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Client information
April 2022

Corporation law revision

In its meeting of 2 February 2022, the Federal Council decided to bring into force on 1 January 2023 the amendments to the revision of the corporation law passed by Parliament. Selected changes of this extensive revision package, which are also relevant from a tax perspective, are outlined below.

1. Interim dividends

From 1 January 2023, interim dividends, i.e. distributions from current profits, can also be paid out based on interim financial statements (Art. 675a nOR). If all shareholders agree to the payment of the interim dividend and the claims of creditors are not jeopardised, the audit of the interim financial statements can be waived.

This flexibility can be used for tax optimisation under certain circumstances. In specific cases, a tax-optimised financing structure can possibly be achieved already in the current tax period due to an interim dividend. The progression effect on income tax in connection with dividend distributions should also be taken into consideration: By dividing the total payout into an interim dividend in the current year and an ordinary dividend in the following year, it may be possible to reduce the progression effect. However, interim dividends can also lead to additional tax risks (e.g. in connection with hidden equity or the violation of reporting obligations or deadlines). Interim dividends therefore require careful planning.

2. Loss offsetting

The corporation law provisions on reserves and retained earnings are adjusted to the existing accounting law. The new company law (Art. 671 et seq. nOR) also provides for a division of reserves into a statutory capital reserve, statutory retained earnings and voluntary retained earnings. Losses now have to be offset in the following order (Art. 674 OR):

1. Against profit carried forward
2. Against voluntary retained earnings
3. Against statutory retained earnings
4. Against statutory capital reserve

Instead of being offset against statutory retained earnings or the statutory capital reserve, remaining annual losses can be brought forward to new account either in whole or in part (Art. 674 [2] nOR).

Thus, there is still no obligation to offset against the statutory capital reserve going forward. This is important from a tax perspective regarding capital contribution reserves: Capital contribution reserves can be distributed free of withholding tax (Art. 5 [1bis] VStG) and collected free of income tax in the case of a participation attributable to private individuals (Art. 20 [3] DBG). In general, these reserves are reported under the statutory capital reserve. However, the tax-free distributable capital is lost when it is offset against losses in the commercial balance sheet. Therefore, it would make sense not to offset existing losses against capital contribution reserves, but rather to carry them forward to new account.

3. Capital band

3.1. Overview

The corporation law revision introduces the concept of a capital band. The general meeting can authorise the board of directors to increase or decrease share capital within a range of up to 50% during a maximum period of five years (Art. 653s OR). The capital band is to a certain extent a combination of an authorised capital increase and an authorised capital reduction.

3.2. Capital band in the context of stamp duty

On 13 February 2022, Swiss voters rejected the abolition of the stamp duty on equity injections and newly issued shares. Against this backdrop, the following new regulation should be noted: In terms of timing, the tax claim only arises at the end of the capital band (Art. 7 [1] f nStG). In addition, capital contributions within the framework of a capital band are only subject to stamp duty to the extent that they exceed repayments within the context of this capital band (net view; Art. 9 [3] nStG).

As capital contributions outside of a capital band are taxed in each case, regardless of any capital reductions, this change may result in tax advantages under specific circumstances.

3.3. Capital band in the context of income tax and withholding tax

A capital reduction can trigger income and withholding tax consequences (‘partial liquidation’). This will also apply to a capital reduction within the context of a capital band, not only at the end of the capital band, but also when repurchasing own shares for the purpose of capital reduction (Art. 4a [1] VStG).

If, on the other hand, share capital is increased with a share premium within the context of a capital band, the question arises as to whether this paid-in surplus can be considered as a reserve from capital contributions. According to Art. 5 (1ter) nVStG and Art. 20 (4) nDBG, this is only the case if additions exceed repayments within the context of this capital band. The net view also applies to withholding tax and income tax. This is to prevent public companies from obtaining tax advantages by using the second trading line and the capital band.

However, this net view can - depending on the interpretation of these new provisions – result in adverse consequences, especially for privately held companies. This is the case if both a capital increase with a share premium and a capital reduction are carried out within the capital band, which leads to withholding and income tax obligations. In other words, there is a risk that – in the context of the capital increase – no capital contribution reserves may be formed, whereas a similar capital increase outside of a capital band would have led to the creation of capital contribution reserves.

4. Foreign-currency stock or share capital

Under current law, bookkeeping and accounting can already be carried out in a foreign currency relevant to the business activities (Art. 957a [4] and 958d [3] OR). However, the stock or share capital currently has to be registered in Swiss francs. Under the revised law, stock or share capital can also be denominated in a currency relevant to the business activities. The Federal Council determines the allowed currencies (Art. 621 [2] nOR; Art. 773 [2] nOR).

This mitigates some issues in relation to the treatment of translation differences. If all capital-related aspects, such as the creation of share capital, dividend distributions, the formation of reserves or the assessment of over-indebtedness take place in a foreign currency, it would be consequent if all tax-relevant elements related to the determination of taxable capital or taxable profit were also held in the same currency. While this will not be the case for profit and capital tax under future law either (according to Art. 80 [1bis] nDBG or Art. 31 [3bis] nStHG, net profit must be converted into Swiss francs at the annual average rate and, according to Art. 31 [5] nStHG, equity must be converted into Swiss francs at the year-end exchange rate), according to unofficial announcements, changes in capital contribution reserves can be reported to the Swiss FTA in a foreign currency in future if the accounting is carried out in a foreign currency.

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