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Switzerland's main international tax development in 2012 was the signing of bilateral tax agreements with Austria, Germany, and the United Kingdom, while the most important issue on the national level was the launch of the debate on corporate tax reform.

Developments in Swiss Tax Legislation

The Federal Council put into force on March 1 amendments to the Banking Act that are designed to resolve the ''too big to fail'' issue. The amendments also contain changes to the Federal Act on Stamp Duties. In accordance with the ''too big to fail'' bill, systemically important Swiss banks must build up more capital, meet more stringent liquidity requirements, and ensure better risk diversification by 2018.

The changes to the Federal Act on Stamp Duties also came into force on March 1. The stamp tax on bonds and money market papers has been eliminated, and stock or shares issued after the conversion of contingent convertible bonds (CoCos) are exempt from stamp duty. Interest payments on CoCos will be exempt from Swiss withholding tax for four years as of January 1, 2013.

The canton of Zurich abolished lump sum taxation on January 1, 2010, and voters in several other cantons followed suit. In 2012 the voters in the cantons of Schaffhausen, Basel, and Appenzell Outer-Rhodes decided to end lump sum taxation at the cantonal level, but voters in other cantons turned out in favor of the regime. To ensure wider acceptance, the Federal Council decided to tighten up the assessment basis for lump sum taxation at the federal level, and the amendments were published on September 28. There still may be an optional referendum on the lump sum tax, but there is also an initiative under way to end it at the federal level.

As of January 1, unemployed persons became subject to higher social security contribution rates. People who are subject to lump sum taxation are classified as unemployed in Switzerland and are directly affected by the increase in those rates.

On January 1, 2013, new legal provisions regarding the taxation of employee participation rights will enter into force. Under the new rules, employee stock options will in most cases be subject to taxation upon release. Free and blocked employee shares remain subject to taxation at grant.

Case Law

On March 7 the Swiss Federal Administrative Court (FAC) decided the first reported court case worldwide regarding beneficial ownership as it applies to total return swaps in a tax treaty context (BVger A-6537/2010). The Swiss Federal Tax Administration (FTA) denied a refund of withholding tax to a Danish bank, arguing that because the bank entered into a total return swap transaction, it lost beneficial ownership and committed treaty abuse. In response to a complaint by the bank, the FAC granted the refund, holding that the bank retained beneficial ownership and that because the bank has substance in Switzerland, there was no treaty abuse. The appeal of the decision is pending before the Swiss Federal Court.

On April 4 the FAC rejected a U.S. behavior pattern request for administrative assistance under the Switzerland-U.S. income tax treaty (BVger A-737/2012). The U.S. accused employees of Swiss Bank Credit Suisse of actively assisting clients — all U.S. taxpayers — in concealing their income and assets from the IRS, but the request did not include the clients' names.

The FAC decided that the behavior pattern that involves accounts held by a domiciliary company with a U.S. beneficial owner with U.S. securities and with which Form W-9 is not associated doesn't fall under the ''tax fraud or the like'' requirement in the treaty. It also held that the search criteria are insufficient to enable the bank to identify with a high degree of probability those clients who are suspected of fraudulent conduct triggering administrative assistance. It is generally assumed that the outcome of the Credit Suisse case would be different under the negotiated protocol awaiting U.S. Senate approval.

Bilateral Tax Agreements

Bilateral agreements that Switzerland signed with Germany on September 21, 2011, and with the United Kingdom on October 6, 2011, have been under EU scrutiny, with the European Commission arguing that they violate the EU savings tax directive.

On March 20 Switzerland and the U.K. supplemented the tax agreements through a protocol and amendment agreements. A few days later, Switzerland and Germany signed a supplementary protocol. Interest payments are no longer included in the scope of the agreements. On April 13 Switzerland and Austria signed a similar bilateral agreement. The agreements with the U.K. and Austria will enter into force on January 1, 2013. In Germany, however, the tax agreement failed to pass the upper house of Parliament, and it will not be adopted.

The new agreements provide a mechanism to regularize assets that are held with Swiss custodians and weren't properly taxed in the past, and they introduce a future withholding tax on those assets that is withheld by the custodians and remitted to the foreign state.

Relationship With the European Union

In 2008 the Federal Council initiated Corporate Tax Reform III. It seeks to develop a sustainable solution to resolve the tax dispute between the commission and Switzerland over cantonal tax privileges (especially for holding companies and mixed companies). Some Swiss cantons (Geneva, Basel, and Zurich) fear that the dispute with the commission might result in the revocation of cantonal tax privileges and that international companies might no longer stay in Switzerland. Thus, the cantons announced that they will reduce the corporate tax rate at the cantonal level. Because the cantons have not coordinated the reduction of the corporate tax rate with the Swiss Federal Council, which is working with the commission to resolve the dispute over cantonal tax privileges, the issue has been subject to public debate.

Income Tax Treaties

Switzerland revised several income tax treaties in 2012 with the intention of aligning the exchange of information provisions with the OECD standard. Some of the treaties have been signed by the contracting states (those with Bulgaria, the Czech Republic, Ireland, Portugal, and Slovenia), and some have already entered into force (those with Canada, Germany, Greece, Japan, and Sweden). New treaties with Hong Kong and Singapore entered into force in 2012 and will apply as of January 1, 2013 (as of April 1, 2013, in Hong Kong for tax matters).

In 2011 Switzerland passed the first phase of the Global Forum on Transparency and Exchange of Information for Tax Purposes peer review on OECD transparency guidelines. The global forum noted that under Switzerland's existing regime, holders of bearer shares cannot always be identified. The forum recommended that Switzerland change its legal framework for bearer shares. Also, Switzerland still hasn't met the criterion on effective exchange of information because the requirements for identifying the taxpayers and holders of information are too restrictive. Consequently, treaties revised in 2011 have had to be revised again by the contracting states.

On July 5 Switzerland and France adopted a new draft agreement for the avoidance of double taxation regarding inheritance taxes. The agreement still must be ratified by both countries and won't enter into force before January 1, 2014. Under the new agreement, inheritance tax will also be levied on real estate held by real estate companies in the country where the real estate is situated. Other assets will generally be taxed in the state where the deceased was last resident.

Federal Tax Administration Announcements

On July 27 the FTA published Circular Letter 36 on professional securities trading. It replaces Circular Letter 8 of June 21, 2005, on the same topic. The new circular letter takes into account recent cases decided by the Swiss Supreme Court (2C-766/2010 and C-385/2011). The criteria considered by the tax authorities for the qualification of gains resulting from the trade in securities have been tightened. The safe haven rules have been adapted selectively, especially regarding the six-month holding period instead of the 12 months previously applicable. Also, the close connection between the transactions and the professional activity, as well as the use of specific know-how, is no longer deemed harmful. ◆

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