

# Transfer Pricing 2022

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# Transfer Pricing 2022

**Contributing editors****Wendy Abkin, Barton WS Bassett, Sanford W Stark  
and Drew A Cummings****Morgan, Lewis & Bockius LLP**

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Transfer Pricing*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Luxembourg and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Wendy Abkin, Barton WS Bassett, Sanford W Stark and Drew A Cummings of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



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# Switzerland

Raoul Stocker, Susanne Schreiber and Patrick Schmid

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## OVERVIEW

### Principal legislation

1 | Identify the principal transfer pricing legislation.

Switzerland is a federal state with 26 cantons. The legislative and administrative powers regarding taxation are distributed between federal and cantonal parliaments and tax administrations. While the cantonal tax administrations are competent with regard to corporate income taxes (including the tax assessment of federal corporate income tax), the Swiss Federal Tax Administration (SFTA) is the competent authority with regard to withholding taxes, stamp duty and value added tax.

### Primary legislation

Swiss tax law includes no general, explicit definition of 'related parties' or the arm's-length principle and its application to related-party transactions.

### Corporate income tax

With regard to corporate income tax, according to case law and administrative practice, articles 58, 60, 61a and 61b of the Federal Direct Tax Act (FDTA) and articles 24(1), 24c and 24d of the Federal Tax Harmonisation Act (FTHA) form the legal basis for the application of the arm's-length principle.

### Constructive dividends and hidden capital contribution

Profits realised owing to inadequate transfer prices by a shareholder or related entity may be qualified as constructive dividends and, pursuant to article 4(1)(b) of the Federal Withholding Tax Act (FWTA), lead to withholding tax consequences. Conversely, pursuant to article 5(2)(a) of the Federal Act on Stamp Duty (FSDA), transfer prices to the inadequate benefit of a direct subsidiary of a parent company may be classified as hidden capital contribution and, therefore, result in stamp duty consequences. A hidden capital contribution can also have adverse income tax consequences (adjustment of taxable income) at the level of the Swiss shareholder.

### Value added tax

Regarding value added tax (VAT), article 24(2) of the Federal VAT Act (FVATA) defines the principle of dealing at arm's length and article 3(h) of the FVATA defines the term 'related parties' for value added tax purposes.

### Secondary legislation

Switzerland has agreed to apply the OECD Transfer Pricing Guidelines. As Swiss tax law provides no country-specific transfer pricing legislation, the SFTA instructed the cantonal tax administrations to apply the guidelines directly via a circular letter published in 2004. Therefore, Switzerland relies on the OECD Transfer Pricing Guidelines directly

for the definition of the arm's-length principle and the determination of arm's-length prices.

In addition, the SFTA has published a number of administrative directives addressing a few specific topics, including safe harbour rules with regard to thin capitalisation and safe harbour interest rates.

To date, the local cantonal tax administrations have issued no directives on transfer pricing.

### Enforcement agency

2 | Which central government agency has primary responsibility for enforcing the transfer pricing rules?

Switzerland is a federal state with different competencies with regard to taxation on different levels. Consequently, there is no specific central government body regulating transfer pricing in Switzerland. While the cantonal tax administrations are competent for corporate and individual income tax matters, the SFTA has the competencies for withholding tax, value added tax and stamp duty matters. The conclusions of the SFTA and the competent cantonal tax administrations may, thus, diverge.

With regard to the federal income tax, the SFTA, in addition, has a supervisory function over the cantonal tax administrations' assessments of federal income tax. In this context, the SFTA issues administrative directives with regard to federal income taxes (eg, the circular on the safe haven rules in connection with thin capitalisation). Often the respective cantons base their decisions concerning cantonal taxes on the SFTA's directives, even though they are not legally bound to do so.

The State Secretariat for International Finance is the competent authority with regard to bilateral and multilateral advance pricing agreements, as well as mutual agreement procedures between Switzerland and other countries.

### OECD guidelines

3 | What is the role of the OECD Transfer Pricing Guidelines?

Switzerland has agreed to apply the OECD Transfer Pricing Guidelines (TPG) but has not implemented them into domestic law. Therefore, the competent tax administrations generally apply the Guidelines directly. However, since the Guidelines have not been implemented in domestic law, the Swiss tax administrations are not legally bound to apply them.

### Covered transactions

4 | To what types of transactions do the transfer pricing rules apply?

The law on direct taxes includes no definition of related or associated parties. Consequently, the Federal Supreme Court has defined the term in case law as entities with close commercial or personal relationships. In line with this definition, it is decisive whether the transaction in question was conducted under the given conditions because of a relationship

between the parties involved or whether the transaction could also have taken place between independent parties. Thus, from a tax law perspective, the direct or indirect control of management or capital of one involved party over the others is not required for the assumption of an inadequate related-party transaction; any close relationship between the parties involved in the transaction suffices.

### Arm's-length principle

5 | Do the relevant transfer pricing rules adhere to the arm's-length principle?

Yes, with the following exceptions:

- where a formulary apportionment method is allowed by double taxation treaty based on the OECD model preceding 2010. Formulary apportionment is considered non-arm's length by the OECD;
- Swiss thin capitalisation rules; and
- Swiss safe haven interest rules.

### Base erosion and profit shifting

6 | How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

In principle, the new TPG is immediately applicable in Switzerland. However, although Switzerland has agreed to apply the TPG, it has not implemented the Guidelines into domestic law. Therefore, the competent tax administrations generally apply the TPG directly. However, since the Guidelines have not been implemented in domestic law, the Swiss tax administrations are not legally bound to apply them.

## PRICING METHODS

### Accepted methods

7 | What transfer pricing methods are acceptable? What are the pros and cons of each method?

All usual methods are acceptable.

### Cost-sharing

8 | Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

Yes. Switzerland follows the position of the OECD in this regard.

### Best method

9 | What are the rules for selecting a transfer pricing method?

Neither Swiss tax law nor case law or practice defines a hierarchy of methods. Instead, the most appropriate method should be used.

### Taxpayer-initiated adjustments

10 | Can a taxpayer make transfer pricing adjustments?

Swiss tax law differs between changes to the accounts owing to non-compliance with the commercial law and changes that are not required from a commercial law perspective. Changes to the accounts that are not required for commercial law compliance reasons are generally possible until the tax declaration of the respective tax year is filed. Changes required for the annual reports to be compliant with the commercial law, however, can and must be made even after the tax return is filed.

### Safe harbours

11 | Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

The Swiss Federal Tax Administration has defined safe haven rules with regard to interest payments on loans between related parties and with regard to thin capitalisation.

## DISCLOSURES AND DOCUMENTATION

### Documentation

12 | Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits?

Swiss tax laws and the tax authorities generally do not require the submission of transfer pricing documentation. However, Swiss tax laws do require the preparation of documents that allow reconciliation of filed tax returns (ie, documentation that supports the applied transfer pricing and the remuneration of the Swiss taxpayer). In addition, Swiss competent tax administrations may question the compliance of transactions with the arm's-length principle (eg, in a tax audit).

To substantiate compliance with the arm's-length principle of a transaction questioned by the tax administration, it is useful to have contracts in writing that reflect the actual conduct of the parties and to document any further legal and economic reasoning that has influenced the terms and conditions of internal dealings and transactions. Tax administrations consider this documentation to be more credible if it was demonstrably created at the moment the transfer pricing issue first occurred as opposed to the moment of a tax audit.

### Country-by-country reporting

13 | Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local country-by-country reporting rules and the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines?

The law requires only country-by-country reports to be filed. Neither master nor local files are mandatory, but these are recommended. Best practices apply.

### Timing of documentation

14 | When must a taxpayer prepare and submit transfer pricing documentation?

Generally, Swiss tax law does not require the taxpayer to prepare and submit transfer pricing documentation. Swiss tax law, however, does require documentation in place to reconcile filed tax returns (ie, the applied transfer price and the remuneration of the Swiss taxpayer). The tax administrations may also question compliance with the arm's-length principle of a transaction in any tax assessment process or audit. To defend compliance with the arm's-length principle of a transaction in respect of the tax administrations, it is useful for the taxpayer to be well documented at least on the transactions that are material to the companies involved.

## Failure to document

- 15 | What are the consequences for failing to submit documentation?

If transfer prices are not properly documented, the probability that the pricing is accepted is lower, and the burden of proof may change from the tax administration to the taxpayer. Therefore, timely and complete documentation for all transactions among associated enterprises and intracompany dealings should be kept.

## ADJUSTMENTS AND SETTLEMENT

### Limitation period for authority review

- 16 | How long does the tax authority have to review an income tax return?

There are no official published statistics on the time that the tax administrations require to review an income tax return. In our experience, the required amount of time varies greatly among the different cantonal tax administrations, between a few weeks and several years. The amount of time further depends on the complexity of the case, the particularities of the procedure and the amount of cooperation between the tax authorities, the tax advisers and the taxpayers.

### Rules and standards

- 17 | What rules, standards or procedures govern the tax authorities' review of companies' compliance with transfer pricing rules? Does the tax authority or the taxpayer have the burden of proof?

When reviewing companies' compliance with transfer pricing rules, tax authorities rely on the guidance given by the OECD.

As a general rule, tax authorities must prove any fact that establishes or increases taxation, whereas the taxpayer must prove any fact that reduces or removes taxation. However, the Swiss Supreme Court ruled, in 2009, that any change leading to an increase of the taxable profit is for the tax administration to prove. The tax administration of the canton of Zurich, for example, has developed a practice whereby the taxpayer must prove that he or she received any benefit from the counterparty in return for a consideration in question, but the tax administration – if it challenges the arm's-length pricing compliance of this transaction – is then required to prove that the consideration was not at arm's length. The taxpayer, however, has a duty to cooperate with the tax administration and provide the necessary documentation for the tax administration to verify compliance with the arm's-length principle.

### Disputing adjustments

- 18 | If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

Adjustment decisions can be appealed before the courts. At first instance, the decision is appealed before the tax administration that issued the decision. This may be followed by appeals to two or three independent courts, depending on the type of tax and the canton concerned. The final instance, irrespective of the canton and tax concerned, is the Federal Supreme Court.

## RELIEF FROM DOUBLE TAXATION

### Tax-treaty network

- 19 | Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Switzerland has agreed to apply the OECD Transfer Pricing Guidelines and has signed numerous double taxation treaties. The complete list, as of 1 January 2020, can be downloaded from the website of the State Secretariat for International Financial Matters (SIF). All treaties contain a clause concerning mutual agreement procedures.

### Requesting relief

- 20 | How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

Following the formalities required, any Swiss resident taxpayer who currently suffers double taxation or is threatened by double taxation in the future can request a mutual agreement procedure.

Mutual agreement procedures are not public, and final decisions are, therefore, not published.

### When relief is available

- 21 | When may a taxpayer request assistance from the competent authority?

Assistance from the competent authority can be requested once steps to obtain the foreign tax rebates have been completed unsuccessfully.

### Limits on relief

- 22 | Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

Swiss authorities generally do not grant secondary adjustments according to article 9(3) of the OECD Model Tax Convention on Income and on Capital.

### Success rate

- 23 | How effective is the competent authority in obtaining relief from double taxation?

According to the statistics submitted by SIF to the OECD, the vast majority of mutual agreement procedures end with the agreement fully eliminating double taxation or fully resolving taxation not in accordance with the tax treaty. This is also the case for post-2015 attribution and allocation cases, meaning cases that concern transfer pricing.

## ADVANCE PRICING AGREEMENTS

### Availability

- 24 | Does the country have an advance pricing agreement (APA) programme? If so, is the programme widely used? Are unilateral, bilateral and multilateral APAs available?

Switzerland also grants APAs. Unilateral, bilateral and multilateral APAs are available and widely used.

## Process

### 25 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

The State Secretariat for International Financial Matters (SIF) is the responsible authority for multilateral APAs according to double taxation treaties. They have published the following information with regard to this question:

*The request generally has to be submitted to the competent authority in the taxpayer's country of residence. If a taxpayer wishes to submit a request to two or more competent authorities, it has to be submitted simultaneously to each of them. In Switzerland, mutual agreement procedure and APA requests have to be submitted in writing or electronically in one of the official languages or in English. Requests should be made using the specified form that can be downloaded from [https://www.sif.admin.ch/dam/sif/en/dokumente/Internationale-Steuerpolitik/Doppelbesteuerung/Formular%20Verst%C3%A4ndigungsverfahren.PDF.download.PDF/Final\\_Template%20-%20MAP%20&%20APA%20-%20Filing%20Request%20-%20SIF.PDF](https://www.sif.admin.ch/dam/sif/en/dokumente/Internationale-Steuerpolitik/Doppelbesteuerung/Formular%20Verst%C3%A4ndigungsverfahren.PDF.download.PDF/Final_Template%20-%20MAP%20&%20APA%20-%20Filing%20Request%20-%20SIF.PDF)*

Most of Switzerland's double taxation agreements contain a legal time limit of three years for the submission of the request. However, some of them do not specify a deadline, or specify a different delay, by which the mutual agreement procedure must be requested. In any case, it is also in the taxpayer's interests to request the initiation of a mutual agreement procedure as quickly as possible. The request must contain the following:

- details (eg, name, address and tax identification number) regarding the identity of the taxpayer concerned;
- details (eg, name, address and tax identification number) regarding the identity of any other directly affected persons (eg, associated companies);
- whether the taxpayer has an authorised representative or a valid power of attorney;
- the Swiss tax authority concerned, including the contact person if known;
- the other country or countries concerned;
- description of the facts and circumstances of the specific case (including the tax amounts in question in Swiss francs and in the foreign currency and the details of any relationships between the taxpayer making the request and the other persons directly affected by the case, as well as the annual financial statements for the tax periods concerned in the case of companies);
- the tax periods for which double taxation is claimed, is imminent or is to be avoided;
- if available, a copy of the assessment decisions issued in Switzerland and in the country concerned for the tax periods in question;
- if available, a copy of the tax audit reports and adjustment proposals that led to the double taxation claimed;
- detailed information on any steps taken in Switzerland or abroad to prevent or eliminate double taxation (correspondence with tax authorities, objection, etc), particularly on any mutual agreement procedure request submitted to the competent authority abroad (indicating the date of the request, as well as the name of the person and the authority where the request was sent);
- if the mutual agreement procedure request was also submitted to another authority based on another international treaty with a dispute resolution mechanism, the date of that request, the name of the person and the authority to which it was submitted (a copy of

- that other request and all enclosures is to be included if this mutual agreement procedure request is not identical to the other request);
- if available, detailed information on any legal remedies sought in Switzerland or abroad;
- if applicable, an indication that the object of the mutual agreement procedure request was already dealt with (eg, in an advance ruling, an APA or a court ruling), together with a copy thereof;
- any other pertinent details or documents for resolving the case; and
- a declaration confirming that all information and all documents in the mutual agreement procedure request are accurate and that the taxpayer will assist the competent authority by diligently supplying any other pieces of information or any other document required by the authority.

Within two months of receiving the mutual agreement procedure request, SIF contacts the taxpayer, indicating whether it requires additional information, particularly if items regarding the facts and circumstances, etc, mentioned above are missing, for the request to be completed by the taxpayer.

If the above conditions are not met, SIF will decline to initiate a mutual agreement procedure.

If SIF considers the conditions required to initiate a mutual agreement procedure to be met and finds that the double taxation that occurred cannot be eliminated unilaterally, it initiates the mutual agreement procedure and informs the competent authority of the state concerned about the mutual agreement procedure request. The Swiss tax authorities concerned are also informed of the initiation of a mutual agreement procedure. The taxpayer does not participate in the procedure itself. The competent authorities strive to eliminate the double taxation or to prevent it from arising by communicating directly either verbally or in writing. The mutual agreement procedure is free of charge. The taxpayer bears his or her own costs involved in making the request (in particular any agent fees due).

The taxpayer is informed about the outcome of the mutual agreement procedure. He or she generally has 30 days to accept implementation of the mutual agreement procedure. If the taxpayer accepts, he or she is requested to renounce recourse to judicial remedies in relation to the issues to which a solution has been found in the mutual agreement. If the taxpayer is not satisfied with the mutual agreement signed by the competent authorities, he or she has no recourse to remedy against this agreement. If he or she rejects the implementation of the agreement it will not be implemented, but the mutual agreement procedure will, nonetheless, be concluded. If the implementation of the mutual agreement is rejected, the taxpayer may have recourse to Swiss internal appeal procedures against the Swiss tax decision if the conditions are met. SIF informs the relevant Swiss tax authority about the outcome of the mutual agreement procedure and, if the taxpayer has agreed, tells it to implement the mutual agreement automatically.

## Time frame

### 26 How long does it typically take to obtain a unilateral and a bilateral APA?

The average duration of a bilateral or multilateral APA procedure is, depending on the other country involved, between two and three years. Swiss authorities have expressed their willingness to treat APA procedures swiftly to preserve the international attractiveness of the Swiss business environment.

The duration for a unilateral APA is, depending on the complexity of the case, between four and 16 weeks.



## Duration

27 | How many years can an APA cover prospectively? Are rollbacks available?

In practice, APAs are generally concluded for five years. Rollbacks are generally possible, but the rollback period is restricted by domestic legislation.

## Scope

28 | What types of related-party transactions or issues can be covered by APAs?

There is no general rule excluding certain types of related-party transactions or issues from being eligible for APA.

## Independence

29 | Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

Concerning bilateral or multilateral APAs, the competent authority is SIF, which is a federal public authority and is independent of the federal and cantonal tax authorities. Within SIF, the personnel responsible for transfer pricing issues is separate from other departments of SIF.

The competent authority for unilateral APAs is the same authority that is responsible for tax examinations (ie, depending on the type of tax concerned, generally the cantonal tax authority or the Swiss Federal Tax Administration).

## Advantages and disadvantages

30 | What are the key advantages and disadvantages to obtaining an APA with the tax authority?

There are no country-specific advantages or disadvantages in Switzerland of obtaining an APA. While there is the disadvantage that the submission of an APA request involves disclosing often sensitive information about the business and represents a certain amount of work and expense, an APA helps prevent latent disputes and promotes good faith among taxpayers and the tax administrations.

## SPECIAL TOPICS

### Recharacterisation

31 | Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

Swiss tax authorities are generally required to adhere to the official financial statements. These are established according to Swiss accounting law. A deviation from these financial statements is allowed only if Swiss tax laws permit correction. The most relevant permission for deviation dictates that non-business-related expenses cannot be deducted from the taxable profit. This means that transactions that are not at arm's length can be corrected. Whether a transaction was made at arm's length is generally determined in accordance with the principles of the OECD Transfer Pricing Guidelines.

In addition, there are a number of situations in which the formal arrangement of a business or transaction can be recharacterised. Based on case law, the tax administrations may disregard a set-up for tax purposes if it:

- has been chosen for the sole purpose of tax avoidance;
- appears to be unusual and to disregard any economic reasoning; and

- results in an actual reduction of taxes in comparison to an ordinary set-up.

If these conditions are met, tax administrations are entitled to disregard the legal structure of a business or a transaction and can base their taxation on the legal structure that would have been chosen without tax considerations. In general, the tax administrations base their tax assessment on the economic substance rather than the chosen legal form of a given structure and contracts. Case law and administrative practice have developed in order to target specific structurings related to tax avoidance. To improve legal certainty, some frequent issues are addressed in the Swiss tax laws. Others are merely found in case law and administrative practice.

### Selecting comparables

32 | What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

Swiss authorities are aware of the scarcity of purely Swiss benchmark data and generally accept regional European comparable data.

### Secret comparables

33 | What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

Tax authorities are able to compare different cases that they have on file, while respecting public authority secrecy. In our experience, a transfer pricing study from an independent third party can create strong evidence with regard to the determination of the comparable data. If the taxpayer has fulfilled all procedural duties of cooperation, but the tax administration still considers a payment to be incongruent with the arm's-length principle, the tax administration must prove that the transfer pricing study is methodologically faulty or is not based on an appropriate set of data. However, if, owing to time constraints or other reasons, a transfer pricing study cannot be provided, defending against secret multiples may prove difficult.

### Secondary adjustments

34 | Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

Over the years, the federal tax administration has developed a practice of allowing secondary adjustments under certain conditions with regard to Swiss withholding tax.

### Non-deductible intercompany payments

35 | Are any categories of intercompany payments non-deductible?

In general, all payments that are at arm's length are deductible.



## Anti-avoidance

**36** What legislative and regulatory initiatives (besides transfer pricing rules) have the government taken to combat tax avoidance with respect to related-party transactions? What are the penalties or other consequences for non-compliance with these anti-avoidance provisions?

Swiss tax law includes clauses directed against abusive tax avoidance. Based on case law, the tax administrations may disregard a set-up for tax purposes if it:

- has been chosen for the sole purpose of tax avoidance;
- appears to be unusual and to disregard any economic reasoning; and
- results in an actual reduction of taxes in comparison to an ordinary set-up.

Instead, the tax administrations generally base their tax assessment on the economic substance rather than the chosen legal form of a given structure and contract. Case law and administrative practice have developed in order to target specific structurings related to tax avoidance. To improve legal certainty, some frequent issues have been addressed in Swiss tax laws. Others are merely addressed in case law and administrative practice.

In addition, Switzerland takes part in the spontaneous exchange of information on advance tax rulings, which affects advance Swiss tax rulings in place since 1 January 2018, and in the exchange of country-by-country reports.

Furthermore, Switzerland was one of the first countries to adopt anti-treaty abuse measures in 1962. Most of the general principles have been modernised and continue to be applied to deny treaty benefits to taxpayers engaging in treaty shopping. Swiss tax treaties themselves may contain specific anti-abuse rules, such as definitions of beneficial ownership. The convention of implementing tax treaty-related measures to prevent base erosion and profit shifting (BEPS) causes the applicability of a principal purpose test in accordance with the BEPS standard with regard to certain tax treaties. Other treaties are expected to be amended accordingly in the near future.

## Location savings

**37** How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

There are no country-specific rules with regard to location savings.

## Branches and permanent establishments

**38** How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

The attribution of profits to a branch or permanent establishment depends on the applicable unilateral attribution method as well as on the respective applicable tax treaty. Under certain tax treaties, it is possible for Switzerland to attribute profits to permanent establishments using a formulary apportionment method in certain circumstances.

## Exit charges

**39** Are any exit charges imposed on restructurings? How are they determined?

In restructurings, preserving tax liability in Switzerland is a basic requirement. If this condition is not met, the cross-border restructuring triggers exit taxation on all hidden reserves regarding income tax and

withholding tax. The hidden reserves amount to the difference between the book value and the market value of the exiting assets. The regular tax rates apply.

## Temporary exemptions and reductions

**40** Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

In general, tax subsidies are not allowed, and there are only some highly restrictive exceptions to this rule. Therefore, tax holidays are only granted for a maximum period of 10 years.

The exact conditions depend on the respective regulatory body (federal, cantonal or communal government). The federal government only grants tax holidays if the tax holidays are also granted by the responsible cantonal government, if a newly created industrial or qualifying service company creates new or reorients existing job positions, certain political goals regarding regional developments are served, the canton requires the reimbursement of tax privileges that were acquired abusively, the company is located in a special designated development zone, and it is made subject to certain financial supervision. Tax holidays often involve special rules regarding the determination of taxable income or reductions of the tax rates and sometimes even complete exemption from taxation.

## UPDATE AND TRENDS

### Tax authority focus and BEPS

**41** What are the current issues of note and trends relating to transfer pricing in your country? Are there particular areas on which the taxing authority is focused? Have there been any notable legislative, administrative, enforcement or judicial developments? In particular, how is the OECD's project on base erosion and profit shifting affecting both policymakers and tax administrators?

As Switzerland directly applies the OECD Transfer Pricing Guidelines, any changes to these may lead to changes in administrative practice. In addition, the international discussion on base erosion and profit shifting (BEPS) has led to increased awareness with regard to transfer pricing among the cantonal tax administrations, and Swiss tax commissioners have begun investigating related-party transactions in more detail.

Finally, Switzerland:

- has agreed to implement the BEPS minimum standards of the G20 countries and the OECD, and has consequently signed the Multilateral Competent Authority Agreement for the Automatic Exchange of Country-by-Country Reports and the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent BEPS;
- participates in the spontaneous exchange of information on tax rulings;
- grants access to the mutual agreement procedure;
- includes principal purpose clauses in double taxation treaties; and
- has implemented mandatory arbitration based on the 'baseball arbitration' approach and currently conducts treaty-based arbitration procedures.

Furthermore, the Swiss Federal Council has released its dispatch to Parliament, including a draft with comments to the multilateral convention to implement tax treaty-related measures to prevent BEPS, which is expected to take effect on the tax treaties with regard to 12 jurisdictions. Changes concern the preamble, the principal purpose test, qualification conflicts, mutual agreement procedure and arbitration. It was accepted

by both chambers of Parliament on 22 March 2019. Specifically with regard to qualification conflicts, article 5 of the convention introduces a switch-over clause.

Domestic legislation with regard to country-by-country reports and the spontaneous exchange of information on tax rulings has already entered into force.

### Coronavirus

42 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There are not many tax instruments that are available owing to the covid-19 pandemic. Swiss tax administrations have implemented legislation regarding:

- the late filing of tax returns without penalties;
- the late payment of taxes due without late interest payments;
- the late payment of value added tax without late interest payments;
- the final withdrawal of taxes due under certain very restricted situations; and
- in a minority of cantons, the possibility of the building of tax provisions for the taxable year 2019 owing to effects of the pandemic.

Additionally, Switzerland entered into agreements with Germany, France, Italy and Liechtenstein regarding the taxation of cross-border commuters working from their home offices.




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