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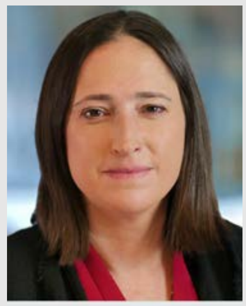

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In this article, the eighth in a series, the authors summarize their findings from a KPMG member firm survey of how tax authorities around the world apply the OECD control of risk framework and the transfer pricing guidelines on development, enhancement, maintenance, protection, and exploitation of intangibles. This installment is focused on Switzerland.

Swiss Transfer Pricing Legislation

Swiss tax law does not include specific legislation or regulations on transfer pricing.[1] However, the arm's-length principle is applied on the basis of various provisions, such as article 58, paragraph 1 and article 24, paragraph 1 of the Federal Act of 14 December 1990 on the Harmonization of Direct Taxation at Cantonal and Communal Levels in the case of corporate income tax (CIT), and article 4, paragraph 1, letter b of the Federal Act of 13 October 1965 on Withholding Tax regarding withholding tax (WHT).[2]

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[1] For previous installments in this series, see Mark R. Martin et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: The U.S. and U.K.," *Tax Notes Int'l*, May 8, 2023, p. 705; Olivier Kiet et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: France, Italy, and Spain," *Tax Notes Int'l*, June 5, 2023, p. 1327; Julia Bürkle et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: Germany, the Netherlands, and Sweden," *Tax Notes Int'l*, June 26, 2023, p. 1743; Carlos Pérez Gómez et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: Mexico and Canada," *Tax Notes Int'l*, July 17, 2023, p. 251; Sophie Lewis et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: Australia and China," *Tax Notes Int'l*, Aug. 28, 2023, p. 1083; Tai-Joon Kim et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: India and South Korea," *Tax Notes Int'l*, Aug. 12, 2024, p. 973; and Koichiro Fujimori et al., "A Global Survey on the Application of the Control of Risk and DEMPE Frameworks: Japan," *Tax Notes Int'l*, Sep. 16, 2024, p. 1775.

[2] In terms of WHT, the excessive portion of remuneration (*i.e.*, exceeding the arm's-length return) paid to a Swiss company's shareholders (*e.g.*, its parent company) or to close associates (*e.g.*, a sister company) abroad, or the inadequate portion of the remuneration received by it is considered to be a significant monetary benefit or deemed dividend subject to Swiss WHT.

The OECD transfer pricing guidelines[3] are not referenced in Swiss legislation and are hence not binding under domestic law. However, they are considered a tool for interpreting bilateral tax treaties that include a provision equivalent to article 9 of the OECD Model Tax Convention on Income and on Capital. Swiss tax authorities and courts frequently cite the OECD guidelines and use them to interpret and apply the arm's-length principle. Swiss transfer pricing recommendations were also published in 2024 by the Swiss Tax Conference and edited by the Federal Tax Administration (FTA).[4] Because these recommendations are intended for general information purposes only, they are not binding on taxpayers, but taxpayers are strongly advised to follow them when applying transfer pricing in Switzerland.

While there is no specific reference in Swiss law or regulations to the OECD revised guidance on the control of risk and development, enhancement, maintenance, protection, and exploitation (DEMPE) frameworks, this guidance is also followed by Swiss tax authorities because of their adherence to the OECD guidelines.

Cantonal and Federal Tax Authorities

In Switzerland, 26 cantonal tax authorities (CTAs) are responsible for applying transfer pricing in the context of CIT, while the FTA is responsible for collecting WHT.[5]

Rulings related to CIT, including transfer pricing cases, fall within the competence of the CTAs, while those relating to WHT are handled by the FTA. Given that the same transaction may have implications for both CIT and WHT, taxpayers often file two ruling applications — one with the relevant CTA, and one with the FTA.

Despite the separate responsibilities outlined above, the CTA and FTA work together closely during tax audits and tax rulings.

The State Secretariat for International Finance (SIF) is the competent tax authority for financial, monetary, and tax matters if foreign countries are involved. In this capacity, the SIF has sole responsibility for advance pricing agreements and mutual agreement procedures.

General Approach to Control of Risk and DEMPE

In tax audits, APAs, MAPs, and tax rulings, the Swiss tax authorities follow an evidence-based approach, which is substantiated by intensive fact-finding activities. Swiss tax authorities frequently request summaries of functional interviews for C-level employees, organizational charts and reporting lines, financial forecasts, and comparative scenarios.

In this regard — and especially in cases involving the transfer of intellectual property or the analysis of research and development activities — Swiss tax authorities integrate the application of the control of risk and DEMPE frameworks within the wider process of delineating the controlled transaction and performing the related functional analysis.

Swiss tax authorities tend to assess taxpayers' transfer pricing across multiple periods, not only the year in which the specific intercompany transaction under consideration took place. For this reason, Swiss tax authorities tend to request from taxpayers a description of the whole storyline behind the IP development and commercialization, as well as the relevant intercompany agreements, transfer pricing documentation, and organizational charts. All these documents are considered when applying the control of risk and DEMPE frameworks. The Swiss tax authorities are increasingly comparing intercompany agreements with the conduct of the relevant counterparties as part of their assessments. Also, organizational charts are becoming an essential part of the application of the control of risk and DEMPE frameworks in Switzerland, with the number and role of personnel employed by the entities of a multinational group being used by Swiss tax authorities as a potential proxy for assessing the substance and role of these entities.

While the Swiss tax authorities generally take a holistic approach when contextualizing IP development and commercialization, they generally take a year-by-year approach when assessing the taxable income of a Swiss entity,

[3] OECD, "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022" (2022).

[4] Swiss Tax Conference, "Dossier Tax Information — Transfer Pricing" (legislation as of January 1, 2024).

[5] The FTA is also responsible for VAT matters.

rather than allowing the use of multiyear averaging.[6]

Applying the Frameworks in Practice

Below, we outline three cases in which the Swiss tax authorities have reviewed taxpayers' application of the control of risk and DEMPE frameworks.

Case Study 1: Cost-Sharing Arrangement

The first case regards the FTA and CTA tax rulings requested by a Swiss entity of a U.S. group to obtain certainty on a cost-sharing arrangement (CSA) covering R&D activities performed by a Swiss and U.S. entity to develop specific IP for pharmaceutical products. As part of these rulings, the taxpayer requested confirmation of the valuation of the legacy IP that was previously developed exclusively by the U.S. entity and was being contributed to the CSA. In addition to the request of supporting documentation related to the assumptions underlying the legacy IP valuation (such as cash flows, royalty rate, cost of equity, and cost of debt) and the CSA mechanism, the Swiss tax authorities asked the taxpayer to provide a detailed description of the R&D activities carried out by both entities, with a focus on the assumption of key risks and performance of DEMPE functions. Because of the information they received, the tax authorities concluded that the Swiss entity was performing more DEMPE functions and assuming more R&D risks than indicated in the initial tax rulings by the taxpayer. They thus redetermined the CSA method to compensate the Swiss entity for these additional functions and risks.

In this case the difference between CSAs provided by the U.S. regulations and cost contribution arrangements provided by the OECD guidelines was critical when defining the correct allocation mechanism of costs and benefits between the Swiss and U.S. entities. The Swiss tax authorities placed a stronger emphasis than the taxpayer's initial analysis on the performance of management control functions, assumption of significant risks, and financial capacity related to these risks.[7] Since more of these management and risk control functions were performed in the United States, the redetermination of the CSA method led to attributing more costs to the U.S. entity participating in the CSA compared with the taxpayer's initial position.

Case Study 2: IP Creation From R&D Services

The second case concerns a bilateral APA between Switzerland and France on a business restructuring that led to the transformation of an R&D center into a routine R&D service provider and the relocation of key personnel from Switzerland to France. Before the restructuring, the Swiss entity was performing R&D activities for industrial IP owned by the French parent, as well as distribution activities for the Swiss market. For several years the Swiss entity was the only R&D center of the group, hosting key personnel and performing all the DEMPE functions related to the IP developed, and hence was being remunerated through a value-based fee, compensating it for both the activities it performed and the risks it managed. However, because of market difficulties and the resignation or relocation of certain key personnel, the functional profile of the Swiss entity began to shift toward a more routine R&D service provider, with key functions being transferred to the French parent. The taxpayer submitted a bilateral APA to confirm, among other things, (1) the new routine remuneration for the R&D activities performed by the Swiss entity and (2) the absence of the transfer of something of value following the restructuring, which could have led to the imposition of an exit tax.

The Swiss tax authorities initially argued that the transfer of DEMPE functions from Switzerland to France, combined with the change to the group's transfer pricing model, which would leave the Swiss entity worse off, constituted the transfer of something of value. In response, the taxpayer performed a DEMPE analysis pre- and post-restructuring, together with an assessment of the location of the key

[6] Decision of the Administrative Court of Zug dated December 5, 2024 (Case No. A 2023 1).

[7] For more details on the differences and similarities between CSAs and cost contribution arrangements, see Jeroen Dijkman and Prita Subramanian, "Evaluating the Equivalence of Cost-Sharing and Cost Contribution Arrangements," *Tax Notes Int'l*, Mar. 13, 2023, p. 1473.

functions in recent years, which also included a framework assessing the personnel who were responsible, accountable, consulted and informed (RACI).[8] This assessment allowed the taxpayer to demonstrate that the Swiss entity's functionality had been declining recently and that the nonroutine remuneration it received during these years was akin to being indemnified for the transfer of functions. The DEMPE and RACI analysis also clearly showed that the key functions and risks were now being performed by the French parent, and therefore that the Swiss entity should only be entitled to a routine remuneration for its R&D services from then on.

Case Study 3: Key Factors Used by Different Competent Authorities

The third case is related to a bilateral APA between Switzerland and Japan in which a taxpayer requested an agreement on the transfer prices for the intercompany sale of goods when both entities were contributing to the development, manufacturing, and distribution of said goods.

Specifically, one entity (Party A) was focused on product and brand development and management, while the other entity (Party B) was acting as a fully fledged manufacturer. Both parties were involved in the R&D process through a joint R&D committee and were also responsible for the distribution of goods to third-party customers in their respective markets of reference. As a result of their functions performed and related risks assumed, which were closely related to the success or failure of the business, the taxpayer concluded that the residual profit-split method was the most appropriate method to assess the compliance with the arm's-length principle of the sales of goods between Party A and Party B.

The competent authorities involved took different approaches to evaluating the method proposed by the taxpayer. The SIF focused on the value chain and key contributions by the parties, while the Japanese competent authority used the cost basis of each party involved as its primary reference point and relied on the value chain analysis only as a corroborative approach. Further, both competent authorities asked the taxpayer to provide financial forecasts in terms of projected costs (especially R&D) and revenues, as well as future plans in terms of functions and key roles employed by the parties to understand how the business model would evolve in the coming years covered by the bilateral APA.

After the simulation of various scenarios and significant negotiations, a solution was found that favored the more quantitative and "objective" approach required by the Japanese tax authorities — in other words, a return based on various costs, with the assessment of the relative value provided by both the Swiss and Japanese entities, as required by the SIF.

Conclusion

These cases demonstrate that the Swiss tax authorities place a strong emphasis on the control of risk and DEMPE frameworks during the evaluation of any transfer pricing matter relating to the valuation and transfer of IP or the performance of R&D-related activities. The tax authorities adopt this approach even when the outcome isn't favorable from a Swiss perspective. The approach adopted is often practical and focuses on the actual facts and circumstances of a case.

The Swiss tax authorities have applied these frameworks in multiple cases, including assessing whether certain IP exists, determining its nature and arm's-length value, delineating the functional profile of entities performing R&D activities, and defining the appropriate remuneration mechanism for these activities. The control of risk and DEMPE frameworks often plays a role in corporate tax matters, as well — for example, in relation to R&D expenses and related tax deductions. For instance, the DEMPE framework is used to assess the validity of, among other things, R&D super-deductions and patent box incentives, as well as tax-neutral uncovering of hidden reserves for a move of functions into Switzerland.

[8] The RACI concept aims at assigning responsibilities in a matrix and has been widely used in project management to establish people responsible, accountable, consulted, and informed. Conceptually following the DEMPE approach, the RACI concept is a more value-chain-focused approach to identifying contributions to intangible property, and hence the respective profit share derived from it. The RACI analysis is a concrete analysis method that classifies roles and quantifies individual contributions based on a four-letter principle.

As a result, taxpayers should prepare documentation that describes in detail the functions performed, risks assumed, and assets used by the different entities involved in R&D activities and owning IP. The documentation should also include a specific explanation identifying the legal and economic owner of the IP and the entities actually exploiting the IP in the course of their business.[9] ■

[9] The foregoing information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only, and does not necessarily represent the views or professional advice of KPMG LLP nor KPMG AG.