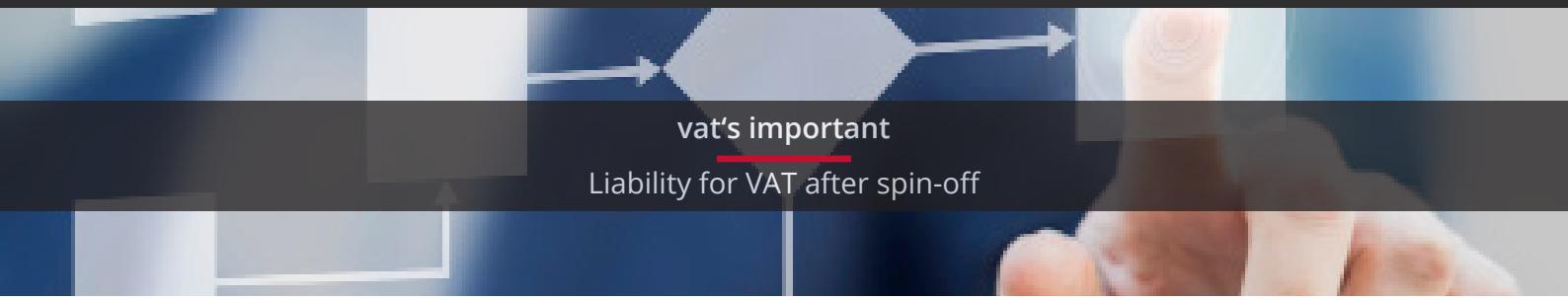

vat's important

Liability for VAT after spin-off

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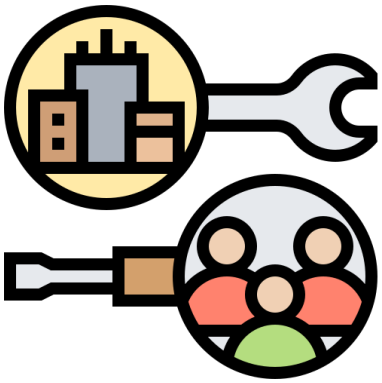
It happens again and again that companies want to outsource a branch of business or transfer it to a new company to be founded (so-called spin-off). This is often done retroactively, e.g. to the beginning of the current year. In this case, which company owes the VAT amounts attributable to the spin-off branch of business?

The currently valid Swiss VAT Law (VATL) states in Art. 15 para. 1 lit. d that, in the event of the transfer of a business, the previous tax debtor is jointly and severally liable with the taxable person for the tax claim arising prior to the transfer for a period of three years from the notification or announcement of the transfer. Furthermore, Art. 16 (2) VATL regulates tax succession as follows: „A person who takes over a business acquires the tax rights and obligations of his legal predecessor." In this regard, the Federal Supreme Court held in its decision 2C_923/2018 of 21 February 2020 that even the transfer of a partial asset leads to a (partial) tax succession.

What is a business transfer?

In contrary to the previous provisions, the currently applicable Art. 16 (2) VATL no longer speaks of „taking over assets and liabilities" but of „taking over a business". Whether a business is being taken over must be assessed on a case-by-case basis. A merger under the Merger Act is in any case deemed to be an acquisition of a company for VAT purposes. The type of takeover is not relevant; such a takeover can be based on a singular succession or by merger, demerger or transfer of assets under the Merger Act. By contrast, transformations within the meaning of the Merger Act do not constitute a takeover of a company, as in this case no transfer of rights takes place. Since merger law also permits the transfer of assets and liabilities of a sub-fund, partial tax succession is also possible under new law.



It should be noted that the term „business" in this context should not be confused with „business" as defined in Art. 10 (1) and 1bis VATL, which deals with the subjective obligation to pay VAT. The terms in the two legal provisions of Art. 10 and 16 VATL are not to be interpreted identically.

Recent ruling of the Federal Court

In August 2020, the Federal Supreme Court had to decide in its ruling 2C_255/2020 whether, following a retroactive spin-off as of 1 January 2012, the supplies and services rendered in the second quarter of 2012 were to be attributed to the newly formed company or the transferring company as the VAT service provider. The question was also raised as to which of the two companies would therefore have to pay VAT on the turnover invoiced in April, May and June 2012. In the second quarter of 2012, the transferring company had issued all invoices in its name and provided the related services.

The Federal Supreme Court stated that from a VAT point of view, the external appearance was decisive for the allocation of supplies and services. The VATL expressly states that a supply/service is deemed to have been provided by the person who acts as the external provider of the supply/service. According to the Swiss Civil Code, legal persons only acquire the right of personality through registration in the Commercial Register. In this sense, the Merger Act stipulates that the demerger becomes legally effective upon entry in the commercial register.

In the present case, the spin-off and the formation of the new company was entered in the Commercial Register on 5 July 2012. In the external relationship, the new company was in principle only able to participate in legal transactions with legal effect from 5 July 2012. In contrary to direct tax law, is not commonly used to VAT law and retroactive effect is not taken into account for VAT purposes.

According to the Federal Supreme Court, there is no doubt that the transferring company was the only one to have appeared externally during the second quarter of 2012. In the opinion of the Federal Supreme Court, the transferring company is therefore deemed to be the service provider that provided the relevant services. Thus, the Federal Supreme Court concludes that the transferring company itself is liable for the VAT to be paid on sales in April, May and June 2012. It is not liable (jointly and severally) for another person or the newly established company.

As your VAT and customs team, we will be happy to assist you with the VAT risk assessment for business transfers and are also available to answer any other questions you may have.

With best regards from your VAT team

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