

Client information  
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## **Sale of treasury shares from a VAT perspective Decision of the Federal Supreme Court dated 5 October 2021**

In its decision, the Federal Supreme Court follows the approach of accounting law, withholding tax and capital tax. Accordingly, the sale of treasury shares is to be assessed as a capital contribution and not as a sale of securities, that would be exempt from VAT.

### **What was the underlying VAT question to decide?**

The court had to clarify the question of whether the sale of treasury shares constitutes a service in the VAT sense or a contribution to a company. The assessment as a service would lead to the sale proceeds constituting a turnover exempt from VAT pursuant to Art. 21 para. 2 ciph. 19 lit. e VAT Act (turnover with securities). This would mean that input tax on expenses incurred in connection with the sale of treasury shares would not be deductible. In the case in dispute, this amounted to more than TCHF 400.

If, on the other hand, the sale of treasury shares is to be assessed as a contribution, this is a so-called non-remuneration (Art. 18 para. 2 lit. e VAT Act), which leads neither to VAT consequences nor to an input tax adjustment.

### **What criteria does the Federal Supreme Court take into account in its decision?**

The Federal Supreme Court once again referred to the economic approach of VAT. Based on the unity of the tax system and with a view to the case law of the ECJ, the court applied the following criteria:

- In principle, the transfer of shares as a transfer of intangible assets and rights against consideration may constitute a supply in the sense of VAT. However, it is also clear that the inflow of funds in the context of the issue of shares (issue proceeds) is a capital contribution.
- From the perspective of accounting law the repurchase of treasury shares is not regarded as an acquisition of an asset in financial and business terms, but as a withdrawal of capital. Consequently, treasury shares are no longer reported as assets, but only as a negative equity position. The sale is assessed as a capital contribution by the acquirer: The negative equity position is to be written off against the proceeds from the sale. Any difference is not recognised in the profit and loss statement, but as an increase to or decrease in capital reserves.

- The assessment of treasury shares as "non-assets" is also recognised from a withholding tax point of view, according to which the repurchase constitutes an impoverishment of the corporation.
- For capital tax purposes, treasury shares are also no longer considered as part of the taxable capital.
- Moreover, the EU Court of Justice does not consider the repurchase of a company's own capital shares to be an economic activity, so that it does not fall within the scope of the VAT System Directive.

### **Conclusion of the Federal Court**

If treasury shares do not constitute an asset, a sale of treasury shares cannot constitute the transfer of one. However, the existence of a supply for VAT purposes requires the exchange of an economic value against a consideration. From an economic point of view and from the perspective of accounting law, the proceeds of treasury shares - like the issue of new shares - are to be assessed as a capital contribution. The sale of own shares from a derivative acquisition (repurchase) is to be treated in the same way as an original acquisition (subscription of new shares in the context of a capital increase). As a contribution (non-remuneration according to Art. 18 para. 2 lit. e VAT Act), the proceeds of the sale do not fall within the scope of VAT and, above all, do not trigger an input tax adjustment.

### **Need for action**

With this decision, the Federal Supreme Court ensures uniform treatment of the sale of treasury shares from the perspective of accounting law, withholding tax and capital tax, and now also VAT. From an income tax perspective, however, we understand that appeals are still pending in specific cantons. You should therefore take this court decision as an opportunity to scrutinise the sale of treasury shares in recent years and in the future in order to ensure neutrality for all types of taxes.

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