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Innovation, flexibility and expertise

SWITZERLAND: INTERCANTONAL COMPANY DELOCALISATION AND TAX DOMICILE

Introduction

Inter-cantonal tax competition is a particular feature of Swiss federalism. The recent tax and AHV financing reform (RFFA) has prompted cantons to introduce measures to maintain their attractiveness to businesses internationally. Among the measures with the most immediate impact is of course the lowering of cantonal tax rates on the profits of legal entities. However, these reductions have also had the not inconsiderable effect of repositioning the cantons in the virtual national ranking of the most competitive in terms of corporate tax burden.

At a time when mobility is particularly easy, thanks in part to recent digitalisation processes, companies are seriously considering the possibility of locating, and possibly even relocating, their operations in tax-saving cantons.

However, it should be borne in mind that the location, typically of the registered office, but also of certain business activities, in the same canton does not necessarily mean that the company is recognised as resident for tax purposes (i.e. subject to unlimited tax liability) in that canton, if the effective management and administration are exercised in a different canton. This would not only make the efforts and costs involved in relocating to a more attractive canton futile but would also entail the risk that two (or more) cantons – the canton of the head office and the canton of effective management – would claim unlimited tax liability.

It is therefore good to be aware of the elements that qualify the place of effective management and the burdens towards the tax administration in the event of an assessment.

Registered office vs. effective management, judgment 80.2019.309/310 of the Chamber of Tax Law (CTL) of the Canton of Ticino

As often happens, actual cases help to better understand theoretical principles. In the aforementioned judgment, the CTL points out that the registered office of a company, as indicated in the articles of association and in the commercial register, is capable of determining a tax liability on the basis of personal affiliation, if it does not represent a mere "letterbox" address, which is characterised by the lack of close links with the territory and the absence of important infrastructure. Moreover, even if there were a minimum of infrastructure and staff at the place of establishment, and they were not actually employed to carry out commercial and administrative functions but were rather a structure set up specifically to conceal reality, this would not suffice to constitute effective management[1].

According to doctrine and case law, the absence of staff, offices or other facilities, as well as the lack of a telephone line or the unreachability by telephone at the place of the registered office, or even the diversion of the address, or the fact that the meetings of the corporate bodies are not held at the place of the registered office, are to be considered as indications in favour of the purely formal and fictitious nature of the registered office[2].

According to the Federal Supreme Court, effective management is the place where those activities which together serve the fulfilment of the statutory purpose take place, where the company has the centre of its actual and economic interests and where those management activities which are usually concentrated at the registered office[3] are exercised. In general, doctrine and case law define the effective management as the *day-to-day management of* the com-

1 Judgment of the FSC No. 2C_259/2009
2 Judgment of the FSC No. 2C_431/2014
3 BGE 54 I 301

pany, a notion which is contrasted on the one hand with the simple administrative activity and, on the other hand, with the control activities and strategic decisions falling within the competence of the Board of Directors[4].

In the case at hand, the corporate tax office of the Canton of Ticino has subjected to unlimited tax liability an Sagl with registered office in another canton, because of its effective management in Ticino. The Sagl resulted in having as partners two spouses both domiciled in Ticino and the husband as manager. The tax declaration forms of the canton of domicile were sent to the private address of the husband and wife, as well as the tax notification of the same canton and the declaration forms of the Canton Ticino. Likewise, all correspondence exchanged between the parties was sent and delivered to post offices in the Canton of Ticino.

The only employee of the company was one of the two partners and manager, while the company's activity was the management of an architectural office, as per the company name written in Italian, albeit in a non-Italian-speaking canton. The CTL found it implausible that the sole employee could be domiciled in Ticino and carry out the activities of his company in the other canton, where it did not have his own offices. In addition, the CTL considered it significant that the Sagl was incorporated in the canton of its registered office the day after the cancellation of the sole proprietorship of the Sagl's manager in the Register of Commerce of the Canton of Ticino, as well as the fact that the latter was a partner in other companies with registered offices in Ticino.

The Federal Supreme Court has ruled that, in the presence of important infrastructures, in particular offices and personnel, at the place of the registered office, it is up to the tax authority to provide evidence that the effective management is exercised in another place, subject to its tax sovereignty. In the absence of such infrastructures and if the tax authority makes it very likely that the taxpayer is subject to taxation in another canton, as in the present case, the burden of proof of the actual, and not fictitious, transfer of the registered office lies with the taxpayer. In the case at hand, the taxpayer has failed to prove in any way the presence of offices or personnel in the canton of domicile.

The CTL therefore considered it undeniable that the company's registered office was of a purely formal nature and that the effective management of the company was carried out in the Canton of Ticino.

As mentioned above, these cases can lead to intercantonal double taxation, in the canton of residence and in the canton of effective management. Since this is contrary to Art. 127 para. 3 of the Swiss Constitution, the taxpayer has the right to appeal to the Federal Supreme Court in matters of public law. He is not obliged to exhaust the cantonal appeal instances in each of the cantons concerned, but it is sufficient for this to be done in one of the two cantons. He may appeal to the Federal Supreme Court against the decision of the last instance in the latter canton, at the same time appealing against the decisions of the other canton, even if not the last instance.

Conclusions

As can be seen from the above, before proceeding with an intercantonal transfer, perhaps in order to benefit from more advantageous tax conditions, it is advisable to assess whether this is done in such a way that the place of the registered office coincides with the place of effective management.

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ITALY: TAXATION OF THE TRANSFER ABROAD OF A HOLDING COMPANY

In its Principle of Law No. 10/2021 of 11 May 2021, the Italian Revenue Agency provided clarifications on the taxation of migration abroad of holding companies and, more specifically, on the possible application of the participation exemption regime to the capital gains generated by the relocation abroad of a corporate asset in which one (or more) shareholdings are included.

Although the principle in question also extends the previous clarifications on the taxation of capital gains arising from the transfer of a company to cases of transfer of the registered office abroad, the same principle, however, as will be illustrated in the conclusions, still leaves open several doubts regarding its application.

Reference to the rules governing the taxation of capital gains in the context of a business transfer

The starting point of this commentary is represented by the previous Circular No. 6/E of 13 February 2006 where at paragraph 5.2, the same tax authorities clarified that in the case of the sale of a corporate asset, including a shareholding, the consideration received for the sale constitutes a value referred to the entire business (and not to individual assets forming part of it) and, consequently, that the capital gain generated by the sale could not be extrapolated from the capital gain attributable to the sale of the shareholding – potentially subject to taxation at a reduced rate of 5% in application of the participation exemption regime under Art. 87 of Presidential Decree No. 917/1986 ("TUIR") – but that the same should be subject to taxation pursuant to Article 86 of TUIR.

The above clarification is based on the general civil law principle of the unitary nature of the business which, pursuant to Article 2555 of the Civil Code, is defined as the "*group of assets organised by the entrepreneur for the exercise of the business*" which has been specifically transposed for tax purposes in Article 86 of the TUIR, where reference is made to the capital gain arising from the sale of the company as "*unitarily determined*".

Extension of treatment to cases of "exit" from Italy

Within the framework of the Principle of law No. 10/2021, the Italian Revenue Agency reiterates how the above-mentioned principles should be applied not only in the event the capital gain is generated as a result of a transfer but, more generally, in the presence of any case of realisation, including also that relating to the transfer abroad of the residence of a company pursuant to Article 166 of the TUIR or to the other cases assimilated by the same article[1] concerning a company or a branch of a company.

This assimilation, in fact, was already contained in Article 166 of the TUIR which, in regulating in a comprehensive manner the tax treatment of exit taxation, provides, in fact, that in cases where the link with the State territory is terminated in relation to a complex company, the capital gain is "*unitarily determined*" and "*equal to the difference between the total market value and the corresponding cost recognised for tax purposes of the assets and liabilities of the person transferring residence for tax purposes which have not been included in the assets of a permanent establishment of that person located in the territory of the State*".

On the basis of these principles, the Italian Revenue Agency concludes its commentary by reiterating that even if the object of the relocation abroad is a corporate asset, even if predominantly made up of participations, the participation exemption regime abstractly applicable to the participations included in the same asset should not be applied instead of the unitary taxation of the entire capital gain generated.

Critical conclusions

As pointed out by a number of scholars[2], the practice in comment, by referring to the transfer abroad of a "generic" holding company (without distinguishing whether it is a pure holding company, a mixed holding company or a management company), is characterized by a rather enigmatic wording which does not allow full understanding of its scope of application.

4 Judgment of the FSC No. 2C_483/2016

1 This refers in the case of:
– transfer abroad of the Italian permanent establishment of a non-resident entity;
– merger by incorporation of a resident entity into a non-resident entity;
– demerger of a resident entity for the benefit of one or more non-resident entities;
– transfer of a permanent establishment of a resident entity to a non-resident entity;
– all have in common the 'severance' of their connection with the territory of the Italian State.

2 See E. Lo Presti Ventura, G. Odetto, "*Trasferimento all'estero tassato in misura piena per le holding*" (*Transfer abroad taxed in full for holding companie)*, Eutekne Info, 12.05.2021.

More specifically, the assimilation of the transfer of the registered office abroad to the sale of a business, which entails the taxation of the capital gain as a single entity, is not unquestionable in cases where the transfer is a business in the statutory meaning of a group of assets in which (also) the shareholdings have a functional link with the other corporate assets creates, instead, more than one doubt in the case of the relocation of a so-called "pure holding company", a situation in which it is difficult to identify a real company in the sense mentioned above.
This critical issue is all the more evident in light of the fact that Article 166 of the TUIR not only regulates the regime of unitary taxation of the capital gain in cases where the object of the transfer abroad is a commercial enterprise or a company, but also applicable to the relocation of individual or more assets not constituting a company, providing for such cases a separate determination and taxation of the capital gain for each individual asset, which would lead, in the case of participations, to the application of the taxation according to the participation exemption regime.

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CYPRUS: IMPLEMENTATION OF THE REGISTER OF BENEFICIAL OWNERS

On 16 December 2020, the Council of Ministers of the Republic of Cyprus expressed its support for the establishment of a central register of *Ultimate Beneficial Owners* ("UBO") for all companies and other legal entities resident in Cyprus, appointing the *Registrar of Companies and Official Receiver,* (ROC) operating under the control of the Ministry of Energy, Trade and Industry, as the competent authority for the maintenance of the register and authorising it to operate the data collection through an interim electronic system. The date for commencement of data collection through an interim online portal was set at 16 March 2021. On 12 March 2021, the *Registrar of Companies* issued Directive 112/2021 containing guidelines for maintaining information and operating the register.

Scope and beneficial owner (*Ultimate Beneficial Owner*)
Directive 112/2021 only specifies legal entities not subject to the application of the provisions, namely:

- companies listed on a regulated market that is subject to disclosure requirements under European Union law or similar rules;
- entities in respect of which the directors have already filed a request for *strike-off* with the Companies Registry, pursuant to Section 327 (2A) (a) of the Companies Act, prior to the date of entry into force of the Directive;
- entities whose liquidation started before the date of entry into force of the Directive.

On the other hand, entities that do not fall into any of the above categories will be subject to the Directive and will therefore have to take steps to collect and voluntarily disclose data.

The definition of the beneficial owner or *Ultimate Beneficial Owner is* taken from the European Directive, i.e. the natural person(s) who ultimately owns or controls the legal entity and/or individual on whose behalf a transaction or activity is conducted.

a. in the case of legal persons, natural persons holding a direct or indirect participation of 25% plus one of the shares or voting rights;
b. for Trusts, the following must be indicated: *Settlor*, *Trustee*, *Protector*, the beneficiaries, if designated, or the category of persons in whose interest the Trust is established;
c. in the case of other legal entities equivalent to Trusts, individuals holding positions equivalent to those referred to in subparagraph (b).

The information to be reported for each beneficial owner is first name, surname, date of birth, nationality, residential address, identification document, date of entry in the register as beneficial owner, date on which changes were made to the data or on which the individual ceased to be a beneficial owner, nature and extent of beneficial interest held in the legal entity. Each year, companies will be required to electronically confirm the accuracy of the information stored in the register. Legal entities already in existence at the time of entry into force of the Directive are given a total period of 12 months, starting on 16 March 2021, to comply. New entities registered after 16 March 2021 must register their data within 30 days from the date of their registration in Cyprus. In the case of changes relating to information on the UBO (change of UBO or changes in personal data) these must be reported within 14 days of the date of the change. The obligation and responsibility for data collection and registration lies with the company/legal entity and its directors. In case of non-compliance, a sanction of €200 is foreseen and a further charge of €100 for each day of continuation of the violation, up to a total maximum of €20,000. However, no sanction will be applied during the period in which the provisional system remains in force.

Access to register and data
During the initial phase, access to the information will only be granted to the competent supervisory authorities. In the second phase, all information collected will be transferred to an IT platform that will be developed for this purpose during the second half of 2021. Access to this platform will be based on the provisions of the EU's 5th AML Directive (EU 2018/843), i.e. only persons who can demonstrate a legitimate interest:

a. The competent supervisory authorities, MOKAS (The Unit for Combatting Money Laundering), customs authorities, the tax department and law enforcement agencies will have unrestricted access without cost and without obligation to notify the company concerned;
b. those obliged under the AML Law, in the context of customer *due* diligence measures, will have access to data such as the name, month and year of birth, nationality and country of residence of the beneficial owner, and the nature and extent of the beneficial interest held by the latter in the company;
c. Subjects belonging to the general public may have access to the data upon electronic registration. Registration for access to the service will be governed by a directive issued by the *Registrar of Companies*, the requesting party must adequately substantiate the reasons for requesting access;

The beneficial owner or the company itself is entitled to request the non-disclosure of the personal data of the beneficial owner(s) to the obligated persons and the general public mentioned in points b) and c) above by submitting a written request to the *Registrar of Companies*. The request must be properly reasoned in order to prove that disclosure of the personal data of the beneficial owner would expose the person to a disproportionate risk of fraud, kidnapping, extortion, harassment, violence or intimidation. The *Registrar of Companies* will analyse each application in detail and notify the applicant of its acceptance or rejection.

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LATIN AMERICA: NEW TAX REFORMS TO AID CONSEQUENCES OF COVID-19

Some Latin American countries in are addressing the COVID-19 economic crisis by proposing or implementing new tax laws. Here are some examples:

Argentina
On 18 December 2020, Law No. 27*.605 'Aporte solidario, y Extraordinario para ayudar a morigerar los efectos de la Pandemia' was* published in the *Boletin Oficial, a* one-off emergency wealth tax that includes:

- The law applies to individuals resident in Argentina on the total amount of their assets held in Argentine territory and abroad, as well as to non-resident individuals with assets located in Argentine territory;
- For the purposes of the application of the emergency wealth tax, Argentine citizens resident or domiciled in a low or no tax or non-cooperative tax jurisdiction (as defined in the Income Tax Law Art. 19 and 20) will be considered Argentine residents;
- Resident and non-resident individuals are subject to taxation if the value of their assets as

of 18 December 2020 exceeded the amount of ARS 200 million (approximately USD 2.4 million);
- The rates have been identified in two different values:
  * for assets located in Argentina, the rates are between 2% and 3.5%.
  * for offshore assets the rates are between 3% and 5.25%.

Bolivia

On 28 December 2020, Law No. 1357 *"Impuesto a las grandes fortunas" was* published and will be applied from the year 2020 as follows:

- Individuals resident in the State of Bolivia are subject to the law on property in Bolivian territory and abroad;
- Subjects are non-resident Individuals on property located in Bolivian territory;
- For the purposes of applying the *Impuesto a las grandes fortunas,* individuals who remain in the State of Bolivia for more than 183 days continuously or not in a 12-month period are considered to be residents of the State;
- Resident and non-resident individuals are liable to tax if the value of their assets as at 31 December each year exceeds the amount of Bs 30 million (approximately USD 4.2 million);
- The rate varies from 1.4% for a tax base of Bs 30 million up to 2.4% for Bs 50 million and more.

Chile

On 21 April, the Chilean Chamber of Deputies approved a bill that, if passed by the National Congress, would establish new tax measures, including a tax on the wealthiest citizens. The purpose of this bill is to fund an emergency universal basic income to help Chile's middle and lower class citizens affected by the COVID-19 economic crisis.

It is intended to introduce a one-time tax of 2.5% on individuals resident or domiciled in Chile with a net worth on Chilean territory and/or abroad of USD 22 million or more as of 31 December 2020.

The bill also provides for a temporary tax for so-called 'mega-corporations', i.e. companies with an average gross income of more than 1 million UF (*Unidades de fomento*) (approximately USD 41 million) in the three years prior to the publication of the law. These companies would be subject to a corporate income tax rate of 30% during the years 2021 and 2022.

Another attempt to help those affected by the pandemic is the proposal to lower the VAT rate from 19% to 4% on some essential products and to 10% on other goods. This decrease was also indicated as a temporary measure until December 2022.

The bill will have to obtain the approval of the various Chilean commissions before coming to a vote in the Senate.

Colombia

On 15 April 2021, the tax reform bill "*Proyecto de Ley 594 de 2020" called "Ley de Solidaridad Sostenible" was* submitted to the Colombian Congress, which includes significant changes on corporate income tax, personal income tax and VAT regimes, in order to combat poverty and inequality and to reactivate the Colombian economy after the crisis created by the COVID-19 pandemic. The main contents are as follows:

- Introduction of a solidarity tax applicable during the second half of 2021 to individuals whose monthly income exceeds COP 10 million (approximately USD 2,700);
- The income subject to tax has been identified as that derived from public or private employment, interest, leases, royalties and dividends;
- The solidarity tax rate has been set at 10% and would be levied by employer withholding tax. The option is given to deduct 50% of the solidarity tax paid from the personal income tax in the year 2021;
- The bill includes a one-off wealth tax of between 2% and 3%, to be applied to Colombian taxpayers with a net worth of more than COP 5,000 million (USD 1.4 million), as well as to large companies;
- The bill also proposes the elimination of the 5% withholding tax paid by foreign investors in the Colombian local bond market in order to encourage investment.

Other states such as Mexico, Uruguay and Peru are considering the introduction of a similar tax. Mexico indicates that new tax measures will not arrive until August 2021 and envisages a one-off tax with an expected revenue of Pesos 100 trillion (about USD 5 trillion). Uruguay is considering a temporary 2% tax on *offshore* financial assets held by individuals residing in Uruguay. Peru, on the other hand, is in favour of a 1% tax on assets held by individuals with a value of USD 100 million or more.

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