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Overview

Tax Partner AG, Taxand Switzerland

Tax Partner AG is focused on Swiss and international tax law and is recognised as a leading independent tax boutique. The firm currently features 11 partners and counsel and a total of approximately 50 tax experts consisting of attorneys, legal experts and economists. The firm advises multinational and national corporate clients as well as individuals in all tax areas. A central focus lies on tax controversy and dispute resolution, including transfer pricing issues. Tax Partner AG also provides support regarding transfer pricing studies and the preparation of transfer pricing documentation. Other key areas include M&A, restructuring, real estate transactions, financial products, VAT and customs. Tax Partner AG is independent and collaborates with various leading tax law firms globally. In 2005 the firm was a co-founder of Taxand.

Transfer Pricing offering:

- Transfer Pricing design, value-chain analysis and optimizations.
- Restructurings and valuations.
- Transfer Pricing implementation.
- Unilateral tax rulings.
- Benchmarking studies.
- Documentation.
- Support in tax audits.
- Tax disputes, including to obtain unilateral and bilateral APAs and MAP agreements.
- Due diligence re transfer pricing set-ups.

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Transfer Pricing Framework

In Switzerland, transfer pricing issues arise mainly in connection with federal and cantonal corporate income taxes and federal withholding tax. However, transfer pricing issues might also arise in connection with VAT.

With respect to corporate income tax, it should be noted that cantons have the authority not only to assess the cantonal and municipal taxes but also the federal corporate income taxes. This means that the cantons can issue advance rulings (so-called tax rulings) not only with regard to cantonal and municipal taxes but also regarding federal income taxes. However, the Federal Tax Administration (FTA) still exercises an important supervisory function over the cantons and can also intervene in individual cases. In practice, the FTA is becoming increasingly involved in discussions, especially in large transfer pricing cases.

While in the area of corporate income tax there is a parallel competence of the federal government and the cantons, the federal government has the exclusive competence to levy withholding tax, stamp duties and VAT. In the area of withholding tax, the FTA established a competence centre for transfer pricing in 2019. It is, hence, no surprise that in practice, for withholding tax purposes, transfer prices are increasingly being critically scrutinised during tax audits. This concerns, in particular, the relocation of functions abroad and controlled transactions between Swiss companies and related companies domiciled in tax havens or low-tax countries.

As far as legislation in the field of transfer pricing is concerned, it should be noted that there **are no specific regulations on the determination and documentation of transfer prices, neither at the federal level nor at the cantonal level.**

Switzerland has accepted the initial version and all updates of the OECD's Transfer Pricing Guidelines ("TPG") without reservation, including the latest update in 2022. Thus, there is **full consensus in Swiss tax law practice that the OECD's TPG are an important interpretative tool** for the application of the at arm's length principle in Swiss tax law.

In exercising its supervisory role over the cantonal tax administrations, the FTA instructed the cantonal tax administrations in 1997 and 2004 with a circular letter to directly apply the OECD's TPG. The Federal Supreme Court (FSC) tends to apply a static approach regarding the version of the OECD's TPG. Hence, the arm's length principle and the methods to determine the relevant transfer prices will be assessed according to the OECD's TPG as they were published at the time the transaction in question was settled.

Accepted Transfer Pricing Methodologies

The FTA instructed the cantonal tax administrations by a circular letter of 1997, which was renewed in 2004, to directly apply the OECD's TPG.

As Switzerland adheres to the OECD's TPG and **has not established specific transfer pricing rules**, the current regime and its development are, in general, reflected by the OECD's TPG. However, the arm's length principle was already acknowledged before the first OECD's TPG were published. Hence, in the matter of Bellatrix SA, the FSC confirmed in 1981 that for withholding tax purposes, the arm's length principle is applicable with regard to transactions concerning the company's shareholders.

Swiss domestic tax laws or practices do not provide specific transfer pricing methods. Nevertheless, as Switzerland adheres to the OECD's TPG, all the usual transfer pricing methods are admissible ("most appropriate method" approach).

In accordance with the OECD's TPG, Switzerland does not have a specific hierarchy of the methods described in the GuidelinesTPG. **The most appropriate method should be used.** However, the three traditional methods – i.e., the comparable uncontrolled price (CUP) method, the resale price method and the cost plus method – are still preferred by the tax administrations.

Transfer Pricing Documentation Requirements

Swiss tax laws do not define specific documentation requirements with respect to transfer pricing. However, taxpayers must provide all documents necessary in order to enable the tax administration to conduct a proper assessment of the taxable base. This legal obligation is based on the principle that the taxpayer and the tax administration jointly determine the relevant facts to ensure a complete and correct assessment as far as corporate income tax is concerned. As a consequence, despite the lack of specific documentation rules, taxpayers are strongly advised to have full and state-of-the-art transfer pricing documentation at hand that can be disclosed if requested by the tax administration. This also includes intercompany agreements with respect to the controlled transactions. Such documentation will also be helpful in the defence of potential tax evasion charges. Such documentation should also include sound and updated benchmarking studies.

If no appropriate transfer pricing documentation can be presented and the taxable base subsequently cannot be properly determined, the tax administration might need to estimate the transfer prices. Even though that estimate has to be dutiful and based on experience, such estimates are rarely in favour of the taxpayer. Although such an estimate is not to be considered as a penalty, it still has to be taken into consideration as a potential negative impact. The reason for that is that the courts will reject such an estimate only if the taxpayer can demonstrate that the transfer prices set by the tax administration are obviously flawed or arbitrary.

Concerning transfer pricing documentation, Switzerland legally only requires to preparepreparing a CbCR. **There is no legal obligation to prepare a master or local file.**

However, in view of a potential challenge of the transfer prices by the tax authorities, it is nonetheless **advisable** to have master and local files at hand.

Local Jurisdiction Benchmarks

Benchmarking studies carried out in accordance with the principles set out in Chapter III of the OECD TPG are generally accepted by the Swiss tax authorities. Pan-European comparables are generally accepted by the Swiss tax authorities.

The Tax audit practice shows that internal CUPs are preferred where available and sufficiently comparable. According to jurisprudence of the highest Swiss court, the Federal Supreme Court, the cost plus method may be preferred to an CUP, especially for those services that are considered low value-adding (FSC, Case No. 2C_548/2020, 2C_551/2020).

Advance Pricing Agreement "APA"/Bilateral Advance Pricing Agreement "BAPA" Overview

Switzerland has a long-standing practice regarding the issuance of unilateral rulings. This practice also includes the issuance of unilateral transfer pricing rulings.

In Switzerland, **advance pricing agreements (APAs) are available.** APAs have become a favoured option for Swiss-based international groups with complex or high-volume transactions. In practice, the procedure starts with a presentation of the facts and a formal request to the State Secretariat for International Finance (Staatssekretariat für internationale Finanzfragen, or SIF), the competent authority in Switzerland.

In 2020, 85 APA proceedings were opened, and 55 of the 304 pending APA proceedings have been closed. The SIF has published guidance on APAs.

In principle, the APA programme is open for all taxpayers that engage in cross-border intra-group transactions.

Under current practice, APA procedures are **free of charge.**

In practice, an APA will cover three to five years. However, Switzerland does not have specific time limitations that an APA may or may not cover. Rather, the time period to be covered by an APA has to be decided depending on the characteristics of the case at hand and is subject to negotiations. Hence, the duration is typically a trade-off between an administrative-economical reasoning and the uncertainty concerning future developments of the transactions that are the subject of the APA.

Transfer Pricing Audits

Transfer pricing issues can generally be raised by the tax administration in the course of ordinary tax assessments or in the course of audits. Tax audits are not regularly performed.

With regard to transfer pricing controversy process, it has to be differentiated whether a cantonal tax administration or the FTA raised the issue of transfer pricing. While the cantonal tax administrations raise this issue in the context of corporate income tax, the FTA may also challenge transfer pricing also with regard to withholding tax, stamp duty or VAT.

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As will be shown, taxpayers may challenge the results of a tax assessment or from an audit in an administrative objection proceeding before bringing the case to court. As regards the selection of the courts, the taxpayer does not have options since the competent courts are determined by law.

Transfer pricing adjustments affecting corporate income tax have to be discussed with the cantonal tax administrations, as hey are the competent authorities to assess and levy corporate income tax at cantonal and federal level. If the tax administration has already issued an assessment or a decision, a formal objection can be lodged with the tax administration itself within 30 days. The tax administration will then have to evaluate the material objections and render a new decision.

The tax administration's second decision can be appealed before court, again within a 30-day deadline. Generally, each canton provides two judicial instances, whereas; though, typically, smaller cantons only established one judicial instance.

Once the highest cantonal court has rendered its decision, an appeal with the FSC can be lodged, also within 30 days.

In contrast to the cantonal instances, the FSC will only deal with questions concerning the correct application of the law, which includes the application of the OECD's TPG as soft law. Issues concerning the facts will only be dealt with if the facts were arbitrarily established. In the context of transfer pricing, it is worth noting that the choice of the transfer pricing method and its correct application of the same is a question of law, whereas the result is considered as a factual question. Hence, regarding the determination of the at arm's length remuneration, the FSC can only intervene if the remuneration appears arbitrary.

In contrast to the cantonal tax administrations, the FTA can raise transfer pricing issues in connection with withholding tax, stamp duty and VAT. As at the cantonal level, the taxpayer can object against a negative decision of the FTA before appealing to the court.

As such a decision affects taxes being levied by a federal administrative authority, the appeal has to be lodged with the Swiss Federal Administrative Court – within 30 days. This court's decision can then be appealed with the FSC.

Transfer Pricing Penalties

Switzerland **does not impose penalties that apply specifically in the transfer pricing context, except for violations of the CbCR requirements.**

However, violations of the arm's length principle can under certain circumstances be qualified as unlawful tax evasion (or tax fraud) and as such be subject to penalties. An unlawful tax evasion might be assumed if basic principles of transfer pricing were grossly neglected and, thus, the violation of the arm's length principle was not only recognisable for the company or the persons in charge respectively but downright obvious. In such cases, it can be assumed that the transfer prices were deliberately set in violation of the arm's length principle.

In the case of tax evasion (or tax fraud), penalties may be imposed for all taxes involved. For instance, a transfer price-induced adjustment by the tax administration concerning corporate income tax may trigger respective consequences regarding withholding tax or VAT. In the case of corporate income tax, the penalties are determined based on the unlawfully evaded tax amount, whereas the potential penalty ranges from one third of the evaded tax to three times that amount. However, in general, the fine is equal to the amount of the evaded tax.

If the tax has not yet been definitively assessed, there may be a case of attempted tax evasion, which reduces the penalty to one third. Important to note is that for the purposes of corporate income tax the fine is imposed on the company. Regarding withholding tax and VAT, however, the fine is directly imposed on the person(s) responsible for the violation. At least in these cases, the fine is not determined based on the amount of tax evaded, but according to a fixed fine range.

Federal and cantonal Swiss tax laws provide for a one-time voluntary disclosure, which leads to a complete penalty relief if specific statutory conditions are met. Outside the voluntary disclosure procedures, penalties charged are lower in the case of ordinary negligence and higher in the case of gross negligence. Collaboration with the tax administration in the course of a tax criminal investigation will usually result in a lower penalty. With regard to the question of culpability, the importance of state-of-the-art transfer pricing documentation should be emphasised. If a company does have such documentation, it will be difficult for the tax administrations to substantiate culpability. However, as indicated above, many disputes can be prevented or settled by negotiations with the tax authorities during a tax assessment or tax audit process (by filing formal complaints).

Local Hot Topics and Recent Updates

Until recently, core transfer pricing issues were rarely touched by tax administrations, but as a result of the BEPS project, transfer pricing is increasingly part of routine tax audits. In recent years, the transfer pricing team of the Swiss tax authorities has been growing in size and taxpayers have been confronted more frequently with detailed questions on transfer pricing issues (e.g., requests for detailed transfer pricing documentation and explanations on comparables). The focus is on the transfer of functions, the transfer of intellectual property rights, financial and trading transactions and asset management services. In particular, transactions with foreign companies in low-tax jurisdictions are attracting the attention of the tax authorities.

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Documentation threshold

Master file	N/A but recommended
Local file	N/A but recommended
CbCR	CHF 900 M

Submission deadline

Master file	N/A
Local file	N/A
CbCR	31 December after FY

Penalty Provisions

Documentation – late filing provision	N/A
Tax return disclosure – late/incomplete/no filing	Assessment by discretion by authorities
CbCR – late/incomplete/no filing	CHF 200 per day of late filing, up to CHF 50k

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