



SWITZERLAND



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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

Swiss tax authorities scrutinize more closely transactions in view of anti-avoidance and anti-abuse rules and in particular the achievement of a tax-free capital gain in a share deal if the seller is an individual and holds his/her shares as part of his/her private wealth.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVE?

Switzerland implements the minimal standards according to the OECD BEPS Project (i.e. nexus approach for IP boxes, abolishment of harmful tax practice, exchange of information on tax rulings, anti-abuse provisions in double taxation agreements and Country-by-Country-Report) as well as optional recommendations if they are implemented by a large number of countries.

Switzerland introduced into domestic legislation the mandatory minimum standard for a spontaneous exchange of information on tax rulings as per 1 January 2017. The implementation has taken place by way of a revision of the Federal Act on International Administrative Assistance in Tax Matters, together with a revision of the Federal Ordinance on International Administrative Assistance in Tax Matters. The information exchange began a year later on 1 January 2018 and covers tax rulings issued after 1 January 2010, and still be applicable on 1 January 2018 or afterwards.

The legal framework for the implementation of the exchange of the Country-by-Country Report, including the Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and the respective Federal Act on the International Automatic Exchange of Country-by-Country Reports of Multinationals, entered into force on 1 December 2017. In Switzerland, multinationals with consolidated group revenues of more than CHF 900 million are required to file a CbC report with respect to the fiscal year beginning on or after 1 January 2018 within 12 months after fiscal year end. The first exchange of CbC reports between Switzerland and its partner states will take place during the first half of 2020.

Regarding the minimal standard for Treaty Abuse according to BEPS Action 6, Switzerland supports the principal purposes test ("PPT" rule). Double tax treaties being recently signed by Switzerland already includes the PPT rule in accordance with BEPS Action 6. In the future, Switzerland will implement the new anti-abuse rules either by the new multilateral instrument according to BEPS Action 15 or by a revision of the existing double tax treaties.

Switzerland signed the multilateral instrument according to BEPS Action 15 (BEPS convention) on 7 June 2017. After the consultation taking place until April 2018, the Swiss Federal Council will submit the BEPS convention for approval to the Parliament. With the BEPS convention, Switzerland will implement the BEPS minimum standards only. This includes the preamble of the double taxation agreement in terms of purpose, the application of the PPT rule and the dispute settlement provisions.



GENERAL

3. WHAT ARE THE MAIN DIFFERENCES AMONG ACQUISITIONS MADE THROUGH A SHARE DEAL VERSUS AN ASSET DEAL IN YOUR COUNTRY?

A) Share deal

Buy-Side

The buyer can generally use the target company's carried-forward tax losses in Switzerland, even after the transfer of the target company's shares. The buyer may not be able to offset financing costs against future profits of the target company. No tax consolidation is possible in Switzerland.

Sell-Side

Business assets: Corporation tax on the sale may be reduced under Switzerland's participation exemption. Losses carried forward in the target company cannot be offset against a capital gain from the sale of the shares.

Private property: For individuals holding shares as part of their private wealth, the gain is in general considered as tax free capital gain. In specific cases the tax authorities re-qualify a capital gain as taxable income:

- ❖ Securities dealer: If the seller qualifies as a professional securities dealer or - according to the Swiss Supreme Court - he/she regularly and systematically deals with securities - the capital gain is subject to Swiss income tax and social security contributions
- ❖ Transformations: The individual sells his/her shares to a company he/she controls
- ❖ Indirect partial liquidation: The purchase price is financed with the assets of the acquired company. An indirect partial liquidation will be assumed if shares representing at least 20% of the share capital of a company are sold from the private assets of an individual investor to the business assets of a corporate or an individual buyer, and the target company distributes current assets not needed for business operations out of distributable profits or reserves within a period of 5 years after the sale of shares with the cooperation of the seller

The transfer of shares is not subject to Swiss VAT.

B) Asset deal

Buy-Side

The buyer may be able to amortise the acquired assets tax effectively, including goodwill. The buyer may be able to offset financing costs against future profits of the transferred business. However, the buyer cannot use any losses carried forward by the seller.

Sell-Side

Corporation taxes are generally payable on capital gains from the sale of assets. Losses carried forward by the seller can be set off against a capital gain from the sale of the assets. A potential loss from the sale of assets can be offset against profits by the seller.

From a VAT perspective the transfer of assets is basically subject to VAT. Depending on the transaction, the VAT due may be notified to the VAT authorities (i.e. no cash flow).



BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

There are no strategies to step up the value of assets in share deals in Switzerland. A step up in the value of tangible and intangible assets leads to a taxable profit.

5. WHAT ARE THE PARTICULAR RULES OF AMORTIZATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

In a share deal, the tax base for the shares in the purchaser's books is equal to the purchase price. Except in exceptional cases (e.g. if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component on shares for tax purposes.

As a contrast, in an asset deal the goodwill may be recorded separately and written off against taxable income. In an asset deal goodwill may generally be depreciated over a period of 5 years or longer.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Under the federal thin capitalisation guidelines, the minimum capitalisation is calculated based on the maximum indebtedness of all of the assets. For each type of asset only a specified percentage may be financed with debt from related parties (directly or indirectly).

According to the practice of the Swiss Federal Tax Administration, the maximum percentage of debt authorised for each type of asset is as follows:

- ❖ Liquidity - 100%
- ❖ Receivables on supplies and services - 85%
- ❖ Other receivables - 85%
- ❖ Stock - 85%
- ❖ Other circulating assets - 85%
- ❖ Swiss bonds and foreign bonds in Swiss francs (CHF) - 90%
- ❖ Foreign bonds in foreign currency - 80%
- ❖ Swiss and foreign quoted shares - 60%
- ❖ Other shares and investments in limited liability companies - 50%
- ❖ Participations - 70%
- ❖ Loans - 85%
- ❖ Installations, machines, tools, etc. - 50%
- ❖ Operating real estate - 70%
- ❖ Villas, parts of real estate, vacation houses and building land - 70%
- ❖ Other real estate - 80%
- ❖ Cost of foundation, increase of capital and organisation - 0%
- ❖ Other tangible assets - 70%



The required equity is calculated on the basis of the fair market value of all assets as stated in the balance sheet at the end of the business year. The federal tax authorities publish maximum interest rates on borrowings from related parties annually. For the fiscal year 2018, the maximum interest on loans between related parties denominated in Swiss francs amounted to 3% for business loans up to CHF 1 million respectively 1% for business loans above CHF 1 million. For loans denominated in other currencies the maximum allowed interest rates for the most important currencies are also published by the federal tax authorities: for the fiscal year 2018, the maximal interest rates for loans denominated in US dollars amounted to 3.0% and for loans denominated in Euros amounted to 0.75%. However different interest rates are applicable if the taxpayer can prove that the financing is at arm's length. In this case a tax ruling is recommended.

Should the interest rates not meet the above requirements, the exceeding interest is qualified as deemed dividend distribution and is not deductible for tax reasons. Furthermore, Swiss withholding tax is levied on the deemed dividend distribution.

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?

If a Swiss leveraged acquisition vehicle (SPV) purchases the shares of the Swiss target company and the SPV and the target company are then merged, the SPV's debts will be taken up into the operating company. However, the Swiss tax authorities will likely qualify this as an abuse, with the result that the interest paid on debt is not tax-deductible. If the SPV is not merged with the target company, dividends paid out by the target company may serve to finance the acquisition debt (participation exemption could be applied on the dividend distributed). In an acquisition by an operational company followed by a merger of the operational company with the target, Swiss tax authorities in general do not treat such debt push-down as misuse.

However, there is a risk that tax authorities could qualify such a merger in the case where the shares have been purchased from a private individual seller as an indirect partial liquidation, triggering unfavourable tax effects for the seller.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Under the current Swiss tax law, there are no tax incentives for equity financing. In the ongoing parliamentary discussions on the introduction of a tax bill on new corporate taxation ("Tax Proposal 2017") it is evaluated whether a notional interest deduction on surplus equity capital will be introduced as a voluntary measure at cantonal / communal level.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

The target companies carried-forward tax losses can generally be used within the maximum offset period of 7 years, even after the transfer of the target companies shares. The transfer of ownership in the target company does not generally impact the carried-forward tax losses. In the case of an acquisition of a shell company (a mostly liquidated company holding cash) the tax losses may not be used.

In an asset deal the target company's losses are not available.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

For Swiss indirect taxes (e.g. Swiss withholding tax, transfer tax, VAT), the statute of limitation is in general 5 years (in the case of tax crimes: 7 years). For Swiss income tax, the Swiss tax authorities issue final tax assessments for each tax year after filing the tax return on a regular basis. If a tax year is finally assessed, in principle no tax audit is possible for this tax year, and the final tax assessment cannot in principle be changed by the Swiss tax authorities any more unless in case of tax evasion or tax fraud.



11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

Transfer stamp duty (or security transfer tax) is due if taxable securities are transferred for consideration and if a securities dealer, as defined in the Swiss Federal Stamp Tax Act, is involved, either as a party or as an intermediary. Certain types of transactions or parties are exempt.

Security dealers are banks, actual dealers in securities and, among others, Swiss companies that hold securities with a book value of more than CHF 10 million according to their latest balance sheet. A new company should not be liable for stamp duty until 6 months after the first balance sheet showing taxable securities of at least CHF 10 million.

Taxable securities are in particular shares, bonds and participations in mutual funds. The rate of transfer stamp duty is 0.15% for Swiss securities levied on the consideration. If foreign securities are transferred, the transfer stamp duty is 0.3%. Transfer stamp duty is payable by the securities dealer but usually paid by the parties to the transaction.

No VAT arises on the transfer of shares. VAT incurred on transaction costs in connection with the acquisition or sale of a share quota of more than 10% is basically deductible as input tax.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Acquisitions costs are in general tax deductible for the buyer. Such costs are tax deductible for the target company only, if the corresponding costs qualify as services providing added value to the target company, and therefore, may be considered as commercially justified.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

Basically, VAT incurred on acquisition costs is deductible as input VAT. Restrictions exist for the acquisition of shares below a 10% quota or for the acquisition of assets that are used for VAT exempt activities. In all other cases, the input tax deduction can be claimed.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY FOREIGN COMPANIES?

Dividends from a Swiss target company are subject to Swiss withholding tax of 35%. Switzerland has concluded tax treaties with numerous countries which provide a full or at least a partial reduction of the withholding tax on dividends. In addition, for EU countries, Article 9 of the Agreement between the European Union and the Swiss Confederation regarding the automatic exchange of information on financial accounts provides for a 0% rate on dividend payments from a Swiss participation to an EU parent company, if the participation amounts to at least 25% and a holding period of at least 2 years is met.

15. CAN THE GROUP REORGANIZE AFTER THE ACQUISITION IN A TAX NEUTRAL ENVIRONMENT THROUGH MERGERS OR A TAX GROUPING?

A company reorganisation can qualify as a tax neutral reorganisation. Reorganisations mainly include:

Legal mergers: A legal merger qualifies as tax-neutral reorganisation if the assets and liabilities are transferred at book value and the entity continues to be liable to tax in Switzerland. The tax neutrality covers corporation taxes, real estate gains taxes, transfer stamp duty, issue stamp duty and dividend withholding tax. The merger is basically also tax neutral for the shareholders. However, for shareholders holding the shares of the merged entity as their private assets, any cash consideration and increase in nominal value is subject to dividend withholding tax and subject to income tax.



Spin-offs: A spin-off is tax neutral if the demerging company carries on at least 2 businesses, one of which is transferred to another company, the book values remain unchanged and the businesses concerned remain subject to taxation in Switzerland.

There is no disposal restriction period imposed on a tax neutral spin-off. Spin-offs of holding, finance, licensing and real estate companies are possible, but these types of companies must meet certain requirements regarding their business activities and employees to qualify as a business.

Share for share exchanges: A share for share exchange is tax neutral if a company exchanges its own shares for shares in a different company and immediately after the transaction controls at least 50% of the voting rights in this company. The use of consideration other than its shares does not prevent the transaction from being tax neutral, provided the consideration does not exceed 50% of the value of the total consideration, including the shares.

Hide-downs: A company can transfer a trade of business or a fixed asset tax neutrally at book value to a newly established or an existing subsidiary in Switzerland. A disposal restriction period of 5 years applies. A company can transfer participations of at least 20%, tax neutrally at book value, to subsidiaries in Switzerland or abroad without having to observe a disposal restriction period.

Intra-group transfer of assets: A company can transfer tax neutrally at book value a participation of at least 20%, a trade or business or a fixed asset to a group company within Switzerland. Group companies are defined as companies that are ultimately controlled by the same entity with at least 50% of the voting rights. A disposal restriction period of 5 years applies both to the asset transferred and the group membership. The transfer is only tax neutral if the acquiring entity is subject to tax in Switzerland.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF TARGET COMPANIES THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

A transfer of shares of a company whose main assets are real estate may be subject to real estate capital gains tax. This is dependent on the canton where the real estate property is located. Depending on the cantonal laws at the location of the property, the transfer of shares may also attract a real estate transfer tax on the property's transaction price (the tax is normally due by the buyer). In general, an economic transfer of real estate property in a sale of shares is deemed taxable if all of the following conditions are met:

- ❖ The owner holds real estate property in Switzerland indirectly through a corporation
- ❖ The owner transfers major parts of the shares in the real estate corporation (i.e., generally more than 50%) to a new shareholder
- ❖ The new shareholder obtains by the acquisition of the shares the economic power of control on the real estate

In international transactions some of the double tax treaties provide for treaty protection for real estate capital gains in share deals with a Swiss real estate corporation.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

Fiscal unity / tax grouping is not available in Switzerland.



18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

With the bill for the new corporate taxation (“Tax Proposal 2017”) a mandatory patent box shall be introduced at cantonal / communal level. Under this system, net profits derived from patents and comparable rights will be taxed at a discount of maximum 90%. The term “comparable rights” encompasses supplementary protection certificates, topographies, plant varieties, data protection in accordance with the Therapeutic Products Act, and the corresponding foreign rights. Not included in the patent box are innovations that are not protected by a patent. This measure does not apply to the direct federal tax.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

A gain due to a transfer of intangibles leads to corporate taxation. Should the remuneration not be at arm's length the difference between fair market value and the remuneration paid is considered as a hidden divided distribution being subject to corporate income tax and withholding tax. Depending on the residence of the beneficiary the withholding tax can be partially or fully be reduced based on the respective double taxation agreement.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

Capital gains are in general taxed with federal income tax and cantonal or communal income tax for entities and individuals holding the assets as business assets.

Participation relief for entities applies for capital gains derived from the disposal of qualifying participations. However recaptured depreciations on a participation are not subject to participation relief. The requirement to qualify for participation relief is a participation of at least 10% and a holding period of at least 1 year.

Participation exemption does not lead to an exemption of the capital gain from the tax base but is rather a tax abatement mechanism. From the gross participation income, administration costs and financing costs need to be deducted. The percentage of the - net participation income calculated in this way to the total taxable income determines the tax abatement for the participation income.

For individuals holding their assets as part of their private wealth, capital gains are in general not taxable in consideration of certain exemptions.

For individuals holding their assets as business assets a reduction of 40% - 60% is granted on the taxable capital gain for qualifying participations (participation of at least 10% and a holding period of at least 1 year) depending on the canton involved.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

As mentioned above a sale of assets is basically taxable. Reinvestment of the consideration received in a new fixed asset is an exception to that rule. If the conditions of a reinvestment are met, the taxation is carried over until the future realisation of the new asset.

5 cumulative conditions must be fulfilled:

The replaced asset and the new asset must be fixed assets necessary to the exploitation



The reinvestment must be done within a reasonable period of time. A period of 2 years qualifies and a longer period must be objectively justified

The reinvestment must take place in Switzerland, but not necessarily in the same canton for cantonal tax purposes

The book value of the replaced asset must be kept. This ensures the tax-neutrality of the operation. If the company sells and reinvests the asset during the same tax period, a depreciation of the same amount of the undisclosed reserve must be accounted. If not, a provision of the same amount must be booked. When the new asset is acquired, the provision will be dissolved and used for depreciation. If the company reinvests only after a reasonable period, the provision is dissolved, and the amount is added to the taxable profit.

22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

In order to qualify for treaty relief on outbound dividends (reduction of the Swiss withholding tax on dividends), the Swiss Federal Tax Administration (SFTA) developed certain criteria which are to be met. For a foreign holding company, the SFTA requires that the equity capitalization of the direct foreign parent company should be at least 30% of the book value of the participations held. Furthermore, in general, the foreign parent company should hold further investments in addition to the Swiss company and have minimal physical substance at its place of residence (e.g. office, employees, board members with local residence). Ultimately, the SFTA base its judgment on the overall facts and circumstances.

23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

A company reorganisation can qualify as a tax neutral reorganization (including for Swiss income tax, VAT and transfer tax purposes). Reorganisations also include:

Legal mergers: A legal merger qualifies as tax-neutral reorganisation if the assets and liabilities are transferred at book value and the entity continues to be liable to tax in Switzerland. The tax neutrality covers corporation taxes, real estate gains taxes, transfer stamp duty, issue stamp duty and dividend withholding tax. The merger is basically also tax neutral for the shareholders. However, for shareholders holding the shares of the merged entity as their private assets, any cash consideration and increase in nominal value is subject to dividend withholding tax and subject to income tax.

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MANAGEMENT INCENTIVES

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

The principle that capital gains are being treated as tax-free is offering great planning opportunities for manager remuneration.

Such capital gains may be realized through the grant of employee shares. In a first instance any benefit upon the grant of shares (positive difference between market and acquisition price) would have to be treated as taxable income subject to income tax and social security contributions. In case the shares are subject to a restriction period, per year of restriction a discount of 6% from the spot may be claimed to define the taxable income (resulting in a maximal discount of 44.161% for a restriction period of 10 or more years). Any capital gain upon



the sale of the shares (after the restriction period - if any) would be treated as tax-free irrespective of the holding period of the shares.

This principle that capital gains are treated as tax-free may be derogated in case the shares need to be sold back to the issuing company in the end or in case they have to be sold to a professional investor who is using funds from the target company to finance the share purchase. Thus, the proper tax planning around employee shares needs to include the detailed action procedure not only upon the acquisition of the shares through the manager but also upon the sale of the equity rights unless the shares of a listed company are involved which can be sold on the stock exchange market.

Also, the tax treatment of sweet equity (i.e. disproportional compensation for certain shareholders compared to others) is still offering good planning opportunities. Most cantonal tax authorities claim in these days that any disproportional compensation of a certain group of shareholders (like the management) does result in the situation that the disproportional part of the compensation needs to be treated as taxable income. However, depending on the exact residency places of the management within Switzerland or in case it is possible to structure the sweet equity compensation with subscription rights it is still possible to argue with tax-free capital gains.

Further, for internationally mobile employees it is possible to spread the income from equity plans over the different employment jurisdictions of the plan participant. This principle does always allow some planning when the characteristics like in Switzerland for the interpretation of double taxation treaties is taken into consideration.

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