Dear reader

On 9 June 2017, the Swiss Federal Council discussed the cornerstones of the revised corporate tax reform (Tax Proposal 17) and assigned the Swiss Federal Department of Finance to prepare a draft bill for consultation until September 2017.

Moreover, the IFRS Interpretations Committee provides - for the first time - binding guidelines for the recognition and measurement of uncertain tax positions and the administrative court of St. Gallen has taken a remarkable decision on the protection of legitimate expectation in case of continued assessments.

In this issue of our quarterly newsletter we will inform you about these and some further important tax developments.

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Swiss Federal Council approves suggested cornerstones of tax reform

**Executive summary**

On 9 June 2017, the Swiss Federal Council approved the cornerstones on the Swiss tax reform, now referred to as “Tax Proposal 17” (TP 17), which the steering body composed of federal and cantonal representatives and led by Federal Councillor Ueli Maurer had set out earlier this month.

The objective of the proposed tax reform remains to ensure that Switzerland continues to offer a sustainable, internationally accepted and competitive corporate tax system. The TP 17 package is compared to the rejected bill on Corporate Tax Reform III (CTR III) - a leaner package with reduced benefits but it takes into account the interests of the cities and the communes. The aim of the new proposal is to reduce tax revenue shortfalls, to generate higher overall revenues and to introduce a social component in order to achieve a more balanced, transparent and a generally politically accepted corporate tax reform.

**Detailed discussion**

**Background**

On 12 February 2017, Swiss voters, in a popular vote, rejected the federal bill on CTR III as adopted by the Federal Parliament last summer. CTR III was supposed to align the Swiss corporate tax system with international standards by replacing existing tax regimes with a new set of internationally accepted measures effective 1 January 2019. However, disagreements on the scope of the new measures and the handling of the anticipated tax losses caused the rejection. Opponents argued that the tax revenue shortfall eventually would have to be borne by the Swiss population.

Nevertheless, the need for tax reform due to the changing international tax environment is undisputed in Switzerland. Therefore, the Swiss Federal Council decided to prepare a revised and more

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1 See EY Global Tax Alert, [Swiss voters reject Corporate Tax Reform III in referendum](mailto:Swiss%20voters%20reject%20Corporate%20Tax%20Reform%20III%20in%20referendum), dated 13 February 2017. Further information on TP 17 is also available under [www.ey.com/ch/USR-III](http://www.ey.com/ch/USR-III).
balanced bill in close cooperation with the cantons and the communes as quickly as possible.

The cornerstones on TP 17 differ in various aspects from the rejected CTR III measures. In particular, the steering body included in the proposed TP 17 package social components such as the increase of the child and education allowances in favor of individuals, restricted the overall tax relief of the patent box and the research and development (R&D) super deduction at the cantonal level to a maximum threshold of 70% instead of 80% and increased the partial taxation of dividends from qualifying participations held by Swiss individuals to 70% at the federal and at least 70% at the cantonal level. On the other hand, the criticized notional interest deduction (NID) on surplus equity has been excluded from the proposed package. The following overview summarizes the differences between the proposed measures under CTR III and TP 17.

Cornerstones on TP 17 (based on press release of 1 June 2017)

Abolition of preferential tax regimes

At the federal level, the taxation practices for principal companies and finance branches will be abolished, whereas at the cantonal level, the holding, domiciliary and mixed company regimes will go away as it was already proposed under CTR III. It should be noted that these preferential tax regimes or practices will continue to be available as long as the amendments to the relevant tax laws have not been enacted with legal effect. Even though the cornerstones on TP 17 do not explicitly address the rules governing the transition from preferential taxation to ordinary taxation (the so-called “two-rate system”) and the rules governing the step-up upon migration to Switzerland as outlined in CTR III, it should be noted that these rules were undisputed under CTR III and are therefore expected to be equally adopted by TP 17.

Introduction of OECD-compliant patent box

The TP 17 package includes the mandatory introduction of a patent box that is fully compliant with the modified nexus approach of the Organisation for Economic Cooperation and Development (OECD). The patent box will only be available at the cantonal level and will – compared to CTR III – not include patented software. The maximum level of permissible tax relief for income related to the patent box has remained at 90%.

Introduction of R&D super deduction

As one of the optional cantonal measures, the revised reform also allows for the introduction of an increased (up to 150%) tax deduction for qualifying R&D expenses incurred in Switzerland. The deductions should focus primarily on personnel expenses.

Restriction of overall cantonal tax relief

Similar to CTR III, the effect of the cantonal tax relief is limited in order to avoid zero-taxation or tax loss carry forwards. The overall cantonal tax relief provided by the patent box and the R&D super deduction shall be restricted to a maximum of 70% of the entity’s net profit (80% under CTR III). It is assumed that the amortization on disclosed built-in gains relating to the step-up under the current system will be included in this threshold as well.

Partial taxation of qualifying dividend income

The minimum taxation of qualifying dividend income earned by Swiss resident individuals should be 70% at the federal level and at least 70% at the cantonal level under TP 17 (i.e., individuals shall only benefit from a maximum exemption of 30%).

Increased share in direct federal tax revenue

In order to compensate for the losses in cantonal tax revenues expected to result from the suggested measures as well as the planned reduction in corporate tax rates (summarized above), the share of the cantons in the direct federal tax revenue will be increased from 17% to 20.5%. In addition to this, a new clause will be included in the new proposal to take into account the cities and communes in connection with the increase of the cantons’ share in the federal tax revenue.

Family allowances

The minimum amount for family allowances is to be increased by CHF 30. This means that child allowances will rise to at least CHF 230 and education allowances will rise to at least CHF 280. In this regard around 18 cantons will need to raise respective payments.

Relief measures for cantonal capital tax

Even though the cornerstones on TP 17 do not explicitly address the cantonal options to introduce targeted capital tax reductions on the company’s net equity (related to participations, intangible assets and intercompany loans) as well as further relief measures such as general capital tax rate reductions or the possibility to credit income taxes against capital taxes, it should be noted that these rules were undisputed under CTR III and are therefore expected to be equally adopted by TP 17.

Related measure not directly included in TP 17

General tax rate reductions

As a measure to further boost the attractiveness of Switzerland as a business location and to compensate the abolition of the cantonal tax regimes, most can-
Cantonal tax rate reductions are at the full discretion of the cantons. Based on official announcements already made by numerous cantonal governments, it is expected that the majority of the Swiss cantons will provide attractive low headline tax rates on pre-tax income between 11.5% and 15% (including federal tax) once the new reform package enters into force.

**Next steps**

The Swiss Federal Council has instructed the Swiss Federal Department of Finance to prepare a TP 17 consultation draft for its attention by September 2017. The Federal Council expects to discuss the dispatch on TP 17 – together with the dispatch on reforming the taxation of spouses – in spring 2018. It will then also decide on a possible staggered schedule for the proposals.

In order to ensure fast implementation of TP 17, the cantons will have to push forward their cantonal implementation plans in parallel to the federal legislative procedure.
According to settled case law of the Swiss Federal Supreme Court, an assessment does not yet justify protection of legitimate expectation, so that taxpayers cannot rely on the fact that the tax administration assessed the same issue differently the year before. The administrative court of St. Gallen has now passed a remarkable judgment protecting the legitimate expectation of a self-employed person whose losses were offset with other income for years. The court held that in the case at hand the tax administration was obligated to inform the taxpayer that without reaching the break-even threshold soon, they would presume non-deductible hobby activity.

**Principle of legality and protection of legitimate expectation in assessment procedures**

In tax law, the principle of legality is of particularly great importance. Every taxpayer shall be taxed according to the law. Because of administrative costs, however, the fiscal administrations are not able to examine all the tax returns down to every last detail. Therefore, according to settled case law of the Swiss Federal Supreme Court, assessments do no constitute a basis for legitimate expectation. In other words, the fiscal administration is generally obligated to verify the correct fiscal registration within every tax assessment. Should it thereby come to the conclusion that a situation has to be considered differently than in the previous year due to the principle of legality, in principle the taxpayer is not entitled to a continued assessment no longer considered lawful.

The administrative court of St. Gallen has now taken a remarkable decision of 20 December 2016 (decision no. B 2015/155) and concretized – in our view convincingly – the protection of legitimate expectation in cases of continued assessments. The decision has been appealed and is now pending with the Swiss Federal Supreme Court. It thus remains to be seen if the Swiss Federal Supreme Court will follow the arguments of the administrative court.

**Facts of the case**

The taxpayer and his wife have been operating a predatory bird park with adjacent kiosk and restaurant in a self-employed activity since 2001 in the canton of St. Gallen. Furthermore, the taxpayer is self-employed as a chimney sweep. The losses of the predatory bird park were constantly being offset against the spouses’ remaining income and were assessed definitively according to self-declaration. In January of 2012, the spouses were requested to hand in their accounting records for the fiscal year 2009. Subsequently, because of the on-going losses, the tax administration qualified the running of the park as (non-deductible) hobby activity and refused the offsetting of losses with the remaining income for the fiscal year 2009. The objection raised against the ruling was approved by the administration recourse commission. The commission held, that the running of the predatory bird park could not be classified as a hobby that served only the interests of the taxpayer. Since the bird park also had an element of public benefit, the activity did not appear as ostensible and as hidden hobby activity. In Switzerland, animal parks and similar institutions are in general reliant on financial support. After the long-standing approval of the losses for tax purposes, the significant investments in fixed assets and facilities did not justify the retroactive change of practice without adequate transitional period.

**Self-employment vs. hobby activity**

In a first step, the administrative court determined if the running of the predatory bird park could be qualified as self-employment or as a hobby activity for fiscal year 2009. The court stated that the park is largely operated professionally, i.e., it has an internet presence, opens regularly (Wednesday to Sunday), has normal market ticket prices, offers flight shows and guided park tours for individuals and school classes as well as sponsorships for animals. However, the park had been showing losses since its founding in 2001 and the taxpayers were not able to disclose how they could lead the park to break even. Therefore, the court confirmed the fiscal administration’s assessment and qualified the predatory bird park not as self-employment, but as a hobby activity.

**Protection of legitimate expectation**

Hence, the court examined further, if due to the continued assessment and thus the continued offsetting of the respective losses from the predatory bird park with the remaining income,
the taxpayers were allowed to have a legitimate expectation to be assessed equally in the future. It was confirmed that the tax administration is generally authorized to reexamine a previously evaluated legal issue in a subsequent assessment. At the same time, it had to exercise a certain reluctance. Particularly, the reassessment by the tax administration is more restricted in cases of ongoing circumstances that had been explicitly assessed by the tax administration, since in these cases, the assessment by the tax administration within the first tax period regularly constitutes assurances for later tax periods. In the case at hand, the tax administration had allowed the offsetting of the losses with the remaining income for years without ever informing the taxpayers that a continuation of this assessment practice requires an at least balanced operating result. Only at the beginning of the year 2012, the tax administration requested additional accounting details concerning the tax return of the fiscal year 2009, which was handed in in autumn 2010. However, it was not evident from the letter if this additional information was asked for with regard to the assessment as self-employment or only to review the claimed losses. Due to the circumstances at hand, the administrative court concluded that in this case, the longstanding approval of an activity as self-employment for tax purposes provides a basis for the protection of legitimate expectation lasting for a certain time.

The administrative court mentioned the following as particular circumstances:

- A predatory bird park is linked to significant investments like facilities, animal stock and longstanding leasing and building rights contracts that do not allow for a short-term liquidation. Without notice about the requalification of the business as a hobby activity, the taxpayer had no possibility of considering a new organizational form, e.g. the transfer to a tax-exempt foundation.

- The predatory bird park was evidently not operated with the – abusive – purpose of claiming private living expenses as deductible exploration costs, considering the professional management, the educational value, the relevance as a regional leisure and tourism offer and the significance for the protection of animals and species.

Conclusion

The decision of the administrative court of St. Gallen is to be welcomed. Even though, due to the mass assessment procedure, not every single tax return can be examined in detail, but is rather processed automatically by software, tax returns of self-employed individuals usually are still manually assessed by tax officials. Moreover, the assessment software is programmed in a way that “conspicuous” tax returns are filtered automatically for review. Self-employed individuals in particular, whose operational losses are continuously allowed to be offset against their remaining income, should thus enjoy protection of legitimate expectation for a limited time period. How long this protection should be granted must be determined on a case to case basis. However, the protection of legitimate expectation should at least be effective until and including the year in which the taxpayer was firstly informed of the amendment to the respective assessment practice, i.e. in the case hand at least for the fiscal year 2012.

It is to be determined, how far the decision of the administrative court of St. Gallen can be applied to other long-lasting cases, e.g. with regards to commercially justified depreciations and interest costs for loans from related parties, which exceed the applicable interest rates according to the practice published by the Swiss Federal Tax Administration (SFTA) or the existence of a (foreign) permanent establishment. To what extent the Swiss Federal Supreme Court will follow the considerations of the administrative court of St. Gallen remains to be seen.
IFRIC 23 provides – for the first time – detailed and binding guidelines for the recognition and measurement of uncertain tax positions in IFRS financial statements. Companies are advised to review their accounting policies on uncertain tax positions, to initiate changes, if required and to re-assess and measure all income tax exposures based on the new regulations of IFRIC 23.

Background

Whilst US GAAP has known binding rules for the recognition and measurement of uncertain tax positions since year 2006 (enactment of FIN 48), such regulations have been missing so far in IAS 12, the applicable standard in the International Financial Reporting Standards (“IFRS”) for income taxes. As a consequence, companies reporting based on IFRS have been applying diverse reporting methods for income tax exposures which reduced comparability of the amounts reported in IFRS financial statements. The IFRS Interpretations Committee (“IFRIC”) observed these diverse methodologies and decided in year 2014 to prepare an interpretation on uncertain tax positions. The final interpretation was published by the International Accounting Standards Board (“IASB”) on 7 June 2017.¹ IFRIC 23 is mandatorily applicable for annual reporting periods beginning on or after 1 January 2019.

Content and key provisions of IFRIC 23

- Examination by taxation authorities

IFRIC 23 states in paragraph 8 that an entity shall assume that a taxation authority (i) will examine amounts it has a right to examine and (ii) have full knowledge of all related information when making those examinations. So far, it was possible under IAS 12 not to record a tax contingency reserve with the mere argument that a taxation authority will likely not examine a specific transaction or that the taxation authority will likely not propose an adjustment as it may not have full knowledge of all facts and circumstances.

- Likelihood of a tax adjustment

Paragraph 9 of IFRIC 23 provides that an entity shall consider whether it is probable that a taxation authority will accept an uncertain tax treatment. The term “probable” is not defined under IAS 12, however, it is generally interpreted as “more likely than not” under IFRS, i.e. reflecting a probability exceeding 50%. Reporting entities are, therefore, no longer required to record a liability for an uncertain tax position if the likelihood is lower than 50% that the taxation authorities will successfully challenge an uncertain tax treatment, i.e. if the probability is less than 50% that the reporting entity will incur additional income tax payments. In current practice, reporting entities sometimes record a tax contingency reserve even in circumstances when the likelihood of a tax adjustment is (clearly) below 50% (e.g. by applying a weighted average approach in cases where the probability is above 50% that the taxation authority will not propose an adjustment). IFRIC 23 no longer allows the recording of a tax risk reserve in these circumstances.

- Whether an entity considers uncertain tax treatments separately

It is sometimes unclear in daily tax accounting practice whether a separate risk assessment is required for every single transaction or whether it is possible to make the risk assessment on a combined basis with one or more additional transactions. As an example, the overall interest margin earned by a finance

company of a multinational group might be in line with the at arm’s length principle despite the fact the interest rate charged on a particular loan receivable is outside the interquartile range and potentially subject to an adjustment by the taxation authority. Depending on the applicable law and practice in a specific jurisdiction, a tax administration may accept a tax filing position if the overall interest margin is at arm’s length whereas in another tax jurisdiction the tax payer could be obliged to file an appendix to the tax return showing the interest margin per loan/borrower.

Paragraph 6 of IFRIC 23 provides discretion to a reporting entity whether it prefers to consider each uncertain tax treatment separately or together with one or more other uncertain tax treatments. However, the reporting entity needs to apply the method that better predicts the resolution of the uncertainty. In doing that, the reporting entity needs to assess how the taxation authority will likely make its examination and resolve issues that might arise from that examination.

**Measurement of uncertain tax positions**

If an entity concludes that it is probable that a taxation authority will successfully challenge an uncertain tax treatment, it can choose between two different calculation methods for the measurement of the required income tax liability according to paragraph 11 of IFRIC 23. The two methods are the (i) “most likely amount” and the (ii) “expected value”, i.e. the sum of the probability-weighted amounts in a range of possible outcomes. A reporting entity needs to assess for every income tax exposure the method that better predicts the resolution of the uncertainty.

The use of the most likely amount is normally preferable if the possible outcomes are binary (i.e. the taxation authority either adds-back a particular expense or accepts the full deduction) or are concentrated on one value. The expected value should usually be taken if there is a range of possible outcomes that are neither binary nor concentrated on one value.

The example on the bottom of this page addressing a transfer pricing case outlines the application of both methods:

The reporting entity records an income tax liability of 440’000 should it conclude that the application of the expected value better predicts the resolution of the uncertainty. However, it will record an income tax liability of 400’000 if it believes that the most likely amount better reflects the likely resolution of the uncertainty.

**Reassessment of uncertain tax positions**

Unsurprisingly, IFRIC 23 confirms in paragraph 13 current practice that a re-assessment of an uncertain tax position is required in case of new facts and information. New information may be in the form of an agreement with the taxation authority in a similar case, new court decisions which can be used as precedent or the expiry of a taxation authority’s right to examine or re-examine a tax treatment. However, should a reporting entity re-assess the tax exposure and adjust an income tax contingency reserve without having new information, it will need – in line with given practice – to evaluate whether it is correcting an error made in a prior period which could even require a restatement according to IAS 8.

**Qualification and treatment of interest and penalties**

The IASB and IFRIC refrained from including binding regulations on the treatment of interest and penalties in IFRIC 23. As a consequence, companies are still entitled, as under US GAAP, to make an accounting policy election as to whether they prefer to include interest and penalties in income tax expense or

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<th>Expected value</th>
<th>Most likely amount</th>
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<td>440’000</td>
<td>400’000</td>
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whether they want to include these charges “above the line” in financial and other expense.

Disclosures

Unlike the implementation of FIN 48 in US GAAP, IFRIC 23 is not requiring any additional disclosures in the notes to the financial statements. However, it is mentioned in paragraph 4 of Appendix A of IFRIC 23 that an entity needs to determine whether it should disclose judgments, assumptions and estimates made in determining taxable profit, tax bases and tax rates. Furthermore, a reporting entity shall determine whether it needs to disclose the potential effect of an uncertain tax position not meeting the “probable” threshold but whose likelihood is more than “remote” as a tax-related contingency.

Effective date and transition

IFRIC 23 is mandatorily applicable for annual reporting periods beginning on or after 1 January 2019. However, earlier voluntary application is permitted.

As regards the transition to IFRIC 23, reporting entities can either apply the new regulations on a retrospective basis by restating prior year information and presenting prior year information in line with IFRIC 23. Alternatively, reporting entities are allowed to apply IFRIC 23 on a “modified retrospective basis”. In such case, there is no requirement to restate prior year figures and the cumulative effect of the initial application of IFRIC 23 is recorded as an adjustment to the opening balance of retained earnings (or other component of equity, as appropriate). It is assumed that most reporting entities and consolidated groups will prefer the second option.

Recommendation

Companies are advised to review their accounting policies on uncertain tax positions and to initiate changes, if required. Additionally, companies should re-assess and quantify early enough all income tax exposures they are aware of based on the new regulations of IFRIC 23. Such approach ensures that impacts, which could potentially be significant, are communicated to group management and to investors in a timely manner.
The fiscal environment in UK is still changing. On the one hand, the British government’s persisting reform efforts over the past years will once again subject the current tax law to changes in 2017. On the other hand, the UK’s upcoming exit from the European Union, will influence UK’s fiscal environment and, amongst others, impact tax accounting & reporting.

Tax law amendments 2017

Following an abbreviated parliamentary debate, the UK passed the amendments in tax laws for the year 2017 (so-called Finance Act 2017) on 27 April 2017. Because of the new elections of the British Parliament for 8 June 2017, there had to be made several amendments and cuts on the draft bill (so-called Finance Bill 2017) at short notice. The final bill, which has been passed now, differs essentially from the last draft bill, which was published on 20 March 2017. The changes and cuts were necessary to give the parliament the possibility of a more absorbed debate - which will only be after the new elections - for the partially very complex provisions. Not covered by the final bill are notably the following points, which are essential for companies. In summary, it can at least be stated that not much has changed for companies as compared to 2016 for now.

► Interest relief

Provided in the draft bill was the introduction of a clause, which would have copied the German interest barrier rules, by restricting the deductible interest expense to 30% of EBITDA (plus a general exemption limit of £2m). For the time being, this provision is not enacted and former regulations are still applicable.

► Tax loss carry forwards

According to the draft bill, taxable profits earned after 1 April 2017 could have been set off against tax loss carry forwards in the amount of 50% only, while the current tax law (with certain exemptions for banks) does not provide for such restrictions.

► Participation exemption

The draft bill provided certain additional reliefs for tax exemption for capital gains relating to the disposal of participations (so-called Substantial Shareholding Exemption) to promote the UK as a business location for holding companies. The current, more restrictive provisions remain unchanged for the time being.

► Amendments to the so-called anti-hybrid rules

According to the draft bill, deprecations on intangible assets would not have been qualified as a “harmful deduction” for purposes of anti-hybrid rules.

► Amendments concerning “cost sharing arrangements” relating to the patent box regime

The new act would have led to several clarifications concerning “cost sharing arrangements” for companies which make use of the patent box regime. Furthermore, grandfathering clauses concerning pre-existing and qualifying intellectual property rights would have been extended for the benefit of tax payers.

Not affected by the changes is the future tax rate reduction, which has been resolved in the previous years. The corporate tax rate will be reduced from the current valid 19% to 17% as of 1 April 2020.

Most of the tax advisors in the UK currently assume that the above-named changes are only temporarily delayed and will find their way into the Financial Bill 2017 after the parliamentary election passed. Thus, Jane Ellison, the responsi-
sible Financial Secretary to the Treasury confirmed on 25 April 2017 that the short-term changes are not supposed to constitute a policy change and that the new parliament will legislate for the remaining provisions at the earliest possible stage.

In practice, it is instead expected that specific provisions could even come into force retroactively - given that the parliament passes the act unchanged in summer or fall. In this case, there would not have been much change in comparison to the original plan.

Nevertheless, the new elections and pending amendments lead to unwanted tax-related uncertainties for companies. For instance, it is uncertain, on what basis the provisional tax payment for 2017 has to be calculated given the fact, that the first installment is due in mid-July. Furthermore, the delayed amendments regarding the participation exemption could aggravate or preliminarily even make impossible the divestment of participations.

It is recommended to corporations and multinational groups with a fiscal link to the UK to monitor closely further developments in order to react on these developments in a timely manner.

**Brexit’s impacts on tax accounting & reporting**

The formal notification to the European Council of the UK’s intent to withdraw from the European Union, handed in on 29 March 2017, has raised the question on several occasions on whether the notification constitutes an immediate change in tax law for income tax accounting purposes concerning multinational companies. During the last decades, the EU has enacted several fiscal directives which are binding for member states (e.g. the Parent-Subsidiary Directive, the Interest and Royalties Directive, or the Merger Directive). UK’s exit from the EU will presumably have the effect, that these directives will not be applicable to British companies anymore. This could for example lead to non-refundable withholding taxes on dividends, interests or royalties.

The activation of art. 50 of the EU Treaty of Lisbon provides that a member state has to leave the EU within a maximum period of two years after submitting the withdrawal notification. The European Council, though, in mutual agreement with the UK, can decide to extend this deadline. Because there is no precedent for a withdrawal of a member state from the EU, it cannot be stated at the time being how long the withdrawal process will take. Furthermore, there are no precise indications if and how the relationship between the EU and the UK will be arranged in the future (e.g. with a new framework convention). That is why it is totally open how the future fiscal situation will be in relation to companies based in the UK or with permanent establishments in the UK.

According to IFRS (IAS 12.46) and US GAAP (ASC 740-10-05-07) the current taxes are to be calculated with the tax rate that is valid at the balance sheet date. According to US GAAP, deferred taxes have to be calculated at the tax rate which is valid at the time of the expected reversal of the temporary difference, whereas the tax rate has to be formally enacted at the balance sheet date. As for IAS 12 it would be sufficient that this (future) tax rate is substantively enacted at the balance sheet date.

The submission of the formal withdrawal notification is simply the beginning of the withdrawal negotiations. Until these negotiations have been completed, all tax laws and EU-Directives remain unchange
ged. Therefore, there was neither an “enactment” (US GAAP), nor a “substantive enactment” (IFRS) of a new fiscal provision on 29 March 2017. Possible tax accounting consequences should rather be considered at the earlier stage of the following two:

- **(Substantive enactment)** of new tax laws and provisions throughout the two years’ withdrawal period by the UK, the EU or EU member states or
- the date on which UK actually withdraws from the EU.

It is reported that the US Securities and Exchange Commission (SEC) shares this opinion. Thus, companies should closely monitor the actual developments on a regular basis - especially within the frame of their interim reporting - to evaluate whether one of these stages has been reached.

Furthermore, it is recommended to make additional transparent disclosures in the notes to the financial statements to indicate the possible tax consequences of the Brexit, insofar as they are relevant for the company.

However, immediate tax accounting consequences could occur if a company knowingly reduces its activities in UK relating to the forthcoming Brexit which, for instance, may lead to the conclusion that tax loss carry forwards are no longer recoverable due to missing expected future taxable profits.

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Early retirement - Tax and social security considerations

Many employees in leading positions wish, after their long-lasting employment, to retire before the ordinary age of retirement of 65/64. The existence of arrangement possibilities - especially regarding the third pillar - allowing for the break of progression is known to many. An important aspect that is often overlooked, however, are the social security contributions that are due until reaching the ordinary age of retirement and that can sometimes lead to unpleasant surprises. Depending on the arrangement, the burden can be reduced significantly. When planning for the third stage of life, next to budgeting for living expenses and deciding about drawing either a pension or capital, one should also consider the social security contributions.

Obligation to contribute to Old Age and Survivors’ Insurance (OASI), Disability Insurance (DI) and Income Compensation Scheme (EO) for early-retired persons

Individuals living and employed in Switzerland are obligatory insured in the OASI¹ and have to pay contributions. The OASI distinguishes between employed and non-employed individuals. Individuals are considered non-employed if they earn no or only low income. The obligation to contribute ends as soon as the ordinary age of retirement is reached. If the contributions are not paid seamlessly, this can lead to a reduction of the pension.

The contributions of non-employed persons conform to the wealth according to the cantonal tax assessment as well as the twentyfold yearly pension income. For married persons, the contributions of every spouse are calculated according to half of the matrimonial assets and pension income, regardless of the matrimonial property scheme. The relevant wealth contains for example savings accounts, securities and real estates. Not part of the relevant assets are entitlements to vested benefit accounts and 3a pillar accounts. These only belong to the relevant assets when they are withdrawn or are due according to the law. In case of a successive liquidation of possible vested benefit accounts, the non-employed person’s relevant assets thus increase accordingly.

Those employed at less than 50% can also be considered as non-employed from the perspective of the compensation fund. Here, a comparative calculation is used: Whoever pays into the first pillar both at least double the minimum amount of CHF 478 as well as of half the contributions they would have to pay if non-employed, is exempted from paying further non-employment contributions. The contributions of the non-employed spouse count as paid provided their spouse has made employment contributions equal to double the minimum amount.

Continuation of employment

Higher contributions for non-employed spouses can be avoided provided that at least one spouse is pursuing a sufficient gainful employment (self-employed or employed)². Depending on the situation and the arrangement, the remaining employment can be arranged in a way that the pension fund assets are not due with the termination of the main employment but are instead transferred³ and can be withdrawn gradually at a later point.

Given that vested benefit and pension fund assets are not part of the assets relevant for the calculation of the non-employment contributions for the OASI, the potential non-employment contributions remain comparatively low, provided the withdrawal is deferred until both spouses reach the ordinary age of retirement. Thus, a comparatively low income is oftentimes sufficient in order that the employment contributions surpass half of the non-employment contributions that would otherwise be due.

¹ Subsequent mentions of OASI always include DI and EO as well.
² Sufficient means either a workload of at least 50% or the payment of at least double the minimum amount and of half the contributions that would be due in case of non-employment.
³ Depending on the arrangement, the transfer is made into the pension fund of the new employer or into a vested benefit account.
Tax issues

Fiscal considerations are especially to be made with regards to the question whether pension fund assets should be withdrawn as a pension, as capital or as a hybrid of both. While the pension shall be taxed at the ordinary rate, a reduced tax rate can be applied to the withdrawal of capital, which oftentimes amounts to only 20% of the ordinary tax.

As long as the pension fund capital could be transferred to two vested benefit accounts, it is generally advisable to withdraw them gradually in order to break the progression. According to practice, many cantons allow for a gradual withdrawal of two vested benefit accounts for the purpose of breaking progression, since legally, the allocation of pension funds is intended for up to two vested benefit accounts. A distribution on further vested benefit accounts, however, is usually not accepted for tax purposes.

In many cantons as well as at federal level, the marginal tax rate (i.e. every additional Swiss franc is charged with the maximal tax rate) appears with a taxable income between CHF 140'000 and 160'000. For high credit balance, the withdrawal as a capital of the second and third pillar is often already taxed at the maximal tax rate, whereby the progression-breaking graduation has only limited effects.

A gradual withdrawal of pension funds still bears advantages, namely the fact that in general they only become part of the taxable assets once they are withdrawn, so that the wealth tax is only due as of withdrawal. Furthermore, they are only counted as relevant assets for the calculations of the OASI-contributions once they are withdrawn, which can entail massive savings in contributions.

Case study

In order to better illustrate this complex issue, following fictional case study shall be demonstrated: Mrs. E would like to retire early at 60 years (without drawing an OASI pension). Her pension fund assets amount to CHF 2 million, which she draws half as capital and half as pension (conversion rate 5.5%). Additionally, she owns five 3a pillar accounts of CHF 20'000 each. Her employer pays her a termination payment in the amount of CHF 500'000 (of provisioning nature). Her husband (age 55) is reducing his workload as well and is earning an annual income of CHF 20'000 on a 20% part-time basis.

Since her husband is only employed at a 20% part-time basis and has not generated enough contributions (half of the non-employment contributions has not been reached according to the control calculation), both spouses are obligated to pay the full non-employment contributions of CHF 8'251, i.e. CHF 16'502. The contributions already made by the husband are credited. In case the husband would work at a part-time basis of at least 50% or if he - independent of his workload - would earn at least CHF 41'000, he would be assessed as an employed person and Mrs. E, as his wife, would be exempted from paying contributions as well and would not have to pay further OASI-contributions.

If Mrs. E would pursue a subsidiary employment instead of drawing a pension, the pension fund capital would not yet become due and accordingly, the assets based on the control calculation are significantly reduced.

<table>
<thead>
<tr>
<th>Calculation of the non-employment contributions in the year of retirement</th>
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<td>Assets according to tax assessment</td>
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<td>Crediting of husband’s OASI-contributions (10.25%)</td>
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If Mrs. E or her husband earn at least CHF 25’000 per year or one of them works at a part-time basis of at least 50%, this spouse would be assessed as an employed person. The matrimonial OASI-contributions could then even be reduced approx. CHF 2’600. At the same time, it has to be considered that the subsidiary employment of Mrs. E may only be of restricted extent, so as not to endanger the provisioning character of her termination payment, which is taxed at the pension rate and not at the ordinary rate.

**Conclusion**

This shows that a forthcoming retirement not only begs the question in what form the living costs should be covered, but, next to tax optimization possibilities, also whether a possible continuing obligation of OASI-contributions can be considered in terms of possibilities of optimization. Due to the fact that the interaction of measures is complex, we recommend submitting the chosen planning option as preliminary ruling request to the tax administrations as well as to the responsible compensation fund.
Determination of the tax base relating to import of goods without a defined purchaser – Swiss Federal Supreme Court decision 2C_1079/2016 issued on 7 March 2017

On 7 March 2017, the Swiss Federal Supreme Court published a decision that concerns the determination of the tax base for import tax purposes. The dispute was about default interest for additional import taxes as well as the question which transaction leads to an import into Switzerland.

Background

The incorporated company A, based in Sweden and registered for Swiss VAT purposes, acts as the main purchasing company for an international group of companies. In a first step, A purchases goods from foreign manufacturers and moves them to a warehouse in the respective country of purchase. Afterwards the goods are delivered to a Swiss distribution center. A operates as importer, organizes the transport from the country of purchase to Switzerland and carries the transport expenses from the foreign warehouse to the Swiss distribution center. After the goods have arrived in Switzerland they are checked on quality and delivered to national subsidiaries. With this respect, it is important to mention that at the point in time the import takes place it is not clear whether or not a sales contract between A and the Swiss local subsidiaries will be concluded.

General VAT principles

Domestic sales carried out by taxable persons are subject to Swiss VAT. In order to eliminate competitive disadvantage relating to the import of goods, the Swiss Federation raises an import tax of currently 8% resp. 2.5% depending on the good imported by taxpayers.

The mere physical movement of goods across the customs border is in general sufficient in order to establish an import tax liability, i.e. a sales transaction as such is not required. Even the transfer of own goods from outside Switzerland into Switzerland is considered a taxable event from an import tax perspective. This means that every movement of goods across the Swiss customs border into free circulation becomes subject to import tax (with some exceptions, e.g. tourist traffic for which there are certain tax provision).

According to art. 51 para. 1 Value Added Tax Act (VATA) any person is subject to tax if it qualifies as a so-called customs debtor from a customs perspective. A customs debtor is defined as a person which delivers goods and/or engages another party to deliver goods on its behalf across the border, for which customs declarations have to be filed.

The import tax for sales and transactions on a commission basis can be calculated based on the remuneration paid or to be paid by the importer or a third party. In case of absence of a sale and commission based transaction the import tax is to be calculated at the fair market value.

According to the practice of the Swiss Federal Tax Administration (SFTA), the sales price, which has been calculated by an independent domestic third party (less 10%), has to be used for the calculation of the import tax at a fair market value.

Considerations of the Swiss Federal Customs Administration (SFCA)

For the purpose of a criminal investigation the SFCA concluded that company A erroneously used the purchase price set by the foreign supplier incl. transport costs as tax base for import tax purposes. According to the SFCA, A should have had to calculate the tax base for import tax purposes based on the sales price charged to the national subsidiaries without VAT considering a deduction of 10%. This was based on the fact, that the SFCA assumed the purchase transaction between the foreign suppliers and A as a mere transfer of own goods across the Swiss border rather than a tax relevant...
import into Switzerland. Given that the import tax due on fair market value was significantly higher than the originally submitted tax, the SFCA assessed A to an additional import tax burden of approx. CHF 100 million as well as a late payment interest of approx. CHF 900'000. Due to the refund of the additional import tax, the unsuccessful appeal of A is directed solely against the late interest payment.

**Considerations of the Swiss Federal Administrative Court**

Similar to the SFCA, the Swiss Federal Administrative Court rejected A's appeal. The court justified its decision considering that the goods had neither been imported into Switzerland in fulfilment of a sales and/or commission based transaction between the foreign supplier and A, nor in fulfilment of such between A and the local subsidiary. The purchase agreement of A had not led to the relevant import transaction. This conclusion was based on the argument that A had already gained the economic power to dispose over the goods abroad and picked them up subsequently. Moreover, the sales business of A does not constitute a tax relevant import, due to the absence of a sales contract with the local subsidiaries at the time of the import. Thus, the court ruled that the actual fees paid cannot be regarded as accurate tax base for calculating the VAT and the fair market value should have been applied instead.

**Decision of the Swiss Federal Supreme Court**

The Swiss Federal Supreme Court, however, finally approved the appeal submitted by the incorporated company A with its decision of 7 March 2017. As for the question whether the import took place “in fulfilment” of a sales transaction, the Supreme Court stated, contrary to the previous instance, that it is irrelevant who arranges the transfer of the goods into the domestic territory. Regardless of the transport modalities, it rather would be decisive that, in the case at hand, A does not need the purchased goods in the country of purchase, but indeed had to provide them at a domestic distribution center. The goods purchased by A abroad were intended for sales in Switzerland, hence, the importation of the goods into Switzerland took place between A and the foreign suppliers. Whether the imported goods are actually resold to local subsidiaries, does not alter their original purpose.

**Conclusion**

The preliminary decision of the Swiss Federal Administrative Court has raised a considerable uncertainty for multiple companies which themselves are importing goods into Switzerland without having defined the purchaser at the time the importation takes place. The Supreme Court eliminated these doubts with its decision and clarified that the purpose of the essential business leading to an import transaction, does not depend on the transport modalities. Regardless of whether the importer carries out the transfer, resp. whether he organizes the transport, or whether the purchaser picks up the goods abroad, the original purchase of the goods characterizes the sales contract. If, as in the case at hand, the purchase takes place on purpose for a resale of the goods in Switzerland, the import takes place in fulfilment of the domestic sales transaction and, therefore, the remuneration in connection with the purchase abroad has to be considered as a base for the calculation of the import tax.
Foreign travel agencies with sales of travel services in Switzerland - pushed much faster into a Swiss VAT liability than expected

The wording of art. 8 para. 2 lit. b MWSTG often entices foreign-domiciled travel agencies and tour operators with their travel services in Switzerland to forego prematurely clarifying their Swiss VAT obligation. Foreign travel agencies, which are in possession of a binding ruling from the Swiss Federal Tax Administration (SFTA) regarding their tax liability in Switzerland, are advised to review the originally approved ruling in the light of the upcoming revised VATL, entering into force as of 1 January 2018, to determine whether the SFTA should be approached with a new ruling request.

General principles relating to VAT liability in Switzerland

According to art. 10 VATL any person, irrespective of legal form, objects and intention to make a profit, is liable to the tax if that person carries on a business and is not exempt from tax liability. The circle of potential taxpayers thus includes those who either provide services on Swiss territory or have their place of business on Swiss territory.

In detail, business activity requires the following elements:

- The activity must be aimed to generating long-term turnover from services;
- The primary objective of the business activity is to generate turnover from services;
- The activity is of professional or commercial nature;
- The activity is carried out on an independent basis, which is normally the case with legal entities;
- The appearance is performed under its own name.

Travel agencies and tour operators domiciled abroad generally easily meet the above-mentioned requirements. Should a company’s turnover exceed CHF 100’000 within a calendar year, it would compulsorily become liable to register for Swiss VAT purposes.

Tax exemption

Art. 8 para. 2 lit. b VATL states that the place of supply of services provided by travel agencies and organizers of events is where the business of the service provider is established. The legal wording suggests, thus, that services rendered by travel agencies follow the principle of the place of establishment. However, a closer examination reveals that the wording should be interpreted differently: The SFTA defines travel services by exclusion and solely applies art. 8 para. 2 lit. b VATL in case one of the remaining conditions to define the place of supply (e.g. catering services, accommodation services or transport services) cannot be applied. Consequently, the scope for the application of art. 8 para. 2 lit. b VATL is limited or even non-existent.

Having outlined the afore mentioned, art. 8 para. 2 lit. b VATL cannot be seen as an a priori tax-exemption rule for travel services provided by foreign travel agencies in Switzerland: If a foreign travel agency solely sells hotel accommodation services in Switzerland, the place of supply of these services is located in Switzerland. The same applies to transport services, events, renting of vehicles as well as catering, if these services are provided on Swiss territory. An exemption from the tax liability (based on the current legal situation), therefore, only comes into question in case the turnover generated from these services is not exceeding CHF 100’000 within a calendar year.

Practice of the SFTA

According to the sector-specific VAT Info 12, part A, ciff. 9, travel agencies established abroad are based on goodwill and until further notice, exempt from the tax liability, if they exclusively provide combined touristic services in Switzerland (e.g. all-inclusive tours).

In this context, two things have to be considered:

- As soon as the foreign travel agency sells specific services (e.g. hotel accommodations) in addition to combined touristic services, the practice of the SFTA does not apply any longer, since not only "exclusively combined services" are provided.
- Even if it can be confirmed that only combined services are provided, it should be kept in mind that the exemption-provision is only accepted in practice by the SFTA until further notice. A case-by-case examination is performed and the assessment is at the discretion of the SFTA.
In practice, the latter leads to the fact that foreign travel agencies are usually in possession of a binding ruling from the SFTA, which confirms the exemption to tax liability.

**Legislative revision**

According to the revised VATL, which will enter into force as of 1 January 2018, the VAT liability of a company is no longer to be determined solely based on the turnover performed in Switzerland but also based on the global turnover (a company is liable for Swiss VAT purposes if it generates turnover in Switzerland and its combined Swiss and foreign turnover exceeds the threshold of CHF 100'000 per year). As such, the tax implications for foreign travel agencies providing combined services in Switzerland cannot yet be assessed. However, a change in the SFTA’s practice is quite conceivable.

Foreign travel agencies in possession of a binding ruling and companies that still have not clarified the VAT implications of their activities in Switzerland with the SFTA should, therefore, review their position and should determine whether a ruling request to confirm their VAT position with the SFTA needs to be filed. This is in order to gain certainty concerning the application of the tax-exemption-provision based on the revised VATL entering into force as of 2018.
Swiss Federal Customs Administration (“FCA”) in transition: Glimpse into the planned transformation program DaziT, progressing digitalization regarding assessment notes and changes in the rectification procedure.

In order to adapt to the vastly progressing digitalization in daily business, the FCA launched the DaziT project to digitalize and simplify customs procedures to increase the efficiency and fulfill the needs of an increasingly changing environment. As a first step to enhance digitalization and save costs, all import assessment notes will have to be obtained electronically as per 1 March 2018. Furthermore, the period for filing appeals against such assessment notes will be lowered from 60 to 30 days by 1 October 2017. Companies that are involved in cross-border activities are well advised to analyze potential impacts on their own business and to implement appropriate measures soon.

Transformation program “DaziT”

Due to a vastly changing environment and increasing cross border movements of goods and persons, it has become more and more difficult for the FCA to meet the demand for simplified customs formalities and appropriate technical solutions. Therefore, the FCA launched the program “DaziT” which should transform the administrative apparatus completely into digitalized customs procedures until 2026 by renewing its outdated IT infrastructure. The continuous digitalization and the use of new technologies will create more efficient and simplified procedures for cross border transactions. For instance, one of the objectives is to provide stakeholders with an internet-based solution to access and track requests that were filed at the authorities.

Besides that, a single IT application for the clearance of goods in relation to import, export and transit procedures will be created to speed up such transactions and increase a smoother flow of goods. A similar project is planned to update and modernize the area of road traffic fees and excise taxes. From an administrative point of view the security aspects will be strengthened with new equipment and increased data collection. Consequently, the currently tied up resources shall be used for more intensive but risk-oriented controls and other tasks in the new environment.

Abolishment of hardcopy assessment notes

In order to apply the e-government strategy and further saving measures driven by the Swiss Confederation, the FCA announced that as per 1 March 2018 they will no longer provide any hardcopy assessment notes (except for exports in the NCTS system) but electronic ones only. Said documents are regarded as proof that goods have been properly customs cleared for importation or exportation. In contrast to paper based assessments notes, electronic versions contain a so-called digital signature. For this reason electronic assessments notes require an electronic archiving system that ensures authenticity and integrity of the documents during the retention period.

FCA allows different access ways to the electronic data base. Generally, such documents can be obtained online without any registration, but that process can be rather bothersome. If goods are imported or exported on a regular basis, companies can register themselves at the FCA and download assessment notes either manually over a platform or via an automated process by means of a software solution. As a consequence thereof, it is essential to analyze the amount of received assessment notes and evaluate possible automated IT solutions as early as possible to be able to obtain such documents before the set deadline.
Reduction of the rectification period for assessment notes by 1 October 2017

The Federal Court and the Federal Administrative Court concluded that the applied rectification procedure according to art. 34 para. 3 and 4 of the Swiss Customs Act were wrongly implemented and require changes by the FCA. This jurisprudence leads to an amendment of the current practise and tightens future rectifications of assessment notes significantly. For the time being the rectification period starts at the time the assessment note is issued and appeals against assessments notes can be filed within a period of up to 60 days. Under the new procedure a request for rectification against an assessment note has to be filed within 30 days (without interruption of period) after goods have left customs supervision. Thus the new practice will shorten said appeal period significantly.

Furthermore, reasons for appeals will be limited to few specific cases and all appeals will have to be filed by a written request (i.e. letter, email) and an amended customs declaration.

In future, all appeals that do not meet the set deadline and formalities will be rejected without exception. In order to avoid any workaround to file appeals when the rectification period expired, it is not possible to file an appeal with reasons that were not previously submitted under the rectification procedure. In a nutshell this means that if the rectification period expires, assessment notes can no longer be amended. This leads to new challenges for importing and exporting companies as well as customs brokers in connection with the whole settlement procedure and internal control processes. Considering the limited time remaining until the new practice will come into force, it is highly recommended to analyse current customs clearing processes and take necessary actions immediately.
Law against harmful tax practices in conjunction with the cession of rights and intellectual property (“IP”)

Royalty Restriction Act § 4j German Income Tax Act (ITA): On 27 April 2017, the German Federal Parliament adopted the Act against Harmful Tax Practices with regard to Licensing of Rights. The necessary approval by the Federal Council was granted on 2 June 2017. Thereby and as intended, the so-called royalty restriction rule will be implemented as of 2018. The royalty restriction will limit the deductibility of royalties in case those are taxed at a lower rate, or not at all. However, this only applies if the royalties and similar payments are made to related parties and if such payments are subject to a harmful preferential tax regime in the jurisdiction of the recipient, and therefore, effectively taxed at a rate below 25%. Exceptions are to be made for payments to OECD compliant IP-Boxes with significant business activities (nexus approach). As a substantial change adopted within the legislative procedure, direct reference is made to the OECD’s definition of the Nexus Approach – as it has been requested by many experts. Should foreign preferential regimes comply with this approach, the German restriction regarding the deduction of operating expenses for royalties will not apply.

Increase of the threshold on immediate depreciations for low-value assets (LVA): The same act also prescribes the increase of the LVA value threshold to 800 Euros. The LVA compound item (pool deduction) is only available for economic assets exceeding 250 Euros (currently 150 Euros), but otherwise remains unchanged.

Tax exemption on restructuring gains in § 3a ITA: With the same act and as a reaction to the decision by the German Federal Fiscal Court (FFC) to cancel the principles of a public letter ruling known as “Sanierungserlass” the German Government initiated the implementation of a new Section 3a ITA to exempt restructuring profits on a legal basis. However, the new legal regulation is still subject to state aid approval by the European Commission (EU Commission). Accompanying measures within the German Corporation Tax Act are regulating its use in cases pertaining tax groups and harmful acquisitions of participations. In a new § 7b German Trade Tax Act (TTA), the tax exemption of restructuring profits is legally standardized for trade tax purposes as well. The German Ministry of Finance also published a public letter ruling on 27 April 2017 on the application period for certain unclarified and open cases.

Federal Ministry of Finance takes a stance on the use of the name within a group

Both the German Tax Administration as well as the German Legislator are currently focusing on royalties. Their deductibility shall be limited, on the one hand, in relation to inbound cases by the royalty restriction and, on the other hand, the German Federal Ministry of Finance has commented on the use of the name within a group in its public letter ruling dated 7 April 2017.

It is oftentimes controversial, especially in so-called outbound cases, if a German parent company is required to claim royalties from its foreign subsidiary for the use of the name within the group, which would subsequently lead to a German tax base. The FFC had already decided last year that a “mere” use of the name without transfer of trademarks within the group, as subject of a shareholders’ agreement, did not constitute a business relationship between related parties. The transfer of such trademarks free of charge therefore does not justify the estimate of an adjustment according to the German Foreign Tax Act.

The German Federal Ministry of Finance elaborates that one can only speak of a “mere” use of the name without the transfer of trademarks if there is no economic advantage to be gained solely from the use of the name, for which the party issuing the rights would receive remuneration according to the arm’s length principle and for which the party using the rights would be willing to pay said remuneration.

If the use of such a name can be denied to an unrelated third party, the permission or sufferance of the use of the name constitutes the transfer of the use of an intangible value, so that, in principle, a royalty can be presumed.

Doubts about the add-back taxation for controlled-foreign-corporation income of a capital investment nature

The FFC has doubts about the compatibility of the add-back taxation for controlled-foreign-corporation income (“CFC-taxation”) of a capital investment nature in third country cases with the European Union law and calls on the European Court of Justice (ECJ) for clarification.

In the case at hand, a German Ltd held 30% of shares in a Swiss Ltd that receives profits from receivables that were subject to a (low) tax rate of less than 25%. The German Tax Administration recorded the Swiss Ltd’s profits as controlled-foreign-corporation income of a capital investment nature at the level of the German Ltd for German tax purposes.

The FFC, however, has doubts about the CFC taxation rules compatibility with the principle of freedom of movement of capital, which is protected under European Union law. Contrary
to participations in intermediate companies from EU/EEA-countries, taxpayers do not have the possibility of proving a factual economic activity relating to participations in third countries.

Given that under the CFC taxation rules income of a capital investment nature, a participation quota of 1% and under particular conditions of even less than 1% (portfolio participations) is sufficient, according to the FFC, in specific instances, the freedom of movement of capital is not superseded by the freedom of establishment, which would not be applicable in third country cases.

Initially, the ECJ has to clarify if the add-back taxation for controlled-foreign-corporation income of a capital investment nature in third country cases falls under the “inventory protection” of the so-called “standstill” clause of art. 57 section 1 EC (new art. 64 section 1 TFEU). Accordingly, restrictions of free movement of capital for direct investments in third states are permitted, provided these investments were already existing on 31 December 1993. Should the add-back taxation for controlled-foreign-corporation income of a capital investment nature fall under the standstill clause, as a previous rule, it would not be scrutinized against the free movement of capital according to art. 56 EC (new art. 63 TFEU).

Should the ECJ deny the application of the standstill clause, it would have to answer to FFC’s question, i.e. whether the case at hand constitutes a non-justifiable violation against the free movement of capital.

The Fiscal Court of Baden-Württemberg as well expressed some concerns about the add-back taxation’s compatibility with European Union law in a case where a Swiss Ltd performed services in the Swiss real estate market. In another procedure for reconsideration pending with the FFC, the add-back taxation is on trial regarding real estate earnings generated in Switzerland. For the time being, it remains to be seen how the ECJ will decide on the issues they were presented with. The answers provided by the ECJ will certainly be relevant to many cases concerning the add-back taxation relating to third countries.
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