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Federal Supreme Court confirms strict practice of Federal Tax Administration concerning stamp duty restructuring relief

Walder Wyss Ltd | Corporate Tax - Switzerland



FABIENNE
LIMACHER



MAURUS
WINZAP

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Introduction

On 7 September 2023, in its latest ruling, the Swiss Federal Supreme Court (SFSC) confirmed the strict practice of the Swiss Federal Tax Administration (SFTA), according to which distressed Swiss companies can only make use of the stamp duty restructuring relief if they derecognise the respective losses in the balance sheet.

Stamp duty restructuring relief and waiver of stamp duty

As a general rule, capital contributions to a resident company are subject to one-time capital duty at a rate of 1%. However, to avoid burdening the restructuring efforts of companies by levying stamp duty on contributions that are intended to help restructure the company, each company can make use of the one-time stamp duty restructuring relief in the total amount of 10 million Swiss francs (approximately £9,000) during its lifetime. In cases where the relief threshold of 10 million Swiss francs is exceeded, the company may request a waiver of the issuance stamp duty from the SFTA.

According to the SFTA's long-standing practice, existing losses must be derecognised in the balance sheet in order to benefit from the restructuring relief or the waiver for stamp duty purposes.

In contrast, in its ruling of 29 November 2021,⁽¹⁾ the Swiss Federal Administrative Court (SFAC) held that the provisions concerning stamp duty restructuring relief, as well as the waiver of the stamp duty, were not conditioned upon the elimination of the respective losses in the balance sheet. The SFAC's ruling was reversed by the ruling of the SFSC of 7 September 2023 regarding said restructuring relief in the total amount of 10 million Swiss francs. The ruling is final when it comes to the waiver of stamp duty. Despite this binding part of the ruling, the SFTA still requires in practice that the companies book out the losses in the balance sheet in order to benefit from the waiver of the stamp duty.

Capital contribution reserves

For withholding and income tax purposes, contributions made by the direct shareholder to restructure a distressed company qualify as capital contributions reserves. Future distributions of reserves paid out of capital contributions are not subject to withholding tax of 35% and not subject to income tax for individuals tax resident in Switzerland.

Until recently, the formation of capital contribution reserves necessitated a separate account in the balance sheet and, consequently, capital contribution reserves could only be created if they were not offset against losses. Therefore, a Swiss company had to choose between the creation of capital contribution reserves and relief from issuance stamp duty as the restructuring exemption of up to 10 million Swiss francs or the waiver for issuance stamp purposes will only be available according to the SFTA practice if losses are offset.

However, in its recent ruling dated 17 March 2023, the SFSC stated that the booking in a separate account would not be required to create capital contribution reserves for income tax purposes and that, therefore, capital contribution reserves will not be extinct if they are offset against losses. Thus, the choice between capital contribution reserves, on the one hand, and relief from issuance stamp duty no longer applies without restriction and should only be relevant in cases in which the shareholders are not entitled to a full refund of 35% Swiss withholding tax.

Comment

Due to the SFSC's ruling, distressed Swiss companies receiving contributions cannot, in the event of a restructuring, benefit from the creation of withholding tax-free repayable capital contribution reserves and at the same time benefit from restructuring relief for stamp tax purposes. However, the consequences of this ruling might, at least to some extent, be mitigated by another recent ruling of SFSC dated 17 March 2023, according to which capital contribution reserves can be repaid to individuals resident in Switzerland without triggering income tax consequences even though they are not reflected as such in the balance sheet.

For further information on this topic please contact Fabienne Limacher or Maurus Winzap at Walder Wyss by telephone (+41 58 658 58 58) or email (fabienne.limacher@walderwyss.com or maurus.winzap@walderwyss.com). The Walder Wyss website can be accessed at www.walderwyss.com.

Endnotes

(1) (A-5073/2020)

