

Newsletter No.

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Swiss Federal Tax Administration's Update on the Circular Letter on Taxation of Companies in Distress

On 20 January 2025, the Swiss Federal Tax Administration (SFTA) released Circular Letter No. 32a, which supersedes Circular No. 32 (dated 23 December 2010), effective immediately. This updated Circular provides essential guidance on the tax treatment of Swiss companies undergoing restructuring, covering federal direct taxes, withholding tax, and stamp duties.



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Key Changes and Updates in the Circular Letter

The revised Circular incorporates amendments from Circular No. 5a (1 February 2022), which focuses on restructurings. It also reflects updates based on SFTA practices since its publication in 2010 and integrates relevant case law.

A notable update stems from the Swiss Federal Supreme Court's (SFSC) ruling dated 7 September 2023. As a general rule, capital contributions to a Swiss company are subject to a one-time capital duty at a rate of 1%. However, to support companies in distress, the SFTA provides a stamp duty restructuring relief of up to 10 million Swiss francs over a company's lifetime. If this threshold is exceeded, companies may request a waiver of issuance stamp duty.

In said ruling dated 7 September 2023, the SFSC confirmed the SFTA's long-standing practice that existing losses must be derecognised in the balance sheet and offset against equity in order to benefit from the above-mentioned restructuring relief for stamp duty purposes. As a consequence, a Swiss company is required to choose between relief from issuance stamp duty and the creation of capital contribution reserves for withholding tax purposes since the formation of the latter necessitates a separate account in the balance sheet and is consequently conditional upon these not having been offset against losses.

Against this backdrop, the updated circular letter includes the following significant changes or precision of the current practice:

(a) Definition of Tax-Recognised Financial Distress:

Under federal direct tax law, a company will be considered to be in financial distress if it has incurred losses and lacks available open or hidden reserves

to cover these losses. For withholding tax and stamp duty purposes, the financial statement is crucial in determining whether a company qualifies as being in financial distress. Importantly, hidden reserves are not considered when applying the restructuring exemption of up to 10 million Swiss francs.

(b) Capital Contributions and Tax Recognition:

The updated Circular clarifies that capital contributions made by direct shareholders during a restructuring, when booked into the company's equity and not offset against losses, are to be viewed as capital contribution reserves for tax purposes. This also applies to waivers of claims from direct shareholders. However, if these contributions or waivers are recognised and booked in the profit and loss statement, they cannot be treated as capital contribution reserves.

(c) Conditions for Restructuring Relief:

To benefit from said restructuring relief of up to 10 million Swiss francs, contributions must be offset against existing losses. Losses from the current financial year at the time of restructuring are regarded as existing losses. Offsetting such losses falls within the competence of the general meeting of the shareholders. Therefore, authorisation thereof must be sought during the relevant ordinary general meeting approving the annual accounts for the period in which the restructuring contribution was made. Any loss elimination must be completed by the end of the financial year following the restructuring. Notably, this exemption is a one-time benefit, but it may be split across multiple restructurings. If the total contributions exceed 10 million Swiss francs, the taxpayer may request a waiver of issuance stamp duty for the portion exceeding the respective restructuring relief.

(d) Conditions for the waiver of debt:

If a company has fully utilised its restructuring relief of 10 million Swiss francs, it may request a waiver of stamp duty for contributions exceeding this threshold, provided the following conditions are met:

- The restructuring contributions must be offset against the company's existing losses .
- The company must not be over-indebted, with the remaining losses not exceeding its original capital, and there should be no hidden or open profit reserves.
- Sufficient equity must have existed prior to the restructuring. This will not be the case following a company's reckless assumption of risks and a replenishment of the required equity only once losses have been incurred.
- The company should not engage in excessive restructuring, including the creation of unnecessary reserves. However, creating a restructuring reserve will be permitted if the latter is used to eliminate losses over the course of the fiscal year in question.
- The company's financial distress should not have been caused by hidden profit distributions.
- The company must continue its business operations and must not be in liquidation or bankruptcy.

rulings and ensures that businesses can make more informed decisions regarding their tax strategy during restructuring. However, companies will still face trade-offs between creating withholding tax-free capital contribution reserves and benefitting from stamp duty restructuring relief or requesting a waiver of stamp duty.

For businesses undergoing financial restructuring, careful consideration of these tax and accounting treatments will be crucial for maximising the available benefits whilst ensuring compliance.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Comment

In conclusion, the SFTA's updated Circular Letter provides essential clarifications for companies navigating through restructuring processes. Key points include updated guidelines for the formation and recognition of capital contribution reserves, the treatment of stamp duty exemptions, and the necessary conditions for restructuring relief. The update aligns with recent legal