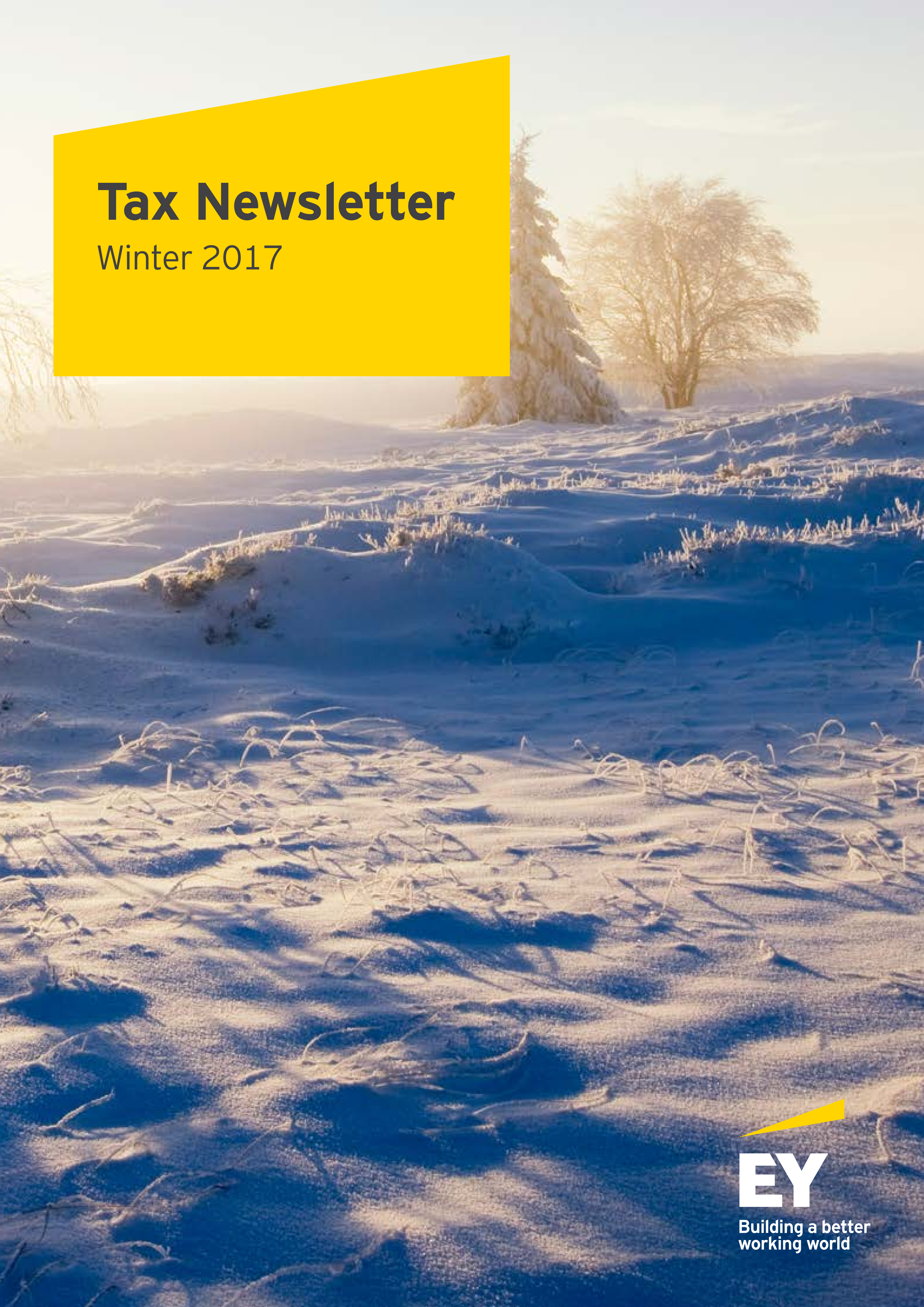
Tax Newsletter

Winter 2017



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Building a better working world

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Dear reader

On 1 December 2017, the Swiss Federal Council enacted the new federal law regarding the automatic exchange of Country-by-Country Reporting for multinational corporations. This brings about far-reaching changes in the Swiss tax landscape and poses new challenges for multinational corporations.

Not only the new transparency rules, but also VAT legislation contain a number of important changes.

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

In this edition

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Legislation on automatic exchange of Country-by-Country Reporting enters into force

In June 2017, the Swiss Parliament adopted a new federal law regarding the automatic exchange of Country-by-Country (CbC) Reporting (CbCR) for multinational corporations (the Law). The deadline for a referendum regarding the Law expired on 5 October 2017 and the Swiss Federal Council put the Law into force on 1 December 2017.

On 29 September 2017, the Swiss Federal Council enacted an ordinance in relation to the Law, providing more clarity and detail regarding the implementation of CbCR in Switzerland. This ordinance also entered into force on 1 December 2017.

Key elements of the Swiss CbCR regulations are:

- Mandatory CbCR applies for fiscal years (FYs) starting on or after 1 January 2018. The FY18 CbC reports will be exchanged with partner countries beginning in 2020.
- Voluntary filing is possible for Swiss Ultimate Parent Entities (UPEs) for FY16 and FY17.
- The content of Table 1 and Table 2 of the CbC report is consistent with the guidance of the Organisation for Economic Co-operation and Development (OECD) on Action 13 of the Base Erosion and Profit Shifting (BEPS) project.
- A consolidated minimum revenue threshold at group level of CHF 900 million before Swiss tax-resident entities are required to prepare and submit a CbC report. No periodic adjustments of the amount are foreseen to reflect FX variations.

Detailed discussion

The legal basis for the automatic exchange of CbC reports between tax authorities is the *Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA).* The Federal Council has published a list of partner countries with which it will automatically exchange CbC reports.

The Law stipulates the general framework for the automatic exchange of CbC reports of multinational corporations, whereas the ordinance contains detailed implementing provisions.

Important features of the ordinance are the minimum CHF 900 million consolidated revenue threshold at group level (this threshold applies to the FY directly prior to the FY in question) and confirmation that the Swiss CbCR requirements relating to Table 1 and 2 are in line with the OECD's BEPS Action 13 guidance, and likewise the option to include additional or explanatory information in order to enhance the understanding of the data included (Table 3).

Additionally, the ordinance permits the same optionality when preparing the CbC report as reflected in the OECD guidance, e.g. the use of local GAAP of the constituent entities or the GAAP for the consolidated group.

A request for suspension of the exchange of the CbC report with other tax administrations can be made. Such a request has to be communicated to the State Secretariat for International Financial Matters.

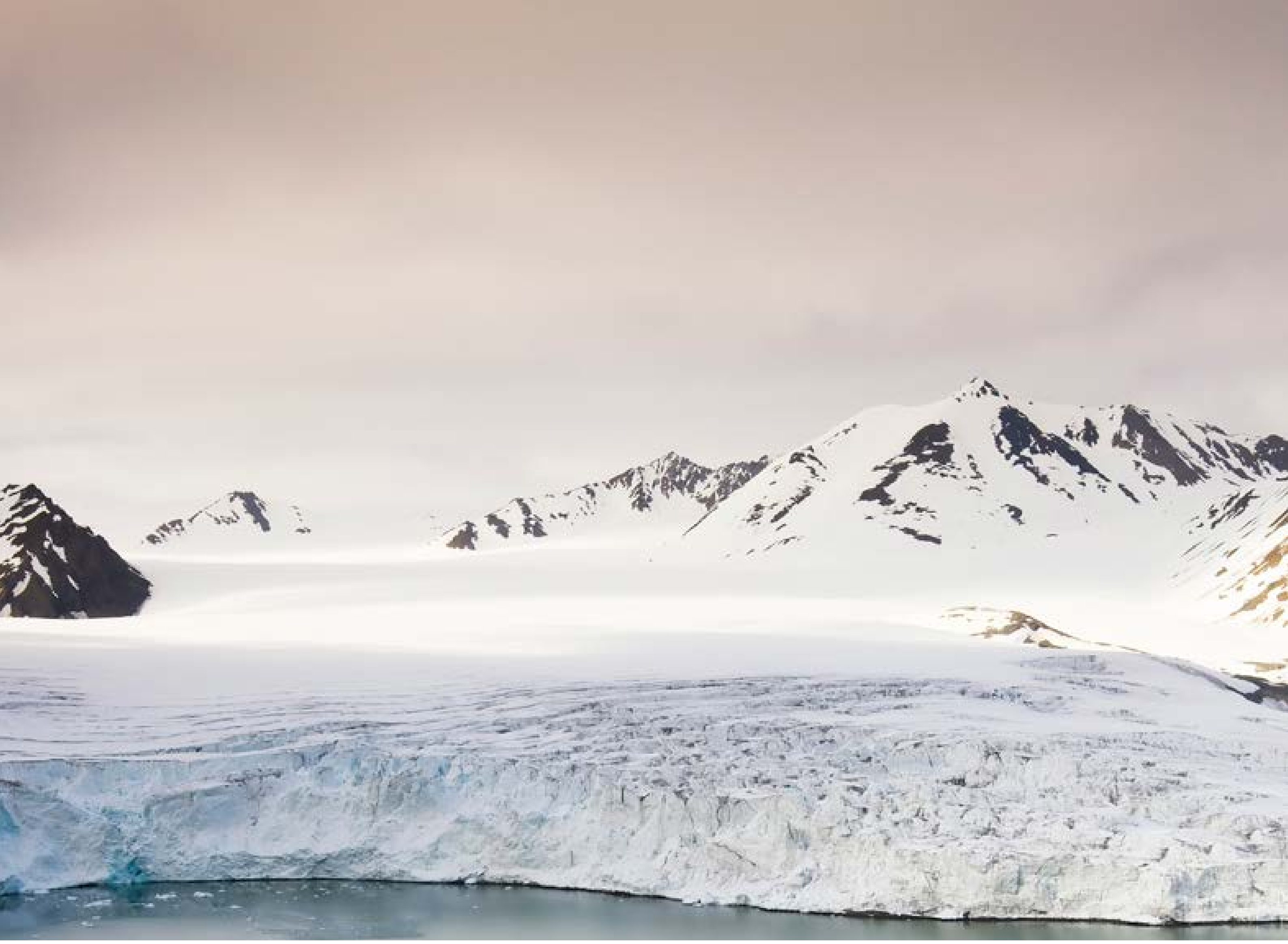
If a constituent entity situated in Switzerland is required to submit the CbC report as a result of the secondary filing obligations, it can elect for another Swiss constituent entity to file on its behalf. In this case, the entity has to notify the Swiss Federal Tax Authority (SFTA) as to which Swiss constituent entity will submit the report.

Further, the ordinance describes the exchange of CbC reports within Switzerland. The Swiss Cantons will provide to the SFTA a list of all constituent entities, including the respective identification number, within two months following the end of each calendar year. The SFTA, which receives CbC reports from foreign tax administrations, allocates these to the Canton according to the identification number. Ultimately, the Cantons can retrieve the relevant reports from the SFTA. This way, the SFTA makes the CbC reports available to the Canton in which the constituent entity is subject to taxation.

Voluntary filling

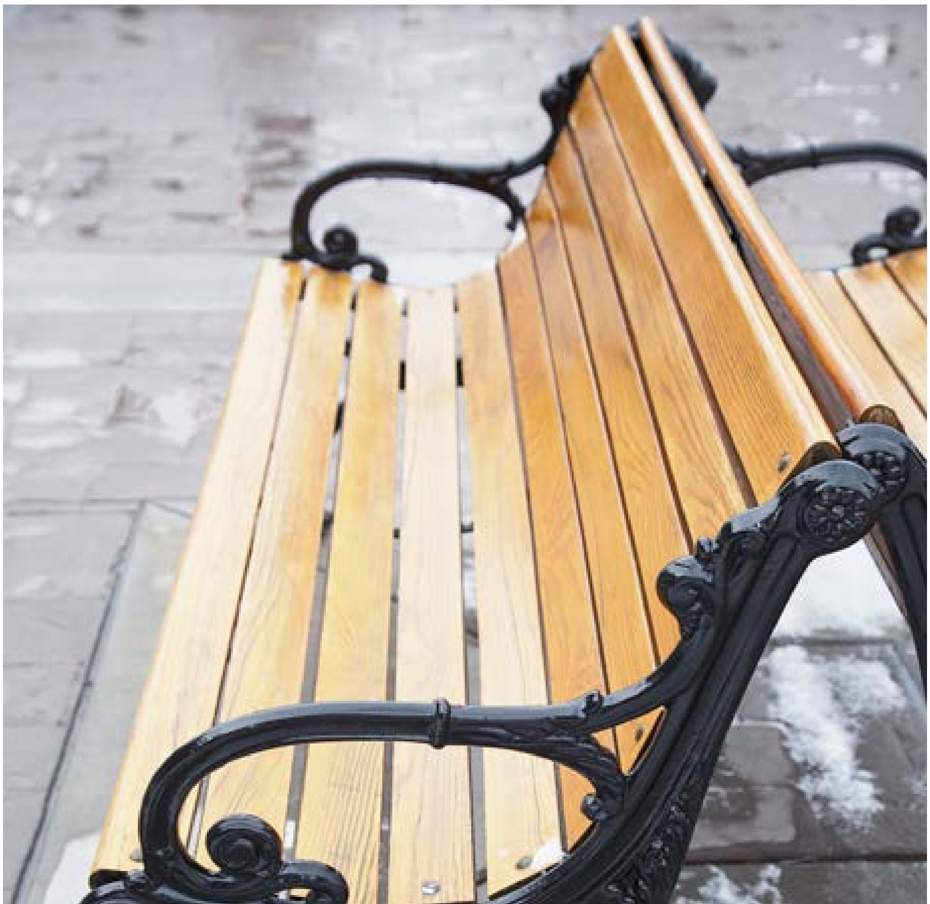
According to the Law, taxpayers in Switzerland are required to submit a CbC report for FYs beginning on or after 1 January 2018. However, Swiss UPEs may voluntarily submit a CbC report for FY2016 and FY2017. The SFTA will then automatically exchange these reports with the selected partner countries in order to avoid secondary filing obligations for constituent entities of Swiss multinational groups. The SFTA has issued guidance on how to submit a voluntary report.[1]

1 See https://www.estv.admin.ch/estv/de/home/internationales-steuerrecht/fachinformationen/cbcr/freiwillige-berichteinreichung.html.



Next steps

Swiss multinational groups that are subject to CbCR should consider voluntary filling of the CbC report in Switzerland for FY16 and FY17 in order to address potential secondary filing obligations of its foreign constituent entities. Furthermore, Swiss groups should review the list of countries with whom Switzerland will exchange CbC reports for FY16 and FY17 to identify countries for which a secondary filing would still be required.



For more details with regard to BEPS Action 13 and its challenge for medium-sized Swiss businesses see next article (starting page 5) from Andy Fross and Hubert Stadler.

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Implementation of transfer pricing documentation and Country-by-Country Reporting (BEPS Action 13) - a challenge for medium-sized Swiss businesses

While BEPS Action 13 applying minimum standards (i.e. Country-by-Country Reporting) and extending requirements to other aspects exceeding such minimum standards is rapidly adopted around the world, the implementation occurs inconsistently and with different effective dates. The low country-specific thresholds for the preparation of transfer pricing documentation and the therein required disclosure of tax rulings also impacts medium-sized Swiss businesses that are not affected by Country-by-Country Reporting.

Introduction

As a result of the comprehensive BEPS action plan, several measures were adopted in autumn 2015 on an OECD level in order to establish international tax fairness and to create increased transparency. The latter shall be achieved, amongst others, with the recommendations according to the final report on BEPS Action 13 (hereafter "Final Report").

The Final Report stipulates a standardized three-tiered documentation approach: a Country-by-Country Report (hereafter "CbCR"), a master file and a country-specific documentation (hereafter "local file") and recommends its implementation with effect 1 January 2016. The information contained in the different documents provides the tax authorities with a better overview of where the economic activities of the Group are carried out and in which countries the resulting profits are subject to taxation.

The greatest novelty in connection with the abovementioned Final Report is the automatic exchange of the CbCR. This was agreed as one of several so-called minimum standards of the BEPS-Project, which also Switzerland politically committed to implement. By contrast, the master and local files are not subject to automatic exchange, but are to be submitted locally to the relevant tax authorities either proactively or upon request.

Implementation of the minimum standard in Switzerland

The automatic exchange of information (as well as the spontaneous exchange and the exchange upon request) is included in the Convention on Mutual Administrative Assistance in Tax Matters (hereafter "MAC"), which entered into force in Switzerland on 1 January 2017. On this basis and in conjunction with the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (hereafter "CbC MCAA"), the CbCR is transmitted routinely and in predetermined intervals to authorized partner states.
The implementation, organization and regulation of the automatic exchange of CbCRs according to the CbC MCAA is substantiated by the Federal Act on the International Automatic Exchange of Country-by-Country Reports of Multinationals (hereafter "CbC Act").

During its meeting on 23 November 2016, the Federal Council adopted the dispatch on the CbC MCAA as well as the CbC Act required for its implementation to the Parliamentary Councils, who both provided their consent thereon on 16 June 2017. The referendum period for this submission lapsed unused on 5 October 2017, thereby prompting the Federal Council on 18 October 2017 to put the CbC Act into force as of 1 December 2017.

The enactment of the CbC MCAA shall follow in December 2017. As part of the enactment of the CbC MCAA, Switzerland has to disclose to the OECD the list of countries with which it will exchange CbCRs. The Federal Council has already adopted this list of countries (actually 100). The countries include signatory states of the CbC MCAA and all member states of the "Inclusive Framework on BEPS", whereby the final number will only be known at the time of the Swiss notification of the OECD in December 2017. It should be noted that the CbC MCAA between Switzerland and another state only becomes applicable once the other state has also included Switzerland on its respective list.

As a result, multinational businesses in Switzerland (upon reaching a consolidated turnover threshold of CHF 900 million) are required to submit a CbCR for the first time for fiscal year 2018. However, CbCRs for earlier fiscal periods (i.e. for 2016 and 2017) can be submitted voluntarily (starting from 1 November 2017 and within the deadline set by the OECD until the end of December 2017 respectively December 2018) for Swiss Ultimate Parent Entities ('UPE') to the Swiss Federal Tax Administration (hereafter "SFTA"). In order to ensure the application of the guaranteed conditions as contained in the CbC MCAA and the MAC (data protection, confidentiality and proper use), the Federal Council has issued an additional declaration on the MAC. Therewith, the MAC – limited to the exchange of voluntarily filed CbCRs – will become applicable for fiscal years 2016

and 2017 for the companies which fulfill relevant criteria. This way, the exchange of voluntarily submitted CbCRs can be carried out by the SFTA and coordinated by the State Secretariat for International Finance Matters (SIF) in a timely manner and in accordance with the guidelines of the OECD, i.e. latest by the end of June 2018 (for 2016) respectively by the end of March 2019 (for 2017). Therefore, transitional problems like the exchange of CbCR via a surrogate parent entity may be avoided. Irrespective of the voluntary submission of CbCR in Switzerland, additional local notifications should be considered, where required, wherein it is bindingly stated in which jurisdiction the CbCR will be submitted for the Group. Failure to provide local notifications may result in high penalties, depending on the country.

Implementation of the Final Report in other states

Beyond the aforementioned minimum standard (i.e. the compulsory submission of the CbCR), many states are also introducing the obligation to prepare a master and/or local file. The thresholds that oblige the preparation of a master file or a local file are not consistent in their amounts and can also be defined differently from state to state. Thus, some countries account for the local turnover (e.g. Austria: EUR 50 Mio.), others draw on consolidated group turnover (e.g. the Netherlands: EUR 50 Mio. / Australia: AUD 1 Mia.) or on metrics other than turnover (e.g. Germany: volume of business transactions).

In general, the standardized master file should provide an overview of the business activities of the multinational corporation. This also includes information on the nature of its global operations, its transfer pricing policy as well as the global distribution of its revenues and economic activity. Beyond that, the master file should contain a list and brief description of the multinational corporation's existing unilateral advance pricing agreements ("APA") and other tax rulings relating to the allocation of income among countries.

The local file complements the master file with detailed information regarding the significant intercompany cross-border transactions for each local entity. As opposed to the master file, the local file must include copies of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which relate to controlled transactions described in the local file.

The disclosure of tax rulings in the master and local file are not subject to a time limit, hence in our opinion, also those issued before 1 January 2010 can be exchanged — meaning those that do not fall within the scope of the spontaneous ruling exchange substantiated by the revised Tax Administrative Assistance Ordinance. Likewise, tax rulings for the calendar year 2016 may come to light earlier than expected because of the disclosure requirement, including those that are going to be revoked by the companies before the end of 2017. With reference to the five ruling categories, as elaborated by the Forum on Harmful Tax Practices, other categories — next to unilateral rulings with transfer pricing character — can be subject to an exchange, for example rulings concerning preferential taxation (e.g. principal, mixed company status) or permanent establishments, provided that a profit allocation between the states is the subject of the letter.

Effects on medium-sized businesses in Switzerland

Other than with CbCRs, from which approximately 85 to 90 percent of all multinational companies are exempted to submit due to the relatively high prescribed threshold, the non-standardized respectively inconsistent thresholds for master/local files may result in a filing duty in foreign jurisdictions. Especially for medium-sized businesses in Switzerland, it may prove difficult to keep track of the various country-specific regulations regarding the submission of the master/local file and the associated documentation requirements. A Swiss medium-sized company for example, which acts in Spain through a foreign subsidiary or a permanent establishment, is already liable to create a master and local file when it achieves a consolidated turnover of EUR 45 Mio. in Spain, whereas in Switzerland there is no obligation to prepare a transfer pricing documentation.

High fines implemented by the local legislative authority are not an infrequent measure to encourage taxpayers to comply with the duties of cooperation and documentation. In Australia, for example, this may lead to a penalty of AUD 105'000 or higher. It is therefore very important to keep a comprehensive and current overview about the criteria that can trigger a liability to file the documents in individual jurisdictions. The internal controlling system should therefore also focus on taking these triggering values into account to ensure that tax compliance can be guaranteed in a rapidly changing tax environment. Insufficient risk management presents the danger of high penalties or the arising of detrimental double taxations. Our tax experts at EY would be glad to support your company in the risk management with regard to the international documentation requirements in accordance with BEPS Action 13.

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Automatic Exchange of Information: registration of Swiss financial institutions

In Switzerland, the legal basis for the international Automatic Exchange of Information (AEOI) entered into force on 1 January 2017 and from 2018 the first exchange of data will start to take place with selected partner states. As a first step, Swiss financial institutions must identify their AEOI status and then register with the Swiss Federal Tax Authorities (SFTA) by the end of 2017. The registration is exclusively possible via the SFTA's web application SuisseTax.

Why register?

The Automatic Exchange of Information (AEOI) is an international standard developed by the Organisation for Economic Co-operation and Development (OECD) that governs how tax authorities in the participating countries exchange data relating to financial accounts of taxpayers. The underlying goal is to increase tax transparency and identify tax evasion on a timely basis. As a member country of the OECD, Switzerland agreed to implement the AEOI standard and transcribed it into national law that came into force on 1 January 2017. For this reason, Swiss resident financial institutions have started collecting information with respect to financial accounts held by foreign persons and will report such information to the Swiss Federal Tax administration (SFTA) from 1 January 2018. The SFTA will then exchange the information with the tax authorities in their AEOI partner countries. For this purpose, a reporting financial institution is obliged to register with the SFTA by the end of 2017, even if it does not have any reportable accounts (cf. Art. 13 of the AEOI Act and Art. 31 para. 1 of the AEOI Ordinance).

Who has to register?

A financial institution has to register with the SFTA if it qualifies as a "reporting Swiss financial institution". Broadly, the term refers to legal entities or similar legal arrangements which are resident in Switzerland for tax purposes and undertake financial services and asset management for or on behalf of a client. However, the term "financial institution" is to be broadly interpreted and does not only cover banks, brokers, asset managers and other typical financial intermediaries but may include life insurance companies, investment funds as well as many non-operative companies. Hence, an entity may be a financial institution if it falls within any, or more than one of the following categories:

i. Depository Institution;
ii. Custodial Institution;
iii. Investment Entity; or
iv. Specified Insurance Company.

If you do not register

The AEOI Act provides for a fine of up to CHF 250,000 for the failure to register under Art. 32 lit b of the AEOI Act. Therefore, we strongly recommend Swiss entities, as well as foreign entities with a Swiss branch, to perform an AEOI status assessment as soon as possible and to determine if registration is required by the end of 2017.

How to register?

Registration of a reporting Swiss financial institution must be submitted electronically on "SuisseTax". This is an online platform run by the SFTA that can also be used for reporting submissions. It is not possible to register via paper form or letter.

A first time user of SuisseTax is required to create a personal user account. For each company an authorization is required by an authorized signatory due to data protection laws. After you have electronically requested the respective form to grant a power of attorney (PoA), the SFTA sends the form directly to your registered office address according to the UID register (in the case of a foreign financial institution the PoA is sent to the domestic tax representative). The signed PoA must then be returned to the SFTA.

A financial institution that is already registered with SuisseTax needs to request a new PoA for AEOI purposes due to data security laws.

How EY can support you

As a first step, it is essential to determine whether your entity qualifies as a reporting Swiss financial institution with respect to the AEOI standard and whether you are obliged to register with the SFTA. In this regard EY can provide you with an in-depth analysis and perform the respective assessment. If your AEOI status as a reporting Swiss financial institution is identified, the next step will be to register with the SFTA. SuisseTax is designed that a financial institution can delegate its registration process to an external party and authorize a third party user. It is therefore possible for EY to complete the registration process with the SFTA on your behalf.

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Changes for communities under the partially revised VAT Act as of 1 January 2018

Partial revision of the Swiss Value Added Tax Act

On 30 September 2016, the National Council and the Council of States adopted the partial revision of the Value Added Tax Act (revVAT Act) in the final vote. In accordance with a decision by the Swiss Federal Council, the revVAT Act will enter into force by 1 January 2018. Additionally, on 18 October 2016, the Swiss Federal Council adopted the partially revised Value Added Tax Ordinance (revVAT Ordinance). Its amendments will enter into force together with the revVAT Act. One of the most prominent reforms in the revVAT Act concerns the determination of the turnover threshold for compulsory VAT liability, whereupon the crucial element for the justification of the tax obligation will explicitly be the worldwide generated turnover.

In addition to this new regulation on compulsory VAT liability, which has already received widespread attention, at least in Switzerland, the revVAT Act also bears extensive changes to the numerous organizational units of the Federation, the Cantons, the cities and the municipalities, as well as to their remaining institutions under public law. Their companies, institutions, foundations and associations will be affected as well.

Decisive turnover for a compulsory VAT liability of communities (article 12 section 3 revVAT Act)

According to the current VAT Act (article 12 section 3), a VAT subject of a community is compulsory liable to register for VAT purposes only if it cumulatively exceeds the turnover threshold per calendar year of (a) CHF 25'000 from taxable supplies rendered to non-communities and (b) CHF 100'000 from taxable supplies rendered to non-communities and other communities.

Pursuant to the revised VAT Act, the limit of CHF 25'000 to determine the compulsory VAT liability and thus the two-tier threshold approach, have been eliminated. The decisive factor for the compulsory VAT liability will be a turnover of at least CHF 100'000 from taxable supplies rendered to non-communities.

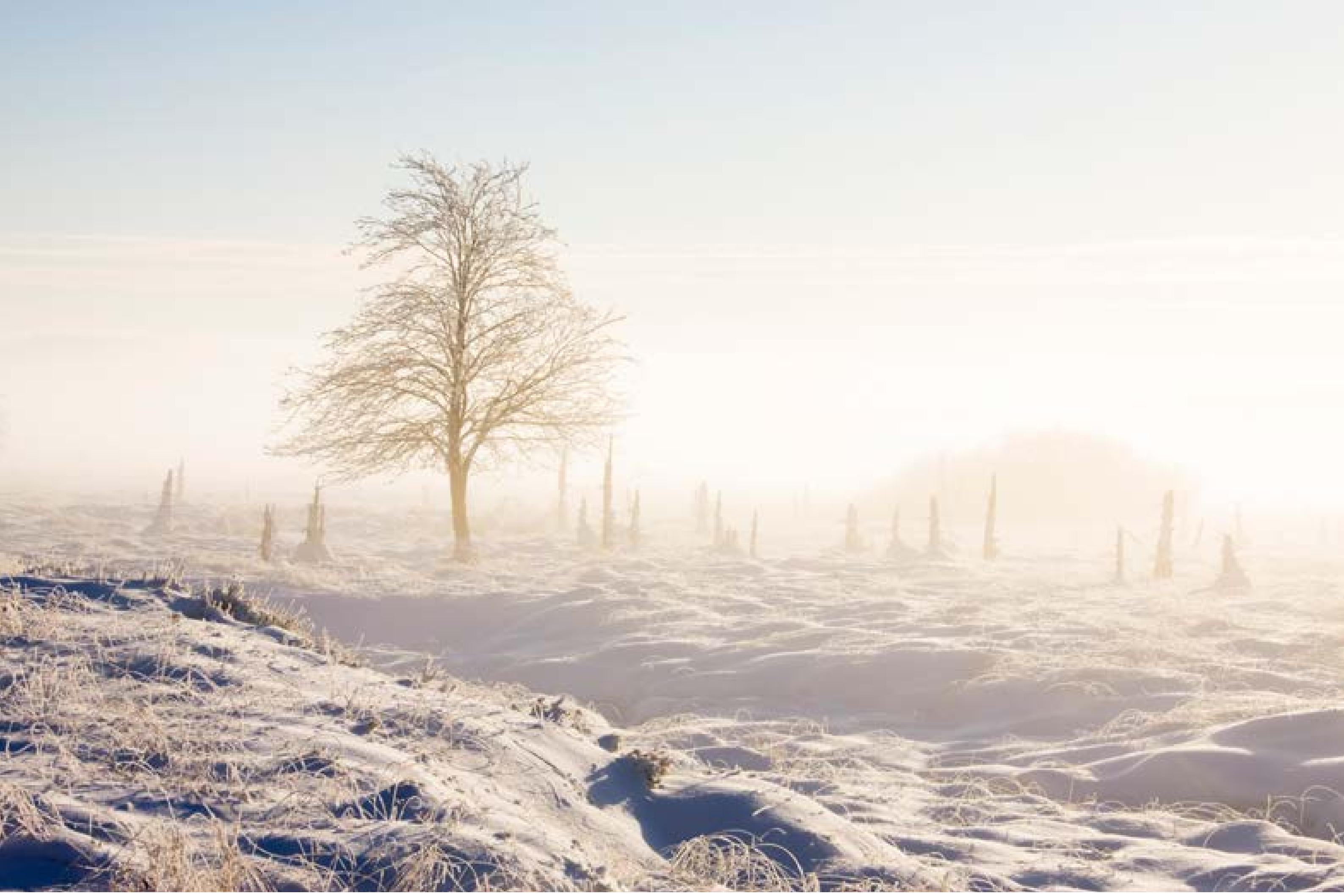
As a result, the new regulation simplifies the calculation of the compulsory VAT liability of a community respectively its individual departments. As before, the system for determining compulsory VAT liability only applies to communities, respectively their individual departments, and the remaining public law institutions (e.g. administration unions, public-law institutes and foundations with their own legal personality and, as a residual clause, unregistered partnerships; article 12 VAT Ordinance). Organizational units of the communities which were established under private law are still not regarded as institutions of public law and are therefore not covered by this provision (e.g. private limited companies). As before, they will even become liable to register for VAT purposes based on supplies they provide exclusively to communities, as long as the VAT exemption pursuant to article 21 section 2 clause 28 revVAT Act does not apply.

Revision of VAT exemption for communities (article 21 section 2 clause 28 revVAT Act)

Article 21 section 2 clause 28 of the current VAT Act states that supplies of goods and services rendered within the same community are exempt from VAT. In which cases the supplies are deemed as being provided within the same community is not regulated by the law itself, but rather by article 38 VAT Ordinance. According to this standard, foundations without legal personality, institutions or legal entities established under private law may also be considered organizational units of the same community, provided that they fully belong to this community, i.e. ownership of 100%.

In this context, article 21 section 2 clause 28 of the revVAT Act and article 38 of the revVAT Ordinance lead to a clarification and extension of the VAT exemption. The cooperation of different communities in the performance of common tasks by means of common organizational units should no longer be burdened by VAT, so long as it has led to a final cost share in the absence of a full deduction right of input VAT so far. Newly introduced as of 1 January 2018, supplies rendered between private and public companies (owned solely by the communities) and the communities which own them, as well as between institutions and foundations (established exclusively by the communities) and the founding communities will also qualify for VAT exemption. The community or one of its organizational units (from a VAT point of view these constitute the same community) can thereby be service providers or recipients. In addition, the VAT exemption also covers the supplies between these private and public companies, institutions and foundations ("subsidiary entities"), as long as the communities are the sole founding or owning parties, and their "sub-subsidiaries" as long as the sole founding or owning parties are the respective subsidiary entities. Supplies provided by such sub-subsidiaries to the communities or to one of their organizational units are also qualifying for VAT exemption.

The VAT exemption does not apply to supplies provided to independent communities or rendered between companies, institutions or foundations that are co-owned or co-founded by different communities. Only the hiring of services is newly exempt from VAT according to



article 21 section 2 clause 28bis revVAT Act, provided that it takes place between communities. Relevant case studies on the individual scenarios regarding VAT exemptions are currently being published by the Swiss Federal Tax Administration in the "Draft Practical Adjustments revVAT Act" for the VAT-industry-leaflet 19 communities (so called "MWST-Branchen-Info 19 Gemeinwesen" resp. "MBI-19 Gemeinwesen").

The provision of VAT exempt supplies (or even a de-registration from an existing VAT liability) has an impact on the input VAT deduction right. Moreover, the individual situation regarding the application of potential VAT exemptions can be quite complex. We therefore recommend in any case to examine the consequences in due time and — depending on the structure of the entire service chain — to consider the possibility of an option for taxation.

Revision of the option for taxation in the area of communities (article 22 section 1 revVAT Act)

An option for the voluntary taxation of VAT exempt supplies pursuant to article 22 section 1 revVAT Act is still possible, subject to the provisions of section 2, by way of charging VAT on the invoices issued to customers. What is new, however, is the explicit regulation in the revVAT Act according to which an option for taxation will be accepted even by a mere declaration of the relevant revenue as opted turnover in the VAT return. This as long as the finalization period for the relevant tax period has not yet expired. On one hand, this revision can be understood as a formal facilitation for exercising the option. On the other hand, it is still only the open charge of VAT on invoices by the supplier to the customer that leads to the latter being entitled to deduct input VAT within the limitation of the individual recovery rate. Simplified example:

The VAT registered ARA AG (A AG) is 100% owned by the VAT registered municipalities G and Z. A AG bills its sewage cleaning service to the municipalities G and Z, which in return bill these costs at the standard VAT rate to the customers in the respective municipality. The VAT-burdened costs of A AG — so far generally with an input VAT deduction right — can be considered substantial.

If A AG does not voluntarily opt for taxation in relation to the services rendered to the municipalities G and Z, this will have a negative effect on the sewage fees for the residents and businesses as customers in the municipalities G and Z. Because A AG will bear all of the accrued and thus non-deductible input VAT (and input VAT corrections) as final costs and will carry out a (performance-related) transfer of these costs to the communities G and Z, which will at their end subsequently increase the standard taxable sewage fees charged to the customers. This increase of costs can be countered by A AG by way of voluntarily taxation of this service in the future and thus enabling the communities G and Z to deduct input VAT.

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Radio and television duties: linked to the (global) VAT relevant turnover

In order to finance the public service of radio and television, duties are raised for each operational reception device. It is also due to the expansion of the reception of radio and television programs on devices, which were not covered by the previous version of the Federal Act On Radio And Television (RTVA), that the RTVA had to be amended. The revised RTVA was ratified in the national referendum of 14 June 2015 and is in force since 1 July 2016. One of the most relevant amendments is that the duties are no longer raised per device, but by individual household or company. However, this amendment has not entered into force yet. The Federal Council is obliged to determine the point of time for the introduction of the new duty system.[1]

Radio and television duties for entrepreneurial entities

Since the revision of the RTVA, companies are required to pay duties to Billag depending on the number of devices they operate in Switzerland (the charge per business premise was dropped and a threshold of CHF 500'000 was established). This billing method will be continued until the new duty system is introduced. According to the current system, companies pay approx. CHF 600 for each device that is able to receive radio and television programs.[2]

After the implementation of the new system – the implementation is currently set out for the beginning of 2019 – the duties will be determined based on turnover. Currently, the following duties can be expected:[3]

Annual turnover in CHF	Yearly duties in CHF
< CHF 500‘000	CHF 0
CHF 500‘000 – 999‘999	CHF 365
CHF 1‘000‘000 – 4‘999‘999	CHF 910
CHF 5‘000‘000 – 19‘999‘999	CHF 2‘280
CHF 20‘000‘000 – 99‘999‘999	CHF 5‘750
CHF 100‘000‘000 – 999‘999‘999	CHF 14‘240
> CHF 999‘999‘999	CHF 35‘590

Collection of radio and television duty

The alteration in the system assigns the task of collecting radio and television duties to the Swiss Federal Tax Administration (SFTA).[4] The SFTA determines the amount of the duty on an annual basis[5] and charges entrepreneurs accordingly. In this context, businesses are considered an entrepreneur if they have been entered in the Swiss VAT register. The turnover relevant for the calculation is equivalent to the achieved turnover in the previous tax period (= calendar year) according to Art. 34 Federal Act On Value Added Tax (VAT Act). Thereby, the qualification of the turnover is not relevant, the total turnover according to box 200 minus reduction of consideration according to box 235 on the VAT return form is decisive.[6]

Foreign entrepreneurs not domiciled in Switzerland

According to information granted by the Federal Office of Communications (OFCOM), the new system will also be applied to foreign entrepreneurs that are registered in Switzerland for VAT purposes but are not established in Switzerland. Due to the parallel revision of the VAT Act, according to which the registration obligation for companies is determined by their global turnover (which has to be declared in box 200 based on the current status of the discussion), entrepreneurs also have to pay radio and television duties in accordance with their global turnover in this constellation. This can cause a foreign entrepreneur to be charged with the maximum amount of radio and television duties (CHF 35'590) – because their global turnover exceeds one billion CHF – although the respective entrepreneur itself only achieved little taxable turnover in Switzerland. In case a foreign company owns a business premise in Switzerland, only the turnover that was achieved by this business premise is relevant for the calculation. According to its own statement, the OFCOM is in the process of analysing the implementation together with the SFTA.

1 Art. 109b par. 1 RTVA.
2 For industrial use (only for employees). For commercial reception (also for third parties) a degraded system that is based on the number of devices is be applied.
3 https://www.bakom.admin.ch/bakom/de/home/elektronische-medien/empfangsgebuehren/gebuehrensystem-und-dessen-anpassungen/das-kuenftige-abgabesystem.html.
4 Art. 70a par. 1 RTVA.
5 Art. 70a par. 2 RTVA.
6 Raffaello Pietropaolo, Head Main Department VAT, within the seminary of St Gallen on 14/15 February 2017.

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European Commission proposes far-reaching reform of the EU VAT system – consequences for Swiss businesses?

On 4 October 2017, the European Commission published proposals for what is described as the largest reform of EU VAT in 25 years. Below, we provide a high level overview of the proposals and the consequences for businesses in Switzerland. A definitive VAT system for the EU has been a long-standing commitment of the Commission. Recently, the Commission's VAT Action Plan outlined the need to arrive at an EU single European VAT area in further detail.

The Commission is proposing a series of fundamental principles or "cornerstones" and key reforms for the EU's VAT area. The EU's priority is to render the VAT system more robust, simpler and fraud resilient. In particular, the Commission is seeking agreement on:

- **Tackling VAT fraud:**
  VAT would be charged on cross-border trade between businesses. Currently, this type of trade is exempt or subject to reverse charged VAT. For further information, see the definitive VAT system below.
- **One Stop Shop:**
  VAT obligations for companies that sell cross-border will be simplified. "One Stop Shop" is a concept already used in cross border trade.
- **Greater consistency:**
  A shift to the 'destination' principle where the final amount of VAT is paid to the final consumer's Member State at the rate applicable in that Member State.
- **Less red tape:**
  A significant simplification of invoicing rules which would allow sellers to issue invoices in compliance with their local rules, even when the underlying supply is cross border.

The proposal also introduces the notion of a "Certified Taxable Person" – a category of trusted businesses who will benefit from simplified and time-saving rules. This is a new concept to facilitate trade and make life easier for companies operating cross-border in the EU. Provided that companies meet a set of criteria, they will be able to obtain a certificate allowing them to be considered a reliable VAT taxpayer throughout the EU. Once certified, both they and the companies that do business with them will enjoy a number of simplified procedures for the declaration and payment of cross-border VAT. The status of Certified Taxable Person will be mutually recognized by all EU Member States.

The Definitive VAT regime

Based on the proposal, VAT will be charged on cross-border sales at the rate applicable in the country of destination. The supplier would thus have to register for and charge VAT in the country where the goods or services are ultimately consumed. For example, a French manufacturer selling goods to a Polish distributor would have to charge 23% Polish VAT. Initially, it is intended that the definitive VAT system will apply only to supplies of goods. Furthermore, the option to report VAT under the reverse charge mechanism on cross-border supplies of goods within the EU will remain for Certified Taxable Persons. It is as of yet unclear whether this option will remain indefinitely or only for a limited period of time.

One Stop Shop

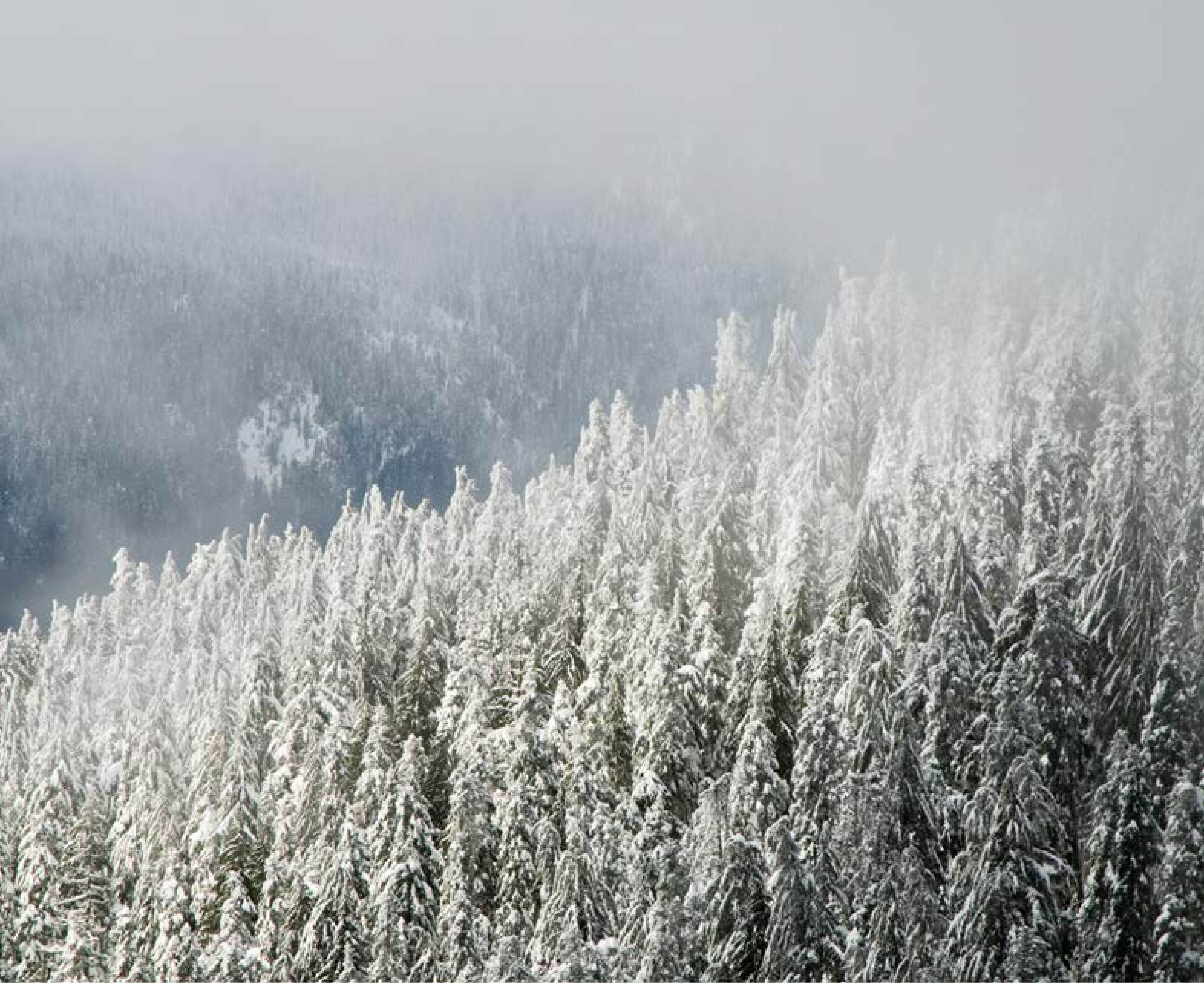
In order to reduce the wide range of requirements for the numerous EU VAT registrations, businesses will be able to make declarations, payments and deductions of VAT for cross-border supplies of goods through a single online portal, as is already the case for the supply of e-services. The online portal would allow VAT to be collected by the country where the sale is made and transferred to the country where the goods are consumed.

Short Term "Quick Fixes"

In addition to the proposals around the definitive regime, the Commission has proposed a number of short-term measures to improve the VAT system until the definitive regime has been fully agreed and implemented.

These quick fixes address a number of issues explicitly requested by businesses and Member States:

- Simplification of VAT rules for companies in one Member State storing goods in another Member State to be sold directly to customers there (call-off stock). The simplification, which will be limited to Certified Taxable Persons, will remove the need to register and pay VAT in another Member State when goods are stored there in a consignment stock.
- Improved legal certainty of the VAT treatment of chain supplies – Based on the proposal, rules determining which supply in a chain transaction should be viewed as the cross-border supply are laid out. While the rules offer some simplification measures, these will only be available to Certified Taxable Persons.
- New harmonized and uniform rules making it easier for traders to prove that goods have been transported from one EU country to another. This simplification is limited to Certified Taxable Persons.



- Clarification that, in addition to proof of transport, the VAT number of the commercial partners recorded in the electronic EU VAT-number verification system (VIES) is required for the cross-border VAT exemption to be applied under the current rules.

Next Steps

The proposal will be forwarded to the European Parliament for consultation and to the Council of Ministers for their agreement. It will require unanimous agreement from all Member States in the Council before it can enter into force.

A second directive overhauling the entire VAT Directive will be proposed, entailing the implementation of the aforementioned cornerstones and the replacement or cancellation of current transitional articles. Further changes regarding the administrative cooperation rules and substantial IT developments will be necessary in order to ensure the proper operation of the system. The adoption of this second proposal is currently scheduled for 2018 and the definitive regime should enter into force in 2022.

Consequences for Swiss businesses

One of the key elements of the proposed changes is the introduction of the concept of a Certified Taxable Person. Based on the current proposal, the certification will be available to entities established in the EU, suggesting that only entities with at least a branch or a fixed establishment in the EU would be able to benefit from the certification. For entities that are not able to benefit from the simplifications available to Certified Taxable Persons, the new regime will most likely result in multiple VAT registrations and an increased administrative burden. It is unclear at this stage whether the requirement of having an establishment in the EU will remain in the final wording of the stipulations and whether any exceptions would be granted to businesses established in the EEA or the single market.

As mentioned, the introduction of the general destination principle for services is foreseen at a later stage (presumably also in the B2C area). This would be a change with an immense impact on Swiss businesses, however as no details around the timeline or the exact provisions are at hand, no immediate action is currently necessary in this respect.

However, for Swiss businesses with already existing EU VAT registrations, the following questions, among others, will need to be addressed:

1. If several registrations exist, under which registration will supplies be made in the future?
2. Will an existing registration impair an entity's option to make use of the "One Stop Shop" (as is currently the case with the "Mini One Stop Shop")?

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Current developments in German tax law

German Federal Ministry of Finance issued a public letter ruling regarding §50a ITA — restricted tax liability and witholding taxes in case of cross-border software and data base use

When assessing cross-border software licensing or cloud services, there is often confusion in practice. In particular, this concerns the question of whether the payments for software, cloud services and database usage involve German withholding tax. The German Federal Ministry of Finance (FMF) has now issued a public letter ruling addressing the question of whether a German (withholding) taxing right exists on cross-border payments for software, cloud or database use.

According to the point of view that the FMF set out in the public letter ruling of 27 October 2017 (published on 2 November 2017), income pursuant to § 49 (1) no. 2 lit. f or no. 6 German Income Tax Act (ITA), and thus a deduction obligation on withholding tax (§ 50a (1) no. 3 ITA) only apply to the domestic paying company if the software user is granted extensive rights to exploit the software/database that go beyond those rights that are typically granted for the intended use of the software/database (rights of reproduction, processing, distribution and publication) for further commercial use.

According to the FMF, this is not yet the case if the functionality and only the intended use of the software is the focus of a contract. This assessment should take place regardless of whether it involves standard software or custom-made software. However, the FMF assumes that as a rule for standard software, the functional use is agreed and not the concession of further exploitation rights.

The FMF also comments on the cross-border use of data bases. Income pursuant to § 49 (1) no. 2 lit. f or no. 6 ITA does not exist if only rights are granted that are necessary for the access to and use of elements of the data base (access rights, reading and printing functions).

Global Tax Alert
http://www.ey.com/gl/en/services/tax/international-tax/alert--germany-issues-draft-guidance-on-classification-of-cross-border-software-and-database-use-payments-for-withholding-tax-purposes

Law against tax evasion

Barely fifteen months following the publication of the Panama Papers, the FMF has decided to tighten the reigns. Business relations with "domiciliary companies" (also known as letterbox companies) should in future be comprehensively declared to the FMF. In addition, the new law contains minor revisions to the income and inheritance tax law as an adjustment to current case law issued by the European Court of Justice (EJC).

The new Act on Tax Evasion (announced in the Federal Law Gazette, BGBl of 24 June 2017) aims to create transparency about "dominant" business relations between domestic taxpayers and so-called domiciliary companies outside of the EU and EFTA. For this purpose, new transparency obligations and sanctions are intended in the General Tax Code, such as:

- Stricter reporting obligation on the acquisition and disposal of qualified holdings in foreign corporations. The reporting threshold is uniformly set at 10% (indirect participations must be calculated).
- Mandatory disclosure of business relations with directly or indirectly controlled partnerships, corporations, associations of persons or assets in third countries. Failure to comply is threatened with an initial inhibition of the taxation period as well as a fine of up to EUR 25'000.
- Notification requirement of the financial institutions to the tax authorities on business relations of local taxpayers to third state companies established or brokered by them. Otherwise, the financial should be liable for any tax losses caused and can be punished with a fine of up to EUR 25'000.
- Abolition of the so-called tax banking secrecy.

The Act also includes adjustments to income tax and inheritance tax legislation to transpose a number of ECJ rulings to national law. This concerns the tax deduction for special precaution expenses as well as inheritance tax-exempt amounts for limited taxpayers.

Current German Federal Fiscal Court decision on exit taxation

Participation-based consideration for exit taxation

The so-called "exit taxation" of § 6 FTA provides that if the German domicile is relinquished and thus the limited tax liability ceases, the hidden reserves in privately held shares of capital stock will be subject to a final taxation. According to the German Federal Fiscal Court (FFC), the exit taxation of § 6 FTA is only applicable to an increase in assets. Whether there is an increase in assets is to be determined separately for each investment. Exit taxation can thus not be reduced by offsetting notional capital gains with notional capital losses.

In this specific instance, the taxpayer was significantly invested in several stock corporations. Upon his departure (2009, emigration to Austria), some investments experienced an increase of value compared to the respective acquisition, while others decreased in value.

Within the framework of exit taxation according to § 6 FTA, the taxpayer claimed to offset the notional capital gains with notional capital losses. However, the FFC declined.

In the FFC's opinion (decision of 26 April 2017), exit taxation of § 6 FTA only takes

effect in case of capital increase. The provision only refers to § 17 FTA (notional sale) in cases where the common value of the shares exceeded the acquisition costs at the time of the decisive date for taxation. According to the FFC, the question of whether capital has increased must be based on the individual share (share-based consideration). Thereby, the notional losses from depreciated assets remained unconsidered for the determination of expatriation tax. A balanced offset of the recognized notional gains from the value increases shares with the value decreases of the depreciated shares was not possible according to the share-based analysis by the FFC.

Index of transparency — Considerable fines for violation of reporting obligation

On 26 June 2017, a new law on money laundering entered into force, which may also have tax implications. Thus, the term of the "beneficial owner" was redefined, a concept which has recently gained more and more inclusion into tax law (e.g. in the framework of FACTA and the OECD Common Reporting Standard). In addition, almost all legal entities of private law, commercial partnerships, trusts and legal entities, whose structure and function are similar to trusts, must notify their beneficial owner to the newly created transparency register as early as 1 October 2017 and to report any changes immediately. Failure to comply or even repeated failure to comply with these duties bears the risk of substantial fines, that can amount to well over EUR 1 million, based on a multi-level system.

From now on, all economic beneficiaries will be entered in a central electronic transparency register in the Federal Gazette. This information can be accessed by supervisory, criminal prosecution and taxation authorities in particular, but also by obligated parties according to the Money Laundering Act (e.g. banks, financial service providers, lawyers, tax consultants, auditors) and by persons with a legitimate interest (e.g. specialist journalists, non-governmental organizations). Access to the transparency register will be granted from 27 December 2017. Control circumstances such as trusteeships, voting rights and similar arrangements that have remained unknown so far, especially with regard to family businesses, will then become transparent to authorized persons.