

Spotlight 08/25



NEW DEVELOPMENTS IN THE TAX CONSEQUENCES OF CORPORATE RESTRUCTURING

Explanations on the revised Circular letter 32a of the Federal Tax Administration on corporate restructuring

Banks and Financial Service Providers | Capital Market and Listed Companies | Competition | **Compliance** | Construction and Real Estate | Corporate and Commercial Law | Data Protection | Energy | Financing | FinTech | Foundations | Funds and Asset Management | Insurance | Intellectual Property Law | Internal and Regulatory Investigations | Labor and Employment Law | Litigation and Arbitration | Mergers and Acquisitions | Migration | Notarial Services | Pharma and Health Care | Private Clients and Estate Planning | Private Equity | Public Procurement | **Restructuring and Insolvency** | **Taxation** | Technology and Media | Venture Capital | White Collar Crime | Sports Desk | Start-up Desk |

Wenger Vieli Ltd.
Dufourstr. 56
P.O. Box
8034 Zurich
—
Metallstr. 9
P.O. Box
6302 Zug
—
+41 58 958 58 58
spotlight@
wengervieli.ch

The existing Circular letter No. 32 on the restructuring of corporations and cooperatives was comprehensively revised in January 2025 (hereinafter "**CL 32a**"). The revisions implemented changes in administrative practice, current case law, and statutory amendments. Of particular note is the change to waivers of shareholder's loans, which are recognized – in accordance with commercial law – without triggering corporate income taxes, which will offer taxpayers greater flexibility. In addition, the definition of a company in need of restructuring has been revised.

Concept of needing restructuring

The tax assessment according to CL 32a is only applicable if it can be assumed that restructuring is required for tax purposes. However, the need for restructuring of a company is defined differently for each type of tax. Due to differing definitions of terms, it may be the case that not for all taxes the requirements for a financial restructuring are fulfilled.

Direct federal tax (corporate income taxes)

A company is in need of restructuring from a direct federal tax perspective if it has a genuine negative equity and therefore has no open and/or hidden reserves that would offset the losses carried forward under commercial law. If this criterion is met, debt waivers can also be offset against losses carried forward that are more than seven years old and therefore could generally no longer be offset against tax losses carried forward (according to Art. 67 para. 2 DBG and Art. 25 para. 3 StHG).

Type of tax	Direct federal tax (corporate income taxes)	Withholding tax	Stamp duty: one-time allowance	Stamp duty: waiver
Definition of need for restructuring	Losses > open and/or hidden reserves	Losses > open reserves	Losses > profit carryforward and voluntary profit reserves	Losses > profit carryforward, voluntary and statutory profit reserves, and hidden discretionary reserves
Offsetting of statutory reserves	Yes	Yes	No	Yes, except where the reserves were subject to stamp duty or were formed as a result of a tax-neutral restructuring
Consideration of hidden reserves	Yes	Upon request possible	No	Yes, if discretionary reserves are available

The amendments to CL 32a now stipulate that a waiver of claims by shareholders that is recognized directly in equity (i.e. not hitting the P/L) does not trigger any income taxes based on the principle of prudence ("Massgeblichkeitsprinzip"). In light of this, it is therefore recommended that debt waivers by shareholders be recognized in equity directly. It is no longer necessary to use alternative instruments, such as a debt-equity swap. This principle also applies outside of restructuring.

The previous practice regarding debt waivers by shareholders or related parties, according to which a distinction is made between genuine and non-genuine restructuring profit, remains unchanged. A debt waiver that is recognized as income in the P/L is therefore generally subject to corporate income tax ("genuine restructuring profit"). Exceptions exist if the loan was granted on terms that an independent third party would not have granted or if the loan was treated for tax purposes as hidden equity (in accordance with Circular letter No. 6a of the Federal Tax Administration (hereinafter "FTA")) or was proactively declared as such by the company in its tax return. In these cases, there is a so-called "non-genuine restructuring profit," which is treated as not affecting corporate income tax. Debt waivers by third parties, on the other hand, are always subject to corporate income tax.

Withholding tax

For withholding tax purposes, hidden reserves are not taken into account when determining whether there is a negative equity in the context of assessing the need for restructuring. However, at the request of the taxpayer, they may still be considered.

Withholding tax may be incurred in restructuring cases if an affiliate provides a restructuring measures, such as a debt waiver, that does not comply with the arm's length principle. In this case, a deemed dividend is assumed, as corporate restructuring is generally a responsibility of the shareholders. The withholding tax must be charged to the company providing the restructuring measures. This can result in effective withholding tax consequences if, for example, the company providing the restructuring measures is registered abroad (and does not hold at least 10% of the shares in the company undergoing restructuring). Considering this, it is recommended that restructuring measures be provided by the direct shareholders whenever possible.

Furthermore, CL 32a now stipulates that capital contribution reserves can only be used in the case of ordinary profit distributions and not in the context of restructuring measures. Any withholding tax consequences can therefore no longer be avoided by off-setting capital contribution reserves.

Stamp duty

Contributions made by direct shareholders in the case of so-called "open restructurings" (i.e., capital reduction followed by a capital increase) or so-called "silent restructurings" (i.e., direct contribution from a shareholder) are generally subject to 1% stamp duty. In this regard, the legislator provides for two relief instruments in the context of restructurings: a one-time allowance of CHF 10 million and a waiver of the stamp duty.

The conditions for the one-time allowance are that existing losses are off-set with the shareholders' contributions and the contribution amount does not exceed a total of CHF 10 million. The allowance can be claimed for open and silent restructuring, whereby in the case of a capital increase without a simultaneous capital reduction, only the premium is exempt from the stamp duty.

The stamp duty is payable on the nominal value, but this is not likely to be material in most cases. With regard to the need for restructuring in order to claim the one-time allowance of CHF 10 million, the loss may only be offset against retained earnings and voluntary profit reserves, but not against statutory profit and capital reserves – even if the statutory reserves exceed the minimum amount of 50% and 20% of the share capital respectively, as stipulated in the Swiss Code of Obligations. Since the loss for the financial year in which the restructuring takes place also qualifies for the one-time allowance, it is advisable to take an estimate of the current loss into account.

In order to claim the one-time allowance, the loss offset must be approved at the latest by the ordinary general meeting that approves the annual financial statements for the financial year in which the restructuring measures were made. The commercial law loss offset with the restructuring measures must therefore be carried out at the latest in the financial year in which the general meeting is held. The disadvantage is that no capital contribution reserves can be built with the restructuring measures.

For the stamp duty waiver, however, there must be no profit reserves, voluntary profit reserves, or discretionary reserves, or these must first be offset against losses carried forward under commercial law. However, it is not necessary to revalue (in the sense of a step-up) hidden reserves, obliged by statutory law. According to the new tax practice, capital reserves no longer have to be offset if stamp duty has been paid on them or if they were created through a restructuring that was exempt from stamp duty. A request for waiver will only be granted if the one-time allowance of CHF 10 million has been fully utilized.

In order for the waiver to be granted, the company must undergo sustainable restructuring so that it is no longer over-indebted after the restructuring. It is therefore harmless if the restructuring measures result in positive equity. However, the waiver will not be granted if the company was undercapitalized from the beginning. The principles relating to hidden equity must be observed in this regard. Furthermore, the need for restructuring must not be attributable to entirely foreseeable or reckless risks without adequate self-financing.

Furthermore, with CL 32a, the FTA has taken the opportunity to codify the already established administrative practice according to which a contribution from the grandparent company is not subject to stamp duty.¹

Restructuring in the course of formal liquidation

The new CL 32a also stipulates that only restructuring measures made by shareholders in connection with a liquidation that take place after the publication of the liquidation or the registration and entry of the liquidation resolution in the commercial register are not subject to stamp duty. It is therefore advisable to make restructuring measures in the context of liquidation only after the liquidation has been published in the commercial register.

¹ Subject to tax avoidance.

Due date and formalities

Deadlines must be observed in the context of corporate restructuring. These are as follows and remain unchanged under CL 32a: A withholding tax claim must be declared and, if applicable, paid within 30 days of the due date of the restructuring measures or, in the absence of a due date agreement, at the time of the resolution using Form 102. The stamp duty is due 30 days after the end of the quarter in which the restructuring measures were published in the commercial register or, if publication is not necessary, in which the restructuring measures were made. At the same time, the stamp duty must be declared to the FTA using the corresponding forms 3 or 4.

Keyfacts

- 01** CL 32a has been comprehensively revised. The definition of a company's need for restructuring varies depending on the type of tax and is broader in CL 32a than before.
- 02** CL 32a provides clarity in favor for taxpayers regarding corporate income tax-neutral and commercial law-neutral debt waivers by shareholders.
- 03** Restructuring measures must be carefully planned to ensure that tax relief measures are effective and do not result in undesirable tax consequences.



Patric Egger
Partner
p.eggler@wengervieli.ch
+41 58 958 53 14



Jonas Bühlmann
Counsel
j.buehlmann@wengervieli.ch
+41 58 958 55 04



Jill Blattmann
Senior Associate
j.blattmann@wengervieli.ch
+41 58 958 56 13

Wenger Vieli is your reliable partner in legal and tax matters. Not only do we pride ourselves on bringing outstanding professional skills, experience, and a sense of responsibility to the table, but we are also highly inquisitive! Where others see obstacles, we see opportunities, find solutions, and open up new horizons. We do this with pleasure. In Switzerland, Europe, and the rest of the world.