

# Tax Newsletter

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Swiss Federal Administrative Court's ruling of  
29 November 2021: A welcome relief for  
distressed Swiss companies

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walderwyss attorneys at law



By **Fabienne Limacher**  
MLaw, LL.M., Certified Tax Expert,  
Attorney at Law  
Partner  
Telephone +41 58 658 52 81  
fabienne.limacher@walderwyss.com



and **Maurus Winzap**  
lic. iur., LL.M., Attorney at Law /  
Certified Tax Expert  
Partner  
Telephone +41 58 658 56 05  
maurus.winzap@walderwyss.com

## Change of the Swiss Federal Tax Administration's long-standing practice on the stamp duty restructuring relief and waiver

In times when many companies are economically and financially distressed, dealing with restructurings and its tax consequences take on central significance. In its latest ruling of 29 November 2021 (A-5073/2020), the Swiss Federal Administrative Court adopted a welcome change to the long-standing practice of the Swiss Federal Tax Administration (SFTA), according to which distressed Swiss companies have to choose between making use of the stamp duty restructuring relief or creating withholding tax-free repayable capital contribution reserves.

### Previous SFTA practice

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

It needs to be noted that according to the SFTA's current practice existing losses must be booked out in the balance sheet in order to benefit from the restructuring relief or the waiver for stamp duty purposes.

For Swiss withholding and income tax purposes contributions made by direct shareholders within the framework of a restructuring entitle the distressed Swiss company to create so-called capital contributions reserves. Future distributions of reserves paid out of capital

contributions are not subject to Swiss withholding tax of 35% and not subject to income tax for individuals tax resident in Switzerland. The formation of capital contribution reserves, however, requires a separate account in the balance sheet and as a consequence, capital contribution reserves can only be created if they are not offset against losses.

As a consequence, a Swiss company had to choose between the creation of capital contribution reserves and relief from issuance stamp duty until now as the restructuring exemption of up to CHF 10 million or the waiver for issuance stamp purposes has only been available according to the previous SFTA practice if losses were offset.

### Swiss Federal Administrative Court's decision of 29 November 2021

In its ruling of 29 November 2021 (A-5073/2020), the Swiss Federal Administrative Court held that the provisions concerning the stamp duty restructuring relief as well as the waiver of the stamp duty were not conditioned upon the elimination of losses in the

balance sheet. Accordingly, in contrast to the previous SFTA practice and in consideration of relevant changes to the Swiss tax legislation in the past few years, the Swiss Federal Administrative Court ruled that in order to benefit from the stamp duty restructuring relief or the waiver of the stamp duty Swiss companies were no longer required to book out losses in the balance sheet which is the prerequisite for the creation of capital contribution reserves.

### Conclusion

Due to the welcome ruling by the Swiss Federal Administrative Court, the SFTA needs to adapt its practice so that distressed Swiss companies receiving contributions in the event of a restructuring can benefit from the creation of withholding tax-free repayable capital contribution reserves and simultaneously also from the restructuring relief and/or a waiver for stamp tax purposes. While the Swiss Federal Administrative Court's ruling is final when it comes to the waiver of the stamp duty, the Swiss Federal Tax Administration still has the right to appeal against the change of practice with regard to the stamp duty restructuring relief in the total amount of CHF 10 million.

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