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NEWS

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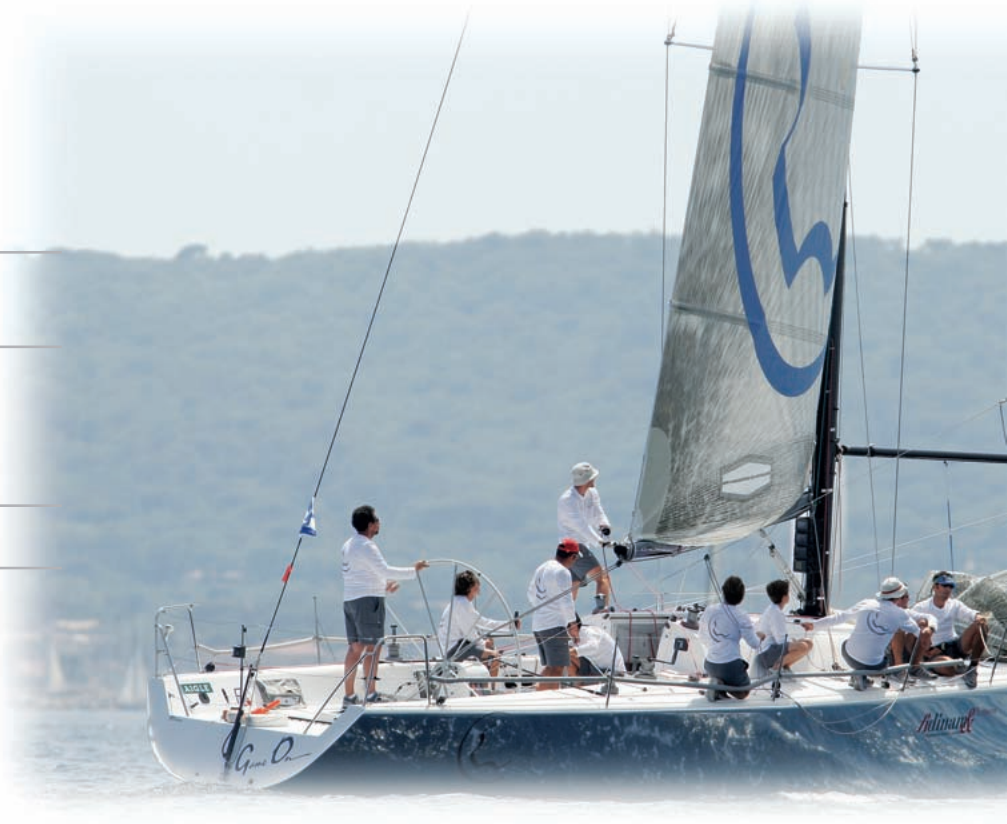

Innovation, flexibility and expertise

SWITZERLAND: RECENT CASE LAW OF THE FEDERAL SUPREME COURT ON FAMILY BUSINESS SUCCESSION

Introduction

Every day, also in consideration of the demographic trend and the strong innovation in progress, more and more entrepreneurs are confronted with the generational change at senior management level.

The question most often asked is: "I would like to carry out a business succession, but I don't know who to leave my corporate legacy to" or the tax consequences linked to the succession are too important and hold me back in the succession process!!

There are many proposals and the solutions can therefore be almost endless. However, it is necessary to foresee the succession and anticipate organizational and structural choices in order to avoid also significant "tax surprises".

Recently the Federal Court had to bow down over a business succession between people close to each other, starting from the principle that the interested party wished to make a tax-free profit.[1] Unfortunately, the structure of the succession meant that the sale/donation was reclassified as a taxable and non-exempt economic sale.

Complaint and comment process

Status in brief:

Mr. X. (father) resident in Switzerland, holds 100% of Z-CH AG in his private assets. His son G., also resident in Switzerland, has a 100% private equity interest in Y-CH AG.

Mr. X decides to sell 50% of the shares of Z-CH SA to the company Y-SA CH, held by his son. The agreed price of CHF 3'100'000 was registered with Y-CH SA as a loan received from X.

1 Art. 16 Para. 3 FITA (SR 642.11)

Subsequently X. donates to his son G. 50% of the credit for CHF 1'550'000.

In law:
The intent of the taxpayers was to make a tax-free capital gain, thus avoiding any taxation of substance.[2]
In Swiss tax law, income from movable capital is taxable, in particular dividends, profit shares, liquidation surpluses as well as the appreciable cash benefits resulting from holdings of any kind (including free shares, free nominal valuation increases, etc.).[3]
In general, under the current tax system, capital gains made on the realisation of private assets are exempt from tax[4]. Notwithstanding this rule, the proceeds from the sale of an investment are considered as "income from movable assets" if the following three conditions are cumulatively fulfilled:

- at least 5% of the share or share capital is transferred,[5]
- the transfer is effected from the private to the commercial assets of a partnership or a legal entity in which the seller or the transferor has a minimum holding of 50%, and
- if the total of the consideration received exceeds the nominal value and the capital contribution reserves of the transferred investment.[6]

This type of transaction is re-categorized as tax avoidance.
According to case law, tax avoidance is presumed when[7]:

- a legal form chosen by the parties involved is unusual or inappropriate
- it can be assumed that the chosen legal form is misused for the sole purpose of saving the taxes that would otherwise be due.
- the structure chosen actually leads to a considerable reduction in the tax burden.

On the basis of these points, the Federal Supreme Court has reclassified the sale from "exempt capital gains" to "income from movable capital", since the form chosen and the time frame of the transaction (sale against credit and subsequent donation of the credit) is qualified as a single economic transaction (donation to son G. of 50% of the shares of Z-CH SA and subsequently contributed to Y-CH SA at market values).
The taxation on transposition was calculated as follows:

Value of the consideration:
CHF 1'550'000 (or 25% of the market value of Z-CH SA)

./. nominal value
of the transferred capital
CHF – 625'000 (total share capital 5'000 shares with a nominal value of CHF 500 x 25%)

Total taxable income
CHF 925'000

Conclusion
In the transfer of companies, even in the area of succession, other decisive factors can take over, such as, for example, the tax burden.
Business transfers are carefully monitored by the tax authority. It is therefore appropriate to plan carefully to avoid the cancellation of any possible benefits or potenially worsening the financial situation of the counterparties.

2 Art. 16 Para. 3 FITA (SR 642.11)
3 Art. 20 para. 1 lett. c FITA (SR 642.11)
4 Art. 16 Para. 3 FITA (SR 642.11)
5 With the new regulations due to the corporate tax reform (TRAF) from 01.01.2020, the 5% share will fall
6 Art. 20a para. 1 lett. b FITA (SR 642.11)
7 DTF 138 II 239 E. 4.1 pag. 143 et seq.

SWITZERLAND: CAN HOLDING COMPANIES DEDUCT INPUT TAX ON VAT?

Introduction
Companies with a corporate purpose of acquiring, holding and disposing of equity investments are, from 01.01.2018, considered as entrepreneurial activities.[1]
This allows the taxpayer to be subjected to VAT with the possibility of recovering the input tax paid.

Participations
Equity investments are shares in the capital of other companies, which are held as long-term investments and which have a decisive influence. Shares representing at least 10% of the capital are considered holdings.[2]

Right to recover the input tax
There is the right to deduct the input tax in the business environment that entitles you to purchase, hold and sell participations.
For the determination of the deductible input tax, the holding company can base itself on the entrepreneurial activity of the companies it holds that gives the right to the deduction of the input tax.

1 Art. 10 para. 1ter of the VAT Act
2 Art. 29 para. 3 of the VAT Act

SWITZERLAND: CONSEQUENCES FOR VAT PURPOSES ARISING FROM THE FINANCING OF PREPARATION COURSES FOR FEDERAL EXAMINATIONS

With the entry into force of article 56a of the law on vocational training (LFPr; SR 412.10) Federal Vocational Education and Training Act (VPETA; SR 412.10), from 1 January 2018 the persons who have attended the courses of preparation for the federal professional examinations and the higher federal professional examinations receive support uniform at federal level.

As a rule, federal contributions are paid to these people only later, i.e. after the federal exam has been taken. In this regard it should be noted that the costs of the courses taken by third parties and paid directly to the training institute are not financed by the Confederation. However, the financial support paid by third parties directly to the person who attended the courses does not compromise the right to benefit, in the sense that the federal contribution is not reduced according to this amount.
In the circumstances described in Section 3.6 the employer is entitled to deduct input tax from the portion of the costs he has incurred. The input tax cannot therefore be deducted from the employee's own contribution, which also includes the federal contribution requested and paid by the employee.

From an accounting point of view, the employer may, if it finances (in advance) all training or continuing education expenses, enter the employee's reimbursable portion in a "Loan" account.

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THE NETHERLANDS: TAX NEWS FOR 2020

On 17 September 2019 the Dutch Finance Minister submitted to the Parliament the

draft tax law for 2020 which provides for the introduction of several changes, including on the income tax of legal entities, among which we highlight:

1. The rate of corporate income tax should be amended and established as follows:
   - For 2020, equal to 16,5% on income up to EUR 200'000 and 25% on income exceeding this threshold;
   - For 2021, equal to 15% of income up to EUR 200'000 and 21,7% of income exceeding this threshold.

2. The proposal to introduce, from 1 January 2021, a withholding tax on interest and royalty payments made to related companies residing in identified low tax jurisdictions (where the income tax rate is less than 9%) or forming part of the *blacklist* drawn up by the European Union which currently includes the following countries: Anguilla, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Kuwait, Qatar, Saudi Arabia, Turks and Caicos Islands, Vanuatu and United Arab Emirates). *Withholding tax* will be equivalent to the highest corporate income tax rate which in 2021 should be equal to 21,7%. It will apply to royalty and interest payments made by Dutch companies or by Dutch permanent establishments of foreign companies to related entities.
   A company is considered to be related in the following cases:
   - The company receiving the payment holds, either directly or indirectly, more than 50% of the capital or voting rights of the company making the payment;
   - The company making the payment holds, either directly or indirectly, more than 50% of the capital or voting rights of the companies receiving the payment;
   - A third-party company holds, either directly or indirectly, more than 50% of the capital or voting rights of the company making the payment and of the one receiving it;
   - The company that receives the payment holds, either directly or indirectly, together with other companies of the same group, a qualified interest in the company making the payment;
   - The company making the payment holds, either directly or indirectly, together with other companies of the same group, a qualified interest in the company that receives the payment;

   The withholding tax will also apply in the case of abuse, where by abuse is meant an artificial construction that has the purpose of avoiding the *withholding tax*. For example, the interposition of a non-resident intermediate company in a low-tax jurisdiction (so-called "*conduit company*") between the Dutch subject who pays royalties or interest and the company resident in a low-tax jurisdiction will be considered as abusive and therefore will result in the application of withholding tax. The directors of the company that pays and the company that receives the royalties and / or interests may become personally liable for the payment of the withholding tax.

3. The proposal to modify, starting from 1 January 2020, the conditions that allow the benefit of exemption from withholding tax on dividends distributed by a Dutch company to shareholders resident in one of the countries of the European Union or in a country that has signed a double taxation agreement (hereinafter "DTT") with the Netherlands. This proposal is based on a ruling by the European Court of Justice known as "*Danish cases*". Currently, the satisfaction of the substance criteria ("relevant substance") by a person resident in the European Union or in a country that has signed a DTT with the Netherlands is considered sufficient to exclude a situation of abuse of rights and therefore be able to benefit from the exemption or the conventional reduction of withholding tax on dividends. With the proposed amendment, the Dutch tax authority will have the opportunity to demonstrate that even a company that meets the substance criteria can be considered "abusive" and therefore will not be able to benefit from a reduction in the *withholding tax*.

4. Currently, a foreign company residing in a *black list* jurisdiction, controlled by a Dutch tax resident, in the event that it carries out a substantial economic activity can never be considered a *Controlled Foreign Company* (hereinafter "CFC"). The new bill for 2020 will introduce the possibility for the Dutch tax administration to reject this exception.

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UNITED KINGDOM: REAL ESTATE TRANSFER. NEWS FOR NON-RESIDENTS

From 6 April, the proceeds deriving from the disposal of real estate by non-residents are subject to the Corporation Tax and the Capital Gains Tax
Starting from 6 April 2019, the proceeds deriving from the disposal of property located in the United Kingdom by non-resident subjects are subject to taxation. In the case of companies, corporate income tax (Corporation Tax) is applied to these earnings, in the case of other entities the capital gains tax (Capital Gains Tax). With this regulatory intervention, the UK government aims to ensure the same tax treatment for UK residents and non-residents.

The scope of the regulation
The new measure concerns income deriving from the disposal of properties located in the United Kingdom and that deriving from indirect sales of properties located in the country. The transfers made by non-residents to companies, partnerships and trusts that hold a property in the United Kingdom will also be subject to taxation. Other key points of the extension of the tax on capital gains for non-residents are as follows: for both direct and indirect transfers, non-resident companies are subject to the payment of corporation tax (19%) on the realized capital gains; non-resident investors are entitled, if certain conditions are met, to request a tax relief on capital gains that previously could only be enjoyed by UK residents.

Property and land of *property rich companies*
From 6 April 2019, non-residents (with some exceptions) will be subject to tax on capital gains deriving from the direct sales of investments in land in the United Kingdom and from the sale of rights or shares in legal entities that directly or indirectly derive at least 75% of their gross asset value from property in the United Kingdom and hold many properties ("property rich company"). A company is considered "property rich" if at least 75% of its gross market value derives from properties located in the United Kingdom and the fee will only apply if the owner making the sale holds more than 25% of the investment (directly, or through a series of other groups) in the property in question at any time in the two

years prior to the sale. Therefore, in the case of disposals made on or after 6 April of the current year, capital gains tax is levied on disposals made by non-residents of shares in entities which hold real estate in the United Kingdom. The "indirect transfers" are the sales of shares in companies defined as *"property rich entities"*, i.e. in the event that, at the time of disposal, at least 75% of the disposal value (for example of the shares) derives from properties located in the Kingdom Kingdom. The other case is that in which the non-resident party which effects the transfer holds at least 25% of the company in question.

Collective Investment Vehicles are affected by the changes

Disposals made by collective investment institutions and entities will also be subject to tax if they fall within the definition of "property rich". The definition of the instruments concerned is broad and covers most real estate companies and joint venture structures between partnerships, mutual funds and real estate investment funds. The proceeds from the sale of shares of a collective savings scheme will be subject to UK taxes, unless the person making the sale falls under a specific tax regime.

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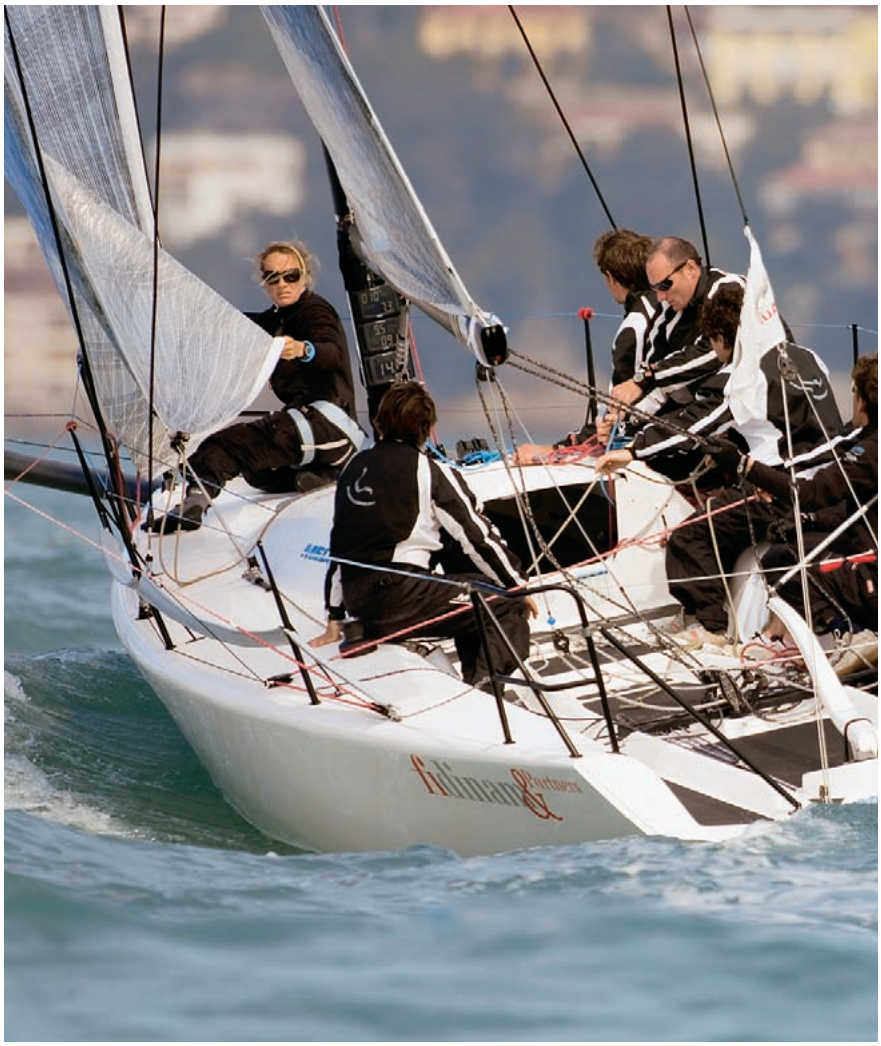

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