

Transfer stamp tax: Intermediation in Private Equity



The transfer stamp tax on securities transactions

The transfer stamp tax is levied on the purchase and sale of domestic and foreign securities. The subject of the tax is the transfer of ownership in taxable securities against consideration, provided that one of the contracting parties or an intermediary is a domestic securities dealer within the meaning of the Federal Act on Stamp Duties (StG).

The concept of intermediary in case law

The term "intermediary", which triggers the transfer stamp tax, is not defined in the StG. However, the Federal Supreme Court as well as the Federal Administrative Court have interpreted this concept of intermediary in various rulings.

In a ruling of 4 March 1985, the Federal Supreme Court affirmed that an asset management company, which issues stock exchange orders in the name and for the account of its clients within the scope of its administrative powers, is involved in the conclusion of the corresponding securities transactions as an intermediary.

The Federal Administrative Court came in its ruling of 26 March 2010 (A-515/2007) to the conclusion that the StG is based on a broad concept of intermediation. An intermediary is anyone who causally participates in the conclusion of a securities transaction, i.e., anyone who knowingly causes or contributes to the actual success of the exchange of the corresponding declarations of intent. If, however, the activity of the

professional investment advisor is limited to a purely advisory activity, i.e., if the advisor merely points out the possibilities of purchases and sales in a non-binding manner without directly participating in the corresponding transactions, this cannot constitute a causal contribution to the turnover of taxable securities.

In its ruling 2C_638/2020 of 25 February 2021, the Federal Supreme Court recently commented on the interpretation of the term "intermediary" under the StG. Based on the law on brokerage contracts, it ruled that a securities dealer qualifies as an intermediary if it is either the first to prove the opportunity to conclude a contract, like a business opportunity broker ("Nachweismäkler"), and the transaction is ultimately concluded on the basis of this proof, or if, like an intermediary broker ("Vermittlungsmäkler"), it influences the willingness of the other contracting party to conclude a contract in the course of the contract negotiations in a manner that is co-determining for the conclusion of the contract. In the judgment 2C_638/2020, the Federal Supreme Court affirmed a psychological connection between the conduct of the group parent company (or the persons acting on behalf of the group parent company) in the context of the contract negotiations and the decision of the shareholders to sell the securities. Consequently, the group parent company acted as an intermediary within the meaning of the StG.

The private equity company as a securities dealer

A securities dealer within the meaning of the StG is, among others, a person whose activity consists exclusively or to a substantial extent in acting, in the capacity of an asset manager or investment advisor, as intermediary in the purchase and sale of taxable securities.

In the case of private equity companies, intermediation of taxable securities may occur both in the fund subscription process and in the fund's securities transactions, depending on how the company is involved in these processes.

An intermediation under the transfer stamp tax law is typically given if the domestic company:

- makes the decision to subscribe to the fund on behalf of the investors (e.g., in the context of a discretionary asset management mandate); or
- plays a significant role in the negotiations with the investors and decisively influences them to subscribe to the fund, or
- acts as an investment manager and makes investment decisions for the funds.

According to the practice of the SFTA, the provision of investment advisory services to a foreign counterparty in the sense of merely issuing a buy or sell recommendation for a security does not qualify as intermediation for transfer stamp tax purposes as long as the formal decision is made by the foreign counterparty.

As soon as an intermediary activity is carried out on a commercial basis, the domestic private equity company qualifies as a securities dealer for transfer stamp tax purposes. In particular, it acts commercially if it intermediates securities transactions with the intention of obtaining a permanent source of income.

Due to the different business models in the private equity sector, the securities dealer status for each company has to be assessed individually based on the respective activities performed in Switzerland or Liechtenstein. Companies that act as investment managers for their funds and make investment decisions should normally qualify as securities dealers, whereas companies that only perform an investment advisory function in Switzerland or Liechtenstein may not meet the requirements.

Conclusion

Due to the latest court practice on the concept of intermediary, it is recommended that domestic private equity companies analyse their activities in more detail from the perspective of the transfer stamp tax.

If the activities performed qualify the company as a securities dealer within the meaning of the StG, it must immediately register with the SFTA and fulfil the associated obligations such as the declaration and settlement of the transfer stamp tax.



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