CORPORATE
M&A

Courts offer end to uncertainty over Swiss STT in M&A deals

Christoph Suter and Alice Johnson of Bär & Karrer discuss two recent decisions that clarify the definition of 'intermediary' for Swiss securities transfer tax purposes and address whether an M&A advisor qualifies as a securities dealer

Swiss securities transfer tax (STT) remains a recurring theme in Swiss M&A transactions. The tax – levied at a rate of 0.15% to 0.3% if a so-called Swiss 'securities dealer' is involved in the transaction as a party or intermediary – can substantially add to the cost of the transaction, in particular if the deal value is important.

While the notion of 'party' to a transaction does not generally leave room for interpretation, it is less obvious what the term 'intermediation' or 'intermediary' is supposed to mean, since neither the law nor the relevant administrative circular provide a definition.

Two recent court cases have dealt with the concept of intermediation and provided clearer contours of this notion in the context of STT.

Swiss parent companies as intermediaries

The involvement of a Swiss parent company – which meets the criteria as a 'securities dealer' if it has shareholdings of more than CHF 10 million on its balance sheet – in negotiations leading to the purchase or sale of a target company by another group company is often regarded as intermediation, leading to a STT charge on the purchase or sales price which otherwise may not have been due.

Given the absence of a clear-cut definition of the term 'intermediary' in the relevant tax laws, the criteria for such intermediation by the parent company remained vague.

Tax administration practice considered that, among other things, indications of an intermediation by the parent company could include that the name of the parent company regularly appears in documents and negotiations, that the management of the parent company and the acquisition company are identical or that the parent company provides the funding of the acquisition.

In a decision in February 2021, the Supreme Court has ruled that the term intermediation should be interpreted

Christoph Suter
Partner, Bär & Karrer
T: +41 58 261 57 25
E: christoph.suter@baerkarrer.ch

Christoph Suter heads Bär & Karrer's tax team in Geneva. He advises corporate and private clients in complex national and international tax matters.

Christoph has broad experience in corporate taxation, in particular M&A, reorganisations, corporate finance, national and international tax planning as well as tax litigation work. He is also an expert in tax topics of the banking and asset management industry, such as the taxation of financial instruments.

Christoph is a frequent lecturer at national and international tax conferences and publishes articles on relevant taxation topics.

Alice Johnson
Associate, Bär & Karrer
T: +41 58 261 57 36
E: alice.johnson@baerkarrer.ch

Alice Johnson is an associate at Bär & Karrer.

Alice's practice focuses on all aspects of national and international tax law.

Alice has a master's degree in international business law from the Université Paris I Panthéon-Sorbonne and a master's degree in international tax law from the Université Paris II Panthéon-Assas and HEC Paris.

"STT can substantially add to the cost of the transaction, in particular if the deal value is important"

by reference to Swiss private law governing brokerage contracts.

Swiss private law recognises two general categories of brokerage: referral brokerage, which is limited to the announcement of investment or contractual opportunities, and negotiation brokerage, which implies an active participation on the part of the intermediary in the conclusion of a contract.

Such an active role is characterised when a psychological connection can be established between the intermediary's behaviour and the decision of the other contracting party to enter the transaction. The Supreme Court ruled that both types of brokerage contracts may trigger STT.

On this basis, the Supreme Court held that STT will be due if the Swiss parent company of either the buyer or the seller in an M&A transaction, qualifying as a securities dealer due to holding significant shareholdings, is actively involved in the transaction via its officers or internal deal team and will therefore be viewed as a negotiation broker to the transaction. In that respect, neither the existence of a formal contractual relationship between the involved parties, nor the payment of a brokerage fee was deemed relevant.

This decision marks a departure from the Swiss Federal Tax Administration's approach that partly relied on economic principles (e.g. the funding of the purchase price by the parent company) to establish an intermediation relationship. Whether a party has an underlying economic interest in the transaction's outcome thus appears irrelevant, as the outlines of intermediation are now clearly defined in relation to civil law.

The decision may therefore narrow down the number of cases in which a parent company qualifies as an intermediary in an M&A transaction. However, in view of this case law, where there is a significant involvement of the Swiss parent company in the deal, STT may remain an issue – and an additional cost.

The impact of this decision may however remain limited given a change to the law adopted by the Swiss parliament in December 2021. This change provides that the purchase and sale, as well as the intermediation in the purchase and sale, of Swiss or foreign shares representing at least 10% of a company's share capital by a Swiss company qualifying as securities dealer (i.e. a company whose assets consist of more than CHF 10 million of taxable instruments) are exempt from STT, provided that such shares constitute a fixed asset.

This legislative change will likely be put to referendum in the second half of 2022 and will become effective only if approved by Swiss voters.

Involvement of M&A advisory firms triggering STT

In a second decision of November 2021, the Federal Administrative Court has looked at the role of a Swiss M&A advisor in respect of STT.

The court held that the activity of the M&A advisor met the legal definition of "exclusively or to a substantial extent […] acting as investment advisors or asset managers in the purchase and sale of taxable securities (intermediary)" and that it therefore qualified as a securities dealer.

"These new developments in the field of Swiss STT highlight the attention required in relation to the structure of M&A deals"

First, the court did not hesitate to find that the M&A advisor, whose activity is to guide company owners interested in selling their shares through the entire sales process and to handle the sales transaction, qualifies as an intermediary for STT purposes. To do so, the court relied on the terms of the standard contract concluded by the firm, in which it was described as acting as a broker on behalf of its client.

In that respect, the advisor was responsible for overseeing the preparation of the sales documentation, contacting and organising meetings with potential buyers and negotiating the sales contract, as the clients undertook not to hold any direct talks with prospective buyers without the advisor's consent. These elements were deemed consistent with the criteria set out by the Supreme Court in the aforementioned decision, as they indicated an active participation on the part of the advisor, as a professional negotiation broker, to influence the potential buyers' will to enter the contract.

The claimant contested the fact that it had acted "as an investment advisor", which is one of the legal categories to qualify as securities dealer, insofar as its activity did not consist in making recommendations regarding specific investments (similarly to services usually rendered by banks or wealth managers) but only in accompanying customers in the sale of their investments, as a one-off process, thus implementing a decision already taken at company level.

The court ruled however that inasmuch as the firm provided tailored advice in respect of selling shares, the aforementioned activities fulfilled the criteria of an 'investment advisor' and thus a securities dealer.

While the M&A advisory teams of banks or asset managers have traditionally been 'securities dealers' for STT, this was generally not the case for independent M&A advisors. The broad interpretation of the notion of 'investment advisor' may bring them into the scope of STT, triggering new reporting obligations and resulting in an additional STT cost on transactions they are involved in.

Key takeaways

In conclusion, these new developments in the field of Swiss STT highlight the attention required in relation to the structure of M&A deals, ranging from the localisation of deal teams to the involvement of independent advisors.

This is particularly relevant considering that proposals to abolish STT have been stalled and it is uncertain when a new initiative for its abolition will see the light.