

Transfer Pricing Country Summary Switzerland

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Legislation

Existence of Transfer Pricing Laws/Guidelines

There are no specific transfer pricing regulations. However, legal support for adjusting profits of a taxpayer is derived from the arm's length principle in Article 58 of the Federal Law on Direct Federal Tax and Article 24 of the Federal Law on the Harmonization of the Cantonal and Communal Taxes on a cantonal level. Furthermore, the Swiss Federal Tax Administration (SFTA) instructed the cantonal tax administrations in Circular Letter issued on 17 September 1997 that when taxing multinational enterprises, they should take into consideration the OECD Transfer Pricing Guidelines. Switzerland has agreed to apply the key aspects of the OECD Transfer Pricing Guidelines.

There are a number of circulars and circular letters that imply transfer pricing regulations, such as:

- Circular Letter No. 6 issued in June 1997, which regards hidden equity;
- Circular letter No. 8 issued in December 2001, which regards the international profit allocation of principal companies;
- Circular Letter No. 4 issued in March 2004, which states that the remuneration for services performed by service companies should respect the arm's length principle by selecting an appropriate transfer pricing method and an arm's length margin of mark up.

On yearly basis, SFTA publishes a Circular letter regarding the interest rates for inter-company loans in Swiss Francs and a Circular letter regarding the interest rates for inter-company loans in foreign currencies. The interest rates vary per currency.

A draft legislation regarding corporate tax reform is in its final stages of parliamentary works. It is expected that the new legislation will be enacted in 2019/2020.

Implementation of BEPS-related documentation requirements

Switzerland implemented the Country-by-country reporting obligation in its legislation. The CbCR law entered into force on 1 December 2017.

Definition of Related Party

There are no formal related party disclosure requirements. In general, the OECD definition regarding associated enterprise is applied. Therefore, a related party is considered to be a direct or indirect shareholder of (a) the Swiss company, (b) any other group company or (c) a third party fronting for them.

The Swiss Federal Supreme Court has in his jurisprudence clearly defined this expression. An entity is considered as a related party if primarily a commercial or secondarily a personal close relationship

exists between the two entities. Therefore, a direct or indirect participation in the management, control or capital is not required. The crucial question is if the tested transaction was conducted only because of the associated relationship or not.

Transfer Pricing Scrutiny

The risk that transfer pricing issues are scrutinized during an audit has increased (medium level of audit risk). Transfers of intangibles, services, intercompany financing or business restructuring are usually more scrutinized.

There is no specific TP audit in Switzerland so far. Transfer pricing can potentially be audited during the normal tax audit procedure.

The cantonal tax authorities are now more active regarding transfer pricing during a tax audit, in particular towards foreign companies showing a balance sheet loss. The FTA is also becoming more active toward foreign companies, in particular regarding WHT related to deemed dividend and Swiss value-added tax (VAT), when applicable.

Transfer Pricing Penalties

There are no specific transfer pricing penalties, but general penalty rules apply. However, penalties are only imposed in case of fraud or negligence. Interest charges for late payment are due in case of adjustments.

As a non-arm's length transaction can be considered as a hidden distribution of profits, a transfer pricing adjustment can result in the payment of Swiss withholding tax of 35% or a gross-up to 54% (if not borne by the beneficiary). Nevertheless, the company may request for a total or partial refund based on the applicable double taxation agreement between Switzerland and the concerned foreign state.

Advance Pricing Agreement (APA)

Advance Pricing Agreements can be concluded with the Swiss tax authorities. Even though there are no specific formal procedures, tax rulings are a common practice in Switzerland. Also, SFTA participates in bilateral and multilateral APAs in accordance with Mutual Agreement provision in the applicable double tax treaty. APA is generally granted for 3 to 7 years but it may be subject to different negotiation.

Documentation and Disclosure Requirements

Tax Return Disclosures

There are no specific disclosures with respect to transfer pricing.

Level of Documentation

Swiss tax law does not have specific requirement in terms of documentation with the exception of the Country-by-country reporting obligation (please refer hereafter to the paragraph concerning the Country-by-country reporting obligation).

The taxpayer must submit documentation (most often within 30 days) upon request from the tax authorities as part of the normal tax audit. According to article 126 FDTA and article 42 FHDT, the taxpayer should provide all necessary documents for properly assessing the taxable income.

In case of intercompany transactions, the taxpayer must be able to demonstrate that transfer prices applied are based on sound economic and commercial reasoning. There is no specific formal requirement but the taxpayer should prepare appropriate documentation depending on its structure and/or activities.

If the tax authorities do not request for further information, the taxpayer has no obligation to maintain TP documentation, although it is now highly recommended to prepare adequate documentation.

There is no formal requirement in terms of TP documentation in Switzerland then the documentation may be limited. The only requirement is that the documentation provided should respond sufficiently to the tax authorities' request. The Swiss practice is to refer to the OECD guidelines on Transfer Pricing and thus it is expected that intercompany transactions adhere to the arm's length principle.

Country-by-country reporting obligation

Switzerland signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country (CbC) Reports and adopted the CbC reporting standards in its domestic legislation. The law and the ordinance regarding the CbC reporting entered into force as of 1 December 2017.

The obligation to prepare and file a CbC report will become mandatory for the first time from the tax year 2018 onwards. The first exchange between Switzerland and its partner states or countries that have signed the multilateral competent authority agreement (MCAA) will be mandatory from 2020 onwards.

To enable Swiss-based and only Swiss-based companies to meet with the generally expected earlier

exchange of CbCR from the tax year 2016 onwards, the Ordinance and in particular the law foresee voluntary submission of CbCR for tax periods before 2018. These reports can be transmitted by the Federal Tax Administration (FTA) based on the MCAA on the Exchange of CbCR to partner states from 2018 onwards. The FTA published on its website the procedure to follow.

Content of Transfer Pricing documentation

There is no specific requirement in terms of content except for the fact that the taxpayer should provide appropriate documentation to support positions taken. The notion of “appropriate documentation” is not defined and varies on a case by case appreciation.

Record Keeping

There are no specific transfer pricing regulations or rules dealing with record keeping. There are general and mandatory record keeping rules in the statutory accounting regulations, though.

Language for Documentation

Documentation should be drafted in the official language of the cantonal authorities where the company is established. The official languages of Switzerland are: German, French, Romansh or Italian. English documentation may also be accepted, but it is expected that the documents have to be translated into the relevant official language, upon request.

Small and Medium Sized Enterprises (SMEs)

There are no specific provisions with regard to the documentation requirements for small and medium sized enterprises.

Deadline to Prepare Documentation

There is no statutory deadline for preparation of transfer pricing documentation. It is highly recommended that the documentation is prepared in advance and that the transfer pricing methodology applied in transactions with related parties be properly documented.

Deadline to Submit Documentation

There is no statutory deadline for submitting the document. If the tax authorities request transfer pricing documentation during a tax audit, the deadline is generally 30 days after the request has been made. This time limit may be extended at the discretion of the tax authority if the taxpayer so requests.

Statute Of Limitations

The general rule provides up to ten years prior from the end of the assessment year, if new facts or circumstances are discovered on Transfer Pricing Assessments (deadline to file the appeal is 30 days after the notification of the assessment).

Transfer Pricing Methods

The SFTA adheres to the OECD Guidelines for transfer pricing, and prefers the transactional methods over the profit based methods. Circular Letter 4/2004 mentions that mark ups of service companies must be determined in accordance with the arm's length principle, on the basis of comparable uncontrolled transactions and with appropriate ranges of mark ups for any individual case. The Circular Letter also implicitly states that the cost plus method is the most appropriate method for service companies to price their services. However, the cost plus method is only exceptionally the appropriate method for financial services or management functions. A company that wishes to lower the mark up applied under the cost plus method for determining its taxable income has the burden to prove that the mark up is too high.

However, where facts and circumstances indicate, other methods of arriving at a profit on the services may be appropriate.

Comparables

Swiss comparables are preferred but limited; therefore Pan-European benchmark searches are generally accepted by the Swiss tax authorities. The Amadeus database is generally applied.

Mutual Agreement Procedure

Swiss double taxation treaties usually contain a provision for Mutual Agreement Procedure (MAP). If a double taxation occurs with a country with which Switzerland has signed a double tax treaty or if there is a risk of double taxation occurring, taxpayer resident of Switzerland may request to the Federal Department of Finance in Berne (State Secretariat for International Financial Matters) to initiate a MAP. MAP to avoid double taxation related to TP must be filled by using the "Filling request for Mutual Agreement Procedures (MAP) / Advance Pricing Agreement (APA) regarding Transfer Pricing". Most of Switzerland's double tax treaty provides that the request must be submitted within 3 years from the first notification of the action resulting in a double taxation. The State Secretariat for International Financial Matters (SIF) then informs the Swiss competent tax authority about the outcome of the MAP and when necessary implements the decision automatically. MAP is free. The tax payer incurs the costs of his request.