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Swiss Association of Asset Managers | SAAM

Tax agreement Switzerland – Germany and Switzerland – United Kingdom

Association position

The SAAM (Swiss Association of Asset Managers) welcomes the signature of the tax agreements with the Federal Republic of Germany and the United Kingdom. It regards them as a step towards specific implementation of the new, forward-looking tax policy of Switzerland, previously only outlined theoretically and characterised by very compliant conduct in the question of mutual administrative assistance. It is desirable that corresponding agreements, which strike a balance between the protection of confidentiality and the tax interests of friendly countries, are concluded with further countries.

The SAAM regrets that it has once again not proved possible to achieve better market access opportunities for independent asset managers in Switzerland by means of negotiations. The negotiating result in this area must be assessed as inadequate.

The new tax agreements, after all, demand increasingly more knowledge of the tax handling of assets in German or British tax law respectively from independent asset managers who service clients with a tax domicile in the Federal Republic of Germany and the United Kingdom. The SAAM is committed to improved training in this area and in particular also devote itself to ensuring that corresponding information is also made available to its members in Switzerland under favourable conditions.

Point of departure

After many months of tough negotiations, the tax agreements between Switzerland and the Federal Republic of Germany and between Switzerland and the United Kingdom were signed and published at the end of September and the beginning of October 2011 respectively. These agreements provide for the future of tax relationships between Switzerland and the two treaty states through a tax levied by Swiss payment offices and to be transferred to the treaty state. Retroactively, the treaties provide for non-recurrent payments with which any tax irregularities of the taxpayers entitled to the assets are finally settled. Under ancillary agreements, the easing of

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market access for Swiss financial service providers is also to be finally established by the time the agreements enter into force.

Important treaty provisions

To settle past accounts, both treaties, whose contents are for the most part similarly structured, provide for tax regularisation of the assets deposited with Swiss financial intermediaries on the entry into force of the treaties by a non-recurrent charge by the account-holding/custodian banks. This charge will range between 19% and 34% and will be precisely assessed on the basis of the duration of the client relationship and the capital stock at the beginning or end of an examination period of several years. Individual tax factors, especially the effective taxable returns, will not be taken into account.

As an alternative to the non-recurrent charge, clients resident in the Federal Republic of Germany can opt for the information directly relevant to their taxation and additional information (especially on the asset composition) being reported to the tax authorities in their state of residence. Additional optional choices arise for taxpayers resident in the United Kingdom.

The Swiss payment offices will collect taxes on income and capital gains incurred as of the entry into force of the treaties and pass these on anonymously to the domicile states of the entitled parties. The tax payment will have the effect of settling claims (also in the case of the UK, which previously had no corresponding tax system). In the case of the Federal Republic of Germany the tax rate will be 26.375% (though if the taxpayer so desires the church tax can in addition be transferred). For entitled parties with tax domicile in the United Kingdom the tax rates are 48% on interest income, 40% on dividends and 27% on capital gains. These tax rates are practically on the level of the highest tax rates in the UK.

To guarantee a minimum tax volume, the Swiss banks have bound themselves to an advance payment of CHF 2 billion to the Federal Republic of Germany and CHF 500 m to the United Kingdom. These advance payments can be compensated by the non-recurrent charges to be paid, although these payments can only be set off in part from a particular amount against the advance payment. Full compensation only occurs if the non-recurrent charges have reached twice as much as the advance payments.

Finally, the provisions on the safekeeping of assets by Swiss collective investment schemes are to be adjusted to “international standards” and as a result in particular the provisions on organisation and responsibility of custodian banks tightened.

Particular provisions contain the agreements for mailbox companies, trusts, foundations and insurance wrappers. In the case of such constellations, the paying bodies will regulate the tax treatment according to the information collected on economic entitlement on the basis of the Money-Laundering Act. Insurance wrappers are only recognised if the insurance agreement is recognised as such in the domicile country of the insurance holder.

Entitled parties who disagree with the decisions of the bank on the implementation of the treaties can lodge objections against these. The further proceedings must still be regulated within the context of the domestic implementation.

Both treaties are in general configured as “one-way streets” in favour of the Federal Republic of Germany and the United Kingdom. However, Switzerland can also request that its treaty states introduce an equivalent system.

Assessment of the treaties from the point of view of independent asset managers

1. Concept of the non-recurrent charge that settles claims and exempts from prosecution is welcomed

The SAAM welcomes the success in agreeing on a solution at government level with the treaties with the Federal Republic of Germany and the UK, which indicates a way out of the intractable international tax debate, making allowance in an appropriate manner for the protection of privacy as well as the fiscal interests of the states involved. The concept demonstrates that mutual administrative assistance and criminal prosecution are not the only methodological approaches for settling past tax offences.

The SAAM's assessment is that the concept has the potential to serve as a model for solving other tax conflicts.

2. The treaties are not amnesty agreements

The treaties do not constitute a tax amnesty. Corresponding bluster by the opposition in the Federal Republic of Germany is an outward manifestation of the permanent electoral campaigning prevalent there.

The non-recurrent settlement according to the treaty with the Federal Republic of Germany will probably turn out to be higher in the great majority of cases than in the self accusation procedure provided for in German national law. Surveys among German tax consultants have shown that in

self accusation proceedings the taxes to be transferred retrospectively (including the back interest to be paid) very seldom exceed 15% of the assets involved, while the minimum limit according to the treaty is 19%.

However, there are some case constellations in which the non-recurrent charge according to the treaty is the more reasonable solution from purely financial viewpoints. These include cases in which large parts of the assets were invested in instruments subject to very disadvantageous tax rates in Germany (in part in a practically arbitrary manner) (e.g. so-called “black funds”), but also constellations in which in the past transfers by way of gifts or devolutions of estates in higher tax bands occurred according to German law and cases in which spontaneous declarations in Germany was not (or no longer) possible in Germany without resulting in criminal prosecution or where spontaneous declarations can trigger further tax or tax proceedings against third parties (e.g. companies in the environment of the taxpayer).

Similar constellations can also be recognised under the treaty with the United Kingdom, although this also permits carrying out more precisely calculated anonymous retrospective taxation on an individual basis.

However, the important finding is that in all cases the client affected must also carry out an assessment what the preservation of privacy, i.e. the anonymous taxation by Switzerland, is actually worth to him. This decision of the client is based on personal value decisions, for whose respect the treaties create a good foundation. There is a legal alternative to being a “glass citizen”.

The fact that this does not involve amnesty agreements is also underlined by the circumstance that one cannot achieve any regularisation via Switzerland by bringing assets to Switzerland which up to 31 December 2010 were safeguarded in other countries. New style “treaty shopping” is ruled out.

3. Freedom of choice is granted

The clients affected will be granted the freedom required to decide on two possible ways out of the existing tax situation: Anonymous settlement of old tax burdens by anonymous non-recurrent charge or the exchange of the tax information. Both options exist side-by-side and the taxpayer can choose the option that better suits his needs.

Finally, the treaty leaves the parties affected the option “opting out with their feet”, i.e. withdrawing their assets from Swiss payment offices. Switzerland has pledged to transfer statistical data on the commonest destination states for assets withdrawn from Switzerland. In the case of persons with British domicile, the withdrawal of assets from Switzerland also includes the option of

regularising the tax situation via the Principality of Liechtenstein according to the treaty arrangements of these two states in particular. However, anonymous settlement of claims is not possible under this arrangement. As the arrangements between the UK and the Principality are of limited duration, this solution will over time lead to an automatic exchange of information.

In addition, the clients also have the option of restructuring their assets until the treaties take effect.

However, in the case of the Federal Republic of Germany, essentially the only option that arises is concluding insurance agreements compatible with tax law in Germany. This only achieves a further tax deferment. The taxation then occurs upon expiry of the insurance agreement.

By contrast, in the case of clients with a British domicile, there are tax configuration options which go further, especially in the field of trusts and foundations, which are all lawful according to the applicable tax law and do not represent any evasion of the treaty.

4. Independent asset managers are not payment offices

In practically all cases independent asset managers are not payment offices in the meaning of the treaty. Only those who work as independent asset managers in a fiduciary capacity, i.e. generate capital returns or profits in their own name for customers with domicile in the Federal Republic of Germany or the United Kingdom, which are not realised via a relationship to an existing Swiss payment office, have to register themselves with Swiss finance department as payment office.

In general, independent asset managers can also continue to administer assets of clients from Germany and the United Kingdom if the client withdraws these assets from Swiss payment offices and then moves these to another country. Here, only those regulatory restrictions have to be observed that apply at the new location of the assets. This is because in many of these countries, which can be considered as a new destination for the assets, cross-border asset management by independent asset managers from Switzerland is restricted or even impossible. Moreover (with the exception of safekeeping in the Principality of Liechtenstein) a half turnover charge is incurred on all securities transactions.

What must be borne in mind here is that continued management of persons resident for tax purposes in the Federal Republic of Germany or the United Kingdom in another country without tax regularisation occurring probably represents a criminal tax offence according to the law of both countries and the exclusion from criminal prosecution provided for in the treaties does not apply.

5. Future taxation

The option is also created under the treaties for taxpayers domiciled in the Federal Republic of Germany or the United Kingdom to anonymously submit their asset returns in future to proper taxation in Switzerland.

This option is also open to clients who do not currently have their assets in Switzerland and transfer these to Switzerland. They can thus then legally configure “the present”. However, they cannot claim regularisation via the non-recurrent charge.

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