Corporate immigration into Switzerland

Rolf Wüthrich, of burckhardt, examines the process of corporate immigration of existing companies into Switzerland as an alternative to establishing a new Swiss company when seeking a tax efficient reorganisation.

Merger or acquisition activities often lead to antecedent or subsequent structural reorganizations within a group, be it for business, tax or legal reasons. As Switzerland is still considered a business location offering long-term legal, financial and political stability as well as a friendly atmosphere between taxpayer and tax administration, the country is often used as a hub for European headquarters or as a holding location. For this purpose, not only the establishment of new Swiss companies, but also corporate immigration of existing companies from abroad to Switzerland is a lately more often used alternative to reorganize a structure in an efficient way. Hereby it has been observed that not only subsidiaries of multinational companies, but also smaller privately held companies make use of corporate immigration. Corporate immigration without formal liquidation of a company offers, especially for contractual relationships, an attractive alternative to reorganize a business structure.

This contribution describes practical issues to be taken into consideration in connection with corporate immigration into Switzerland, both from a civil law as well as from a tax law perspective. Corporate immigration requires sound analyzes of possible tax exposure, both in the emigration as well as in the immigration country, and advance tax rulings in order to have a clear tax situation in the immigration country. The coordination between two countries and the involvement of administrative bodies in different countries requires early planning and sufficient time reserves to successfully implement an international company migration.

Civil law aspects of corporate immigration

Swiss civil law contains specific regulations on corporate immigration without liquidation of a company into Switzerland. In principle, one can immigrate with every foreign company into Switzerland. Swiss law, however, requires that the foreign country, out of which the company is planning to emigrate, also allows under its domestic laws the immigration and emigration of companies without liquidation. Furthermore, the legal form of the immigrating company must be adjustable to one of the Swiss company forms, which are the stock corporation or the limited liability company. As in the course of a corporate immigration the immigrating company is not liquidated, existing contractual relationships and ownership rights are not affected by a corporate immigration. Summarized, the following documents are required for a corporate immigration into Switzerland:

- Minutes of an extraordinary shareholder meeting of the foreign company deciding the immigration into Switzerland, including the approval of the new Swiss articles of incorporation of the migrating company. The minutes must be taken by way of a public deed and must be apostilled;
- Evidence of existence of the emigrating company in the emigration country: A legalized and apostilled commercial register extract and the articles of incorpora-

tion of the company issued by the country of emigration are required;
- The authorities of the emigration country must issue a confirmation that emigration without liquidation is possible under the laws of the emigration country;
- The Swiss Institute of Comparative Law must issue an opinion that the foreign company form of the emigrating company is comparable to a Swiss company form and that the adoption of the foreign company form to a Swiss company form is possible;
- The emigrating company must confirm that the centre of activities of the company is moved into Switzerland;
- A report by a certified auditor must be issued confirming that after immigration into Switzerland the formal capital of the company will be covered according to the regulations of the Swiss Code of Obligations; and
- New Swiss articles of incorporation of the company must be issued.

Even though the required legal documents for immigration of a company into Switzerland are not extremely complicated, to obtain the collection of the required documents as well as the coordination between the two countries involved will take, without planning period, at least two months. For the implementation of a corporate migration sufficient time reserves should therefore be taken into consideration.

Biography

Rolf Wüthrich

burckhardt
Mühlenberg 7
4010 Basel, Switzerland

Tel: +41 61 204 01 00
Email: wuethrich@burckhardtlaw.com

Rolf is an international tax lawyer focusing his areas of expertise on national and international tax planning, inbound and outbound transactions, especially 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, tailored advice on national and international tax planning issues and structuring, offers corporate secretarial and notary services, supports clients with professional expertise and broad international experience on restructurings, mergers and joint ventures, advises on inbound and outbound investments and in all matters related to employment, trade and transport law.

Tax aspects

The following explanations only take into consideration Swiss tax law aspects. Even though a corporate emigration as understood in this article does not lead to a liquidation for civil law purposes, an emigration normally triggers a liquidation for tax purposes in the country of emigration. Possible tax consequences to be triggered by an emigration should therefore also be carefully analysed in the country of emigration before implementing an emigration.

Corporate income and capital tax

An immigrating company will be subject to corporate income and capital tax in Switzerland as from the date of immigration. The date of immigration is the date on which the company is registered in the commercial register in Switzerland. Due to practical timing issues regarding the collection of the required civil law documents (e.g. obtaining apostilles), the relevant date of emigration for civil and tax law purposes in the country of emigration may differ from the relevant date of immigration for civil and tax law purposes in Switzerland. It may, for example, be the case that tax liability ends in the country of emigration on the date of holding the extraordinary shareholder meeting deciding the emigration. Before the civil law documents are apostilled in the country of emigration, are sent to Switzerland and are registered in the commercial register in Switzerland, several days may pass. As the country of emigration will stop taxing the company on the date of holding the extraordinary shareholder meeting, while Switzerland will assume tax liability only as of the date of registration in the commercial register in Switzerland, there might arise a period in which the company is not subject to tax in any country. To avoid such a situation, it is required to define with the involved tax administrations the timing when tax liability shall end in one country and begin in the other country.

According to the Swiss Code of Obligations, the inventory, the profit and loss account and the balance sheet of a Swiss company must be drawn up in Swiss Francs. In practice many companies keep their books in their foreign functional currency and convert their financial statements from their functional currency into Swiss Francs at the end of the business year. The keeping of the financial statements in functional currency other than Swiss Francs will not only lead to translation gains or losses in connection with the year-end conversion (can such gains and losses be booked over the profit and loss account or shall they be booked into the equity), but also to other tax relevant questions such as the treatment of possible exchange rate gains or losses in connection with dividend distributions by the Swiss company or the repayment of investment made in a currency other than Swiss Francs.

Before immigrating into Switzerland it is therefore advisable to obtain from the tax administration a tax ruling on the taxation regime applicable to the immigrating company. Even

though a tax ruling can still be obtained once the company is registered in Switzerland, an advance ruling obtained before immigration will grant certainty to the immigrating company.

Stamp duty

Subject to stamp duty (*Emissionsabgabe*) of 1% is, *inter alia*, the initial contribution or a later increase of the formal capital, in a native person. The Swiss stamp duty law describes a native person as a person having its civil law residence, its permanent presence, its statutory seat or its legal seat in Switzerland or as a person being registered in the Swiss commercial register. In the course of an immigration to Switzerland a legal entity is not wound up and newly established under the laws of Switzerland, but becomes subject to Swiss law without being newly established. No shares in a newly established company are issued, but the already existing shares are now subject to Swiss law and are re-issued under the laws of Switzerland. By issuing shares under Swiss law, the immigrating company gets a native company for stamp duty purposes. This process is for stamp duty purposes, however, neither considered an initial contribution nor a later increase of the formal capital of the immigrating company; no Swiss stamp duty is therefore due on the equity when immigrating into Switzerland.

As a consequence, highly capitalised entities may therefore immigrate into Switzerland without triggering stamp duty consequences. Should a company increase its formal capital shortly before immigration into Switzerland (e.g. because the country of emigration does not levy any stamp duty or similar tax on capital increases), then the Swiss tax administration might consider such capital increase as avoidance of the Swiss stamp duty and levy stamp duty on the increased amount. It is therefore advisable to get – before the corporate immigration takes place – an advance ruling with the Swiss federal tax administration on the treatment of the equity to be immigrated for stamp duty purposes. When immigration takes place, the formal capital of the immigrating company must be converted into Swiss Francs. The formal capital will be recorded in Swiss Francs in the Swiss articles of incorporation of the company and will be registered in the commercial register in Switzerland. The Swiss articles of incorporation, including the nominal capital of the company in Swiss Francs, will, however, already be approved during the extraordinary shareholder meeting of the company deciding the emigration to Switzerland. Thus, the formal capital of the company in Swiss Francs must be translated and defined before the immigration is registered in Switzerland. Between the date of the emigration decision and the date of the effective immigration into Switzerland the exchange rate may change resulting in conversion differences.This problem can be solved by agreeing with the federal tax administration on the formal capital of the company to be converted from its original currency in Swiss Francs on the day the extraordinary shareholder meeting approving the immigration takes place. As a conversion rate, the rate published on such day by the Swiss Federal Customs Administration is acceptable.

Transfer tax

For Swiss transfer tax purposes (*Umsatzabgabe*) a legal entity qualifies as security dealer if its last balance sheet shows securities (as defined under the stamp duty law) with a book value in excess of SFr10 million ($10.8 million). Thus, a Swiss company is, in principle, subject to transfer tax if its securities exceed a book value of SFr10 million. A security dealer is subject to transfer tax on the consideration received or paid for purchased or sold securities. The transfer tax rates are applied to the paid consideration and amount 1.5% for taxable securities issued by a Swiss party and 3% for taxable securities issued by a non-Swiss party. The question arises if the immigration of a company may lead to transfer tax consequences if the company owns securities (including shares in subsidiaries) exceeding a book value of SFr10 million.

In the course of immigration into Switzerland a company keeps its legal personality. No liquidation of the foreign company and establishment of a new Swiss company takes place, but the foreign company becomes by law subject to Swiss law without being newly established. There is no change in ownership in the securities and no securities are transferred. As a consequence, the immigration of a company into Switzerland does not trigger any transfer taxes.

Further, the question arises as to which moment an immigrating company, which fulfills the 10 million security requirement, will become subject to transfer duty. A company will be subject to transfer tax on its security transactions six months after issuing a balance sheet showing securities exceeding the threshold of SFr10 million. This means that a company must first of all issue a Swiss year-end balance sheet showing securities in excess of SFr10 million. When immigrating into Switzerland during a running business year a company may opt for an extended first business year, meaning that the company does not have to close its books for tax purposes at the regular end of the first business year, but can extend the first Swiss tax business year until the end of the following business year. Only six months after closing of this extended business year and, as a consequence, issuing a Swiss balance sheet the company will, subject to securities in excess of SFr10 million, qualify as security dealer and will get subject to transfer tax.

Withholding tax

The principle of contributed capital puts, for Swiss tax purposes, contributions and premiums payments made by a shareholder into the equity of a company equal to the creation of formal capital in such company. On the other side profits realised in the current tax period, profits carried forward, hidden capital contributions and capital contributions

not made by the shareholder are not considered to be reserves from capital contributions and, as a consequence, are qualified for tax purposes as "other reserves". Under the Swiss withholding tax law any repayment of "other reserves" (i.e. of equity other than the formal capital or contributed capital) is considered to be a dividend and, as a consequence, subject to Swiss withholding tax at a rate of 35%. If the parent company of the dividend distributing Swiss company is not a Swiss, but a foreign company, then the Swiss withholding tax consequences (reporting procedure, application of refund procedure, no refund at all) depend on the existence of a tax treaty between Switzerland and the state of residence of the parent company. If a tax treaty can be applied, then Swiss withholding tax is limited to the applicable treaty rate for dividends (in general 0% or 5%). If no tax treaty is applicable, Switzerland will not grant a refund and a final withholding tax of 35% will be levied on the dividend distribution.

When immigrating a legal entity into Switzerland the equity of such company must also for withholding taxes be qualified as formal capital, as reserve from capital contributions or as other reserve. For the qualification of the equity of the immigrating entity it will, for Swiss tax purposes, be decisive how the reserves were created when the immigrating company was still a non-Swiss company. To have certainty about the acceptance of the qualification of the reserves it is therefore advisable to submit the qualification of the reserves (formal capital, reserves from capital contributions or other reserves) of the immigrating company to the Swiss tax administration before the immigration will take place.

Alternative to corporate immigration: Share contribution with subsequent liquidation of contributed subsidiary

As mentioned before, the full implementation of a civil law immigration requires sufficient planning and implementation time. Such time may not always be available and more time efficient solutions must be found. Economically nearly the same result as a civil law immigration is reached if a new Swiss company is established, the shares in the company to be immigrated are contributed to the new Swiss company, the foreign company hereafter distributes all its assets as dividend and, in a last step, is then liquidated. A significant difference and disadvantage compared to the corporate immigration, however, results in the fact that possible contractual relationships of the company to be immigrated will not be transferred by law to the Swiss company, but that such relations must be transferred individually or be renegotiated between the parties as the contractual relationships are not transferred with the dividend distribution. This disadvantage will restrict the practical implementation of this alternative to less complex situations with simple contractual relationships.

If a legal entity is the shareholder in the company to be migrated to Switzerland, then the shareholder can make a contribution in kind (shares in company to be migrated) into the equity of the Swiss company against no consideration. Such contribution can take place, subject to certain conditions, income and stamp duty free. If an individual is the shareholder in the company to be migrated to Switzerland, a contribution in the reserves against no consideration is not tax-free possible and a so-called share-to-share deal must be implemented to contribute the share stamp duty free to the Swiss company. Under the share-to-share deal, the shareholder contributes the shares in the company to be migrated at nominal value in the equity of the Swiss company and receives as consideration shares in the Swiss company. Thus, the shareholder changes its shares in the company to be migrated against shares in the Swiss company. A share-to-share deal therefore mandatorily requires an increase in the formal capital of the Swiss company, unless the share-to-share deal takes place in the course of the establishment of the Swiss company as payment in kind of the initial formal capital.

The tax administration favours the corporate immigration over the share contribution with subsequent dividend distribution and liquidation. If sound business reasons exist, however, this alternative to the corporate immigration will also be accepted and can be implemented tax neutral.

Simple to implement

Corporate immigration without liquidation into Switzerland may be time intensive, but is rather simple to implement from a civil point of view. In the course of an immigration the entity is not wound up in the country of emigration and newly established under the laws of Switzerland, but the entity becomes by law subject to Swiss law without being newly established. As a consequence, all contractual relationships of the immigrating company remain in force. From a Swiss tax point of view, corporate income and capital tax, stamp duty and transfer duty as well as withholding tax issues may be issues to be clarified before the immigration takes place. To obtain clarity on possible tax consequences it is advisable to request advance tax rulings in the case of corporate immigration.

burckhardt

Attorneys • Civil Law Notaries • Certified Tax Experts

focused

pragmatic

personal service

burckhardt Ltd
Mühlenberg 7 • PO Box 258 • CH-4010 Basel • Switzerland
Tel. +41 61 204 01 01 • Fax +41 61 204 01 09

info@burckhardtlaw.com
www.burckhardtlaw.com