

Rolf Wüthrich

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Switzerland updates tax ruling procedures

Basel

burckhardt AG
Steinentorstrasse 23,
Postfach 258,
CH-4010 Basel

Zürich

burckhardt AG
Usterstrasse 12,
Postfach 1172,
CH-8021 Zürich

Switzerland updates tax ruling procedures

Switzerland's federal tax administration has published an update on its tax ruling practice for federal taxes, withholding taxes (WHT) and stamp duty as it nears a second referendum on corporate tax reform. **Burckhardt Switzerland's Rolf Wuethrich** explores how these may affect tax structuring and merger and acquisition (M&A) sentiment.

Switzerland's federal tax administration (SFTA) published a number of updates on April 29 2019 regarding the required formalities that should be respected in the areas of federal tax, withholding tax (WHT) and stamp duties (hereafter referred to as 'communication').

It is a long-standing practice in Switzerland that tax rulings have legal certainty. Especially for companies, tax rulings provide legal certainty in the field of mergers and acquisitions (M&A), restructurings, and in the international allocation of profits or with respect to special tax regimes applicable to Swiss based companies.

Even if a long lasting practice exists, federal or cantonal tax authorities have historically had a different approach to how tax rulings should look like.

As a result, the published communication might be a welcome effort to harmonise the formalities for ruling requests on federal as well as on a cantonal level in Switzerland. This article provides a summary of the key communication updates.

Switzerland's tax laws

Switzerland's tax laws generally set forth a broad set of guidelines rather than detailed provisions. Accordingly, case law and doctrine has played an important role in explaining these guidelines. Many aspects of these guidelines are covered in 'circular letters' ("Kreisschreiben") or in guidelines for administrative practice ("Merkblätter") that the Swiss tax administration issues from time to time.

Despite these publications, there is still capacity for interpretation of these tax laws. In Switzerland, it is good business practice to discuss tax matters with the tax administration. This dialogue and the subsequent tax climate is considered one of the major advantages for choosing

Switzerland as a corporate headquarter, provided these discussions are held in a climate of mutual respect.

Code of Conduct

In 2003, the Swiss Tax Conference, the SFTA, the fiduciary chamber (today *EXPERTsuisse*), and the academic community drew up a Code of Conduct for tax authorities, taxpayers and tax consultants.

This Code of Conduct provides a very basic list of “dos” and “don’ts” which applies to communication between tax advisors and the tax administration, as well as citizens approaching an administrative authority.

With respect to tax rulings, the Code of Conduct contains various statements. In situations where requested, a taxpayer’s identity and their relationship with their advisors can be disclosed. It also states that there must be an interest in justifying a request for a tax ruling or for binding information, and these can include the completion of a given transaction depending on a tax ruling, uncertainty regarding the law, an intent to avoid legal disputes, or a lack of precedents when a particular situation is encountered.

If no professional advisor is involved in a ruling request, then the formal requirements shall be relaxed.

In cases where there is a request made for a tax ruling, all legal issues involved and all relevant facts shall be provided. The presentation of the relevant facts shall be accurate, true and complete. Anything that has no proper bearing on the final determination should be omitted.

The resulting conclusions are to be based on the legal considerations applicable to the underlying facts. The tax administration shall then approve or deny the taxpayer’s request. In case the tax administration does not approve the request, the taxpayer may request file a formal objection.

In situations where there is a contradiction between the communication and the Code of Conduct, the communication takes precedence over the Code of Conduct.

Switzerland’s tax rulings

A tax ruling is binding information issued by Switzerland’s tax administration on the tax treatment of a planned, tax-relevant situation. It takes place by request from a taxpayer. The tax ruling aims to ensure a correct assessment of the facts in question, but has no assessment character.

Tax rulings are defined as advanced information by the tax administration. They do not qualify as an assessment, but can trigger legal consequences. Tax rulings can affect both individual situations (e.g. tax consequences of a specific restructuring) and permanent situations (e.g. tax qualification of an employee participation plan). They can be requested by the taxpayer or its authorised representative.

In order to obtain in good faith a binding tax ruling from the tax administration, the following requirements must be fulfilled:

- i) The confirmation issued by the tax administration must refer to a specific pattern affecting a specific taxpayer;
- ii) The tax administration issuing the confirmation must be competent to do so, or the taxpayer must have good reasons to believe that the issuing administration is competent to handle the case at hand;
- iii) The taxpayer has no reason to believe that the consequences confirmed by the tax administration are inaccurate or wrong;
- iv) Based on inaccurate confirmation, the taxpayer has made arrangements that cannot be reversed without negative consequences to the taxpayer;
- v) The legal situation at the time of implementation is the same as the time the ruling request was filed; and
- vi) The protection of legitimate expectations in a specific case must be weighted more important than the interest in the correct application of the law.

If all the aforementioned requirements are fulfilled, the tax ruling is binding, even if the answer of the tax administration is incorrect (i.e. in contradiction to the law or administrative practice).

It should be noted that a generally written or oral statement by the tax administration is not a tax ruling. Furthermore, a tax agreement does not have the same effect as a tax ruling.

Specifically, a tax agreement is an agreement between the taxpayer and a tax authority that applies to a specific situation where regulations deviate from the statutory provisions of the tax obligation.

Swiss Federal Tax Authority responsibilities

The SFTA has a number of responsibilities that directly oversee federal tax, WHT and stamp duties.

Direct federal tax

Switzerland’s direct federal tax is assessed and levied by the cantons under the supervision of the Swiss federal authorities. Federal supervision is exercised by the SFTA as part of the Federal Department of Finance.

Considering that the SFTA only carries out supervision in the field of income taxes, the cantonal tax administrations are therefore responsible for issuing a tax ruling in the area of direct federal corporate and individual income tax. The SFTA only provides expert information in the form of a statement for direct federal tax. Only in very special cases is the SFTA responsible for the legal harmonisation of tax rulings (e.g. for the approval of Pillar 3a products).

Withholding tax and stamp duties

Pursuant to the Swiss federal law on WHT, the SFTA issues all instructions, orders and decisions for the levy and reimbursement of WHTs that are not expressly reserved to another authority. This implies that the SFTA is responsible for approving corresponding tax rulings in the field of WHTs.

The SFTA is also responsible for issuing all instructions, orders and decisions in the field of stamp duties that are not expressly reserved to another authority. The SFTA is therefore also responsible for approving corresponding tax rulings for stamp duties.

Formal requirements of a tax ruling

A tax-ruling request must comply with the following requirements:

- 1) The tax ruling must be submitted in writing to the SFTA;
- 2) The request must summarise all relevant legal facts clearly and comprehensively in a brief form;
- 3) The identities (names and addresses) of the involved individual and legal entities must be disclosed in the request;
- 4) The request must contain the legal considerations and the resulting tax consequences;
- 5) The ruling must contain one or more legal requests;
- 6) All necessary supporting documents must be enclosed in the request;
- 7) The ruling must be drafted in one of the official Swiss languages (German, French, Italian or Rhaeto-Romanic, if a request concerns a Rhaeto-Romanic speaking taxpayer). Possible necessary translation costs from a foreign language to one of the official Swiss languages must be borne by the requesting taxpayer. Supporting documentation can, after consulting the SFTA, be filed in the original language (especially in English); and
- 8) Legal representatives filing tax rulings for their clients must include in their communication a duly signed power of attorney.

The SFTA reserves the right to reject without further examination a request for a tax-ruling if it does not meet the aforementioned requirements.

Impact of a tax ruling

If all formal and material requirements for a tax ruling have been met, and the ruling request complies with the relevant legal requirements, the tax ruling will be approved by the competent department within the SFTA.

This approval will be issued in writing, either by counter-signing the ruling request, or by issuing a separate letter with the confirmation. As a ruling request might be counter-signed directly on the filed request, it is advised to always file two sets of ruling requests with the SFTA (or other cantonal authorities). An approval by the competent tax administration might be given either unconditionally, or be subject to certain reservations.

The issuance of tax rulings by the SFTA is normally free of charge. In individual cases, however, the SFTA reserves the right to charge a fee in the event of an excessively extensive review.

A tax ruling can only have legal effects if all the facts are set out in it. For example, if relevant parameters change, or



Rolf Wüthrich

Attorney
burckhardt

Tel: +41 59 881 00 00

wuethrich@burckhardtlaw.com

Rolf is an international tax lawyer with expertise in national and international tax advisory, inbound and outbound transactions, particularly between the US and Switzerland, corporate restructuring and acquisitions, as well as general corporate secretarial services.

Burckhardt provides its clients and their businesses with comprehensive advice on national and international tax planning issues and structuring, offers corporate, general, secretarial and notary service, supports clients with professional expertise and broad international experience on restructurings, mergers and joint ventures, advises on inbound and outbound investments, as well as on financing and in all matters related to employment, trade and transport law.

facts are omitted, these protections are automatically rendered null and void. In such cases, the tax ruling does not have to be formally terminated by the SFTA.

Revocation of tax rulings

Tax rulings affecting permanent situations enjoy protection of legitimate expectations until they are revoked by the responsible tax administration (in general, or for individual cases). The SFTA may also limit a tax ruling by time.

The SFTA is also responsible for the revocation of tax rulings in the field of WHT and stamp duties. In the areas of direct federal tax and the refund of WHT to individuals who are a resident in Switzerland, the SFTA instructs the competent cantonal tax authority in writing to revoke a tax ruling it has formerly granted, and informs the taxpayer accordingly.

The revocation of a tax ruling takes place in written form and with effect for the future. In individual cases, the SFTA may grant the taxpayer an appropriate transitional period until it expires. In such cases, the SFTA enables the taxpayer to adapt their structures or arrangements to the new legal situation.

The protection of legitimate expectations in a tax ruling ends automatically (i.e. without revocation of the ruling by the competent tax authority) if the relevant legal provisions change, the case law leads to an adjustment of the administrative practice, or the time limit set by the SFTA when approving the tax ruling has expired. In such cases, it is not necessary for the tax administration to terminate or revoke the tax rulings concerned.

Exchange of information impacts

Since January 1 2018, Switzerland has enforced an exchange of information (EOI) on tax rulings with other states, without the prior request of the other state. This is based on the Mutual Administrative Assistance in Tax Matters Convention from January 25 1988.

Only the basic parameters of a tax ruling (e.g. information on the taxable company, duration of the tax ruling, summary of the content of the tax ruling), and the so-called ruling reports (templates), are exchanged.

The EOI impacts tax rulings issued from January 1 2010, which are still applied from January 1 2018 or later.

The SFTA grants Swiss companies impacted by a spontaneous EOI ruling the right to be heard in advance of the exchange. This Swiss procedure is reviewed and evaluated by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes.

The recipient state has the possibility of requesting the complete tax ruling by means of an EOI upon request. The spontaneous EOI takes place on a reciprocal basis, and Switzerland has exchanged, but also received ruling reports, from other contracting states since 2017. Such received ruling reports are made available to interested cantonal tax administrations by the SFTA.

The SFTA has developed a digital platform that allows the electronic recording of ring messages and is available to taxable companies and cantonal tax administrations.

Tax rulings and VAT

The SFTA is also responsible for providing information in the field of Swiss value added tax (VAT). Legal information issued by the SFTA relates to domestic and acquisition tax. On the other hand, import taxes are levied by the Federal Customs Administration. Customs enquiries must be addressed to the Federal Customs Administration.

According to Swiss VAT law, a taxable person must provide the SFTA in good faith with information on all matters to the best of their knowledge. Information and tax rulings are legally binding for the requesting taxpayer and for the SFTA as long as there is no change in the law or practice of the SFTA. Information given by the SFTA is binding, even if it is incorrect and the taxpayer does not recognise this.

[This article was written by Rolf Wuethrich of burckhardt Switzerland.](#)