

## Switzerland's Tax Cooperation Agreements With the U.K. and Germany — Regularizing the Past

by Leonard Toenz and Katja Krech

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# PRACTITIONERS' CORNER

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In September and October 2011, Switzerland concluded bilateral agreements with Germany and the U.K. to enforce the Federal Council's "white money strategy." So far, the treaties intend to ensure that in the future only tax-compliant assets are invested in Switzerland and that German and U.K. citizens' assets stashed in Swiss bank accounts are handled properly.

Under these agreements, individuals resident in Germany or the U.K. can retrospectively tax their existing banking relationships in Switzerland either by making a one-off tax payment or by disclosing their accounts. Further, future investment income and capital gains of a German or a U.K. bank account holder in Switzerland will be subject to a final withholding tax, and proceeds of this will be transferred to the competent authorities of the contracting states. Also, mutual market access for financial services will be improved.

Both agreements require the approval of the parliament of the contracting states and should enter into force at the start of 2013. While the agreement has been the subject of a lively political discussion in Germany, it hasn't attracted much attention in the U.K. In Switzerland, the agreements will probably be subject to an optional referendum.

Because the content of the two treaties is largely identical, this article focuses on both agreements to the extent that no difference is explicitly mentioned.

### Relevant Terms

Persons affected by the treaties, known as "relevant persons," are broadly defined in the agreements. Therefore, a relevant person means any individual resident in the U.K. or Germany who:

- as a contractual partner of a Swiss paying agent is the account holder or deposit holder and beneficial owner of assets; or
- is the beneficial owner of assets held by:
  - a domiciliary company;
  - an insurance company in an insurance wrapper (if the insurance company is not able to confirm to the Swiss paying agent that it will deliver the appropriate certification to the competent authority of the contracting state); or
  - another individual by means of an account or a deposit with a Swiss paying agent.

Under the Switzerland-U.K. agreement, persons who have listed a U.K. address as their principal private home are also affected by the treaty.

The term "Swiss paying agent" is defined in the Switzerland-U.K. agreement as it is in the EU-Switzerland taxation of savings income agreement.<sup>1</sup> In accordance with this agreement, Swiss paying agents are:

- banks under the Swiss Banking Act of November 8, 1934;
- securities dealers under the Swiss Stock Exchange Act of March 24, 1995;

<sup>1</sup>The Agreement on Taxation of Savings Income Between Switzerland and the EU entered into force on July 1, 2005 (SR 641.91).

- natural and legal persons resident or established in Switzerland; and
- partnerships and permanent establishments of foreign companies that accept, hold, invest, or transfer assets of third parties or merely make payments of income or gains for third parties or secure such payments in the normal course of their business.

However, a person is not considered a Swiss paying agent solely because that person pays out dividends or interest directly to its shareholders or creditors, provided that the amount of these payments does not exceed CHF 1 million per year.

Under the agreements, “relevant assets” means all forms of bankable assets booked or deposited with a Swiss paying agent, including cash accounts, metals accounts, bankable assets held by a fiduciary agent, all forms of stocks, shares and securities, options, debts and forwards contracts, and structured products. Not considered relevant assets are items maintained in safe deposit boxes, real property, chattels, and insurance contracts that are regulated by the Swiss Financial Market Supervisory Authority.

### Regularizing the Past

The Swiss paying agent must give notice within two months of the date of entry into force of these agreements, that is, February 28, 2013, to the relevant holders of accounts and deposits regarding the rights and duties resulting from the agreements.

A relevant person who held relevant assets with a Swiss paying agent as of December 31, 2010, and as of May 31, 2013 (and who is, in the meaning of the agreement with the U.K., not a non-U.K.-domiciled individual), can opt for one of two different ways of regularizing existing banking relationships in Switzerland:

- one-off payment on the relevant assets; or
- voluntary disclosure to the German or U.K. authorities.

The relevant person must inform the Swiss paying agent in writing until May 31, 2013, which option he chooses for each account or deposit in existence on May 31, 2013. This notification is irrevocable. If the relevant person does not choose any of the options, the Swiss paying agent must disclose the information in accordance with the voluntary disclosure to the competent Swiss authorities as if the relevant person had provided written authorization to the Swiss paying agent to disclose.

Relevant persons that decide not to regularize their assets (that is, banking clients who are not willing to accept either an anonymous one-off tax payment or voluntary reporting) must close their Swiss accounts by May 31, 2013.

### One-Off Tax Payment and Clearance of Liabilities

If a relevant person opts for the one-off tax payment, the Swiss paying agent levies a one-time flat-rate tax payment on the relevant assets as of May 31, 2013. Having levied the final withholding tax, any U.K. or German taxes that may be due on undeclared assets of a Swiss banking account are settled anonymously.

The applicable rate is 34 percent under both agreements. In most cases, the final tax burden should amount to between 19 and 25 percent of the relevant capital depending on a range of factors, including the duration of the clients' relationship to the Swiss paying agent and the amount of relevant assets of the relevant person. Generally, the longer the relationship to a Swiss paying agent during the years 2003 through 2010 and the higher the amount of the funds in the accounts at the end of the year the account was opened in relation to the relevant capital, the lower the effective tax burden (minimum 19 percent).

The relevant person must make sufficient funds available as of May 31, 2013, for the settlement of the one-off tax payment, which is levied and transferred to the competent authority of Switzerland by the Swiss paying agent in euros or sterling.

At the time the one-off tax payment is levied, the relevant person ceases to have any liability to any U.K. or German taxes, including income tax, capital gains tax, VAT, inheritance and gift tax, and any interest, penalties, and surcharges that may be chargeable regarding those tax liabilities. The clearance applies to individuals who are jointly or severally liable and is not limited to any fiscal periods.

However, claims are not deemed to have expired if the relevant assets represent the proceeds of crime (other than crime connected to a tax-related offense). Also, according to the agreement with the U.K., claims are not deemed to have expired if the relevant assets represent the proceeds of crime connected to criminal tax-related offenses punishable by two years' imprisonment or more, and according to the agreement with Germany, claims are not deemed to have expired if the tax affairs of a relevant person are under investigation as of the date the agreement entered into force.

Once the relevant assets have been regularized by the settlement of the one-off tax payment, the U.K. or German authorities are not allowed to start any investigations regarding a tax-related offense concerning the assets.

### Voluntary Disclosure

Relevant individuals that have timely paid their taxes could authorize the Swiss paying agent to transfer information to the competent Swiss authority, which communicates the information to the competent authority of the U.K. or Germany.

Based on this authorization, the Swiss paying agent will transfer to the authorities of the contracting states

the identity (last name, first name, and birthday); address; tax reference number; the name and address, if known, of the Swiss paying agent; the customer number of the account or deposit holder (IBAN code); and the yearly account balance and statement of assets as of December 31 of the years 2002 through 2013.

### Liechtenstein Disclosure Facility

Alternatively, relevant U.K. persons may consider disclosing their Swiss bank accounts to HM Revenue & Customs under the Liechtenstein Disclosure Facility (LDF) available to new and existing clients in the Principality of Liechtenstein.

A single composite rate of 40 percent of the taxable income is levied and a penalty of 10 percent of the total amount of taxes is due. The LDF is available to all persons with new or existing fiduciary, company, or other holding structures or financial accounts in Liechtenstein during the period between September 1, 2009, and March 31, 2015.

Under the LDF, a person is liable for U.K. tax on all previously undisclosed tax liabilities for each U.K. tax year commencing on and after April 6, 1999, and ending with the U.K. tax year covered by the disclosure at issue. In contrast to the regularizing procedure under the tax agreement at hand, the LDF applies to the worldwide assets, including those outside the Principality of Liechtenstein.

### Options for Non-U.K.-Domiciled Persons

Under the Switzerland-U.K. agreement, non-U.K.-domiciled individuals are treated differently from U.K. resident domiciliaries.

A non-U.K.-domiciled individual qualifies as a relevant person for purposes of regularizing the past if the person was not domiciled in the U.K. on December 31, 2010, and claimed the remittance basis of taxation for the tax year ending on April 5, 2011, or April 5, 2012, and this has been verified through the certification process. The certification process requires a certificate produced by a lawyer, an accountant, or a tax adviser confirming that the relevant person is not domiciled within the U.K. and has claimed the remittance basis of taxation for the previous mentioned tax years. The certification must be provided to the Swiss paying agent by May 31, 2013, at the latest.

Special options are available to non-U.K.-domiciled individuals who held relevant assets with a Swiss paying agent from December 31, 2010, to May 31, 2013, regarding the regularizing of the past: The relevant per-

son can choose the standard options one-off tax payment or voluntary disclosure or he can choose one of the special options, either the opt-out or self-assessment. Anonymity is guaranteed in the cases of the one-off payment and self-assessment. The relevant person must inform the Swiss paying agent in writing before May 31, 2013, which of the described options he chooses.

If the relevant person confirms to the Swiss paying agent that the opt-out method is chosen, no clearance of the past and no taxation takes place. This option will only be selected if the non-U.K.-domiciled individual is confident that its tax affairs are absolutely in order. If unreported U.K.-source income or unreported remittances are discovered later, tax, interest, and high penalties going back up to 20 years will be levied.

When the non-U.K.-domiciled individual opts for self-assessment, the individual needs to disclose to the Swiss paying agent all non-U.K. income and gains that have been remitted to the U.K. from Swiss accounts and all amounts that arose from a taxable source within the U.K. between December 31, 2002, and August 24, 2011, and on which U.K. taxes have not been paid. The tax rate is 34 percent of the omitted taxable base disclosed to the Swiss paying agent. The clearance is merely granted to the tax liabilities for the amounts declared in the self-assessment.

As an alternative to the one-off tax payment, the LDF is still available for non-U.K. residents for the regularization of the past.

### Summary

These two special tax agreements are good for the contracting states as they satisfy the interests and requirements of the contracting states equally well. They respect the protection of bank clients' privacy applicable in Switzerland and also ensure the recovery of unpaid taxes from offshore accounts both for the past and the future.

However, the agreements are very complex indeed and comprise some 32 pages. They impose significant responsibilities on the Swiss financial institutions as well as on the U.K. or German resident taxpayer, and the time frame within which important decisions must be made are very short. However, any option chosen by a relevant person to regularize the past has no impact on options available for the future regarding the potential withholding tax on income and gains on relevant assets levied by Swiss paying agents. ♦