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Tax in Distressed Situations
SWITZERLAND

DEBT RESTRUCTURINGS

GENERAL

1. Does debt have a specific meaning for tax purposes?

Debt does not have a specific definition for Swiss tax purposes, which would differ from its interpretation under Swiss commercial law. However, due to the various forms of debt, different Swiss tax implications can arise depending on the specific type of debt, such as loans, bonds, or term notes, including, for instance whether or not the debt and respective interest payments could potentially lead to Swiss stamp duty and withholding tax consequences.

In addition, recent developments indicate that the Swiss tax authorities are increasingly scrutinizing whether intra-group debt qualifies as a loan from an economic perspective, which must be interest bearing. This is particularly relevant for debt receivables at the level of a Swiss entity, as interest income must be recognized in the P&L.

Moreover, detailed regulations and case law exist regarding the reclassification of intra-group debt as equity for Swiss tax purposes (hidden equity as per Swiss thin capitalization rules). Additionally, there are comprehensive rules and guidelines governing the treatment of interest payments on debt involving related parties and debt guaranteed by related parties; see also more under 3.

In addition, a debt can be classified as taxable bond or term note with respective Swiss tax consequences; see in detail under debt refinancing 3.

2. Do derivatives have a specific meaning for tax purposes?

There are established guidelines concerning the taxation of derivatives under Swiss tax law. However, there are no specific interpretations of derivatives for Swiss tax purposes.

3. Generally, are intra-group debts treated differently to external debt for tax purposes?

Under Swiss tax law, it is essential to distinguish between external debt and intra-group debt, i.e., debt provided by, or to, related parties. It should be noted that, there is no legal definition for the classification of a related party under Swiss tax law; thus, this qualification must be made on a case-by-case basis, considering factors such as ownership, involved individuals, and contractual structures.

Intra-group debts must generally comply with the Swiss thin capitalization rules as outlined in Circular Letter No. 6/1997. The maximum allowable debt financing of a Swiss company is calculated based on the fair market value *("***FMV**") of the assets. According to the Circular Letter No. 6/1997, a company's debt may be reclassified as hidden equity to the extent that the debt consists of related-party debt and cannot be justified with economic arguments or an arm's length test. To determine the arm's length nature of intra-group transactions, the Swiss tax authorities generally rely on the OECD transfer pricing rules.

In addition, intra-group debt must have an arm's length nature, which includes, taking into account, inter alia (i) proper documentation, (ii) arm's length interest rates, (iii) amount of loan (no cluster risk for lender regarding borrower), (iv) term of loan, (v) borrower's will and capacity to repay the loan, (vi) repayment mechanism, (vii) solvency of borrower, (viii) events of default, and (ix) security. Where no evidenced arm's length interest rates can be provided, the so called safe harbour interest rates as annually published by the Swiss Federal Tax Administration on loans receivable and payables from related parties should be applied.

4. Does it make a difference if debt is owed by a partnership or other pass through entity in distress to third parties versus to its partners?

As a general rule, and given that partnerships and limited partnerships are not taxable as companies, the income and gains will be allocated to the general and limited partners. There are specific rules applicable to partnerships or other pass-through entities. These rules also include provisions relating to debt positions of partnerships or pass-through entities and the liability for corporate debts of the partnerships.

DEBT IMPAIRMENT

1. **What are the key tax considerations on a debt impairment for the creditor?**

   Under Swiss tax law, a debt impairment for the creditor must be commercially justified and thus at arm's length, particularly when the debtor is a related party. If a debt impairment is commercially justified, it should be fully deductible for Swiss corporate income tax purposes for the creditor, [especially if the amount is fully taxable at the level of the debtor]. In general, an impairment should not give rise to taxable income at the level of the debtor as long as the impairment can be reversed and would not constitute a debt waiver.

   Further key Swiss tax considerations include, in particular, whether the debt impairment will be made by a direct or indirect shareholder, by a sister company or by a subsidiary and whether a debt impairment constitutes a debt waiver / release. If this is the case, the following should be considered:

   Shareholder: If a direct or indirect shareholder is performing the debt impairment, special attention should be given to the recognition of the debt impairment in the balance sheet and profit and loss statement (P&L), since Swiss tax law generally follows accounting principles, as there may be a circumstance where a debt impairment would be considered as a contribution of the debt into the subsidiary, followed by a potential impairment thereof rather than just an impairment of the debt.

   When a debt impairment is made towards a subsidiary or other group companies, the following considerations are essential to determine whether the debt impairment would constitute an asset swap followed by a potential impairment for Swiss corporate income tax purposes:

   - whether the loan the subject of the debt impairment was reclassified as hidden equity prior to the financial restructuring;
   - whether the loan the subject of the debt impairment was initially granted, or additionally provided, due to deficient business performance, and whether it would have been granted by independent third parties under the same circumstances.

   Sister company: If a sister company is performing a debt impairment, the question is whether the impairment is made on arm's length terms or due to group relationship, i.e., upon request of the common shareholder. In the former case the impairment would be fully corporate income tax effective, i.e., fully deductible, while in the latter case, there may be an upward adjustment for corporate income tax purposes, i.e., the impairment will be added-back to the taxable profit due to the requalification as a deemed dividend, which may have also an impact on the tax book values and initial investment costs at the level of the common shareholder. In addition, deemed dividends are subject to Swiss withholding tax of 35%. Generally, the refund of Swiss withholding tax may be requested by the direct beneficiary, which would be the sister company. The notification of Swiss withholding tax instead of a payment and refund may only be applicable in limited circumstance e.g. if the debtor and creditor have the same direct parent entity and, additionally, if the debt impairment is performed as part of a financial restructuring as in this case the beneficiary of the deemed dividend is the shareholder of the financially distressed entity.

   In an international context, the (partial) refund and the applicability of the notification procedure depend on the relevant double tax treaty, previously confirmed treaty clearance, and whether the entities have the same direct parent entity.

   Subsidiary: Similar to the impairment of debt by a sister company, it is necessary to assess whether the impairment is at arm's length. If it is, the impairment is fully effective for corporate income tax purposes. Otherwise, an upward adjustment will be made for corporate income tax purposes due to its classification as a deemed dividend. This deemed dividend will also trigger Swiss withholding tax consequences. However, in this case, the process should be more straightforward compared to a sister company, as the direct beneficiary would be the shareholder. This generally means that the domestic notification procedure is applicable. In an international context, if a confirmed treaty clearance is applicable, the notification procedure applies; otherwise, Swiss withholding tax must be paid and a (partial) refund needs to be requested.

2. What are the key tax considerations on a debt impairment for the debtor?

The impairment of the debt at the level of the creditor should, in principle, not have any adverse Swiss tax consequences at the level of the debtor unless it constitutes a debt waiver or debt release. In this case, and provided the debt release/waiver is at arm's length, it will generally be recognized as income in the P&L, which is fully corporate income tax effective and thus, deductible for corporate income tax purposes.

However, in certain situations, debt releases by shareholders are deemed not to have occurred for corporate income tax purposes at the level of the debtor, particularly in the first two cases described above, i.e.,:

- where the underlying loan of the debt impairment was reclassified as hidden equity.
- where the loan the subject of the debt impairment was initially granted or additionally provided due to deficient business performance, and whether it would have been granted by independent third parties under the same circumstances.

In those cases, there should be no taxable income as it is treated as a mere contribution by the shareholder.

In addition, if a debt release is made by a sister company, it needs to be reviewed whether such debt impairment withstands a third party comparison or not. In the first case, i.e., if it's at arm's length, the debt impairment is fully subject to corporate income tax, while in the latter case it is merely a so called non-genuine restructuring income, which can be recognised in other reserves and which should not be effective for corporate income tax purposes and thus, not subject to corporate income tax.

DEBT AMENDMENT, REFINANCING AND NOVATION

1. What are the key tax considerations on a debt amendment?

A debt amendment generally needs to comply with arm's length terms, (i.e., market conditions) as otherwise adverse Swiss tax consequences may be triggered. This is particularly relevant if the creditor agrees to a debt amendment of a related party in a situation where a third party would not have agreed to a debt amendment.

2. Does the deferral of any payments of interest or repayments of principal trigger tax consequences?

In general, the deferral of any payments of interest or repayments of principal needs to comply with the arm's length terms, as otherwise adverse Swiss tax consequences may occur. Swiss tax law generally follows the accounting treatment; thus, a deferral of any interest accrual may, in addition, have an impact on the timing of recognition of any interest income and expenses.

3. What are the key tax considerations on a debt refinancing?

A debt refinancing, whether in a distressed scenario or otherwise, generally has the same key Swiss tax considerations:

- **Withholding tax**. In principle, Switzerland does not levy withholding tax ("**WHT**") on interest payments, provided that the 10/20 non-bank lenders rules and thin capitalization rules are complied with, and that interest payments are in line with arm's length terms. Non-arm's length interest payments will be requalified as a deemed dividend, which is generally subject to 35% Swiss withholding tax. This tax can be reclaimed if a double tax treaty is applicable.

  Swiss 10/20 non-bank lender rules: Withholding tax of 35% applies on certain debt instruments involving a Swiss resident company as borrower/issuer or security provider and notably applies in the following scenarios:

  - Swiss borrower has issued debt to more than 10 non-bank lenders or more than 20 non-bank lenders ("**Swiss Non-Bank Rules**"):
  - *10 non-bank lender rule*: A Swiss resident borrower borrows funds from more than 10 non-bank lenders on identical terms against written acknowledgment of debt and the total borrowed sum is at least CHF 500,000 (taxable bond; 10 Non-Bank Rule).

- *20 non-bank lender rule:* A Swiss borrower borrows funds from more than 20 non-bank lenders on variable terms against written acknowledgment of debt and the total borrowed sum is at least CHF 500,000 (taxable note; 20 Non-Bank Rule). For the purpose of calculating the relevant number, all interest-bearing instruments are taken into account.
- Non-bank lenders are persons that do not qualify as (i) banks as defined in the Swiss banking legislation, or (ii) persons or entities which effectively conduct banking activities with their own infrastructure and staff as their principal purpose and which have a banking license in full force and effect issued in accordance with the banking laws in force in their jurisdiction of incorporation ("**Qualifying Banks**").
- Non-Swiss borrower has issued debt to more than 10 non-bank lenders or more than 20 non-bank lenders with guarantee or security provided by a Swiss company (down-stream guarantee/security) and proceeds from such non-Swiss issuance are directly or indirectly remitted to Switzerland in excess of the equity of the non-Swiss issuer calculated as per the closing of the financial year (harmful use of proceeds rule).
- It is standard market practice to obtain an advance tax ruling confirmation from the Swiss Federal Tax Administration that in case of an upstream security which is limited to the amount of distributable reserves of the Swiss security provider, such guarantee would not be considered as not harmful for Swiss withholding tax purposes.
- Thin capitalisation rules: Under the rules set forth by the circular letter 6/1997, the maximum debt financing is calculated based on the fair market value of the assets. Debt from related parties exceeding the threshold may be considered as hidden equity, and the quota of interest expenses allocated to the hidden equity will not be deductible for corporate income tax purposes and will be subject to 35% withholding tax (or up to 54% if grossed-up; refund according to applicable double tax treaty possible).
- In addition, Switzerland also levies a withholding/source tax on interest payments on mortgage-secured loans.

- **Interest deductibility**. Interest is generally a deductible expense for Swiss corporate income tax purposes. However, a number of detailed rules should be observed which can impact the deductibility of interest for Swiss corporate income tax purposes, particularly the thin capitalization rules and whether the interest payments correspond to the arm's length principle.
- **Stamp duty**. Generally, no stamp duty is levied on the issue of debt. However, if the debt is requalified into a taxable bond or term note, such a bond can be subject to stamp duty upon transfer by a Swiss securities dealer or involvement of such.

4. Does rolling up interest or satisfying interest through issuing "payment in kind" notes give rise to any tax consequences?

Given that Swiss tax law follows the accounting principle, neither the rolling of interest nor the issuance of PIK notes should have any adverse Swiss corporate income tax consequences for either a Swiss creditor or a Swiss debtor, provided the interest is at arm's length and commercially justified. However, Swiss withholding tax consequences can be different depending whether there is a roll-up of interest or satisfaction of interest through issue of PIK notes, whereas the latter can also trigger additional Swiss tax implications.

- **Roll-up of Interest**: If interest is capitalised or booked to a separate account, no Swiss withholding taxes should be due since no payment is made. However, if and when the rolled-up interest is paid, it must be determined whether the interest is at arm's length. If the interest is not at arm's length, it may be requalified as a deemed dividend, resulting in Swiss withholding taxes.
- **Satisfaction of Interest through PIK Notes**: The issuance of PIK notes in satisfaction of interest may be subject to Swiss withholding tax if requalified as a deemed dividend. Additionally, the different settlement of the PIK should be analysed in detail, if e.g., the PIK notes are settled by issuing new shares, stamp duty consequences may also be triggered.

5. **Does the novation of debt by a debtor to another group company trigger any adverse tax consequences?**

   Generally, the novation of debt by a debtor should not have adverse Swiss tax consequences, provided that the underlying 10/20 non-bank lender rules are adhered to and the conditions of the debt, particularly the interest rates, remain unchanged and at arm's length terms.

6. **Are there any specific tax considerations to bear in mind where the security / guarantee package is amended as part of the debt amendment / refinancing?**

   Generally, if a non-Swiss borrower provides up-stream and cross-stream guarantees, it should be noted that such guarantees must generally be limited to the freely distributable reserves in accordance with Swiss corporate law.

   If the guarantee package provided by a non-Swiss borrower changes to a down-stream guarantee, it is important to note that such a downstream guarantee can have adverse Swiss withholding tax consequences, particularly under the 10/20 non-bank lender rules for a non-Swiss borrower, especially if the harmful use of proceeds rule is violated. Therefore, it is essential to analyse whether (i) there will be a change from an up-stream or cross-stream guarantee of a non-Swiss borrower to a downstream guarantee and if such a change occurs, it should be further analysed (ii) whether there is indeed a harmful use of proceeds in Switzerland.

   In addition, it is crucial that the guarantee is remunerated at arm's length as otherwise adverse Swiss corporate income tax and withholding tax consequences can arise.

DEBT RELEASES

1. **Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?**

   The same principles set out above in "*What are the key tax considerations on a debt impairment for the debtor?*" equally apply, particularly with respect to the consequences of a debt release/ debt waiver. In principle, the Swiss tax consequences may be different depending on whether a direct shareholder, a sister company or a subsidiary is performing a debt release. A debt release by a third party which is a debt waiver is generally corporate income tax effective and thus taxable as this is considered an income.

   Further considerations with respect to debt-equity swaps and other methods of debt releases are detailed below.

   An exemption for stamp duty (issuance stamp duty) in connection with a debt-equity swap of a direct shareholder exists if the debtor will be liquidated.

2. **Does the release of debt trigger any withholding or indirect tax? If so are there any reliefs or exemptions?**

   There should not be any Swiss withholding tax and indirect taxes due in connection with a debt release if the release is made by either a third party or a related party, provided the release is made under arm's length conditions. For other situations, the same principles apply with respect to Swiss withholding tax as outlined in "*What are the key tax considerations on a debt impairment for the creditor*".

3. **Can a creditor claim a deduction in respect of any debt that is released?**

   The same principles as set out in "*What are the key tax considerations on a debt impairment for the creditor*" equally apply

4. **Is the position different if the debt being released is a trade debt?**

   No difference for Swiss tax purposes, see above.

5. **Does the release of an uncalled guarantee obligation trigger any adverse tax consequences? Is the position different if the guarantee has been called?**

   As long as the guarantee obligation is not recognised as a liability for accounting purposes, the release of an uncalled guarantee obligation (being a contingent contractual promise) should not have any adverse Swiss tax consequences.

6. Do any adverse tax consequences arise on the release of liabilities owed under a derivative contract?

The starting point is whether liabilities owed under a derivative contract will generally give rise to an accounting credit and thus taxable income for a Swiss debtor. If there is a release of liabilities, there will generally be corporate income tax consequences to the extent such release is made by a third party or in accordance with arm's length terms.

7. Are there any Pillar 2 considerations to take into account specifically in distressed situations?

It lies beyond the scope of this guide to provide a comprehensive account of the Swiss implementation of the Pillar 2 framework and the following addresses a selected topic in connection with debt releases involving a Swiss debtor and specific applicable Pillar 2 Model Rules. Further review is required where for instance a Swiss creditor performs an impairment on a loan to a financially distressed company, notably whether such impairment is accepted for GloBE purposes or added back to the GloBE income with respective consequences as this decreases in principle the GloBE ETR.

In essence, and as of 1 January 2024, Swiss based constituent entities and permanent establishments of multinational enterprise (MNE) groups falling within the scope of the Pillar 2 rules may be subject to the Swiss Qualified Domestic Minimum Top Up Tax (**Swiss QDMTT**). It is important to note that Switzerland has not enacted the OECD GloBE Model Rules into domestic statutory law; instead, the Pillar 2 rules have been introduced through a temporary federal ordinance (**Swiss Pillar 2 Ordinance**), which substantially relies on the GloBE Model Rules of 20 December 2021 as the governing interpretative standard.

In the context of debt waivers, their relevance for the Swiss QDMTT follows a derivative, accounting based approach. The calculation begins with the financial accounting result and is then adjusted pursuant to the GloBE framework to determine the jurisdictional effective tax rate (**ETR**) and any resulting top up tax. For Swiss constituent entities, the starting point for determining GloBE Income and covered taxes is the separate financial statements prepared under an Acceptable Financial Accounting Standard, such as IFRS, US GAAP, or Swiss GAAP FER. Any restructuring transaction therefore needs to be analysed in light of the underlying accounting treatment, including any adjustments required under the OECD GloBE Model Rules, for example, those addressed in Article 3.2.1 of the Model Rules, and the accompanying Administrative Guidance dated 2 February 2023.

Where a debt release is granted to e.g., a Swiss debtor in a financially distressed situation, the question arises whether such debt release has to be recognised as income under a true and fair view accounting standard. If this is the case, such income may in principle be included in the financial accounting net income used as the starting point for the GloBE computation under Pillar 2. However, there are situations where such income may not form part of the GloBE income and, consequently, is not subject to the Swiss QDMTT. In these cases, the Swiss debtor's GloBE income is reduced by the amount forgiven, and any domestic taxes triggered by the waiver cannot be treated as covered taxes for purposes of the GloBE ETR computation.

However, under the GloBE Model Rules, this exclusion applies (upon election) only in narrowly defined situations, namely where the debt release is granted i) within a statutory insolvency, bankruptcy or equivalent restructuring proceeding, ii) outside a formal proceeding, but where it is reasonable to conclude and which must be supported by an assessment from a qualified independent expert such as the statutory auditor, that the debtor would become insolvent within 12 months or iii) (only applicable to third party debt) if the debt waiver is granted outside a formal insolvency or restructuring procedure but occurs immediately prior to the company becoming balance sheet insolvent. The characterisation of the waiver is determined with reference to the economic position of the debtor at that moment. In particular, the assessment hinges on whether, immediately before the release of the obligation, the debtor's liabilities exceeded the fair market value of its assets.

Accordingly, if a debt release is recognised as income and the resulting profit is included in the GloBE base, the Swiss QDMTT may also apply to the portion of the taxable debt waiver, unless the waiver qualifies for one of the recognised exclusions for financially distressed entities according to the GloBE Rules as described above.

Consequently, for Swiss QDMTT purposes, it must generally be assessed whether a debt waiver is recognised directly in equity rather than as income under the applicable accounting standards such as IFRS, US GAAP or Swiss GAAP FER. Where no income arises at the level of the financial statements, no further analysis would typically be required for GloBE purposes as there is no additional amount as part of the GloBE income base and therefore in principle also no related Swiss QDMTT consequence. The Swiss domestic corporate income tax consequences of a debt waiver would have to be assessed separately (see e.g., "*What are the key tax considerations on a debt impairment for the debtor?*").

DEBT FOR EQUITY EXCHANGE

1. What are the key tax considerations on a debt-for-equity exchange for the creditor?

The key considerations for Swiss tax purposes primarily involve how the debt-equity swap is performed and recognised in the balance sheets of both the debtor and the creditor, and whether the swap is executed by the direct shareholder or another (group) company, as this could give rise to stamp duty of 1% in the case of the involvement of a direct shareholder or if the debt-equity swap is structured against an issuance of new shares.

In principle, when a debt-equity swap is performed by the direct shareholder, it is generally considered a mere asset swap at the level of the direct shareholder. This means that the receivable will be added to the initial investment costs of the participation, followed by a potential amortisation of the same amount, which is usually deductible for Swiss corporate income tax purposes (although future recapture is possible). Consequently, in the case of a future disposal, any difference between the tax book value and the initial investment costs of the participation will be subject to Swiss corporate income taxes

2. What are the key tax considerations on a debt-for-equity exchange for the debtor?

As highlighted above, the key considerations for Swiss tax purposes primarily involve how the debt-equity swap is recognized also in the balance sheets of the debtor and whether tax avoidance is assumed or not. If the (direct or indirect) shareholder contributes the existing debt against the (direct or indirect) subsidiary into the subsidiary as a contribution in kind (in the sense of a contribution to the reserves), this constitutes an '*à fonds perdu*' contribution, which is not subject to corporate income taxes. However, if this contribution is made by the direct shareholder, the transaction is generally subject to issuance stamp duty. See "*What are the key tax consequences of capital contributions by a parent company into its subsidiary?*" for potential exemptions with respect to issuance stamp duty.

It is also possible to contribute the debt in exchange for the issuance of new shares by the debtor. This process should not be considered a taxable debt waiver, as the shareholder's claim is used to acquire participation rights. For the debtor, the debt-equity swap is fully recognized as equity (share capital, legal reserves), regardless of any prior value adjustments to the debt.

Another form of debt-equity swap involves that the (direct or indirect) shareholder, as the creditor of the debt, intends to make a contribution of the same amount to the (direct or indirect) subsidiary, thereby creating a new claim of the subsidiary against the creditor. Typically, a contribution agreement is established between the creditor and the debtor (subsidiary), outlining a promise to make a contribution. In the next step, the debtor declares the offsetting of their debt against the claim from the contribution agreement. The same tax consequences arise as above, i.e., if a contribution promise is made by the direct shareholder, this would typically trigger issuance stamp duty.

3. Where warrants or similar instruments are issued as part of a debt restructuring does this trigger any adverse tax consequences?

In principle, the issue of warrants should per se not trigger adverse Swiss tax consequences if it is planned with a corresponding capital increase or decrease and if they are only issued to shareholders and do not carry an entitlement to cash compensation. However, depending on the precise exercise mechanic, Swiss tax consequences such as issuance stamp duty may be triggered.

On the other hand, the issue of call or put-options may trigger adverse Swiss corporate income taxes as well as withholding taxes if they are issued to the shareholder below fair market value and if they do not relate to a capital increase.

4. **What are the key tax consequences of capital contributions by a parent company into its subsidiary?**

   Generally, contributions into a Swiss company by direct shareholders are subject to issuance stamp duty. A one-time exemption of issuance stamp duty for contributions up to CHF 10m applies if the subsidiary is in need of financial restructuring and the contribution will be offset against existing losses. An additional exemption applies if the distressed company is unable to pay the issuance stamp duty or if the company is being liquidated. Another one time exemption with respect to the increase of share capital (plus agio, also known as share premium) for up to CHF 1m may be available, which, however needs an analysis whether the share capital has been increased in the past and whether the one-time exemption will still apply.

   Consequently, it is more beneficial to perform contributions through the indirect parent company, as such contributions are generally not subject to issuance stamp duty, provided no tax avoidance takes place.

FEES AND TRANSACTION COSTS

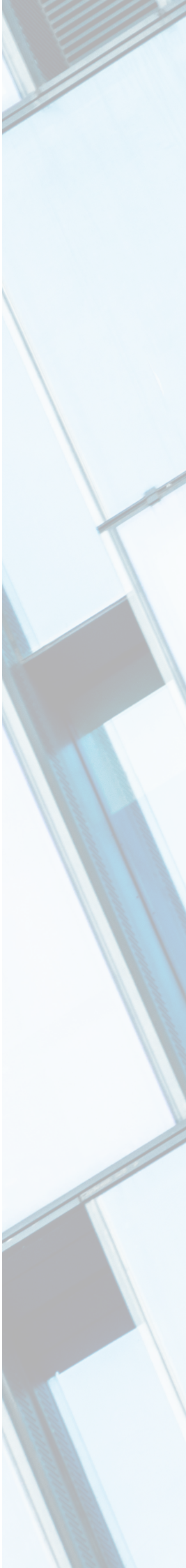
1. **Is there any adverse tax impact in respect of common restructuring fees, for example, consent fees?**

   Payment of restructuring fees should not give rise to any Swiss tax implications as long as the counterparty is a third party or as long as such fees correspond to the arm's length principle.

2. **Are transaction costs deductible for tax purposes and is any VAT recoverable?**

   For Swiss corporate income tax purposes, transactions costs should be deductible where they are commercially justified and correspond to the arm's length principle.

   The recoverability of input VAT is possible if the Swiss entity is registered for Swiss VAT purposes and if the Swiss entity generates supplies and services subject to VAT, i.e., has a taxable business.



DEBT ENFORCEMENT

1. **Aside from insolvency proceedings, what are the key methods of enforcement and their tax impact?**

   Under Swiss law and apart from insolvency proceedings and to the extent applicable, further formal proceedings include that a creditor may initiate a debt enforcement for realisation of pledge.

2. **If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?**

   It is generally not the case under Swiss law that the creditor will take ownership of equity or assets upon an enforcement and during insolvency proceedings as this will be managed by an administrator. However, a creditor may be free to buy assets during an enforcement / insolvency proceedings.

3. **Are any specific tax considerations arising on payments or transferring security under guarantees as opposed to the debt?**

   The Swiss tax treatment of payments under guarantees is rather complex and needs to be analysed on a case-by-case basis.

   In principle, any payments under a guarantee need to be remunerated by the beneficiary for Swiss corporate income tax purposes. Where no remuneration or inadequate remuneration takes place, the Swiss tax authorities would consider the payment under a guarantee to be a deemed dividend, subject to upward adjustments for Swiss corporate income tax purposes.

   For Swiss withholding tax purposes, the same principle applies. If no remuneration or inadequate remuneration is made for a guarantee payment, the payment would be requalified as a deemed dividend, subject to Swiss withholding tax at a rate of 35%. The beneficiary of the payment may subsequently request a (partial) refund based on domestic law or an applicable double tax treaty. In defined situations, a reduction at source for Swiss withholding tax purposes may also be possible.

4. **Are there any adverse tax consequences arising from a change of control or break of a tax group?**

   Under Swiss tax law, there is no possibility of a tax group for corporate income tax purposes. Only for indirect tax purposes may a tax group be possible. The group members are jointly and severally liable for the tax liabilities of the VAT group for taxes due during the period of their membership. This also applies after the break of the VAT group. A change of control should generally have no impact on the tax losses carried forward available at the level of the Swiss entity as those are usually bound to the entity or a business of the entity.

5. **Where equity / assets are indirectly transferred as part of an enforcement, does that trigger adverse tax consequences?**

   Generally, if there is an indirect transfer of equity assets on a level above the direct shareholder of the Swiss company, no adverse Swiss tax consequences should be triggered. It should nevertheless be analysed, whether Swiss real estate is involved and whether specific notification to the Swiss tax authorities need to be made, such as e.g., in case of an existing treaty clearance.

   Further reference is made to "*If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind*".

6. **Is any claw back permissible where a distressed company pays taxes for which a solvent shareholder is liable?**

   Under Swiss tax law, there are generally no provisions for clawing back paid taxes; only erroneous payments of taxes that were not due can be reclaimed. However, it is important to note that if a Swiss company pays taxes on behalf of a solvent shareholder without corresponding remuneration, this is typically treated as a deemed dividend for Swiss tax purposes, leading to Swiss corporate income tax and withholding tax implications.

ACQUISITION OF DEBT

1. **Does the acquisition of a creditor's interest in distressed debt trigger any adverse direct tax consequences for the debtor?**

   Under Swiss tax law, there should be no direct tax consequences if a new creditor would acquire a debt but the usual rules in terms of thin capitalization, arm's length interest rate and 10/20 non-bank lender rules should be considered in view of the interest deductibility and potential Swiss withholding tax consequences.

2. **Does the acquisition of distressed debt trigger any adverse withholding or indirect tax consequences for the debtor?**

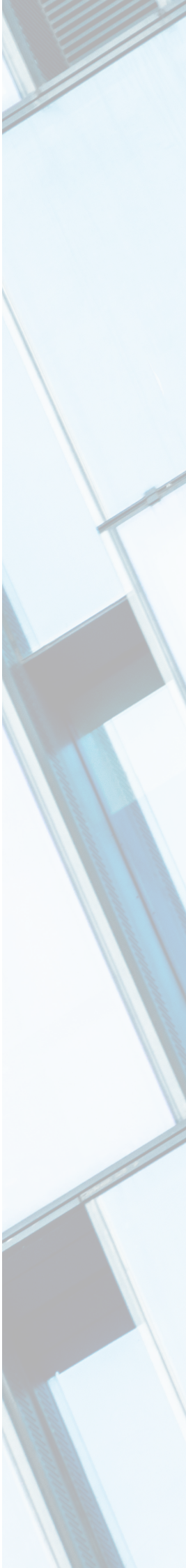
   As outlined under "*Does the acquisition of a creditor's interest in distressed debt trigger any adverse direct tax consequences for the debtor?*", the debtor must evaluate the potential for Swiss withholding tax on interest payments to the new creditor. This evaluation should consider the regulations on thin capitalization, arm's length interest rates, and the new creditor's status under the Swiss 10/20 non-bank lender rules.

3. **What are the key tax considerations for the purchaser of a creditor's interest on the acquisition of distressed debt?**

   From a Swiss tax perspective, it is essential that the acquisition of debt is commercially justified and does not result in the acquisition of a so-called "*non-valeur*" or an acquisition above fair market value. Between related parties, this could lead to adverse Swiss corporate income tax and withholding tax consequences. On the other hand, if below fair market value, this would result in a fully taxable event for a Swiss corporate investor.

4. **Are there any particular beneficial regimes accessible to a purchaser of a distressed debt portfolio?**

   There are no specific beneficial regimes for a Swiss purchaser of a distressed debt portfolio. However, it is worth noting that certain cantons permit a reduction in the annual net equity tax burden, provided it can be attributed to intragroup loan receivables, participations, or patents.



INSOLVENCY PROCEEDINGS

1. What are the key insolvency procedures?

In Switzerland, the key insolvency procedures include formal insolvency and restructuring proceedings, i.e.;

- Bankruptcy Proceedings / liquidation (*Konkursverfahren*): This process involves the complete liquidation of the debtor's assets. Upon initiating insolvency proceedings, the insolvency administration will compile an inventory of the assets within the insolvent estate. If the inventory shows that there are sufficient assets to cover the costs of the proceedings, the insolvency administration will decide between ordinary or summary insolvency proceedings, based on the amount of assets and the specific circumstances. A public announcement will be made, calling creditors to file their claims. The assets are then realized, and the proceeds are distributed to the creditors according to the distribution plan.

Additionally, the commencement of insolvency proceedings has the following effects:

  - The debtor's right of disposal is transferred to the insolvency administration.
  - All obligations of the debtor become due, except those secured by mortgages on real estate.
  - Non-monetary claims are generally converted into monetary claims of equivalent value.

- Composition/moratorium Proceedings: There are several forms of composition proceedings with the aim of restructuring, or at least rescuing a profitable operating part of the debtor. Moratorium proceedings start with a provisional moratorium and may be followed by a final moratorium.

2. What are the key tax considerations arising upon entry into an insolvency procedure?

Upon entering insolvency proceedings, i.e., after registering the liquidation with the commercial register, the key Swiss tax considerations are:

- Tax Liability: The Swiss entity remains liable for Swiss corporate income tax, net equity tax, as well as Swiss withholding tax, stamp duties, and VAT.
- Taxable Profit: Income generated from ordinary business activities or the realization of assets, including capital gains, is generally subject to Swiss corporate income tax. Available tax loss carry forwards can be used to offset taxable profits.
- Executive Liability: Executive bodies of a Swiss entity may become liable for certain social security contributions and withholding tax obligations that were not paid before the opening of insolvency proceedings. In addition, joint liability for executive bodies who act as liquidators for other taxes in case of negligence.
- If a final dividend will be distributed to the shareholder, Swiss withholding tax consequences may be triggered.

3. Does entry into an insolvency procedure impact tax groupings?

Under Swiss tax law, the entry of a Swiss entity into an insolvency procedure may only have consequences for VAT groups. In principle, if a company within a VAT group enters insolvency, the VAT group remains liable for the VAT obligations of the whole VAT group. Therefore, the insolvency of one member can affect the entire VAT group due to the joint and several liability.

4. Are there any specific tax set offs available in an insolvency?

There are no specific tax set-offs available in an insolvency procedure. Inter alia and as mentioned, the Swiss entity may still benefit from tax losses carried forward.

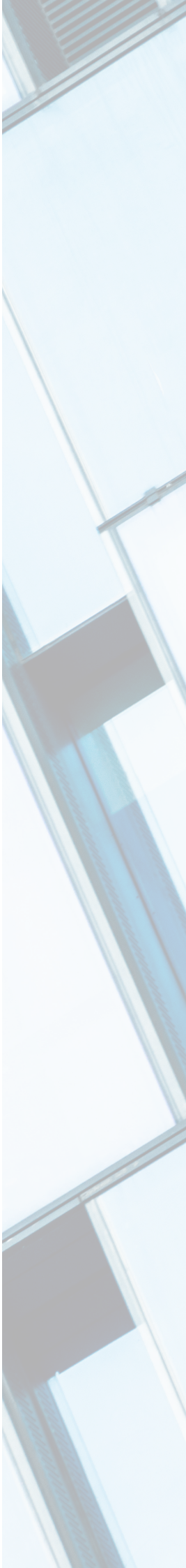
5. Is the tax authority a preferential creditor in an insolvency?

In general, a Swiss tax authority is not a preferential creditor in an insolvency. However, if a Swiss tax authority obtains information that a taxpayer is in a distressed situation, the tax claims will be reviewed, and missing information for a proper assessment will be requested.

In particular, the Swiss tax authority may carefully review whether corporate income taxes have been prepaid, whether the input VAT claimed is indeed correct, whether any withholding tax is due, and whether any stamp duty will be due.

6. Are directors or other managers personally liable for tax debts in an insolvency?

See "*What are the key tax considerations arising upon entry into an insolvency procedure*", executive bodies of a Swiss entity may become liable for certain social security contributions and withholding tax obligations that were not paid before the opening of insolvency proceedings as well as joint liability for executive bodies who act as liquidators for other taxes in case of negligence.



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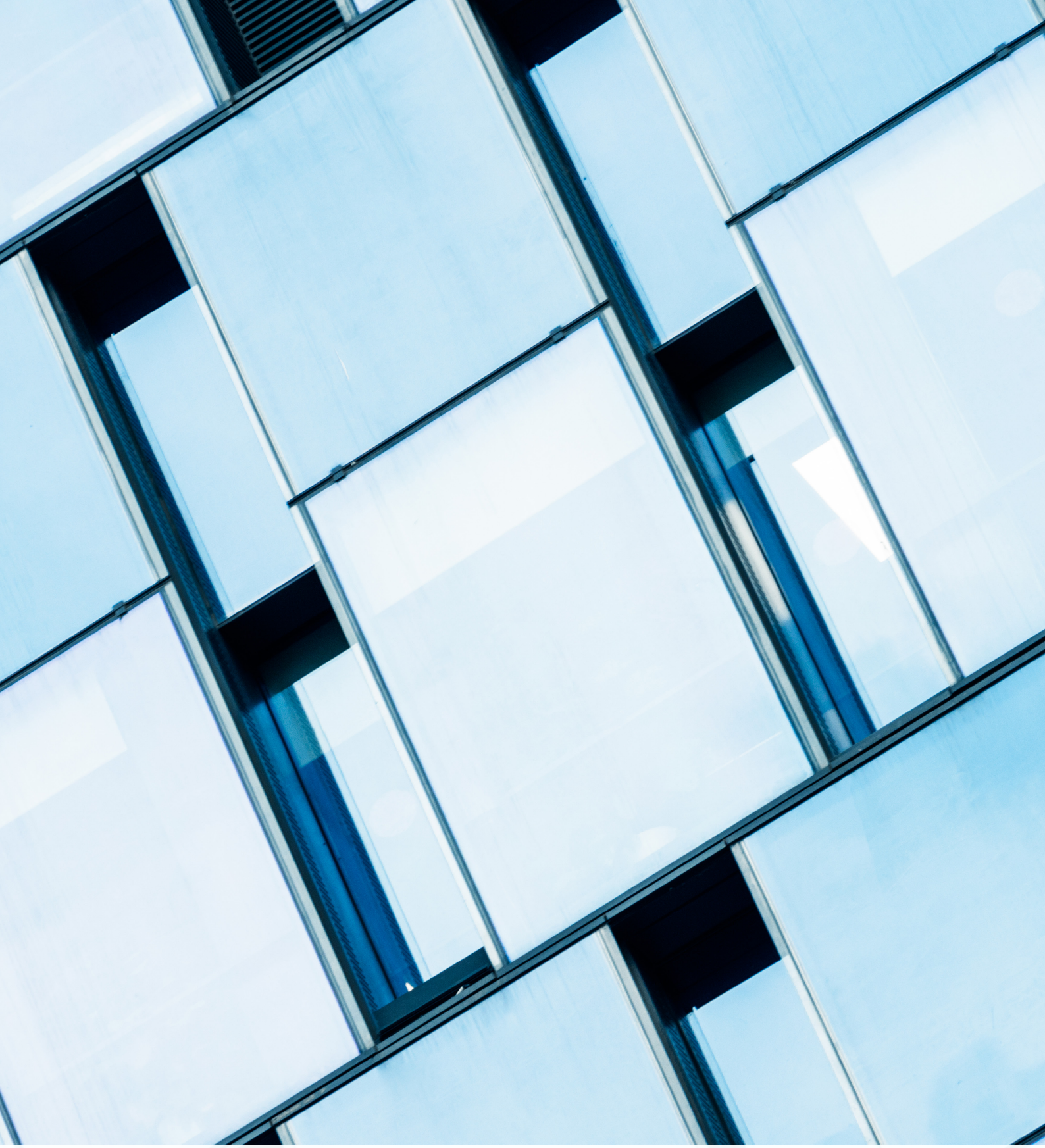

CLICK HERE for more guides providing a high-level overview of important tax considerations for debt restructurings, enforcement, acquisitions of debt and insolvency proceedings for both debtors and creditors from UK, US, French, Luxembourg, Swiss, Belgian and Dutch tax perspectives.