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The Swiss construction site: Aligning tax law with international standards

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The Swiss construction site: Aligning tax law with international standards

In recent years, Switzerland has confirmed its commitment to internationally-recognised standards of taxation and the global fight against tax fraud and tax evasion with a view to safeguarding the integrity and reputation of the country while remaining an attractive business location. **Rolf Wüthrich** of **burckhardt** explains this process.

Given the global focus on transparency and information exchange, it is no surprise that these issues form a central pillar of the work being undertaken by the Swiss government to bring the country's tax and legal regimes into greater alignment with developing international standards.

Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) ensures that the international standards regarding transparency and the exchange of information for tax purposes are complied with and are implemented in a uniform manner internationally. Switzerland has been a member of the Global Forum since 2009 and is represented in the Steering Group and in the Peer Review Group.

Switzerland underwent phase 1 of the peer review in June 2011, when the Global Forum concluded that Switzerland was non-compliant or only partially compliant with respect to three issues concerning information exchange. The Global Forum required one of the three issues to be fixed before Switzerland could move to phase 2. The three issues claimed by the Global Forum were:

- Tax treaties (DTAs) and tax information exchange agreements (TIEAs): Switzerland has to revise a majority of its tax treaties (about 90 in place) to conform with the exchange of information standard; this revision has to cover all of its main partners. As of October 2014 Switzerland had signed about 50 tax treaties in accordance with the applicable exchange of information standard (exchange of information upon request), and 41 of these are already in force. Switzerland also signed seven TIEAs of which three are in force. In addition, Switzerland signed the multilateral OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters. Finally, the Federal Council has instructed the Federal Department of Finance to prepare a draft for unilateral application of the OECD standard on the exchange of information upon request to all DTAs that are not yet in line with this standard.
- Prior notification: Switzerland has to implement an exception to prior notification of persons concerned by a request for information. This condition has been met with the revision of the Swiss Federal Act on International Administrative Assistance in Tax Matters, which came into force on August 1 2014. The law contains, for certain cases, provisions for not notifying a person concerned by an administrative enquiry until after the relevant data has been transmitted to the requesting state.

- Identification of owner of bearer shares: Switzerland must be able to identify the holders of bearer shares. The government has drafted commercial law modifications containing identification duties for stock corporations regarding the holders of bearer shares and drastic sanctions in case of non-observance of the new provisions. On April 4 2015 the referendum deadline for the draft legislation will expire. Should no referendum be raised, then it is expected that the identification provisions will enter into force in 2015 or beginning 2016.

After the revision of the Tax Administrative Assistance Act in summer 2014, the Global Forum accepted Switzerland's request for a supplementary report. The Peer Review Group will examine this supplementary report in spring 2015 to assess the changes made to the Swiss legislative framework. This examination will decide whether Switzerland moves to phase 2 or not.

Automatic exchange of information

Cross-border tax evasion should be prevented with the help of the new global standard for the automatic exchange of information. Switzerland has declared its intention to adopt the standard.

On January 14 2015, the Federal Council launched two consultations for introducing the future international automatic exchange of information in tax matters. One Bill concerns the OECD/Council of Europe administrative assistance convention signed by Switzerland in 2013. The other Bill concerns Switzerland's participation in the Multilateral Competent Authority Agreement and the Automatic Exchange of Information (AEOI) implementing act. The question regarding the countries with which Switzerland should establish AEOI will be presented to Parliament separately at a later stage.

Both consultations will run until April 21 2015. The Federal Council's dispatches for the attention of Parliament are expected in summer 2015. Parliament can thus discuss the draft legislation as of autumn 2015. This means that the legislation could come into force as of 2017. Switzerland's first automatic exchange of information with a foreign country would then take place from 2018 onwards. Information to be exchanged would relate to 2017.

It is important for Switzerland that the exchanged information will be used solely for the agreed purpose (principle of speciality); that the information will be reciprocal, that is, flow in both directions; that data protection will be ensured and that the beneficial owners of trusts and other financial constructs will be identified.

Dialogue with the EU and Swiss Corporate Tax Reform III

The dispute between Switzerland and the European Union (EU) in the area of corporate taxation goes back to 2005, when the EU criticised certain cantonal tax practices as con-

stituting state aid and therefore breaching the 1972 Free Trade Agreement. Switzerland has always refuted this interpretation. After the failure of a compromise in 2009, the EU proposed to Switzerland to cultivate a dialogue on adopting its code of conduct for business taxation. While Switzerland was not ready to fully adopt the European Code of Conduct, it was prepared to discuss certain controversial tax regimes. In July 2012 the Swiss Federal Council adopted the mandate on a dialogue with the EU concerning the Swiss tax regimes. The aim was to find a solution that preserves Switzerland's competitiveness as a business location and that is internationally accepted. On October 14 2014 Switzerland and the 28 EU member states signed a mutual understanding on corporate taxation resulting in the end of nearly 10 years of controversy which has put a strain on relations between Switzerland and the EU.

As a consequence of the long-lasting dispute, the Federal Department of Finance and the cantons established working groups to draw up the basis for the implementation of the Corporate Tax Reform III. The project Corporate Tax Reform III was closely linked to the dialogue with the EU. Within the framework of this planned reform, which will enter into force in 2018, the abolishment of certain Swiss tax regimes is planned, particularly those that treat domestic and foreign revenue differently (ring-fencing). Possible new tax measures will also have to respect the OECD international standards, especially the standards according to the base erosion and profit shifting (BEPS) Action Plan.

EU taxation of savings income

In parallel to the Directive on taxation of savings income, which applies within the EU, the EU has savings taxation agreements with five neighbouring third countries: Switzerland, Andorra, Monaco, Lichtenstein and San Marino. The aim of these agreements is to assist member states in recovering tax revenue they may be due from citizens who have savings accounts in these countries.

Under the EU-Swiss agreement, Switzerland applies a 35% withholding tax when payments are made to EU citizens earning interest on savings. From an EU perspective, the purpose of this withholding tax is to deter tax evasion and encourage accountholders to voluntarily disclose the savings that they have in Switzerland. If EU residents authorise their Swiss financial intermediary to disclose the information on income from these savings to the Swiss tax authorities for the purpose of AEOI with the tax authorities of their member state of residence, these taxpayers avoid the withholding tax. If taxpayers are subjected to the withholding tax but nevertheless declare the income to their tax authorities, they can be refunded the difference between this high level of withholding tax and the (usually lower) national tax rate. The high level of Swiss withholding tax therefore acts as an incentive to be tax compliant. The EU-Swiss agreement also provides for

information exchange on request, within a limited scope (for example, in cases of fraud).

In 2009, Switzerland declared its willingness to negotiate amendments to the savings agreement. In May 2013, the European Commission was given a mandate to negotiate the revision of the existing taxation of savings agreement with Switzerland, Andorra, Monaco, San Marino and Liechtenstein, respectively, in line with developments at EU and international level. The revision will close loopholes so as to prevent the taxation of interest income from being circumvented by using intermediary companies or certain financial instruments.

FATCA agreement

With the enactment of the Foreign Account Tax Compliance Act (FATCA), the United States wishes to ensure that all accounts held abroad by US taxpayers can actually be taxed. FATCA is a unilateral set of US regulations that applies worldwide for all countries. It requires foreign financial institutions (FFIs) to disclose information on US accounts to the Internal Revenue Service (IRS) or levy a tax.

The agreement between Switzerland and the US on cooperation to simplify the implementation of FATCA entered into force on June 2 2014. The Federal Council brought the corresponding implementing act into force on June 30 2014. FATCA implementation in Switzerland is based on a Model 2 intergovernmental agreement (IGA), which means Swiss financial institutions will disclose account details directly to the US tax authority with the consent of the US clients concerned. The US will have to request data on recalcitrant clients through normal administrative assistance channels.

The Federal Council approved the mandate for negotiations with the US on switching to a Model 1 IGA on October 8 2014. The mandate provides for AEOI. It is still unknown at the present time when there will be a corresponding agreement.

Initiative: Stop the tax privileges for millionaires

On November 30 2014 a vote was held in Switzerland on the initiative entitled 'Stop the tax privileges for millionaires (abolishment of lump-sum taxation)'. The initiative called for expenditure-based taxation to be abolished. According to the initiative, foreigners living in Switzerland who are not engaged in gainful activity should be taxed on the basis of their income and assets alone in the future, and no longer on a lump-sum basis according to their cost of living. The initiative was rejected.

Vote on introduction of federal inheritance and gift tax

In Switzerland, inheritance and gift taxes are cantonal taxes. Gifts and inheritances to spouses and children are normally exempt. No federal inheritance or gift tax exists. With the exception of the canton of Schwyz, all cantons



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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 service, supports clients with professional expertise and broad international experience on restructurings, mergers and acquisitions as well as joint ventures, corporate financing, advises on inbound and outbound investments and in all matters related to employment, trade and transport law as well as to private clients.

levy an inheritance and a gift tax. The canton of Lucerne waives the right to levy a gift tax.

On June 14 2015 the Swiss population is going to vote on the replacement of the cantonal inheritance and gift taxes by a harmonised federal inheritance and gift tax. Under the federal tax concept, a flat tax of 20% shall be levied on inheritances and gifts. Exempt from the tax will be: (i) an amount of CHF 2 million (in total for all heirs or donees, and not per person); (ii) inheritances or gifts to spouses or registered partners; (iii) inheritances or gifts to tax exempt persons (charitable persons); and (iv) gifts up to CHF 20,000.— per person and year.

Should the new law be accepted in the public vote, then it will enter into force on January 1 2017. However, the new law contains a provision with retroactive effect: any gifts made as of January 1 2012 will have to be added back for inheritance tax purposes to a future estate. The amount of an estate must be calculated as follows:

- The valuation will have to take place at fair market value (today tax values are used for immovable property, which are normally significantly lower than the fair market value);
- Any gifts made must be added back to the estate; and
- Any assets put into family foundations, insurances or comparable vehicles must be added back to the estate to the extent such assets were transferred to such vehicles for tax avoidance purposes.

As there will be an exempt amount of CHF 2 million there will be the planning possibility for spouses with children to make a tax exempt gift to their children in the amount of CHF 2 million. The remaining assets can be transferred, tax exempt, to the spouse. At a later moment the spouses can

again make a tax-free gift in the amount of CHF 2 million to his or her children. Any excess will be subject to the flat tax of 20%. Thus, by correctly planning the estate, an amount of CHF 4 million can still be transferred tax-free to the next generation.

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