

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

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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

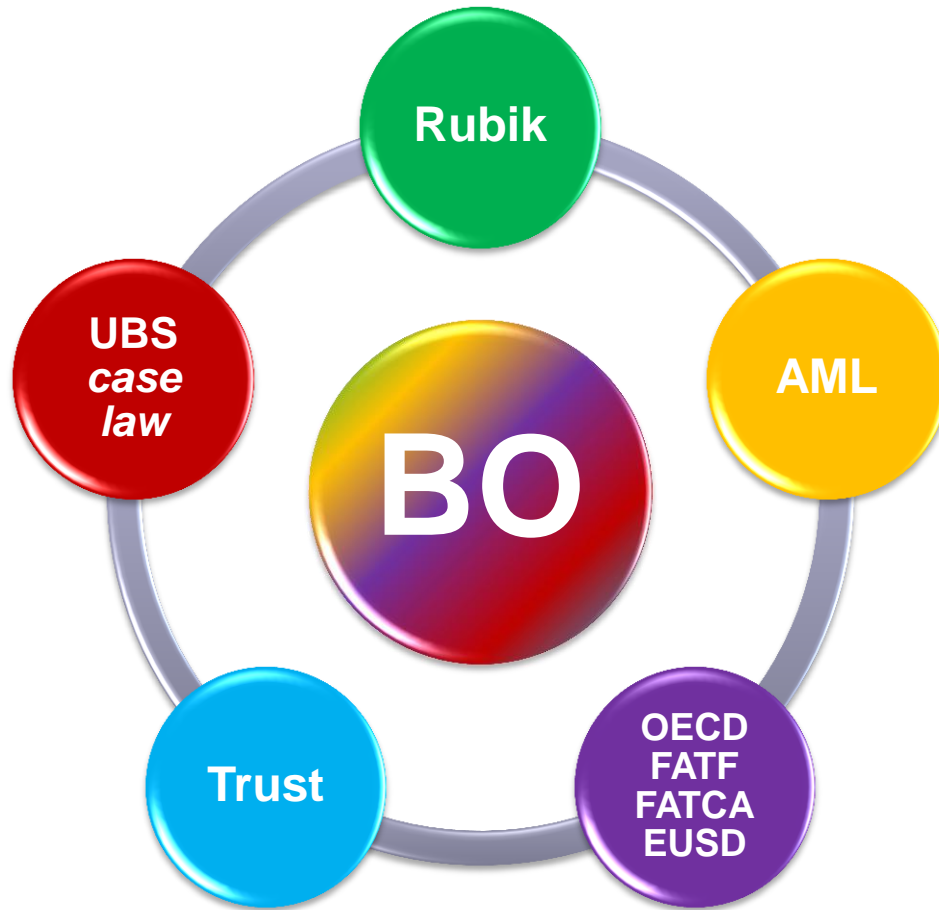
- ▶ Anti-Money Laundering Act
- ▶ Agreement on the Swiss banks' Code of Conduct with regard to the exercise of due diligence (CDB 08)
→ Form A and T

→ Anti-money laundering standard for tax purposes

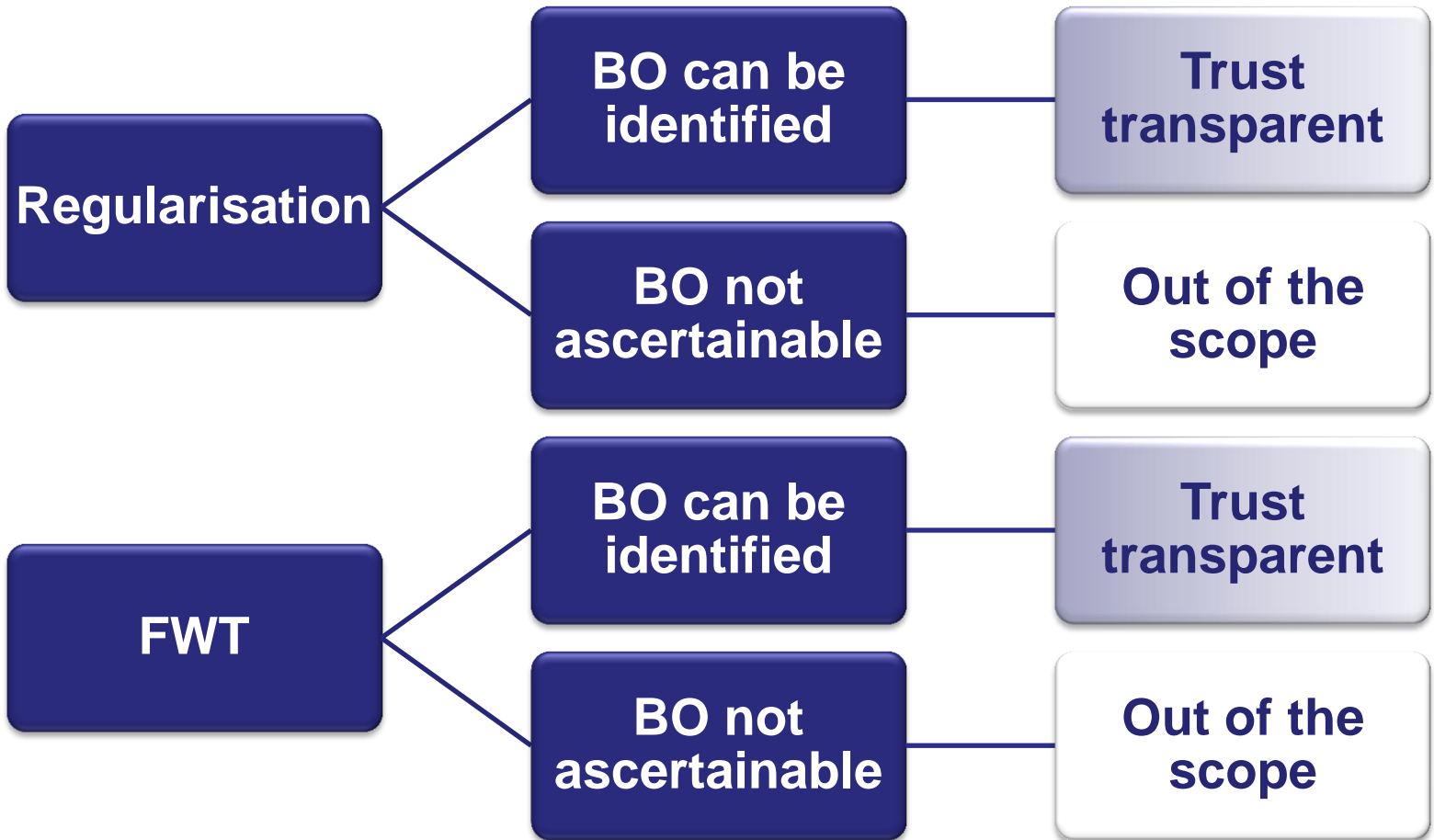
■ All the circumstances known to the SPA

- ▶ 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



II. Trusts – Identification of BO



II. Trusts – Trust categorisation

TRUST	REGULARISATION <i>Paras. 101 ff</i>	FWT <i>Paras. 54 ff</i>
Revocable	BO = settlor / person with right of revocation	BO = settlor / person with right of revocation
Irrevocable & non discretionary	BO = person as identified under due diligence process <i>e.g. fixed interest trust</i>	BO = person as identified under due diligence process <i>e.g. fixed interest trust</i>
Irrevocable & discretionary (I&D)	Out of the scope <u>Except</u> <i>special cases</i> →	Out of the scope <u>Except</u> <i>special cases</i> →
I&D set up between RD2 and entry into force	No regularisation	–
Underlying company	Rules applicable to trusts	Rules applicable to trusts

II. Trusts – Special cases

TRUST irrevocable & discretionary

REGULARISATION

- Settlor has **signatory powers** or general POA
- Settlor is **sole director of an underlying company**
- Settlor (instead of the contracting party) **regularly issues instructions** to the SPA
- In addition to one of the above factors, settlor has **unrestricted investment powers and takes all investment decisions alone**

In scope

FWT

- Settlor documented as **beneficiary** on Form T
- Settlor or beneficiary as documented on Form T acts as **trustee**
- Settlor or beneficiary as documented on Form T has **signatory powers** or general POA
Exception: not applicable if powers are limited to management or information
- Settlor or beneficiary as documented on Form T acts as **protector** who also has **signatory powers** or general POA
Exception: not applicable if powers are limited to management or information

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 conceptT**
 - ▶ 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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