The Corporate Tax Planning Law Review

Fifth Edition

Editors
Jodi J Schwartz and Swift S O Edgar

The Law Reviews

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PREFACE

We are pleased to present the fifth edition of *The Corporate Tax Planning Review*. This volume contains 17 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany and Korea); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city state of Singapore; and several nations in the Global South (Colombia, Nigeria and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and, at times, uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Ouassila Mebarek, Adam Myers and Emily Wolfin at Law Business Research Limited for their editorial acumen and dedication to this project.

Jodi J Schwartz and Swift S O Edgar
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Chapter 16

SWITZERLAND

Floran Ponce and Jean-Blaise Eckert[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. Switzerland has no controlled foreign company (CFC) rules in place and limited anti-avoidance rules. Furthermore, income (e.g., dividends and capital gains) from qualifying participations benefits from participation relief.

The year 2020 saw major changes to Swiss tax law with the Tax Reform and Social Security Funding Act (the Tax Reform Act) entering into force on 1 January 2020; no major changes occurred since.

In 2022, the Swiss population rejected proposed corporate tax changes, which would have favoured businesses. The proposal to abolish issuance stamp tax was rejected by the Swiss population in a referendum held on 13 February 2022. The Swiss population also rejected by 52 per cent the reform aiming at eliminating withholding tax on most interest payments which would have fostered the Swiss capital market by allowing Swiss companies to issue bonds without withholding tax, in a referendum held on 25 September 2022.

As a result, no major changes took place in 2022, and none are planned for 2023 as the main corporate tax policy topic is the preparation of legislation aiming at implementing the OECD Pillar Two Rules in Switzerland with effect as of 2024.

II LOCAL DEVELOPMENTS

i Entity selection and business operations

Entities

Non-corporate entities include general and limited partnerships. They are rarely used by large businesses because general partners must be individuals and have unlimited personal liability.

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

1 Floran Ponce and Jean-Blaise Eckert are partners at Lenz & Staehelin.

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 the income is distributed or accumulated).

Companies limited by shares require a minimum share capital of 100,000 Swiss francs, whereas limited liability companies 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.

Certain legal entities may be exempt from taxes – for example, public benefit companies, charities and pension funds.

Corporate income tax principles

Companies with either their statutory seat or their place of effective management in Switzerland are considered Swiss 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 a company's statutory purpose). Secondary factors include the place where fundamental decisions are made and the place where administrative work (e.g., accounting and 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.

Swiss-resident corporate taxpayers are subject to corporate income tax on worldwide income, with the exception of income from foreign real estate, permanent establishments and business enterprises. Corporate income tax is levied on the net profit.

Swiss permanent establishments of foreign companies are subject to Swiss corporate income tax on income attributable to it. Non-resident companies with real estate in Switzerland are subject to income tax arising from the real estate.

In comparison with other countries in the world, in particular in the OECD, Switzerland taxes corporations at a low rate.

The federal corporate income tax rate is 8.5 per cent on profit after tax; cantonal and communal corporate income tax rates vary.

Current effective rates (including federal, cantonal and communal taxes) are the following: 13.04 per cent in Basle, 14 per cent in Geneva, 14 per cent in Lausanne (Vaud), 11.85 per cent in Zug and 19.7 per cent in Zurich. There were no changes in these cantons in 2022. However, certain smaller cantons which all had rates above 15 per cent, such as Aargau, Valais and Jura, lowered their corporate tax rates in 2022 by 1 to 1.6 per cent in 2022.

Corporate tax base

In principle, the taxable income is the same as the profit listed in statutory financial statements, which is determined using the accrual basis accounting method. Generally, all expenses are deductible provided that 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 commercial buildings, 3 to 4 per cent using the declining balance method and 1.5 to 2 per cent using the straight-line method; and for intangibles, 40 per cent using the declining balance method and 20 per cent using the straight-line method).

A lump sum provision for a third of the inventory value is permitted for federal and cantonal tax purposes. Further lump sum provisions for accounts receivables are allowed. The standard amount is 5 per cent for Swiss receivables and 10 per cent for foreign receivables.

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 method.

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

Interest is deductible. The Federal Tax Administration (FTA) publishes annual 'safe harbour' interest rates for loans granted to related parties. Interest payments exceeding the safe harbour rates are reclassified as constructive dividends if paid to a shareholder or related party. Consequently, this 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 DTT).

Similar rules apply to interest paid on debt exceeding the maximum allowed debt. 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 plant (commercially used) and 70 per cent for intangibles.

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.

Participation relief and foreign-source income

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

However, 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 10 per cent of the distributing company's profit and reserves. Participation relief is granted for capital gains if the shareholder owns at least 10 per cent of the equity and the participation has been held for at least one year.

There is no rule limiting the use of the participation relief based on the amount of tax paid by the subsidiary.

Depreciations on participations are possible and tax deductible. However, a recapture rule stipulates that depreciations must be reintegrated as profit if the participation fulfils the criteria for participation exemption and its fair market value exceeds its book value.

Foreign-source income is subject to corporate taxes if it is included in the legal entity's statutory financial statements, with the above-mentioned exception for income from foreign real estate, permanent establishments and business enterprises.

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

A Swiss company may offset losses incurred abroad by a foreign permanent establishment against domestic profits even though the foreign-source income is tax exempt. If the permanent establishment makes a profit within seven years, the Swiss company's initial taxation is revised to recapture the offset foreign losses.

Holding company regimes

Previously, holding companies were exempt from most cantonal and communal corporate income taxes. However, this was abolished when the Tax Reform Act entered into force on 1 January 2020. Nevertheless, holding companies continue to benefit from a quite far-reaching participation relief for qualifying participations.

Withholding tax

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 withholding tax, withholding tax is not levied on interest paid on private loans, including intercompany loans.

Under the 10/20 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.

In practice, these rules often make the issuance of bonds by Swiss issuers fiscally unattractive and can make non-bank financing difficult, especially when it comes to financing from debt funds, and particular attention must be paid to avoid loans that could be requalified as bonds for withholding tax purposes. In practice, it is recommended to have a transfer restriction clause in financing agreements to avoid having more than 10 or 20 non-bank lenders, as well as various Swiss-specific provisions in the loan agreement.

Withholding tax is not levied on royalties.

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.

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 that capital tax is levied only if it exceeds the cantonal corporate income tax due. There is no federal capital tax; it is levied only by the cantons. In the event of thin capitalisation, the part of the loan reclassified as equity is subject to capital tax.

ii Common ownership: group structures and intercompany transactions

Absence of tax grouping and transfer pricing rules

Switzerland tax law does not permit consolidated taxation for corporate income tax purposes. This means that each legal entity is treated as an independent entity and must comply with the principle of 'dealing at arm's length'.

On the basis of this rule, Swiss tax authorities can correct intra-group transactions that are not at arm's length. When a transaction does not respect the arm's-length price, the difference between the price paid and the arm's-length price is treated as a constructive dividend and the taxable income is adjusted. The arm's-length principle is also applicable when choosing the method to determine the mark-up.

In assessing 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.

In respect of intercompany loans, the FTA publishes an annual circular letter with rules regarding safe harbour interest rates on loans and advances between related parties. This circular letter sets out maximum rates for loans from shareholders to the company and minimum rates for loans from the company to shareholders and related parties.

Regarding interest, thin capitalisation rules might affect the deductibility of interest. However, in most cases, and in view of the generous thin capitalisation rules, it might be worthwhile to finance Swiss subsidiaries through interest-bearing debt.

Participation relief on intercompany dividends and capital gains

Dividends paid to other group companies might benefit from participation relief. In the case of dividends received from, or capital gains on, the sale of a foreign affiliate, participation relief applies irrespective of the withholding tax (see Section II.i, 'Participation relief and foreign-source income').

Reorganisation

In principle, reorganisations (mergers, demergers (see in Section II.iii), conversions and asset transfers) 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.

Similarly, the intra-group transfer of assets is tax free, but only for business units or operational assets; there is a blocking period of five years (participations and assets that were part of the reorganisation cannot be sold for five years).

Losses from both companies may be carried forward during a merger, except in the case of tax avoidance or abuse of a right (e.g., a merger with a company that has liquidated most or all of its assets). In the event of a demerger or transfer of a business unit, the losses survive and must be allocated between the companies based on economic criteria.

Anti-avoidance and CFC rules

In Switzerland, general anti-avoidance rules 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 that is 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 on its legal structure.

According to case law, there is tax avoidance if:

a the taxpayer has chosen an abnormal structure;

b it was done with the intention to save on taxes; and

c the taxpayer would save on taxes if permitted to use the structure.

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.

Withholding tax on intercompany transactions and treaty exemption

As explained above, Swiss companies must levy a 35 per cent withholding tax on profit distributions (including constructive dividends and liquidation proceeds). To qualify for treaty benefits, the foreign parent company must be the beneficial owner of the dividend income. Furthermore, the withholding tax refund will not be granted if the FTA determines that there is treaty abuse. In assessing beneficial ownership and 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 exemption.

Rather than paying withholding tax, companies can request permission to use the simplified notification procedure (withholding tax relief) for intra-group distributions to Swiss parent companies or to parent companies resident in a DTT country.

The Swiss Federal Council recently proposed overhauling the withholding tax system. The current withholding tax system makes it disadvantageous for companies to issue domestic bonds, so bonds are often issued through a foreign affiliate. To rectify this, the Federal Council has proposed switching to the paying agent principle. Under this system, instead of the company being responsible for paying withholding tax (as the debtor of the interest payment), withholding tax would be paid by the investor's paying agent (the custodian bank). Furthermore, withholding tax would be levied only on payments to Swiss-resident individuals; domestic legal entities and foreign investors would be exempt. Contrary to the company, the paying agent would know the identity of the investor, so it could guarantee that withholding tax is levied only when required by law.

This new system would apply only to bonds (including structured products and collective capital investments) and not to dividends or interest on customer bank balances.

iii Third-party transactions

Asset deals

Asset deals tend to be more favourable for buyers because a step-up in basis is allowed, whereas share deals are beneficial for sellers, in particular for individual sellers, because individuals are not subject to 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.

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

Share deals

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). If the buyer or seller is a professional securities dealer, then transfer stamp duty will be levied.

From the perspective of corporate sellers, capital gains realised by Swiss-resident companies may benefit from participation relief if the participation fulfils the aforementioned conditions (i.e., participation of 10 per cent or more and a holding period of at least one year).

Share deals are particularly beneficial for individual sellers because Swiss-resident individuals are not subject to capital gains tax on gains arising from private assets but are subject to income tax on dividends.

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

The criteria for indirect partial liquidation are as follows:

a the sale of at least 20 per cent of the share capital in a Swiss or foreign company to a third party;

b 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);

c the target company has commercially distributable reserves at the moment of the transfer and assets beyond those required to run the business; and

d the 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.

From the purchaser's perspective, acquisitions can be carried out using a local or foreign entity. An acquisition in and of itself does not trigger withholding tax.

When the purchaser is a Swiss company, the purchase price is recorded in the books of account at the share value. This value cannot be decreased (unless the market value decreases).

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

tax must also be considered when structuring a leveraged acquisition with a Swiss borrower, because withholding tax is levied on bonds and certain non-bank loans are requalified as bonds under the 10/20 non-bank rule.[2]

When using a foreign parent company to hold a Swiss company, investors should ensure that the foreign parent company is located in a jurisdiction that has a DTT with Switzerland 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 that it complies with the criteria for treaty exemption.

In international situations, investors should also 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 that is 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.

Attention must also be paid to 'liquidation by proxy' in the event of an acquisition in which a Swiss entity acquires a Swiss target entity that was previously held by non-Swiss-resident shareholders who were ineligible for a withholding tax refund in respect of dividends paid by the Swiss target entity. In accordance with the Swiss anti-avoidance rules, were that entity to be partially or totally liquidated shortly after the sale, it is possible that the Swiss acquiring company would be ineligible for a withholding tax refund.

Share-for-share exchange

In practice, share-for-share exchanges are common and qualify as tax-neutral quasi-mergers. They take place through an in-kind contribution of shares in exchange for shares in the acquiring company. This requires increasing the acquiring company's share capital as well as exchanging shares with the acquired company's shareholders. A cash consideration is permitted, but it must not exceed 50 per cent of the total consideration.

Capital gains resulting from quasi-mergers are tax free for individual sellers, unless there is a case of transposition.

Transposition occurs if transfer is of at least 5 per cent of the share capital of a company from the private assets of an individual to a partnership or company in which the individual holds at least 50 per cent of the capital after the transfer, and the consideration is worth more than the nominal value of the transferred shares.

Income resulting from transposition is taxed as dividend, rather than as a capital gain. The Tax Reform Act abolished the 5 per cent threshold.

Share-for-share exchanges may lead to the creation of reserves resulting from capital contributions, which may be redistributed in a tax-neutral manner to shareholders and are not subject to withholding tax. Therefore, they may be used in the context of public company transactions.

Demergers

As mentioned in Section II.ii, reorganisations, including demergers, are tax neutral, provided that certain conditions are met.

2 See Section II.i.

For demergers, these conditions are that: (1) the company remains subject to tax in Switzerland; (2) there is no re-evaluation of commercial assets; and (3) a business unit or part of a business unit is transferred. A business or business unit is defined as a group of assets and liabilities forming an independent entity. In general, a business unit exists when a company offers services on the market and has employees.

Further, for tax purposes, the notion of demergers includes both ordinary demergers and 'two-step demergers'. Circular Letter No. 5, published by the FTA, defines a demerger as a reorganisation in which the transferring company transfers some of its assets to the acquiring company in exchange for shares. In a two-step demerger, the transferring company incorporates a subsidiary and transfers certain assets to the subsidiary. It then transfers shares in the subsidiary to its existing shareholders as a dividend in kind. Subsequently, those shareholders sell their shares in the new company to a third-party buyer.

iv Indirect taxes

Issuance stamp duty

Issuance stamp duty is levied on capital contributions from shareholders to Swiss companies, meaning that it is levied on both the initial creation of share capital as well as subsequent increases of share capital and contributions without the 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.

The formal nature of stamp duty means that it is levied only when there is a contribution from a shareholder, so it is possible to avoid issuance stamp duty if the contribution is made by an affiliated company that is not a direct shareholder.

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; Swiss securities dealers are defined as banks, securities traders and professional intermediaries (individuals and legal persons) and companies 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.

The Swiss Federal Council recently proposed changes to transfer stamp duty. Under the proposal, transfer stamp duty would have been abolished on the transfer of domestic bonds. However, the Swiss population ultimately rejected this proposal.

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. On 25 September 2022, the Swiss people approved raising VAT rates in a referendum as follows: the ordinary rate is raised to 8.1 per cent, VAT on accommodation to 3.8 per cent and VAT on essential goods to 2.6 per cent. Those changes will enter into force on 1 January 2024.

Legal entities with a common management can benefit from group taxation for VAT purposes.

Although income from investments does not qualify as turnover from a VAT standpoint, it is possible, and recommended, that holding companies voluntarily register to be subject to VAT so that they can recover VAT that they have paid and avoid an irrecoverable VAT charge on the acquisition of services from abroad under the reverse charge mechanism. The same advice applies to international companies with an annual turnover under the 100,000 Swiss francs required for mandatory VAT liability.

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

Switzerland has taken a number of actions to comply with the minimum standards set by the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS).

In response to Action 5 of the BEPS plan, the Swiss Parliament adopted the Tax Reform Act to abolish the cantonal special tax statuses, which had been deemed a harmful tax practice. Other actions include amending Swiss legislation concerning the spontaneous exchange of information contained in advance tax rulings.

With regard to Action 13 of the BEPS plan, Switzerland also implemented country-by-country reporting regarding exchange of information.

In connection with Action 14 of the BEPS plan, Switzerland improved its dispute resolution mechanisms.

Under the Pillar Two rules agreed on by 137 countries, multinational companies with a turnover of more than €750 million must be taxed at a minimum rate of 15 per cent. Swiss resident companies will be impacted by this reform as the tax rates of most cantons are below 15 per cent and the corporate tax base is based on rules which often result in a tax base which is lower than that relevant under the Pillar Two Rules.

On 12 January 2022, the Swiss Federal Council decided to implement this minimum tax rate. In a nutshell, the proposal is to add a federal top-up tax which would apply to entities which are in scope of the Pillar Two Rules and bring their effective tax rate to 15 per cent. As it requires a change in the federal Constitution, a referendum will be held on 18 June 2023. If the Swiss people and cantons approve the minimum tax rate, it will enter into force on 1 January 2024 on the basis of the new constitutional provision, which will be completed by a federal temporary ordinance until final legislation is adopted by parliament.

ii EU proposals on taxation of the digital economy

The State Secretariat for International Financial Matters has taken a position on the question of taxation of the digital economy. Switzerland is in favour of digitalisation and aims to provide a favourable framework for the development of a digital business model. With regard to taxation and OECD developments, Switzerland's position is that it is important to avoid hindering technological development and innovation through taxation. Thus, it is necessary to tax value where it is created and to eliminate double taxation. Switzerland also favours a multilateral instrument and consensual solutions.

Beyond these favourable statements of intent regarding the digital economy and the need to preserve innovation, the question of the digital economy has not resulted in any substantial changes to Swiss tax law.

iii Tax treaties

Switzerland has an extensive network of DTTs, most of which closely follow the OECD model. Switzerland has concluded treaties with over 80 jurisdictions, including most European countries, the United States, Russia, Japan and China. To date, Switzerland has adapted, or intends to adapt, the DTTs signed with Argentina, Austria, Chile, the Czech Republic, Iceland, Italy, Lithuania, Luxembourg, Mexico, Portugal, South Africa and Turkey to bring them up to the minimum BEPS standards.

In addition, 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.

As mentioned, most of Switzerland's DTTs are close to the OECD model. As a rule, treaties tend to reduce the withholding tax rates from 15 per cent to zero per cent.

Finally, on 7 June 2017, Switzerland signed the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument) (MLI) and the MLI entered into force in Switzerland on 1 December 2019, meaning that DTTs will need to be amended to bring them into line with the minimum standards agreed on in the BEPS project.

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
Russia	15	5	20 and 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 RECENT CASES

i Perceived abuses

Withholding tax

The FTA has taken to rigorously applying anti-avoidance rules with regard to withholding tax. This has had consequences in three areas.

a Holding companies: the FTA used to be relatively lenient with holding companies resident in a DTT country, provided that the holding company was not thinly capitalised. The FTA's practice has evolved in recent years, and now the FTA seeks to ensure that the parent company has sufficient substance. For a holding company, this does not necessarily require personnel and premises, but the company must

demonstrate that it holds multiple participations and exercises a real holding function. This can be a challenge for certain investors, such as those in the private equity sphere where funds often use foreign special purpose vehicles to carry out acquisitions. Tax rulings can be obtained from the FTA before the transaction or restructuring.

b Third-party acquisition: as previously mentioned, the FTA, based on the Swiss Federal Supreme Court's case law, has developed two withholding tax restrictions that can be applied in the event of an acquisition by investors who ordinarily would benefit from a withholding tax exemption from investors who did not benefit from a withholding tax refund. Swiss and foreign investors need to be aware of these restrictions when acquiring a Swiss company and assess the risk before carrying out the transaction. Tax rulings permit investors to know in advance whether they will benefit from a withholding tax refund post-transaction; it is generally advisable to request such a ruling, since there often is a considerable amount of post-transaction scrutiny.

c Dividend stripping: over the past several years, the FTA has increasingly been scrutinising withholding tax relief claims lodged by Swiss and foreign banks, as well as large claims by treaty-resident investors (e.g., pension funds and sovereign funds). In two leading cases[3] concerning Danish banks that had purchased Swiss stocks as hedges on total return swaps or futures, the FTA alleged that the banks were not the beneficial owners, and the Swiss Federal Supreme Court sided with the tax authorities. The approach followed by the court is not in line with the OECD commentary, and it might have been more appropriate to analyse these cases under the principle of treaty abuse. In addition, the criteria developed by the case law are vague and difficult to apply in practice. The criteria are currently the subject of extensive interpretation by the FTA. The FTA has also been challenging certain refunds with the argument that it has been provided with insufficient information about the transactions. This will likely result in other court cases.

Transfer pricing

In recent years, there has been an increase in transfer pricing disputes, both with the FTA in withholding tax matters and with the cantonal tax authorities in income tax matters.

The FTA regularly conducts withholding tax audits of companies participating in cash pool arrangements with foreign affiliates, and tends to challenge the short-term nature of the deposits to argue that higher interest rates should have applied. Withholding tax audits often result in additional tax charges, as the FTA levies the 35 per cent withholding tax and grants only a partial refund of 20 per cent when the beneficiary of the constructive dividend is a resident of a DTT country but is not the direct parent company.

In addition, the cantonal tax authorities have been conducting more transfer pricing audits than in the past, even though they are still not as frequent as in many other countries.

3 Federal Court, 2C_364/2012 and 2C_377/2012 dated 5 May 2015. See Federal Administration Court, A-1951/2017 dated 22 August 2018 and its translation in International Tax Law Reports, p. 285, vol. 21, Part 3, 2019 for a recent case and confirmation on the Federal Court rulings.

ii Recent successful tax-efficient transactions

Contrary to many other European countries, spin-off and sale transactions can be structured in a tax-efficient manner in Switzerland without excessive difficulties. This can be carried out through a tax-neutral reorganisation of the business into a subsidiary or a group of subsidiaries. The Swiss parent company can then sell the subsidiary to a third party and will benefit from the participation relief on the gain.

It is also possible to carry out a spin-off transaction at the holding company level. This can be done by way of a two-step spin-off (incorporation of a subsidiary with in-kind contribution of assets followed by a distribution of the newly incorporated company to the shareholders). Such a transaction can generally be structured in a tax-neutral manner.

V OUTLOOK AND CONCLUSIONS

The last major change in Switzerland's corporate tax policy was the 2020 tax reform, which resulted in a reduction of cantonal tax rates and maintained low corporate tax rates for multinational companies, which had previously benefited from special tax regimes. This reform was effective in that it allowed Switzerland to remain an attractive jurisdiction for businesses.

No major changes took place in 2022 or in 2023.

The current focus of the Swiss policymakers is the implementation of the Pillar Two Rules. A proposal to amend the Constitution and a temporary ordinance have been prepared in order to ensure that the rules can enter into force on 1 January 2024. The Swiss population will vote on it on 18 June 2023. Switzerland has to implement these rules as several cantons have a corporate tax rate lower than 15 per cent and would miss out tax income if the tax rates were not to be increased.

The introduction of the global minimum tax will have far-reaching consequences for the international tax competition as it will reduce the ability of tax jurisdictions like Switzerland to attract businesses through competitive tax policies. While the tax income is likely to increase in the short term if Switzerland introduces the minimum tax, Switzerland will have to ensure that it remains attractive as a jurisdiction by ensuring that it keeps good economic framework conditions, such as a flexible labour market and a good access to talent.

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