

UK/SWISS TAX AGREEMENT - A DETAILED SUMMARY



The UK/Swiss Tax Agreement, ratified in principle on 24 August 2011, was formally signed and published on 6 October 2011. It is expected to come into force from 1 January 2013. To understand it, two points have to be kept in mind. First, what was agreed had to be practical enough to be administered by Swiss paying agents. Secondly, the Tax Agreement has been concluded on entirely different principles to the Liechtenstein Disclosure Facility (LDF).

The LDF is a comprehensive disclosure opportunity (which remains open until 31 March 2015). Where the necessary conditions are met it:

- allows individuals to regularise their worldwide tax affairs on the basis of the 10 years to 2009;
- covers all taxes and liabilities of one or more taxpayers if the Composite Rate option (of 40% tax on income, profits, gains and other sums requiring disclosure) is chosen; and
- from the point that the application is accepted, removes the threat of criminal prosecution (unless there is criminal activity besides tax evasion).

The UK/Swiss Tax Agreement is very different. The aims are (i) to address the issue of non-compliant assets held or managed by Swiss paying agents for UK residents; and (ii) to introduce a mechanism to ensure future income and gains from these assets are subject to disclosure or to a withholding tax, set at a level which reflects the top UK rates. As such, it is not a disclosure facility. Rather, it could be described as a combination of an enhanced EU Savings Tax and an exchange of information agreement.

The Agreement addresses past tax irregularities, but only to a limited extent. Unlike the LDF, the one-off levy (computed using a complex mathematical formula) is not comprehensive either in its scope or its terms.

Where there have been tax irregularities, opting to pay the one-off levy will provide no protection from HMRC investigation (and possible prosecution) initiated before the Agreement comes into force. For many individuals, it is going to be preferable to register under the LDF rather than suffer the one-off levy, the withholding tax and the other terms of the UK/Swiss Tax Agreement.

Going forward, the withholding tax, at the rates proposed, will prove a blunt instrument which will rarely equate to the actual tax which would be due. This will be especially the case for foreign domiciliaries where Swiss paying agents would be required to apply withholding tax to remittances to the UK, the taxation of which can be extremely complex. Generally, opting for disclosure will be the better alternative.

BRIEFING

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A KEY TERMINOLOGY

The Agreement will come into force from 1 January following the date on which both parties confirm that the necessary domestic legal procedures have been implemented. Both parties are currently assuming that these procedures will be completed so as to enable the Agreement to come into force on 1 January 2013. This, then, is the date to which Swiss paying agents should work when considering the timetable for developing the systems to allow them to comply with the requirements of the Agreement.

Various key dates in the Agreement are dependent on the date of implementation. In this briefing, it is assumed that it will come into force, as expected, on 1 January 2013.

The Agreement defines certain key terms (such as “Swiss paying agent”, “relevant person” and “relevant asset”). These terms are explained in detail in section H.

In this briefing, Her Majesty’s Revenue & Customs is referred to as HMRC and the Swiss Federal Department of Finance as the SFDF.

B THE MAIN ELEMENTS

B1. Overview

To understand the Agreement, the objectives of the UK and Swiss Governments have to be borne in mind. The UK wanted a comprehensive mechanism to collect tax from non-compliant funds held in Switzerland. It has been said (it is not known on what basis) that around 80% of funds held in Switzerland by UK residents are non-compliant.

For their part, the Swiss wanted to preserve banking secrecy whilst dealing with the historic legacy of non-compliant funds. To an extent, banking confidentiality has been preserved, but at a high price, and greatly reduced by exchange of information provisions requiring disclosure in the case of named individuals (see B15).

The Agreement is focused on identifying relevant assets booked by or deposited with Swiss paying agents, which are held directly or indirectly for

beneficial owners who are UK resident individuals (“relevant persons”). The point of focus is on such assets held at 31 December 2010 and 31 May 2013 (five months after the Tax Agreement is assumed to come into force) and ensuring that these funds are either subject to a levy (and withholding tax thereafter), or are disclosed to the UK authorities.

Individuals whose relationship with one or more Swiss paying agents ended before 31 December 2010 are unaffected. The position for individuals who held relevant assets with Swiss paying agents at 31 December 2010 and 31 May 2013 is discussed in sub-sections B5 to B7. The special rules where a business relationship is established in the period between 31 December 2010 and 31 May 2013 are covered in B13. The situation where funds are moved out of Switzerland before 31 May 2013 is discussed at B8.

There are special rules for UK resident foreign domiciliaries (explained in more depth in section C). Provided the conditions have been met, a certification procedure will apply to allow foreign domiciliaries (having that status as at 31 December 2010, and claiming the remittance basis for 2010/11 and/or 2011/12) to opt out, so that neither the levy nor the historic information disclosure will apply. There is, however, no opt out from the ongoing withholding tax provisions and authorising disclosure of information may be advisable since the withholding tax applied is likely to be inaccurate.

Dave Hartnett (Permanent Secretary for Tax) has made it clear that, because of the tax benefits available to foreign domiciliaries, HMRC will press for higher penalties from any found to have evaded tax.

There are four main elements to the Agreement:

1. A one-off levy (of between 19% and 34%) which, to a limited extent, will regularise the past position (see sub-section B5). There are special provisions for foreign domiciliaries (see sub-section C2)
2. From 1 January 2013 (the date the Agreement is expected to come into force), Swiss paying agents will be required to deduct withholding tax (referred to as “final withholding tax”). The tax will be levied on income and gains from relevant assets held beneficially for a relevant person at rates which will be close to the highest

appropriate UK rate (see sub-section B9). There are set-off provisions where the income and/or gains have suffered other taxes. Special provisions apply for foreign domiciliaries (see section C3).

3. The establishment of a body to oversee the operation of the Agreement, and an anti-abuse article to ensure Swiss paying agents comply with the obligations which the Agreement imposes on them (see sub-section B14).
4. The imposition of additional obligations on the Swiss authorities to exchange information with the UK (see sub-section B15).

The approach to elements 1 and 2 appears to have been formulated so as to be operable by Swiss paying agents (defined in H1).

B2. Identification of relevant persons (defined at H2)

Swiss paying agents are permitted to rely on information collected when establishing business relationships to identify relevant persons. Clients will be assumed to be UK resident by the Swiss paying agent if:

- its due diligence records show a UK address as the client's principal private residence; or
- where a UK passport is presented. This presumption can be rebutted by the submission of a residence certificate issued by the competent authority of the state or jurisdiction where the individual claims to be resident.

The Swiss paying agent may not necessarily identify as relevant persons all who, under UK law, are liable to tax with respect to funds held in Switzerland. An example could be where a UK domiciled settlor has established a foreign discretionary trust for his grandchildren. Under UK tax law he would be taxable on the gains realised by the trustees. However, in such a case, the individual should not be classified by the Swiss paying agent as a relevant person, and therefore neither the levy nor ongoing withholding tax would be applied. This would mean that, if he has not been compliant, the Agreement will not regularise the settlor's position. If he has been fully

compliant and is not identified by the Swiss paying agent as a relevant person, the Agreement will have no effect, and he will not have any duty to inform the Swiss paying agent that he is subject to UK tax on the funds.

Difficulties could result from a Swiss paying agent identifying an individual as a relevant person when this is not the case. This could occur where, for example, there is a discretionary trust, but the Swiss paying agent wrongly identifies the settlor as the beneficial owner. It is, therefore, suggested that in situations where there might be confusion over beneficial ownership issues (such as with discretionary trusts) the Swiss paying agent is contacted well before 1 January 2013 to ensure that the correct position has been recorded in its records.

B3. Notification of relevant persons

Swiss paying agents have to review their clients to identify relevant persons for the purposes of both the one-off levy and the ongoing withholding tax deductions. For the one off levy the test is whether the relevant person held relevant assets as at 31 December 2010. Broadly, the term "relevant assets" covers all readily tradable and valuable assets including assets held under fiduciary agent arrangements. Assets which the Swiss paying agent could not be expected to know about, such as the contents of safety deposit boxes, are not included. (The definitions of "relevant person" and "relevant assets" are both covered in more detail in section H).

The Swiss paying agent should contact all clients who have been identified as being relevant persons as at 31 December 2010 by 28 February 2013 (within two months of the Agreement coming into force). The notification should make clear both the provisions of the UK/Swiss Tax Agreement and the individual's rights and duties. There are specific provisions where a Swiss paying agent takes on new clients in the period from 1 January 2011 to 31 May 2013 (discussed in section B13).

For the purposes of the ongoing withholding tax, the requirement is simply to identify relevant persons holding relevant assets, and unless instructed otherwise to withhold tax at the appropriate rate (see sub-section B9).

B4. Regularising the position of funds held in Switzerland

As explained, the Agreement's main objective is to ensure that UK tax is suffered on income and gains from funds held directly or indirectly in Switzerland by UK residents. It is difficult to conclude such agreements (which allow for the principles of one system of taxes to be administered by those in another country) without at least some collateral damage. In this case compliant taxpayers could be disadvantaged by the provisions if action is not taken.

As explained, Swiss paying agents will have to write to all relevant persons, with no distinction between compliant and non-compliant taxpayers. If the paying agent receives no response by 31 May 2013, then the historical levy will be deducted (provided the relevant assets held are sufficient) and withholding tax will be deducted on an ongoing basis.

It is highly unlikely that compliant UK domiciled taxpayers will want either the one-off levy to be deducted (it would seem a high price to pay for confidentiality) or the ongoing withholding tax, and so they will need to authorise disclosure.

With respect to the one-off levy (as explained in section C) foreign domiciliaries resident in the UK have more options than UK domiciliaries, and can opt out altogether. For the compliant this will generally be the best course of action as, in most cases, there would be no reason to suffer the one-off levy or the more targeted levy (on disclosed untaxed remittances). Depending on the rate of tax that the formula would give, an exception might be where a foreign domiciliary has an account containing accumulated remittance basis income and gains, and needs to remit significant funds (see C2). Opting for full disclosure would seldom be advisable as the information which will be disclosed (see sub-section B7) will not assist in the accurate determination of their UK tax affairs. To prevent the one-off deduction and secure opt out status, the foreign domiciled individual will need to:

- provide the Swiss paying agent with the necessary domicile certificate (see section C); and

- inform the Swiss paying agent that he has chosen the "opt out" method with respect to the "regularising the past" provisions in Part 2 of the Agreement.

B5. Regularising the past - the capital method

A relevant person has a choice between (i) accepting the one-off levy (referred to in the Agreement as the "capital method"), and (ii) authorising disclosure. This does not have to be a single choice covering all assets held with the Swiss paying agent, but that person can make a separate choice with respect to each account or deposit. The choice must be made by 31 May 2013 and once made it is irrevocable.

If no choice is made and the holder is UK resident, the default position is that, where the Swiss account was open at 31 December 2010 and remains open on 31 May 2013, a one-off levy will be deducted. The levy only covers Income Tax, Capital Gains Tax (CGT), Inheritance Tax (IHT) and Value Added Tax (VAT). It does not cover Corporation Tax, National Insurance or Stamp Taxes. It also only covers tax owed by the beneficial owner of the relevant assets, rather than a person who may have a secondary tax liability in the UK (such as a settlor).

Where the levy is imposed it will also satisfy interest and penalties with respect to these liabilities. However, the levy will not necessarily absolve all past issues of non-compliance. This is particularly so where funds have been withdrawn either to spend or to acquire assets. For example, where an account contains £5 million of undeclared income as at 1 January 2003 and only £2 million as at 31 December 2010 (£3 million having been invested in foreign property) the one-off charge will only cover the £2 million remaining in the account unless between 1 January 2011 and 31 December 2012 funds equivalent to the withdrawn sums are paid back into the account. It is also understood that the levy will not satisfy all UK liabilities where funds have been taken from the account to cover bank fees and investment management expenses. This means that for most individuals it is likely that the levy will not fully resolve their historic tax liabilities.

It is understood that there will be examples on the HMRC website of the calculations and what will and will not be covered by the levy. Primary UK legislation in Finance Act 2012 (with draft clauses being released on 6 December 2011) will clarify the position.

The one-off levy is computed using a complex formula. Where there are one or more bank accounts denominated in a currency other than sterling, the Agreement specifies that the necessary figures for the formula should be converted into sterling using the fixed exchange rate for the relevant date as published by the SIX Telekurs AG. Sterling funds are to be transferred to HMRC by the SFDF.

The minimum tax rate is 19% with 34% being the highest potential rate. It has been suggested that, for a typical client, the methodology will result in an effective tax rate of between 20% and 25% of total assets. Somewhat surprisingly, the longer the assets have been held in the account the closer the rate will be to 19%. A higher rate will apply where there has been rapid capital appreciation and where assets in the account have been held for shorter periods.

The UK taxpayer will be issued with a certificate by the Swiss paying agent showing the tax which has been paid over to HMRC. This certificate should be retained as the taxpayer will need to produce it in the event of an HMRC enquiry into his tax affairs.

In certain circumstances it is specified that the one-off levy will not be taken as extinguishing the entire liability with respect to the funds but rather be treated merely as a payment on account. Broadly, this will be where:

- the assets originated from criminal sources; or
- assets have remained undisclosed despite either (i) past enquiries by HMRC; or (ii) a direct approach from HMRC under a disclosure campaign.

It is important to realise that the Agreement provides no protection from any investigation initiated by HMRC between now and 31 December 2012. Such enquiries can lead to penalties for offshore evasion of up to 200% of unpaid tax and possible criminal prosecution. HMRC has been increasingly successful in securing convictions for tax evasion during the past year.

HMRC already has a significant amount of specific information in relation to Swiss accounts held by UK residents. In addition, there is both the desire and the resource (a special Offshore Compliance Unit having been established) for HMRC to make use of this information. Between now and 31 December 2012 it is understood that HMRC will be focusing on processing the information it already has, writing to individuals it has information about and opening enquiries. A number of non-compliant individuals may, therefore, find they are not able to benefit from the Agreement.

As explained in section D, even if there is no investigation before 31 December 2012 and an individual regularises his affairs by paying the one-off levy, there is no absolute guarantee of protection from criminal prosecution. As such, when comparing this route to the LDF, more factors must be considered than just which option would result in the lower payment.

B6. Regularising the past - insufficient funds to pay the one-off levy

The one-off levy will normally be taken from the relevant assets under the control of the Swiss paying agent. Where these assets are insufficient the Swiss paying agent should write to the individual allowing an extension (of up to eight weeks) during which time the necessary additional funds can be added to the account. If the additional funds are not added, the Swiss paying agent will be obliged to pass information, with respect to the individual's identity, through to the SFDF which will pass the details to HMRC. The letter sent to the individual asking for the additional funds should make this clear.

B7. Regularising the past - the disclosure option

As noted, UK resident and domiciled individuals only have two options:

- to pay the one-off levy (discussed in sub-section B5); or
- to authorise the Swiss paying agent to disclose information.

If the disclosure option is chosen by 31 May 2013, the Swiss paying agent will disclose the following information to the SFDF:

- the first name, surname, date of birth and address of the relevant person;
- the UK tax reference (if known);
- the name and address of the Swiss paying agent;
- the customer number of the account or deposit holder and the IBAN code;
- the yearly account balance and statement of assets, as at each 31 December, between 31 December 2002 (or the first 31 December after the account was opened, if later) and 1 January 2013.

The SFDF will send the information across to HMRC. If the information provided does not enable HMRC to identify the relevant UK taxpayer, it can ask for additional information.

Compliant UK resident and domiciled taxpayers will want to avoid the one-off levy (since they will already have suffered appropriate UK tax) and so will choose this option. Foreign domiciliaries who claim the remittance basis for 2010/11 or 2011/12 and who can, therefore, choose the opt out option (see sub-section C2) are overwhelmingly likely to do so to avoid disclosure.

Given the limitations and risks with the one-off levy (see sub-section B5) it is suggested that individuals who are currently non-compliant should also choose disclosure, having initiated a voluntary disclosure before 31 December 2012 (most probably using the mechanism of the LDF).

B8. Moving assets out of Switzerland

Free movement of capital provisions mean that there can be no rules to prevent taxpayers closing their Swiss accounts prior to 31 May 2013, in order to avoid the one-off levy. There is, however, an Article which obliges the SFDF to provide HMRC (by 31 May 2014) with a list of the top ten states or jurisdictions into which funds have flowed from closed Swiss bank or deposit accounts between 6 October 2011 and 31 May

2013. It is clear that these jurisdictions will come under intense pressure to exchange information with the UK.

With the proliferation of Tax Information Exchange Agreements, it is likely that over the next few years many (if not all) of the major private banking centres will have agreed to exchange information with HMRC. Considering that the terms of the UK/Swiss Tax Agreement are less attractive than the LDF, further agreements of the same type may be even less attractive. Account must also be taken of the commercial risks of holding money in private banking centres which still offer complete bank secrecy. Issues (such as probate and inheritance laws) may also make these other centres unattractive.

Tax evasion is a crime. It is clear from the press releases at the time the Agreement was signed that the UK Government expects HMRC to come down very heavily on individuals who continue to seek to evade tax. Moving funds from Switzerland so as to continue to evade tax is risky not just with respect to higher penalties but carries a significant risk of criminal prosecution. The UK Government seems to feel little embarrassment at using information which has been stolen or illegally acquired to identify tax evaders (see section D for the undertaking made with respect to stolen data).

B9. The ongoing position - withholding tax

A relevant person has the choice between (i) accepting that withholding tax will be levied on income and gains; and (ii) authorising disclosure. Where the withholding option is chosen, the tax will be paid across without any reference to the individual. It would appear that he will not have to report the Swiss account income and gains on a UK tax return. Should HMRC enquire it will be necessary to show the certificate provided by the Swiss paying agent to show that tax had been paid in full.

The withholding tax option is the default position. The rates have been set at 48% on interest income, 40% on dividend income, 48% on other income, and 27% on capital gains, the small reduction from the highest UK tax rates being justified by the fact that, since the tax is being deducted at source, it is being paid over earlier. Again there are special rules for foreign domiciliaries (see section C).

The Agreement contains specific definitions of interest income, dividend income, other income and capital gains. Broadly, these definitions are designed to ensure that capital receipts which UK tax law deems to be income will be taxed as such under these provisions. To assist the Swiss paying agents in determining what rates to apply it is understood that HMRC will provide guidance on the tax treatment of various different kinds of financial products held by Swiss paying agents.

The withholding tax must be calculated, levied and transferred to HMRC in sterling. Where sterling is not the reference currency of the account or deposit, the Swiss paying agent must convert the amount into sterling by using the fixed exchange rate for the relevant date as published by the SIX Telekurs AG.

The withholding tax due will be reduced where there are other taxes levied at source such as: tax withheld under the EU Savings Tax Agreement, Swiss anticipatory tax (with the Swiss paying agent responsible for ensuring that the treaty rate of tax is applied), UK tax levied at source on UK income, and foreign tax (where relevant, relief is again restricted to the treaty specified amount).

At the end of each tax year (including a tax year during which the banking relationship is ended) the Swiss paying agent must issue the relevant person with a certificate showing the tax deducted. This should be kept by the individual either to show that his liability has been settled, or to claim the tax withheld as a payment on account of his tax liability for the relevant tax year. The latter circumstance will be unusual since it would be preferable for the compliant individual to have avoided the withholding tax by opting for disclosure, but it might be that the taxpayer did not act in time for that tax year.

Withholding tax rates should be adjusted if the UK rates change. The UK has to inform Switzerland of any rate changes. Any increase or decrease in the actual highest UK rates should be mirrored by the same change in the withholding tax rates. Switzerland has the option to refuse to implement increases but should it do so the UK can apply to terminate the Agreement.

B10. The ongoing position - the disclosure option

A UK resident does not have to suffer the Swiss withholding tax. He or she can opt to permit the SFDF to provide HMRC with details of the Swiss account income and/or gains. For all UK residents (whether or not the remittance basis is claimed) such a choice would result in the following being disclosed:

- the first name, surname, date of birth and address of the relevant person;
- the UK tax reference (if known);
- the name and address of the Swiss paying agent;
- the customer number of the account or deposit holder and the IBAN code;
- the tax year concerned.

For individuals other than those taxed on the remittance basis in the relevant tax year, the following additional information will be provided:

- the total amount of income arising in the tax year (using the specific treaty definition of income);
- the total amount of gains and losses.

Where the Swiss paying agent has been notified that the remittance basis applies for the year the additional information provided would be:

- the total amount of UK income and gains arising in the tax year;
- the total amount of direct transfers to the UK (unless the individual told the Swiss paying agent that the transfer was exempt).

It is clear that remittance basis users have to provide the appropriate declarations and certification to the Swiss paying agent annually (see sub-section C1). However, it is not clear whether the decision to disclose or pay the withholding tax is a one-off or an annual decision, nor when the Swiss paying agent must be notified. If it is an annual decision, then it may be

that notification in advance, by 31 March in the previous tax year, will be necessary. What the situation is for the period from 1 January to 5 April 2013 is unclear. Presumably the Swiss paying agents will need to be informed prior to 31 December 2012.

B11. The administrative mechanisms

Swiss paying agents will bear the brunt of the work with respect to the one-off levy, the ongoing final withholding tax and (where the taxpayer gives permission) the disclosure of information. However, the Swiss paying agents will never communicate directly with HMRC or pay funds directly across to HMRC. The Swiss paying agents will pass funds and information through the SFDF which will make all payments and transfers of information to HMRC. The Agreement allows the SFDF to deduct 0.1% from the funds due to HMRC for its expenses.

It has been agreed that an initial CHF 500 million should be paid over by Swiss paying agents to the SFDF by 25 January 2013 with the funds being transmitted to HMRC by 31 January 2013. To streamline payments to the SFDF the Swiss paying agents have to set up, by 20 January 2013, an entity (referred to as an implementation vehicle) to receive the funds with respect to this upfront payment and all future funds arising as a result of the Agreement.

The Swiss paying agents must issue certificates for the one off payments deducted on 31 May 2013 at the time the deduction is made. The relevant person then has 30 days to dispute the amount deducted (silence being taken as consent). Once the certificate is final, the amount deducted must be paid to the implementation vehicle. The implementation vehicle will then make regular transfers of funds to the SFDF, with these transfers occurring monthly from 30 June 2013 to 31 May 2014. Onward transfer to HMRC will also take place monthly from 31 July 2013 to 30 June 2014. However, once the total paid to HMRC has reached CHF 1,300 million, the SFDF will offset the upfront CHF 500 million (with funds being returned to the Swiss paying agents through the implementation vehicle) until the amount has been fully recovered, at which time payments to HMRC will be resumed.

The timetable for the transfer of information under the disclosure option also starts with the first transfer to HMRC being made by 31 July 2013. All historic disclosures are to be notified by 31 December 2013.

The ongoing withholding tax will be deducted normally on the arising basis and transferred in sterling to the SFDF not later than two months after the end of each calendar year, with a breakdown between the different types of income and gain. HMRC will receive the tax due for each calendar year as a single payment made by 31 March following the end of the calendar year.

Where the disclosure option is chosen, the Swiss paying agents must provide the SFDF with the information within three months following the end of the tax year. The data will be transferred by the SFDF to HMRC within six months of the end of the tax year.

B12. Mistakes

The Agreement deals with situations where a Swiss paying agent realises that a mistake has been made, either with respect to an error in identification, or a computational error with respect to the lump sum payment levied or the ongoing withholding tax. Broadly, the position has to be rectified as quickly as possible.

The situation where a foreign domiciliary submits an initial statement of intent that he will be taxed on the remittance basis, but either changes his mind or fails to provide necessary certification, is discussed in sub-section C3. Broadly, where no election for disclosure has been made, there will be a catch up charge at higher tax rates on all income and gains arising.

B13. New clients

There are specific provisions dealing with the situation where a Swiss paying agent establishes a business relationship with a relevant person between 1 January 2011 and 31 May 2013.

The relevant person will be obliged, by 30 June 2013, to provide to the Swiss paying agent a written statement disclosing:

- whether the relevant assets were booked with another Swiss paying agent as at 31 December 2010; and
- whether the business relationship with the Swiss paying agent was ongoing as at 31 May 2013.

Where the relationship has ceased the relevant person is obliged to notify the new Swiss paying agent by 30 June 2013 of his choice as between the one-off levy and disclosure. He must also authorise the new paying agent to request from previous Swiss paying agents the necessary information either to enable the one-off levy to be computed, or to permit the necessary disclosure to be made. The new paying agent must apply the provisions and the previous agents must provide the required information.

Where the relationship is ongoing as at 31 May 2013, the paying agent as at 31 December 2010 is responsible for applying the provisions.

Where there is no previous Swiss paying agent the one-off levy provisions are not applicable.

If the relevant person does not comply with these obligations, the new Swiss paying agent is obliged to make the same disclosure as if the relevant person had given authority under the terms of the Agreement (see sub-section B7).

B14. Oversight body and anti-abuse article

The Agreement contains specific provisions aimed at ensuring that the Swiss paying agents implement the Agreement in the spirit intended. There is an anti-abuse article to prevent Swiss paying agents knowingly creating, or colluding in the use of, artificial tax avoidance arrangements (the paying agent risks being made to suffer the cost of the withholding tax avoided if it promotes such arrangements). There is anxiety as to whether merely allowing accounts to be closed and funds transferred to an offshore jurisdiction could be seen as falling within these provisions, thereby exposing the Swiss paying agent to a liability with respect to the withholding tax avoided. As discussed in section F it is understood that guidance will be issued with respect to the implementation of this Agreement. Given the importance of this point to Swiss paying agents it is assumed that the Swiss Bankers

Association will ensure the issue is covered fully.

In addition there are regulatory provisions, such as for regular audits of the Swiss paying agents by the SFDF (both with respect to the operation of the one-off levy and the ongoing withholding tax) and the provision of annual reports of the audit findings to HMRC. The Swiss authority has made it clear that there will be penal sanctions in the event of Swiss paying agents acting in breach of the rules.

There is also to be a Joint Commission made up of representatives of the contracting states which will:

- examine the proper functioning of the Agreement;
- opine on matters with respect to the interpretation and application of the Tax Agreement;
- assess relevant developments;
- consider the maximum number of admissible information exchange requests per calendar year under the Agreement (see sub-section B15); and
- recommend amendments or a revision to the Tax Agreement to the Contracting States.

B15. Enhanced exchange of information provisions

As well as providing for the one-off levy to regularise the past, the ongoing withholding tax and the supervision of Swiss paying agents, the Agreement also gives HMRC further rights to request information from the Swiss authorities.

Supplementary to existing treaty rights, this Tax Agreement allows HMRC to make up to 500 information requests with respect to named individuals where it has a plausible reason. HMRC is required to provide the following details of the subject of enquiry: name, address and, if known, date of birth, professional activity and other identifying information. It also has to state the time period (within the ten years prior to the request) for which information is sought. Unless it has grounds for thinking that notice of the request might jeopardise the assessment or collection of tax, HMRC must inform the individual concerned.

Following a request the Swiss authorities will investigate the existence of accounts and deposits. This will be done through requests to the Swiss banks who will be obliged to disclose the existence of accounts and deposits of the named individual. The information passed back to HMRC will show the name of any Swiss institutions at which the individual holds accounts, and the number of accounts and deposits in existence during the time period information was requested for. Information will not be provided where: the account existed as at 31 December 2010; there have been no changes in beneficial ownership; no new funds have been paid in; the one-off levy was paid; and ongoing withholding tax is suffered on all income and gains.

The SFDF will inform the UK taxpayer before the information is transmitted to HMRC. The UK taxpayer may appeal against the intended exchange of information to the extent provided by Swiss law.

The Agreement makes it clear that HMRC should have reasonable grounds for considering the individual to represent a tax risk and should not embark on a “fishing expedition”. When making a request HMRC has to confirm that the requirements are met (meaning that it has to assert that it does have plausible grounds for its suspicions). It does not, however, have to evidence this.

For the first three years, the number of information requests permitted under the Agreement cannot exceed 500 per calendar year. This is the maximum permissible but the Agreement gives power to the Joint Commission to set the actual limit and specifies that no exchange of information can be made before this has been done. The number allowed will be adjusted in line with the results of annual reviews of the success rate. The first review will take place at the beginning of 2016 and establish the maximum number of permitted requests for that year.

Each review will look at the total HMRC requests made in the calendar year (the “base review year”) three years before the year under review. For 2016 this means that the requests made in 2013 will be considered. Where for the base review year, HMRC requests were less than 20% of the maximum, the limit for the year in which the review takes place will be unchanged. Where the 20% limit is exceeded the permitted requests may either rise or decrease by 15% depending on the success of the requests made in the base review year:

- there will be a 15% increase in the permitted maximum if the requests made in more than two thirds of cases led to the direct or indirect identification of additional UK tax liabilities of at least £10,000; and
- a 15% decrease if less than one third of requests led to the direct or indirect identification of additional UK tax liabilities of at least £10,000.

In the case of indirect tax identification there must be a link between the additional UK tax liability and the account or deposit identified in the information exchange.

C FOREIGN DOMICILIARIES

C1. The certification process

The Agreement contains specific provisions for UK resident foreign domiciliaries who claim the remittance basis. To be eligible for these special rules, the relevant person must provide the Swiss paying agent with a certificate.

The certificate must be provided by a lawyer, accountant or tax adviser who is a member of a relevant professional body. The following must be verified:

- (where required) that the UK tax return for the relevant tax year contains a claim or statement that the relevant person is not domiciled anywhere within the UK;
- (if appropriate) that a remittance basis claim has been made;
- to the best of the knowledge of the professional signing the certificate, the domicile status of the relevant person is not formally disputed by HMRC.

The certificate must then state that the individual is non-domiciled for the purposes of the Agreement.

- With respect to the one-off levy this requires confirmation that the individual:

- o was not domiciled anywhere within the UK as at 31 December 2010; and
- o is a remittance basis user in 2010/11 and/or 2011/12
- With respect to the ongoing withholding taxes it requires confirmation that the individual:
 - o is not domiciled anywhere within the UK in the relevant year; and
 - o is a remittance basis user for the relevant year.

For the one-off levy the certificate needs to be provided by 31 May 2013. For the ongoing withholding tax deductions the individual must provide the Swiss paying agent with a declaration of intent to claim the remittance basis by 31 March preceeding the tax year, and must follow up with a certificate by 31 March following the end of the tax year. By example, for 2013/14 the declaration of intent must be provided by 31 March 2013 and the certificate must be submitted by 31 March 2015.

C2. Foreign domiciliaries and the “regularising the past” provisions

Where the necessary certificate has been submitted by 31 May 2013, a foreign domiciliary can choose from four options in respect of historical issues:

- a) to accept the one-off levy on the entire funds (see sub-section B5)
- b) to authorise disclosure in the same way as for a UK domiciliary (see sub-section B7)
- c) to make a self-assessment of omitted UK and remittance basis income and gains in the form prescribed, instruct the Swiss paying agent to apply the 34% rate to the omitted amount and, on 31 May 2013, make a one-off levy equivalent to this amount
- d) to opt out entirely.

Where a one-off levy is accepted the funds will then be able to be brought into the UK free from additional tax. It is unlikely that foreign domiciliaries will choose this route unless the account contains significant remittance basis income and gains and they need to remit considerable funds. In such a case it is possible that paying the one-off charge might be more efficient than remitting the funds and paying tax under the standard charging provisions. There is the question of whether the one-off levy would be a constructive remittance, if it is made from remittance basis income or gains. In cases where it cannot be taken as full satisfaction of liabilities and is seen as a payment on account, this is a particular problem. If possible, therefore, in exceptional cases where the levy is to be paid efforts should be made to ensure it is paid from clean capital.

Generally foreign domiciliaries will “opt out”. This will invariably be preferable for the compliant and for those whose Swiss accounts contain no UK income or gains, and have not been used to fund UK remittances. For the non-compliant, the self-assessment option might seem attractive but the danger of an investigation prior to the Tax Agreement entering into force must be considered (see B5). Regularisation of past issues through early voluntary disclosure and then choosing the “opt out” method is likely to be the safest route.

C3. Foreign domiciliaries and the ongoing withholding tax provisions

An individual who will be a remittance basis user for a relevant tax year must choose between:

- withholding tax on (i) UK income and gains arising; and (ii) remittances to the UK (as identified by the Swiss paying agent);
- disclosure of information on (i) UK income and gains arising; and (ii) remittances to the UK (as identified by the Swiss paying agent).

The Swiss paying agent will only consider direct transfers to the UK to be remittances and the taxpayer can inform the Swiss paying agent that a remittance is exempt.

Where the withholding tax option is chosen the provisions contain a sting in the tail if the stated intention to claim the remittance basis is not then followed through. In such cases the withholding tax levied is recomputed on the worldwide basis but at higher rates (50% for interest income and other income, 42.5% for dividend income and 28% for capital gains). A catch up payment is taken by the Swiss paying agent (who should have been keeping records of the tax that would be withheld on the arising basis just in case there was a failure to provide the certificate). There is an issue if, within eight weeks of 31 March following the end of the relevant tax year, there are insufficient funds deposited to cover the catch up payment. In such cases the Swiss paying agent will be obliged to disclose the identity of the taxpayer as though permission had been granted to disclose information.

There is no “opt out” possibility with respect to the ongoing withholding tax. Where remittances direct to the UK are made, it is very unlikely that, if the withholding tax option is chosen, any tax deducted will be accurate. This is because, even making the unlikely assumption that the Swiss paying agent knows enough about the composition of mixed accounts and the mixed fund rules to be able to identify whether foreign income or capital gains have been remitted, they may not have the full picture of remittances from the account for the tax year (only looking at direct transfers to the UK) and so will be unable to apply the rules correctly.

In such cases the relevant person will need to complete a tax return to ensure that the correct amount of tax is deducted. The problem which will then arise is that any tax withheld will be seen as a payment on account of the individual’s final UK tax liability. This could result in further taxable remittances if payment derives from funds other than capital. Therefore, where remittances to the UK are made, the better option will generally be to allow exchange of information. Even here, however there could be problems as the information provided to HMRC may confuse matters (for example, in the case of a foreign trust, whose gains would not be taxable as realised). In such cases, if there is an HMRC enquiry it will be necessary to explain why the information provided by the Swiss authorities was irrelevant and/or misleading.

D SUNDRY

D1. Associated documents released with the Agreement

To coincide with the formal signing of the Tax Agreement a number of additional documents were released on the HMRC website (www.hmrc.gov.uk/taxtreaties/ukswiss.htm). These include:

- A Joint Declaration concerning the equivalence of the Tax Agreement - this states that both the UK and Swiss Governments see this Tax Agreement as being equivalent to an agreement for automatic exchange of information.
- A declaration concerning the acquisition of customer data stolen from Swiss banks (discussed below).
- A letter from HMRC on criminal investigations.
- Agreed minutes.
- A memo produced by HM Treasury after meeting with Swiss bankers on issues raised in respect of cross border financial services.
- A note associated with the memorandum.

D2. Stolen data

The UK Government has not unequivocally ruled out further purchases of stolen Swiss bank data. However, it was reported as part of the releases surrounding initialling of this Agreement in August 2011, that the UK Government does not envisage further purchases of stolen Swiss bank data. In addition the 6 October 2011 Declaration states that the UK Government will not actively seek to acquire customer data stolen from Swiss banks.

D3. Criminal investigations

The letter from HMRC on criminal investigations looks at the position of: (i) relevant persons who have evaded tax; and (ii) Swiss bank employees and other Swiss professionals whose behaviour in connection with money laundering obligations and their other dealings with UK resident tax evaders has been such that HMRC could consider criminal charges. The letter is caveated, with no absolute guarantees being given with respect to criminal proceedings and no assurances being given with respect to other UK law enforcement agencies.

There is no absolute promise of protection from criminal prosecution for relevant persons who seek to regularise their affairs through the payment of the one-off levy or by allowing disclosure of information under the Tax Agreement. The letter states that in such cases, provided there is full co-operation with HMRC, a criminal investigation is highly unlikely. The exception would be where the Swiss funds represent the proceeds of crime other than tax evasion or the tax evasion is serious enough to warrant a custodial sentence of more than two years.

It was reported in August 2011, that HMRC was unlikely to push for the criminal prosecution of Swiss bank employees as a result of participation in tax offences. The letter states that, whilst absolute assurances cannot be provided, it is unlikely to be in the UK public interest for HMRC to seek to prosecute professional advisers, Swiss paying agents and their employees for past tax related offences.

D4. Improvements to market access for financial services

From the perspective of the Swiss Government and the Swiss Bankers Association the provision of cross-border financial services in the UK by Swiss firms is an important issue and so as part of the Tax Agreement documentation HM Treasury officials met with Swiss bankers and produced a memorandum providing guidance on issues raised in respect of cross border financial services so that Swiss institutions can offer such financial services.

E RATIFICATION

The Tax Agreement has now been signed formally and published (in both English and French, each version being equally authoritative). Before it can come into force it needs to be authorised by the legislative organs of both jurisdictions (it will be debated in both the UK and Swiss Parliament). It is also subject to a possible referendum in Switzerland.

In addition, it is understood that both jurisdictions will need to pass domestic law in order for the treaty provisions to be workable. The UK domestic legislation will be part of Finance Bill 2012 and draft clauses will be published on 6 December 2011 (as part of the wider release of draft legislation in connection with announced Finance Bill 2012 measures).

Consultation in Switzerland has already begun (see www.efd.admin.ch/themen/wirtschaft_waehrung/02316/index.html?lang=en) with respect to the Federal Act on International Withholding Tax (WTA) that will need to be passed for both this UK Tax Agreement and a Tax Agreement which Switzerland concluded with Germany to be implemented. As noted (in section B) the aim is that the ratification and legislative processes in both jurisdictions should be completed so that the Tax Agreement can be implemented from 1st January 2013.

F WHAT NEXT?

In addition to the draft legislation (which both Governments will consult on) it is expected that both HMRC and the SFDF will publish guidance with a view to clarifying how parts of the Tax Agreement will work (HMRC will probably publish answers to the most common queries received) and how it will operate in practice. There will be pro forma templates with respect to the various certification processes envisaged in the Agreement.

In addition to the guidance to be issued by the UK and Swiss authorities, the Swiss Bankers Association (SBA) has been heavily involved with the discussions and it is expected that, over the coming months, the SBA will issue detailed guidance to members.

Given the relatively short time before the Agreement will come into force, Swiss paying agents will need to develop their IT systems and begin the process of identifying relevant persons. Where there are concerns that the Swiss paying agents' records may be inadequate and wrongly show individuals as being beneficially entitled to assets (a particular concern with discretionary trusts where, due to misunderstandings over the nature of the trust, the Swiss paying agent's documentation may wrongly show an individual as being beneficially entitled to the trust property) it is suggested that action be taken now to prevent future difficulties.

G THE EU DIMENSION

A European Commissioner has questioned whether the UK Government has the competence to enter into the Agreement (the same question is posed with respect to the German/Swiss Agreement). The issue was addressed in a speech by Commissioner Algirdas Semeta on 25 October 2011 advocating a level playing field for taxation across Europe. The Commissioner made it clear that the Commission had not yet had a chance to look in detail at the two agreements but passed a general comment about bilateral agreements encroaching on areas of exclusive EU competence or undermining EU Agreements. There seems to be more initial concern with the German agreement as its withholding tax rates are lower than in the EU/Swiss Agreement.

It seems clear that the EU Commission is looking to conclude a new wider Agreement with Switzerland and to have a coordinated approach towards third countries and the taxation of savings income.

H DEFINITIONS

H1. Swiss paying agent

The term "Swiss paying agent" covers:

- all Swiss banks (as defined under the Swiss Act of 8 November 1934);
- securities dealers (as defined under the

Swiss Stock Exchange Act of 24 March 1995); and

- any other natural person or entity (however structured and including permanent establishments of foreign companies) resident or established in Switzerland which:
 - o accepts, holds, invests or transfers assets of third parties; or
 - o merely makes payments of income or gains for third parties or secures such payments in the normal course of their business.

However, a person is not considered to be a Swiss paying agent solely because that person pays out dividends and interest directly to its shareholders or creditors, provided that the total amount of these payments does not exceed CHF1 million per year.

H2. Relevant person

A "relevant person" is defined as a UK resident who:

- is the account or deposit holder and beneficial owner of the assets and has directly entered into a contract with a Swiss paying agent; or
- is determined to be the "beneficial owner" of assets where someone/or some other entity has entered into such a contractual arrangement.

The Agreement specifically states that a broad range of entities should be considered if a UK resident can be seen as the (ultimate) beneficial owner: companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trade or manufacturing activity or another form of commercial operation.

In the case of discretionary trusts, it will not be possible to determine the beneficial ownership of the assets, so the trust's income and gains should not be seen as relating indirectly to a UK resident settlor or beneficiary. There may be difficulties if the Swiss paying agent has not classified the nature of the trust correctly and such cases ought to be reviewed and errors corrected.

There are also potential issues with respect to insurance wrappers (as described in H3) where the beneficial owner is UK resident. These can be bypassed if the insurance company confirms to the Swiss paying agent that it will deliver the necessary certificate to HMRC in line with the UK legislation with respect to offshore life assurance bonds.

Where there is a bare trust or nominee relationship the relevant person will be the individual beneficially entitled to the trust property, if he or she can be identified. If the Swiss paying agent cannot establish who the beneficial owner is, the individual to whom the assets are legally registered will be taken to be the relevant person.

In the case of collective or joint accounts or deposits the Agreement provides that, unless the Swiss paying agent can determine all the persons holding an interest in such an account or deposit, the entire assets are to be attributed to an identified relevant person. If all the persons can be identified the Swiss paying agent is to allocate assets according to the number of contractual partners, unless the agent has documentary evidence for a different allocation. If a relevant person holds an interest in a partnership the same rules apply.

H3. Relevant asset

The term “relevant asset” covers all readily tradable assets where the value can be easily ascertained. This includes assets held under fiduciary agent arrangements. The following are given in the Tax Agreement as examples of relevant assets:

- cash accounts and precious metal accounts;
- bankable assets held by a Swiss paying agent acting as a fiduciary agent;
- all forms of stocks, shares and securities;
- options, debts and forward contracts;
- other structured products traded by the banks such as certificates and convertibles.

Assets the Swiss paying agent could not be expected to know about (such as the contents of safety deposit boxes, real property and chattels)

are not relevant assets. Insurance contracts regulated by the Swiss Financial Market Supervisory Authority are also not relevant assets. The exemption does not include assets referred to as “insurance wrappers”, being assets held by insurance companies in accounts separate from the main accounts and on terms where:

- there is minimal risk protection; and
- the pay-out or redemption is not restricted to death, disability or illness.

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