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# Concept of "participation" within the meaning of VAT law: Federal Administrative Court creates clarity

christoph.drexl@primetax.ch
zsuzsanna.serra@primetax.ch

Unlike in other European countries, in Switzerland the acquisition, holding and sale of participations is considered a business activity that generally entitles the holder to deduct input tax. The law contains a definition of what constitutes a participation in this sense (hereinafter "qualified participation") in Art. 29 Para. 3 of the VAT Act: Participations are shares in the capital of other companies that are held with the intention of permanent investment and which convey a significant influence. Shares of at least 10% of the capital are deemed to be a participation. However, it is unclear how the 10% limit in particular is to be interpreted: does a legal presumption apply above 10%? Or is a participation excluded if less than 10% is held? The Federal Administrative Court has taken a position on this (judgement of 17 July 2024, A-903/2023).

## FACTS OF THE CASE

X AG holds a 9% stake in A AG. It has granted a loan to B AG. It requested confirmation from the FTA that its 9% shareholding in A AG and the loan to B AG are deemed to be qualifying holdings. X AG took the view that the provision in the second sentence of the legal definition was a "safe haven rule" in which the existence of a participation was automatically assumed. Below this threshold, the existence of a qualifying holding must be examined on a case-by-case basis. The FTA pointed out that shareholdings of less than 10 % of the capital are not deemed to be a qualified participation and that the granting of a loan does not constitute a participation in this sense either. X AG could therefore not claim an input tax deduction in this context.

## DECISION OF THE FEDERAL ADMINISTRATIVE COURT

In the present case, the question was whether the complainant was entitled to deduct the input tax it had claimed. In order to be able to assess this, it was first necessary to examine whether the appellant is liable for VAT, i.e. whether it holds participations within the meaning of Art. 29 para. 3 of the VAT Act.

The Federal Administrative Court comes to the conclusion that the limit of 10% set out in Art. 29 para. 3 VAT is not an absolute value. The interpretation rather points to a "safe haven rule", according to which a participation of at least 10% is in any case considered a participation within the meaning of this article. For shares of less than 10%, however, the taxpayer can and must provide evidence that a qualified participation nevertheless exists, which in particular "conveys significant influence". The court does not conclusively comment on whether, even in the case of

shareholdings of at least 10%, it is open to the tax authorities to prove that the shareholding is not held for business reasons but merely as a financial investment.

The question of how to successfully prove significant influence also remains unanswered. In the present case, the appellant was unable to provide proof of significant influence in the view of the court, which therefore rejected the appellant's view that it was entrepreneurial in this respect within the meaning of Art. 10 para. 1$^{ter}$ VAT Act.

The court also rejected the appellant's view that a loan could constitute a qualified participation. Shares in the capital of other companies are consistently understood as "participations". Receivables do not constitute participations.

**CONCLUSION**

It is positive that even in the case of shareholdings of less than 10%, the taxable person is free to prove that they have a qualifying holding within the meaning of Art. 10 para. 1$^{ter}$ MWSTG. It remains unclear how this proof can be provided. It should be viewed critically that the court leaves open whether the FTA reserves the right to negate a qualified participation even in the case of participations of more than 10%.

In the context of this judgement, it is also important to always bear in mind that VAT inspections must not tempt taxable persons to lull themselves into a false sense of security. A failure to raise an objection during a VAT inspection does not provide any protection of confidence that the same facts will not be objected to by the FTA in the future. The situation is similar with rulings, in which the FTA only ever comments on the facts of the case described and within the framework of the questions raised. Incomplete or incorrect facts do not give rise to any protection of legitimate expectations and the protection of legitimate expectations cannot go beyond the questioned treatment.