In this edition, we again report on corporate tax reform III, this time mainly on national and international developments. What’s the current state of play? The initial interim reports from the Federal Department of Finance are a step in the right direction. To maintain Switzerland’s position as an attractive business and tax location, the country still needs to draw in value-added operations – a conclusion mirrored in the work of the OECD.

This newsletter also looks at tax residency for offshore financial companies in light of a new Swiss Federal Supreme Court ruling supporting a broad interpretation of the term “residence”. The ruling concerned a specific situation to which no double taxation agreement is applicable, and is to be viewed with a critical eye. For this reason it should not be applied to similar situations without closer examination. A one-size-fits-all approach is to be avoided in favor of detailed analysis of each individual case.

Another subject discussed in this newsletter is the EU’s Generalised Scheme of Preferences (GSP). Changes to the current preferential import arrangements for developing countries will be in place as of 1 January 2014, when 87 countries will lose their status as beneficiaries. Whether the new provisions will spark a revision of the Swiss GSP rules remains unclear, and so companies that import from the countries affected are advised to keep an eye on the situation.

A ruling from the German Federal Tax Court provides us with an opportunity to discuss developments in the EU in terms of VAT treatment of chain transactions and how this affects Swiss companies. We also report on the tightening of the joint and several liability regulations in the Swiss Secondment Act, under which the general contractor can be made liable if a subcontractor fails to comply with pay and employment conditions, and look at new requirements on travel documents for entry into the Schengen area in the wake of changes adopted by the Federal Council, to enter into force as of 18 October.
Finally, we provide an update on the withholding tax procedure and its tax implications for cross-border commuters and weekday residents, and take a glance at the effects of the US government’s Foreign Account Tax Compliance Act (FATCA) on multinationals outside the finance sector. Even though FATCA focuses on foreign financial institutions, group companies active in other business areas may also be affected. As failure to comply with the FATCA provisions is costly, we recommend detailed analysis of the implications of FATCA for individual cases.

We hope you find this informative and entertaining reading.

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Based on these guidelines, the report emphasizes the following measures alongside a general reduction of cantonal corporate taxes:

- A “license box” solution for income generated from intellectual property with the aim of creating tax incentives for research, development and innovation, combined with a generous tax deduction of research and development expenses. The aim behind this measure is to promote value-added group operations in Switzerland and to replace the mixed company regime.

- The introduction of a tax deduction for interest on equity with the aim of eliminating the tax advantages of debt financing (financing neutrality).

- Implementing a modified version of the “tax follows accounting” principle (Massgeblichkeitsprinzip) to remedy any injustices in the tax system.

- Making adjustments to the taxation of participations (income and capital gains) should ensure that Switzerland remains attractive as a tax location for headquarter companies, even if the holding company privilege should be abolished.

Economically interest representatives – Economiesuisse and SwissHoldings in particular – have set up a number of working groups, which are working intensively on concrete proposals.

**International developments**

The wheels are also in motion at international level. On 19 July 2013, the OECD has published an Action Plan that reinforces the “Base Erosion and Profit Shifting” report of February 2013. The Action Plan sets out fifteen measures to counteract base erosion and profit shifting. One of the key objectives is to ensure that companies are taxed in the jurisdiction in which value creation occurs.
In a judgment handed down on 16 May 2013, the Swiss Federal Supreme Court was required to determine the tax residence of a financing company which had its head office in Guernsey, X. Ltd., was registered in the Guernsey Register of Companies on 15 October 2002, with CHF 50 million in share capital provided by Y. Holding AG, which had its headquarters in the Canton of Zug.

The corporate purpose of X. Ltd. consisted in lending funds to group companies. In the period 2002 to 2005, the entire share capital was used to fund a loan to Y. AG. Further loans were granted to subsidiaries of Y. Holding AG between 2006 and 2008.

The entity’s physical presence and structure in Guernsey was relatively small. Two low-paid, part-time employees were responsible for managing X. Ltd. Three individuals served as directors of both X. Ltd. and Y. Holding AG. The annual cost in sterling of renting commercial premises in Guernsey was in the low four-figure range. However, all meetings of the X Ltd. Board of Directors and general meetings of shareholders were held in Guernsey.

Both the tax authorities of the Canton of Zug and the cantonal courts took the view that the company’s place of effective management was in the Canton of Zug and that X Ltd. was therefore fully liable to corporate income tax in Switzerland.

Swiss Federal Supreme Court ruling

The Swiss Federal Supreme Court concurred with the findings of the lower authorities that Switzerland was the corporate tax residence.

Based on established practice and the principles laid down in the “X Corporation” judgment of 4 December 2003 (2A.321/2003), the Swiss Federal Supreme Court reasoned in its decision that the place of effective management is the location from which the company is ordinarily managed. In making this determination, it is important to distinguish between top-level management activities and purely administrative activities. The place in which control of the business is exercised and strategic decisions are made for the company is also immaterial. Moreover, the place of effective management cannot be determined on the basis of the shareholders’ place of residence or the place in which board meetings or general meetings of shareholders are held.

The Federal Supreme Court also concluded that the day-to-day business of X. Ltd. merely consisted in transferring to group companies the capital that had been allocated. It held that the sole activity in Guernsey was the management of existing loans, as also evidenced by the limited infrastructure, but that clarifications and decisions regarding the granting of specific loans were made at the head office of Y. Holding AG in the Canton of Zug. As a result, the place of effective management, i.e. the place where the management of day-to-day business in pursuit of the company purpose takes place, was Switzerland rather than Guernsey.

Conclusion

In conformity with long-standing practice, the Swiss Federal Supreme Court draws a distinction between purely administrative functions, actual management of the business and the strategic and supervisory role of the Board of Directors. Unfortunately, in making its decision, the Federal Supreme Court overlooks the fact that intra-group financing companies only require limited staff and infrastructure to perform the necessary functions. Neither do they need to make major business decisions on a daily basis. Within a group structure, it is also not unusual to involve Group Treasury in financing decisions, which may necessitate the informal transfer of certain management responsibilities to other companies.

The ruling involves a case in which Swiss taxing powers are not restricted by any double taxation agreement. It is open to question whether the stance of the Swiss Federal Supreme Court would be allowed to prevail in a mutual agreement procedure as provided in Article 25 of the OECD Model Convention. In this context, it should be noted that some countries, unlike Switzerland, are more inclined to consider matters of form when determining the place of effective management, such as the place where management meetings are held. This Federal Supreme Court ruling should not therefore be applied to DTT cases without closer scrutiny.

It is to be hoped that the Swiss tax authorities will not apply this ruling indiscriminately to similar situations, but assess in detail on a case-by-case basis whether functions are performed outside Switzerland and the level of staffing and infrastructure involved. Otherwise, there is a risk that Switzerland will adopt a sweeping, “one-size-fits-all” approach to offshore companies which is not justified on objective grounds. Unfortunately, this judgment does not clarify whether the performance of functions incidental to financing outside Switzerland (e.g. hedging or rating borrowers) would be enough to establish a substantial presence such as to preclude residence for tax purposes in Switzerland.

Other rulings on the place of effective management

It is worth noting two other rulings by the cantonal courts concerning the place of effective management.

In the “P1 Ltd. (Jersey)” decision dated 29 November 2011 (A 2010 15), the Administrative Court of the Canton of Zug held that the Canton of Zug was the place of effective management. P1 Ltd. is an investment company headquartered in Jersey. The Zug Administrative Court took the view that the key investment decisions of P1 Ltd. were taken by group company P3 AG, which had its head office in Zug, and that the activities in Jersey
As of 1 January 2014 the current European Union (“EU”) Generalized Scheme of Preferences (“GSP”) regime will be revised and 87 countries and territories will be removed from the list of beneficiaries. As a consequence, imports of goods into the European Union originating in those countries will no longer benefit from a preferential (often zero) duty rate, but become subject to increased import duties. For Swiss businesses, these changes may e.g. lead to higher sourcing costs when procuring affected products from European vendors or require adjustments to the current supply chain.

**The GSP regime**
The “Generalized Scheme of Preferences” (GSP) allows developing countries to pay lower or even zero duties on their products when imported into the EU. A key element of the scheme is to give these countries preferential access to EU markets and thus improve their economic growth by granting facilities. The new GSP regime is adjusted to ensure that benefits are granted to those countries and those product sectors only which the EU considers to be truly in need of duty preferences. Countries which are regarded not requiring preferences for being competitive will no longer benefit from the scheme. This especially includes countries which already have preferential access by a Free Trade Agreement or achieved a high or upper middle income per capita.

Although for many countries / territories an alternative preferential regime has entered into force, 20 countries (listed as high or upper middle income economies) will no longer be able to benefit from a preferential regime when exporting goods to the EU. Amongst others, the BRIC countries Brazil and Russia are completely taken out of the regime, whereas for India the catalogue of covered products has been narrowed. Furthermore, many oil producing countries like Saudi Arabia, Kuwait, Qatar, United Arab Emirates, Venezuela and Libya will no longer qualify for preferential customs duties. As a consequence, many oil products will in future face substantially higher import duties.

**Impact on industry**
Companies which are affected by the changes should analyze their existing supply chains and assess the financial impact. This includes:

- Determination whether products originating in the above countries are imported into respectively via the EU;
- Assess the quantity of products imported into the EU to quantify the potential impact of losing preferential GSP status;
- Identify the ultimate countries of destination and / or usage of the affected products;
- Investigation of the current commercial agreements with supplies and customers to evaluate to what extent increased customs duties may be passed on/down the supply chain.

**Based on this assessment it may be worth to evaluate other sourcing countries.**

It is still unclear whether the new regulations of the EU GSP scheme coming into force on 1 January 2014 will lead to a revision of the Swiss GSP regime and consequently the list of beneficiaries will also be amended for imports into Switzerland. However, the Swiss customs administration will inform the public in due course. Companies importing from affected countries should be advised to monitor the situation continuously.

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Generalized Scheme of Preferences

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At March 2013, the Tax Appeals Court for the Canton of Zurich made an identical finding. A. Ltd. is an “underlying company” which is held by the D Trust and engages in various financial investments. The settlor and beneficiary of the D Trust is “B”, an individual who is resident in the Canton of Zurich. The Tax Appeals Court for the Canton of Zurich held that B was responsible for making the key investment decisions for A. Ltd. and that Zurich was therefore the place of effective management of A. Ltd. A. Ltd. has appealed the decision and that appeal is now pending before the Administrative Court of the Canton of Zurich.
EU developments affecting the VAT treatment of chain transactions
(in the light of recent case law developments in Germany)

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In its latest decision of 28 May 2013, the German Federal Tax Court affirmed the relating decisions of the European Court of Justice (e.g. VSTR, Eurotyre), resulting in a partial reversal of the stance previously held in Germany. It is vitally important for companies to keep informed about developments, especially in cases that are not clear-cut.

If several businesses conclude contracts for the supply of the same goods and the goods concerned are directly transported from the first supplier to the last supplier, the European Union (EU) usually deems that a chain transaction has taken place. Only one supply within a chain transaction may be treated as “supply with movement”, which may be considered VAT exempt as intra-Community supply (under circumstances). Determining which supply is to be considered as “supply with movement” and assessing whether all requirements for the application of the VAT exemption for intra-Community supplies are met, pose significant problems in practice (especially considering differences in national VAT provisions).

In the “VSTR” decision (C-587/10) dated 27 September 2012, the European Court of Justice (ECJ) stated its position on the VAT treatment of chain transactions. The Court held that in order for a supply to be considered as “supply with movement”, potentially treated as VAT exempt intra-Community supply, all specific circumstances of the case and, in particular, the moment in which the right to dispose of the goods as owner is transferred to the final recipient need to be determined. An exemption from VAT may not be refused solely on the grounds that the party acquiring the goods failed to use a valid VAT identification number. The proof of such an identification number should be considered as a formal requirement and should not preclude other forms of evidence for the tax exemption. However, in order for alternative evidence to be considered, it is necessary for the supplier to have taken all the measures that can reasonably be required to record the VAT identification number of the party acquiring the goods.

The latest ruling of the German Federal Tax Court dated 28 May 2013 (XI R 11/09) reflects the ECJs’ decision and essentially affirms that a VAT exempt intra-Community supply may exist despite the lack of the VAT identification number of the party acquiring the goods. This judgment also marks a significant reversal from previous decisions in Germany. In line with the VSTR ruling, the Federal Tax Court now requires an assessment of all the circumstances, and, in particular, consideration of the moment at which the right to dispose of the goods as owner is transferred. However, the judgment does not set forth any clear guidelines in this respect. However, it is clear that this latest decision has overturned established principles.

This has the following implications for Swiss companies in the EU:

▷ If a Swiss-based company acquires intra-Community goods in the EU and is charged with VAT solely on the grounds of failure to provide for a VAT identification number, the latest ruling may support a defense strategy to justify the application of the VAT exemption. This could potentially reduce input VAT risks and obviate the need for VAT registration.

▷ Any classification of an intra-Community supply within a chain transaction should also be assessed on the basis of ECJ criteria, especially if the goods supplied by the Swiss company in the EU member state concerned are deemed to be subject to VAT under national legislation. There is also the potential to reduce VAT risks, e.g. by circumventing local VAT liability and, consequently, the requirement to register for VAT.

Where Swiss companies have an EU VAT identification number, the above remarks regarding the classification of intra-Community supplies are also highly relevant to “triangular transactions”, especially if the Swiss company is acting as the intermediate party.
Joint and several liability on the part of general contractors

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On July 15, 2013, the tightening of the joint and several liability regulations already stipulated by the Swiss Secondment Act (Entsendegesetz) entered into force after being ratified by the Swiss parliament on December 14, 2012. Joint and several liability means general contractors can be held liable for failure on the part of their subcontractors to comply with conditions relating to pay and employment.

The principles of joint and several liability
The purpose of joint and several liability is to prevent certain abuses in connection with the kind of subcontracting arrangements typically found in the construction industry. Joint and several liability allows general contractors to be held liable under civil law for claims asserted by employees in cases where a subcontractor has not adhered to the minimum pay and employment conditions applicable in Switzerland. General contractors can however release themselves from such liability if they can show that given the circumstances, they took the appropriate care to ensure compliance with the pay and employment conditions every time work was delegated within the contract chain. Specifically, this condition is met if the general contractor checks the subcontractor’s compliance with the minimum pay and employment conditions in accordance with the Secondment Act when awarding contracts. The general contractor must ask subcontractors to credibly demonstrate that they comply with the minimum pay and employment conditions by furnishing appropriate documents and records.

Despite the joint and several nature of the liability, the law stipulates that the general contractor’s liability is subsidiary to that of the subcontractor and employer as the party responsible for paying wages. This means that claims can only be asserted against the general contractor if the subcontractor has already been prosecuted without success, or cannot be prosecuted.

The new provision is stricter than the one it is replacing, and allows an administrative fine to be imposed on general contractors who do not satisfy the duty of care.

The general contractor’s duty of care in detail
There are three aspects to the duty of care, and it is up to the general contractor to decide what level of care to apply with respect to a particular subcontractor and which aspects require more or less attention on a case-by-case basis:

► Demonstration of compliance with pay and employment conditions: When awarding contracts, the general contractor must request documents from the subcontractors that credibly demonstrate that they comply with the minimum pay and employment conditions.

► Contractual precautions: The general contractor must regulate the assignment of contracts to second or third subcontractors, and obtain contractual assurances that any assignment shall be subject to the general contractor’s approval. The general contractor can also satisfy the duty of care by obtaining a contractual claim to information concerning the relevant pay and employment conditions.

► Organizational measures: Organizational measures must be taken to ensure that the general contractor can investigate the subcontractor in question beforehand in the event that contracts are assigned within his/her construction project. The general contractor must regularly inspect the construction site in person in order to ensure that there are no subcontractors working on the site that he/she has not investigated.

The Secondment Act suggests documents that subcontractors can use to show the general contractor that they comply with the minimum pay and employment conditions. The price offered, for example, can give the general contractor an idea of whether the subcontractor adheres to the minimum pay and employment conditions. However, compliance with the duty of care is always assessed according to the circumstances of each case.

The consequences of joint and several liability
For the companies affected, joint and several liability means increased administrative work and expenses due to the documentation requirement as well as the organizational measures it entails. It is reasonable to assume that general contractors will be more likely to work with subcontractors they already know and trust in order to reduce administrative work and costs. This will constitute a barrier to entry, and could put new companies looking to establish themselves on the market at a disadvantage. It is also conceivable that general contractors will provide for measures to reduce their risk of liability when drafting contracts (for example in the form of a guarantee payment), which could result in liquidity shortages for small and medium-sized companies and therefore put them at a competitive disadvantage.
New travel document requirements for entry to the Schengen area

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Requirements as regards travel documents for entry to the Schengen area vary for foreign nationals depending on their citizenship and the purpose of their visit (tourist, employed person, student, retired person). In addition, the duration of stay is restricted, regardless if a visa is required or not. Within the reproduction of the EU’s amendments of the Schengen Border Code which have already become effective, on 21 August 2013, Switzerland’s Federal Council approved amendments that will change these rules and take effect immediately as well as on 18 October of this year.

Current rules

In accordance with Switzerland’s current Ordinance on Entry and Visa Procedure (VEV), citizens of non-Schengen countries may, regardless of any visa requirement, enter and remain within the Schengen area for up to 90 days in a 180 day period starting from the date of first entry.

When they enter a Schengen state, citizens of third countries (i.e. those that are not part of either the EU or EFTA) who are required to have a visa must in addition hold a travel document that is valid for at least a further three months after the planned departure from the Schengen state. For foreign nationals who are not obliged to have a visa, however, the only requirement is that the travel document is valid.

Changes

The Federal Council has approved the necessary amendments to the EU regulation governing the Schengen Borders Code and other legislation governing border controls, entry and visas. The changes to the Schengen rules and how they are implemented in Switzerland has meant that Switzerland’s Ordinance on Entry and Visa Procedure has had to be amended, with these amendments entering into force on 18 October 2013.

1. Validity of travel document

Pursuant to Article 5 (1) (a) of the Schengen Borders Code as amended by (EU) Regulation No. 610/2013 of the European Parliament and of the Council of 26 June 2013, in force since 19 July 2013, travel documents are now required to be valid for at least three months after the planned departure from the Schengen state and must have been issued within the past ten years. This requirement applies regardless of fact that the traveler is required to have a visa or not.

2. Calculation of duration of stay

The calculation of the 90 days within a six-month period during which a person is authorized to remain within the Schengen area have become more complicated. It is currently the case that the 180 days (or six months) are calculated from the date of first entry. With the change, however, the six-month period (the “reference period”) will no longer correspond to 180 days following the date of first entry, but rather to the 180 days prior to the control date (e.g., border control upon entry or departure from the Schengen area or police check within Schengen area).

For most travelers, the changes will have no direct consequences. Nevertheless, there could be a negative impact for those who have frequent stays in the Schengen area, as they may suddenly find themselves facing a travel ban that would not have arisen under the current rules.

The federal government has issued a table that illustrates how the periods are calculated (see below). It must also be said that the current rules are considerably easier for those concerned to understand and apply, as with the new calculation the authorized duration of stay often can no longer be calculated from a specific fixed point, but rather depends on a multitude of variables that, in some instances, cannot be planned or known in advance (e.g., where a police check is carried out on a random basis). Therefore, travelers have to make sure that they never ever exceed their stay of 90 days within a 180-days period in the Schengen area.
**Example 1 - Person occasionally travels within the Schengen Area**

A foreigner (tourist, visitor, businessman, ...) spent 30 days in the Schengen Area in April. He would now like to spend another 30 days in the Schengen Area in October.

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According to the current rules (90 days per 180-day period starting from the date of first entry), such a stay is possible. In fact, over the course of the reference period (which covers the 180 days following entry in early October), the duration of stay does not exceed 90 days.

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**Reference period**

According to the new rules (90 days over any 180-day period), which will enter into force on October 18, 2013, such a stay is also possible. In fact, over the course of the reference period (which covers 180 days prior to departure at the end of October), the duration of stay does not exceed 90 days.

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**Reference period**

**18.10.2013**

**Example 2 - Person travels frequently within the Schengen Area**

A foreigner (tourist, visitor, businessman, ...) spent 90 days in the Schengen Area from February to June. He would now like to spend another 90 days in the Schengen Area from August to October.

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According to the current rules (90 days per 180-day period starting from the date of first entry), such a stay is possible. In fact, over the course of the reference period (which covers the 180 days following entry in early August), the duration of stay does not exceed 90 days.

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**Reference period**

According to the new rules (90 days over any 180-day period), which will enter into force on October 18, 2013, the foreigner must leave the Schengen Area on October 17, 2013. If his travel document is checked on October 18, 2013 or during the following days, the border control officer will calculate the stay according to the new rules and will see that the foreigner has exceeded his or her authorised period of stay; the duration of stay will have exceeded 90 days during the reference period (which covers the 180 days prior to the control date).

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Recently tax authorities have informed employers and also the public about changes of the tax at source procedure in Switzerland. These changes come along with the implementation of the electronic wage reporting system (ELM) which will take place in 2014. One of the main consequences among others will be that the naming of the applicable source tax tariffs across Switzerland will be unified. This unification has also tax impacts. Namely one category of taxpayers who are subject to tax at source, the so called international weekly commuters (IWC) will be affected. This eNews intends to shed some light on the category of taxpayers concerned and on the consequences the change will have for them.

Important to remark is that daily cross-border commuters will not be affected by the change described hereafter.

International Weekly Commuter – Applicable Source Tax Tariffs So Far
An international weekly commuter (IWC) is basically commuting regularly for working purposes from his home country to Switzerland and back. From a Swiss tax perspective the economic and personal relations (center of vital interests) of an IWC are closer to his home country than to Switzerland. The basis for such an approach is a valid and applicable double tax treaty. In practice the center of vital interests is mostly checked with the questions whether the tax payer is married and whether his family lives outside of Switzerland. If both questions can be answered positively the taxpayer is basically considered as IWC. As such the IWC is not considered tax resident in Switzerland. But due to his work relation to Switzerland he is limited tax liable mainly on his employment income. As the IWC is not considered tax resident in Switzerland he has no possibility to file a tax return unless 90% and more of his worldwide (family) income is Swiss sourced.

So far many cantons at least in the north-western part of Switzerland do apply the married single earner tariff for IWCs. An exception is the canton of Zurich where the basic tax at source tariff A is applied for IWCs (no matter whether the spouse of the IWC works abroad). The result in those cantons applying the married single earner tariff is a mild taxation of IWCs whose spouse work abroad as the income abroad is not considered tax wise.

The Applicable Source Tax Tariffs Starting 2014
With the change of the federal tax at source decree coming into force in 2014 all cantons have to apply the implemented standardized tariffs. In other words it will be no more possible that for example the canton of Zurich does apply the basic tax at source tariff A for an IWC whose spouse is working abroad whereas the Basel cantons do apply the married single earner tariff B.

According to the federal tax at source decree all cantons will have to apply the married single earner tax at source tariff B for IWCs whose spouse does not work abroad. On the other hand all IWCs whose spouse does work abroad will be subject to the married double earner tariff C. As consequence the tax at source burden of IWCs in the cantons applying the basic tariff will decrease slightly (e.g. in Zurich). In those cantons where the married single earner tariff is applied the tax at source burden will increase as the double earner tariff is basically ‘more expensive’ than the married single earner tariff.

As described above it is difficult for IWCs to file a Swiss tax return. With this in mind and without deductions/reliefs that can be taken through a source tax correction the risk for paying higher taxes is given (at least in those cantons that are actually applying the tax at source tariff B, no matter whether the spouse abroad works or not). Even if deductions/reliefs can be taken through a source tax correction the basis of taxation, namely the applicable tariff C will stay and lead basically to higher taxes compared to the same correction under the tariff B.

Changes Of The Tax At Source Procedure

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The impact of Fatca for multinational non-financial corporate groups

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The U.S. Foreign Account Tax Compliance Act (“Fatca”) affects not only the financial services sector but also other industries.

Fatca imposes a 30% withholding tax (“Fatca withholding”) on certain U.S. sourced payments, unless a foreign entity (being the recipient of the payment outside the U.S.) meets certain requirements. Even though most of the burden of FATCA falls upon Foreign Financial Institutions (“FFI”) such as banks, asset managers and insurance companies, also entities of groups with activities in other business sectors may be affected. As noncompliance with Fatca may be costly the impact of Fatca needs to be analysed in detail in the specific case.

Definition of an FFI is broad
The final Fatca regulations were initially written with focus on the financial services sector. Nevertheless, the broad definition of an FFI may also apply to group entities of industrial groups. It has to be noted that the definition of an FFI focuses on the business activities of the entity rather than on the overall activities of the group as a whole. Therefore it is crucial for all entities worldwide to analyze their primary business activity and to determine whether the entity is seen as conducting a financial business activity under the broad definition of Fatca (i.e. potentially holding company, treasury center etc.). If the group as a whole is considered a non-financial group under the Fatca definition, exclusions from the FFI status may be applicable under certain conditions.

Even if the entity as such does not qualify as an FFI - due to the fact that it does not perform financial activities or the like - it may still be impacted by Fatca due to the receiving of U.S. sourced income. Should an entity receive such income it is crucial that the paying agent with whom the entity bank account is booked is an FFI that registers with the IRS (“participating FFI”). Otherwise a 30% U.S. withholding tax will be levied on the U.S. source income. Furthermore, the entity as such has to meet certain criteria and may be requested to inform its paying agents in this respect to avoid Fatca withholding.

Obligations under the final regulations
The final Fatca regulations foresee that an FFI has to register with the U.S. Internal Revenue Service (“IRS”) and sign an FFI agreement. This implies that such participating FFI has to fulfill the obligations contained in the FFI agreement. The registration should take place no later than 25 April 2014 to ensure FATCA compliance in due time. The Fatca online registration portal is available since 19 August 2013. The IRS will assign a Global Intermediary Identification Number (“GIIN”) to the registered FFIs. This GIIN is of great importance because it states that the FFI is Fatca compliant and therefore no U.S. withholding tax should be imposed on U.S. sourced income which is received by the FFI.

Intergovernmental agreements
Certain countries have concluded on an intergovernmental agreement (IGA) with the United States. These IGA foresee some country specific exemptions, grandfathering or relief of certain Fatca regulations. It is key for an FFI to understand whether it has to fulfill the Fatca obligations in accordance with the final regulations or with an IGA.

Next steps for non-financial groups
Every entity has to analyze whether it qualifies under Fatca as an FFI. If an entity qualifies as an FFI, this entity has to register with the IRS no later than 25 April 2014. It is also key to understand what the Fatca obligations are according to the final regulations and/or an IGA.

Furthermore, the payments received and investments have to be analyzed in order to determine any U.S. source payments. In case there is a U.S. nexus it has to be ensured that the paying agent who will credit the payments to the entity account is a participating FFI, also such paying agent needs to be informed about the FATCA compliant status of the recipient of the payment.

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