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Global Legal Group

The International Comparative Legal Guide to: Corporate Tax 2012

A practical cross-border
insight to corporate tax work

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Switzerland



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1 General: Treaties

1.1 How many income tax treaties are currently in force in Switzerland?

As of 30 June 2011 there are 96 income tax treaties in force to which Switzerland is a party. In addition, there are 10 tax treaties on inheritance tax in force, as well as 22 tax treaties on the taxation of maritime and air navigation companies. Please note that Switzerland has not concluded any tax treaty on gift tax, except an agreement with France concerning tax treatment of gifts made for non-profit making purposes. Since January 2010, treaties between Switzerland and Chile, Ghana, Qatar, Georgia and Columbia, respectively, entered into force. Switzerland has signed new agreements with Hong Kong, Malta, Tajikistan, Turkey and Uruguay, which must still be ratified by the relevant authorities before they can enter into force. Treaties with Oman, United Arab Emirates and Peru have all been initialised.

As a result of Article 15 of the agreement between Switzerland and the EU regarding savings tax, Switzerland has been granted equivalent rules to those laid down in the EU parent/subsidiary and interest/royalty directives (i.e. 0% withholding tax). These will apply in relation to all EU Member States, including Cyprus and Malta (Switzerland only recently concluded a double taxation treaty with the latter).

1.2 Do they generally follow the OECD or another model?

Most Swiss treaties follow the OECD model treaty. However, since Switzerland has traditionally had an extensive treaty network, there are some older treaties, such as, for the time being, that with the Netherlands, which do not follow the OECD model treaty. However, as a consequence of the bilateral agreements between Switzerland and the EU, most treaties with EU Member States will be re-negotiated in the near future, or have already been re-negotiated (i.e. the treaty with the Netherlands). Also, the treaty with the United States of America does not follow the OECD model exactly but rather the US model treaty. With respect to the exchange of information, Switzerland originally made a reservation with regard to Article 26 of the OECD model treaty so that the exchange of information would be granted only for the correct application of the treaty.

Since 2004, Switzerland changed its policy with respect to the exchange of information. It then accepted to exchange information in cases of tax fraud and modified its reservation to the OECD model accordingly. As from 2009, Switzerland generally concludes

treaties providing for administrative assistance in accordance with Article 26 of the OECD model treaty. Already existing treaties have been revised or are under revision in this respect. The Federal Council furthermore decided in February 2011 that requests for the exchange of information are no longer compelled to indicate the names and addresses of the taxpayer and of the holder of the information if they can be identified by other means and as long as there is no “fishing” for information.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Double taxation treaties entered into by Switzerland do not have to be incorporated into domestic law before they take effect. In accordance with the monist system, international treaties form part of federal law once they have been ratified and thus immediately become valid sources of law. Treaties in general rank before domestic law in the Swiss legal system.

1.4 Do they generally incorporate anti-treaty shopping rules (or “limitation of benefits” articles)?

Double taxation treaties entered into by Switzerland do not normally incorporate anti-treaty shopping rules or “limitation of benefits” articles. In 1962 Switzerland enacted unilateral rules to avoid treaty-shopping (“Abuse Decree”). This Abuse Decree contains a number of tests that must be fulfilled by every Swiss resident company in order to be eligible for treaty benefits. Basically, these rules are still in force. However, in 1998 facilitations were introduced for holding companies, active companies and publicly quoted companies. In August 2010, the criteria to qualify for an active company were relaxed.

The treaties with Italy, Belgium and France have incorporated anti-abuse rules which originate from the Abuse Decree. The anti-abuse rules in these treaties basically aim at excluding persons who are not fully subject to taxation in Switzerland (i.e. holding and domiciliary companies as well as individuals taxed on the basis of a so-called lump-sum arrangement) from the benefits of the respective treaties. Since the anti-abuse rules of the above treaties are considered *lex specialis* as compared to the general anti-abuse rules of the Abuse Decree, the 1998 and 2010 facilitations mentioned above do not apply in relation to Italy, Belgium and France. Furthermore, the treaty with the United States in Article 22 contains limitation of benefit clauses. Other double taxation treaties express the possibility of restricting the application of the treaty through mutual agreement procedures, such as with Belgium, the United Kingdom, Morocco and the Netherlands. The double

taxation treaty with Luxembourg stipulates that the treaty is not applicable to tax-privileged Luxembourg companies (such as a Holding 1929).

Lastly, according to the practice of the Swiss tax authorities, a foreign company claiming a refund of Swiss withholding tax must fulfil some substance requirements. This is particularly true where the treaty provides for a full refund of Swiss withholding tax, such as the treaties with the Netherlands, Luxembourg, Denmark and Sweden. When examining the situation, the Swiss tax administration looks into the real substance of the structure, and not merely its form. An “economic approach to the facts” is adopted, which gives weight to the overall business situation. The tax administration is assessing whether the structure has been arranged with the sole or the primary intention of securing full relief.

The Federal Tax Authorities have recently adapted their practice with regard to financing and IP companies of a group. An IP company will now be considered as effectively active (with sufficient substance) regardless of the number of employees. What matters more is the actual activity of the company, risks taken, functions assumed and the qualifications of the employee, in relation to the purpose of the company. Following a larger interpretation of criteria, the employee may also now formally be employed by another company of the same group.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Generally speaking, treaties rank before Swiss domestic law in the Swiss legal system. Hence, as a principle, treaties are not overridden by any domestic law, whether existing when the treaty took effect or introduced subsequently. However, there is some domestic law, such as the Abuse Decree, that has treaty-overriding power to a certain extent.

2 Transaction Taxes

2.1 Are there any documentary taxes in Switzerland?

The transfer of Swiss situated real estate is regularly subject to a cantonal or communal **Real Estate Transfer Tax**. The applicable tax rates vary from canton to canton. Normally they range between 1% and 3% of the transfer value of the real estate. However, some cantons do not levy real estate transfer taxes (e.g. the canton of Zurich).

Not only is a formal transfer of real estate subject to this tax, but also a so-called “economic change of ownership” which is the case when shares in a real estate company are transferred.

Furthermore, based on the Swiss Stamp Duties Act, the following stamp duties are levied by the Federation:

- Securities Issuance Tax;
- Securities Transfer Tax; and
- Insurance Premium Tax.

The **Securities Issuance Tax** is a stamp duty levied on the issue (= primary market) of certain Swiss securities, mainly shares, similar participating rights in corporate entities and bonds. The taxable person is the company or the person who issues the securities.

The rate is 1% of the capital contribution in the case of shares and participating rights. However, the issuance stamp tax levied on capital created or increased by a corporation or a limited liability company is exempted from the issuance stamp tax up to the amount

of CHF 1 million. Furthermore, certain transactions, especially in the case of restructuring, are exempt from tax. Rescue companies created for restructuring purposes are exempt from issuance stamp duty, as are capital increases and additional contributions, provided previously existing losses are eliminated and the aggregated payments by the shareholders or members do not exceed CHF 10 million.

The issue of bonds is taxed at 0.06% or 0.12% per year to maturity.

The **Securities Transfer Tax** is levied on the transfer of certain Swiss securities, mainly shares, similar participating rights in corporate entities, bonds and shares in investment funds, and on foreign securities with similar functions, if a Swiss stockbroker (“*Effekthändler*”) is involved. As of July 1, 2010 remote members of the Swiss stock exchange no longer qualify as Swiss stockbrokers. Stockbrokers are mainly banks and other brokers but also companies holding taxable securities with a book value of more than CHF 10 million (holding companies).

The rates are:

- 0.15% in respect of Swiss securities; and
- 0.3% in respect of foreign securities.

The **Insurance Premium Tax** is levied on certain insurance premiums. The taxable person is the Swiss insurance company or the holder of a policy taken from a foreign insurance company. The standard rate is 5% of the premium. Life insurance premiums - if taxable - are taxed at 2.5%.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Switzerland introduced Value Added Tax in 1995. The system of tax is similar to the VAT in the European Union. The standard rate currently applicable as of 2011 is 8.0%.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

The Swiss VAT system largely follows the 6th VAT Directive of the European Union (note: Switzerland is not a member of the European Union). A new VAT Act has recently been adopted in Switzerland. The principle aim of the new Act is to simplify the VAT legislation and make it more user-friendly, thus lightening the administrative burden for the taxpayers.

Taxable transactions

The following transactions are subject to VAT:

- supply of goods and services in Switzerland;
- self-supply in Switzerland; and
- import of goods or services.

Taxable persons

Taxable persons are all entrepreneurs (regardless of the legal form of the business) exercising a gainful business activity in Switzerland. However, they may request to be exempted from VAT if the turnover is less than CHF 100,000 per year. Furthermore, all persons (also private individuals) importing services for more than CHF 10,000 per year must pay VAT (to be declared in the so-called “reverse charge procedure”).

VAT rates

The rates currently applicable (as of January 2011) are:

- 8.0% standard rate;
- 2.5% reduced rate (e.g. medicine, newspapers, books and food); and

- 3.8% lodging services.

VAT Exemptions and Zero-rated Transactions

Article 21 of the VAT Act provides for certain turnovers to be exempt from VAT. The most important exceptions are: hospital and medical care; education (school, courses etc.); cultural activities (theatre, museum, libraries etc.); insurance and reinsurance transactions; granting and negotiation of credits; transactions in shares and other securities; real estate transfers; and letting and leasing of real estate (in general). Input taxes in respect of exempt transactions are not deductible. In order to avoid competitive disadvantages the enterprise may, however, opt for VAT in certain cases. On the other hand, the taxpayer is allowed to deduct input taxes in these cases.

Article 23 of the VAT Act provides for a list of “zero-rated” transactions. Here the fact that no VAT is due on the respective turnover does not affect the deduction of input taxes. Typical examples are export of goods and services outside Switzerland and supplies in the field of international air transport.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

The VAT Act in principle grants deductibility for all VAT due or paid in respect of goods and services accumulated for the purpose of entrepreneurial activities (“input taxes”). Where a taxpayer has taxable and tax-exempt turnover (see question 2.3 above), he must reduce the input tax recovery proportionally. For smaller businesses, special rules apply. They may opt for a lump-sum method, whereby reduced VAT rates for the calculation of tax due take input tax into account.

For private goods, there are possibilities to proceed with a so-called fictive input tax deduction. Self-supply is calculated as a simple correction to the input tax and is not included in the calculation of the turnover.

2.5 Are there any other transaction taxes?

No, there are no other transaction taxes.

2.6 Are there any other indirect taxes of which we should be aware?

The consumption of certain alcoholic beverages, of tobacco and of mineral oil as well as emissions of carbon dioxide and the heavy traffic, are subject to State levies. The taxes are included in the retail price and are not disclosed to the end-user.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Profit distributions made by Swiss corporations, limited liability companies, and cooperatives are subject to withholding tax. Withholding tax is levied on interest, annuities, profit sharing and all other income derived from shares, social participations in limited liability companies and cooperatives, participation certificates or profit sharing certificates, issued by a person who is domiciled in Switzerland. Distributions made by partnerships are not considered as taxable dividend distributions. Profit distributions are defined as any benefit which may be financially

quantified and which is made to the creditor or shareholder in excess of the paid-in nominal capital. They include ordinary dividend distributions, liquidation proceeds, stock dividends and constructive dividends (hidden profit distributions).

The Corporate Tax Reform II introduced a change from the so-called nominal value principle to the capital re-investment principle, which allows a tax exempt repayment of capital re-invested by shareholders. Only distributed profits remain subject to WHT. This new rule will enter into force as per January 1, 2011.

The applicable WHT rate is 35%, whether paid to a Swiss resident or to a non-resident recipient.

Swiss resident recipients can normally obtain a full refund of dividend WHT, provided they have properly reported the gross amount of the dividend received as taxable income.

Non-resident recipients may apply for a full or partial refund of dividend WHT pursuant to the provisions of the applicable treaty.

On most inter-company cross-border dividend payments, Swiss-based companies with substantial foreign shareholders may apply for a reduction of the WHT at source and the Swiss company has to pay the non-refundable WHT only. However, before the due date of dividend payment, the paying Swiss company has to file a request for the application of the reporting procedure with the FTA.

The authorisation, if applicable, is granted on the basis of form 823B or 823C. This form has to be signed by both companies and has to be stamped by the State of residence of the parent company.

In case the reporting procedure does not apply, the 35% WHT due on dividend distributions has to be withheld by the Swiss company and be paid to the FTA. The foreign (parent) company may reclaim all or part of the WHT, based on the applicable double taxation treaty.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Switzerland does not levy WHT on royalties, whether paid to a resident or a non-resident person.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Withholding Tax

Interest paid on bonds and interest paid on bank deposits is subject to Swiss WHT. The applicable rate is 35%. There is no WHT on private and commercial loans (including inter-company loans). However, the definition of a “bond” - according to Swiss WHT law - is rather large.

Tax at Source

Non-resident recipients of interest paid on a loan which is secured by mortgages on Swiss real estate are subject to federal and cantonal taxes levied at source on gross income. The federal tax is 3%; the cantonal taxes vary between 13% and 21%.

System of tax Retention on Interest Payments

According to the agreement between Switzerland and the EU on the taxation of savings income, Switzerland agreed to introduce a special withholding tax (retention tax). Interest payments from non-Swiss sources made by a Swiss paying agent to a beneficial owner who is an individual and resident of an EU Member State are subject to a retention tax in Switzerland.

Tax retention rate: Currently 20% on the gross interest amount, 35% after 2011.

The EU Member State in which the beneficial owner of the interest payment is a resident receives 75%, and Switzerland retains 25% of the retention tax.

In the case of express instructions from the beneficial owner, instead of retaining tax, the paying agent will report the interest payments to the Swiss Federal Tax Administration, who will exchange the information with the tax authorities of the EU Member State of residence.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Switzerland has introduced thin capitalisation rules. They are laid down in a circular letter issued by the FTA. Interest paid by a Swiss resident payer is normally not subject to WHT. However, to the extent that interest is paid on amounts of debt exceeding the maximum debt allowed according to the circular letter, it is re-qualified as a hidden dividend, if paid to a shareholder or a related party to the shareholder. As a consequence, such interest is not deductible for the paying company. In addition, it is subject to the 35% Swiss WHT like any other dividend.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

According to the circular letter issued by the Federal Tax Authorities for finance companies, the maximum debt allowed is 6/7 of total assets (fair market value). For other companies, the maximum debt allowed is defined for certain types of assets as follows:

- cash: 100%;
- accounts receivable: 85%;
- inventory: 85%;
- other current assets: 85%;
- bonds in CHF: 90%;
- bonds in foreign currency: 80%;
- quoted shares: 60%;
- non-quoted shares: 50%;
- investments in subsidiaries: 70%;
- loans: 85%;
- furniture and equipment: 50%;
- property, plant (commercially used): 70%;
- other real estate: 80%; and
- intellectual property rights: 70%.

3.6 Would any such "thin capitalisation" rules extend to debt advanced by a third party but guaranteed by a parent company?

As a principle, the thin capitalisation rules are only applicable to debt advanced by shareholders or related parties to the company. However, if debt is advanced by a third party, but guaranteed by the parent company, the thin capitalisation rules could nevertheless apply.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

The provisions of the Abuse Decree Circular of 1962 with regard to equity-debt ratios, as well as maximum rates allowed for the remuneration in the form of interest, are generally not applicable

since the Abuse Decree Circular of 1999.

In addition to the thin capitalisation rules mentioned above, the FTA publishes maximum rates allowing that the interest will not be considered a hidden profit distribution (deemed dividend).

Otherwise, there could be provisions in the applicable double taxation treaty regarding beneficial ownership.

3.8 Does Switzerland have transfer pricing rules?

Historically, due to the moderate taxation of corporations in Switzerland, foreign companies have been trying to shift profits into rather than out of Switzerland. Switzerland does not have explicit transfer pricing rules in its tax laws. However, one of the general principles governing Swiss corporate income tax law is the principle of "dealing at arm's length". This is particularly important as Switzerland does not know the concept of consolidated taxation for corporate income tax purposes. Another important principle of Swiss tax law is the concept of tax avoidance. Pursuant to this rule, any transaction which in itself does not make economic sense and which can only be explained with the goal of saving tax is disregarded. Transfer pricing issues are normally dealt with by the Swiss authorities by applying these principles.

In addition, in a letter issued in 1997, the Federal Tax Administration instructed the cantonal authorities that when taxing multinational enterprises, they have to take into account the OECD Transfer Pricing Guidelines. In 2004, it issued a new circular replacing the previously existing one. The 2004 circular states that the arm's length principle is also applicable when choosing the method of determination of mark ups, and that implies for financial services or management functions that the cost plus is not an appropriate method (or only in very exceptional cases).

Hence, although there are no explicit Swiss rules on transfer pricing, the principles to be observed in Switzerland are similar to those of other OECD Member States.

With respect to inter-company loans, the FTA publishes yearly, by way of a circular letter, rules regarding loans and advances between related parties. Thus, maximum rates are stipulated regarding loans from the shareholders to the company and minimum rates regarding loans from the company to the shareholders and related parties.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Corporate profits are taxed at the federal as well as at the cantonal level.

Corporate profits tax is itself deductible from the taxable corporate profits. Therefore, the statutory rates are higher than the effective tax rates.

At the federal level, the statutory corporate profits tax rate is 8.5%, corresponding to an effective tax rate of 7.83%.

The cantonal tax rate varies from canton to canton. A corporation is liable to corporate profits tax in each canton where it has a permanent establishment or a piece of real estate. Some cantons foresee a progressive tax rate, others foresee a flat rate. In addition to this initial tax rate, most of the cantons foresee cantonal and communal tax multipliers. These multipliers vary from year to year, depending on the financial needs of the local authorities.

In 2010, effective corporate profits tax rates were (federal, cantonal and communal tax included):

- Zurich 21.17%.

- Geneva 24.17%.
- Zug 15.64%.

It should be noted that in each canton, special tax relief, which can significantly reduce the above rates of taxation, may be granted. This is especially the case for so-called auxiliary companies. Also, special rules apply to holding companies.

4.2 When is that tax generally payable?

The tax year is the business year. The basis for corporate taxation is the applicable accounting period, which may end at any date within a calendar year. During the year, companies will pay provisional instalments on the basis of the tax return of the previous year. If the amount of taxes so collected is lower than the final tax due, the difference will bear interest.

4.3 What is the tax base for that tax (profits pursuant to commercial accounts subject to adjustments; other tax base)?

The tax base is the annual profit as reported in the commercial accounts. This tax base is subject to various adjustments such as depreciation, provisions and expenses which are not commercially justified.

4.4 If it otherwise differs from the profit shown in commercial accounts, what are the main other differences?

At both federal and cantonal levels, tax laws provide for the possibility of carrying forward losses for seven years. It should be noted that in certain circumstances such carry forward may also be used in mergers and similar operations.

In addition, interest paid on hidden equity (see question 3.4 above) is not tax-deductible.

4.5 Are there any tax grouping rules? Do these allow for relief in Switzerland for losses of overseas subsidiaries?

There are no tax consolidation rules with regard to corporate tax. Thus, each company is taxed as a separate tax payer. Mergers and other transactions of two or more companies are disregarded, if the only goal is to combine the tax base of the companies involved and to set off taxable profits with losses of other companies.

There is an exception with regard to VAT: A VAT group consisting of closely associated legal entities, partnerships and individuals who have their domicile or corporate seat in Switzerland can be treated as a single tax-liable entity for VAT purposes. As a consequence, intra-VAT group transactions are not subject to Swiss VAT (even if accounted by the VAT group leader).

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Whether profits are retained or distributed, they are subject to the same annual income and capital tax (capital tax is levied at cantonal and communal level only). However, the Corporate Tax Reform II introduced the option for cantons to choose to credit corporate income taxes to the capital levied in their territory (see question 4.8 below). When the company distributes its profits, it must withhold a 35% withholding tax, which is fully or partly refundable depending on the country of residence of the beneficiary. To allow for a tax-neutral repayment of excess capital to the shareholders, the

Corporate Tax Reform II introduces a change from the so-called nominal value principle to the capital contribution principle, according to which the repayment of the capital reinvested by the shareholders is also tax free at the level of the shareholders. This also applies to share premiums or additional contributions. This rule will come into force as per 2011. Only distributed profits remain subject to dividend taxation.

4.7 Are companies subject to any other national taxes (excluding those dealt with in "Transaction Taxes") - e.g. tax on the occupation of property?

There may be, at the cantonal level, certain other taxes payable depending on the canton. Thus, certain cantons may levy a tax on real estate situated in such cantons. In the canton of Geneva, there is a "professional tax" which is calculated as a percentage of turnover, rent paid and number of employees.

4.8 Are there any local taxes not dealt with in answers to other questions?

The Swiss cantons levy a so-called capital tax. This tax is based on the corporation's net equity (i.e. paid-in capital, open reserves and retained profits). The amount which is subject to tax may also be increased by the debt re-characterised as equity in the application of the Swiss thin capitalisation rules (see question 3.4 above). The rate of tax varies from one canton to another, but it generally does not exceed 1%. Some cantons foresee a different tax rate for holding companies or other tax-privileged companies. For example, in Geneva the maximum rate of tax is 0.2% and for holding companies only 0.03%. Again, cantonal and communal multipliers will apply.

The Corporate Tax Reform II introduced an improvement in this regard, as the cantons may opt for crediting corporate income taxes to the capital taxes levied in their territory. Hence, companies generating enough profit will not have to pay capital tax additionally. Loss-making or only low profit-making companies continue to be subject to capital tax (to some extent). Once again this new federal rule provides only a possibility for the cantons which they will then have to integrate into their legislation.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

With two exceptions, which will be dealt with hereunder (participation reduction and replacement of certain assets), there is no special set of rules for taxing capital gains realised by legal entities. Hence, as a principle, capital gains form part of taxable profit; capital losses are tax deductible.

In certain cantons special rules apply to capital gains arising from the sale of real estate. Such capital gains may be taxed separately from other income of the company; i.e. regardless of the profit of the company.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

All income (including capital gains) earned by a company is taxed as business income. The only exceptions to that rule are the realisation of a capital gain on a qualifying participation (see

question 5.3 below) and the capital gain on real estate (see question 5.1 above).

5.3 Is there a participation exemption?

If a corporation realises a capital gain on the sale of a qualifying participation, it is entitled to a participation reduction.

a. Capital gains for which relief is available

To qualify for relief on capital gains, a Swiss company must make a profit on the sale of a participation which represents at least 10% of the share capital of another company which it has held for at least one year. It should be noted that if a company is a registered venture capital company, the relief is available if the participation represents 5% of the share capital of another company.

Losses incurred as a result of the sale of qualifying participations remain tax deductible.

A capital gain is defined as the difference between the proceeds from the sale of a qualifying participation and the acquisition cost of the investment. Hence, any amount of previously tax-deductible depreciation or provision on the participation is not taken into consideration to calculate the amount of gain which can benefit from the relief. In addition, revaluation gains from participations do not qualify.

Favourable tax treatment is also available for qualifying participations transferred to group companies abroad; the group holding or sub-holding company must be incorporated in Switzerland.

b. Calculation of tax relief

Companies with qualifying capital gains may reduce their corporate income tax by reference to the ratio between net earnings on such participations and total net profit. The following formula must be applied in each tax period to determine the amount of the tax relief available:

$$\text{Tax relief} = A \times B / C$$

Where:

A= corporate income tax;

B= net qualifying capital gain; and

C= total net profit.

The amount of net qualifying capital gain is determined as follows:

$$= \text{gross qualifying capital gain} - (\text{Financing costs} + \text{administrative costs})$$

Financing costs are defined as interest on loans and other costs which are economically equivalent thereto. They are generally attributed to qualifying capital gains by reference to the ratio between the book value of the qualifying participation and total assets.

Administrative costs are usually fixed at 5% of gross dividend income (unless actual proven administration costs are lower).

5.4 Is there any special relief for reinvestment?

According to the provisions of the new Merger Law, a company can transfer certain business assets and investments to Swiss group companies without realising capital gains. Hence, hidden reserves available on such assets can be rolled over. In addition, in some cantons hidden reserves available on real estate can be rolled over to a new piece of real estate replacing the original piece sold (i.e. the capital gain is not taxed, but can be deferred for tax purposes in the case of replacement of certain pieces of real estate). Finally, in the canton of Geneva, the gain realised on real estate is subject to

the special tax, but the amount is then credited against the tax on corporate profits.

Cantons that subject corporations to this special tax foresee the tax deferral on real estate by analogy to the generally applicable set of rules. Therefore, the tax deferral is available, whether or not the capital gain is taxed according to the special tax or the corporate profit tax.

The Corporate Tax Reform II foresees an extension of the replacement purchase. The profit generated by the sale of a production facility remains tax-free if it is reinvested to purchase a replacement. In the future, this will apply even if the operating asset serves a different purpose than the production facility sold. This rule will enter into force on 1 January 2011.

Finally, capital losses are recognised immediately, whether or not the company acquires similar assets in replacement.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

Securities issuance tax is levied upon creation or increase of the par value of participation rights (see question 2.1 above). The participation right can take the form of shares of Swiss corporations, LLCs, cooperatives, as well as profit-sharing certificates and participation certificates. A contribution to the reserves of the company (even though the share capital is not increased) made by the shareholders as well as the transfer of the majority of shares of a Swiss company that is economically liquidated, are also subject to the tax. The securities issuance stamp tax is levied at a flat rate of 1%. It is only levied to the extent that the share capital of the company exceeds CHF 1 million. Special rules apply when shares are newly issued in the course of reorganisations, mergers, spin-offs and similar transactions. Such types of transaction are normally exempt from the 1% tax.

Securities issuance tax is not levied on the capital allocated to a branch.

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

No, there are no such other significant taxes or fees, but notary fees on the notarisation of the articles of incorporation would become due.

6.3 How would the taxable profits of a local branch be determined?

A foreign entity is liable to Swiss corporate tax on income and capital attributable to the Swiss permanent establishment. In general, taxable income of permanent establishments is determined on the basis of its separate financial statements as if it were a corporate entity separate from its head office (direct method).

In the past, the indirect method has been preferred for both the determination of taxable income/capital of domestic permanent establishments of foreign companies and of taxable income/capital of foreign permanent establishments of Swiss companies. Accordingly, Swiss double taxation treaties normally contain a corresponding reservation in favour of the indirect method.

Special rules apply with respect to profit allocation of permanent establishments of banks and insurance companies.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

A branch is subject to the same profits tax and capital tax as a Swiss company, i.e. there is no special branch profits tax.

There is no withholding tax or other special tax on profit repatriations from the branch to its head office.

6.5 Would a branch benefit from tax treaty provisions, or some of them?

A branch would not benefit from any tax provisions of tax treaties entered into by Switzerland as it is not a resident of Switzerland, pursuant to Swiss domestic law.

6.6 Would any withholding tax or other tax be imposed as the result of a remittance of profits by the branch?

The remittance of profits by a Swiss branch to a foreign head office is not subject to withholding tax or any other tax.

7 Overseas profits

7.1 Does Switzerland tax profits earned in overseas branches?

Swiss tax law generally provides for the exemption of tax liability for enterprises, permanent establishments and real estate located abroad.

A Swiss enterprise may compensate losses of a permanent establishment abroad with profits generated in Switzerland if the State in which the establishment is located has not already taken account of those losses for tax purposes. The provisions of the tax treaties remain applicable.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

The taxation of dividends received will depend on the importance of the participation held.

At the federal and cantonal levels, the participation reduction regime applies, so that the effective tax rate applicable to the dividends received is proportionately reduced as per the ratio of the net dividend income over the total net taxable income, provided the local company holds at least 10% of the participation or participation rights with a market value of at least CHF 1 million.

At the cantonal level only, the privileged tax status as holding company is available in cases where the participation or the income there from represent at least two-thirds of the total assets or of the income. Such holding companies (without commercial activity in Switzerland) do not pay profit tax at the cantonal level.

7.3 Does Switzerland have “controlled foreign company” rules and if so when do these apply?

Switzerland does not have “controlled foreign company” rules.

8 Anti-avoidance

8.1 Does Switzerland have a general anti-avoidance rule?

In Switzerland, there are very few written and specific anti-avoidance rules, but it is the general principle of abuse of law or tax evasion that applies. In order to remove the uncertainties regarding the tax consequences of a planned transaction (the abuse of law concept is very large), the tax payer may request an advanced tax ruling. The tax administrations are prepared to discuss in advance specific questions (law or facts) on taxation. While doing this, the tax consequences of the planned activities can be defined in a binding tax ruling - the principle of protection of good faith applies.

8.2 Is there a requirement to make special disclosure of avoidance schemes?

Aggressive tax planning is generally admitted by Swiss tax law provided that the tax payer does not commit an abuse of law or tax evasion (which is not a criminal offence). According to the tax evasion concept, a structure or a transaction may be disregarded and the tax treatment assessed according to the economic situation underlying the transaction, as far as the following three cumulative conditions are met: i) the form chosen by the taxpayer is unusual; ii) the form has been chosen only for tax purposes (tax savings); and iii) the tax payer would make significant tax savings in the hypothesis in which the structure was recognised by the tax authorities. Provided that these three conditions are met, the tax authorities disregard the form chosen and used by the tax payer and re-qualify the transaction from an economic point of view. This approach is very similar to the substance over form theory. In addition to that, even though the form is not abusive, the tax authorities may disregard it in the cases where the tax law explicitly refers to economic concepts (e.g. the concept of fringe benefits).

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