



**The revised Swiss Russian
DTA -
The things that you need to know
from the Russian and Swiss sides**

Presentation for STEP

Zug, 27 March 2012

Overview

- 25 September 2011: Signature of a protocol to amend the double taxation agreement between CH and Russia (“DTA”) with respect to taxes on income and capital
- Possibly, ratification in 2012. In this event, entry into force 01.01.2013. One of the chambers (“Conseil national”) of the Swiss Parliament approved.

Overview

- Exchange of information similar to OECD standard
- Introduction of the zero rate for interest payments
- Elimination of the residual tax on dividend payments to pension funds and the central banks of both countries
- Taxing power for the gains derived from the alienation of shares in real estate companies in the country of the immovable property
- “Anti conduit” provision
- New definition of “resident”
- Negotiations on an arbitration clause as soon as Russia has introduced such clause in a DTA with another country

Overview – 0% withholding tax rate on interest

- Country of residence of the beneficial owner has an exclusive right to tax interest
- Penalty charges for late payment are excluded from the definition of “interest”
- “Interests” include payments on units of mutual/real estate investment funds deriving less than 50% of their income from shares
- Domestic “thin capitalization rules” apply, i.e. excess interest payments on disguised equity are reclassified as dividends and withholding tax applies (Art. 269 Tax Code RF: loan is over 3x net assets)

Overview - Dividends

- Dividends paid to pension funds and pension schemes, Governments, political subdivisions, local authorities, Central Bank of Russia or Swiss National Bank shall be exempt from withholding tax in the source state
- Otherwise - no change: 5% for participations of at least 20% and 15% in all other cases
- “Dividends” include payments on units of real estate funds and on units of mutual investment funds deriving more than 50% of income from shares
- “Income from immovable property” is not subject to unrestricted taxation in the source jurisdiction i.e. is classified as dividends or interest (cf. DTA Russia / Cyprus)

Overview – Capital gains from disposal of shares in real estate companies

- The country where the immovable property is situated should be given taxing power for the gains derived from the alienation of shares in real estate companies, except:
 - Shares quoted on a recognized stock exchange
 - Shares in a company deriving more than 50% of its asset value from immovable property in which it carries on business, i.e. active business use of immovable property (plants, factories etc.)

Overview - the “anti conduit” provision

- Under Article 25b “Conduit arrangement” means:
 - *a **transaction or series of transactions** which is structured in such a way that a resident of a Contracting State entitled to the benefits of the Agreement receives income arising in the other Contracting State but that resident pays, directly or indirectly, all or substantially all of that income (at any time or in any form) to **another person who is not a resident of either Contracting State** and who, if it received that item of income directly from the other Contracting State, **would not be entitled under the DTA** between the State in which that other person is resident and the Contracting State in which the income arises, or otherwise, to benefits with respect to that income which are equivalent to, or more favorable than, those available under this Agreement to a resident of a Contracting State”;*
 - *and the **main purpose of such structuring** is obtaining benefits under this Agreement”*

Overview - the “anti conduit” provision

- The tax rates for interest, dividends, royalties do not apply to conduit arrangement
- Prevention of treaty-shopping
- Ex conduit company: There is a 10% withholding tax on interests paid by a Russian company to a Lithuanian company under the DTA Russia/Lithuania. Inserting a Swiss company between a Russian and Lithuanian would result in 0% tax rate on interests paid by Russian to Swiss company under the DTA Russia/Switzerland and also in 0% tax rate on interests paid by Swiss company to Lithuanian company under article 15 of Agreement between Switzerland and EU dated 26 October 2004 providing for measures equivalent to those in Directive 2003/48/CE (RS 0.641.926.81)

Overview - Resident

- *“Any person who, under the laws of that State, is liable to tax therein by reason of its domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof”; but*
- Not: any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein
- *“...place of effective management ... is situated where the key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made”*

Exchange of information

- Exchange of information in tax matters through:
 - **Administrative assistance under double taxation agreements**
 - information obtained under DTA may be used to assess a taxpayer's liability
 - **Mutual legal assistance, in the course of criminal investigations**
 - 'Speciality' principle: excludes transmission of information by judicial authorities to tax authorities
 - Only in cases tax fraud; excluding transmission of information in tax evasion matters

Exchange of information

- Art. 26 OECD Model Tax Convention
 - obligation to exchange information foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of contracting states , i.e. tax evasion is not excluded
 - a requested State may not decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person, i.e. Swiss bank secrecy does not prevent disclosure (Swiss taxpayers excepted)

Exchange of information

- Russia is not a member of OECD
- Russia uses its own Model Tax Treaty of 24 February 2010 to negotiate its DTAs
- Article 26 of Model Tax Treaty “Exchange of information” is similar to Article 26 OECD Model Tax Convention

Exchange of information - New Art. 25a DTA

- Exchange of information (“Eol”) only upon request (no spontaneous or automatic Eol, cf. Council Directive 2011/16/EU on administrative cooperation in the field of taxation and 2003/48/EU on savings income)
- Limitation to taxes covered by DTA (incl. VAT)
- No fishing expeditions – “group requests” may be agreed to in future
- Safeguard of taxpayers’ rights, i.e. administrative procedural rules regarding taxpayers’ rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State
- Guarantee of a fair procedure

Exchange of information - New Art. 25a DTA

- Confidentiality (excl. disclosure trade, business, industrial, commercial or professional secret or trade process, or info disclosure of which would be contrary to public policy)
- Principle of subsidiarity, i.e. requesting State has exhausted its normal procedures under domestic law to obtain the information
- No retroactivity, i.e. Article 25a DTA shall have effect to requests made on or after the date of entry into force and covers information that relates to taxable periods beginning on or after the first day of January of the year following the entry into force of the Protocol i.e. 01.01.2014
- No EoI if request is based on stolen data
- These conditions are mirrored in the new Swiss Federal Act on Administrative Assistance in Tax matters (draft, approved by “Conseil national”)

Exchange of information - Request must contain:

- Information sufficient to identify the person under examination or investigation (usually, account number or individual's name)
 - but: see Amendments to 10 DTA providing that “other means of identification should be admissible”
- Period of time for which information is requested
- Nature and form in which requesting State wishes to receive information
- Tax purpose for which information is sought
- Name and, to the extent known, the address of any person believed to be in possession of requested information (a/c number not necessary)
- Request is not examined on the merits, only foreseeably relevant

Exchange of information – “group requests”

- Federal Order concerning an addendum to the US Swiss DTA 2009, dated 16 March 2012 re: interpretation of the new US Swiss DTA 2009 to include “group requests”, i.e.:
 - taxpayer’s identification may be possible through means other than name and address
 - name and address of information holder only to the extent known
 - taxpayer’s identification is possible through description of ‘pattern of behavior’
 - ‘pattern of behavior’ should suggest that taxpayers failed to fulfill their duties
 - information holder significantly contributed to such behavior

Lessons learnt from UBS-IRS case

- New: no search for individuals / specific accounts but search for structures without naming individuals (general abstract facts):
 - “Accordingly, this request is not limited to accounts already identified by UBS but includes all cases in which UBS knowingly falsified and/or maintained inconsistent records and documentation of account ownership by its United States clients.”
- Prohibition of fishing expeditions? No: Pilot decision of the Swiss Federal Administrative Court (A-7342/2008 and A-7426/2008) of 5 March 2009
- Extremely lax interpretation of what is not a fishing expedition: description of the account, even without a specific name, could be sufficient to grant the requested assistance

UBS- IRS case – Decision of the Swiss Federal Administrative Court (A-6053/2010 dd. 10.01.11) re beneficiary of Liechtenstein Foundation

- Substance over form
- American woman was named as beneficial owner on Form A because at the time of account opening she was named as “Erstbegünstigte” in the Foundation’s Regulations. She made no withdrawing, no investment decisions, had no signatory right on a/c
- Who is the beneficial owner? Control over and power to dispose of the account assets and revenue, influence on the timing and extent of distributions
- Appeal rejected: appellant failed to rebut the assumption of beneficial owner in a clear and decisive manner

UBS- IRS case – Decision of the Swiss Federal
Administrative Court (A-5974/2010 dd. 14.02.11) re
beneficiary of Liechtenstein Foundation

- US person became Foundation's beneficiary after the death of the first beneficiary and had a life annual interest of 5% of the capital and income of Foundation.
- Beneficiary according to UBS Form A but Foundation Council informed UBS when submitting Form A that US person was not to be given information about assets, nor entitled to give investment instructions nor make withdrawals
- Arguments against beneficial ownership, i.e. person has no control over assets:
 - Distributions entirely within the discretion of the Foundation Council
 - Foundation benefit is inalienable, non-hereditary and not encumbered
- Appeal admitted

UBS- IRS case – Decision of the Swiss Federal
Administrative Court of 18 March 2011 re beneficial owner
of a trust (A-7013/2010)

- Examined whether a bank account held in the name of trustees with UBS was within the ambit of the disclosure
- Appellant (US person) was within the class of possible income objects/beneficiaries named in the trust deed
- Held that since the beneficiary/object had no control over the assets and income of the discretionary trust, he should not be treated as the beneficial owner of assets owned by the trust

UBS- IRS case – Decision of the Swiss Federal
Administrative Court of 18 March 2011 re beneficial owner
of a trust (A-7013/2010)

- Burden of proof:
 - Request of information is admitted upon initial suspicion of a tax offense
 - The person concerned by request is to refute suspicion in clear and decisive manner, i.e. show he/she is not a beneficial owner
- Form A (identification of beneficial owner by a Swiss bank) [or Form T used for trusts as from 2008] is sufficient proof of suspicion that the person concerned is the beneficial of the account

Q&A

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