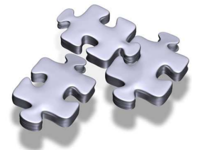

THE SWISS-UK TAX COOPERATION AGREEMENT

Signed on 6th October 2011

SELECTED QUESTIONS

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I. What is the purpose of this agreement?

Essentially, the agreement aims to remove the pressure of the European Union on Switzerland to introduce an automatic exchange of information[1], on the one side, and on the other side to collect for HMRC, on an anonymous basis, taxes from UK tax payers on assets deposited in Switzerland, both for the past and the future.

II. How should this agreement be interpreted?

This agreement is an international treaty. Accordingly its interpretation must follow exclusively the rules laid down in the Vienna Convention on the Law of Treaties, i.e. primarily with regard to the ordinary meaning of the text of the agreement.

In this respect, it is positive to find a number of provisions giving detailed definitions of the main underlying terms in the mechanism of the agreement.

III. Who are the parties directly concerned?

A/ "Relevant persons"

1. Who are "relevant persons"?

"Relevant persons" are all individuals

- resident in the UK[2]
- holding directly[3] or indirectly, as beneficial owners[4],
- "relevant assets"[5]
- with a "Swiss paying agent"[6]
- at a certain point in time.

[1] This is however not totally excluded: surprisingly, article 35 of the agreement leaves the initiative for this to Switzerland.
[2] Though the treatment of non-domiciled residents is different from the one of domiciled residents, as explained hereafter
[3] As counterparties
[4] Through
- domiciliary companies, except such companies are proven to be subject to effective taxation in their place of incorporation or effective management or are treated as non-transparent with reference to their income under UK law, or
- insurance companies or insurance wrappers (unless the insurance company confirms to the Swiss paying agent that it will deliver the appropriate certification to the UK competent authority), or
- other individuals, e.g. nominees, fiduciaries, agents.

Are not beneficial owners individuals whose right on the "relevant assets" cannot be ascertained because of a discretionary trust or foundation in which they are placed.

[5] E.g.
- cash and precious metals accounts,
- bankable assets held by a Swiss paying agent acting as a fiduciary agent,
- securities,
- options, debts and forward contracts,
- structured products such as certificates and convertibles,

but not:
- contents of safe deposit boxes,
- chattels,
- real property,
- insurance contracts regulated by SFMSA (except assets held by an insurance company in a separate account combined with a minimal risk protection)

[6] As defined hereafter in §III.B/

2. How are "relevant persons" identified?

Their identity and residence are established on the basis of the anti-money laundering records of the "Swiss paying agent", which show in particular their UK principal private address.

UK passport holders claiming to be non-UK residents must prove their non-UK residence tax status by means of a third country's tax residence certificate.

UK residents claiming to be non-UK domiciled must prove their non-UK domiciled tax status by means of a certificate produced by a UK qualified professional[7], which should also indicate that they have claimed the remittance basis of taxation for the relevant years[8].

3. Are there any "relevant persons" who are denied the benefit of the agreement?

The agreement will not be available to UK residents under investigation on tax matters.

4. Does the agreement apply in the reverse case, i.e. when Swiss residents hold relevant assets with UK paying agents?

Though the agreement does not contain any specific provisions to this effect, it furthers the transmission of information by the UK to ensure the effective taxation of Swiss residents on their UK assets by opening the door to reciprocity measures to be implemented by a complementary agreement.

B/ "Swiss paying agents" – who are they?

Banks, securities dealers, resident individuals and companies, partnerships and permanent establishments of foreign companies accepting, holding, investing or transferring third parties' assets or merely making payments of income or gains for third parties or securing such payments in the normal course of their business, qualify as "Swiss paying agents". In essence, all financial intermediaries as per the Swiss Anti-Money Laundering Act are "Swiss paying agents".

The reference to "Swiss paying agents" may be somewhat misleading. Indeed, the effective payers will be the "relevant persons", as they will suffer the tax drain. The "Swiss paying agents" will be acting more as "tax collecting agents" for HMRC; they will be collecting the tax and remitting it to the Swiss federal tax authorities, which in turn will be paying it to HMRC (after deducting an expense allowance of 0.1% of the amounts transferred).

The fact that the Swiss banks have agreed to make out of their own means an upfront payment of CHF 500 million in January 2013 should not be seen as a gesture of the "Swiss paying agents" in favor of the "relevant persons". This amount is recoverable by means of compensation against the CHF 500 million tax collected after the first tranche of CHF 1,300 million has been paid to HMRC.

[7] Lawyer, accountant or tax advisor, member of the relevant professional body.
[8] For regularizing the past, for the years ending 5.4.2011 and 5.4.2012 and for the final withholding tax – for the relevant year. In both cases, the "Swiss paying agent" should be provided with the certificate by 31st March each year, as of 2013.

This payment may therefore be seen as the price paid (eventually by the "relevant persons") for the agreement on the "Provision of cross-border financial services in the United Kingdom by firms from Switzerland", which is the twin agreement of the tax cooperation one.

IV. At what point in time do the "relevant assets" have to be held by a "Swiss paying agent" in order for the "relevant persons" to be concerned by the agreement?

Though the agreement is meant to be enforced as of 1st January 2013, "relevant persons" have until 31st May 2013 to withdraw their "relevant assets" and so avoid falling under the agreement. In order however to avoid the possible exchange of information under this agreement, the "relevant assets" should be withdrawn by 31st December 2012.

V. How will the agreement work?

A/ With regard to the past

A different treatment will be applied to "relevant persons", depending on their status of UK-domiciled or non-UK domiciled residents.

The former, who have "relevant assets" with a "Swiss paying agent" on 31st December 2010 and 31st May 2013, will have the option to

- either instruct their "Swiss paying agent" to levy a one-off payment of 34% on a base calculated as per a formula taking into account the capital held back as far as 31st December 2002 (and so possibly reducing the effective rate down to 19%), or

- authorize their "Swiss paying agent" to disclose their relationship to the Swiss federal tax authorities, who in turn will report it to HMRC (voluntary disclosure)

The latter having "relevant assets" on the same dates will have, in addition to the above options, the possibility to

- disclose to their "Swiss paying agent" all their non-UK income and gains remitted to the UK between 31st December 2002 and 24th August 2011, on which the full amount of UK taxes has not been paid ("omitted taxable base") by making a self-assessment and a one-off payment, or

- confirm to their "Swiss paying agent" that none of the above options is chosen ("opt-out method").

B/ With regard to future income and gains

These will be subject to a final withholding tax with different rates applying on different types of revenue[9]. The voluntary disclosure always remain an option.

[9] Interest income - 48%, dividend income - 40%, other income, e.g. structured products, - 48%, capital gains - 27%. These rates are function of the current UK tax legislation and are subject to amendment. (In the event of lack of proof of a non-UK domiciled status after a declaration has been given, the rate will be as follows: interest income - 50%, dividend income - 42.5%, other income - 50%, capital gains -28%.

A non-UK domiciled resident will be liable only for the UK source income or the remitted one[10].

VI. What are the rights and duties of the "relevant persons"?

Their primary choice is between becoming a "relevant person" and avoiding it.

The latter implies the closing down of the relationship with the persons or institutions which will qualify as "Swiss paying agents" by 31st December 2012 or at latest before 31st May 2013[11].

The former choice implies submission to the agreement and, consequently, the "relevant persons" will have to

- limit their exposure by establishing the absence of a UK residence status or that of a non-UK domiciled resident,
- opt, for each account or deposit, as of 1st January 2013, for the one-off payment regularizing the past or for the disclosure,
- in case of insufficient funds for the one-off payment, dispose of up to eight weeks to provide the "Swiss paying agent" with the necessary funds (failing to do so, disclosure will follow),
- receive a certificate for the one-off payment from the "Swiss paying agent" which is worth clearance of UK tax liability for income, capital gains and inheritance taxes as well as VAT (except in case of a false declaration of non-UK domiciled status or election for the self assessment when there are outstanding tax liabilities in respect of "relevant assets" which are not declared on the self assessment).

Transitional situations are regulated as follows:

- for a business relationship with a "Swiss paying agent" established between 31st December 2010 and 31st May 2013, the "relevant person" will have to produce, if applicable, a written confirmation stating whether:
    - o his "relevant assets" were booked with another "Swiss paying agent" as at 31st December 2010, and
    - o the said business relationship was ongoing as of 31st May 2013.

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[10] In the event of lack of proof of a non-UK domiciled status after a declaration has been given, the rate will be as follows: interest income - 50%, dividend income - 42.5%, other income - 50%, capital gains - 28%.

[11] On the basis of the information received from the "Swiss paying agents", the Swiss federal tax authorities must communicate to HMRC, by 31st May 2014, the ten jurisdictions to which "relevant persons" who have closed their accounts or deposits between 6th October 2011 and 31st May 2013 have transferred the largest volume of "relevant assets. This information should contain the number of "relevant persons" for each jurisdiction.

- If only the first of these two conditions is met, then the "relevant person" must, by 30th June 2013:

    - notify the new "Swiss paying agent" of his choice between the one-off payment and the voluntary disclosure, and

    - instruct him in writing to request from each previous "Swiss paying agent" all necessary information for the application of the chosen option, and

    - authorize in writing each previous "Swiss paying agent" to transfer to the new one, on the latter's request, all necessary information for the application of the chosen option.

The non compliance with these duties will be treated as being an option for voluntary disclosure.

VII. What are the duties and liabilities of the "Swiss paying agents"?

In summary, their duties are to

- establish the identity and residence of the "relevant persons" according to their Swiss due diligence records,

- notify them by 28th February 2013 of the content of the agreement and the rights and duties it generates for them,

- transfer monthly the information to the Swiss federal tax authorities related to personal details and statements of accounts or deposits of their "relevant persons" who have chosen the disclosure option,

- levy, on the 31st May 2013, a one-off payment on the "relevant assets" of their "relevant persons", for regularizing the past,

- annually levy a final withholding tax on income and gains generated by "relevant assets",

- transfer to the Swiss federal tax authorities, within two months following the year end, the tax levied and indicate the allocation between the types of income and gains on which it has been levied,

- issue to the "relevant persons" at the end of each year a certificate proving the payment of tax, if required by HMRC,

- transfer relevant data to another "Swiss paying agent" when "relevant assets" are transferred,

- if the “Swiss paying agent” is an institution governed by the Swiss Banking Act, disclose the existence of accounts or deposits of a UK taxpayer, if required by the Swiss federal tax authorities in response to a nominative request of information made by the HMRC[12].

In addition to the above individual duties, the Swiss banks have the following joint obligations:

- to form, by 1st January 2013, a common implementation vehicle acting as pooling and clearing institution, as to the upfront payment to be made by them,

- to make this payment of CHF 500 million to the Swiss federal tax authorities by 26th January 2013.

A particular emphasis should be placed on the obligation that the “Swiss paying agents” are assigned by the agreement not to knowingly manage or encourage the use of artificial arrangements with the sole or main purpose of the avoidance of taxation of the “relevant persons”. In case of a clear and direct evidence of such a behavior, the incriminated “Swiss paying agent” will be liable for the payment of the tax avoided.

VIII. What is the relationship between the taxes levied by virtue of this agreement and other taxes levied at source?

Each type of taxes (e.g. those levied by virtue of the Agreement on the Taxation of Savings, the Swiss Withholding Tax Law or the UK tax legislation) is levied for itself. To the extent however that the base of these taxes may be the same, tax credits are available in order to avoid double or multiple taxation.

IX. What is the relationship, with regard to the exchange of information, between this agreement and the Swiss-UK double taxation treaty?

The communication of information requested by HMRC does not prevent it from seeking further information by virtue of the double taxation treaty. In addition, as long as reciprocal exchange of information is not implemented by virtue of this agreement, the double taxation treaty is the only avenue for the Swiss federal tax authorities to seek information from HMRC.

[12] Except in some specific cases.

X. What are the main points of comparison of this agreement with the Liechtenstein Disclosure Facility (LDF)?

1. Introduction

On 11th August 2009 already, simultaneous to a tax information exchange agreement (TIEA) as per the OECD Model, Liechtenstein and the UK signed a Memorandum of Understanding (MoU) offering a tax payer assistance and compliance program and a special disclosure facility, the Liechtenstein Disclosure Facility (LDF). These were followed by two joint declarations clarifying the MoU and by the enactment of a five-year tax payer assistance and compliance program (TACP), with effect as of 1st September 2010. This legal basis is much more detailed than the Swiss-UK Tax Cooperation Agreement.

The relationship between the TIEA and the MoU is of prime importance: the LDF runs from 1st September 2009 to 31st March 2015, so preventing the exchange of information under the TIEA which applies as of 31st March 2015.

2. Who are the parties directly concerned?

The definitions of “relevant persons” having “relevant property” with “financial intermediaries” are the same as the ones given by the Swiss-UK Tax Cooperation Agreement, except that companies, and not only individuals, may have access to the LDF.

3. At what point in time does the “relevant property” have to be held by a “financial intermediary” in order for the “relevant persons” to be concerned by the facility?

The LDF applies to “relevant property” held on 1st September 2009, and from 1st December 2009 for a “relevant property” moved to Liechtenstein after 1st September 2009. It ends on 31st March 2015.

4. What are the main differences that the LDF presents in comparison with the Swiss-UK Tax Cooperation Agreement?

These differences can be placed in two categories:

A/ From the point of view of substance

With regard to the scope of UK taxes concerned, the LDF is larger: it includes UK inheritance tax, income tax, corporation tax, capital gains tax, stamp duty, VAT and national insurance contributions.

The assessment period is limited to accounting periods/tax years commencing April 1999. This means in practice that amnesty is given for prior years (whilst normally the statute of limitation for income tax is twenty years and there is no statute of limitation for inheritance tax).

In case of an “innocent error”, the assessment period is shortened to six years from the point in time of the disclosure report.

The LDF is open for assets not only in but also outside of Liechtenstein.

The tax liability can be discharged by the "relevant persons" either by calculating the actual tax or by using a composite rate of 40% (any tax withheld as per the EU-Liechtenstein Savings Agreement being available to be set off). Except in the case of an "innocent error", and in addition to the interest due, a penalty of only 10% is levied. The tax drain may therefore be much less harmful than under the Swiss-UK Tax Cooperation Agreement.

B/ From a procedural point of view

Prior to making a disclosure, it is possible to conduct initial no-names discussions with HMRC.

There is a special desk opened by HMRC and an official booklet published by it containing detailed guidance of how to use the LDF.

As a rule, the LDF guarantees immunity from prosecution for tax related offences and from other unpleasant publicity in the UK.

XI. Conclusion

The Swiss-UK Tax Cooperation Agreement is the second of this type signed by Switzerland. It follows the pattern of the Swiss-German agreement signed on 21st September 2011.

The Swiss-UK agreement is clearly less attractive than the Liechtenstein Disclosure Facility; this can be seen as a complementary option for "relevant persons" to obtain a better deal by moving some of their "relevant assets" to Liechtenstein.

Despite some indications that other countries, such as Greece and Italy, have shown interest to sign similar cooperation tax agreements with Switzerland, it should be pointed out that the two agreements already signed have not been perceived with great enthusiasm by the public and some professional milieu in the UK and in Germany. In any case, they still have to undergo the parliamentary approval.