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Board of Directors and taxes

or

Why the Board of Directors should also be interested in taxes

Viktor Bucher / 30. August 2019

Overview

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The duties of the board of directors

Art. 716a OR

The board of directors has the following **non-transferable** and **indefeasible** duties:

1. the overall management of the company and the issuing of the necessary directives;

2. the definition of the organizational structure;

3. the design of the accounting system, financial control and financial planning, provided that these are necessary for the management of the company

4. the appointment and dismissal of the persons entrusted with the management and representation of the company:

5. the overall supervision of the persons entrusted with the management and representation of the company;

6. …….

7. ……..

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Why the Board of Directors should also be interested in taxes

Taxes as a business risk

- Today, tax issues are dealt with prospectively and permeate practically all processes and business transactions in a company.

- Tax issues are complex, international and dynamic.

Nowadays taxes are a risk field within company

Tax risks

Surveys conducted in recent years show that tax risks are one of the top priorities of corporate governance for most companies in Switzerland and the rest of Europe.

Due to developments in the OECD and the EU, this perception is likely to increase in the future.

The active "management" of these risks is therefore important and necessary.

Tax risks

Before the risks can be managed - the risks must be known/identified.

The systematic recording of all tax-relevant tax issues within the framework of tax engineering is often the starting point for "Tax Risk Management".

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The tax triumvirate

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The tax triumvirate

- **Corporate structure / organization**
  - Structure based on operational processes and needs, structural changes, changes in business management conditions, etc.
- **Governmental framework**
  - Legal structure of the company, tax status in the individual countries, applicable double taxation agreements, tax policy, etc.
- **Tax law fundamentals**
  - Direct taxes, sales taxes, customs, international developments, etc.

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Corporate tax planning

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The planning levels

There are two levels of tax planning:

1. **Strategic tax planning**
2. Operational tax planning

Strategic tax planning

The main topics in strategic tax planning:

- Tax strategy
- Tax department
- Risk management
- Governance
- Partnerships
- Documentation
- Audit management

The planning levels

There are two levels of tax planning:

1. Strategic tax planning
2. **Operational tax planning**

Operational tax planning

- Case-by-case assessment of business transactions regarding their tax relevance within a limited period of time.

- This includes in particular:
  - Profit statement planning
  - Annual financial statements
  - Investment planning
  - Funding
  - Tax declaration

- Taxes are actively managed as a cost factor.

- Operational tax planning is based on strategic tax planning.

Operational tax planning

Operational tax planning can be divided into two main levels:

A. The calculation / accounting level

B. The legal / organisational level

The annual financial statements belong to the calculation / accounting level of operational tax planning

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Taxes and international accounting standards

Taxes and international accounting standards

US GAAP, IFRS und (Swiss GAAP FER)

- More and more companies prepare their annual financial statements according to international accounting standards, following the principle of "true and fair view".

- The international accounting standards create areas of conflict regarding tax regulations in the individual countries.

- These differences must be recorded within the "tax accounting" and displayed in the balance sheet.

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from

Tax risks

to

Tax planning

to

Tax opportunities

The systematic recording and assessment of the tax situation not only helps to identify tax risks, the overall picture of the tax situation also reveals opportunities for tax planning measures.

The relationship between the company and its shareholders

The relationship between the company and its shareholders

The hidden distribution of profits

- Business relations between the company and its shareholders (and related persons) are to be structured in accordance with the rules of third-party settlement. Deviations from this principle result in tax adjustments at the level of the company and the shareholder.

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The relationship between the company and its shareholders

- Transactions not carried out at arm's length should be avoided, as they may result in back taxes and criminal liability
- Fines can be avoided through non-punishable voluntary disclosure
- Hidden profit distributions alleged by the tax administration should not be accepted without first clarifying the further consequences

Succession planning

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Influencing factors

inheritance law level property law level	tax law level
corporate law level	financial level economical level

Succession planning

Crucial tax issues

- Share deal or asset deal
- Private capital gains
- Transposition
- Indirect partial liquidation
- The financing model
  - Acquisition vehicle or direct investment

The liability risks of the Board of Directors

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The liability risks of the board of directors

- In the case of withholding tax– Art. 15 Witholding Tax Law (VStG)
  - Joint liability if the board of directors was involved in the liquidation, also in the case of de facto liquidation - Sell assets and distribute proceeds instead of reinvesting
  - Liability for withholding tax, default interest and procurement costs - even before taking up office in the board of directors, **the time at which the withholding tax is claimed** by the authorities is decisive
  - Strict guarantor liability due to the function of the board of directors but: Exoneration through proof of due diligence (difficult)

- For direct federal tax - Art. 55 of the Federal Law on Direct Federal Tax (DBG)
- Joint liability in the event of liquidation for outstanding tax amounts up to the amount of the liquidation result or in the event of relocation of the registered office abroad
  - Exoneration through proof of due diligence

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The liability risks of the board of directors

- In the case of value added tax– Art. 15 Abs. 1 lit. e / f Value Added Tax Law (MWStG)
  - Joint liability in the event of liquidation and relocation of the registered office abroad
  - Analogous to the regulation for withholding tax

- With regard to social security– Art. 52 Abs. 2 Federal Law on Old Age and Survivors' Insurance (AHVG)
  - Obligation of the board of directors to settle AHV contributions from employers and employees and to transfer them to the social security institution
  - Liability requires intent or gross negligence (quickly fulfilled under current jurisdiction)
  - Solidarity of liability!

The liability risks of the board of directors

- In criminal law– Art. 12 Abs. 2 und 3 Federal Act on Administrative Criminal Law (VStrR)
  - Fault not necessary
  - Joint liability for persons who participated in the offence

The liability risks of the board of directors

- Tips for avoiding a liability risk

  - Obligate the company to deposit tax liabilities
  - Constant monitoring of the payment of all taxes and social security contributions
  - In the event of a possible liquidation - pay all taxes and social security contributions!
  - In case of emergency, consider resigning from the board of directors and initiating the deletion from the commercial register
  - Taking out liability insurance possibly minimizes the (imminent) risk

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Bord mandate and taxes

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Board mandate and taxes

- The form of the mandate relationship
  - Employment or contractual relationship
- Use of an assignment vehicle / company as contractor
- Special issues for foreign board members
- Treatment of equity shares

The secret main factor influencing the shaping of the mandate relationship is the social security.

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