Exemple

Monsieur A détient une part 10% de la société X SA, d'une valeur nominale de 10 dans sa fortune privée. Il apporte sa participation dans X SA à sa valeur vénale de 100 à la société Y SA, qu'il détient à 100%. L'entier de l'apport a été comptabilisé au crédit du capital nominal de la société Y SA.

Cette opération engendre immédiatement pour Monsieur A une imposition sur le montant qui excède la valeur nominale, soit 90. Monsieur A bénéficiera néanmoins de l'imposition partielle à hauteur de 70% prévue à l'article 20 alinéa 1bis LIFD, de sorte que le montant imposable sera de 63.

Si l'apport avait été comptabilisé au crédit des « autres réserves », aucune imposition n'aurait eu lieu.

Conclusion

La transposition constitue une des exceptions à l'exonération des gains en capital privés. Comme nous l'avons illustré, l'imposition dépend de la manière de comptabiliser l'opération dans la société reprenante. Nous attirons l'attention du lecteur sur le fait que, comme pour toute opération de restructuration, il y a lieu de prendre conseil auprès de professionnels, ce d'autant plus qu'en matière de transposition, l'imposition peut être conséquente alors même que le contribuable ne perçoit pas forcément de liquidités dans le cadre de l'opération et peut par conséquent faire face à des difficultés pour s'acquitter de la charge fiscale.

Transposition – an exception to the private capital gains exemption

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One of the peculiarities of the Swiss tax system stems from the principle that capital gains realised by individuals on their private assets are exempt from income tax (art. 16 al. 3 of the Federal Act of 14 December 1990 on Federa direct tax; hereinafter: "FDTA"). As with any principle, there are certain exceptions, including that resulting from «transposition», a theory originally developed by case law which was then codified in article 20a paragraph 1 letter b FDTA. We will begin with a brief presentation of the principle of capital contributions, then go on to explain the concept of «transposition» in Swiss tax law, reviewing its conditions and tax consequences. We will conclude with an example.

Principle of capital contributions

Until 31 December 2010, any benefit granted by a company to a shareholder was considered a taxable return if it was not a repayment of the nominal capital. Article 20 paragraph 3 FDTA, which embodies the principle of capital contributions, came into force on 1 January 2011. This new regime treats any repayment of capital contributions, premiums and additional payments made by a shareholder in the same way as a repayment of capital. Since the introduction of this regime, when a company makes a distribution, it is necessary to assess whether it comes from capital, from contributions (reserves from other capital contributions: ROC) or from other reserves. Circular no. 29c of the Federal Tax Administration of 23 December 2022 specifies that capital contributions, premiums and additional payments made by a shareholder are deemed to be ROC if they have been openly accounted for as such (Circular 29c, 2.1,

p. 5). In the absence of separate accounting, these contributions form part of the "other reserves" that are fully taxable in the event of a distribution.

Transposition

Under article 20a paragraph 1 letter b FDTA, a taxable return on movable assets arises when a private individual sells or contributes shareholdings in a company - which he holds in his private assets - to a company he controls, for an amount in excess of the nominal value of the said shareholdings. The justification for such taxation is as follows: before carrying out such a transaction, the taxpayer held participations on which there was deferred taxation, i.e. open and/or deferred reserves, which would be taxed when they were distributed or when the company was liquidated. By selling or contributing these holdings to a company that he controls, he receives in return a value that is not taxed when it is repaid, i.e. share capital or a receivable from the company. He has thus "transposed" a taxable value into a tax-exempt value. Ultimately, the taxpayer has not really sold his shareholdings, but has restructured his assets by eliminating the deferred tax attached to them.

Conditions

Article 20a paragraph 1 letter b FDTA sets out four cumulative conditions for the tax authorities to consider that a transaction qualifies as a taxable transfer:

1. Transfer of an interest in the capital of a capital company
Until 31 December 2019, the law stipulated that the transferred holding had to represent at least 5% of the company's capital. Since 1 January 2020, this threshold has been abolished, so that any percentage of holding can meet this criterion, including isolated shares or small portfolios of securities.

2. A change of system
The securities must be transferred from the taxpayer's private assets to the commercial assets of a company.

3. Control of the seller over the buyer
The transferor (by sale or contribution) must hold at least 50% of the capital after the transfer. This control may be exercised by several persons carrying out the transfer jointly.

4. A compensation in excess of the nominal value and the proportional share of the ROCs of the shareholding transferred
This is a condition to which particular attention should be paid. As explained below, it determines the extent of taxation.

The Federal Court recently handed down a ruling on the subject of transposition, stating that the conditions listed above are objective and that it is not possible to eliminate taxation by demonstrating that the transaction was carried out for reasons other than taxation (ATF 9C_679/2021 of 20 April 2023).

Tax consequences

The realisation of the transfer leads to immediate taxation of the difference between the compensation received and the sum of the nominal value of the transferred shareholding and the proportion of the ROCs.

It should be noted that since the 5% threshold requirement has been abolished, a transposition can easily be carried out on the shares of listed companies. For example, a Nestlé share has a nominal value of CHF 0.10, whereas its stock market price is currently around CHF 105.00. This means that in the event of a contribution or sale for this amount, if the other conditions listed above are met, the shareholder would immediately be taxed on an amount of approximately CHF 104.90 per share sold/contributed. If the shareholder holds a qualifying interest in the company, i.e. more than 10% of the capital, he will benefit from reduced taxation, with the tax base being reduced to 70% (art. 20 para. 1bis FDTA).

In order to ensure that no taxation is levied, it is possible to sell or contribute the shareholding at its nominal value. In addition to this possibility, there is another solution which guarantees the tax authorities that no taxable substance is eliminated and that, consequently, the conditions for transposition are not met: the "other reserves" solution. By accounting for the difference in the acquiring company's "other reserves", the deferred tax charge remains in place since these reserves are fully taxable in the event of a distribution or when the company is liquidated. Ultimately, taxation depends on how the surplus has been accounted for in the acquiring company.

Example

Mister A holds a 10% stake in X Ltd, with a nominal value of 10, in his private assets. He contributes his shareholding in X Ltd at its market value of 100 to Y Ltd, of which he owns 100%. The entire contribution was accounted for as nominal capital of Y Ltd.

As a result of this transaction, Mister A will immediately be taxed on the amount in excess of the nominal value, i.e. 90. However, Mister A will benefit from the 70% partial taxation provided for in article 20 paragraph 1bis FDTA, so that the taxable amount will be 63.

If the contribution had been accounted for in the "other reserves" of Y Ltd, there would have been no taxation.

Conclusion

Transposition is one of the exceptions to the tax exemption of private capital gains. As we have illustrated, taxation depends on how the transaction is accounted for in the acquiring company. As with any restructuring operation, it is advisable to seek professional advice, especially as in the case of a transposition, taxation can be substantial even though the taxpayer does not necessarily receive any cash in connection with the operation and may therefore face difficulties in paying the taxes. ■