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# Limits to capital gains exemption – Transposition

**Introduction**

Continuing our series on the reclassification of exempt capital gains as taxable income (see TaxPage issues of February and March 2025), we now discuss a new exception: income realised as a result of transposition.

**The issue**

Taxation based on transposition aims to prevent taxpayers from converting taxable assets into non-taxable ones through asset restructuring. When a taxpayer transfers or sells a shareholding from their private assets to a company they control, for more than its nominal value, it results in taxable income. The justification for such taxation is as follows: before carrying out this operation, the taxpayer held participations on which there was a latent taxation, i.e. open and/or latent reserves, which would be taxed when they were distributed or when the company was liquidated. By transferring or contributing these holdings to a company that they control, they receive in return a value that is not taxed upon its repayment, either in the form of share capital or a receivable against the company. In this way, they have 'transposed' a taxable value into a tax-exempt value. Ultimately, the taxpayer has not really sold holdings but has carried out a restructuring of assets by eliminating the latent tax liability attached thereto.

**Conditions**

Under Art. 20a para. 1 let. b of the Federal direct tax Act, three conditions must be met for a transaction to qualify as a taxable transfer:

1. First, the shares must be transferred from the taxpayer's private assets to the commercial assets of a company.
2. The transferor (by sale or contribution) must hold at least a 50% stake in the share-capital after the transfer, bearing in mind that this control can be exercised by several persons carrying out the operation collectively.
3. The compensation received by the transferor must exceed the nominal value of the transferred stake.

Until 31 December 2019, an additional condition required the transferred shareholding to represent at least 5% of the company's capital. This threshold was abolished on 1 January 2020, allowing even smaller shareholdings to qualify.

The Federal Court recently confirmed yet again that the conditions listed above are objective and that it is not possible to avoid taxation based on transposition by demonstrating that the operation was carried out for reasons other than tax.

**Consequences**

If these conditions are met, the difference between the compensation received by the transferor and the nominal value of the transferred shareholding is a taxable income for the transferor and is taxed immediately.

**Possible solutions**

To ensure that no taxation takes place, it is possible either to transfer or contribute the holding at its nominal value, or to record the difference in the 'other reserves' of the acquiring company's books. This ensures that the latent tax liability remains.

**Conclusion**

Taxation due to transposition thus depends on the way in which the contribution or transfer is accounted for in the acquiring company's books. Nevertheless, since the threshold of 5% of the shares of the transferred company was abolished in 2020, the consequences of a transposition may apply in many cases. Ultimately, as with any restructuring operation, it is wise to seek professional advice. This is all the more important in the case of transposition because the tax liability can be substantial even though the taxpayer does not necessarily receive any liquid assets as part of the transaction in question and may therefore find it difficult to pay the tax bill.

Please do not hesitate to contact us if you have any questions.

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