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## Presumption of *animus donandi* in transactions between related parties

### Introduction

When shareholdings are transferred between related parties, especially within a family, the tax authorities closely review whether the agreed price reflects market value or instead confers a benefit that may qualify as a mixed gift. If the price is below market value, the difference may be treated as a gift. In a recent decision, the Federal Supreme Court examined a sale of shares by a son to his father at a price well below market value, which the cantonal tax authority had treated as a mixed gift (ATF 9C\_118/2025).

### Concept of gift in Swiss tax law

According to settled case law, the Federal Supreme Court finds that a gift presupposes the fulfilment of three conditions: (1) an inter vivos allocation (2) free of charge and (3) with the intention of making a gift (*animus donandi*). On this last criterion, the Federal Supreme Court held that it is not arbitrary to presume the existence of the *animus donandi* between close persons, when the other conditions are met.

### Case in point

In the above-mentioned judgment, a father owned 60% of the shares of a company founded in 2007, while each of his two sons owned 20%. On 1 July 2008, the three shareholders entered into an agreement providing for the capital to remain entirely in the family and granting the remaining shareholders a right of purchase in the event of the death or departure of one of them, exercisable at the par value of the shares. On 1 August 2017, one of the sons sold his twenty shares, with a par value of CHF 1,000 each, to his father for CHF 20,000. The cantonal tax authority considered that this sale constituted a mixed gift, up to the difference between the par value and the tax value of the shares, i.e. CHF 6,862,000, and also imposed a fine for tax evasion for failing to declare it. Together with the taxes and late-payment interest, the total bill amounted to CHF 2,058,600. The Cantonal Court confirmed this assessment, considering that the right of purchase as agreed clearly favoured the shareholders and that neither the shareholders' agreement nor the sale contract could be assimilated to agreements concluded between third parties.

The Federal Supreme Court rejected this analysis. It found that the existence of an *animus donandi* must be assessed at the time when the acts were concluded and that there is no indication that, when the shareholders' agreement was signed, one of the shareholders intended to favour another in the event of death or exit

from the company. According to the agreed text, all shareholders — and not just the father — could exercise the right of purchase under the same conditions. The sale of shares at their par value thus resulted from a general contractual clause applicable to each shareholder. The Federal Supreme Court also noted that the reasons for the son's withdrawal in 2017 were irrelevant, since any exit entailed the sale of the shares at par value if the right of purchase was exercised. It concludes that, in view of the circumstances of the particular case, namely the obligation to sell the shares at a price fixed in advance in 2008, due to a withdrawal from the company in 2017, and the uncertain nature of the clause, the presumption of *animus donandi* between relatives does not apply in the present case and that the tax authority in addition did not establish the existence of a will to give. Therefore, the classification of a mixed gift has been rejected.

### Consequence

In view of the Federal Supreme Court's ruling that there was no *animus donandi*, the cantonal tax authority was not entitled to tax the gift and was therefore unable to impose a fine for tax evasion.

### Conclusion

This decision provides a useful clarification: the presumption of *animus donandi* does not automatically apply to all transactions between related parties. However, caution is still advised in such legal transactions. For this reason, it is advisable to obtain a tax ruling before entering such a transaction.

Do not hesitate to contact us if you have any questions.

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