The seller's tax

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The founder who sells shares in a Swiss AG or GmbH held as private wealth realises a tax-free private capital gain, subject to two traps that Swiss practice has refined for decades and that apply with full force to crypto businesses.[1] The first is the indirect partial liquidation. It applies if the buyer is a company or a person holding the shares as business assets and, within five years of the sale, distributes non-business-related reserves that existed at the time of sale with the seller's participation. The seller's gain is then recharacterised as taxable investment income to that extent.[2] A crypto company that holds a large token treasury in excess of its operating needs is the paradigm case of distributable substance. The seller should either distribute the excess before the sale, which is taxable to the seller as a dividend but at the partially relieved rate, or obtain a covenant from the buyer against distributions and a ruling from the cantonal tax administration. The second is the transposition, which recharacterises the gain where the seller transfers the shares to a company the seller controls.[3] Neither trap applies to a founder taxed on the lump-sum basis described in Chapter I, for whom the sale is simply outside the computation.

The Singapore founder who sells shares in a Pte. Ltd. held as an investment realises a capital gain that is untaxed. The buyer pays stamp duty of 0.2 per cent on the higher of the consideration and the net asset value of the shares. The seller's only

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exposure is the question whether the founder was trading in companies, which for a founder who built and sold one business does not arise.[4] The s. 10L rule on foreign-sourced disposal gains applies to entities, so a founder who sells personally is outside it. A founder who holds the Singapore company through a Swiss holding company obtains the Swiss participation relief on the gain after a one-year holding period, which reduces the Swiss profit tax on the gain to a fraction of the ordinary rate.[5]

An earn-out paid in the buyer's tokens adds a layer. For a Swiss private seller the earn-out is part of the tax-free capital gain if it is consideration for the shares. It is employment income if it is in substance a retention payment for the founder's continued services. The Zug tax administration reads earn-outs that are conditional on the founder's employment as the latter.[6] For a Singapore seller the same distinction applies and IRAS reaches the same answer. The structuring consequence is that the earn-out should be tied to the business's performance and never to the founder's presence, if the capital treatment is to hold.

Notes

1. DFTA, SR 642.11, Art. 16 para. 3 (tax-free private capital gains). Part G, Chapter II. ↩
2. DFTA, SR 642.11, Art. 20a para. 1 lit. a (indirect partial liquidation: sale of a participation of at least 20 per cent from private to business assets, followed within five years by a distribution of non-business-related substance existing at the time of sale, with the seller's cooperation); FTA Circular No. 14 of 6 November 2007. Part G, Chapter IV. ↩
3. DFTA, SR 642.11, Art. 20a para. 1 lit. b (transposition). ↩
4. Stamp Duties Act 1929 (2020 Rev. Ed.), First Schedule, Article 3(c) (duty on transfer of shares at 0.2 per cent of the consideration or value, whichever is higher). Part M, Chapter II. ↩
5. DFTA, SR 642.11, Art. 70 para. 4 (participation relief on capital gains from participations of at least 10 per cent held for at least one year). Part G, Chapter IX. ↩

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6. FTA Circular No. 37 of 30 October 2020, section on earn-outs and retention payments; BGer 2C_618/2014 of 3 April 2015 (characterisation of payments conditional on continued employment as employment income). Part G, Chapter IV. ↩

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