On 23 September 2015, in the recently ended autumn session of the Swiss Parliament, the Council of States voted on an important draft bill dealing with the notification procedure in connection with withholding taxes. Our first article looks at this late-breaking issue. Since 1 January 2001 it has been possible to fulfill the withholding tax duty on intra-group dividends by declaring the taxable dividend distribution instead of tax payment. The legislators’ aim was to simplify intra-group dividend payments from a fiscal and administrative perspective. But a controversial Federal Supreme Court decision dated 19 January 2011 resulted in a stricter administrative practice with respect to the 30-day deadline for submission of the declaration and disclosure forms. The court interpreted the 30-day time line as a forfeiture clause. However, this goes against the original intent of the legislator, which is now to be implemented through a parliamentary initiative. The National Council accepted the draft bill on 16 June 2015. The Council of States, however, only accepted part of the draft bill and rejected the retroactive effect proposed by the National Council. We provide you with more details and background on this issue and discuss what is next in the political process.

Our second article also deals with withholding tax, but in a different context. We look at the potential conversion of Swiss withholding tax to a paying agent tax and the consequences of such a restructuring. Banks and financial institutions in particular would be saddled with considerable efforts required for the implementation if withholding tax were based on a paying agent principle rather than the current debtor principle. They have therefore increasingly proposed a domestic automatic exchange of information on interest income. Time will tell whether this conversion of the withholding tax will happen. As a first step a popular initiative to protect privacy will be put to the vote – and it seems the Federal Council wants to await the outcome.

A decision by the Federal Supreme Court on 5 October 2012 on the binding effect of a tax ruling was a cause of perceptible uncertainty among taxpayers, their advisors and the tax authorities. Up to then, there had been a general consensus in the tax world that it was within the authority of the cantonal tax authorities, as the assessing authorities, to hand down rulings on direct federal tax. The Federal Supreme Court recently handed down two groundbreaking decisions on the competence of the cantonal tax authorities to issue tax rulings and on related key questions. We explore this decisions and its consequences in detail.
In three new decisions on 31 August 2015, the Federal Supreme Court confirmed its 2009 decision on the treatment of foreign exchange differences resulting from the translation of financial statements from a functional foreign currency into Swiss francs. The court's opinion is that such translation differences do not qualify as taxable income or deductible expenses. We examine the recent decisions and explain their practical consequences.

We also investigate the Federal Supreme Court's ruling of 10 June 2015 on one-time equity tax in respect of quasi-mergers and examine the most important conclusions. The decision confirms the current practice of the Swiss Federal Tax Administration, which makes the existence of a tax-neutral quasi-merger conditional on the acquiring company increasing its share capital.

Last but not least we review the new rules concerning the declaration for subjection regime on goods under customs control on Swiss territory. The Federal Tax Administration has introduced the "Declaration for subjection for Swiss territory" which institutionalizes its current practice and increases the scope of applicability in favor of the taxable person. Current permits lose their validity as of 1 January 2016. Holders of such permits should apply for a new permit in good time.

We hope you enjoy reading this issue and find it worthwhile.

Dr. Philip Robinson

VAT Event Series

On the following dates our next VAT apéro will be held with important information about VAT.
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November 4, 2015, EY Zurich
November 5, 2015, Intercontinental Hotel, Geneva

More information can be found here (in German language only).
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Notification procedure for intra-group dividends – latest legislative developments

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Since 1 January 2001 it has been possible to fulfill the withholding tax duty on intra-group dividends by declaring the taxable dividend distribution. The legislators’ aim was the simplification of intra-group dividend payments from a fiscal and administrative perspective. The decision of the Federal Supreme Court dated 19 January 2011 (as well as the decisions of the Federal Administrative Court dated 28 January, 9 July, 31 July and 17 August 2015, which support the decisions of the Federal Supreme Court) led to major changes in the way the administration handles the notification procedure, particularly with regard to the observance of the submission deadline for the declaration and notification forms. Based on the aforesaid decision of the Federal Supreme Court, the tax administration took up the position that the the 30-day time limit for the notification of a taxable dividend distribution is a forfeiture clause, both for national as well as international dividend distributions. If the taxpayer fails to meet the deadline, the withholding tax is then levied under the ordinary procedure, i.e. the withholding tax due must be paid retrospectively and the tax burden passed on to the recipient of the dividend payment. Further, 5% default interest for late payment are due on the withholding tax due from the 31st day on. In order to restore the original intent of the legislators, both houses of the Swiss Parliament (National Council and Council of States) have voted on the implement the parliamentary initiative “Clarification of the longstanding practice of the withholding tax notification procedure “. The latest legislative developments are described below.

I. Parliamentary proceedings

1. Result of the vote of the Technical Commission of the National Council (WAK-N)

On 12 December 2014, the Technical Commission for Economic Affairs and Taxation of the National Council (WAK-N) opened the consultation process on the preliminary draft proposal for amending the Withholding Tax Act. Based on the comments submitted on the preliminary draft, on 13 April 2015 the WAK-N proposed by a majority vote a new provision based on which it would be possible to apply the notification procedure even after the 30-day notification period has expired, without forfeiting the right to use this procedure or having to pay default interest. Accordingly, it shall no longer be decisive whether a notification has been made or not. If the declaration, an application for the notification or the notification itself is not submitted on time, the notification procedure would nevertheless be permitted, subject to a fixed penalty, provided that the material prerequisites for the application of the notification procedure are fulfilled. A minority requested an extension of the declaration period of the taxable dividend payment to 90 days, combined with an extension of the deadline for making use of the notification procedure from 30 days to one year. With respect to the transitional arrangements, the majority of the WAK-N members requested a provision that could be applied in cases that occurred before the changes described above come into effect, provided that the tax or default interest payment liabilities have not expired by limitation or have not been finally assessed yet before 1 January 2011.

2. Position of the Federal Council

In a letter dated 5 June 2015, the Federal Council expressed its position on the WAK-N vote, stating that the majority proposal of the WAK-N can only relate to notification procedure arrangements. This would lead to unequal treatment of taxpayers, which cannot be objectively justified. The Federal Council also stated that it opposed making the law retroactive and proposed that the WAK-N minority proposal for extending the deadlines be approved.

3. Result of the National Council’s vote

Even though the finance minister and many representatives of the minority opinion expressed their concerns about unequal treatment of taxpayers, the National Council (as the first chamber) approved the application of the notification procedure even after the 30-day declaration period has expired by a large majority and was therefore in line with the majority opinion of the WAK-N.

The National Council also voted the same way as the WAK-N did on the retroactive effect of the proposed law. In the vote on the entire draft law, the National Council approved the change in the law and passed the matter on to the Council of States (as the second chamber).

4. Result of the vote of the Technical Commission of the Council of States (WAK-S)

The Economic Affairs and Taxation Committee of the Council of States (WAK-S) decided by unanimous vote on 26 June 2015 to abandon the parliamentary initiative “Reduction of bureaucratic obstacles in the notification procedure. Change to the Withholding Tax Act,” as the issue was considered settled with the presentation of the previously
submitted draft on the parliamentary initiative “Clarification of the longstanding practice of the withholding tax notification procedure”. In addition, the majority of the WAK-S members were of the opinion that there was no justification for non-compliance with the declaration deadline to lead to a change in the procedure from notification to the ordinary withholding tax procedure. The majority of the WAK-S therefore proposed to the Council of States that it follow the decision of the National Council. The WAK-S also followed the decision of the National Council regarding the retroactive effect, although a minority of the committee opposed the retroactive application of the new provision. In the vote on the entire draft law, the WAK-S approved the draft.

5. Result of the Council of States’ vote
On 23 September 2015, as part of its autumn session, the Council of States, as the second chamber, debated the draft. Like the National Council had done before, the Council of States approved by a large majority the possibility of applying the disclosure procedure even after the 30-day declaration period has expired. With respect to retroactive effect, however, the proposal of the minority of the WAK-S members was accepted, namely that retroactive application should not be possible. From a legal point of view, it is possible to allow for genuine retroactive effects, provided that the following requirements are met:

a) The retroactive effect must be expressly stated or must be clearly intended by the legislator.

b) The retroactive effect must be moderate time-wise. The specific conditions of the provision in question are crucial. In particular, the foreseeability of the change in the law has to be considered.

c) The retroactive effect must be justified on the basis of compelling reasons. Fiscal reasons are generally not sufficient, unless the public finances are in danger.

d) The retroactive effect may not cause any outrageous inequality before the law.

e) The retroactive effect must be justified on the basis of an overwhelming public interest.

f) The retroactive effect may not impinge on acquired rights.

On the basis of the aforementioned, the matter is being referred back to the National Council, as the Council of States and the Federal Council in its statement, agree that the planned retroactive effect is not permissible because not all requirements have been met.

6. Procedure for the resolution of differences and conciliation conference
As the two chambers of Parliament do not agree on the issue of retroactive effect, the procedure for the resolution of differences has been started. The differing resolutions of the councils are being sent for consultation to the other council or temporarily back to the WAK-N until an agreement is reached. Please note, however, that the consultations are limited to those questions on which no agreement has been reached. If after three detailed consultations there are still disagreements between the two councils, a conciliation conference is called for. If the conciliation draft of the conciliation conference is not approved by the two councils, then the proposed law will be rejected conclusively.

II. Conclusion
After the voting in the Council of States, there is a consensus regarding the amendment of the Swiss Withholding Tax Act in both Councils for the following elements:

1. The dividend notification procedure (i.e. direct application of a reduced dividend withholding tax rate according to a double tax treaty) shall be applicable even if the 30 days notification deadline has elapsed. In other words, the right to apply the dividend notification procedure shall not forfeit only because the formal 30-day notification deadline has been missed.

2. Under the condition that the substantive requirements of the dividend notification procedure are satisfied, no interest for late-payment shall be levied if the 30-day notification deadline is missed.

3. However, should the 30-day notification deadline be missed an administrative fine may have to be paid.

Regarding the retroactive effect of the draft legislation, the Council of States voted in favour of the minority proposal of the WAK-S and follows the Federal Council’s recommendation, which makes it necessary to find a consensus in the procedure for the resolution of differences. This uncertainty has to be cleared out.

III. Outlook and recommendation
Due to the difference in the outcome of the votes by the two Swiss councils on (genuine) retroactive effect, the matter has been delayed indefinitely. With elections approaching fast in Switzerland, a newly elected Parliament will deal with this pending item. There could also be a referendum on the issue, hence it is unlikely that the new law comes into effect before mid-2016. Undoubtedly, however, the Federal Supreme Court will have to deal with the issue once again due to the cases decided by the Federal Administrative Court which have been appealed. Following the rather surprising vote by the Council of States, it remains to be seen how the Federal Supreme Court will react until the changes have come into effect: will it make decisions on the basis of the current legal situation, suspend pending proceedings until a new law takes effect and then decide on the basis of the new law or simply postpone the pending procedures? In any case, it is to be hoped that, in this important decision on amending the notification procedure, which is of utmost importance for the Swiss economy, the Swiss Parliament does not let itself be guided by purely theoretical legal concerns regarding retroactive effect or by hunger for tax revenues.

All national and international groups that have the potential to pay out dividends are therefore urged to strictly comply with the 30-day declaration deadline until a final change to the law has been made or the legal situation has been cleared up. For proof purposes, the proper forms must continue to be sent by registered mail to the Swiss Federal Tax Administration (SFTA).
Withholding tax — "to be or not to be?"

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If the Swiss withholding tax were to be converted into a paying agent tax, investments in Swiss debt instruments would become more attractive for foreigners. It might result in the return of some issuance business to Switzerland, but it would also mean more complexity for paying agents themselves, and an upcoming vote could throw a spanner in the works.

The Swiss withholding tax requires (on the basis of what is termed the "debtor principle") that Swiss debtors pay 35% of the gross amount of dividend or interest payments to the Swiss Federal Tax Administration in all cases. The only exemptions to this principle are certain payments within a group of affiliated companies. The remaining 65% goes to the holders of the bonds or equities. If these holders are domiciled for tax purposes in Switzerland, they may request reimbursement of the deducted taxes or use them to offset others. Foreign holders of bonds or equities can have at least a part of the withholding tax reimbursed if they are domiciled in a country that has concluded a double taxation agreement (DTA) with Switzerland. After making the corresponding reimbursements, Switzerland has generally kept between about CHF 4.5 and 6 billion of the collected withholding tax as public revenue.

Banks must meet capital adequacy requirements — and they can do so using debt instruments as well

For large banks with international shareholders, the withholding tax poses a major problem. Banks that are classified as system-relevant in Switzerland have to meet certain minimum capital adequacy requirements (often referred to as the "Basel provisions"). This capital may initially take the form of equity capital. In recent years, however, banks have also started issuing debt capital in the form of convertible bonds. If the equity capital of one of these banks goes below certain limits, these bonds are automatically converted into eligible equity capital. These bonds are therefore also called mandatory convertible bonds or contingent convertible bonds ("CoCo bonds"). For reasons of legal certainty, it would be preferable to have these bonds issued by banks in Switzerland, and not by subsidiaries abroad. However, this would mean that the interest income from these bonds would be subject to the withholding tax.

This, in turn, would mean that investments in these securities would become unattractive for investors in countries that do not have a DTA (e.g., Saudi Arabia) because of the deduction of withholding tax. In addition, better risk diversification can be achieved if the bonds are subscribed by investors from different countries.

In order to enable the timely issue of these instruments in Switzerland, the interest on these specific bonds was exempted from the withholding tax for a limited period of time. However, this exemption led to a broader discussion as to whether the withholding tax should be abolished. Given the loss of public revenues, abolishing it hardly seems sustainable without a corresponding alternative source of financing. Furthermore, the "safety function" of the withholding tax for Swiss resident tax payers would disappear — Swiss resident investors receive a reimbursement of the 35% withholding tax only if they declare the corresponding gross amount on their tax return.

A potential conversion to the paying agent principle would have other effects aside from simplification

The Federal Council has made two proposals, based on an expert report, to convert the current debtor principle to a "paying agent principle". The plan calls for Swiss debtors to pay interest payments to a Swiss bank or financial institution without deducting withholding tax. This bank or financial institution would then be responsible for determining the party from which the withholding tax is to be deducted. It is important to note here that the potential conversion of the withholding tax would apply only to interest payments. Payments of dividends would continue to be subject to the withholding tax, which would be deducted by the company paying the dividend.
In place of a potential deduction of withholding tax, they want mandatory reporting of interest income to the Swiss tax authorities, even without the prior consent of clients; this is, in effect, an automatic exchange of information – at least with respect to client income from interest. This would simplify the processes and entail lower liability risks for banks because they would not have to maintain a costly "tax deduction system" alongside the reporting system.

By contrast, under the popular initiative to protect privacy that is being put to a vote (the "Matter initiative") client data would not automatically be forwarded to the authorities, or only as part of criminal proceedings or cases where there is well-founded suspicion of major tax offenses. It seems that the Federal Council would like to wait for the results of the vote on the initiative before it proceeds with the conversion of the withholding tax.

However, the conversion of the withholding tax system would also present paying agents with new complexities that they do not currently have to deal with. They would have to determine precisely whether a client is subject to tax in Switzerland and identify changes in domicile. They would also have to collect tax on the interest from foreign sources – which would represent a new feature – but this would be offset against any foreign withholding taxes. Accrued interest, i.e., the interest earned but not yet paid from on an interest coupon (also called "Marchzinsen" or "Stückzinsen"), which was not previously subject to withholding and income tax, would now be included as well. This would have a significant impact on the fund industry, which would have to prepare daily statements of interest that has been accrued but not yet paid. All of this means that the effort required by banks and financial institutions to implement the conversion would be considerable.

Will there be an exchange of information within Switzerland?

So it is not surprising that banks in particular have proposed a different mechanism that they find preferable.
The binding effect of tax rulings

Groundbreaking statements by the Federal Supreme Court

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The judgment delivered on 5 October 2012 was a cause of perceptible uncertainty among taxpayers, their advisors and the tax authorities about the binding effect of a tax ruling. Up to then, there had been a general consensus in the tax world that it was within the authority of the cantonal tax administrations, as the assessing authorities, to hand down rulings on direct federal tax. The Federal Supreme Court had cast doubt on that principle in the aforementioned judgment. Now, it recently made groundbreaking statements about (i) the competence to issue rulings, (ii) the binding effect of rulings issued by an authority not authorised to do so, (iii) the revocation of rulings and (iv) the transition periods applicable in case of a revocation.

Tax ruling

Taxpayers are able to submit facts and circumstances to the responsible tax authority in order to obtain in advance a written confirmation on the tax implications. In practice, tax rulings of this kind are of great importance, as they make possible legal certainty concerning the tax implications of a particular course of action, hence avoiding "unpleasant surprises" when taxes come to be assessed. If a tax ruling is to be binding on the tax authorities, it must be issued (i) for a specified taxpayer or category of taxpayers, (ii) in relation to specific facts and circumstances, (iii) in advance and (iv) by the competent tax authority. Moreover, the taxpayer can invoke it only if (v) he has made arrangements on the basis of it and (vi) the law has not changed since the ruling was confirmed.

The actual trigger for the debate – the case of an offshore financing branch

On 5 October 2012 (BGE 139 II 78 resp. 2C_708/2011), the Federal Supreme Court handed down a judgment in a case concerning an offshore financing branch belonging to a real estate group which only operated in Switzerland and had its registered office in the canton of Zug. The real estate group obtained a tax ruling from the tax administration of the canton of Zug. On the recognition of its financing branch for cantonal profit and capital tax as well as direct federal tax purposes. In February 2005, the Swiss Federal Tax Administration (SFTA) advised the tax administration of the canton of Zug that it would no longer accept the respective ruling for direct federal tax purposes, starting as of tax period 2005. In due course, the cantonal tax administration of Zug informed the taxpayer in this regard. The Federal Supreme Court came to the conclusion that the offshore financing branch could not be accepted for tax purposes due to insufficient substance and could therefore not qualify as a permanent establishment. It was not clear to the Federal Supreme Court whether the real estate group was protected by the tax ruling. It noted that the SFTA had not been asked by the cantonal tax administration to give advice on the fact pattern for direct federal tax purposes, which would have had a direct impact on the taxpayer's coverage due to the bona fide principle. Up to then, there had been a general consensus in the tax world that the cantonal tax authorities were responsible and also authorized to handing down rulings on direct federal tax, as they were entrusted by the law with its assessment. Fortunately, the Federal Supreme Court referred the case back to the lower court for further clarification and thus had now another opportunity to express its opinion about important considerations concerning the legally binding status of tax rulings not only in this case itself but also in other cases.

Authority competent to give rulings on direct federal tax

In its judgements on 24 August 2015 (2C_807/2014 and 2C_529/2014), the Federal Supreme Court discussed competence to give rulings on direct federal tax at length. It concluded that the SFTA is in general not legitimated to give binding tax rulings; on the contrary, competence to do so with regard to direct federal tax lay exclusively with the cantonal tax authorities responsible for assessing it. This represents a revision by the Federal Supreme Court of the view it expressed in its judgement of 5 October 2012. Therefore, tax rulings given in relation to direct federal tax by the competent cantonal tax authority continue to be valid, and hence also binding on the SFTA, until such time as the ruling is revoked, either by the cantonal tax authority or by the SFTA (see below).

Legitimate expectations for rulings given by a tax authority not authorised to do so

In judgement 2C_529/2014 and in the decision on 26 October 2012 in the same case (2C_565/2011), the question was raised whether a cantonal tax authority is bound by a ruling given by the SFTA for direct federal tax purposes. In an issue concerning the tax implications for Swiss investors in a foreign investment vehicle, a tax advisor had obtained rulings from numerous cantonal tax authorities in relation to the relevant cantonal and municipal taxes and from the SFTA a ruling on direct federal tax. No attempt was made to get the SFTA ruling on direct
federal tax subsequently approved by the cantonal tax authorities, even though they, as the assessing authorities, had competence in relation to ruling requests on direct federal tax.

In this case, the taxpayer was nevertheless able to rely on the ruling from the SFTA and on its competence to give it, despite being represented by an experienced tax specialist. The tax ruling was valid and binding on the cantons and the SFTA in relation to direct federal tax because the SFTA typically gave such rulings on direct federal tax in various similar cases in the past and in consultation with the cantons, gave it without reservation - having said this, the ruling was not made dependent on the cantonal tax authorities' approval - and the SFTA is empowered to act as the authority supervising the orderly and uniform application of direct federal tax.

With good reason, however, the ruling by the SFTA was not binding as regards cantonal and municipal taxes. One of the investors was liable to tax in the canton of Fribourg, where no cantonal tax ruling had been obtained. While the canton of Fribourg recognised the SFTA's ruling on the assessment of direct federal tax, it did not accept its view of cantonal and municipal taxes in this case.

It should be noted at this point, that the Federal Supreme Court made several references to the "situation in this case". The case involved taxpayers in a large number of cantons. In practice, it is certainly usual in such cases to get an approval for the tax ruling on cantonal and municipal taxes and on direct federal tax by the canton most affected in cooperation with the SFTA and subsequently to submit the signed ruling to the other cantons for their approval. Thus, it cannot be ruled out that the Federal Supreme Court would have come to a different decision in a case in which only one canton was affected.

**Form and timing of the revocation of a ruling**

The Federal Supreme Court had also been asked to establish precisely when the tax authority was no longer bound by a ruling (2C_807/2014). In this case, the SFTA had informed the cantonal tax administration in February 2005 that it would no longer accept the ruling with reference to direct federal tax for the 2005 tax year. The canton's tax administration had then promptly informed the taxpayer of the SFTA's decision in writing. In this case, the Federal Supreme Court stated that information in such a form was sufficient that the taxpayer could no longer have confidence in the ruling's substance. The letter does not need to be described as a revocation respectively an explicit revocation of the ruling is not necessary.

**Transition period when a ruling is revoked**

The Federal Supreme Court also had to decide about the transition period when a ruling is revoked. In the offshore financing branch case, it concluded that, given the slimline nature of the local structures and the 4-month notice period provided for in the employees' contracts, a period of only a few months would be sufficient to liquidate the local structure. As the Federal Supreme Court took the view that the revocation of the ruling in February 2005 was legally valid, it also regarded a transitional period until 31 December 2005 as adequate, so that the ruling remained applicable for the 2005 tax year.

It must, then, be assumed that transitional deadlines tend to be kept tight, although the taxpayer should, in our view, still be able to apply the ruling in the tax year in which it was revoked.

**Summary**

Tax rulings may have been examined thoroughly and systematically by doctrine, but they still originate from practice. For that reason, it is very good news that the Federal Supreme Court has not only corrected a statement it had made which caused uncertainty, but has also expressed a detailed view of other major practical aspects of rulings.

Following these findings, it can be assumed when dealing with rulings that

- a ruling on direct federal tax must as a rule be given by the cantonal tax authority,
- any such ruling given without reservation by the SFTA in relation to direct federal tax is valid in so far as it has been common for the SFTA to give rulings in comparable situations,
- a ruling is valid only until it is revoked, for which purpose a simple letter informing the taxpayer of that fact shall be sufficient, provided that it makes it clear that the tax implications confirmed in the ruling will no longer be accepted,
- and an appropriate transition period following the revocation must be provided for, although we take the view that the ruling should continue to be applicable at least for the tax year in which it was revoked.
Swiss Supreme Court confirmed its decision on currency translation differences

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In October 2009 the Swiss Supreme Court (hereinafter: “the Court”) issued a leading decision regarding the treatment of foreign exchange differences resulting from the translation of financial statements kept in another functional currency into Swiss Francs. According to the Court, such translation differences (both translation gains and losses) do not qualify as taxable income or deductible expense and need to be recorded as part of the equity and not in the profit and loss statement. Following three appeals filed against decisions rendered by the Court of Justice of the canton of Geneva on the same topic, the Court has confirmed on August 31, 2015 the above mentioned case law.

Background: decision of October 1, 2009 (ATF 136 II 88)
The Court decided that translation differences (both FX-gains and FX-losses) do not qualify as taxable income or expense and need to be recorded directly in equity and not through a profit and loss statement. In substance, the Court argued that Swiss tax and commercial law does not contain specific rules regarding the accounting treatment of FX translation differences. The Court also ruled that the principles of prudence and imparity do not apply in the case of FX translation gains and losses since they are considered virtual and, therefore, should not affect the profit and loss statement.

For further details, please refer to the International Tax Alert published on February 2, 2010.

Decisions of August 31, 2015 and confirmation of the current case law
Concerning the non-recognition of FX-losses as tax deductible items, three appeals have been filed against decisions rendered by the Court of Justice of the canton of Geneva. Therefore, the Court had the opportunity to confirm the current case law by rendering three decisions issued on August 31, 2015 (case # 2C_766/2014 and 2C_767/2014, case # 2C_768/2014 and 2C-769/2014 and case # 2C_775/2014 and 2C_776/2014). Generally, the arguments put forward by the Court are the same across the three decisions and can be summarized as follows:

- Despite some criticisms, many leading scholars in Switzerland approved the content of ATF 136 II 88. Moreover, it has been analyzed by the Swiss Conference of Tax, which established a certain number of principles. Finally, no change in the current legislation has been triggered following the issue of ATF 136 II 88.
- The net profit should represent an effective enrichment or impoverishment over a certain period of time. However, translation differences do not lead to an effective change in the economic position of the company. Art. 58 par. 1 let. b DTL should be interpreted in the light of the ability-to-pay principle. As a consequence of this principle, translation losses do not really constitute incurred losses. They represent pure accounting losses and cannot be therefore considered as commercially justified expenses. According to the Court, even if one should admit that the record of translation losses in the profit and loss statement were acceptable, their tax deductibility would be in any case excluded by the application of the corrective tax rule contained in Art. 58 par. 1 let. b DTL.
- Denying the deductibility of translation losses for companies recording their financials in functional currency does not imply the violation of the principle of equal treatment. On the contrary, admitting the tax deductibility of translation losses (i.e. expenses, which are not incurred but arise from the conversion of the financials into Swiss currency) would unduly benefit to companies, that have chosen to perform their activities in functional currency, to the detriment of those, that did not make a similar choice.

Conclusion
The question whether the various cantonal tax administrations permit the taxpayer to file the tax returns in functional currency remains open. In any case, the canton of Geneva appears not follow this approach. Moreover, it appears that the Court of Justice already started recently reopening proceedings that had been suspended while awaiting the decision of the Court.

It appears that the above-mentioned decisions bring a closure to the chapter of deductibility of conversion losses for Swiss income taxes.
Federal Supreme Court ruling on one-time equity tax in quasi-mergers

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In its decision of June 10, 2015 (2C_976/2014), the Federal Supreme Court determined the preconditions for a "quasi-merger" (merger-like transaction). It concluded that a tax-neutral quasi-merger is conditional on the acquiring company increasing its share capital.

Facts and circumstances
Mr. A. held all shares in X.AG and 50% of the shares in Y.AG private assets. The remaining shares in Y.AG were held by two other private individuals. A. sold his 50% stake in Y.AG to X.AG for CHF 50,000 (nominal value). The share capital of X.AG remained unchanged after the purchase. The market value of Y.AG came to approx. CHF 720 million.

The Swiss Federal Tax Administration (SFTA) qualified the nominal-value sale, in the amount of the difference between the purchase price and the higher market value of the holding, as a (hidden) contribution by the shareholder to X.AG, and levied one-time equity of approximately CHF 3.6 million (1% of CHF 368.7 million) plus interest.

After submitting an unsuccessful appeal to the Federal Administrative Court, Y.AG argued to the Federal Supreme Court that the restructuring constituted a tax-neutral quasi-merger that should be exempt from one-time equity tax. The Federal Supreme Court rejected the appeal for the following reasons.

Arguments of the Federal Supreme Court
The phrase "a consolidation of companies economically similar to a merger" (= quasi-merger), in Art. 6 para. 1abis of the Federal Stamp Duty Act, is not defined anywhere in current legislation. Its meaning is determined by a substance-over-form interpretation. According to the Federal Supreme Court, quasi-mergers are considered transactions that are, for whatever reason, not conducted as mergers but which have the same economic effect as a merger. In contrast to a merger, as a legal merging of companies, in a quasi-merger companies are combined in such a way that the acquiring company increases its capital under exclusion of the subscription rights of its shareholders, and a share exchange takes place with the shareholders of the acquired company. Following a quasi-merger, the acquiring company (here: X.AG) is a shareholder of the acquired company (here: 50% of the shares in Y.AG) and the acquired company remains a legal entity. The Federal Supreme Court thus confirms the practice of the SFTA, according to which a quasi-merger requires the acquiring company to hold a dominant position vis-à-vis the acquired company. According to the Federal Supreme Court, this is the case if the acquiring company holds at least 50% of the voting rights in the acquired company following the transaction, and no more than 50% of the effective value of the acquired participation rights is paid in cash to the shareholders of the acquired company.

The Federal Supreme Court ruled that the transaction in the case at hand could not be regarded as a quasi-merger, as the acquiring company did not increase its capital. This is not a mere formality, but constitutes a precondition for the economic integration of the companies involved in terms of their participation. The present case concerns a pure share-purchase transaction, not an economic integration of the two companies.

Recommendations for the practice
With this ruling, the Federal Supreme Court confirmed the SFTA practice for quasi-mergers as described in Circular no. 5 of June 1, 2004. In terms of practice, and now also according to the case law of the Federal Supreme Court, it is clear that a quasi-merger may result in an exemption from one-time equity tax only if the acquiring company increases its capital. The amount of the capital increase is apparently not significant; an increase of only one single share should be sufficient. The Federal Supreme Court did not rule on whether it is sufficient for a company to transfer its own shares. However, it can be assumed that a company's own shares are not sufficient for the formal capital increase required for purposes of a quasi-merger, which means that new shares must be used in each instance, and not a company's own shares.
New declaration for subjection concerning goods under customs control

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The Swiss Federal Tax Authorities (SFTA) have introduced new regulations concerning the declaration for subjection regime (also referred to as “subordination license”, “Unterstellungserklärung”, “déclaration d’engagement”) concerning goods under customs control on Swiss territory. Old authorizations are not valid anymore after 31 December 2015.

What is it about?
If a vendor selling goods under customs control on Swiss territory (e.g. goods stored in bonded warehouses, imported under the temporary admission regime etc.) wants to avoid that his customer is regarded as importer of record, he can ask the SFTA for a subordination license. Note that a corresponding practice has been applied by the SFTA in the past (however, not institutionalized). The respective permits granted in the past will lose their validity as of 1 January 2016. Action should therefore be taken by holders of such permits. At the same time, the SFTA broadens the scope of the application of the respective regime which may thus become an option for businesses which were to date not able to apply this regime.

Background
With introduction of the new customs law as of 1 May 2007 bonded warehouses in Switzerland became Swiss territory for customs purposes explicitly. As a consequence thereof, supplies of goods taking place in a bonded warehouse became also subject to Swiss VAT. In order to ease this consequence, the supply of goods which are under customs control on Swiss territory became exempt from VAT under the revised VAT law introduced in 2010, Article 23 par. 2 ciph. 3 VATL.

A sale of such goods with subsequent withdrawal from the bonded warehouse terminates the special customs regime and requires the importation for free circulation into Switzerland (provided the goods remain within Switzerland). Importer of record in such a scenario is the customer in Switzerland. Hence, the customer is liable for customs duties and import VAT.

The parties involved in such a transaction may have an interest in avoiding the customer acting as importer of record. The “regular” declaration for subjection as stipulated in Article 3 VAT Ordinance was not applicable as the goods in question were on Swiss territory already. However, the SFTA allowed for the analogue application of the regulation under certain circumstances allowing the supplier to voluntarily subject his supply to Swiss VAT (thus waiving the VAT exemption) and also act as importer of record.

“Declaration for subjection for Swiss territory”
With the newly introduced “declaration for subjection for Swiss territory” (“Unterstellungserklärung Inland”) the SFTA now institutionalized its practice and broadened its scope of application in favour of the taxable person. Based on the information available, the “declaration for subjection for Swiss territory” is now fully aligned with the “regular” declaration for subjection (now referred to as “declaration for subjection for foreign countries”, “Unterstellungserklärung Ausland”).

Further information as well as the respective applications can be found here:

► In German: http://www.estv.admin.ch/mwst/dienstleistungen/01455/index.html?lang=de
► In Italian: http://www.estv.admin.ch/mwst/dienstleistungen/01455/index.html?lang=it
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