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Transfer Pricing 2025

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Switzerland: Law and Practice & Trends and Developments

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SWITZERLAND

Law and Practice

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Tax Partner AG is focused on Swiss and international tax law and is recognised as a leading independent tax boutique. With, currently, 16 partners and counsel and a total of approximately 50 tax experts consisting of attorneys, legal experts and economists, the firm advises multinational and national corporate clients as well as individuals in all tax areas. A central focus lies in tax controversy and dispute resolution, including transfer pricing issues. Tax Partner AG also provides support regarding transfer pricing studies and the preparation of transfer pricing documentation. Other key areas include M&A, restructuring, real estate transactions, financial products, VAT and customs. Tax Partner AG is independent and collaborates with various leading tax law firms globally. In 2005 the firm was a co-founder of Taxand, the world's largest independent organisation of highly qualified tax experts.

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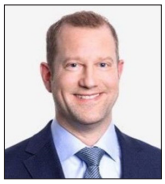

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1. Rules Governing Transfer Pricing

1.1 Statutes and Regulations

Preliminary Remarks

First of all, it should be noted, that Switzerland has no specific codified transfer pricing law. Consequently, there are no specific regulations regarding determination and documentation of transfer prices, neither at the federal level nor at the cantonal level. The arm's length principle is, nevertheless, recognised and substantiated by the practice of the Swiss Federal Tax Administration (SFTA) and case law. In addition, Switzerland has accepted the initial version and all updates of the OECD Transfer Pricing Guidelines (TPG) without reservation, including the latest update in 2023. Thus, there is full consensus in Swiss tax law practice that the OECD TPG are an important – although not binding – interpretative tool for the application of the arm's length principle in Swiss tax law. The importance of the OECD TPG has been further underlined in several publications made by the Swiss tax authorities, namely the SSK (*Schweizerische Steuerkonferenz*) and the SFTA regarding transfer pricing, as these publications strongly rely on and basically summarise the OECD TPG. Further, the SFTA publishes and regularly updates a Q&A on specific transfer pricing topics.

Mainly, transfer pricing issues arise in Switzerland in connection with federal and cantonal corporate income tax and federal withholding tax (WHT). However, transfer pricing issues might also arise in connection with VAT – eg, in the event of retrospective transfer pricing adjustments and VAT impact at the level of the foreign related party. While, in the area of corporate income tax, the federal government (limited to a supervisory role) and the cantons have parallel competence, the federal government has the exclusive competence to levy withholding tax, stamp duties and VAT. With regards to withholding tax, in 2019 the SFTA established a competence centre for transfer pricing. It is therefore no surprise that, in practice, for withholding tax purposes, transfer prices are increasingly being critically scrutinised during tax audits. This concerns, in particular, the relocation of functions abroad and controlled transactions between Swiss companies and related companies domiciled in tax havens or low-tax countries. In general, Swiss withholding tax implications may be a substantial concern as a result of a transfer pricing adjustment done in tax audits.

OECD TPG

In exercising its supervisory role over the cantonal tax administrations, in 1997 and 2004 the SFTA instructed the cantonal tax administrations, through a circular letter, to directly apply the OECD TPG. The Federal Supreme Court (FSC) tends to apply a static approach regarding the version of the OECD TPG. This approach has recently been confirmed in an FSC ruling from 2024. Hence, the arm's length principle and the methods for determining the relevant transfer prices will be assessed according to the OECD TPG as they were published at the time the transaction in question was settled.

Statutes

Corporate income tax

From a corporate income tax perspective, the following two scenarios must be distinguished:

- controlled transactions between a company and its shareholders; and
- controlled transactions between a company and related parties, other than its shareholders.

The latter includes, in particular, transactions between group companies that are under the

same management and control. In both situations, the arm's length principle has to be applied.

Under Swiss law, a tax authority may make an adjustment only if the following three conditions are met:

- the company has evidently received no adequate compensation for its services or deliveries;
- the compensation in question was in favour of the shareholder or a related party and would not have been provided to unrelated parties under the same conditions; and
- the evident discrepancy between the service or delivery and the compensation was recognisable for the company or the persons representing the company.

The first two conditions concern the question of whether the agreed transfer prices fall within the range of prices or margins that independent third parties would have agreed on for the respective intercompany transaction (services, goods, licensing, financing, etc). The third condition, however, is a Swiss peculiarity: the tax authority may only make an adjustment if the violation of the arm's length principle is obvious and thus recognisable by the management or the board of directors. This has to be determined on the basis of the concrete facts and circumstances of the case at hand.

If profits are shifted from the subsidiary to the parent company due to an obvious violation of the arm's length principle, a deemed dividend is to be assumed and the tax authority is entitled to adjust the profit of the subsidiary. In addition, income is attributed to the shareholder to the extent of the deemed dividend. If, on the other hand, the violation of the arm's length principle leads to an increase of income at the level of the subsidiary, there is a so-called informal capital contribution. The tax treatment of such an informal capital contribution at the level of the shareholder and the beneficiary company depends on the facts and circumstances of the case.

If the contracting parties of a transaction violating the arm's length principle are sister companies, the so-called modified triangular theory applies. In a first step, the profit of the company that has distributed a deemed divided is adjusted. In a second step, the benefit is attributed to the shareholder, which in turn makes a hidden capital contribution to the beneficiary sister company.

Withholding tax

Hidden profit distributions as described above, which result from a violation of the arm's length principle, regularly also trigger withholding tax consequences for the distributing company.

Under Swiss law, withholding tax of 35% must be passed on to the recipient of the deemed dividend. The taxable company must therefore, in principle, reclaim the withholding tax from the beneficiary company. Unlike in the case of corporate income tax, it is not the triangular theory that applies, but the direct beneficiary theory. In the case of payments to sister companies, this means that the reimbursement must be requested by the benefiting sister company. If it is not possible to pass on the withholding tax, the deemed dividend is grossed up and the beneficiary is deemed to have effectively received only 65% of the deemed dividend. The corporation that provided the deemed dividend is therefore liable for the payment of the remaining 35%. This gross-up results in an effective withholding tax rate of 53.8% of the tax adjustment. Political discussions on also applying the triangular theo-

ry for withholding tax purposes were rejected in December 2024, so the direct beneficiary theory will in principle continue to apply in the future.

Foreign beneficiaries may request a full or partial refund of the withholding tax based on the applicable double taxation agreement (DTA). However, the application of the direct beneficiary theory regularly limits the treaty relief in cases where the direct beneficiary is not the direct shareholder. If specific conditions are met, the law entitles companies to fulfil the withholding tax liability by notification instead of paying the tax. In the case of deemed dividends, however, the application of the notification procedure is granted only very reluctantly. The notification procedure is not applicable in the case of deemed dividends to sister companies. In these cases, the full WHT has to be paid to the SFTA, the WHT has to be shifted (invoiced) to the beneficiary and the beneficiary has the right to get a (partial) refund if the respective conditions based on the respective DTA are met. If the notification procedure is not available, not only the full withholding tax but also interest on late payment of 5% per annum will be due. However, there are ongoing discussions about extending the notification procedure for Swiss WHT on deemed dividends within an international group.

Stamp tax duty

Regarding stamp duties, the arm's length principle is only applied in certain cases. In principle, as in the case of withholding tax, the direct beneficiary theory also applies to the stamp duty, which means that only hidden capital contributions made directly by shareholders to the corporation are subject to the 1% stamp duty. In particular, this has the consequence that contributions to sister companies do not trigger stamp duty. Also, no stamp duty is triggered for so-called benefits periodically granted to the subsidiary, as is the case, for example, where the shareholder charges an interest rate that is too low according to the arm's length principle for the loan granted to the subsidiary.

Value added tax (VAT)

The Federal VAT Act, in contrast to the above-mentioned legislation, explicitly states that transactions between related parties have to be at arm's length. For VAT purposes, a related party is to be assumed if a shareholder holds at least 20% of the nominal share capital or an equivalent participation, or in the case of foundations and associations with which there is a particularly close economic, contractual or personal relationship.

Regarding the determination of the arm's length transfer prices for VAT purposes, it can generally be referred to the principles applicable for corporate income tax. However, according to administrative practice in specific cases, the arm's length price can be calculated on a lump-sum basis. If, for example, a holding company does not have its own personnel to effectively manage the holding company and that management is carried out by personnel of its subsidiaries, the arm's length remuneration can be set at 2% or 3% of the average total assets held by the holding company.

Furthermore, it should be noted that in relation to VAT, the SFTA, according to case law and in contrast to corporate income tax, can challenge the prices determined between related parties without first having to prove that the agreed remuneration violates the arm's length principle and that such a violation was obvious (see above comments on corporate income tax). If the SFTA does not agree with the prices set by the taxpayer and the self-declaration respectively, the taxpayer has to prove that the prices nonethe-

less comply with the arm's length principle and are determined by using the appropriate transfer pricing method. Concerning the selection of the method, the FSC noted in a ruling concerning VAT that the selection of the method is regarded as a legal question that the FSC is free to review. The result of the selected method, however, is regarded as a question of fact that can only be reviewed by the FSC for obvious incorrectness or arbitrariness. It goes without saying that the challenging the selected method and the proving of obvious incorrectness or arbitrariness requires solid transfer pricing documentation, which is – however – not required by law.

Administrative Guidelines

As already set out, the SFTA instructed the cantonal tax administrations by a circular letter of 1997, which was renewed in 2004, to directly apply the OECD TPG. The circular explicitly states that the profit margins for service companies must be determined in accordance with the arm's length principle – ie, for each individual case on the basis of comparable uncontrolled transactions and with reference to the range of appropriate margins.

The most relevant administrative guidelines in Switzerland in the area of transfer pricing can be seen in the circulars published by the SFTA providing safe harbour rules for thin capitalisation and for intra-group interest rates (see **11.1 Transfer Pricing Safe Harbours**) where the arm's length principle is not adhered to.

1.2 Current Regime and Recent Changes

Overview

As Switzerland adheres to the OECD TPG and has not established specific transfer pricing rules, the current regime and its development are, in general, reflected in the OECD TPG. However, the arm's length principle was already acknowledged before the first OECD TPG were published. Namely, in the matter of Bellatrix SA, the FSC confirmed in 1981 that for withholding tax purposes, the arm's length principle is applicable with regard to transactions concerning the company's shareholders.

Recent Changes

Prior to the progression of the OECD's base erosion and profit shifting (BEPS) project, core transfer pricing issues were seldom touched on by the tax administrations. However, transfer pricing issues increasingly form part of routine audits today. Hence, taxpayers are more often confronted with detailed questions regarding transfer pricing matters (eg, requests regarding detailed transfer pricing documentation and explanations concerning comparables). Switzerland itself also seems to be increasingly confronted with requests for administrative assistance in transfer pricing cases.

In international cases, the main focus is on the transfer of functions, the transfer or licensing of intellectual property rights, the renumeration for the use of intellectual property, financial transactions, corporate management services and asset management services. Another main focus lies on transactions with foreign companies in low-tax jurisdictions. Recently, the OECD TPG were also referred to in a purely national, inter-cantonal FSC case where one company was domiciled in a high-tax and one in a low-tax canton. In another purely domestic FSC case the OECD TPG were cited by the court in connection with the inter-cantonal value attribution of an intangible.

2. Definition of Control/Related Parties

2.1 Application of Transfer Pricing Rules

Swiss tax law – except VAT-legislation (see more in **1.1 Statutes and Regulations**) – does not include an explicit definition of the terms *"associated enterprises"*, *"related parties"* or *"controlled transactions"*.

According to the FSC, for income tax purposes, related parties are to be considered as entities with close commercial or personal relationships, where any close relationship between the parties involved in the transaction is enough. According to the Swiss understanding of the term *"related parties"*, direct or indirect control (participation in management or capital) in itself is not decisive. The crucial question is whether the tested transaction was conducted under the given conditions only as a consequence of the associated relationship. In practice, some cantonal tax administrations tend to apply the definition of *"associated entities"* set forth by the OECD. Furthermore, according to the FSC, *"associated enterprises"* or *"related parties"* can be assumed if the conditions agreed upon by the involved parties apparently do not meet the arm's length standard.

3. Methods and Method Selection and Application

3.1 Transfer Pricing Methods

Swiss domestic tax laws or practices do not provide specific transfer pricing methods. Nevertheless, as Switzerland adheres to the OECD TPG, all the usual transfer pricing methods are admissible (*"most appropriate method"* approach). However, according to the SFTA circular of 2004, the cost plus method is, in general, not to be seen as an appropriate method for financial services or management functions.

3.2 Unspecified Methods

As Switzerland adheres to the OECD TPG, and these do not exclude the use of unspecified methods, such methods can indeed be applied.

However, if an unspecified method is intended to be applied, as the TPG specify, it should be explained why the methods described by the TPG themselves are not considered appropriate for the case at hand.

3.3 Hierarchy of Methods

As Switzerland generally follows the OECD TPG, the hierarchy of the transfer pricing methods as stipulated in the OECD TPG is also applicable in Switzerland. However, in individual decisions, the FSC has held that there is no fixed hierarchy of methods, meaning that the most appropriate method should be used according to the case at hand. In other rulings the FSC has held that the hierarchy of methods as stipulated in the OECD TPG should in fact be followed. In a recent decision by the Swiss Federal Administrative Court, it was ruled that the SFTA has to respect the hierarchy of methods according to the OECD's TPG.

In practice, the three traditional methods – ie, the comparable uncontrolled price (CUP) method, the resale price method and the cost plus method – are still preferred by the tax administrations. Furthermore, the CUP method enjoys preference over the other two traditional methods in the case of comparability. However, the transactional net margin method (TNMM) is the most commonly used method in Switzerland for determining transfer prices for services (corporate services, contract manufacturing services, contract R&D services), and routine distribution,

whereas the CUP method is the most commonly used method for intangible property licensing and financing.

The hierarchy of transfer pricing methods as stipulated in the older versions of the OECD TPG can still be of relevance. This is due to a static approach to the application of the TPG that means that the version of the TPG in effect at the time the transaction was settled is applied (see **1.1 Statutes and Regulations**).

It is sometimes difficult, however, to assess whether an update of the OECD TPG can be considered merely a more detailed explanation of the existing principles or an actual change in the guiding principles. If the former is the case, a dynamic approach to the application of the TPG is permissible as well.

3.4 Ranges and Statistical Measures

The use of statistical tools that consider central tendency, such as the interquartile range or other percentiles, is not required. However, in practice, such tools are usually used to narrow the range, in particular because the comparables in a benchmark study are usually not perfect.

For the determination of adequate transfer prices, the tax authorities generally consider the interquartile range as the arm's length remuneration.

3.5 Comparability Adjustments

Swiss domestic tax laws do not provide specific guidance on comparability adjustments. However, the OECD TPG on how and when to apply comparability adjustments are applicable.

4. Intangibles

4.1 Notable Rules

Swiss domestic tax laws do not provide specific guidance on the pricing of controlled transactions involving intangibles. Rather, the OECD TPG are to be consulted regarding transfer pricing of intangibles.

4.2 Hard-to-Value Intangibles

Officially, Switzerland did not adopt the hard-to-value intangibles (HTVI) approach as defined in Chapter VI of the OECD TPG as this approach seems to collide with long-standing case law and the tax laws themselves. In particular, the question is whether ex post data can influence open or final tax assessments.

However, in general, due to the adherence to the OECD TPG, the OECD's approach regarding HTVI should be applicable in Switzerland.

Open Tax Assessments

If a tax assessment is not yet final, a transfer pricing adjustment requires, inter alia, an obvious mismatch between the value of the transferred intangible and the compensation received, and that this mismatch was recognisable for the persons in charge (see **1.1 Statutes and Regulations**). This mismatch is evaluated ex ante, namely at the time the transaction was settled.

The hard-to-value intangibles (HTVI) approach, however, assesses the conditions of the transaction ex post and does not provide an answer to whether a potential mismatch was ex ante already obvious and, thus, recognisable. Hence, the HTVI approach – as mentioned above – does not seem to fit into pre-existing domestic law and the respective case law. So far, however, there is no precedent on this issue.

Final Tax Assessments

If a tax assessment is already final and legally binding, an adjustment is generally only possible if the tax administration becomes aware of new facts or evidence. As long as the taxpayer provided the tax administration with appropriate and correct transfer pricing documentation during the assessment relating to the ex ante valuation of the intangible in question, the administration is not entitled to come back to its own evaluation should ex post show that the value of the intangible is, in fact, higher. In this case, the ex post data would not qualify as new facts or evidence, and thus prohibit the final tax assessment from being reopened and changed.

4.3 Cost Sharing/Cost Contribution Arrangements

Switzerland recognises cost contribution arrangements and applies the OECD TPG correspondingly. However, Switzerland does not have special rules that apply to such arrangements.

5. Adjustments

5.1 Upward Transfer Pricing Adjustments

Switzerland does not have specific rules regarding upward transfer pricing adjustments. Generally, pursuant to Swiss tax law, the financial statements prepared in accordance with commercial law are, in principle, binding for tax purposes. The tax administrations can only deviate from the financial statements in order to determine the taxable base if the statements violate accounting principles as set forth in the federal Code of Obligations, or if specific rules of the tax law require an adjustment.

However, as long as the tax return has not yet been filed by the taxpayer, the balance sheet can, in accordance with the Code of Obligations, be adjusted without further restrictions. Once the tax return has been filed, a balance sheet adjustment is only permissible if it violates commercial law. Hence, if a transfer pricing issue arises once the tax return has been filed, an adjustment, in principle, will only be allowed if the original transfer prices also violate commercial law.

Neither transfer pricing-specific returns nor related-party disclosures are required to be filed with the corporate income tax return.

5.2 Secondary Transfer Pricing Adjustments

Secondary adjustments in Swiss practice are adjustments that arise from imposing tax on a secondary transaction. A secondary transaction is a constructive transaction resulting from the transfer of excessive remuneration, characterised as constructive dividends, constructive equity contributions or constructive loans, depending on the jurisdiction.

In Switzerland, a secondary adjustment represents the levying of withholding tax on the amount that qualifies as a hidden profit distribution in the context of transfer pricing. Secondary adjustments in Switzerland are therefore carried out exclusively by the SFTA, which has sole authority for levying withholding tax.

If a primary adjustment made by a cantonal tax administration is partly or fully confirmed in a mutual agreement procedure (MAP), the question of secondary adjustment arises – ie, the levying of withholding tax by the SFTA on the amount of the primary adjustment confirmed in the MAP. If the question of the levying of withholding tax is not covered in the mutual agreement, withholding tax is to be levied on the amount of the

hidden profit distribution if the material and procedural criteria for collection are met.

The mutual agreement concluded by the Swiss state competent body – ie, the State Secretariat for International Finance (*Staatssekretariat für internationale Finanzfragen*, or SIF) – and the other state(s) may provide for the possibility that the taxpayer makes a repatriation payment of the amount of the confirmed primary adjustment by the Swiss cantonal tax authority; this should generally take place within 60 days after the taxpayer's acceptance of the mutual agreement. If the taxpayer performs this repatriation, the secondary adjustment will not be made – ie, the SFTA will not levy withholding tax on the amount of the adjustment confirmed by the mutual agreement. The payment must be documented by the SIF, which forwards the relevant information to the SFTA. However, the existence of such a reference in the mutual agreement does not oblige the taxpayer to make a repatriation payment. If no repatriation payment takes place, withholding tax is levied on the amount of the primary adjustment in accordance with the applicable DTA.

The taxpayer does not have any right to have such a reference included in the mutual agreement – this depends on the circumstances of the individual case. In particular, the levying of withholding tax is not waived in obvious cases of profit shifting. Also, such reference is excluded in case of tax audits performed by the SFTA.

Repatriation payments are repatriations of profits that have been adjusted by a tax administration between associated enterprises that are parties to a transaction. They are used to reconcile the commercial balance sheet with the tax balance sheet resulting from the adjustment. These are not mandatory under treaty law or domestic law.

In application of Article 18 paragraph 4 of the Federal Act on the Implementation of International Tax Agreements (ITAIA), repatriation payments are not considered to be hidden profit distributions as defined in Article 4 paragraph 1 letter b of the Withholding Tax Act (WTA) and are not subject to withholding tax, provided they are carried out in accordance with the results of a MAP or an internal agreement concluded on the basis of Article 16 of the ITAIA. In contrast, in the absence of a MAP or an internal agreement, withholding tax is levied on the payments made for repatriation purposes.

6. Cross-Border Information Sharing

6.1 Sharing Taxpayer Information

Exchange of Information on Request

In 2009, Switzerland committed to the internationally agreed standard regarding the exchange of information on request. By doing so, Switzerland renewed most of its more than 100 DTAs.

Moreover, in 2016, Switzerland ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, extending the network of jurisdictions for exchange of information even further. Switzerland has implemented the legal basis for exchange of information on request with around 140 jurisdictions. In addition, Switzerland has signed ten tax information exchange agreements.

Under current law, administrative assistance may only be provided if the requesting state demonstrates in its request that the information requested is foreseeably relevant and confirms that it will treat the requested information confidentially. Administrative assistance may be refused if the information is to be used for taxa-

tion contrary to the DTA or if the requested information could not be obtained by the Swiss tax authorities under domestic tax procedural law.

Practice shows that foreign tax authorities are increasingly submitting requests for administrative assistance to Switzerland when auditing transfer prices, thereby requesting very comprehensive information and data. In this context, the Federal Tax Court (FTC) has – correctly in itself – decided that requested information for the verification of transfer prices must be exchanged. In doing so, the FTC referred in particular to the explanations of the OECD TPG in Chapter V regarding documentation (in the 2010 version). At the same time, the FTC stated that the OECD TPG are not binding for the court and merely represent an interpretative instrument. This means in the context of international exchange of information in tax matters that the provision of administrative assistance is not limited to the information required to apply a specific transfer pricing method. It is sufficient that there is merely a reasonable connection between the information requested and the facts described in the request for administrative assistance. As a result, the administrative assistance provided by Switzerland in transfer pricing cases can be very comprehensive and information is also transmitted that would not be required for the application of the methods defined in the OECD TPG.

Spontaneous Exchange of Information on Specific Tax Rulings

Switzerland has implemented the spontaneous exchange of information on tax rulings into domestic law as of 1 January 2017. In particular, it has also committed to the spontaneous exchange of unilateral rulings on transfer pricing and permanent establishments with the state of the direct parent, the state of the group top company and, if available, the state of the counterparty of the transaction.

Automatic Exchange of Information on Country-by-Country Reports (CbCR)

As of 1 January 2017, Switzerland also signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (MCAA CbCR). However, the MCAA CbCR will not be applicable between Switzerland and another state until the other state has also included Switzerland on its list.

6.2 Joint Audits

In principle, Switzerland does not participate in joint audits. In the context of a MAP or an advance pricing agreement, the SIF is, however, authorised, with the consent of the person making the request, to conduct an inspection together with the competent authority of the other state if this serves to establish the facts. There is no legal framework in place regarding joint audits. Also, Switzerland does not participate in the OECD's International Compliance Assurance Programme or in the EU's European Trust and Cooperation Approach.

7. Advance Pricing Agreements (APAs)

7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

Unilateral Rulings

Switzerland has a long-standing practice regarding the issuance of unilateral rulings. This practice also includes the issuance of unilateral transfer pricing rulings.

With respect to corporate income tax, cantons have the authority not only to assess cantonal and municipal taxes but also federal corporate

income taxes. This means that the cantons can issue advance (tax) rulings not only regarding cantonal and municipal taxes but also regarding federal income taxes. However, the SFTA still exercises an important supervisory function over the cantons and can also intervene in individual cases. In practice, the SFTA is becoming increasingly involved in discussions, especially in large transfer pricing cases.

It should be noted that it is important to provide the competent tax administration with comprehensive documentation to keep the tax administration informed regarding the underlying facts of the unilateral transfer pricing ruling at all times, as the tax administration could challenge the validity of the ruling if the relevant facts have not been fully disclosed or new developments not communicated. Once a ruling has been granted, the facts on which it is based must be continuously monitored and changes must be identified, analysed and, if necessary, reported to the tax authorities.

Advance Pricing Agreements

In Switzerland, advance pricing agreements (APAs) are available. APAs have become a favoured option for Swiss-based international groups with complex or high-volume transactions. In practice, the procedure starts with a presentation of the facts and a formal request to the SIF, the competent authority in Switzerland.

In 2023, 77 APA proceedings were opened, and 75 of the 308 pending APA proceedings have been closed. The SIF has published guidance on APAs.

7.2 Administration of Programmes

With regard to bilateral and multilateral APA procedures, the competent authority in Switzerland is the SIF.

Concerning unilateral transfer pricing rulings for corporate income tax purposes, the cantonal tax administrations and the SFTA will be the competent authorities.

7.3 Co-Ordination Between the APA Process and Mutual Agreement Procedures

Since the SIF is also the competent authority for mutual agreement procedures (MAPs), co-ordination between APA procedures and MAPs is ensured.

7.4 Limits on Taxpayers/Transactions Eligible for an APA

In principle, the APA programme is open for all taxpayers that engage in cross-border intra-group transactions.

7.5 APA Application Deadlines

The application for an APA procedure can be filed at any given time.

7.6 APA User Fees

Under current practice, APA procedures are free of charge. However, the implementation costs in connection with a mutual agreement can, in individual cases, be charged to the taxpayer (Article 23, Federal Law on the Implementation of International Agreements in the Tax Field).

7.7 Duration of APA Cover

In practice, an APA will cover three to five years. However, Switzerland does not have specific time limitations that an APA may or may not cover. Rather, the time period to be covered by an APA has to be decided depending on the characteristics of the case at hand and is subject to negotiations. Hence, the duration is typically a trade-off between administrative/economic reasoning and uncertainty concerning the possible

future development of the transactions that are the subject of the APA.

7.8 Retroactive Effect for APAs

Basically, unilateral rulings cannot have retroactive effect, as ruling requests can only be accepted if they concern future affairs.

However, as bilateral and multilateral APAs are based on the MAP provision of the respective tax treaty, the aforementioned restriction does not apply. Hence, APAs can, depending on the involved countries, have retroactive effect. However, the retroactive reach is limited to ten years by Swiss domestic law. In practice, Switzerland seeks to limit the retroactive effect of APAs to five years. The limiting factor in practice is often the legislation in the country of the counterparty, as only certain foreign tax authorities allow a roll-back period.

8. Penalties and Documentation

8.1 Transfer Pricing Penalties and Defences

Transfer Pricing Penalties

Switzerland does not impose penalties that apply specifically in the transfer pricing context, except for violations of the CbCR requirements.

As a general rule, tax adjustments to values that are determined on a discretionary basis – as is the case with transfer pricing – have no criminal consequences. This principle only applies, though, to the extent that the provisions of commercial law have not been violated and the relevant transactions have been presented correctly in accordance with commercial law. However, violations of the arm's length principle can, under certain circumstances, still be qualified as unlawful tax evasion (or tax fraud) and as such be subject to penalties. This is the case if basic principles of transfer pricing have been grossly neglected and, thus, the violation of the arm's length principle is not only recognisable by the company or the persons in charge, respectively, but downright obvious (see also **14.2 Significant Court Rulings**). In such cases, it can be assumed that the transfer prices were deliberately set in violation of the arm's length principle. Furthermore, ignoring an earlier correction by the tax authorities could also give rise to a violation of the arm's length principle that could lead to prosecution. This would be the case, for example, if the tax authority had rightly objected to an assessment in previous tax periods and the taxpayer deliberately stuck to the original estimate or approach, respectively, without disclosing it to the tax authority.

In the case of tax evasion (or tax fraud), penalties may be imposed for all taxes involved. For instance, a transfer price-induced adjustment by the tax administration concerning corporate income tax may trigger consequences regarding withholding tax or VAT. In the case of corporate income tax, the penalties are determined based on the unlawfully evaded tax amount, whereas – if the respective year has already been finally assessed – the potential penalty ranges from one third of the evaded tax to three times that amount. In general, the fine is equal to the amount of the evaded tax. Mitigating circumstances, such as full co-operation, are taken into account when determining the fine for tax evasion.

If the tax has not yet been definitively assessed, there may be a case of attempted tax evasion, which reduces the penalty by one third. It is important to note that for the purposes of corporate income tax the fine is imposed on the company. Regarding withholding tax and VAT,

however, the fine is directly imposed on the person(s) responsible for the violation. At least in these cases, the fine is not determined based on the amount of tax evaded, but according to a fixed fine range.

Documentation Obligations

Swiss tax laws – apart from the Federal Act on the international automatic exchange of country-by-country reports of multinational groups – do not define specific documentation requirements with respect to transfer pricing. However, taxpayers must provide all documents necessary in order to enable the tax administration to conduct a proper assessment of the taxable base. This legal obligation is based on the principle that the taxpayer and the tax administration jointly determine the relevant facts to ensure a complete and correct assessment as far as corporate income tax is concerned. In particular, taxpayers are obliged to provide the tax authorities with any information on transactions between associated companies upon request. As a consequence, despite the lack of specific documentation rules, taxpayers are strongly advised to have full and state-of-the-art transfer pricing documentation at hand that can, if requested by the tax administration, be disclosed. This also includes intercompany agreements with respect to the controlled transactions. Such documentation will also be helpful in the defence of potential tax evasion charges. Such documentation should also include sound and updated benchmarking studies. In addition, it should be noted, that with regard to MAPs and APAs, the master and local file as well as any other relevant information for the resolution usually have to be presented by the taxpayer.

If no appropriate transfer pricing documentation can be presented and the taxable base cannot therefore be properly determined, the tax administration might need to estimate the transfer prices. Even though that estimate has to be reasonable and based on experience, such estimates are rarely in favour of the taxpayer. Although such an estimate is not to be considered as a penalty, it still has to be taken into consideration as a potential negative impact. The reason for that is that the courts will reject such an estimate only if the taxpayer can demonstrate that the transfer prices set by the tax administration are obviously flawed or arbitrary.

Penalty Relief

Federal and cantonal Swiss tax laws provide for a one-time voluntary disclosure, which leads to a complete penalty relief if specific statutory conditions are met. Outside the voluntary disclosure procedures, penalties charged are lower in the case of ordinary negligence and higher in the case of gross negligence. Collaboration with the tax administration in the course of a tax criminal investigation will usually result in a lower penalty. Regarding the question of culpability, the importance of state-of-the-art transfer pricing documentation should be emphasised. If a company does have such documentation, it will be difficult for the tax administrations to substantiate culpability. However, as indicated above, many disputes can be prevented or settled by negotiations with the tax authorities during a tax assessment or tax audit process (by filing formal complaints).

Back Taxes

It is worth noting that criminally relevant violations of the arm's length principle may also trigger back taxes. This is the case if the tax administration becomes aware of new facts or pieces of evidence that have not been disclosed to the tax administration with the tax return or during the ordinary tax assessment procedure. In order to levy back taxes, the tax administration can

reopen tax assessments as far back as the last ten fiscal years.

8.2 Transfer Pricing Documentation

Concerning transfer pricing documentation, Switzerland legally only requires preparing a CbCR. There is no legal obligation to prepare a master or local file.

However, in view of a potential challenge of the transfer prices by the tax authorities, it is nonetheless advisable to have master and local files (or similar documentation) at hand. In practice, tax authorities increasingly expect local files (at last broadly in line with the OECD TPG) for Swiss companies to be prepared by taxpayers in the event of a tax audit.

9. Alignment With OECD Transfer Pricing Guidelines

9.1 Alignment and Differences

Though the OECD TPG are not implemented into domestic law, the administrative practice has declared the OECD TPG as applicable. The importance of the OECD TPG for administrative practice is underpinned by the paper on transfer pricing published by the SFTA in 2024, which makes strong reference to the OECD TPG.

Nonetheless, a caveat is made regarding the application of thin capitalisation rules and the determination of intra-group interest rates for loan receivables and loan payables both in Swiss francs and in foreign currencies. In this regard, the SFTA annually publishes safe haven interest rates that deviate from the arm's length principle as defined and agreed upon in the OECD TPG (see **11.1 Transfer Pricing Safe Harbours**). Taxpayers that rely on these safe haven interest rates are generally exempt from providing further evidence to prove the arm's length nature of the applied interest rate. However, any deviation may lead to an independent reassessment of the interest rate applied and the safe haven interest rates do not represent a lower limit of any possible adjustment (for recent court cases see **14.2 Significant Court Rulings**).

There is a long tradition in Swiss tax law of applying the formulary apportionment method for the profit allocation between the Swiss head office of an enterprise and its foreign permanent establishments. However, Switzerland now follows the OECD-authorised approach for the attribution of profits of permanent establishments (AOA). The FSC has, in its ruling in the matter of Swiss International Airlines, even shown sympathy for the application of the AOA also in domestic matters, but ultimately left the question open. In this respect, it should be noted that Switzerland has numerous DTAs in force that are still based on the OECD Model Convention, where the application of the formulary apportionment method for the allocation of profits to permanent establishments was considered permissible. However, Switzerland tends to follow the AOA even if a tax treaty has not yet been updated regarding the new Article 7.

9.2 Arm's Length Principle

Besides the above-mentioned exceptions, deviations from the arm's length principle can be seen in the implementation of the patent box and the notional interest deduction, which were introduced in connection with the corporate tax reform that came into force on 1 January 2020.

In line with BEPS Action 5, cantons are allowed to exempt income from patents and similar rights from taxation up to 90%. To determine the qualifying income, a top-down approach is used. Thereby, income from routine activities and trade

marks is to be excluded, thus being subject to ordinary taxation. According to the SFTA, it is not necessary to determine the income for routine activities and brand use by means of transfer pricing studies. Instead, for reasons of practicability, the law provides for fixed margins. For the income of routine functions, a mark-up of cost plus 6% is defined, and concerning the income of trade marks, as a rule of thumb, 1% of the turnover of the patent box is regarded as appropriate. However, the right to prove higher or lower income from trade marks based on the arm's length principle is reserved.

The law also provides for simplifications in connection with the notional interest deduction (only available in the canton of Zurich). The special feature of the Swiss notional interest deduction is that it is only possible on the so-called security equity. For this purpose, core and security equity must be determined in a first step. The law does not require the preparation of a transfer pricing study for this purpose.

For reasons of practicability, the regulation rather provides for equity backing rates for the individual assets, following the circular on thin capitalisation and its inversed maximum safe haven debt capacity rates (for example, for intercompany loans, a minimum equity rate of 15% is required). If these rates are exceeded, there is security capital on which an imputed equity interest deduction can be claimed. In general, this interest is also not determined on the basis of the arm's length principle. Rather, the law provides for the interest rate for ten-year federal bonds. However, to the extent the security capital is attributable to receivables from related parties, an interest rate corresponding to the arm's length principle may be applied.

9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project

In general, the BEPS project had a major impact on the Swiss tax law landscape. Based on BEPS Action 5, Switzerland agreed to spontaneously exchange certain tax rulings, and based on BEPS Action 13, to the exchange of country-by-country reports (see **6.1 Sharing Taxpayer Information**).

Moreover, Switzerland abolished the administrative practices on Swiss finance branches and principal companies in 2019. The BEPS project raised the awareness of transfer pricing considerably, prompting the tax administrations – at cantonal and federal level – to address this issue more frequently and persistently (see **1.2 Current Regime and Recent Changes**).

9.4 Impact of BEPS 2.0

Switzerland is in favour of long-term, broad-based multilateral solutions instead of a multitude of (confusing) national measures. Thus, in principle, Switzerland supports the parameters of the discussed rules regarding the international profit reallocation of large multinational entities (MNEs) according to Pillar One as well as the minimum taxation global anti-base erosion (GloBE) rules according to Pillar Two, in order to restore legal certainty for countries and corporations.

Pillar One

Regarding Pillar One, Switzerland advocates that the interests of small, economically strong countries be taken into account in its implementation. Although, in principle, Pillar One works in both directions, Switzerland exports much more than it imports, as it creates attractive location conditions for a wide range of industries while is itself a small but nevertheless important consumer market.

It is not yet clear whether/how Switzerland will implement Amount B.

Pillar Two

On 18 June 2023, the Swiss electorate voted on the implementation of the OECD/G20 minimum taxation (and the creation of the constitutional basis for the introduction of Pillar One), with the proposal being approved by 78.5%. The referendum was necessary as the introduction of the OECD/G20 minimum taxation required an amendment to the Federal Constitution. This was because the OECD/G20 minimum taxation would have contradicted the constitutional principle of equal treatment of taxpayers. With the approval of the constitutional amendment, which came into force on 1 January 2024, the Federal Council enacted the ordinance on minimum taxation at federal level on the same day. At the same time, some cantons also decided to increase tax rates for companies.

It should be noted, however, that the minimum taxation in Switzerland was limited to the national supplementary tax (qualified domestic minimum top-up tax, of QDMTT) for tax years starting from 1 January 2024. As for tax years starting as from 1 January 2025, Switzerland decided to also introduce the income inclusion rule (IIR). The Federal Council has refrained from applying the undertaxed profit rule (UTPR) for the time being. The introduction of the minimum taxation results in a tax increase for relevant corporate groups, provided the GloBE effective tax rate (ETR) in Switzerland is below 15% (and no corresponding substance-based income exclusion applies).

It is obvious, that Pillar Two (as well as Pillar One) poses major challenges for Switzerland. Low taxes, clearly a locational advantage for Switzerland, will lose importance. However, the liberal economic system – in particular, the liberal labour law – good infrastructure, the first-class education system and the comparatively moderate corporate tax burden are reasons why Switzerland is, and will continue to be, a popular location for group headquarters and entrepreneurial activities that yield high residual profits, despite quite high labour costs by international standards.

Even though the effective Swiss tax burden may increase for multinational companies that fall under the Pillar Two regime, their higher tax costs may be offset by other benefits: the cantons are analysing how to use the expected additional tax revenues from the additional qualified domestic top-up tax, and it can be expected that they will take measures to maintain and even improve their attractiveness. In this context, the instrument of the qualified refundable tax credit (QRTC) and the introduction of new subsidy schemes will play an important role.

Given this situation, there will also be a significant tax rate differential between Switzerland and many other jurisdictions after Pillar Two, so foreign tax authorities are expected to continue to be increasingly interested in intra-group transactions with Swiss companies.

9.5 Entities Bearing the Risk of Another Entity's Operations

From a contract and commercial law perspective, a group can freely allocate risks and functions to be assumed between its entities. With a view to the acceptance of such an allocation, the FSC held, in favour of the taxpayers, that the tax administration must recognise the contractual distribution of functions and risks undertaken by group entities, if these were not merely sham structures.

However, as the tax administrations are also following a substance-over-form approach in the area of transfer pricing, the splitting up of the assumption of risks and functions is increasingly questioned by the tax authorities. In particular, the tax administrations will evaluate whether the personnel of a risk-bearing entity were effectively able to manage and control the assumed risks.

10. Relevance of the United Nations Practical Manual on Transfer Pricing

10.1 Impact of UN Practical Manual on Transfer Pricing

The UN Practical Manual on Transfer Pricing is of only minor importance in Swiss transfer pricing practice.

11. Safe Harbours or Other Unique Rules

11.1 Transfer Pricing Safe Harbours

There are safe harbour rules that apply to thin capitalisation and to interest rates that are regularly used by corporate taxpayers (see **9.1 Alignment and Differences**).

Thin Capitalisation

The SFTA published, on 10 October 2024, the updated thin capitalisation rules in its Circular Letter No 6a. In this circular, the maximum debt is determined according to maximum debt capacity to assets ratios, which apply for each asset category. No interest expense can be made on debt that surpasses this maximum debt amount (to be considered as constructive dividend distribution). Special safe haven rules might apply on the level of the Swiss cantons (eg, a maximum debt to assets ratio of 6:7 in the canton of Zug).

Interest Rates

Furthermore, the SFTA annually publishes circular letters providing inbound and outbound safe harbour interest rates on long-term intercompany loan receivables and payables.

The SFTA, in principle, allows taxpayers to deviate from the conditions set out in the above-mentioned circular letters if the taxpayer can prove that the applied interest rate is at arm's length by performing and providing a detailed transfer pricing analysis. Based on a recent court decision, the tax authorities can independently determine whether the interest rates are in line with the arm's length principle, if the taxpayer deviates from these safe haven interest rates (see **14.2 Significant Court Rulings**). In particular, the interest rates published in the circulars do not represent lower or upper limits for adjusting interest rates.

11.2 Rules on Savings Arising From Operating in the Jurisdiction

Switzerland does not have any specific rules relating to location savings and relies on the OECD TPG on this issue. However, Switzerland does not provide notable location savings in the sense of the OECD TPG as production and labour costs are comparatively high.

11.3 Unique Transfer Pricing Rules or Practices

Switzerland does not have unique transfer pricing rules and, in principle, adheres to the OECD TPG.

11.4 Financial Transactions

Switzerland has no specific rules governing financial transactions. Financial transactions are treated in line with the principles of the OECD Transfer Pricing Guidelines. This is supported by the Q&A that was published by the SFTA

in January 2024, also covering questions and answers in connection with intra-group loans, making reference to the OECD Transfer Pricing Guidelines. Finally, reference is made to the safe haven interest rates and safe haven calculation regarding thin capital mentioned in **11.1 Transfer Pricing Safe Harbours**.

12. Co-Ordination With Customs Valuation

12.1 Co-Ordination Requirements Between Transfer Pricing and Customs Valuation

Switzerland levies VAT on imported goods (import tax) of 8.1%, where the tax is assessed on the respective consideration. The import tax is levied by the Federal Customs Administration, which acts, like the SFTA, as an independent administrative body of the federal government.

Despite the fact that the SFTA and the Federal Customs Administration act independently, the administrations are entitled and encouraged to exchange relevant information between themselves and with other interested administrative bodies. The information exchange has massively increased within the past couple of years, which is mostly due to improved electronic systems, allowing a comprehensive and steady data flow. Hence, transfer pricing adjustments should always be considered for import tax purposes, as well.

Regarding customs duty, no adjustment is generally required as the customs duty itself is based on weight and not on monetary value. It is to be noted that Switzerland has abolished levying customs duty on industry products as of 1 January 2024.

13. Controversy Process

13.1 Options and Requirements in Transfer Pricing Controversies

General

Transfer pricing issues can generally be raised by the tax administration in the course of ordinary tax assessments or in the course of audits. For the transfer pricing controversy process, whether a cantonal tax administration or the SFTA raised the issue of transfer pricing has to be differentiated. While the cantonal tax administrations raise this issue in the context of corporate income tax, the SFTA may also challenge transfer pricing with regard to withholding tax, stamp duty or VAT.

As will be shown, taxpayers may challenge the results of a tax assessment or of an audit in an administrative objection proceeding before bringing the case to court. As regards the selection of the courts, the taxpayer does not have options since the competent courts are determined by law.

Corporate Income Tax

Transfer pricing adjustments affecting corporate income tax have to be discussed with the cantonal tax administrations, as they are the competent authorities to assess and levy corporate income tax at cantonal and federal level. If a tax administration has already issued an assessment or a decision, a formal objection can be lodged with the tax administration itself within 30 days. The tax administration will then have to evaluate the material objections and render a new decision.

The tax administration's second decision can be appealed before court, again within a 30-day deadline. Generally, each canton provides two

judicial instances; though, typically, smaller cantons only establish one judicial instance.

Once the highest cantonal court has rendered its decision, an appeal with the FSC can be lodged, also within 30 days. In contrast to the cantonal instances, the FSC will only deal with questions concerning the correct application of the law, which includes the application of the OECD TPG as soft law. Issues concerning the facts will only be dealt with if the facts were arbitrarily established. In the context of transfer pricing, it is worth noting that the choice of the transfer pricing method and its correct application is a question of law, whereas the result is considered a factual question. Hence, regarding the determination of the arm's length remuneration, the FSC can only intervene if the remuneration appears arbitrary.

The disputed tax needs to be paid irrespective of the fact of appealing a decision or moving the case forward into court. If the appeal/objection is successful, the tax already paid will be paid back, with interest. However, the FSC clarified that the tax administration is not entitled to enforce the disputed tax amount as long as the controversy has not been decided with legal effect. Nevertheless, the tax authority may request a freezing order at any time, even before the tax amount has been legally determined, if the taxpayer is not domiciled in Switzerland or payment of the tax owed by them appears to be at risk. The freezing order is immediately enforceable and has the same effects in the debt collection proceedings as an enforceable court judgment.

Withholding Tax, Stamp Duty and VAT

In contrast to the cantonal tax administrations, the SFTA can raise transfer pricing issues in connection with withholding tax, stamp duty and VAT. As at the cantonal level, the taxpayer can object to a negative decision of the SFTA before appealing to the court.

As such a decision affects taxes being levied by a federal administrative authority, the appeal has to be lodged with the Swiss Federal Administrative Court (FAC) – within 30 days. This court's decision can then – again within 30 days – be appealed with the FSC.

14. Judicial Precedent

14.1 Judicial Precedent on Transfer Pricing

Due to Switzerland's practice of issuing transfer pricing rulings and its APA programme, disputes on core transfer pricing issues that have to be settled by courts are relatively rare. Nevertheless, the FSC as well as the FAC have recently issued important decisions that raise key issues in the field of transfer pricing. Furthermore, it can be observed that cantonal courts are also scrutinising transfer pricing in more detail and increasingly refer to the OECD TPG.

14.2 Significant Court Rulings

Decision of the Federal Supreme Court (BGer 6B_90/2024 and 6B_93/2024)

In 2011, a real estate company belonging to an MNE received a CHF93 million long-term loan from an Irish group company, bearing interest at 3.15% per annum. During a cantonal audit in 2014, this interest rate was deemed excessive even if the interest rate was within the interquartile range of a benchmark study prepared retroactively due to the audit. To settle the case, the cantonal tax authorities and the taxpayer agreed on an arm's length interest rate of 2.5% per annum. However, the taxpayer did not proactively declare this hidden dividend to the SFTA

subject to Swiss WHT rules. Only in July 2016 was the WHT due paid.

Starting in 2018, the SFTA opened criminal proceedings for WHT purposes against an unknown entity. Later, the proceedings were extended to the taxpayer's controller, who was accused of failing to fulfil the WHT obligation for 2014, despite knowing since the beginning of 2015, based on the compromise with the cantonal tax authority, that the interest rate was not at arm's length. An external adviser of the firm was charged with incitement, on the grounds that he had allegedly induced the business controller not to file a declaration.

The Federal Supreme Court supported the arguments of the cantonal court and confirmed the business controller's conviction.

The adviser, on the other hand, was acquitted of the incitement charge. According to the Federal Supreme Court, the adviser merely fulfilled his mandate by defending the contested interest rate before the tax authorities and analysing potential tax risks, without prompting the controller to neglect the WHT declaration. It could not be proven that the adviser had instigated the controller. This assessment was mainly made due to the fact that a memo prepared by the adviser, which stated that the WHT risk was high, has been sent to the controller after the due date of the WHT.

This case makes it clear that employees can face criminal prosecution if they violate tax regulations. Due to his role and the course of events, the taxpayer's controller was clearly aware that the interest payments were not at arm's length and therefore constituted a declarable hidden dividend. He failed to make the self-declaration required by law – according to the Federal Supreme Court at least with contingent intent. The personal fine of CHF8,000 was confirmed.

Decision of the Federal Supreme Court (BGer 9C_690/2022)

The Federal Supreme Court case 9C_690/2022 involved a Swiss entity that received intra-group financing from its parent company at 2.5% per annum (unsecured loan) and 3% per annum (credit line). During the cantonal assessment, the Zurich Tax Administration deemed 1.08% per annum to be the arm's length interest rate, based on its own benchmarking analysis (versus the safe haven interest rates of 2% per annum for 2014 and 1.5% per annum for 2015.

The taxpayer determined the 2.5% per annum interest rate starting with a 0.75% per annum reference rate, adding a 0.25% per annum commission for the remuneration of transactional services and then adding 150 basis points as an individual market risk premium. It seems, however, that the taxpayer did not prepare a benchmarking study according to the prerequisites of the OECD Transfer Pricing Guidelines. The Zurich Tax Administration, however, based its calculation on the parent's refinancing costs, referencing a publicly issued bond at 0.83% per annum. In addition, it took into account a mark-up of 0.25%, which was applied analogous to the safe haven circular compensating the financing function, arriving at an arm's length interest rate of 1.08% per annum.

The lower court initially ruled that only the interest rate exceeding the safe haven maximum interest rates of 2% (2014) and 1.5% (2015) constituted a hidden dividend distribution. On appeal, the Federal Supreme Court clarified that tax authorities may (but need not necessarily) apply a lower than arm's length interest rate if

the taxpayer cannot justify its higher than the maximum safe haven interest rate.

However, the federal supreme court argued, in addition, that the margin has to be determined through consideration of the arm's length principle and not by referencing the safe haven circular margin.

Overall, this ruling reaffirms the importance of robust documentation for market-based interest rates, particularly when the interest rates applied on intercompany financing transactions deviate from the safe haven guidelines.

See the Swiss Trends & Developments chapter in this guide for further discussion of these FSC cases.

Decision of the Zug Administrative Court (A 2023 1)

A legal entity based in the Canton of Zug, which is part of an international pharmaceutical group, acted as limited risk distributor as of 2018. For 2018, the company reported a negative operating margin of –21.8%. The cantonal tax administration objected to this margin as being non–arm's length and instead assessed the company with a margin of 1.1% which was the lowest value of the interquartile range of the benchmarking study. As a result, a profit adjustment in the amount of around CHF9 million resulted. The taxpayer filed an objection and countered that the three-year average (2016–18) stood at 1.2%, which would compensate for the low 2018 margin. During court proceedings, the taxpayer referred to the OECD TP guidelines, which allow the use of multi-year data to determine appropriate transfer prices. The taxpayer concluded from this statement that it could also smooth the margin over several years.

The Administrative Court in the Canton of Zug did not accept the line of reasoning provided by the taxpayer. It emphasised the principle of periodicity, which requires taxes to be assessed separately for each tax year. A subsequent *"smoothing"* of the margin over multiple years was deemed impermissible, especially as there were no extraordinary circumstances substantiating the negative result in 2018. According to the court's ruling, it is in line with the fundamentals of transfer pricing law that each business unit be taxed according to the economic substance of the value it adds. This analysis is carried out anew every year.

15. Foreign Payment Restrictions

15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

Switzerland does not have any specific rules or even restrictions regarding uncontrolled outbound transactions.

15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

Switzerland does not have any specific rules or even restrictions regarding controlled outbound transactions.

However, as for all transactions, the payments have to be commercially justified in order to be effectively deductible for corporate income tax purposes. Furthermore, according to the FSC, *"particularly qualified"* duty to co-operate with the tax authorities in the case of cross-border legal relationships has to be taken into account. This increased duty especially applies to outbound payments to a non-DTA foreign country or to a DTA foreign country to the extent that

the DTA does not yet meet the current OECD standard on information exchange. The reasoning is that the circumstances of the foreign recipient are beyond the control of the domestic tax authorities.

15.3 Effects of Other Countries' Legal Restrictions

Switzerland does not have specific rules regarding the effects of other countries' legal restrictions. In the event that a foreign entity is affected by an adjustment of a payment to a Swiss entity due to such restrictions, a double taxation is most likely to be incurred.

However, Swiss tax authorities may prevent a double taxation with unilateral measures if they agree to the reason and extent of the correction. Otherwise, a MAP would need to be initiated if a double taxation agreement is applicable.

16. Transparency and Confidentiality

16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

In Switzerland, taxpayer information is kept strictly confidential. Thus, results from APAs and transfer pricing audits are not published.

However, it is to be noted that court rulings (excluding the reasoning) are made publicly available at the court for 30 days, whereby the names are generally not redacted. The FAC, as an exception, also redacts the names during the temporary public disclosure. After the public disclosure, rulings are published online with the names redacted. Despite the redactions, it cannot be excluded that from the other pieces of information of the decision, the party concerned can be identified. Outside of the administrative procedure, tax secrecy is therefore not guaranteed.

16.2 Use of "Secret Comparables"

In principle, Switzerland adheres to the OECD TPG and follows the principle according to which the tax administration is prohibited from basing transfer pricing adjustments on secret comparables.

Trends and Developments

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Tax Partner AG is focused on Swiss and international tax law and is recognised as a leading independent tax boutique. With, currently, 16 partners and counsel and a total of approximately 50 tax experts consisting of attorneys, legal experts and economists, the firm advises multinational and national corporate clients as well as individuals in all tax areas. A central focus lies in tax controversy and dispute resolution, including transfer pricing issues. Tax Partner AG also provides support regarding transfer pricing studies and the preparation of transfer pricing documentation. Other key areas include M&A, restructuring, real estate transactions, financial products, VAT and customs. Tax Partner AG is independent and collaborates with various leading tax law firms globally. In 2005 the firm was a co-founder of Taxand, the world's largest independent organisation of highly qualified tax experts.

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Introduction

Switzerland continues to align its transfer pricing framework with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 (the *"OECD TP Guidelines"*), while maintaining certain local specificities. In 2025, Swiss tax authorities uphold the arm's length principle as the cornerstone of intercompany pricing, requiring related parties to price transactions as if they were dealing at arm's length. This article presents several noteworthy developments in the area of intercompany financing transactions and the penal implications of wrongly set transfer prices for the employees responsible for the pricing and their tax advisers.

Swiss Federal Tax Administration Q&A

On 23rd February 2024, the Swiss Federal Tax Administration (SFTA) published a Q&A list (in German, English and French), shedding light on its transfer pricing practice. It is intended that these questions and answers will be regularly updated. In this Q&A, the SFTA clarifies questions in relation to transfer prices, always with reference to the OECD TP Guidelines. These clarifications reflect the SFTA's commitment to aligning with international standards while providing practical guidance tailored to the Swiss context.

Most of the questions answered relate to financing transactions. This shows the importance of financing transactions in general and the clear need to provide clarification by the tax authorities to taxpayers. Considering that the chapter on financing transactions is only part of the OECD TP Guidelines as of the 2022 update, it is unclear whether these answers are also valid for the years before. Focusing on intercompany financing transactions, the SFTA's Q&A provides several valuable clarifications.

Safe harbour interest rates

The SFTA annually publishes safe harbour interest rates for intercompany loans. Adhering to these rates eliminates the need for further proof of compliance with the arm's length principle. However, these rates basically do not apply to short-term loans, and foreign tax authorities are not bound by them. If a taxpayer chooses to deviate from the safe harbour rates, they must substantiate the arm's length nature of the applied interest rate through a detailed transfer pricing study.

Credit rating analysis

The Q&A emphasises the importance of distinguishing between the credit rating of the borrower and that of the specific financial transaction. While the OECD TP Guidelines acknowledge the use of a group's credit rating in certain circumstances, the SFTA advises that a subsidiary's credit rating should generally be assessed on a standalone basis. The group's credit rating should only be used in exceptional cases, with appropriate justification based on all relevant facts and circumstances.

Currency considerations

The SFTA outlines acceptable scenarios for an intercompany loan being denominated in a foreign currency, such as when the currency aligns with the company's functional currency, offers more favourable terms considering hedging costs, or corresponds to the currency in which the financed asset generates most of its revenue.

The SFTA underscores the importance of using comparable transactions occurring at or near the issuance date of the intercompany loan for benchmarking purposes. Recognising the challenge of finding comparables in Swiss francs, the SFTA permits the use of loans in other currencies, particularly euros, provided that appro-

priate adjustments are made to ensure comparability.

Transition from LIBOR

Addressing the cessation of LIBOR, the SFTA recommends adopting alternative reference rates, such as the Swiss Average Rate Overnight (SARON) for Swiss franc-denominated loans. It advises that any modifications to existing loan agreements should adhere to the arm's length principle and not be used to alter other unrelated terms without proper justification.

Recent Federal Supreme Court Decision Regarding Safe Harbour Interest Rates (BGer 9C_690/2022)

In a landmark decision, the Federal Supreme Court (FSC) addressed the determination of an arm's length interest rate for intra-group financing transactions and clarified the interplay between market-based individual assessments and the SFTA's safe harbour interest rates.

The case involved a Swiss operating company which was partially tax-liable in the Canton of Zurich due to local permanent establishments. The company had entered into a framework loan agreement with its foreign parent which granted access to credit facilities of up to CHF1 billion. Based on this agreement, the parent entity granted a fixed-term unsecured loan of CHF500 million with an interest rate of 2.5% per annum and a current account facility (*"Kontokorrent"*) for the remaining amount, carrying a 3% per annum interest rate.

The interest rates applied in 2014 and 2015 were not supported by a comprehensive benchmarking study. Instead, the taxpayer derived the 2.5% rate by building up from a base rate of 0.75%, adding a 0.25% commission for handling and administrative functions, and a 150 basis point risk premium.

The Zurich Tax Administration, following a tax audit, rejected this methodology. It performed its own benchmarking analysis and set the allowable interest rate at 1.08%, comprising a 0.83% refinancing rate derived from a bond issued by the parent company and an additional 0.25% margin, analogous to the mark-up prescribed in the SFTA's safe harbour circulars for related-party financing. The tax authority treated the excess interest (above 1.08%) paid by the Swiss entity as a hidden dividend distribution subject to a correction of the taxable profit (in effect, an increase in the taxable profit).

The Zurich Administrative Court ruled that only the interest rate exceeding the safe harbour maximum interest rates of 2% per annum (2014) and 1.5% per annum (2015) constituted a hidden dividend distribution subject to a correction of the taxable profit. Accordingly, the interest rates, as stated in the SFTA circular, served as the lower limit for the adjustment.

The core issue before the FSC was whether tax authorities are bound by the SFTA's published safe harbour interest rates when assessing intra-group financing arrangements if taxpayers deviate from these safe harbour rates, or whether they may apply lower market-based rates where warranted. First, the court ruled that the safe harbour rates are rebuttable presumptions. The interest rate thresholds published annually by the SFTA are intended to simplify administration and provide legal certainty. Taxpayers adhering to them benefit from a presumption of arm's length pricing. However, when a taxpayer deviates from these safe harbour rates, the burden of proof shifts, and the tax administration is entitled to verify market conformity. Second,

the FSC rejected the lower court's conclusion that the hidden dividend should be limited to the difference between the applied interest rate and the safe harbour maximum interest rate (2.0% per annum for 2014 and 1.5% per annum for 2015). Instead, it held that if a taxpayer applies rates above the published maximum safe harbour interest rates and cannot substantiate their arm's length nature, the authority may adopt a lower rate based on objective benchmarking. As a result, there is no entitlement to safe harbour protection when applying interest rates above the published maximum safe harbour interest rate.

As a result, the position of the Zurich Tax Administration was upheld to the extent that the parent company's refinancing rate could serve as the basis for determining the arm's length interest rate. However, the Court also ruled that the margin has to comply with the arm's length principle. In particular, the Court scrutinised the 0.25% margin added by the Zurich Tax Administration, noting that its application was derived from safe harbour circular for loans granted by related parties (ie, from the lender's perspective). The Federal Supreme Court argued that while the refinancing rate of 0.83% was a valid starting point, the additional margin must be independently evaluated for its market conformity and risk compensation. Consequently, the case was remanded to the Zurich Administrative Court to reassess whether this margin is substantiated by a credible benchmarking study and accurately reflects the underlying risk and service costs associated with the financing arrangement.

The court decision delivers further guidance to taxpayers engaging in intra-group financing. Applying interest rates above safe harbour thresholds without substantiating their market conformity exposes the taxpayer to adjustments and the risk of requalification into hidden dividend distributions with corresponding corporate income tax (and further, in a different procedure, Swiss withholding tax (WHT)) implications. Authorities may but need not assess lower rates if they substantiate the lower rate. In the present case, the taxpayer's failure to provide a defensible benchmarking study aligned with OECD TP Guidelines significantly undermined its position.

The ruling reinforces the importance of robust transfer pricing documentation and provides nuanced guidance for taxpayers deviating from safe harbour interest rate thresholds. Based on feedback from the SFTA on this court decision, tax authorities can still apply corrections based on the safe harbour interest rates, if the taxpayer fails to prove higher rates. They can but are not forced to perform a benchmark study.

Recent Federal Supreme Court Decision Regarding Penal Risks for Employees and Tax Advisers (BGer 6B_90/2024 and 6B_93/2024)

In 2011, a Swiss real estate company belonging to a multinational enterprise received a long-term loan of CHF93 million from an Irish group company, carrying an annual interest rate of 3.15% per annum. During a 2014 cantonal tax audit for corporate income tax purposes, this interest rate was deemed excessive – even though it fell within the interquartile range of a benchmarking study prepared retrospectively as part of the audit proceedings. To resolve the matter, the company and the cantonal tax authorities agreed to a revised arm's length interest rate of 2.5% per annum. This implied that the excess interest paid – 0.65% per annum – constituted a hidden dividend distribution resulting in an increase of the taxable profit.

However, the company did not proactively notify the SFTA of the resulting WHT liability arising from the hidden dividend distribution. The WHT was only declared and paid in July 2016, well after the 30-day deadline prescribed by law for such self-declaration.

In 2018, the SFTA initiated criminal proceedings against unknown persons for WHT violations. These were later extended to include the company's controller, who was accused of having failed to declare the hidden dividend distribution for tax year 2014 – despite having known by early 2015, based on the agreement with the cantonal tax authorities, that the agreed interest rate was not at arm's length. The SFTA argued that, through his role and the overall course of events, he must have recognised that the interest payments constituted a hidden dividend distribution, triggering a WHT liability that required timely self-declaration.

The company's external tax adviser (the relevant partner of the tax advisory firm involved) was also charged – specifically with incitement to commit a WHT offence. The accusation alleged that the adviser had induced the controller not to submit the required self-declaration to the SFTA concerning the hidden dividend distribution.

The Federal Supreme Court confirmed the controller's criminal conviction. It found that he had failed to fulfil the legal obligation to declare a hidden dividend distribution to the SFTA, at least with conditional (eventual) intent. The court held that the controller was aware – or at least accepted the possibility – that the agreed interest rate was not at arm's length and yet failed to act upon this knowledge by making the required self-declaration to the SFTA. The CHF8,000 fine imposed by the lower court was therefore upheld.

The adviser, on the other hand, was acquitted of the incitement charge. According to the Federal Supreme Court, he had merely fulfilled his professional mandate by defending the contested interest rate before the tax authorities and assessing potential tax risks – without actively prompting or inducing the controller to omit the WHT declaration. The court found that there was no proof that the adviser had instigated the offence. This assessment was based in particular on the fact that a memo prepared by the adviser, which stated that the WHT risk was high, had been sent to the controller only after the legal deadline for the self-declaration had already passed.

This court case makes it clear that employees can face criminal prosecution if they violate tax regulations. Given his role and the overall course of events, the controller was, according to the court, clearly aware that the interest payments were not at arm's length and thus qualified as a declarable hidden dividend distribution. He failed to make the self-declaration required by law – and the Federal Supreme Court found that he had done so at least with conditional intent.

Conclusion

It is clear that there is an increased focus on transfer pricing topics in Switzerland. This not only has effects on taxpayers per se – ie, the corporate body, but can also have penal implications for employees and/or tax advisers of the corporate body, if the respective tax regulations are not adhered to.

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