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The International Comparative Legal Guide to:

Corporate Tax 2019

15th Edition

A practical cross-border insight into corporate tax work

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EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Corporate Tax*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate tax

It is divided into two main sections:

Two general chapters, offering an insight into tax and state aid, and tax in relation to the digital economy.

Country question and answer chapters. These provide a broad overview of common issues in corporate tax laws and regulations in 34 jurisdictions.

All chapters are written by leading corporate tax lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor William Watson of Slaughter and May for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Chapter 33

Switzerland

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

Switzerland has a very extensive income tax treaty network with more than 90 income tax treaties in force. New tax treaties were signed in 2018 with Saudi Arabia and Brazil. Moreover, Jordan and Switzerland have agreed on the importance of concluding an income tax treaty between them. Cameroon and Switzerland have both expressed their interest in negotiating and signing an income tax treaty. In addition, a handful of inheritance tax treaties as well as tax treaties on the taxation of maritime and/or navigation companies are in force.

Up until 2009, Switzerland made a reservation on Article 26 of the OECD Model Tax Convention on Income and on Capital ("OECD MC") in its double tax treaties on income and capital and provided for exchange of information in tax matters only in cases that involved acts of fraud, subject to imprisonment according to the laws of Switzerland and the other contacting state. However, as of 2009, Switzerland fully adopted the OECD standards in exchange of information in tax matters as laid out in Article 26 of the OECD MC in its new income tax treaties, thus providing for an exchange of information upon request under certain conditions. Switzerland, today has adopted more than 50 income tax treaties that include the full implementation of Art 26 of the OECD MC as well as a handful of Tax Information Exchange Agreements (Andorra, Belize, Grenada, Greenland, Guernsey, Isle of Man, Jersey, San Marino and the Seychelles). As of January 2017, the OECD Convention on Mutual Administrative Assistance in Tax Matters ("CMAAT") entered into force in Switzerland increasing, therefore, the number of countries with which an exchange of information in tax matters upon request can take place.

On 1st January 2017, the agreement on automatic exchange of information in tax matters between Switzerland and the EU entered into force. The said agreement implements the global automatic exchange of information standard of the OECD and further replaces the taxation of saving income agreement between the EU and Switzerland. As a result, firstly, the first exchange of financial account data between Switzerland and EU Member States will occur in 2018. Secondly, Switzerland has been granted the equivalent rules to those laid down in the EU parent/subsidiary and interest/royalty agreements that is, full withholding tax exemption of cross-border dividends, interest and royalties between related entities if certain requirements are met. Further, with the entering into force of said agreement, Switzerland's withholding tax agreements with Austria and with the United Kingdom were terminated on 1st January 2017.

Furthermore, Switzerland has concluded various bilateral agreements in the form of international treaties in order to be in line with the OECD Common Reporting System ("CRS").

On 7th June 2017, Switzerland, together with over 70 countries, signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") which will serve to efficiently amend double taxation agreements in line with the minimum standards agreed upon in the Base Erosion and Profit Shifting ("BEPS") project. Switzerland will implement these minimum standards either within the framework of the Multilateral Convention or by means of the bilateral negotiation of double taxation agreements. Entry into force is not anticipated prior to January 2019.

1.2 Do they generally follow the OECD Model Convention or another model?

The majority of the Swiss income tax treaties follow the OECD MC. The income tax treaty signed with the United States of America follows the US model treaty. Switzerland has signed several treaties with an arbitration clause. Further, Switzerland has opted for the mandatory and binding arbitration clause of Articles 18 to 26 of the MLI.

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

Given that Switzerland follows the monistic system, international treaties form part of federal law once they have been ratified and thus, immediately become valid sources of law. In other words, they do not have to be incorporated into domestic law before taking effect. Once into force they are an integral part of the internal law and supersede any contrary domestic law.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

Not all double taxation treaties entered into by Switzerland incorporate explicit anti-treaty shopping rules or "limitation on benefits" articles. Naturally, the US-Swiss income tax treaty includes a limitation of benefit clause.

According to prevailing jurisprudence of the Swiss federal Supreme Court, however, all Swiss treaties are subject to an implied anti-abuse provision. In 1967, Switzerland enacted unilateral rules to avoid treaty-shopping with the "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. 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.

With the entry into force of the MLI, Switzerland is expected to adapt the title and preamble of the Swiss tax treaties to the minimum standard. Further, it has opted for the Principal Purpose Test ("PPT") rule alone, which provides that a benefit under a tax treaty shall not be granted if obtaining that benefit was one of the principal purposes of an arrangement or transaction. Concomitantly, the Abuse Decree was partially repealed and became an ordinance.

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

Treaties supersede Swiss domestic law in the Swiss legal system, whether existing when the treaty took effect or was introduced subsequently. However, some domestic law provisions, such as the Abuse Decree, may limit the application of provisions of treaties.

1.6 What is the test in domestic law for determining the residence of a company?

Companies are considered to be resident in Switzerland and therefore, subject to unlimited tax liability if their statutory seat or effective administration is in Switzerland. The statutory seat is determined by the place in which the company is registered. The effective place of management is determined through the Supreme Court's case law and it is where the company has its effective and economic centre of activity. Otherwise put, where its day-to-day management is.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

The transfer of Swiss-situated real estate is regularly subject to a cantonal or communal **Real Estate Transfer Tax** (see section 8 hereunder).

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

- Securities Issuance Stamp Tax.
- Securities Transfer Stamp Tax.
- Insurance Premium Tax.

The **Securities Issuance Stamp Tax** is a stamp duty levied on the issue (primary market) of certain Swiss securities – mainly shares and similar participating rights in corporate entities – as well as on equity contributions to such corporate entities. The taxable person is the company or the person issuing the securities or benefitting from the equity contribution.

The rate is 1% of the capital contribution. However, the capital created or increased by a corporation or a limited liability company is exempt 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 tax, 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 **Securities Transfer Stamp Tax** is levied on the transfer of certain Swiss and non-Swiss securities – mainly shares, similar participating rights in corporate entities, bonds and shares in investment funds, if a Swiss stockbroker ("*Effektenhändler*") is involved as a party or an intermediary to the transaction. 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 applicable on the purchase price 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 and as of 1st January 2018 the standard rate applicable is 7.7%, the reduced rate (e.g. medicine, newspapers, books and food) is 2.5% and the lodging services rate is 3.7%.

VAT is only levied at the federal level and the system of tax is similar to the one of VAT in the European Union.

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. As of 1st January 2012, taxpayers have the possibility to request a VAT audit by the federal administration. This is especially interesting in cases of the purchase and sale of enterprises.

Taxable transactions

The following transactions are subject to VAT:

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

Taxable persons

A taxable person is any person, irrespective of legal form, that carries on a business and makes supplies on Swiss territory through business or has its own registered office, domicile or permanent establishment in Switzerland. Taxable persons may file an application for exemption if they have a turnover below CHF 100,000. Moreover, all persons (including private individuals) receiving services from non-Swiss service providers with a total value exceeding CHF 10,000 annually must pay VAT (to be declared in the so-called "reverse charge procedure"). Furthermore, any person importing goods for private use for a value in excess of CHF 300 is subject to VAT at the border.

Finally, a partial VAT reform, aiming to remove competitive disadvantages between foreign and domestic companies, entered into force on 1st January 2018. The main modification consists of foreign businesses (not established in Switzerland), supplying goods to Switzerland or providing end users with telecommunication and electronic services, with a global turnover of over CHF 100,000 becoming subject to VAT in Switzerland. Up until that date, foreign businesses were exempt from VAT if they generated less than CHF

100,000 of turnover per year from taxable supplies in Switzerland. As of 1st January 2019, foreign mail-order companies will have to charge VAT to their customers in Switzerland if their turnover for small, import tax-free consignments is over CHF 100,000 annually.

VAT exemptions and zero-rated transactions

Article 21 of the VAT Act provides a list of certain activities to be exempt from VAT. Notably: hospital and medical care; education (school, courses, etc.); cultural activities (theatre, museum, libraries, etc.); insurance, reinsurance and social insurance transactions; granting and negotiation of credits; transactions in shares and other securities; real estate transfers; and letting and leasing of real estate (in general), etc. Input taxes in respect of exempt transactions listed in article 21 of the VAT Act are not deductible. In order to avoid competitive disadvantages, a taxable person may, however, opt for VAT in certain cases as per article 22 of the VAT Act and be able to deduct input taxes in these cases.

Article 23 of the VAT Act provides a list of "zero-rated" transactions for the effective use or enjoyment of outside Switzerland (destination principle). Examples of activities that are allowed zero rates are the export of goods and services outside Switzerland, transit goods, and supplies in the field of international air transport. The fact that no VAT is due on the respective activities does not affect the deduction of input taxes.

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, it is possible to proceed with a so-called fictitious input tax deduction (with the exception of – starting 1st January 2018 – collection pieces, for which a special procedure will apply). Self-consumption of goods or services is calculated as a simple correction to the input tax and is not included in the calculation of the turnover.

2.5 Does your jurisdiction permit VAT grouping and, if so, is it "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

Under Swiss VAT legislation, the head offices and permanent establishment are treated as separate taxpayers. Therefore, intracompany supplies of services are probably subject to Swiss VAT. Article 13 of the Swiss VAT Act permits group taxation (including the Swiss permanent establishment of a foreign entity). Legal entities with their register office or permanent establishment in Switzerland, which are closely associated with one another under the common management of a single legal entity, may apply as a single taxable person.

2.6 Are there any other transaction taxes payable by companies?

No, there are no other transaction taxes apart from real estate transfer taxes (please see question 2.1 and section 8).

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

The consumption of certain alcoholic beverages, tobacco and mineral oil, as well as emissions of carbon dioxide and 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 co-operatives are subject to withholding tax ("WHT"). WHT is levied on interest, annuities, profit sharing and all other income derived from shares, social participations in limited liability companies and co-operatives, 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).

No WHT is levied on dividend payments out of so-called capital contribution reserves created from earlier capital contributions of shareholders.

The applicable WHT rate is 35%, whether paid to a Swiss-resident or 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 and claim the refund within a period of three years. Moreover, inter-group companies under certain conditions may apply for the notification procedure on intra-group dividends to the parent company, so that the WHT is not paid and reclaimed.

Non-resident recipients may apply for a full or partial refund of dividend WHT pursuant to the provisions of an 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 notification procedure with the Federal Tax Administration ("FTA").

The permission to pay dividend without WHT, 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. The dividend payment must be notified to the Swiss federal tax administration within 30 days from the due date of the dividend.

In case of refusal of the notification procedure, the 35% WHT due on dividend distributions will 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.

As per the amended Withholding Tax Act which entered into force on 15th February 2017, the following regulations were adopted (i) non-compliance with the 30 days filing requirement will not result in denial of the notification procedure, (ii) no interest of late payment will apply, and (iii) late filing of declaration and notification forms result to a maximum administrative fine of CHF 5,000.

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 non-resident person. However, to the extent that the royalties do not follow the "arm's length" principle, they will be re-qualified as hidden dividends if paid to a shareholder or a related party to the shareholder. Consequently, such royalties would not be deductible for the paying company. In addition, they are subject to the 35% Swiss WHT like any other dividend.

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

Withholding Tax

The Swiss WHT is levied on interests from bonds issued by a Swiss resident and on interests paid on Swiss bank deposits. However, Switzerland does not levy any WHT on private and commercial loans (including inter-company loans).

The definition of a bond according to Swiss WHT law is rather extensive and includes any bonds emitted by a Swiss resident, offered to more than 10 non-banks under similar conditions or to more than 20 non-banks under different conditions. Further, the definition of a bank according to the WHT law includes anyone who publicly offers to receive interest-bearing deposits from more than 100 clients.

In this context, please note that intra-group loan-relationships/deposits neither qualify as bonds, nor as bank deposits for the above calculation purpose. In other words, they do not have to be taken into account when calculating the 10, 20 and 100 limit, respectively unless a bond is issued by a foreign group-company, guaranteed by a Swiss group-company, and the funds are repatriated in Switzerland.

Tax at Source on Mortgage Secured Loans

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%, while the cantonal taxes vary between 13% and 21%.

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

In Switzerland, thin capitalisation rules are embodied in the circular letter n°6 issued by the Federal Tax Administration on 6th June 1997. The circular sets out safe harbour rules that require a minimum equity ratio for each asset class.

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. Consequently, such interest is not deductible for the paying company and is subject to the 35% Swiss WHT like any other dividend. However, the rules set by the FTA are safe harbour rules and allow for the taxpayer to prove that different "arm's length" debt-to-equity ratios and interest rates apply.

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

As per the circular letter n°6, for a company the maximum debt allowed must not exceed the aggregate value of the following assets (valued at their fair market value):

- 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%.

Further, as per the same circular letter financial companies can have the maximum debt/equity ratio of 6:7 of the total assets (fair market value).

3.6 Would any such 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. However, if debt is advanced by a third party, but guaranteed by related parties, the thin capitalisation rules could apply nevertheless.

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 debt-to-equity ratios, as well as maximum rates allowed for 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 for the interest not to be considered a hidden profit distribution (deemed dividend).

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

3.8 Is there any withholding tax on property rental payments made to non-residents?

Switzerland does not levy any WHT on property rental payments, whether paid to a resident or non-resident person. However, to the extent that the rental payments do not follow the "arm's length" principle, they will be re-qualified as hidden dividends if paid to a shareholder or a related party. Consequently, such rental payments would not be deductible for the paying company, and would be subject to the 35% Swiss WHT like any other dividend.

3.9 Does your jurisdiction have transfer pricing rules?

Switzerland does not have a formal transfer pricing legislation, however, all related party transactions with Swiss entities must respect the "arm's length" principle as well as tax avoidance. The Swiss authorities normally deal with transfer pricing issues by applying these principles. Swiss tax authorities follow the OECD transfer pricing guideline. When the transfer price does not correspond to the "arm's length" price, a hidden profit distribution is assumed and taxable income is adjusted as per article 58 of the Federal Income Tax Act.

Circulars and circulars letters have been issued by the FTA implicitly or explicitly referring to the determination of transfer pricing. For example, circular letter n°4 from 19th March 2004 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 "cost plus" is not an appropriate method (or only in very exceptional cases).

On a yearly basis, FTA publishes a Circular letter regarding the interest rates for inter-company loans in Swiss Francs and a Circular letter regarding the interest rates for inter-company loans in foreign currencies. The interest rates vary per currency.

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, cantonal and communal level. The corporate profits tax is itself deductible from the taxable corporate profits resulting to the statutory rates being 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 rates vary 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.

For 2017, effective corporate profits tax rates are (federal, cantonal and communal tax included):

- Geneva: 24.16%.
- Lucerne: 12.32%.
- Zug: 14.60%.
- Zurich: 21.15%.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

The tax base is the annual profit as reported in the commercial accounts. This tax base is subject to few adjustments.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

There are three categories of adjustments. First, tax adjustments aiming at ensuring compliance with Swiss mandatory accounting rules; for instance, if there is a registration of private expenses of a shareholder or a fictitious loss. Second, tax adjustments aiming at ensuring compliance with the periodicity principle; for instance, if provisions without commercial justification are created. Third, tax adjustments aiming at preserving the system, because Switzerland loses its taxing rights, particularly in case of transfer abroad (liquidation fiction).

It should be added that transfer pricing adjustments will be made when group internal transactions do not meet the "arm's length" standard.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

There are no tax consolidation rules with regard to corporate profit tax. Thus, each company is taxed as a separate taxpayer. 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.

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. Consequently, intra-VAT group transactions are not subject to Swiss VAT (even if accounted by the VAT group leader).

4.5 Do tax losses survive a change of ownership?

In Switzerland, losses from seven financial and tax years preceding the current tax period may be deducted to the extent they could not be included in the computation of taxable net profit of those years. This rule applies regardless of the shareholder; thus, tax losses do survive a change of ownership.

In case of restructuration, tax losses should survive in principle. If, through the merger of a parent company and its subsidiary, losses are transferred to the parent company, they may be taken into account, even if the parent company has already made depreciation expenses on the participation or provided remediation services.

In case of a financial reorganisation scheme, losses lying further back can also be credited with rescue contributions aimed at equilibrating an adverse balance.

However, this rule does not apply in cases of abuse. If an economically sound company transfers, by means of contribution in kind, all of its operating assets to an over-indebted company without any entrepreneurial reason, the operation is considered abusive and the deduction of the losses is not admitted.

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 corporate profit tax. In the canton of Appenzell-Innerrhoden, however, distributed profits are taxed at a lower rate at the cantonal level.

When the company distributes its profits (other than distributions from capital contribution reserves – see question 3.1), it must withhold a 35% WHT, which is fully or partly refundable depending on the country of residence of the beneficiary.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

Companies are subject annually to capital tax, which, is levied at a cantonal and communal level. It is based in the company's net equity (i.e. paid-in capital, open reserves and retained profits). The amount 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 tax rate depends on the canton and community of domicile but in general varies between 0.01% and 0.5%. 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. However, please note that these cantonal preferential tax regimes will be soon abolished (please refer to question 10.1). 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).

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.

5 Capital Gains

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

In general, no special set of rules for taxing capital gains and losses exists. Capital gains form part of taxable profit; capital losses are tax-deductible. Two exceptions to the general rule exist: (i) participation reduction; and (ii) replacement of certain assets, both of which will be analysed hereafter.

5.2 Is there a participation exemption for capital gains?

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 <u>10% of the share capital</u> of another company which it has <u>held for at least one year</u>.

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:

Tax relief = A × 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:

= gross qualifying capital gain – (financing costs + 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).

5.3 Is there any special relief for reinvestment?

According to the provisions of the 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 also for tax purposes. 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.

A taxation of a capital gain generated by the sale of a non-current business can be postponed if a replacement asset is acquired that can be depreciated accordingly. The same applies for shareholdings of at least 10% held for at least one year. In this context, however, the participation reduction may apply alternatively.

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

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Switzerland does not levy WHT on the proceeds of selling a direct or indirect interest in local assets or shares.

6 Local Branch or Subsidiary?

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

Securities issuance stamp tax is levied upon the 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, limited liability companies ("LLCs"), co-operatives, 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 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

A resident subsidiary is taxed on its profit and equity (income allocated to foreign permanent establishments and real estate are exempted). A Swiss permanent establishment of a non-Swiss headquarters is taxed in Switzerland on the profit and equity allocated to such permanent establishment, usually following the accounts of such permanent establishment.

The issuance of nominal capital of a resident subsidiary and any contribution to the equity of a resident subsidiary is subject to issuance stamp tax at 1% (a threshold of CHF 1 million for capital increases applies), whereas equity allocated to a permanent establishment is not subject to issuance stamp tax.

A resident subsidiary whose assets, as per the last balance sheet, consist of taxable securities in excess of CHF 10 million, qualifies as a stockbroker liable to transfer stamp tax on the transfer of securities where he acts as an intermediary or party to such a transaction (see the answer to question 2.1). Branches do not qualify as stockbrokers merely by holding taxable shares.

A WHT is imposed on dividends paid by a resident subsidiary, whereas no such WHT applies on profit repatriations to the non-Swiss head office for branches.

In contrast to resident subsidiaries, branches are not entitled to invoke tax treaties, since branches are not considered to be resident in Switzerland, pursuant to Swiss domestic law (see also the answer to question 6.5).

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

A foreign entity is liable to Swiss corporate profit tax on profits and equity 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 was 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 the profit allocation of permanent establishments of banks and insurance 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 WHT or other special tax on profit repatriations from the branch to its head office.

6.4 Would a branch benefit from double tax relief in its jurisdiction?

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.

6.5 Would any withholding tax or other similar 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 WHT or any other tax.

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Swiss tax law generally provides for the exemption of profits generated in non-Swiss enterprises, permanent establishments and related to 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. As soon as assumed losses can be offset in the non-Swiss branch, the Swiss corporate income tax basis is increased accordingly. 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 (see also question 5.2 above).

At the cantonal level only, privileged tax status as a holding company is available in cases where the participation or the income therefrom represents 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. The special status of holding companies will be abolished sometime in the future due to *Projet fiscal 17* (see question 10.1 below).

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Switzerland does not have any "controlled foreign company" legislation.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

The transfer of Swiss-situated real estate, commercial or otherwise, 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 this transfer tax (e.g. the canton of Zurich). Both residents and non-residents are subject to this tax.

Further, the capital gain resulting from the disposal of real estate in Switzerland is subject either to a special tax on real estate capital gains or to the ordinary tax on benefits. The cantons are free to choose one or the other taxation method for cantonal and communal tax purposes. The cantons choosing the special tax on real estate capital gains generally set an increasing tax scale relating to the amount of the capital gain, but decreasing relating to the holding period. Both residents and non-residents are subject to this tax on the disposal of real estate.

At the federal level, the capital gain resulting from the disposal of commercial real estate in Switzerland is only subject to the ordinary tax on benefits. A taxable gain at the federal level, however, occurs where the real estate sold has been held by a corporate non-resident or where the real estate formed part of the Swiss permanent establishment of a non-Swiss-resident individual.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

In most cantons, a formal transfer of real estate, commercial or otherwise, is subject not only to the Real Estate Transfer Tax, but also to a so-called "economic change of ownership" which is the case when shares in a real estate company are transferred.

An economic change of ownership does also trigger the taxation of the capital gains in the same way as the direct transfer of real estate (with either the special tax or the ordinary tax on benefits).

In most of the cantons, only the transfer of all or the majority of shares in a real estate company triggers taxation. However, some cantons do also tax the transfer of minority holdings (e.g. the canton of Geneva).

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

Switzerland does not have a special tax regime for REITs.

Special rules, however, exist for Swiss real estate funds with direct ownership of real estate. In general, collective investment of capital is treated as transparent. Therefore, the income and capital of the funds are directly attributed to investors. As to real estate funds with direct ownership of real estate, the fund is treated as non-transparent with respect to income generated from direct ownership of Swiss real estate. Income arising from real estate is therefore attributed to the fund as a taxable legal person and taxed under corporate income tax.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

In Switzerland, anti-avoidance rules are not contained in a specific act. Through the years the Federal Supreme Court developed a general tax avoidance theory. The application of this theory, applied by all Swiss courts and tax authorities, has the consequence that tax authorities have the right to tax the taxpayer's legal structure based on its economic substance if the following conditions are met: (i) the taxpayer's legal structure is unusual, inappropriate or inadequate to its economic purpose; (ii) tax considerations are deemed to be the only motive for the transaction; and (iii) the transaction effectively leads to significant tax savings to the extent that it would be accepted by the tax authorities.

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

Tax planning is generally admitted by Swiss tax law provided that the taxpayer does not commit any abuse of law or tax avoidance (please note that it is not considered a criminal offence).

In order to remove the uncertainties regarding the tax consequences of a planned transaction, as the abuse of law concept is very large, the taxpayer may request an advance tax ruling. The tax administrations are willing 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.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

It should be noted that tax avoidance, which is described as the choice of an unusual, inadequate or abnormal structure or transaction made for the sole purpose of saving taxes, is not a punishable offence under Swiss law. The taxpayer will merely be asked to pay taxes in accordance with the economic substance of the structure or transaction (including possible late interest).

On the other hand, tax evasion (the non-disclosure of taxable items) and tax fraud (the use of forged, falsified or inaccurate documents) are both criminal offences. Tax evasion may result in a fine for the taxpayer. The representative of a taxpayer who instigates, assists, commits or participates in tax evasion may also be fined, irrespective of the fine incurred by the taxpayer, and may be jointly and severally liable for the unpaid tax. Tax fraud is punishable by fine or imprisonment; anyone who instigates or participates as an accomplice of the taxpayer may also be punished.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

While there is no normalised programme for co-operative compliance in Switzerland, cooperation between taxpayers and tax authorities is excellent. In particular, a taxpayer may request a tax ruling to clarify the tax consequences of a planned structure or transaction. This possibility derives from the practice of the tax authorities, as Swiss law does not refer to tax rulings (with the exception of Article 69 of the VAT Act).

A tax ruling is not intended to result in a reduction of tax, but to provide legal certainty regarding the application of the law. In accordance with the principle of protection of good faith, a tax ruling is binding upon the tax authorities if certain criteria are met.

10 BEPS and Tax Competition

10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

Switzerland had elaborated the Corporate Tax Reform Act III, which aimed to strengthen the tax competitiveness of Switzerland and resolve the tax dispute with the EU, as well as align with the standards resulting from the new OECD principles. However, the Reform project was submitted to popular vote and dismissed by Swiss voters on 12th February 2017. A replacement project, called *Projet fiscal 17*, is currently under development.

The said project has the same purpose as the Corporate Tax Reform Act III. It includes among others, the abolition of the special tax status companies at cantonal level as well as a few tax practices at federal level (i.e. finance branch and principal company treatment) along with transitional measures for up to five years and introduction of higher taxation of dividends for qualifying shareholders of individuals. Concomitantly, various measures had been designed to maintain the attractiveness of the Swiss Tax System such as: a proposed general reduction of cantonal corporate income taxes; the introduction of a mandatory patent box regime and optional R&D super deduction both at cantonal level and in the canton of Zurich; and the introduction of a notional interest deduction on surplus equity. If no referendum is called, this should come into full force in 2020 but needs to be implemented in each canton separately.

In order to be in line with the minimum standard of the International Exchange of Country-by-Country Reports ("CbC Reports") of Action 13 of the BEPS project, Switzerland, in January 2016, signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports ("CbC-MCAA"). The Swiss Parliament, further, adopted the Federal Act on the International Automatic Exchange of Country-by-Country Reports ("CbC-Act") as well as the Ordinance on International Automatic Exchange of Country-by-Country Reports ("CbC-Ordinance"). All three came into force as of 1st December 2017.

As of January 2017, Switzerland, being in line with Action 5 of the BEPS project, introduced the spontaneous exchange of information in tax matters through the adoption of CMAAT as well as by revising the Swiss Federal Act on Tax Administrative Assistance Act ("TAAA") and the Ordinance on International Administrative Assistance in Tax Matters ("TAAO"). All three above entered into force on 1st January 2017. It should be noted that certain reservations were made limiting the taxes covered for exchange only to Federal, Cantonal and Communal direct taxes, WHT and capital gain on real estate taxes. Indirect taxes such as stamp duties and value added taxes are excluded.

Finally, as mentioned at question 1.1, Switzerland signed the MLI on 7th June 2017.

10.2 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond what is recommended in the OECD's BEPS reports?

None of Switzerland's foreseeable legislative reforms intend to go beyond the minimum standards in the OECD's BEPS reports.

10.3 Does your jurisdiction support public Country-by-Country Reporting (CBCR)?

The CbC Act came into force on 1st December 2017. According to the said Act, parent entities of multinational enterprises residing in Switzerland with more than CHF 900 million consolidated revenue in the financial year preceding the reporting year or surrogate parent entities must comply with the Country-by-Country reporting obligations and provide the Federal Tax Administration with the report. This report will not be published. The first financial year the Country-by-Country report must be filled is on or after 1st January 2018 depending on the entities' chosen financial year dates and it will be exchanged with partner countries beginning 2020.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Currently, Switzerland maintains preferential profit taxation for holding companies, domiciliary companies and mixed companies. However, as mentioned in question 10.1 they will be abolished. Replacement measures could include a mandatory patent box for cantons.

The canton of Nidwalden, as of 2011, has a "licence box rule". The net licensing income resulting from the right to use intellectual property ("IP") rights is taxed separately at an overall effective 8.8% tax rate. The licence box rule only applies for companies having their domicile or branch in the canton of Nidwalden, and is only granted upon request.

11 Taxing the Digital Economy

11.1 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

Switzerland has not taken any unilateral action with regards to the taxation of digital economy. The State Secretary for International Finance has been working intensively on the taxation of the digital economy and performed an analysis on the subject. Switzerland holds the opinion that it is necessary to favour multinational approaches, which tax profits in the jurisdiction where added value is generated and which do not cause double or over taxation and that measures outside the scope of double taxation agreements are to be avoided.

11.2 Does your jurisdiction support the European Commission's interim proposal for a digital services tax?

No official announcement has been issued by the authorities on the subject.

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