free of charge. S. of Section 15 of the Tax Code for residential purposes is transferred to Section 23 EStG.

Source | BFH judgment of September 26, 2023, Ref. IX R 13/22; FG Münster, judgment of December 12, 2023, case number 6 K 2489/22 E; BFH judgment of September 26, 2023, Ref. IX R 14/22; BFH ruling of November 14, 2023, Ref. IX R 13/23

For all taxpayers

Bonus payments from statutory health insurance companies: EUR 150 remains “tax-free”

| The cash reward (bonus) granted by a statutory health insurance company on the basis of Section 65a of the Social Security Code V for health-conscious behavior
can represent a contribution refund that reduces the special expenses.
For this purpose, the tax authorities created a simplification in a letter dated December 16,
2021: Bonus benefits of up to EUR 150 per insured person represent statutory health insurance benefits and do not reduce special expenses.

This regulation was limited until the end of 2023 - and has now been extended for payments made until December 31, 2024 . |

Source | BMF letter dated December 28, 2023, Ref. IV C 3 - S 2221/20/10012 :005, at www.iww.de, retrieval no. 239484

For all taxpayers

Double household management: Rent payments for a second home by the other spouse are still deductible

| According to the Nuremberg Finance Court, the rent payments for the second home incurred when one spouse runs a dual household, which were paid by the other spouse from his account, are due to the marriage establishing the household management due to the marital economic/life partnership -to be attributed to the spouses as their own advertising costs. Because of the living/ business community, the principles of cost-bearing and third-party expenses are not applicable here. |

PRACTICAL TIP | Since the appeal is pending, it is not yet clear whether this favorable ruling can be relied upon. To be on the safe side you should

The costs are therefore paid by the spouse establishing the dual household management.

Source | FG Nuremberg, judgment of October 21, 2022, Ref. 7 K 150/21, Rev. BFH: Ref. VI R 16/23, at www.iww.de, access no. 239027

For GmbH managing directors

Annual financial statements: raising the thresholds for determining size classes

| There is good news for many corporations. The monetary thresholds for “sales revenue” and “balance sheet total” are to be increased. Increasing the threshold values will result in a reclassification of the benefiting (often small) companies into a lower size category and thus a reduction in reporting obligations. If desired, the new values can be used for the 2023 annual financial statements. |

background

The intended increase in the threshold serves to implement EU requirements that provide for an increase in the monetary thresholds by around 25% and enable the member states to increase the threshold for the 2023 financial year or annual financial statements to use.

Note | The federal government would like to make the greatest possible use of the leeway that the directive offers national legislators.

NOTE | According to information from the Federal Government, around 52,000 companies (corporations, limited liability partnerships and cooperatives) will benefit from the increase in the threshold values in Sections 267 and 267a of the Commercial Code (HGB).

Grouping in a lower size class has the advantage, among other things, that reporting obligations are reduced. For example, medium-sized corporations must prepare a management report (§ 289 HGB); small companies are exempt from this. In addition, there are many size-dependent simplifications when preparing the notes for small and medium-sized companies (Section 288 HGB). Small companies are not obliged to have an annual financial statement audited by an auditor (only a voluntary audit).

Intended new regulation

The current and planned threshold values are summarized in the following overview. Increases only occur for the monetary thresholds “balance sheet total” and “sales revenue”. There should be no adjustments to the number of employees:

Size characteristics (§§ 267, 267a HGB) with the exception of employees in EUR

	current	planned
Small capital company a) Total		
assets ÿ 350,000 b) Sales revenue		ÿ 450,000
c) Employees	ÿ 700,000	ÿ 900,000
	ÿ 10	ÿ 10
small GmbH		
a) Total assets ÿ 6,000,000 ÿ 7,500,000		
b) Sales revenue ÿ 12,000,000 ÿ 15,000,000		
c) Employees	ÿ 50	ÿ 50
medium-sized GmbH		
a) Total assets ÿ 20,000,000 ÿ 25,000,000		
b) Sales revenue ÿ 40,000,000 ÿ 50,000,000		
c) Employees	ÿ 250	ÿ 250
large GmbH		
a) Total assets > 20,000,000 > 25,000,000		
b) Sales revenue > 40,000,000 > 50,000,000 c)		
Employees	> 250	> 250

Note | When reclassifying, it should be noted that at least two of the three characteristics must be exceeded or fallen short of on two consecutive balance sheet dates.

The new thresholds should apply to financial years beginning after December 31, 2023. However, there is an option to use the new values for the 2023 financial year.

NOTE | If a company makes use of the option, the classification must always be based on two consecutive financial years, except in the cases of Section 267 Paragraph 4 Sentence 2 of the German Commercial Code (HGB) (particularities in the case of conversion or new formation). A company would therefore be

on December 31, 2023, should also be considered medium-sized if they have two of the three features in the new version (balance sheet total EUR 25,000,000, sales revenue EUR 50,000) on this reference date and on December 31, 2022 or on December 31, 2022 and on December 31, 2021 ,000 EUR, 250 employees on average per year).
has exceeded.

Source | Formulation aid from the Federal Government from January 17, 2024, at www.iww.de/s10312

For entrepreneurs

Reporting obligations of digital platform operators: Reporting deadline extended to March 31, 2024

| The Platform Tax Transparency Act of December 20, 2022 introduced, among other things, a reporting requirement for operators of digital platforms. The platform operators are obliged, among other things, to obtain the necessary information from providers, to carry out a plausibility check and to report the information to the Federal Central Tax Office (BZSt). Failure to comply with the regulations is subject to a fine. The reporting requirements apply for the first time to the reporting period corresponding to the calendar year 2023. In principle, the deadline for the initial reporting obligation ended on January 31, 2024. However, the BZSt has now announced that there will be no objection if the report is not made until March 31, 2024. Further information on reporting obligations can be found at www.iww.de/s10169. |

For landlords

Prepayment penalty as advertising costs: These rules of the game must be adhered to!

| Advertising costs also include the early repayment penalty paid to repay a loan early, provided that the interest on the debt is economically related to the income from renting and leasing. This connection exists if, at the time of sale of a property, the final decision can be determined based on objective circumstances to use the sales proceeds remaining after the early loan repayment to purchase specific real estate with the aim of generating rental income from them. This was decided by the Cologne Finance Court. |

According to the case law of the Federal Finance Court, an economic connection with the rental income from a new property only arises if the taxpayer is already at the time of sale - e.g. B. in the purchase contract itself or at least when concluding the purchase contract - in advance so irrevocably about the

remaining remaining purchase price, that he can achieve it immediately of rental income with a specific property.

Note | Any remaining doubts will be borne by the taxpayer.

Because he bears the burden of establishing the facts that reduce the tax claim.

As a result of this restrictive jurisprudence, there was no deduction for business expenses in the Cologne Finance Court dispute into consideration. Because the taxpayer initially had the excess sales proceeds (i.e. sales price less the loan to be repaid) himself

collected and then for partial repatriation used to finance individual loans.

Source | FG Cologne, judgment of October 19, 2023, no. 11 K 1802/22, legally binding, at www.iww.de, Retrieval no. 239485

for employer

The transfer of bicycle accessories can be tax-free

| If an employer gives its employee an (electric) bicycle for private use in addition to the wages they are already owed, this monetary benefit is generally tax-free according to Section 3 No. 37 of the Income Tax Act. The Frankfurt Finance Directorate (November 2, 2023, Ref. S 2334 A – 32 – St 210) has now pointed out what applies if bicycle accessories are also provided. Examples of eligible accessories: Accessories that are permanently installed on the frame of the bicycle or other bicycle parts, such as: E.g. bicycle stands, luggage racks, bells, rearview mirrors, locks, navigation devices, other attached carriers or model-specific brackets. Accessories not eligible: rider equipment (e.g. helmet and clothing), devices that can be inserted into model-specific holders (e.g. smartphone) or objects (e.g. trailer, handlebar/saddle bags or bicycle basket). |

For all taxpayers

Childcare costs for separated parents: Now the Federal Constitutional Court is asked

| If parents separate and share the costs of child care from now on, a prerequisite for the special expense deduction for child care costs is that the child belongs to the parent's household. A taxpayer is now suing the Federal Constitutional Court against this. |

Background: If parents not only look after their children themselves, but also commission other people to do so, the expenses can be claimed as childcare costs. In order for the tax office to recognize the costs, the following requirements must be met (Section 10 Paragraph 1 No. 5 Income Tax Act [EStG]):

1. It must be a care service.
2. The child must belong to the household ren.
3. The child must not have reached the age of 14.
4. The invoice must be paid non-cash.

If the requirements are met, 2/3 of the costs can be deducted as special expenses up to a maximum of EUR 4,000 per year.

If parents live separately, the deduction often fails because of number 2. This means: Only the parent to whose household the child belongs is entitled to deduct the costs. A father defended himself against this regulation before the Federal Finance Court and lost - now he is going one step further and has filed a constitutional complaint.

Source | BFH judgment of May 11, 2023, Ref. III R 9/22, constitutional complaint: BVerfG Ref. 2 BvR 1041/23

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