



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 17 partners and counsel and a total of more than 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.

Transfer Pricing offering:

- ❖ Transfer Pricing design, value-chain analysis and optimizations.
- ❖ Restructurings and valuations.
- ❖ Implementation of new Transfer Pricing policies .
- ❖ Unilateral tax rulings.
- ❖ Benchmarking studies.
- ❖ Documentation (Master file, Local file, CbCR, EU pCbCR).
- ❖ Support in tax audits.
- ❖ Tax disputes, including obtaining unilateral and bilateral APAs and MAP agreements.
- ❖ Due diligence regarding transfer pricing set-ups.

Tax Partner AG
Talstrasse 80
8001 Zurich
Switzerland

Tel: +41 44 215 77 77
Email: taxpartnerinfo@taxpartner.ch
Web: www.taxpartner.ch

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. In this regard, it should be noted that transfer pricing principles do not apply only to cross-border controlled transactions, but also domestic inter-cantonal controlled transactions.

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, as well as the is becoming increasingly involved in discussions, especially in large transfer pricing cases.

While in the area of corporate income tax there is 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 center for transfer pricing in 2019. It is, hence, no surprise that in practice, for withholding tax purposes, transfer prices are increasingly subject to scrutiny during tax audits. This concerns, in particular, the relocation of functions and controlled transactions between Swiss companies and related companies abroad.

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 are assessed according to the OECD's TPG as they were published at the time the transaction in question was settled.

The importance of the OECD TPG has been further underlined by the recently (January 2024) published paper of the Swiss tax authorities, namely the SSK (Schweizerische Steuerkonferenz) and the FTA regarding transfer pricing, as this paper strongly refers to and basically summarizes the OECD TPG. Further, in February 2024, the FTA started publishing a Transfer Pricing Q&A on specific transfer pricing topics offering additional transfer pricing guidance and important insights into Swiss practice and the interpretation of international rules. According to the FTA, It is intended that these Q&A will be regularly updated.



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. **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.

In its Transfer Pricing Q&A, the FTA clarified that tax expenses should generally not be included in the cost base, aligning with OECD TPG. However, a Swiss FSC ruling (9C_37/2023 of 11 June 2024) required the inclusion of taxes for domestic cases under article 58(3) of the Federal Direct Tax Act (FDTA). In response, the FTA issued an additional statement on 11 December 2024, reaffirming that this ruling does not impact cross-border transactions, where tax expenses remain excluded.

Similarly, the FTA Q&A highlighted that financing costs, typically unrelated to core business activities, should be excluded from the cost base. Additionally, the FTA Q&A confirms that no mark-up is added on pass-through costs.

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 controlled transactions. Such documentation will also be helpful in the defense of potential tax evasion charges.

In addition, documentation should also include sound and updated benchmarking studies or other economic analysis supporting the arm's length nature of the transfer prices applied.

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 favor 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 preparing 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. **In practice**, tax authorities **expect a transfer pricing documentation** to support the arm's length character of the controlled transaction (see section on the burden of proof below).

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.



Special focus on intercompany finance transactions

Although the Swiss tax authorities do not have specific rules governing financial transactions, such transactions have been on the focus for already a couple of years, in particular if deviating from the unilateral safe harbour rates, annually updated by the FTA. The most relevant administrative guidelines in Switzerland in the area of transfer pricing can be seen in these circulars published by the FTA providing safe harbour rules for thin capitalization and for intra-group interest where the arm's length principle is not necessarily reflected in the published rates.

Financial transactions are treated in line with the principles of the OECD Transfer Pricing Guidelines. This is supported by the Q&A that was published by the FTA in January 2024, also covering questions and answers in connection with intra-group loans, making reference to the OECD Transfer Pricing Guidelines.

The FTA annually publishes circular letters providing unilateral safe harbour interest rates on long-term intercompany loan receivables and payables both in Swiss francs and foreign currencies. In a recent highest court decision, the Federal Supreme Court (9C_690/2022, 17 July 2024) clarified that these safe harbour rates are presumptive only—tax authorities can independently determine whether interest rates comply with the arm's length principle if taxpayers deviate from the published rates.

Consequently, any deviation from the FTA safe harbour rates places the burden on the taxpayer to prove that the applied interest rate is at arm's length through a transfer pricing analysis. Where safe harbour rates are applied to long-term loans, the arm's length presumption is basically satisfied without further justification.

Safe harbour rules also apply regarding the qualification of debt vs. equity for tax purposes (thin cap based on maximum debt capacity ratios per asset category as in the FTA's Circular Letter No 6a of 10 October 2024).

Unilateral Rulings / Advance Pricing Agreement "APA"

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** (APA in the sense of a bilateral APA). APAs have become a favored 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 principle, the APA program 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 administrative-economical reasoning and the uncertainty concerning future developments of the transactions that are the subject of the APA. Switzerland allows but does not require taxpayers to make year-end adjustments. In the APAs for example, Switzerland could agree on a term test solution if required by the taxpayer and agreed with the other Competent Authority.

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.

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 they 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 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.

Withholding tax in the case of primary, corresponding and secondary adjustments

Further, the recently published Q&A by the FTA also provides answers as to when Swiss withholding tax is triggered in the case of primary adjustments, profit repatriations and secondary adjustments.

The FTA stresses that primary and corresponding adjustments typically relate to income tax. If such primary adjustment results in a profit repatriation, these are not considered to be deemed dividends and are not subject to withholding tax if they are carried out in accordance with the result of a mutual agreement procedure or a unilateral agreement based on art. 16 Federal Act on the Implementation of International Agreements in the Tax Area. In the absence of a mutual agreement procedure or a Swiss unilateral agreement, withholding tax is levied on payments made for the purpose of repatriation.

If, for example, a primary adjustment made by a cantonal tax administration is confirmed in whole or in part in the mutual agreement procedure, the question of the secondary adjustment arises – i.e., the levying of withholding tax by the FTA on the amount of the primary adjustment confirmed in the mutual agreement procedure. In this respect, the FTA differentiates between no withholding tax if there is a respective agreement in the mutual agreement or withholding tax. If addressed in the agreement (NB: the taxpayer has no claim that such clause is included in the agreement), the repatriation of profits must take place within 60 days of the mutual agreement's conclusion and needs to be proven vis-à-vis the FTA. In case of FTA audits, such agreement is excluded.

The Burden of Proof in Transfer Pricing: Theory versus Practice

Swiss tax laws, apart from the Federal Act on the international automatic exchange of country-by-country reports of multinational groups, do not define specific documentation requirements with respect to transfer pricing. However, taxpayers must provide all documents necessary 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.

In particular, taxpayers are obliged to provide the tax authorities with any information on transactions between associated companies upon request. Therefore, although there are no statutory TP documentation obligations, sound TP documentation can effectively reverse the burden of proof in favor of the taxpayer. Such documentation will also be helpful in the defense of potential tax evasion charges. Such documentation should also include sound and updated benchmarking studies.

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 under certain circumstances can 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 recognizable for the company or the people 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. It is important to note that for the purposes of corporate income tax a 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 emphasized. 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

Transfer pricing topics are more and more 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.

The Administrative Court of Zug (5 December 2024, Case A 2023/1) reinforced the Swiss periodicity principle, prohibiting multi-year “margin smoothing” across multiple years, i.e. each fiscal year must be assessed separately regarding compliance with the arm’s length principle:

A legal entity based in the Canton of Zug, which is part of an international pharmaceutical group, acted as limited risk distributor as of 2018. For 2018, the company reported a negative operating margin of –21.8%. The cantonal tax administration objected to this margin as being non-arm’s length and instead assessed the company with a margin of 1.1% which was the lowest value of the interquartile range of the benchmarking study. As a result, a profit adjustment in the amount of around CHF9 million resulted. The taxpayer filed an objection and countered that the three-year average (2016–18) stood at 1.2%, which would compensate for the low 2018 margin. During court proceedings, the taxpayer referred to the OECD TP guidelines, which allow the use of multi-year data to determine appropriate transfer prices. The taxpayer concluded from this statement that it could also smooth the margin over several years.

The Administrative Court in the Canton of Zug did not accept the line of reasoning provided by the taxpayer. It emphasized the principle of periodicity, which requires taxes to be assessed separately for each tax year. A subsequent “smoothing” of the margin over multiple years was deemed impermissible, especially as there were no extraordinary circumstances substantiating the negative result in 2018. According to the court’s ruling, it is in line with the fundamentals of transfer pricing law that each business unit be taxed according to the economic substance of the value it adds. This analysis is carried out anew every year.

Documentation threshold

Master file	N/A but recommended
Local file	N/A but recommended, and in practice expected
CbCR	CHF 900 M

Submission deadline

Master file	N/A
Local file	N/A
CbCR	12 months after FY closing

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



CONTACT

Prof Dr René Matteotti
Tax Partner AG

rene.matteotti@taxpartner.ch
+41 44 215 77 61



Caterina Colling Russo
Tax Partner AG

caterina.collingrusso@taxpartner.ch
+41 44 215 77 56



Manuel Ulrich
Tax Partner AG

manuel.ulrich@taxpartner.ch
+41 44 215 77 37



Monika Bieri
Tax Partner AG

monika.bieri@taxpartner.ch
+41 44 215 77 34



Daniel Schönenberger
Tax Partner AG

daniel.schoenenberger@taxpartner.ch
+41 44 215 77 19