

Collective investment schemes

From one fund management company to another

Par Fabien Liégeois le 4 May 2022

In a ruling 2C_624/2021 of March 28, 2022, intended for publication, the Swiss Federal Supreme Court examines the question of the levying of transfer duties when a contractual investment fund changes management.

Specifically, the case concerns a real estate fund reserved for qualified investors. In 2019, a contract provides for the “gratuitous” transfer of management from Ancienne SA to Nouvelle SA. It also stipulates that the new management takes over from the former management as debtor of the fund’s mortgage debts. The execution of the contract involves the transfer of four properties, located in the canton of Fribourg. The Registre foncier de la Gruyère will invoice Nouvelle SA for approximately CHF 740,000 after registering it as the owner. These transfer duties are calculated on the market value of the properties. Nouvelle SA is contesting the tax all the way to the Federal Court.

In view of the tax overlap, we need to look at some of the fund’s characteristics before discussing the transfer duties.

The contractual investment fund is a tripartite contract between the fund management company, the custodian bank and the investor. Like a trust, it has no legal personality. This distinguishes it from a SICAV. A SICAV can become the owner of real estate, whereas a contractual fund cannot. It is the management, a limited company, which exercises the rights on behalf of the investors. When the fund invests in real estate, it assumes (quasi) fiduciary ownership : this is formally recorded in the land register, but it is specified that the real estate “forms part of the real estate fund” (art. 86 para. 2bis CISO). This guarantees investors’ right of segregation in the event of bankruptcy.

Let’s move on to transfer taxes. These are the exclusive responsibility of the cantons. As they are calculated on the basis of the purchase price of the property, they are referred to as indirect taxes. In Fribourg, duties are levied on transfers of real estate for valuable consideration. As elsewhere, they are formal in nature : cantonal law stipulates that any acquisition of legal ownership of real estate constitutes a real estate transfer (art. 3 al. 1 let. a LDMG). According to cantonal case law, it is irrelevant who actually enjoys the power to dispose of the property.

Having established this framework, let’s review Nouvelle SA’s complaints.

First, it complains of arbitrariness in the interpretation and application of cantonal law. The

Federal Court rejects this claim : it is not untenable to subject any act of transfer of ownership – effecting a formal change of ownership – to the levying of transfer duties. In the case in point, and notwithstanding the terms of the contract, the transfer actually took place for valuable consideration, since Nouvelle SA took over the mortgage debts on the buildings.

It then complains of a violation of its economic freedom (art. 27 Cst. feder.). This claim is also rejected, as the transfer duties do not target a particular profession or economic activity.

According to case law, this fundamental right “provides no protection against general taxes or even against taxes to which all professions are subject”. There is therefore no need to examine the conditions under which it is restricted.

It also alleges a breach of equal treatment : unlike a contractual fund, a SICAV that changes management is not subject to tax. This too is rejected. Historical interpretation of the CISA shows that tax equality between the various forms of collective investment applies only to direct (harmonized) taxes. Consequently, Nouvelle SA cannot rely on this to avoid transfer duties.

Lastly, it invokes the principle of the primacy of federal law (art. 49 Cst. feder.) : to levy tax on the occasion of a change of management would be tantamount to depriving it of the benefit of a right (that of changing management : art. 39 al. 1 LEFin ; art. 34 aLPCC). Here again, the Federal Court rejected the claim. Historical interpretation reveals that this provision is intended to protect investors, not the company. In this case, however, only the fund management company is liable for the tax. Moreover, it is clear from the contract that the fund management company has undertaken not to pass the tax on to investors. The purpose of the federal provision would therefore not be thwarted.

The appeal is dismissed. Let us make three comments.

While the recitals of this decision are noteworthy, the outcome of the dispute must be assessed in the light of the power of cognition enjoyed by the Federal Court. As it was limited to arbitrariness or the violation of other constitutional rights, the scope of the ruling should not be overestimated. If a canton were to adopt an opposite practice under its own legislation, it would probably stand up to scrutiny for the same reason (limited power of cognition). This ruling should therefore not call into question the change in practice recently announced by the canton of Geneva.

Beyond the case in point, it is legitimate to ask whether a simple substitution of agent justifies the deduction of tax. The problem arises from the notion that the fund manager is a fiduciary owner : doesn't this approach force us to accept that the change of manager is a legal operation with no economic impact ? Before and after, the same properties are held for the same investors. This line of reasoning stands up to the fact that transfer duties are levied on any legal (and sometimes economic) transfer of real estate, since the entry in the land register specifies that the buildings “form part of the fund”. For this reason, it seems to us that the formal nature of the tax does not prevent it from being waived in the event of a change in the intermediary.

In a similar case, the Cantonal Court of the Canton of Vaud (CDAP, FI.2021.0026 of October 11, 2021) confirmed the levying of transfer duties in the event of the transfer of a property from one real estate fund to another without a change of management. This decision is based on a provision of Vaud law that allows certain economic transfers to be recorded (art. 2 al. 2 LMSD). The (quasi) fiduciary nature of the relationship between fund management and investors thus justified an approach based on economic reality. These two decisions do not seem contradictory to us, given the difference in facts. As usual, tax law moves back and forth between respect for legal relationships (superimposition) and adaptation to economic reality (autonomy). The case before the system is its least weakness.

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