INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

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National Report of Switzerland

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INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are lookinzzg for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing transparency

and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

Please find here some useful information for drafting your report. Following these basic rules will ensure consistency among all our reports as well as a convenient experience for our readers.

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- If you need to display a list, you may use bullet points or letters in lowercase.
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Heading 2, Font: Garamond, Size 12, Bold

- **Body text**

Read here your body text in Garamond, Size 12.

- **Lists**

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BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Switzerland is a civil law country. Therefore, the trust is an imported legal institution in Swiss legal system. There was no legal provision on the recognition of foreign trust until July 1st, 2007, when the Hague Convention on the Law Applicable to Trusts and on their Recognition entered into force in Switzerland. The Hague convention was then transposed in the Swiss Private International Law Act.

From a civil law point of view, there are no restrictions for a settlor to be a beneficiary. However, from a tax point of view, if the settlor is a beneficiary, the trust may not be qualified as irrevocable discretionary trust and would be treated as a transparent trust.

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

The Swiss Civil Code provides for specific rules regarding (Swiss) Foundations. According to the Federal Tax Circular on Trusts, the foundation may have the same function as a trust, but the foundation has the legal personality and is the owner of the assets.

From a legal point of view, the Swiss Foundation is principally used for charitable purposes, which are tax exempt. In such foundations, the founder or related parties cannot be in any case beneficiaries of it. For other type of foundations, any distribution from the Foundation to the (any) beneficiary, qualified as a donation to an unrelated party, may be subject to donations/inheritance tax at the highest possible rate. Each cantons are competent to fix its donation/inheritance tax rates. This is very negative aspect of Swiss Foundation.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Foreign trust or Dutch Foundation are frequently used for asset protection or estate planning. In some cases, a Swiss holding limited company could be accurate. Possibly, the Luxembourg foundation project seems also interesting from a Swiss point of view.

The Swiss holding company is an interesting onshore vehicle, in particular for Swiss residents with foreign assets or for Swiss residents subject to lump sum taxation. Basically, Swiss holding company benefits from participation reduction (full exemption if pure holding) for qualified dividends and capital gains, full credit of Swiss withholding tax on dividend distributions for Swiss resident, access to the broad Swiss treaty network. Dividends to the shareholders are partially exempt.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

Switzerland has a broad Bilateral Investment Treaties. In principle, Swiss tax authorities respect asset protection structure, as long as the structure is correctly established and its purpose is not to evade taxes. Under certain conditions, general anti-avoidance theory may be applied by the tax authorities to pierce the corporate veil or to tax in Switzerland an offshore structure, in case the effective management of such structure is located in Switzerland.

According to the practice of the Swiss Federal Tax Authorities with regard to foreign trusts, is to tend to qualify the trust as revocable trust (transparent fiscally) based on the below indications:

- Does the settlor is a beneficiary of the trust (capital or income)?
- Does the settlor have the right to revoke the trustee and to nominate another one?
- Does the settlor have the right to designate new beneficiaries?
- Does the settlor have the right to replace the protector who has similar powers to the trustee
- Does the settlor have the right to amend the trust deed, respectively to have it amended?

- Does the settlor have the right to revoke or liquidate the trust?
- Does the settlor have a veto power against the decisions of the trustee regarding the assets?

This list shows that if the settlor keeps a certain supervision power or is a beneficiary, the tax authority may qualify the trust as a revocable trust.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non)recognition of foreign judgments) and have there been any changes to these principles recently?

As mentioned above, Switzerland has a broad Business Investment Treaties' network. The political and economic stability is a significant advantage for Switzerland to attract asset protection structures. Switzerland agreed to the automatic exchange of information, i.e. for non-resident, the banking secrecy does not exist anymore. Financial institutions are fully liable. Foreign judgments are recognized under certain conditions.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

(please allow me additional time to revert on this question)

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

In Switzerland, we have an income and wealth tax for individuals, as well as donation and inheritance tax and withholding tax on Swiss source dividends. The taxes are due at the federal, cantonal and municipal taxes.

Revocable trust: Tax transparent. No tax consequences at the time of establishment of the trust. The assets and related income remain taxable in the hands of the settlor (fiscally transparent). Any distribution is qualified as a donation, the tax rate is determined by the cantons. In case of liquidation, if the assets are returned to the settlor, there is no tax consequence. If the assets

are transferred to the beneficiaries in case of liquidation, then it is qualified as a donation.

Irrevocable, fixed interest trust: Non transparent trust. Establishment of the trust is qualified as a donation from the settlor to the beneficiary. Donation tax rate is determined by the canton. In most of the cantons, donation to spouse or heirs in direct line are exempt of donation tax or reduced tax rate (e.g. 3.4%). Distributions of income realized by the trust are qualified as taxable income, as soon as the beneficiary acquires a firm right to the distribution. The beneficiary is subject to wealth tax on its part of the trust's assets. It implies that the distribution of the trust's assets is not qualified as a taxable income and distribution of capital gain (on private wealth of the beneficiary) is, in principle, not taxable. Liquidation of the trust implies similar consequences than distributions of income to the beneficiaries.

Irrevocable, discretionary trusts: In case the Settlor is a Swiss resident at the time of establishment of the trust, then the irrevocable discretionary trust will be fiscally treated as a revocable trust (see above). If the Settlor is not a Swiss resident at the time of establishment of the trust, then the trust will be qualified as non-transparent trust. In such a case, if the settlor is abroad then the donation to the trust is not taxable in Switzerland. The beneficiary is not subject to wealth tax. Distributions of income realized by the trust are qualified as taxable income, as soon as the beneficiary acquires a firm right to the distribution, unless the beneficiary can demonstrate that the distribution consists in the distribution of the initial assets of the trust. Liquidation of the trust implies similar consequences than distributions of income to the beneficiaries.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

On the 19th November 2014, Switzerland was the 52nd State to sign the multilateral Competent Authority Agreement, which will allow the country to implement the automatic exchange of information after going through the usual legislative procedure.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

Switzerland and the USA have signed the FATCA agreement on Model 2, which is applicable today. It means Swiss financial institutions will disclose account details directly to the US tax authority with the consent of the US clients concerned. The United States will have to request data through normal administrative assistance channels.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

On October 8, 2014, the Swiss Federal Government decided to start negotiations with the United States to switch to FATCA-Model 1 (automatic exchange of information). It is still uncertain when it will enter into force.

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

N/A

1.2.5. If not, does your jurisdiction know similar shareholder registers?

The new regulations on UBO-registers entered into force on July 1st, 2015. According to these new regulations, UBO's of Swiss a company have to be identified in case of nominative shares.

Moreover, if the Swiss company issued bearer shares, the company has the legal obligation to keep a shareholder's register.

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

The abovementioned UBO and shareholder's registers remain fully private and are not publicly available. Therefore, in my opinion, it does not threat the anonymity of asset protection structures.

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

In Switzerland, individuals have to declare their worldwide wealth and income.

Income and capital of a Swiss based company are reported in its accounts.

If the Swiss entity is not quoted, then it has no obligation to publish its accounts. Income realized through a foreign PE or real estate is exempt (taken into account for the progressive tax rate for individuals).

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

On the 27th January, Switzerland signed the multilateral agreement on the country-by-country reporting under the BEPS umbrella. The multilateral agreement will be then submitted to the comments of the Swiss economic world, after which it will follow the ordinary legislative way at the level of the Federal Parliament in order to be implemented and will be subject to facultative referendum.

2.1.3. Does the national law currently include obligations to report tax schemes?

N/A

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

On May 27, 2015, Switzerland and the EU signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters.

On November 25, 2015, the Swiss Federal Government submitted the abovementioned agreement to the Federal Parliament

The OECD's global AEOI standard has been included in full in the new agreement. The agreement between Switzerland and the EU should come into force on 1 January 2017, and the first sets of data should be exchanged from 2018, provided the approval process is completed on time in Switzerland and in the EU.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

N/A

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

N/A

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

No additional comments