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**Recent decisions on Swiss tax rulings regarding permanent establishments**

The Swiss Federal Supreme Court (SFSC) recently decided on two cases covering the implications of tax rulings with respect to foreign permanent establishments.

In both cases, the permanent establishments of the Swiss companies were located in offshore locations (Cayman Island and Guernsey).

**The Case (Zug)**

A Swiss company had a permanent establishment located in the Cayman Islands. In a tax ruling dated August 1999, the Cantonal Tax Administration (CTA) of Zug accepted the Cayman finance branch as permanent establishment and confirmed the exemption from Swiss tax of the profits attributable to the permanent establishment. In February 2005, the CTA informed the taxpayer on behalf of the Federal Tax Administration (FTA) that this tax ruling will no longer be accepted for direct federal tax purposes as of 2005.

Accordingly, the CTA allocated the whole profit to Switzerland for the periods 2005 and 2006. The Swiss company appealed against this assessment, but the SFSC confirmed on 5 October, 2012 that the Cayman Island branch could not qualify as a permanent establishment due to insufficient substance.

The SFSC referred the question



whether the taxpayer may invoke the protection of legitimate expectation based on the 1999 tax ruling back to the lower court and had to deal with this question in its decision of 24 August, 2015 (2C\_807/2014).

The SFSC affirmed the protection of legitimate expectation due to the binding ruling issued in 1999 by the competent CTA. However, the SFSC concluded that when the CTA informed the taxpayer that the ruling will no longer be accepted in February 2005, the taxpayer could no longer rely on the protection of legitimate expectation.

The SFSC further explained that a transition period following the revocation of the ruling should be granted that the taxpayer can adapt its business structure to the new situation in compliance with legal and contractual constraints. As the structure of the branch could be regarded as rather “lean”, the SFSC decided that a transitional period for the full tax year 2005 is sufficient in this specific case.

The binding effect of the tax ruling regarding the qualification of a permanent establishment was not questioned. Thus, the pure “different” qualification of a fact pattern by the tax administration in a ruling compared to the court does generally not impact the binding effect of such tax ruling.

**The Case (Geneva)**

This was different in the SFSC’s recent decision dated 30 September, 2015 (2C\_123/2014). A Swiss couple planned to establish a limited partnership in Guernsey. On September 12, 2002 they requested a tax ruling from the CTA of Geneva regarding the qualification of the Guernsey partnership as permanent establishment and the profit allocation.

The CTA accepted the ruling, but only under certain conditions: In particular, the taxpayers have to demonstrate the efficiency and the operational character of the infrastructure and the portfolio management functions by the Guernsey partnership at any time. Furthermore, each partner has

either to work at least 30 days at the business place in Guernsey or has to travel at least ten times each year to Guernsey for business purposes. The ruling provides that if these (and further) conditions will be met, the capital and the profit of the Guernsey partnership will be tax exempt in Switzerland.

On 18 December, 2008 the CTA of Geneva “revoked” the ruling with immediate effect as the business in Guernsey could not be regarded as a permanent establishment. Hence, the CTA attributed the capital and the profit of the Guernsey partnership to the Swiss resident partners (starting 2003).

The SFSC rejected the complaint of the taxpayers. The SFSC stated that the taxpayers cannot invoke the protection of the legitimate expectation as they had established the partnership structure already before the CTA accepted the ruling request in 2004. According to the SFSC, the ruling has – in fact – never taken effect since the taxpayers have never respected its conditions. The complaint of the violation of the protection of the legitimate expectation was without merit and rejected.

Thus, the tax ruling did not have a binding effect here from the outset, because two requirements to rely on it in good faith were not given: firstly, dispositions (here: set-up of partnership) were taken before the formal issuance of the ruling and secondly, the facts and conditions stated in the ruling were not complied with.