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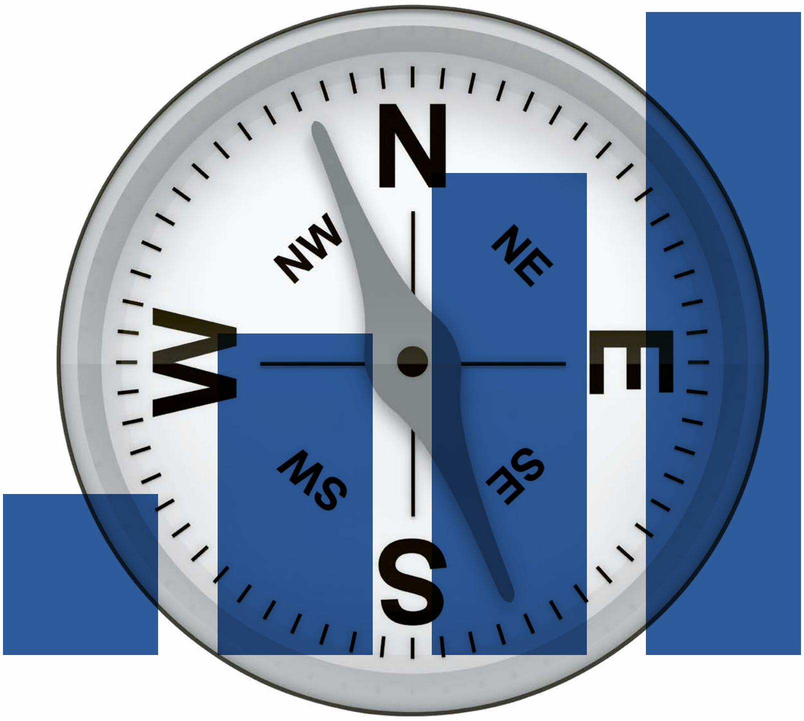

Tax Implications of the Corporate Law Reform

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Key Take-aways

1.
If a capital band is used, only the net capital increase at the end of the term is subject to issuance stamp tax.

2.
For the formation of capital contribution reserves under the capital band, a net consideration also applies. This is unattractive for non-listed companies, but is corrected by practice.

3.
Equity can now be kept in a permissible foreign currency. Only the taxable profit and the taxable equity must still be converted into Swiss francs.

1 Introduction

The revision of company law came into force on 1 January 2023. Some of the new provisions also have **tax** implications which are presented in this newsletter.

An overview of the changes and effects of the company law revision can be found in our newsletters of October 2020, October 2022 and December 2022.

2 Capital Band

The capital band gives the board of directors the **possibility** to **flexibly reduce or increase** the company's **share capital by up to 50% for a maximum of five years**. The capital band thus represents a combination of the existing authorized capital increase and the new authorized capital reduction, which are subject to the corresponding issuance stamp tax and withholding tax consequences.

The introduction of the capital band offers tax structuring possibilities.

2.1 Issuance Stamp Tax

Capital increases are generally subject to an issuance stamp tax of 1%. In order to ensure that not every capital increase within the capital band triggers an issuance stamp tax obligation, a **net consideration** is made for issuance stamp tax purposes. Consequently, **only the net capital increase** (i.e. the positive difference between inflows and outflows within the capital band) at the end of the term of the capital band is **subject to the issuance stamp tax**.

Thus, compared to the previously applicable capital increase options, the introduction of the capital band results in both a **deferral of the issuance stamp tax for up to five years** as well as an **offsetting option for any outflows** during the term of the capital band.

2.2 Capital Contribution Reserves

Capital contribution reserves are relevant from a withholding tax as well as an income tax perspective, as they can be **repaid without withholding tax or income tax consequences**. As with the issuance stamp tax, a **net consideration** applies to the formation of capital contribution reserves under the capital band, which means two things: On the one hand, according to the wording of the law, the increase of the capital contribution reserves is made **only to the extent that the newly formed capital contribution reserves exceed the repayments of reserves under the capital band**. On the other hand, the amendment of the capital contribution reserves is confirmed by the FTA **only at the end of the term** of the capital band. This delayed confirmation is relevant insofar as the capital contribution reserves can only be repaid free of income and withholding tax after they have been recognized by the FTA.

Such net consideration was **introduced with regard to listed companies** and is, in principle, undisputed. Otherwise, listed companies would have been able to provide their shareholders with tax benefits by opening a second trading line for the capital reduction or the repurchase of the redeemed shares. This would have allowed domestic shareholders who hold their shares as private assets to continue selling their shares via the first trading line and thereby realize a tax-free private capital gain (whereas the sale via the second trading line would in principle have resulted in the income and withholding tax consequences of a direct partial liquidation). In case of domestic shareholders who are subject to the book-value principle (legal entities and private individuals who hold the shares as business assets), the tax consequences of such a partial liquidation are generally lower, especially since only the difference between the book value and the repurchase price is subject to personal or corporate income tax or can even benefit from additional relief (e.g. participation deduction or partial taxation). Foreign shareholders – at least those who tender their shares via the second trading line – will regularly be entitled to a full withholding tax refund. Domestic shareholders subject to the book value principle as well as foreign shareholders entitled to a full withholding tax refund can thus tender their shares via the second trading line without any significant tax consequences. **Without a net consideration**, shareholders of listed companies could have **taken advantage of these different tax implications on the first and second trading lines**. In particular, the company would not have to repay any capital contribution reserves in order to grant a tax benefit to the shareholders tendering via the first trading line. At the same time, new capital contribution reserves, repayable free of income and withholding tax, could have been created in the course of the capital increase.

This **net consideration**, which is useful for listed companies in order to prevent abuses, is **not required for non-listed companies**, since they cannot open a second trading line in any event. Capital reductions always trigger income and withholding tax consequences of a direct partial liquidation, if and to the extent that the capital reduction is made against other reserves. For **non-listed companies**, however, the net consideration leads to a **tax disadvantage**, since the capital contribution reserves formed during the term of the capital band are only confirmed at the end. Consequently, an increase of the capital contribution reserves under the capital band is not recognized in case of a simultaneous capital reduction, even though the capital reduction was a taxable partial liquidation. In order to **correct** this **undesirable effect**, the FTA states in its **Circular No. 29c** of 23 December 2022 that the other reserves which were not repaid via a second trading line and which were paid in again by the shareholders, may be **credited** to the capital contribution reserves **in addition to the net inflow from the capital band**. Without this facilitation, tax reasons would most likely render the capital band a dead letter for non-listed companies.

Finally, it should be noted that, according to the aforementioned Circular No. 29c, **capital contribution reserves or foreign capital contribution reserves** repaid under the capital band and **paid in again** by the shareholders can also be credited to the capital contribution reserves in addition to the net inflow from the capital band.

Differences between listed and non-listed companies must be considered.

3 Further Innovations

3.1 Share Capital in Foreign Currency

Until now, accounting could be done in Swiss francs or in the currency essential for the business activity, the so-called functional currency. If a **functional currency** was chosen, the financial statements still had to be converted into Swiss francs for tax purposes, i.e. into the **presentation currency**, which inevitably led to **conversion differences**.

With the entry into force of the new Swiss company law, it is now possible to hold **share capital** in a **foreign currency defined as eligible** by the Swiss Federal Council (currently EUR, GBP, USD and JPY). Since the **capital contribution reserves** are treated the same way as the basic capital and the nominal capital for tax purposes, they can now also be kept in the selected eligible foreign currency and be confirmed by the FTA.

When the share capital or the capital contribution reserves are converted into the functional currency for the first time, they must be converted at the exchange rate on the conversion date (at the beginning of the financial year). Differences arising from the **conversion of the capital contribution reserves** at the historical exchange rate used in the formation of the capital contribution reserves have no impact on corporate income tax. Accordingly, these **conversion differences** are to be charged or credited to the profit/loss carried forward or the free retained earnings in the trade balance sheet **without affecting profit or loss**. Future increases and repayments of the capital contribution reserves are to be converted at the respective daily exchange rate. These will only be confirmed by the FTA in the eligible foreign currency used.

Finally, it should be noted that **taxes still have to be paid in Swiss francs** despite the possibility of keeping the annual financial statements in a foreign currency. Consequently, the taxable profit must be converted at the average exchange rate of the tax period and the taxable equity at the exchange rate at the end of the tax period. The simplification is thus that the entire annual financial statement no longer has to be converted.

3.2 Treasury Shares

The acquisition of treasury shares, provided it is **not for the purpose of a capital reduction** and **within the limits of 10% and 20%** respectively set out in art. 659 CO, has **no direct income and withholding tax consequences** as long as the **maximum holding periods** of six years (or two years in the case of acquisitions in connection with transfer restrictions) are **not exceeded**.

With the entry into force of the new Swiss company law, it could now be permissible from a company law perspective **to exceed the previously known limits**, provided that the repurchases and the resales of treasury shares **up to a maximum of 50%** take place within the context of a capital band **and within two years**. So far, however, there is neither a unified doctrine nor an established practice in this regard. In addition, it is questionable whether a possible exceeding of these limits would also be accepted from a tax point of view, which is why further developments will have to be awaited and monitored.

However, a repurchase option of up to 50% of treasury shares within the context of a capital band would be quite welcome, as this might result in attractive structuring opportunities (e.g. in connection with succession planning). But **for the time being, the known limits of 10% and 20%** should continue to be observed.

Share capital in a foreign currency leads to tax simplifications.

3.3 Interim Dividends

It is now also possible to distribute **interim dividends from current profits**, for example from the realization of extraordinary profits. This results in accelerated distribution options.

Such an **interim dividend is subject to the withholding tax**, analogous to the previous regulation. Since, according to the practice of the FTA, the formation of capital contribution reserves is only confirmed after the presentation of the annual financial statements, it will most likely not be possible to distribute capital contribution reserves formed in the same year by way of an interim dividend free of withholding tax, even according to the recently published practice guidelines.

4 Conclusion

Especially, the capital band as well as the possibility of keeping share capital and the capital contribution reserves in a foreign currency are welcome innovations from a tax perspective and offer interesting structuring options. Developments and adjustments to the still young administrative practice, which may naturally arise in the first few years after the entry into force, remain to be observed.

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