CAPITAL GAIN TAX IN SWITZERLAND

Saison 1 : Private assets vs Commercial assets

Capital gains realised on the sale of private movable assets (financial instruments, works of art, etc.) are in principle exempt in Switzerland. There are however exceptions to this principle arising from anti-abuse practices, particularly in the case of the sale of particpations. Furthermore, this exemption does not apply to the sale of commercial assets, and it is sometimes difficult to distinguish between private and commercial assets. A reclassification as commercial assets may have consequences for direct taxes,VAT and social security contributions (AVS). The same difficulty may arise in the case of sales of private real estate, which are normally exempt from capital gains tax at federal level and are subject to a special tax at cantonal level. The aim of this series is to present case law illustrating these issues.

EPISODE 1: INDEPENDENT LAWYER CO-SHAREHOLDER OF A TRUST COMPANY

An independent lawyer, mainly active in the establishment of private clients and foreign companies, holds 50% of the share capital of a public limited company whose corporate purpose is to carry out trust and audit mandates. As this shareholding had been declared as private assets and taxed as such for several years, the lawyer believed that he was making a non-taxable gain on private assets. However, when the tax authority examined the case more closely at the time of the sale of the shares, it considered that they actually belonged to his business assets and that the gain constituted taxable income. The Federal Supreme Court ruled in favour of the tax authority, giving the following reasoning.

PRINCIPLES

- art. 18 para. 2 of the Federal Income Tax Act (LIFD) : "business assets include all assets that are used, entirely or predominantly, for the purpose of carrying on a self-employed activity" ;

- according to the established practice of the federal courts, the attribution of a shareholding to business assets assumes a close connection, either entirely or predominantly, with the self-employed activity of the holder of the shareholding. Otherwise, it is attributed to private assets:

- a sufficiently close relationship must be assumed, in particular, when the shareholding gives the investor a decisive or even dominant influence over the corporation, whose commercial activities correspond to or usefully complement the investor's own self-employed activity enabling the investor to expand the commercial activity.

- The close relationship required by case law may sometimes exists without decisive or dominant influence. The intention – expressed and realised in practice – to use the shareholding in concrete terms to improve the operating results of one's own company or its market opportunities is decisive (see BGE 147 V 114 E. 3.3.1.2; 120 Ia 349 E. 4c/aa; 9C_454/2023 of 11 December 2024 E. 3.3.2).

In this case, the following circumstances proved to be decisive:

- the registered office of the company was located at the same address as the lawyer's office;

- the lawyer co-managed the company, providing strategic support and advice in particular general legal advice, strategic advice, networking and tax optimisation;

- the fees charged by the lawyer to the company represented a significant portion of his turnover, increasing from 18.4% to 44.5% in six years;

- the services provided by that company are part of the range of services related to the establishment of private clients and foreign companies:

- the lawyer had a decisive influence on the company due to his 50% stake.

The fact that this stake had been declared and taxed as private wealth for several years was of no help in the eyes of the Federal Court. Firstly, due to the periodicity of taxation (facts that continue over several years may be assessed differently from one year to the next - BGE 140 I 114 E. 2.4.3; judgment 9C_301/2025 of 5 November 2025 E. 5.1). Subject to the constitutional protection of legitimate expectations (according to Art. 5 para. 3 of the Constitution, state bodies and individuals must act in good faith). In this case, the lawyer was unable to demonstrate that the tax authority had given him individual and concrete assurances about the future treatment of his shareholding in the company. In the years prior to the sale, the authority had no reason to clarify the classification of the shareholding in greater detail, according to the Federal Supreme Court.

(Federal Supreme Court decision of 19 November 2025 - 9C_54/2025)

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