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Transfer stamp tax

A Tax Confronted with Its Primary Purpose

Par Aurélien Barakat le 24 January 2025

In a ruling intended for publication, the Swiss Federal Supreme Court, against the advice of the Federal Tax Administration, exempts a holding company from stamp duty (i) in the case of an intra-group transfer of shareholdings that do not meet the restructuring conditions set out in the LIFD and (ii) following the granting of shareholdings to employees free of charge (9C_168/2023, 9C_176/2023 of 25 November 2024).

The case concerns a holding company carrying out two transactions which the Federal Tax Administration ('FTA') considers to be subject to stamp duty on trading ('DTN'). The holding company qualifies as a professional securities trader (art. 13 al. 3 let. d LT) because it holds more than CHF 10 million of securities covered by the law in its balance sheet.

The FTA considers that two transactions (intra-group transfer of shares and the granting of shareholdings to employees) should have been subject to a deduction of approximately CHF 2.7 million from the DTN. The Federal Administrative Court ('FAT') upheld the exemption of the first transaction, but not the profit-sharing plan, which was challenged before the Federal Supreme Court ('FSC').

The first transaction – an intra-group transfer – concerned the purchase at market value by the holding company of 14.9 % of the share capital of B SAS – even though it held 25 % – from its wholly-owned daughter company C. The transaction is unquestionably subject to the DTN. However, the parties differ as to the application of the exemption in the event of the transfer of direct or indirect shareholdings of at least 20 % of the share capital of other companies to a group company (art. 14 al. 1 let. j LT *ab initio cum* art. 61 al. 3 LIFD), as well as in the event of the transfer of at least 20 % of the share capital of other companies to a Swiss or foreign group company (art. 14 al. 1 let. j LT *in fine*). In the FTA's view, the conditions were not met.

With regard to the concept of indirect shareholding under Art. 61 para. 3 LIFD, the 20 % threshold is met if a single management company has a total shareholding of at least 20 % in the company whose shares are transferred, which is the case here.

Furthermore, according to the Court, the conditions set out in the LIFD for exemption from taxation on profits (in particular, transfer at book value and continued taxation in Switzerland) are not decisive in this case for the exemption referred to in the TL to apply. In this case, however, the transaction is carried out at market value and is not located in Switzerland, as would be required under art. 14 para. 1 let. j of the FT *ab initio*.

According to the AFC, the 20 % threshold provided for in art. 14 al. 1 let. j LT *in fine* does not provide for an indirect holding, and the conditions for the exemption are therefore not met. Notwithstanding the FTA's arguments and on the basis of a purposive interpretation, the Federal Court concluded that the legislator's objective was to exempt a transfer of intra-group shareholdings in Switzerland or abroad. The exemption is thus confirmed by applying art. 14 para. 1 let. j LT *ab initio*.

The second transfer concerns the granting of shareholdings to Group A employees under two employee shareholding plans. After a *vesting* period, employees could acquire free shares on the basis of their performance and loyalty.

In principle, the granting of these shares can be classified as remuneration with consequences for the taxation of employees' income. However, the Federal Court disagreed with the assessment of the Federal Tax Administration (FTA) and the Federal Administrative Court (TAF) that the shares had been granted for valuable consideration and should therefore be subject to the National Tax Code (art. 13 para. 1 of the Federal Act). According to the TF, the transaction was not carried out 'for valuable consideration' on the basis of the employment relationship – all the more so in this case, as the shares were granted free of charge – as the consideration is impossible to identify and forms part of the work for which the employees are hired. In addition, the tax base would be almost impossible to determine because it would not be possible to quantify the market value of the work, even in the case of the granting of public shares, the value of which can vary greatly.

Finally, the Federal Court pointed out that the TL was originally intended to apply to trading and transactions in securities, which is not the case with free grants of shares to employees. The taxation was therefore invalidated by the TF.

This decision calls for the following comments :

1. This ruling confirms the FTA's practice in the area of intra-group restructuring, according to which the notion of indirect holding must be understood to include all holdings within a single management structure.
2. The assessment of the restructuring criteria of the LIFD to which other laws refer must be made in the light of the objective pursued by the latter.
3. In this ruling, the Federal Court adopts economic approaches that depart from the letter of the law to give priority to its purpose in favour of the taxpayer, notwithstanding a generally formalistic interpretation of this law.

The solution provided by the TF in the context of the granting of shares free of charge is very clear. On the other hand, the question of grants at nominal value or at a recognised formula value, frequently used in practice to avoid tax consequences at the time of grant, is less clear. The TF's analysis of art. 13 TL relies heavily on the total absence of consideration ('not even at a preferential price') : a payment at a preferential price could result in a deduction from the DTN in the aforementioned cases. This being the case, the Court of First Instance has refined its analysis to reach the conclusion that the DTN should probably not apply to the granting of employee shares for the purpose of building loyalty rather than for commercial purposes. Thus, the granting of shares on preferential terms to employees by a professional trader should not be subject to the DTN.