

LATEST DEVELOPMENTS IN SWISS TAX LAW

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Latest tax developments

- Exchange of information – the rules and what will likely happen
- Dealing with the past – Rubik Tax Agreements with Germany and the UK
- Dealing with the future – how can privacy be preserved ?
- Swiss double tax treaty news
- EC Savings Directive update – possible implications for Switzerland
- Will lump sum taxation survive ?
- Will Switzerland abolish its cantonal tax regimes under EC pressure ?
- Domestic tax reform

Exchange of information

The Basic Principles

Swiss basic principles for exchange of information :

- Established administrative assistance procedures must be respected
- International cooperation exclusively within framework of treaty or agreement
- Restricted to taxes that fall within the framework of the double tax treaty
- Administrative assistance limited to individual cases (specific and justified request, person concerned and holder of information must be identified)
 - no information exchanged in case of fishing expeditions
- No exchange based on stolen information (but how does one verify that?)
- The principle of subsidiarity must be respected; and the other contracting state must be willing to eliminate discrimination (e.g. Italy)
- Fair transitory solutions must be found
- Federal Ordinance in force since October 1, 2010. A federal law on the exchange of information based on the above principles has been presented to Parliament and could enter into force soon, likely mid-2012

But ... where are we heading ?

- After discussion with the OECD, the Swiss Federal Council decided on 13 February 2011 to enlarge the interpretation of a valid request for exchange of information. New interpretation presented to Parliament on April 6, 2011. Causing delay of ratification of new treaties, even those already containing the new interpretation
- Requests for administrative assistance need to be interpreted in such a way that an effective exchange of information is not hindered :
“In terms of application, the purpose of referring to information that may be foreseeably relevant is intended to provide for exchange of information in tax matters to the widest possible extent without allowing the contracting states to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. **The details** to be supplied in the administrative assistance request **are important** procedural requirements to ensure that fishing expeditions do not occur, **but they must not** be interpreted in such a way that they **frustrate effective exchange of information.**”

Broadening interpretations ...

- Whereas the rule on interpretation already ensures internationally applicable standards on administrative assistance, administrative assistance practices still have to be fleshed out by defining the rule on interpretation. In particular, it highlights that administrative assistance requests which are not fishing expeditions will be honoured if the requesting state:
 - a) identifies the taxpayer, although this identification can ensue in a way other than by indicating the name and address,
 - b) indicates the name and address of the alleged holder of the information, insofar as this is known to it. In the case of missing data on the information holder, Switzerland will provide administrative assistance if administrative assistance requests are in line with the principles of proportionality and practicability in accordance with internationally applicable standards.

Corporate taxpayers also concerned

- Exchange of information also for corporate taxpayers
- What does this imply for tax rulings, tax declarations, accounts, etc.
- Possible impact for transfer pricing procedures?

Some good news

Taxpayers' rights :

- Swiss domestic law provides for procedural rights protecting taxpayers, Swiss and foreigners alike
- No information can be exchanged before notifying the taxpayer concerned
- The taxpayer has the right to be informed of, to be heard on and to object to (and eventually appeal) a decision by the Swiss FTA to exchange information
- The objection or appeal suspends the exchange

But ... peer group review : improvements needed

“The Global Forum on Transparency and Exchange of Information for Tax Purposes” :

- “In administrative assistance procedures, Switzerland should allow **appropriate exceptions** to the right of those concerned to receive notification and examine the records.”
- “... the identity of holders of bearer shares cannot be determined in all cases with the existing mechanisms. This deficiency in Switzerland's legislation was decisive in not fulfilling the criterion concerning the existence of information on the identification of the ownership of all relevant legal entities.
It has thus been recommended to Switzerland to take measures on identifying all holders of bearer shares.
- “The Global Forum has also recommended that Switzerland ensure there are more effective possibilities for **clarifying the ownership structures of companies that are domiciled in a foreign country but are managed from Switzerland.**”

Dealing with the past

Spectacular developments in the autumn of 2010 :

- October 25, 2010, signing of new double tax treaty with the UK and a joint declaration of the UK and Swiss governments that further negotiations will be held in order to :
 - **regularize** the past, existing undeclared assets should be regularized (Rubik) ;
 - introduce a **final withholding tax** on future investment income (Rubik) ;
 - liberalize **market access** for Swiss financial institutions into the UK ; and
 - **decriminalize** Swiss banks and their staff
- October 27, 2010, signing of new double tax treaty with Germany and the same joint declaration
- New policy ? What's the Swiss strategy ? Why do the UK and Germany want this ?
- Will other countries follow ? Which ? Greece showed interest but France has said "no" for the time being for domestic political sensitivities around amnesties

Rubik's magic

Bilateral Rubik Tax Agreements

- **Rubik CH-DE** signed with Germany on September 21, 2011
 - **regularizing the past** : existing undeclared assets
 - German resident client has the choice between
 - a) anonymous lump-sum payment of between 19 to 34% of the assets ; or
 - b) voluntary disclosure to Germany (via the bank and the Swiss FTA)
 - **regularizing the future** : future investment income
 - German resident client has the choice between
 - a) anonymous final withholding tax at a flat rate of 26.375% ; or
 - b) voluntary disclosure to Germany (via the bank and the Swiss FTA)
- **Rubik CH-UK** signed with the UK on October 6, 2011
 - Essentially the same as CH-DE except that future investment income is subject to a final withholding tax at a rate between 27 to 48%, depending on the nature of the income. Special rules apply to “non-doms”.
- **Entry into force** : foreseen for early 2013

Rubik's magic, cont'd

- **Anti-abuse** : extended information exchange will apply to fight abuse and the Swiss tax authorities will communicate statistic data about the principal destinations of funds of clients that have closed their accounts in Switzerland ;
- Swiss banks will make **advance payments** to Germany of CHF 2 billion and to the UK of CHF 500 million, which will be reimbursed with future Rubik receipts.
- Dynamic provision : **future changes in tax rates** in Germany or in the UK will be communicated to Switzerland and in principle apply under the Rubik agreements
- Interaction with **EC-CH Savings Agreement** (35% WHT rate since July 1st, 2011)
 - To the extent 35% Savings Tax exceeds Rubik Tax due, Swiss paying agent will reimburse the client the difference on behalf of Germany, resp. the UK

Rubik's magic, cont'd

- Interaction with **Swiss domestic WHT** (35% on dividends and sometimes interest)
 - Swiss paying agent can ask for reimbursement or exemption of Swiss WHT on behalf of the client, if the relevant double tax treaty provides this option
 - Residual WHT (i.e., WHT after treaty application) can be credited against Rubik Tax due, but the credit cannot exceed the Rubik Tax (no excess credits)
- Interaction with **German or UK WHT** : a credit for the German/UK WHT can be taken against the Rubik Tax due, but such credit cannot exceed the Rubik Tax
- Interaction with **third state WHT** : third state WHT can be credited against the Rubik Tax due to the extent that reimbursement of such tax by the third state is excluded (i.e., the residual WHT only) under the double tax treaty between the third state and Germany or the UK, but such credit cannot exceed the Rubik Tax

Dealing with the future ?

- **Final withholding tax ?** Bilateral Rubik Tax Agreements with other major treaty partners ?
- **Extension of the EC savings directive ?**
Possible extension to dividends and other income from savings and investments, security-like instruments, certain life insurances, structures products and investment funds.
- **Automatic exchange of information ?**
New EC savings directive will likely include automatic information exchange for all EC member states. Belgium and Luxembourg already gave in. Pressure on Austria. New directive will be followed by new savings agreement with Switzerland. Automatic exchange required ? Or Rubik-like agreement ?
- **Other privacy structures ?**
Trust, foundations ? Will be included in revised Savings Directive as paying agents.

2012 Swiss treaty news

Extended and high quality treaty network with over 80 double tax treaties in force, and now over 40 new treaties (in force, ratified, signed or initialed) with exchange :

20 New treaties in force with exchange : Austria, Canada, Chinese Taipei (Taiwan), Colombia (limited), Denmark & Faroe Islands, Finland, France, Germany, Greece, India, Japan, Luxembourg, Mexico, the Netherlands, Norway, Poland, Qatar, Spain(MFN), the UK and Uruguay

3 New treaties with exchange ratified by CH Parliament : Kazakhstan, Turkey and USA

10 New treaties with exchange signed : Hong Kong, Ireland, Malta, Romania, the Russian Federation, Singapore, Slovak Republic, South Korea, Sweden and the UAE

9 New treaties with exchange initialed : Australia, Bulgaria, Colombia (new), Czech Republic, Oman, Peru, Portugal, Slovenia and Turkmenistan

2012 Swiss treaty news – cont'd

4 New treaties in force without exchange : Chile, Georgia, Ghana and Tajikistan

New Swiss treaty policies :

Exemption from WHT on dividends paid to **qualifying pension schemes**
(e.g. new treaties with Hong Kong, the Netherlands, Qatar, UAE, UK and USA)

Exemption from WHT on dividends paid to **sovereign funds** (Qatar and UAE)

Will lump sum taxation survive ?

- Abolition of lump-sum taxation in Zurich as per 2010 and in Schaffhausen as per 2012 as a result of popular votes (referenda).
The lump-sum was however maintained in Glarus, St Gall and Thurgau after similar votes. New popular votes are foreseen in Appenzell Ausserrhoden (AR), Basel City (BS), Basel Country (BL), Berne (BE), Lucerne (LU), Zug (ZG) and Geneva (GE).
- Swiss federal council proposed to change the federal and cantonal laws with respect to lump sum taxation, perhaps already during 2012 :
 - increase minimum from 5 to 7 times rental value or annual rent ;
 - fix a minimum tax base of CHF 400'000 for federal tax purposes and the cantons will also have to fix a minimum tax base ;
 - the lump sum tax treatment will also include net wealth tax ;
 - all current lump sum tax rulings will be respected for a transitory period of five years (grandfathering clause)

EC-Swiss cantonal tax dispute

- EC-Swiss tax dispute on cantonal corporate taxation since 2005
- EU claims that the Swiss cantonal tax privileges constitute forbidden state aid (based on FTA 1972)
- Legal basis rather weak, but political pressure huge
- Switzerland does not negotiate with the EU, but engages in a “dialogue”
- Cantonal tax privileges will likely have to be changed or abolished
- Proposed Enterprise Tax Reform III deals with only part of the problem
- Question is what attractive new regimes can replace the current ones

- Latest development : ECOFIN 8 June 2010 demands the Commission to open discussions with Switzerland and Liechtenstein in view of implementing the Code of Conduct (enterprise taxation, ECOFIN 1997)

Domestic tax reform

Enterprise tax reform

- Enterprise tax reform II – implementation as per 2011 :
 - most notably reduced taxation (40 or 50% reduction) of dividend income for Swiss substantial shareholders ($\geq 10\%$) and
 - reduction of the participation exemption threshold from 20 to 10% (also new Swiss treaty policy) and
 - imputation of corporate net wealth tax on income tax
- Enterprise tax reform III – consultation, in preparation (related to EU discussions on state aid)
- Enterprise tax reform IV – future, international tax competition

Domestic tax reform (cont'd)

Introduction of the contributed capital concept since January 1, 2011

- All shareholders' contributions now qualify as paid-in equity for tax purposes. This covers mainly Agio or capital surplus. Previously only the nominal share capital was recognized as paid-in shareholders' equity for Swiss tax purposes.
- As a consequence, repayment of contributed capital is now free from the 35% Swiss dividend WHT
- Only capital contributions made as of January 1, 1997 qualify
- The capital contributions must be accounted for in the tax books of the company and reported to the Swiss Federal Tax Administration within 30 days after approval of the accounts by the AGM.

Domestic tax reform (cont'd)

Taxation of employee share and stock option plans

- New Federal Law on the Taxation of Employee Participations approved by Parliament on December 17, 2010. Referendum delay expired on April 7, 2011. Entry into force on January 1, 2013.
- Employee Participations defined as shares, profit shares, participation rights, share quotas and any other participations granted by the employer, the parent company or any other group company to the employee + options to buy such Participations.
- General rule: taxation upon grant based on market value
- Exceptions: non-listed/restricted options taxable upon exercise
- Reduction for blocked participations: 6% per year and max 10 years

Domestic tax reform (cont'd)

Since August 1, 2010, Federal Ordinance modifying the tax treatment of intragroup financing activities :

- Intragroup loans are now exempt from stamp issuance tax and stamp transfer tax
- Interest payments on intragroup loans no longer subject to interest WHT
- Important relaxations to promote intragroup financing activities in Switzerland

Improvement federal practices

Two major recent developments in the Swiss federal ruling practice :

- Federal withholding tax (dividends) – in international holding context no longer necessary to prove physical and functional substance. Generally sufficient that the foreign parent company disposes of sufficient equity (at least 30%) in order to be considered beneficial owner of the Swiss dividend received easier to exit Switzerland at 0% by using holding companies in e.g. Malta or Cyprus or Luxembourg or the Netherlands
- Domestic anti-treaty abuse rules (1962/1999) are relaxed since August 2010. Licensing or financing companies can now be considered active if the Swiss company disposes of at least one competent employee.

Possible to engage in royalty conduit structures or back to back financing and still make use of the extensive Swiss treaty network (over 90 treaties in force)

Any questions ?

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