



Capital gains realized 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 participations. 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 2 : CONTRIBUTION OF PATENT TO OWNED CO – SELF EMPLOYMENT NOT PROVEN

The taxpayer acquires a **patent** from a company where he was employed. The following year, he creates a new company and transfers the patent to it.

Five years later, through a tax **reassessment procedure**, the tax authorities consider that during the period between the acquisition and the contribution of the patent to the new company, the patent belonged to the taxpayer's business assets, on the grounds that he was then self-employed. The contribution of the patent to the company, whose shares he held in his private assets, required its prior **transfer from his business assets to his private assets**, even if only for a logical second. However, the transfer of business assets to private assets is **treated as a disposal** (Art. 18.2 LIFD), like a sale to a third party. For this reason, the tax authorities retroactively assess the taxpayer on an income equivalent to the difference between the actual value of the patent and the book value at which it was contributed to the company.

The actual value is determined using the **discounted cash flow (DCF)** method.

The taxpayer disputes the existence of a self-employed activity and the fact that the patent belonged to his business assets. He argues that he has never personally exploited the patent, never generated any turnover, never held the patent for profit and never appeared as an operator to third parties. He has brought the case before the court twice.

The Federal Court reminds the following principles.

PRINCIPLES

- The concept of self-employment must be understood in a broad sense; profits from an activity that goes **beyond the simple management of private assets** constitute taxable income.

- Self-employment is characterised by the fact that an individual **participates in economic life** at own risk, using labour and capital, within the framework of a **freely chosen work organisation**, on a **permanent or temporary** basis, as **main or secondary** occupation, but in all cases with the aim of making a profit.
- **Secondary indicators** include the hiring of **staff**, the scale of **investments**, the existence of a diverse **client base** and the presence of dedicated **business premises**.
- The fact that the assets are **substantial, managed professionally** and the existence of a **bookkeeping** are irrelevant.
- The assessment must be made on a **case-by-case basis**, based on an overall assessment of the actual circumstances. The various aspects must not be considered in isolation and may also vary in intensity.
- The tax authority bears the **burden of proof** for facts giving rise to taxation and increasing the tax liability, while facts excluding taxation or reducing the tax liability must be proven by the taxpayer.

As neither the tax authority nor the cantonal court provided evidence of a self-employed activity despite the orders issued in an initial referral decision, the Federal Court ruled in favour of the taxpayer.

(Federal Court ruling of 23 December 2025 - 9C_369/2025)

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