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Ninth Edition

Editor
Tim Sanders

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PREFACE

There have been significant recent changes in the global tax landscape as highlighted in the OECD annual report on global tax policy reforms published on 5 September 2018. The report noted the impact of major tax reform in a number of countries, notably in the United States, Argentina and France. At the time the US tax reform became effective on 1 January 2018, Goldman Sachs estimated there was US$3.1 trillion of overseas profit kept outside the United States, which highlights the significance of this reform. One aspect of the US tax reform was lowering of corporate taxes, which reflects a global trend, with the average corporate income tax rate across the OECD dropping from 32.5 per cent in 2000 to 23.9 per cent in 2018. Other tax reform trends identified were the lowering of personal income taxes and new excise taxes, to deter harmful consumption, such as sugar taxes.

An area where coordinated tax reform has not materialised, despite being identified as a key area in the BEPS Action Plan in 2015, is in the taxation of the digital economy. The OECD produced an interim report in April 2018, with further work scheduled for 2019, with the aim of arriving at a 'consensus based solution by 2020'. Although there is widespread recognition of the need for change, consensus on how such change should come about has been limited. Some countries, including the UK, have decided to take unilateral action, pending an international solution. The UK's 2018 Autumn Statement announced a digital services tax (DST) to be introduced from April 2020. The proposal is that a 2 per cent tax will apply to the revenues above £25 million of certain digital businesses to reflect the value they derive from the participation of UK users, with consultation on the detail of the legislation to take place between now and the introduction of the tax in the Finance Act 2020. One may conclude that this reflects the UK's view on the likelihood of an OECD solution by 2020. The UK is not alone: Malaysia revealed plans in November 2018 to introduce a consumption tax on the supply of digital services to Malaysian residents from 1 January 2020; Quebec is introducing a digital sales tax in January 2019; and Chile, Uruguay and Colombia all have plans to tax foreign suppliers of digital services. Potentially, as more countries start to fill the vacuum with their own domestic digital taxes, the possibility of conflict with the regimes in other countries arises.

The potential for tax conflict, rather than competition, is not restricted to the digital economy and is much more likely than in recent years. It is possible that 2019 will see some nations retaliate to US tax reforms and also see the US and certain jurisdictions use tariffs and duties as weapons in their trade wars. Brexit is another potential source of tax conflict.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
London
January 2019

Chapter 32

SWITZERLAND

Frédéric Neukomm and Floran Ponce[1]

I INTRODUCTION

Switzerland is a federal democracy. As such, corporate taxes are levied on the federal, cantonal and communal levels.

Switzerland is a stable, liberal country with a business-friendly environment, relatively low corporate income tax and an extensive double tax treaty (DTT) network.

Current tax incentives include special cantonal statuses for holding companies and administrative companies. However, these special cantonal statuses will be abolished in the near future if the Tax Reform and Social Security Funding Act (the Tax Reform Act) enters into force. In order to keep Switzerland attractive to businesses, the Tax Reform Act provides other benefits, such as IP boxes, and most cantons will lower their ordinary corporate income tax rates.

Additionally, tax rulings allow businesses to secure a specific tax treatment prior to relocating to Switzerland. Additionally, tax rulings may inform businesses of the tax consequences related to specific transactions.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

The most common corporate structures in Switzerland are the company limited by shares and the limited liability company (LLC). However, large companies, with the exception of US multinational enterprises (MNEs) (check the box), generally do not use LLCs.

Companies limited by shares require a minimum share capital of 100,000 Swiss francs, while LLCs require a minimum share capital of 20,000 Swiss francs.

Although less common than the two aforementioned types of companies, Swiss law also permits partnerships limited by shares.

Companies are legal persons, and thus are subject to Swiss taxes. Direct corporate taxes include federal and cantonal corporate income tax and cantonal capital tax. Companies are also responsible for collecting withholding tax on dividend distributions.

ii Non-corporate

Non-corporate entities include general partnerships and limited partnerships. They are rarely used by large businesses, since general partners must be individuals.

1 Frédéric Neukomm and Floran Ponce are partners at Lenz & Staehelin.

Collective investment schemes include investment companies with variable capital (open-end), fund contracts (open-end) and limited partnerships for collective investments (closed-end).

The above structures are transparent for income tax purposes (except for real estate funds), so the assets and income derived therefrom are attributed to the partners or fund participants based on their share of the partnership or fund; Swiss collective investment schemes must pay withholding tax on the income they realise (irrespective of whether such income is distributed or accumulated).

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

Determination of taxable profit

Corporate taxpayers are subject to corporate income tax on worldwide income, with the exception of income from foreign immovable property, permanent establishments and business enterprises. Corporate income tax is levied on the net profit.

In principle, the taxable income is the same as the profit listed in statutory financial statements, which is determined on an accrual basis. Generally, all expenses are deductible, provided they are commercially justified. Corrections are allowed when tax law stipulates that a value different from that in the books of account should be used. For instance, if the tax authorities consider depreciations or provisions excessive, they will be reduced or denied.

Companies may record depreciations using either the declining-balance method or the straight-line method, but for tax purposes certain minimum rates must be respected (e.g., for industrial buildings 3–4 per cent using the declining-balance method and 1.5–2 per cent using the straight-line method, for intangibles 40 per cent using the declining-balance method and 20 per cent using the straight-line method).

A provision for one-third of the inventory value is permitted for federal and cantonal tax purposes. Further provisions for liabilities and dubious receivables are allowed if commercially acceptable. The standard amount is 5 per cent for Swiss receivables and 10 per cent for foreign receivables.

If a company concludes a contract with a shareholder or related party, it must be at arm's length. If not, consideration in excess of the arm's-length consideration is reclassified as a constructive dividend. Amounts reclassified as constructive dividends are not considered justified expenses, so they cannot be deducted from the company's taxable profit. Additionally, withholding tax (35 per cent) may be levied on the constructive dividend.[2]

Capital and income

As a rule, both income and capital profit are subject to federal, cantonal and communal corporate income taxes.

However, income (e.g., dividends) from and capital gains on qualifying participations benefit from participation relief.

Participation income is eligible for participation relief if the receiving company owns at least 10 per cent of the equity in the distributing company, if the participation is worth at least 1 million Swiss francs (for dividends) or if the receiving company is entitled to at least

2 See Section VI.i.

10 per cent of the distributing company's profit and reserves. Participation relief is granted for capital gains if one of the above conditions is fulfilled and the participation has been held for at least one year.

Additionally, some cantons levy a separate real estate capital gains tax on gains arising from the sale of real estate in lieu of ordinary cantonal and communal corporate income tax.

Losses

Under Swiss tax law, losses may be carried forward for seven years; there are no provisions for carry-back. Losses must be carried forward using the first in, first out (FIFO) method.

Older losses (more than seven years) may be carried forward during a financial restructuring due to insolvency, if carrying forward said losses will allow the company to balance its books of account.

Losses survive changes in ownership. Additionally, in the event of a merger, the losses from both companies may be carried forward, except in the case of tax avoidance or abuse of a right (e.g., merger with a company that has liquidated most or all of its assets).

Rates

The federal corporate income tax rate is 8.5 per cent on profit after tax; cantonal and communal corporate income tax rates vary from 5.55 per cent to 23.36 per cent (statutory rates on profits after tax). Since corporate income tax is a deductible expense, the effective rates are between 11.19 per cent and 24.41 per cent (federal, cantonal and communal taxes included).

The current effective rates are: 22.18 per cent in Basle; 24.16 per cent in Geneva; 22.09 per cent in Lausanne (canton of Vaud); 14.60 per cent in Zug; and 21.15 per cent in Zurich (federal, cantonal and communal taxes included).

Many cantons will reduce their corporate income tax rates if the Tax Reform Act enters into force. For instance, the proposed, new effective rates are: 13.04 per cent in Basle; 13.79 per cent in Geneva and Lausanne (Vaud); 12.09 per cent in Zug; and 18.19 per cent in Zurich (federal, cantonal and communal taxes included).

Administration

The federal tax authority is the Federal Tax Administration (FTA). The FTA is responsible for federal taxes, including withholding tax. Each canton has its own tax authorities; the cantonal tax authorities are responsible for income tax, including federal income tax.

Taxpayers are required to file an annual tax return during the three months following the close of the business year; extensions may be requested.

Both the tax authorities and the taxpayer participate in the tax assessment process; taxes are assessed based on the tax return submitted by the taxpayer.

The tax authorities are responsible for determining relevant facts and applicable legal provisions. They are allowed to conduct investigations, including inspections of the books of accounts and any supporting documents. The tax authorities determine the taxes due; this decision is communicated to the taxpayer in writing and includes the tax basis, tax rate and taxes due.

Tax assessments can be challenged before the tax authorities (formal complaint). If the dispute is not resolved, the taxpayer can appeal; the matter then goes to court (federal or cantonal, depending on the matter being appealed). The Swiss Federal Supreme Court is the highest Swiss court.

Tax rulings are very common in Switzerland. However, certain types of rulings are now subject to spontaneous exchange under spontaneous exchange of information agreements and in accordance with the BEPS rules.

Tax grouping

Swiss tax law does not allow for tax consolidation (except for VAT). Companies that are part of a group are taxed as individual companies, subject to ordinary tax rules.

ii Other relevant taxes

Capital tax

Capital tax is a direct tax that is levied on companies' net equity (paid-up capital, as well as open reserves and taxed hidden reserves). Capital tax is levied annually and rates vary (0.001–0.525 per cent) between cantons. Some cantons permit corporate income tax to be credited against capital tax, meaning capital tax is levied only if it exceeds the cantonal corporate income tax due. There is no federal capital tax; it is only levied by the cantons.

In the event of thin capitalisation, the part of the loan reclassified as equity is subject to capital tax.[3]

Issuance stamp duty

Issuance stamp duty is levied on capital contributions from shareholders to Swiss companies, meaning it is levied on both the initial creation of share capital as well as subsequent increases of share capital and contributions without issuance of new shares. Stamp duty is levied at 1 per cent. The first 1 million Swiss francs in share capital is exempt from stamp duty. Exemptions are also granted following a merger or similar restructuring.

Transfer stamp duty

Transfer stamp duty is levied when there is a transfer against consideration of a security subject to stamp duty and the transfer involves a Swiss securities dealer. Securities subject to stamp duty include Swiss and foreign bonds, shares, participation certificates, dividend rights certificates and units in collective investment schemes. A Swiss securities dealer is defined as a bank, securities trader or professional intermediary (individual or legal person) or a company holding over 10 million Swiss francs in taxable securities. Transfer stamp duty is levied at 0.15 per cent for securities issued by Swiss residents and 0.3 per cent for foreign securities.

VAT

The ordinary VAT rate is 7.7 per cent. VAT on accommodation is 3.7 per cent and VAT on essential goods is 2.5 per cent.

Payroll taxes

A social security contribution of 10.25 per cent is levied on employment income; half is paid by the employer and half is paid by the employee (via withholding). Unemployment insurance is also levied on employment income.

3 See Section VII.i.

Additionally, employers are required to levy tax at source on salaries paid to employees not resident in Switzerland or to foreign employees without a long-term resident permit.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

Companies with either their statutory seat or their place of effective management in Switzerland are considered Swiss tax residents for tax purposes.

A company is considered to have its place of effective management in Switzerland if its economic centre is located in Switzerland.

In determining the economic centre, the tax authorities consider a variety of factors and the presence of multiple connecting factors with Switzerland is sufficient to consider that the place of effective management is in Switzerland. The predominant factor is the place where management is carried out (i.e., the day-to-day actions required to carry out the company's statutory purpose). Secondary factors include the place where fundamental decisions are made and the place where administrative work (e.g., accounting, correspondence) is carried out. A passive company's (e.g., a group financing company) place of effective management is where its strategic decisions (e.g., decisions about refinancing, loans and loan conditions) are made.

The place of effective management for companies created by individuals for asset management purposes is the jurisdiction in which the controlling individual or individuals reside.

ii Branch or permanent establishment

Non-resident companies are liable to Swiss corporate income tax and capital tax on income and capital allocated to a Swiss permanent establishment.

For Swiss direct tax purposes, the definition of permanent establishment is similar to the definition in the OECD Model Tax Convention on Income and on Capital (the OECD MC). It is defined as a 'fixed place of business through which the business of an enterprise is wholly or partly carried on' (Article 51, paragraph 2 of the Swiss Federal Income Tax Act of 14 December 1990). Examples include branches, factories, dependent agents with a fixed place of business and construction projects lasting at least 12 months.

Switzerland has an extensive network of DTTs, most of which follow the OECD MC, which provide allocation rules for permanent establishments.

Swiss tax rules stipulate that the direct (objective) method should be used when determining a Swiss permanent establishment's profit. The Swiss permanent establishment's profit is thus based on its books of account and is independent of the entity's total profit.

Switzerland does not levy branch profit tax. Consequently, the remittance of branch profits to a foreign company with its place effective management outside of Switzerland is not subject to Swiss withholding tax.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding company regimes

Currently, holding companies are exempt from cantonal and communal corporate income taxes, with the exception of income and capital gains from Swiss real estate, which are taxed at the ordinary rate.

Holding company status is granted to companies whose statutory purpose is the long-term management of participations in other companies, provided the participations equal at least two-thirds of the company's assets or the income derived from the participation rights equals at least two-thirds of the company's income. Holding companies may not have commercial activity in Switzerland.

If the Tax Reform Act enters into force, the special cantonal statuses (i.e., holding companies and administrative companies) will be abolished as of 1 January 2020.

Federal corporate income tax participation reduction

As explained above, qualifying participation income and capital gains on qualifying participations benefit from participation relief.[4]

ii IP regimes

Currently, only the canton of Nidwalden has introduced a patent box regime. However, the Tax Reform Act includes a mandatory cantonal patent box regime as a replacement measure for the elimination of the special tax statuses. The cantonal patent boxes may provide tax relief for up to 90 per cent of patent-related income; however, total relief from Tax Reform Act deductions (e.g., patent box, R&D deductions, step up) is limited to 70 per cent of a company's taxable profit.

Currently, mixed company status is granted to companies with only minimal commercial activity in Switzerland and is commonly used for the exploitation of IP in Switzerland, in particular by MNE headquarters; it is also used by commodities trading companies. The effective tax rate is between 9 per cent and 12 per cent.

Likewise, principal companies may be used to exploit IP. Principal companies carry out specific tasks on behalf of non-resident, affiliated companies, such as the purchase and sale of goods and supply chain management, and may be used for IP ownership.

Principal companies may allocate 35 to 50 per cent of their profit to deemed foreign permanent establishments. The allocated profit is tax-exempt in Switzerland, resulting in an effective corporate income tax rate of between 5 and 8 per cent.

Principal company status will be abolished by the Tax Reform Act. Starting in 2019, tax authorities will no longer grant principal company status to companies applying for the first time.

Holding companies may be used as well, as long as exploitation of IP does not qualify as a business activity; the effective tax rate is approximately 8 per cent.

4 See Section III.i.

iii State aid

State aid is granted in the form of federal and cantonal tax holidays. The Swiss Federal Act on Regional Policy provides federal tax incentives for creating or preserving jobs in certain regions of Switzerland. Tax relief is limited to an annual amount of 95,000 Swiss francs per job created or 47,500 Swiss francs per job preserved, for a maximum of 10 years. The companies profiting from such tax relief and the number of jobs to be created or preserved are made public.

Cantonal tax holidays are granted for up to 10 years, but contrary to the federal tax holidays, cantonal tax holidays are not restricted to specific economic sectors or geographical areas. Cantonal tax holidays are based on the nature of the planned investment, its economic importance to the canton and the number of new jobs the company will create. Tax relief can take the form of a full or partial exemption from cantonal and communal corporate income and capital taxes.

Manufacturing and industrial businesses typically qualify for tax holidays. Other businesses (e.g., commercial, finance, services) may qualify if they complement existing local business and industries and create significant new employment opportunities.

iv General

Switzerland has relatively low corporate income tax rates and, currently, businesses relocating to Switzerland can benefit from the aforementioned special cantonal statuses. If the Tax Reform Act enters into force, the special cantonal statuses will be abolished, but most cantons will lower their corporate income tax rates as compensation.

Further, Switzerland's extensive DTT network eliminates many instances of double taxation, and dividends paid by Swiss resident companies are often eligible for a full or partial refund under a relevant DTT.

Additionally, the Tax Reform Act includes a step up for foreign companies relocating to Switzerland; companies will be able to disclose their hidden reserves without Swiss tax consequences and additional depreciation deductions will be granted during the initial few years following relocation to Switzerland.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Swiss companies must levy a 35 per cent withholding tax on profit distributions (including constructive dividends and liquidation proceeds) to shareholders or related parties, irrespective of whether the beneficiary is a Swiss tax resident.

Although interest on bonds and other debt certificates issued by Swiss companies is subject to Swiss withholding tax, generally, withholding tax is not levied on interest paid on private loans.

Under the 10/20/100 non-bank rule, loans from 10 non-bank lenders with identical terms (loan debentures) and loans from 20 non-bank lenders with variable terms (cash debentures) are treated as bonds, provided that the financing exceeds 500,000 Swiss francs. Exceptions exist for intercompany loans.

Further, a company shall be deemed a bank for withholding tax purposes if it has at least 100 non-bank lenders or private placements, or both, and its financing or placements, or both, exceeds 5 million Swiss francs. Interest paid by banks is subject to withholding tax; some exceptions apply.

Royalty payments are not subject to withholding tax.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Swiss taxpayers (companies and individuals) may request a withholding tax refund. The refund will be granted if certain conditions are fulfilled (e.g., the taxpayers have fulfilled all of their reporting obligations).

Non-resident taxpayers may claim a partial or total refund of Swiss withholding tax if there is a DTT between Switzerland and their country of residence.

A simplified notification procedure can be requested for intra-group distributions to Swiss parent companies or to parent companies resident in a DTT country.

iii Double tax treaties

Switzerland has an extensive network of DTTs, most of which closely follow the OECD MC. Switzerland has concluded treaties with over 80 jurisdictions, including most European countries, the United States, Russia, Japan and China. On 3 May 2018, Switzerland and Brazil signed a DTT.

Additionally, an agreement between Switzerland and the European Union eliminates withholding tax if the parent company has directly held 25 per cent or more of the subsidiary's share capital for at least two years.

To qualify for treaty benefits, certain conditions must be met. The foreign parent company must be the beneficial owner of the dividend income. Further, the withholding tax refund will not be granted if the FTA determines that there is DTT abuse. In assessing whether a structure is abusive, the FTA examines whether there is sufficient capitalisation (30 per cent) and whether the parent company has substance (personnel and premises) in its country of residence. Generally, holding companies must demonstrate that they hold multiple companies, not just the Swiss company requesting treaty relief.

Maximum withholding tax rates

State	Dividends				Interest	Royalties
	Ordinary maximum (per cent)	Maximum on distributions from a subsidiary (per cent)	Minimum required ownership in subsidiary (per cent)	Holding period (years)		
China	10	5	25	N/A	10	9
France	15	0	10	N/A	0	5
Germany	15	0	10	1	0	0
Italy	15	15	n/a	N/A	12.5	5
Japan	10	5/0	10/50	N/A	10	0
Luxembourg	15	0	10	2 (5 per cent if less)	10	0
Netherlands	15	0	10	N/A	0	0

State	Dividends				Interest	Royalties
	Ordinary maximum (per cent)	Maximum on distributions from a subsidiary (per cent)	Minimum required ownership in subsidiary (per cent)	Holding period (years)		
Russia	15	5	20 (at least 200,000 Swiss francs)	N/A	0	0
United Kingdom	15	0	10	N/A	0	0
United States	15	5	10	N/A	0	0

iv Taxation on receipt

As a rule, Swiss treaties use the exemption method to eliminate double taxation; however, the credit method is used for foreign source dividends, interest and royalties.

As previously explained, participation relief is available under certain conditions.[5] No credit is granted if the income is exempted under participation relief provisions.

VII TAXATION OF FUNDING STRUCTURES

i Thin capitalisation

Swiss federal and cantonal tax rules contain thin capitalisation safe harbour provisions (maximum debt rule per asset class based on their book or fair market value); for example, 100 per cent for cash, 85 per cent for accounts receivable and inventory, 70 per cent for investments in subsidiaries, 50 per cent for furniture and equipment, 70 per cent for property and plants (commercially used) and 70 per cent for intangibles.

Furthermore, the FTA publishes annual safe harbour interest rates for loans granted to related parties. Interest paid on debt exceeding the maximum allowable debt and interest rates exceeding the safe harbour rates are reclassified as constructive dividends if paid to a shareholder or related party. Consequently, such interest is not a deductible expense for federal and cantonal income tax purposes and is subject to withholding tax at a rate of 35 per cent (which may be reduced under an applicable tax treaty).

However, the rules set out above are merely safe harbour rules and the taxpayer may prove that a different arm's length debt-to-equity ratio or interest rate should be used.

ii Deduction of finance costs

As mentioned above,[6] companies may not pay interest on loans from shareholders or related parties in excess of what would be paid to an unrelated third party. Generally, there are no other restrictions on interest deductions.

In the case of a leveraged acquisition, the absence of consolidated taxation for company groups means interest on the acquiring company's debt cannot be deducted by the target company if the latter does not have operational income. Further, the Swiss tax authorities may treat debt push down strategies in a leveraged acquisition as tax avoidance.[7]

5 See Section III.i.

6 See Section VII.i.

7 See Section VIII.i.

iii Restrictions on payments

Swiss company law states that dividends 'may be paid only from the disposable profit and from reserves formed for this purpose' (Article 675 of the Swiss Code of Obligations). Thus, interim dividends are not permitted.

Swiss accounting rules now permit a parent company to temporarily record dividends paid by a subsidiary in the business year in which the subsidiary earned the profit distributed as dividends, rather than in the year in which the subsidiary decided on the dividend amount. This practice is accepted by the Swiss tax authorities provided that upon distribution the dividends are recorded in the income statement and certain procedural conditions are met.

iv Return of capital

Repayments of capital contributions are not subject to withholding tax and are tax-exempt for individuals who are Swiss tax residents; this includes both share capital and share premium. Share premium can be distributed without capital reductions. However, share premium must be listed in a clearly marked share premium reserve and validated by the FTA.

However, if adopted, the Tax Reform Act would limit listed companies from distributing share premium reserves, unless they first distribute an equal or greater dividend.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Acquisition vehicle

Acquisitions can be carried out using a local or non-local entity.

When using a foreign parent company to acquire a Swiss company, investors should ensure that the foreign parent company is located in a jurisdiction that has a DTT with Switzerland so as to reduce or eliminate withholding tax on dividend distributions. Otherwise, it is advisable to use an intermediary holding company located in a jurisdiction that has a DTT with Switzerland, provided it complies with the criteria for treaty relief.[8]

Additionally, investors should be aware of the 'old reserves theory'. Under this theory, if a foreign shareholder transfers shares in a Swiss company to a shareholder located in a jurisdiction with a more favourable DTT, withholding tax may continue to be levied on distributable reserves at the same rate applicable to a tax resident of the first jurisdiction if at the time of the transfer, the company had commercially distributable reserves and assets not economically required.

Acquisition structure

Acquisitions may be structured as either a share deal or an asset deal.

Asset deals tend to be more favourable for buyers, since a step-up in basis is allowed, while share deals are beneficial for sellers, in particular for individual sellers, since individuals are not subject to capital gains tax on gains arising from private assets, but are subject to income tax on dividends.

Asset deals permit the company to record part of the purchase price as goodwill. Payment in excess of the assets' market value is recorded as goodwill; goodwill can be depreciated.[9]

8 See Section VI.iii.

9 See Section III.i.

Transferred assets may be subject to VAT and transfer stamp duty (for transfers of securities).

In the case of a share deal, the purchase price is recorded in the books of account as the share value. This value cannot be decreased (unless the market value decreases). The acquiring company may carry forward the target company's losses for seven years and is responsible for the target company's tax liabilities. If the buyer or seller is a professional securities dealer then transfer stamp duty will be levied.

Special attention must be paid to rules concerning indirect partial liquidation and transposition during share deals involving sales by individuals resident in Switzerland, since tax-free capital gains can be retroactively reclassified as taxable participation income.

The criteria for indirect partial liquidation are: (1) sale of at least 20 per cent of the share capital in a Swiss or foreign company to a third party; (2) the shares are transferred from the seller's private assets to a company or to the acquirer's business assets (in the case of acquisition by an individual); (3) the target company has commercially distributable reserves at the moment of the transfer and assets beyond those required to run the business; and (4) these assets are distributed to the acquirer during the five years following the acquisition.

Generally, indirect partial liquidation can be avoided by adding a clause to the share purchase agreement that prevents distributions during the five years following the transfer.

Transposition occurs under the following conditions: (1) transfer of at least 5 per cent of the share capital of a company; (2) from the private assets of an individual to a partnership or company in which said individual holds at least 50 per cent of the capital after the transfer; and (3) the consideration is worth more than the nominal value of the transferred shares.

Income resulting from transposition is taxed as participation income, rather than as a capital gain. The Tax Reform Act will abolish the 5 per cent threshold.

Financing structure

Financing can be provided through either equity or debt.

Stamp duty is levied on the creation of equity in excess of the 1 million Swiss francs exemption.[10] Additionally, there is no notional interest deduction.

Ordinarily, interest on debt is a tax-deductible expense.

As previously mentioned, loans granted by shareholders and related parties must be at arm's length. Further, thin capitalisation will result in increased corporate income taxes and capital tax.[11]

As mentioned above,[12] debt pushdown in a leveraged acquisition may be regarded as tax avoidance by the Swiss tax authorities, so an acquisition company cannot acquire a target company, merge with it and then deduct interest on loans taken out by the target company. If the Swiss tax authorities consider the debt push down to be tax avoidance, interest on the loan may not be deducted.

If the acquiring company intends to acquire multiple target companies, one solution is to structure the acquisition as a cascade purchase. In a cascade purchase, a target company first acquires another target company, which in turn acquires another target company, and so

10 See Section III.ii.
11 See Section VII.i.
12 See Section VII.ii.

on. Since the target companies have operational income and assets that can be leveraged, they can take out loans to fund the acquisition of other target companies and deduct the interest on these loans.

ii Reorganisation

In principle, reorganisations (mergers, demergers, conversions and the transfer of assets) are tax-neutral. The following conditions must be respected for a reorganisation to be tax-neutral: (1) the company remains subject to tax in Switzerland; and (2) there is no re-evaluation of commercial assets.

Additionally, in the event of a demerger, a business unit or part of a business unit must be transferred. Likewise, the intra-group transfer of assets is tax-free, but only for operational assets; there is blocking period of five years (participations and assets that were part of the reorganising cannot be sold for five years).

iii Exit

In the event of a reorganisation that leads to downsizing or closing Swiss operations, all transactions between associated enterprises resulting from the reorganisation must be at arm's length, as enumerated in Chapter IX of the OECD Transfer Pricing Guidelines.

Exit tax is levied on hidden reserves upon emigration. Likewise, withholding tax is levied on distributable reserves and hidden reserves. The Tax Reform Act provides a clear legal base for levying exit tax on hidden reserves.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

In Switzerland, general anti-avoidance rules (GAARs) are not contained in a specific act. However, the Swiss Federal Supreme Court has developed a general principle of tax avoidance and abuse of rights, applicable to all Swiss taxes. In accordance with this principle, in certain situations, tax authorities have the right to tax a taxpayer's structure based on its economic substance, rather than its legal structure.

According to case law, there is tax avoidance if: (1) the taxpayer has chosen an abnormal structure; (2) it was done with the intention to save on taxes; and (3) the taxpayer would save on taxes if permitted to use the structure.

ii Controlled foreign corporations (CFCs)

Switzerland does not have CFC rules. However, the case law of the Swiss Federal Supreme Court stipulates that a company whose statutory seat is located abroad, but has little or no substance abroad and is effectively managed from Switzerland, may be deemed a Swiss taxpayer.

iii Transfer pricing

The Swiss tax code contains very few rules relating to transfer pricing.

The Swiss tax authorities do not require specific transfer pricing documents, but Swiss tax law states that a company's expenses must be commercially justified and that profits not shown in the company's profit and loss statement still must be included in the taxable profit. Based on these general rules, Swiss tax authorities can correct intra-group transactions that are not at arm's length. In determining whether an intra-group transaction is at arm's length, the Swiss tax authorities follow the OECD Transfer Pricing Guidelines.

It is possible to request an advance pricing agreement from the Swiss tax authorities; the competent authority is the State Secretariat for International Financial Matters.

iv Tax clearances and rulings

Tax rulings are common in Switzerland and help eliminate uncertainty and avoid future disputes.

Generally, it is recommended to request a ruling before entering into a complex transaction or other situation where tax uncertainty could arise.

Rulings concerning tax planning or preferential tax regimes are now automatically exchanged under automatic exchange of information agreements and in accordance with the BEPS rules. This has led to a reduction in the number of rulings, some of which were not necessary in the first place. Conversely, rulings concerning the treatment of specific transactions, generally, are not part of the automatic exchange of information and continue be commonplace.

X YEAR IN REVIEW

Switzerland offers a stable, BEPS-compliant environment for companies looking to make inward investments. Increased pressure for companies to demonstrate actual substance in their stated country of residence, combined with Switzerland's attractive living and working environment for employees has led to an increase in companies looking to onshore in Switzerland.

Switzerland is committed to implementing the BEPS minimum standards. On 7 June 2017, Switzerland signed the OECD's Multilateral Instrument. Switzerland is a signatory to the Multilateral Competent Authority Agreement and the Common Reporting Standard and the first automatic exchanges of information started in autumn 2018. Switzerland has also signed the Multilateral Competent Authority Agreement for the automatic exchange of country-by-country reports, so as of 2018, MNEs in Switzerland have to submit country-by-country reports; the first automatic exchanges of country-by-country reports are scheduled to take place in 2020.

XI OUTLOOK AND CONCLUSIONS

Switzerland is in the process of reforming its corporate tax system to bring it in line with OECD and EU requirements. On 12 February 2017, Swiss voters rejected the Corporate Tax Reform III. In response to the vote, the Federal Council formed a steering committee to develop a new proposal – Tax Proposal 17. During parliamentary debate, members of Parliament agreed to include funding for social security. The bill was renamed the Tax Reform and Social Security Funding Act (the Tax Reform Act). The Tax Reform Act was adopted by Parliament.

The Tax Reform Act will abolish the special cantonal statuses, as well as the principal company reduction. The Tax Reform Act will introduce mandatory IP boxes in all cantons and cantons may offer additional R&D deductions. It is expected that most cantons will lower their corporate income tax rates to compensate for the loss of the special cantonal statuses; some cantons will lower their capital tax rates.

If 50,000 Swiss voters request a referendum on the Tax Reform Act prior to 17 January 2019, which is likely, a referendum will be held on 19 May 2019. If the Tax Reform Act is not rejected by Swiss voters, it is expected to enter into force on 1 January 2020.

Appendix 1

ABOUT THE AUTHORS

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Frédéric Neukomm is a certified tax expert in the Geneva office. His main areas of work are company tax law and tax law for high net worth individuals. He also works in the fields of banking and finance.

Enjoying a 'strong experience of transactional tax matters', Frédéric Neukomm is praised by clients for being 'very collegial – truly a team player', 'his experience is extremely extensive' (Chambers, 2017). Sources highlight his 'positive attitude and drive for successful outcomes' (Chambers, 2018).

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Floran Ponce is a lawyer and certified tax expert. He advises Swiss and foreign banks, investment funds and corporations on a broad range of domestic and international tax as well as commercial law matters. He advises them on matters relating to mergers, acquisitions, divestitures, financing transactions and restructurings, as well as on the management of tax affairs and controversies before Swiss tax authorities. He also assists private clients on complex tax matters.

Floran Ponce is a member of various professional tax law associations. He also teaches specialised tax courses for master's degree programmes at the University of Geneva and the University of Lausanne as well as in the specialised training for the federal tax expert diploma.

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