AFBS Roundtable
Final Withholding Tax – *Quid with the Trusts?*

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14 August 2012 – Geneva
23 August 2012 – Zurich
Plan

I. Relevant persons

II. Trusts

III. Failure to identify

IV. Conclusion
I. Relevant persons (RP) – Definition (Art. 2(1)(h))

- Any individual resident in the UK

- Contractual partner of a Swiss paying agent (SPA)
  - Account/deposit holder and is Beneficial owner (BO) of the assets; or
  - BO, as determined by **Swiss due diligence obligations and all the circumstances known to the SPA**, of assets held by:
    - Domiciliary company → **trusts**
II. Trusts – Domiciliary company

- **Domiciliary company** are “legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations”

- **Principle**: domiciliary company ≠ BO

- **Exception**: domiciliary company = BO
  - itself subject to effective taxation under the general rules for direct taxation applicable under the law of its place of establishment or its place of effective management; or
  - treated as non-transparent with reference to its income under UK law
II. Trusts – Identification standards

- **Swiss due diligence obligations**
  - Anti-Money Laundering Act
  - Agreement on the Swiss banks’ Code of Conduct with regard to the exercise of due diligence (CDB 08)
    → Form A and T
  → Anti-money laundering standard for tax purposes

- **All the circumstances known to the SPA**
  - Undefined
  - “HMRC expects SPA to use all information they hold – including but not limited to that obtained as part of their due diligence process”
II. Trusts – BO: an Unidentified Legal Object

- UBS case law
- Rubik
- AML
- OECD
- FATF
- FATCA
- EUSD
- Trust
II. Trusts – Identification of BO

- **Regularisation**
  - BO can be identified: Trust transparent
  - BO not ascertainable: Out of the scope

- **FWT**
  - BO can be identified: Trust transparent
  - BO not ascertainable: Out of the scope
### II. Trusts – Trust categorisation

<table>
<thead>
<tr>
<th>TRUST</th>
<th>REGULARISATION Paras. 101 ff</th>
<th>FWT Paras. 54 ff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revocable</td>
<td>BO = settlor / person with right of revocation</td>
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</tr>
<tr>
<td>Irrevocable &amp; non discretionary</td>
<td>BO = person as identified under due diligence process e.g. fixed interest trust</td>
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</tr>
<tr>
<td>Irrevocable &amp; discretionary (I&amp;D)</td>
<td>Out of the scope Except special cases ➔</td>
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</tr>
<tr>
<td>I&amp;D set up between RD2 and entry into force</td>
<td>No regularisation</td>
<td>–</td>
</tr>
<tr>
<td>Underlying company</td>
<td>Rules applicable to trusts</td>
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## II. Trusts – Special cases

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<tr>
<td><strong>REGULARISATION</strong></td>
<td><strong>FWT</strong></td>
</tr>
<tr>
<td>• Settlor has <em>signatory powers</em> or general POA</td>
<td>• Settlor documented as <em>beneficiary</em> on Form T</td>
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<td>• Settlor is <em>sole director of an underlying company</em></td>
<td>• Settlor or beneficiary as documented on Form T acts as <em>trustee</em></td>
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<td>• Settlor (instead of the contracting party) regularly issues instructions to the SPA</td>
<td>• Settlor or beneficiary as documented on Form T has <em>signatory powers</em> or general POA</td>
</tr>
<tr>
<td>• In addition to one one of the above factor, settlor has <em>unrestricted investment powers and takes all investment decisions alone</em></td>
<td>Exception: not applicable if powers are limited to management or information</td>
</tr>
</tbody>
</table>

| In scope | In scope |
II. Trusts – Special issues

- Difference between the trust definition under trust law and under the Agreement / STA Instructions: what consequences?
- Trustee as SPA?
- Relationship between the bank and the trustee?
III. Failure to identify
III. Failure to identify – Legal avenues

- **Failure to identify**
  - Notification to the RP
  - Request for regularisation
  - At the discretion of the Contracting States

- **Error in the identification**
  - Opposition to the Certificate to the SPA
  - Opposition to the STA → Decision
  - Appeal to the SFAC
  - Possibly appeal to the SFSC

- **Damage to the RP**
  - Civil action
IV. Conclusion

- **Legal uncertainty regarding the delimitation of the BO concept**
  - Emphasis on tax principles rather than due diligence principles
  - Taking into consideration of the SFAC case law re UBS case: substance over form
  - Risk-based approach

- **Better more information than less**
  - To allow categorisation of trust and identification of BO (e.g. review of trust deed)
  - Amend/complete Form A and T

- **Need for highly professional trustees**
  - Trustees need to identify possible RP and inform them of their rights and obligations
  - Trustees need to ensure that the bank has properly documented the trust
  - Coordination between possible SPAs

- **Banks must beware of civil liability towards clients**
  - General conditions
Thank you

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