CENTRE DE DROIT
BANCAIRE ET FINANCIER

Change of fund management

Tension between CISA and property gains tax ?

Par Aurélien Barakat le 6 February 2024

The Swiss Federal Supreme Court examines a new case involving a change of fund management and the levying of transfer duties in the canton of Fribourg, confirming previous case law while clarifying who bears the economic burden of taxation (9C_312/2023 of December 7, 2023, intended for publication).

The case concerns a real estate investment trust which has changed its fund management. E. SA was registered as a quasi-fiduciary owner of some fifteen properties in the canton of Fribourg and acted as fund manager, which was transferred to A. SA in 2021, resulting in a change of entry in the land register.

Based on the application of Fribourg cantonal law, a transfer duty resulting from a change of land register entry is levied on the market value of the 15 properties located in Fribourg for a total amount of approximately CHF 1.8 million, which A. SA will challenge this decision before the Federal Court.

This application of Fribourg law, which considers that a formal change of ownership in the land register allows the levying of a transfer tax (this solution is not applied in the cantons of Geneva and Vaud), has already been validated by the Federal Court in its ATF 148 II 121 (summary in : Liegeois, cdbf.ch/1233).

It should be pointed out that the appellant is mainly challenging an argument that was not sufficiently examined in the above-mentioned ATF : the economic impossibility for the fund management company to assume the burden posed by the levying of transfer duties – thus de facto limiting the possibility of changing fund management company as provided for by the LPCC.

The Federal Court first recalls that the compatibility of the levying of transfer duties with the primacy of federal law was specifically examined in ATF 148 II 121, which concluded that it was not acceptable for federal private law to limit any possibility for cantons to levy transfer duties under art. 49 Cst. and that a formal rule, such as art. 103 LFus, was necessary.

The appellant argues that, for regulatory reasons based on art. 26 para. 3 CISA and art. 37 para. 2 and para. 2bis CISO, it is not authorized to pass on transfer duties to investors, and must therefore bear them itself, i.e. the equivalent of 20 years' cumulative commissions.

Relying on certain doctrinal opinions, the Federal Court recalls that art. 38 LEFin allows the appellant to be reimbursed for financial commitments resulting from the application of its duties, thus supplementing art. 37 OPCC insofar as this is necessary, so that the appellant does not have to bear these costs itself, since they fall within the scope of art. 38 al. 1 let. b and c LEFin. Unlike in ATF 148 II 121, in this case the fund management company had not contractually undertaken to bear the transfer duty, which is why this question has remained open until now.

According to the Federal Court, the question of investor protection in the event of a change in fund management is guaranteed. It is the responsibility of both the fund management companies involved and FINMA to ensure that the advantages of such a change outweigh the disadvantages (including a charge against the fund's assets for transfer duties).

The Federal Court thus rejected the main allegations of violation of art. 49 Cst. and art. 39 LEFin, referring the issue back to the legislator.

Using the same reasoning as in ATF 148 II 121, the Federal Court also dismissed the claim that the application of cantonal law was arbitrary. Basing itself on various doctrinal opinions, and disagreeing with certain authors including Liégeois, the Federal Court maintains that it is not arbitrary to rely on the letter of the law referring to the transfer of ownership within the meaning of civil law.

This ruling calls for a few comments :

Art. 38 LEFin is intended to supplement Art. 37 OPCC and thus enable fund management companies to obtain reimbursement for expenses incurred in carrying out their fund management mandate and relating to expenses not expressly mentioned in the aforementioned ordinance.
This raises the tricky question of who is responsible for assessing the appropriateness of a change in fund management in terms of protecting investors' interests. It is easy to imagine that the outgoing fund management company may find itself in a conflict of interest when it comes to deciding whether to replace it, and that it will not always be easy for FINMA to decide on the advisability of such a change, an eminently economic decision which a supervisory authority will sometimes find difficult to follow up, except in obvious cases.
The solution adopted by the Federal Court under the arbitrariness test is understandable in its conception, but more difficult in its outcome. The change in fund management has no impact on economic ownership – the fund management is only registered in a quasi-fiduciary capacity in the land register. In our opinion, this solution would not stand up to scrutiny from the angle of complete power of cognition, since it seems doubtful whether this is in casu the real will of the legislator, who will have to act if he wishes to harmonize this rule with those of neighboring cantons.
