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NEWS

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Innovation, flexibility and expertise

SWITZERLAND: COMPANY RELOCATION FROM ABROAD TO SWITZERLAND – TAX TREATMENT

Introduction

With the Federal Act on Tax Reform and AHV Financing (RFFA) which entered into force on 1 January 2020, the legislator wanted to close the disparity in treatment between foreign companies that immigrated to Switzerland, which could incur the exit tax from the transferring country and at the same time be denied the possibility by the Swiss tax authorities to adjust the tax-determining values during the immigration phase. The resulting possible double taxation (taxation by the outgoing country as an exit tax and in Switzerland at the time of the realization of the hidden reserves) penalized precisely these extraordinary transactions.

The introduction of the legislation is not only aimed at the transfer of headquarters of foreign companies but can also be applied to the transfer of a business from abroad to Switzerland. In this publication I will discuss for the purposes of Swiss direct taxes, a dismantling (horizontal demerger) from abroad to Switzerland.

Declaration of hidden reserves present at the beginning of the liability

If at the beginning of the liability the taxpayer declares hidden reserves, including the added value generated internally, they are not subject to profit tax.[1]

The transfer of assets, businesses, branches of business or overseas activities to a company or business establishment located in Switzerland[2] shall be deemed to be the commencement of subjection.

Hidden reserves declared in the tax-basis balance sheet can be amortized annually by the tax rate applied under the SFTA memorandum. The value added internally (goodwill) and declared must be amortized within 10 years[3].

However, hidden reserves arriving from abroad cannot be declared in the following cases:

- Holdings of at least 10 per cent of the share capital of another company;
- Permanent establishments already present in Switzerland;
- Real estate located in Switzerland;
- Permanent establishments under foreign law.

1 Art. 61a para. 1 DFTA (SR 642.11)
2 Art. 61a, para. 2 DFTA (RS 642.11)
3 Art. 61a, para. 4 DFTA (RS 642.11)

Correlation between national and international dismantling

The dismantling at a national level provides that the hidden reserves of a legal entity are not taxable in the context of a restructuring, as the entity remains subject to Swiss tax and the elements hitherto determining for the profit tax are resumed.[4] The transfer of business operations or branches, as well as fixed assets, to a Swiss subsidiary in which the parent company holds at least 20% can be carried out in tax neutrality.[5] The regulations require that, when a tax-neutral transfer of hidden reserves is made, the transferred hidden reserves may not be disposed of or sold within 5 years following the transaction, otherwise there will be retrospective taxation of the transferred tax-neutral hidden reserves (this applies both to the sale of the business transferred to the branch and to a possible disposal of the branch's shareholding).[6]

The correlation between the domestic legislation (Switzerland on Switzerland) and the incoming domestic legislation (foreigners on Switzerland) only finds similarity in the terminology set out in Article 61 para. 1 lett. d DFTA,

4 Art. 61 para. 1 DFTA (RS 642.11)
5 Art. 61 para. 1 lett. D DFTA (RS 642.11)
6 Art. 61 para. 2 DFTA (RS 642.11)

but in no way did the legislature intend to link Article 61a DFTA to the anti-avoidance regulations inherent in the 5-year blocking period set forth in Article 61 para. 2 DFTA, but instead created a separate regulatory article called "imposition of hidden reserves at the end of tax liability". This Article provides that, in the event of termination of taxation, the hidden untaxed reserves existing at that time, including internally generated added value, are taxable.

Example of dismantling from abroad to Switzerland

A foreign company operating in the textile and knitwear sector decides to relocate the knitwear sector to Switzerland.
Outline:

The foreign company presents financial statements as at **31.12.2020** in KCHF 1'000 of which KCHF 500 for the "knitwear" sector. For the latter sector, a horizontal demerger to Switzerland is planned. Goodwill generated by fixed assets equal to KCHF 100 can be attributed to this sector.
On 01.01.2021 the company Textile AG established Knitwear SA by contribution in kind from the knitwear sector, thus having a statutory equity capital of KCHF 500 and a tax-basis balance sheet, revealing the incoming goodwill of KCHF 100, equal to KCHF 600.

As per the previous figures, we are confronted with an additional linear depreciation equal to KCHF 10 due to the activation in the tax-basis balance sheet of the goodwill entering from abroad to Switzerland. The newly incorporated company can thus benefit from a lower tax base compared to the actual economic result of the company. This possibility of displaying the goodwill declared in the tax balance sheet equal to KCHF 10 will bring the company, for the next 10 years, a tax saving of KCHF 1.8[7] per tax year (10 years).

Conclusion

This new tax law, which came into force on 1 January 2020, allows foreign companies, which intend to transfer their business or part of it to Switzerland, to disclose their hidden reserves and to benefit from higher tax-determining values. This will create a reduction in the tax base and therefore tax savings at the level of direct federal, cantonal and municipal taxes.

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7 KCHF 100/10 years = KCHF 10 X 18% tax = KCHF 1.8

ITALY: THE REGISTER OF BENEFICIAL OWNERS

Introduction

With the publication of the draft of the decree by the Ministry of Economy and Finance, together with the Ministry of Economic Development, the rules relating to the implementation of the "Register of beneficial ownership of companies with legal personality, of private legal entities, trusts and institutions and similar subjects" (so-called "Register of beneficial owners") thus implementing, albeit belatedly, the provisions of European Directive 2018/843 (so-called 5th anti-money laundering Directive) on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing.

Although at the time of writing this article, the final version of the decree has not yet been issued or the relative deadlines for the first sending of the required information have been postponed (the original deadline being 15/03), it is in any case interesting to provide an initial illustration of the relevant rules.

Scope of application, data subject to reporting and terms of communication

Specifically, the decree dictates the provisions on the supply, access and consultation of data and information relating to beneficial ownership:

a. for **companies with legal personality** (SpA, Srl, Sapa and cooperative companies);
b. for **private legal entities** (associations, foundations and committees);
c. for **trusts** <u>producing legal effects for tax purposes</u>[1] and **other related legal arrangements**.

Regarding the concept of beneficial owner, the decree specifically identifies:

a. for companies with legal personality: the individual(s)
   - with a shareholding > 25% of the capital;
   - to which control can be attributed on the basis of i) the majority of the votes that can be exercised at an ordinary shareholders' meeting, ii) the possession of the votes needed to exercise a dominant influence at an ordinary shareholders' meeting (including through specific contractual constraints);[2]
   - (residually, in cases where the application of the aforementioned criteria does not lead to the identification of any person) endowed with the powers of legal representation, administration or management of the company.
b. for private legal entities: cumulatively, the founder, the beneficiaries (when identified or easily identifiable) and the holders of managerial, administrative and legal representation functions;
c. for trusts and similar legal institutions: the settlor, the trustee, the guardian, the beneficiaries or classes of beneficiaries or anyone exercising control over the assets conferred in the trust or similar legal institution.

1 By such we mean trusts in possession of a tax code, established or resident in Italy and those not resident for income produced in Italy.
2 Pursuant to Art. 2359 of the Italian Civil Code, influence is presumed when at least 1/5 of the votes can be exercised at the ordinary shareholders' meeting, or 1/10 if the company is listed.

From the point of view of data and information relating to beneficial owners, the communication to the business register (and to the relevant sections for the purposes of the fulfilment in question) must contain the identification data of the individuals indicated as beneficial owners (name, surname, place and date of birth, registered residence and where different the domicile, the details of the identification document and the tax code) and:

- for companies with legal status: the entity of the shareholding in the entity's share capital or, in cases where control is not identified on the basis of the shareholding in the entity's share capital, an indication of the alternative method of exercising control on the same entity;
- for private legal entities: the name of the entity, the legal and administrative headquarters (if different), the PEC address and the tax code;
- for trusts and similar legal institutions: name of the trust / similar legal institution, date, place and details of the trust deed and the tax code

and, importantly for the purpose of limiting subsequent public access to the related information, the indication of the **<u>status of counter-interested party to the access</u>** of the individual indicated as beneficial owner and the reasons why access would expose the same to a disproportionate risk of fraud, kidnapping, ransom, extortion, harassment, violence or intimidation.

Such information, from an operational point of view, must be communicated for the first time by the date of **<u>15 March 2021</u>** (although on this point a postponement is expected which has not yet been made official at the date of publication of this article) or, with reference to subsequent changes, no later than 30 days from the completion of the act that gave rise to the change in the information on beneficial ownership by the party:

- <u>directors</u> of companies with legal status;
- the <u>founder</u> (if still alive) or the <u>administrators or representatives</u> of private individuals;
- the <u>trustee</u> of trusts or trustees of related institutions

identified as persons in charge and responsible (also from a sanctioning point of view) for identifying the beneficial ownership, updating and confirming the information contained in the register to be carried out annually.

The data and information thus communicated will be available for consultation and made available for a period of 10 years.

Access to data and information

Access to the information contained in the Register of beneficial owners is permitted, subject to specific accreditation that ensures the identification and relative verification of the legitimacy to access the information of the accessing party:

- to the **authorities**: Ministry of Economy and Finance, Anti-terrorism and Anti-Mafia Directorate, Sector Supervisory Authority, Guardia di Finanza, Financial Intelligence Unit, Judicial Authority and the authorities responsible for combating tax evasion (which must guarantee the use of data for the aforementioned purposes only);
- to the **subjects obliged to fulfil the due diligence requirements**: Banking and financial intermediaries (SIM [securities investment firms], SGR [asset management companies], SICAV, SICAF), insurance companies, trust companies, financial consultants and professionals;
- for **public use**.

Public access to information is, however, limited in the following cases:

- the existence of counter-interested party to the access;
- for the beneficial owners of trusts and similar institutions to access the data of which the private public must submit to the Ministry of Economy and Finance a specific application containing, among other information, the indication of the factual elements that are valid to qualify for the access of such information, which will be examined by the Ministry of Economy and Finance within 30 days from its presentation.

Conclusion

Although still awaiting the final decree, from the aforementioned discussion it is immediately clear of the impact that the introduction of this register will have both at an operational level on the subjects required to comply with the communication of the requested data, and, above all, on the possible access and use having such information. With reference to this last point, without wanting to enter the debate relating to the alleged violation of the privacy right of "registered" subjects, the thought is directed, especially in the cases of trusts and similar institutions, to the possible traceability that could be made by all the beneficial owners identified for anti-money laundering purposes and, therefore, indicated in the register, as part of the subjects required (also) to comply with tax monitoring obligations.

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URUGUAY: CHANGES IN THE CONDITIONS OF TAX RESIDENCE OF INDIVIDUALS

On 12 June 2020 Decree number 163/2020 was signed, valid from 1 July 2020 which modifies article 5 bis of Decree number 148/007 on personal income tax (IRPF) which refers to tax residence of individuals by adding two new assumptions to the criterion of *economic interests* for obtaining tax residency in Uruguay.

The legislation provides that to obtain tax residency in Uruguay it is necessary to meet at least one of the following conditions:

- A stay of at least 183 days in Uruguay, counting sporadic exits from the territory not exceeding 30 days;
- Establishing the main base of activities in Uruguayan territory, the total revenue generated in Uruguay must be greater than those generated in other countries;
- Possess economic and/or vital interests in Uruguay. The legislation provides, unless proven otherwise, that a vital interest arises when the spouse and minor dependent children are usually resident in Uruguay.

Regarding *economic interests*, unless the taxpayer proves his tax residence in another country, they are deemed to be fulfilled when he owns:

- Real estate valued at more than IU 15,000,000 (approximately USD 1,619,445);
- Direct or indirect shareholdings in a company in Uruguay worth more than IU 45,000,000 (approximately USD 4,858,334) that includes activities or projects declared to be of Uruguayan national interest.

With the changes contained in the new Decree 163/2020 two further conditions are added to *economic interests*:

- Investment in real estate for a value greater than IU 3,500,000 (approximately USD 377,870) provided that it is made on or after 1 July 2020 and that there is an actual physical presence in Uruguayan territory during the calendar year of at least 60 days;
- Investment in direct or indirect stakes in a Uruguayan company worth more than IU 15,000,000 (approximately USD 1,619,445) provided that it is made on or after July 1 2020 and with the condition that it generates at least 15 new full-time jobs in the country during the calendar year.

The recent Decree aims to promote the arrival of new residents in Uruguay by encouraging investment in companies as well as the acquisition of real estate with the territory.

New bill – Tax Holidays

Once you have obtained tax residency in Uruguay you are included in the tax regime of residents with the possibility of joining the non-resident income regime (IRNR), for the year in which the residence procedure takes place and for the following 5 years, thus obtaining tax exemption for movable income obtained abroad (dividends, interest). After this period, the taxpayer will be included in the IRPF regime with a rate of 12% on the aforementioned income.

The new bill of 15 June 2020 provides for the addition of two new options that can be exercised starting from the 2020 fiscal year:

a. The first option is to be subject to IRNR tax for a period of 10 years
   This implies that the taxpayer who acquires tax residence in Uruguay can choose to be subject to the IRNR for the next 10 years, therefore there is an extension of the terms of the exemption from 5 years to 10 years.
a. The second option is to submit to the IRPF tax at a reduced rate
   This implies that the taxpayer is subject to the IRPF tax and in the case of income from foreign moveable capital a rate of 7% instead of 12% is applied.

The new bill grants the taxpayer the possibility to avail himself of any of the two new provisions indicated above. In the case of the first option, the tax years that have elapsed will be deducted, for example if 4 years of exemption have already been used, another 6 years are added to complete the 10 years.

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UNITED KINGDOM: EFFECTS OF BREXIT ON DIRECT TAXATION

The United Kingdom, after having exercised its right of withdrawal from the European Union (the so-called "Brexit") on 01.02.2020, was able to take advantage of a transitional period until 31.12.2020 during which all the European provisions concerning it remained in force.
On 24.12.2020 a free trade agreement ("EU-UK Trade and Cooperation Agreement") was signed between the United Kingdom and the European Union which, published in the Official Journal of the European Union on 31.12.2020, established the basis for extensive relations between the parties, including rules concerning trade in goods, investments, provision of services, digital commerce, transport, and the mobility of people.
As of 1 January 2021, therefore, the United Kingdom effectively left the customs and tax territory of the European Union with consequent implications for direct and indirect taxation and employment.
Regarding direct taxes, the various European Directives are no longer applicable in relations with UK companies, among which the EU Di-

rective 90/435/EEC (so-called Parent-Subsidiary Directive on dividends) and EU Directive 2003/49/EC (so-called Parent-Subsidiary Directive on interest and royalties). As a first consequence, multinational groups with subsidiaries or parent companies in the UK will face an overall tax burden in the distribution of intra-group dividend flows.

Regarding dividends distributed by European companies to UK companies, since it is no longer possible to apply the Parent-Subsidiary Directive, which allowed the reduction of withholding tax to zero, the individual double taxation treaties existing between the country of residence of the subsidiary company and the UK must be applied. The analysis of the Treaties shows that in about half of the 27 countries of the European Union the companies resident there should, in compliance with certain conditions, continue not to apply any withholding tax on dividends distributed to the parent company resident in the United Kingdom: Austria, Belgium, Denmark, Finland, France, Malta, Holland, Poland, Slovenia, Spain, Sweden and Hungary. In the other European countries, on the other hand, the withholding tax on dividends will increase to 5% or 10% depending on the respective Treaties.

Since dividends received by UK resident companies are normally exempt from income tax, it will not be possible to recover the tax credit for withholding tax incurred in the country of the subsidiary company.

Also, in the case of interest and royalties that will be paid by European companies to UK companies, since the Parent-Subsidiary Directive, which allowed the reduction of the respective withholding taxes to zero, can no longer be applied, the individual treaties against double taxation existing between the country of residence of the subsidiary company and the United Kingdom will have to be applied. Companies resident in most of the 27 countries of the European Union will not suffer any tax burden and will continue not to apply any withholding tax on interest and royalties, with the exception of Bulgaria, Croatia, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania and, for royalties only, Luxembourg, the Czech Republic, Slovakia and Slovenia.

In the case of the payment of dividends, interest and royalties by a Swiss company to a UK company, there will be no increase in the withholding tax since, although the Swiss company can no longer apply Art. 15 of the agreement between the European Union and the Swiss Confederation of 26 October 2004 (which made it possible to extend the Parent-Subsidiary Directive also in relations between a European company and a Swiss), Art. Nos. 10, 11 and 12 of the UK-Swiss double taxation treaty do, however, allow the withholding tax on dividends, interest and royalties to be reduced to zero, subject to certain conditions.

There will be no change to dividends paid by UK companies to their subsidiaries resident in EU countries as UK law does not provide for any withholding tax on dividends paid to foreign companies.

On 3 March 2021, the 2021 Finance Bill was introduced in the UK, which provides for the abolition, with effect from 1 June 2021, of domestic legislation (Art. 757-767 of the *Income Tax Act 2005*) which had implemented the EU Parent-Subsidiary Directive on interest and royalties and therefore from that date a 20% *withholding tax* will apply in both cases. These withholding taxes may be cancelled or reduced through the application of the existing double taxation agreements with the various European countries.

Brexit could also have important tax consequences for European groups that have holdings in US companies and have UK-resident entities among their shareholders. US domestic law provides for a 30% withholding tax on dividends, interest and royalties paid to non-residents, which can be reduced (in some cases to zero) through the application of double taxation treaties. However, this reduction may no longer be applicable if, for example, a Luxembourg company that is a shareholder of a US company is controlled by a company listed on the London Stock Exchange or has a UK resident shareholder with a holding of more than 5%.

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