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Newsletter

Significant case law on transfer stamp tax - Management Incentive Plans and Reorganizations

The Swiss Supreme Court handed down on November 25, 2024, an important ruling expected to be made public shortly (9C_168/2023 and 9C_176/2023). The matter dealt with two contentious issues triggered through an audit from the Federal Tax Administration (FTA) regarding a Swiss holding company (the "Company") registered as a securities dealer for transfer stamp tax purposes.

The first issue concerned the acquisition by the Company of a 14.9% - interest in a foreign subsidiary in which the Company indirectly held the entire share capital. The FTA had denied the exemption provided for in Article 14(j) of the Stamp Tax Law regarding transactions involving shareholdings in the event of restructuring considering that the transaction involved a shareholding of less than 20%. In its ruling (sections 6 to 8), the Court considers that Art. 14 let. j of the Stamp Tax Law is covered by Art. 61 par. 3 LIFD (the relevant provisions qualifying as a tax-free reorganization the transfers of direct and indirect shareholdings of at least 20% within a group). Thus, insofar as the Company indirectly held at least 20% of the shareholding acquired and because the transaction took place within the group, the Court followed the arguments of the taxpayer that the transaction had to be exempt from transfer stamp tax. The fact that the transaction was entered between the Company and a foreign related company was irrelevant.

The second aspect dealt with the transfer stamp tax law regarding the delivery of shares to managers for no consideration under a management incentive plan set up by the Company. Eligible employees had been granted shares, which were delivered to them for no consideration subject to a three-year vesting period. The FTA, and subsequently the Federal Administrative Court, had argued that the shares had been remitted for valuable consideration - and were therefore subject to the levying of the transfer stamp tax – on the basis that the grants were closely linked to the work performed by the managers. The Federal Court ruled in favor of the Company (sections 9 and 10). The position of the Company was therefore confirmed, even if the remittance of shares had triggered employment income recognition for the managers. The Court ruled that the shares could not be linked to a specific work performance so that the delivery of the shares did not constitute consideration for the purpose of the transfer stamp tax. Moreover, even if the work of the managers had represented consideration for the delivery of the shares, it would have been necessary to determine a market value to it, which was not possible. Indeed, just considering the market value of the shares granted to the employees as the value of the work was inappropriate since such value was subject to fluctuations according to parameters unrelated to the individuals performance. This is particularly true with respect to shares quoted on the stock exchange.

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This ruling therefore clarifies that the grant of shares for no consideration under a management incentive plan is not subject to the transfer stamp tax. For the avoidance of doubt, the question of the levying of the transfer stamp tax remains open when a manager acquires shares by paying a price below the market price, or as price paid upon the exercise of an option. In such events, the transaction takes place for consideration, so that stamp duty is possible, depending on the circumstances and parties involved in the transaction.

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