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GLOBAL GUIDE TO M&A TAX

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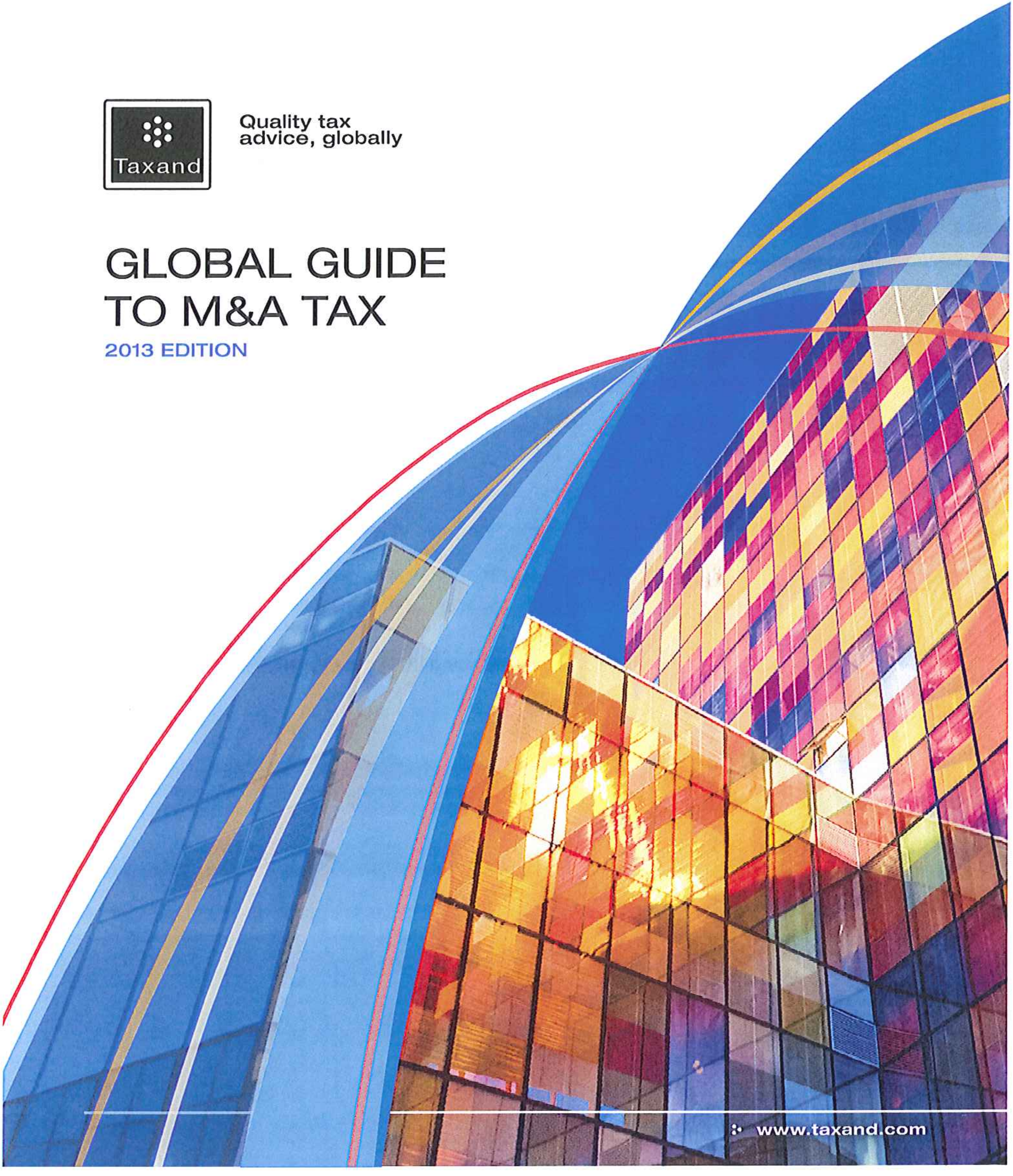

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SWITZERLAND

Switzerland

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

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

Asset deal

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

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

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

3. What are the particular rules of depreciation of goodwill in your country?

In a share deal the tax base for the shares in the purchaser's books is equal to the purchase price. Except in exceptional cases (eg if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component on shares for tax purposes. By contrast in asset purchases the goodwill may be recorded separately and written off against taxable income.

In an asset deal goodwill may generally be depreciated over a period of 5 years or longer.

4. Are there any limitations to the deductibility on interest of borrowings?

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

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

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

The required equity is calculated on the basis of the fair market value of all assets as stated in the balance sheet at the end of the business year.

The federal tax authorities publish maximum interest rates on borrowings from related parties annually. For the fiscal year 2013 the maximum interest on loans between related parties denominated in Swiss francs amounted to 3.75% for business loans. For loans denominated in other currencies the maximum allowed interest rates for the most important currencies are also published by the federal tax authorities: for the fiscal year 2013, the maximal interest rates for loans denominated in US dollars amounted to 1.75% and for loans denominated in euros amounted to 1.75%. However different interest rates are applicable if the taxpayer can prove that the financing is at arm's length. In this case a tax ruling is recommended.

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

5. What are usual strategies to push-down the debt on acquisitions?

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

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

6. Are losses of the target company/ies available after an acquisition is made?

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

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

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

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

Securities dealers are banks, actual dealers in securities and, among others, Swiss companies that hold securities with a book value of more than CHF10 million according to their latest balance sheet. A new company should not be liable for stamp duty until 6 months after the first balance sheet showing taxable securities of at least CHF10 million.

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

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

8. Are there any particular issues to consider in the acquisition of foreign companies?

Dividends from a target company may be subject to foreign source tax. Switzerland has concluded tax treaties with numerous countries. Not all of the Double Tax Treaties (DTTs) provide for a 0% rate for withholding taxes on dividend payments. For EU countries, Switzerland Article 15 of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in the Directive 2003/48/EC on taxation of savings income in the form of interest payments provides for a 0% rate on dividend payments from a participation resident in the EU to a Swiss parent company, if the participation amounts to at least 25% and a holding period of at least 2 years is met.

Switzerland's federal decree on measures against the improper use of DTTs introduced in 1962 still applies in cases where a Swiss resident claims relief for foreign withholding taxes on the basis of a tax treaty. Under the general provision treaty relief is denied if the conditions of residence, registered office, and beneficial ownership or tax liability are not fulfilled or if it is abusive. The focus in practice is to ensure that there is not an abusive application of treaty benefits. This occurs in particular in the case of an abusive transfer of income to non-qualifying persons, inappropriate profit distributions and inappropriate financing and interest rates. The decree does not apply in cases where an applicable tax treaty contains specific or general misuse clauses.

A transfer to non-qualifying persons is regarded as abusive when a substantial part of income is used directly or indirectly to satisfy the rights or claims of persons not entitled to benefit from a tax treaty. In practice the Federal Tax Administration has defined more precisely the limits of this requirement. Not more than 50% of treaty-favoured income may be transferred directly or indirectly to persons not entitled to treaty benefits. However deductible payments made by a Swiss-resident company could exceed 50% of its treaty-favoured income as long as the payments are commercially justifiable and the company meets 1 of the following tests:

- Active trade or business test
- Direct (or indirect) stock exchange test
- Pure holding company test

Thin capitalisation rules apply in Switzerland. In addition the interest paid to foreign creditors may not exceed the appropriate fair market interest rates.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

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

Legal mergers

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

Demergers

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

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

Share for share exchanges

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

Hive-downs

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

Intra-group transfer of assets

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

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

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

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

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

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Dividend withholding tax applies on any open or deemed dividend distribution of Swiss companies. The tax rate is 35%. It can be fully reclaimed by a Swiss resident shareholder. Foreign shareholders are entitled to a refund according to the applicable double taxation treaties or under Article 15 of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in the Directive 2003/48/EC on taxation of savings income in the form of interest payments. A notification procedure applies to intra-group dividends paid to certain corporate shareholders resident in the EU or a state with which Switzerland has a DTT.

Therefore any EU country or any country providing for a 0% rate on dividend payments provides a tax efficient exit route to investing in Switzerland with regard to withholding tax on dividend payments.

12. How is foreign debt usually structured to finance acquisitions in your country?

There are no commonly used structures to finance acquisitions in Switzerland. Any interest on debt is tax deductible in Switzerland if the thin capitalisation rules are met and the maximum interest rate on loans from related parties is set. In particular the treatment of debt in the creditor's country is irrelevant from a Swiss tax perspective. Therefore hybrid loans are in general considered as debt from a Swiss perspective if the loan is treated as equity in the country of residence of the creditor.

Interest payments on inter-company loans from a Swiss company are in general not subject to Swiss withholding tax. However if the Swiss company is considered to be a savings institution in the sense of the Swiss withholding tax act, interest payments are subject to Swiss federal withholding tax. Furthermore if the Swiss entity issues bonds the interest payments on such bonds are subject to Swiss withholding tax at 35%.

A Swiss company becomes a savings institution from withholding tax point of view if it has interest-bearing liabilities against more than 100 non-bank creditors and the financing amount exceeds CHF5 million. A liability is deemed to be a bond if a Swiss company issues liabilities with more than 10 non-bank creditors with identical conditions or with more than 20 non-bank creditors with similar conditions, for both if the financing amount exceeds CHF500,000. Therefore the foreign debt needs to be structured in a way that it may not be qualified as a bond and the Swiss company does not become a savings institution.

Inter-company loans between fully consolidated group companies are not considered bonds and are not subject to Swiss withholding tax on interest and not subject to Swiss issuance stamp tax.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

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

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

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

The transfer of shares is not subject to Swiss VAT.

Asset deals

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

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

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

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

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

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

For individuals holding their assets as part of their private wealth capital gains are not taxable (except for gains on immovable properties).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

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

5 cumulative conditions must be fulfilled:

- The replaced asset and the new one must be fixed assets necessary to the exploitation
- The reinvestment must be done within a reasonable period of time. A period of 2 years qualifies and a longer period must be objectively justified
- The reinvestment must take place in Switzerland, but not necessarily in the same canton for cantonal tax purposes
- The book value of the replaced asset must be kept. This ensures the tax-neutrality of the operation. If the company sells and reinvests the asset during the same tax period, a depreciation of the same amount of the undisclosed reserve must be accounted. If not a provision of the same amount must be booked. When the new asset is acquired the provision will be dissolved and used for depreciation. If the company reinvests only after the reasonable period, the provision is dissolved and the amount is added to the taxable profit

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