

Client information

New securities transfer tax risks in M&A transactions

While the abolition of the securities transfer tax was discussed on various occasions over the last couple of years aiming at a tax relief, two court decisions in 2021 lead the practice in the opposite direction. After the Federal Supreme Court seemingly expanded the concept of intermediation with a new interpretation earlier this year, the Federal Administrative Court now surprises in a recent decision with a broad interpretation of the definition of an intermediary. With this new decision, Advisors in M&A transactions are confronted with the risk of being qualified as securities dealers subject to securities transfer tax.

1. Background

A transaction involving taxable securities such as bonds, stock or shares in collective investment schemes may be subject to securities transfer tax if a securities dealer is either a contracting party or acts as an intermediary.¹

At the same time, a professional intermediary activity may result in a qualification as a securities dealer for the intermediary. In this regard, the Federal Act on Stamp Duties defines a securities dealer as follows:²

"Securities dealers are [...] the domestic individual and legal persons and partnerships, domestic institutions and branches of foreign companies not covered by letter a, whose activity consists exclusively or to a substantial extent in intermediating [...] the purchase and sale of taxable securities as investment advisors or asset managers (intermediaries)."

The two aforementioned court rulings had to assess two different issues in that respect. The Federal Supreme Court ruled in what instance a group company, which undisputedly qualifies as a securities dealer, acts as an intermediary in a transaction. The Federal Administrative Court, on the other hand, had to examine whether the activities of an independent M&A advisor qualify as intermediary activities within the meaning of the Stamp Duty Act and whether the advisor subsequently qualifies as a securities dealer.

¹ Art. 13 paras. 1 and 2 StG

² Art. 13 para. 3 lit. b no. 2 StG

2. Securities dealer as intermediary (BGer 2C_638/2020 of 25 February 2021)

It was disputed whether a securities dealer acted as an intermediary in a transaction of a group company. In the aforementioned decision, the Federal Supreme Court states that the interpretation of the term "intermediary" in the Stamp Duty Act is to be based on a view borrowed from civil law and not on an economic view. The interpretation should therefore be based on the law on brokerage contracts.

According to the Federal Supreme Court, a securities dealer qualifies as an intermediary under the Stamp Duty Act whenever he acts in one of the following capacities in connection with a transaction:

- as an introducing broker, the first person to offer the opportunity to purchase the shares in the target company;
- as an intermediary who, in the course of the transaction negotiations, has influenced the will of the contracting parties in a way that was co-determining for the decision to sell and/or buy.

The economic interests of the securities dealer involved in the transaction and the legal relationships with the contracting parties are thereby irrelevant.

3. Intermediary as securities dealer (BVGer A-5038/2020 of 23 November 2021)

At issue was whether a company acting as an M&A adviser qualifies as an intermediary for the purposes of securities transfer tax. According to the wording of the law, the status of intermediary is fulfilled if an one acts as an investment advisor or asset manager in arranging the purchase and sale of taxable securities. At the same time, this activity must constitute a substantial part of the business activity.

The statutory purpose of the appellant company is, among other things, to offer or provide services, in particular the intermediation and brokerage of enterprises and businesses. It concludes contracts with its customers for the sale of companies and shares in companies, which provide for a compensation for the initial outlay and a percentage share of the sale price. The clients are not permitted to conduct their own transaction negotiations with interested parties.

The court relies on the above-mentioned Federal Court decision and concludes that the qualified intermediary activity can arise from the function of a transaction intermediary.

The Federal Administrative Court takes the following activities of the appellant, inter alia, as evidence for the assessment of the appellant as a qualified intermediary:

- finding suitable buyers for the clients' companies;
- preparation of the sales documentation;
- contacting prospective buyers;
- organization of meetings with interested parties;
- assistance in the negotiation of the sales contracts

The court concludes that, based on this evidence, an activity as a qualified intermediary can be assumed, since the appellant has a causal influence on the conclusion of the contract.

In the present case, the successful conclusion of company sales was a central activity of the appellant due to the predominantly performance-based compensation. In addition, a large part of the sales concluded by the appellant were share deals, which is why it was assumed to be a substantial activity. The court also interprets the term "investment advisor" very broadly and ultimately concludes that anyone who advises on transactions with taxable securities is basically an investment advisor.

4. Conclusion

The decision of the Federal Supreme Court raises particular questions in the case of transactions of group companies as soon as a Swiss company that qualifies as a securities dealer is involved. This may be a holding company, but also a separate group management company or other intra-group advisory companies.

As the Federal Administrative Court's decision is not yet final and may be appealed to the Federal Supreme Court, no hasty conclusions should be drawn. However, the Federal Administrative Court's reasoning leads to great uncertainty in practice, especially among M&A advisors and private equity boutiques, but also among lawyers and other advisors in corporate transactions. According to the Federal Administrative Court, they could all qualify as securities dealers in terms of the Stamp Duty Act, as they advise on transactions involving taxable securities. Due to the broad interpretation of the term "intermediary", these businesses could become subject to unexpected securities transfer tax claims.

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