



Xavier Oberson / Howard R. Hull

Switzerland in International Tax Law

■ Fourth Revised Edition

IBFD

Switzerland in International Tax Law (Fourth Revised Edition)

Why this book?

Switzerland has recently witnessed an unprecedented amount of tax treaty negotiations. Although this is a direct result of Switzerland's revised position regarding exchange of information, a number of Contracting States have taken this opportunity to modify tax treaty benefits and/or clarify certain aspects of tax treaty interpretation and application. These are developed extensively in this fourth revised edition.

As Switzerland has steadily aligned itself with the principles of international taxation, the self-imposed anti-abuse rules for the application of tax treaties have been modified significantly. Indeed, Swiss courts have become more creative in determining where there is and where there is not treaty abuse. As a result, the 1962 Abuse Decree is making way for a more complex basket of anti-abuse rules and regulations.

Switzerland in International Tax Law is designed for practitioners wishing to acquire a working knowledge of the Swiss tax issues involved in international cross-border investment. Whether Switzerland is the source or the destination of income, both domestic and international laws are explained in detail. Due to Switzerland's traditional role in international taxation, particular attention has been paid to the special tax relief granted to Swiss resident individuals and corporations as well as the complex rules for the avoidance of treaty abuse.

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Table of contents

Acknowledgements	v
Foreword	vii
Introduction	1
Chapter 1: Swiss domestic law	3
1.1. Overview of the Swiss tax system	3
1.1.1. Direct taxation	3
1.1.1.1. Introduction	3
1.1.1.2. Individual income tax	3
1.1.1.2.1. <i>Taxable income</i>	4
1.1.1.2.1.1. Business profits	4
1.1.1.2.1.2. Income from immovable property	4
1.1.1.2.1.3. Investment income	5
1.1.1.2.1.4. Personal services income	5
1.1.1.2.1.5. Pension income	7
1.1.1.2.2. <i>Tax deductions</i>	7
1.1.1.2.2.1. Social security	7
1.1.1.2.2.2. Pensions and private investment	8
1.1.1.2.2.3. Interest expense	9
1.1.1.2.2.4. Other deductions	9
1.1.1.3. Individual capital gains tax	9
1.1.1.4. Individual wealth tax	10
1.1.1.5. Corporate income tax	10
1.1.1.5.1. Commercially justified expenses	11
1.1.1.5.2. Depreciation	12
1.1.1.5.3. Corrections and provisions	12
1.1.1.5.4. Taxes	13
1.1.1.5.5. Loss carry-forwards	13
1.1.1.5.6. Thin capitalization	13
1.1.1.6. Corporate capital tax	14
1.1.1.7. Withholding tax	15
1.1.2. Indirect taxation	17
1.1.2.1. Introduction	17
1.1.2.2. Stamp tax	17
1.1.2.3. Value added tax	20
1.1.2.3.1. Introduction	20
1.1.2.3.2. Domestic turnover	21
1.1.2.4. Gift and inheritance tax	23

1.2.	Jurisdiction to tax income	24
1.2.1.	Full tax liability	24
1.2.1.1.	Individuals	24
1.2.1.1.1.	Domicile	24
1.2.1.1.1.1.	Domicile by intent	25
1.2.1.1.1.2.	Domicile by law	26
1.2.1.1.2.	Residency	26
1.2.1.2.	Corporations	26
1.2.1.2.1.	Place-of-incorporation test	26
1.2.1.2.2.	Place-of-management test	26
1.2.1.3.	Partnerships	27
1.2.1.4.	Trusts	28
1.2.1.5.	Investment funds	29
1.2.2.	Limited tax liability	29
1.2.2.1.	Income tax	30
1.2.2.1.1.	Enterprises, permanent establishments and immovable property	30
1.2.2.1.2.	Personal services	30
1.2.2.1.2.1.	Dependent personal services	30
1.2.2.1.2.2.	Directors' fees	32
1.2.2.1.2.3.	Artistes, sportsmen and lecturers	32
1.2.2.1.3.	Pensions	33
1.2.2.1.3.1.	Private pensions	33
1.2.2.1.3.2.	Public pensions	34
1.2.2.2.	Withholding tax	34
1.2.2.2.1.	Taxable investment income	34
1.2.2.2.1.1.	Interest from bonds and other similar debt instruments	34
1.2.2.2.1.2.	Interest on deposits with Swiss banks	35
1.2.2.2.1.3.	Profit distributions from legal entities (dividends)	37
1.2.2.2.1.4.	Profit distributions from collective investments	40
1.2.2.2.1.5.	Intra-group financing	40
1.2.2.2.2.	Taxable persons	41
1.2.3.	Tax-exempt entities	41
1.3.	Special relief for individuals	42
1.3.1.	Lump-sum taxation for individuals	42
1.3.1.1.	Introduction	42
1.3.1.2.	Legal basis	43
1.3.1.3.	Qualifying persons	44
1.3.1.4.	Calculation of standard of living	45
1.3.1.5.	Calculation of comparative tax	47
1.3.1.6.	Proposed Modifications	48

1.3.1.7.	Availability of treaty relief	48
1.3.2.	Taxation of capital gains	49
1.3.2.1.	Introduction	49
1.3.2.2.	Distinction between business and private assets	50
1.3.2.3.	Distinction between independent business activity and management of personal wealth	51
1.4.	Special relief for corporations	53
1.4.1.	Relief for qualifying dividend income and capital gains	54
1.4.1.1.	Legal basis	54
1.4.1.2.	Companies for which relief is available	56
1.4.1.3.	Dividend income for which relief is available	57
1.4.1.4.	Capital gains for which relief is available	57
1.4.1.5.	Calculation of tax relief	59
1.4.2.	Reinvestment relief	60
1.4.2.1.	Legal basis	61
1.4.2.2.	Companies for which relief is available	62
1.4.2.3.	Qualifying transactions	62
1.4.2.3.1.	Participations divested	62
1.4.2.3.2.	New investments	63
1.4.2.4.	Tax relief	65
1.4.2.4.1.	Capital gains tax	65
1.4.2.4.2.	Capital tax	66
1.4.2.4.3.	Negotiation stamp tax	66
1.4.3.	Holding companies	66
1.4.3.1.	Legal basis	66
1.4.3.2.	Criteria to qualify for holding company status	67
1.4.3.3.	Taxation of holding companies	70
1.4.4.	Auxiliary companies	71
1.4.4.1.	Legal basis	71
1.4.4.2.	Criteria to qualify for auxiliary company status	72
1.4.4.3.	Taxation of auxiliary companies	72
1.4.4.3.1.	Income from qualifying participations	72
1.4.4.3.2.	Other Swiss-source income	72
1.4.4.3.3.	Other foreign-source income	73
1.4.5.	Newly established enterprises	73
1.4.5.1.	Legal basis	74
1.4.5.2.	Qualifying businesses	75
1.4.5.2.1.	Businesses for which relief is available	75
1.4.5.2.2.	Newly established businesses (including diversification)	75
1.4.5.2.3.	The interests of the economy	76

1.4.5.2.4.	Non-qualifying businesses	76
1.5.	Bibliography	78
Chapter 2: Swiss Treaty Law		83
2.1.	Sources of treaty law	83
2.2.	Scope of tax treaties	84
2.2.1.	Period in time	85
2.2.2.	Territory	85
2.2.3.	Taxes	86
2.2.4.	Persons	87
2.2.4.1.	General principles	87
2.2.4.2.	Individuals	88
2.2.4.2.1.	Swiss residents subject to lump-sum taxation	88
2.2.4.2.1.1.	France	88
2.2.4.2.1.2.	Germany, Austria, Belgium, Canada, Italy and Norway	89
2.2.4.2.1.3.	Denmark	89
2.2.4.2.1.4.	United States	90
2.2.4.2.2.	Habitual abode or registered office in Germany	90
2.2.4.2.3.	Extended limited tax liability in Germany, the Netherlands and Sweden	90
2.2.4.3.	Corporations	91
2.2.4.3.1.	Luxembourg 1929 holding companies (<i>milliardaires</i>)	91
2.2.4.3.2.	Madeira offshore companies	92
2.2.4.4.	Partnerships	93
2.2.4.5.	Trusts	94
2.2.4.6.	Collective investments	95
2.2.4.7.	Permanent establishments	95
2.3.	Interpretation of tax treaties	95
2.4.	Interaction between Swiss treaty law and Swiss domestic law	99
2.5.	Bibliography	100
Chapter 3: International Allocation of Taxable Income		103
3.1.	Business profits	103
3.1.1.	Principles of taxation	103
3.1.1.1.	General principle	103
3.1.1.2.	Shipping, inland waterways transport and air transport	104
3.1.2.	Permanent establishment defined	104

3.1.2.1.	Legal basis	104
3.1.2.2.	Fixed place of business	106
3.1.2.2.1.	Treaty definition	106
3.1.2.2.2.	Swiss domestic law	107
3.1.2.3.	Representatives	108
3.1.2.4.	Subsidiaries	109
3.1.2.5.	The impact of e-commerce	109
3.1.3.	Allocation of profits	111
3.1.3.1.	Principles of international treaty law	111
3.1.3.1.1.	In general	111
3.1.3.1.2.	Swiss treaty policy	115
3.1.3.2.	Swiss rules of application	115
3.1.3.2.1.	Introduction	115
3.1.3.2.2.	Companies	117
3.1.3.2.2.1.	Total taxable income to be allocated	118
3.1.3.2.2.2.	Lump-sum allocation to head office (praecipuum)	118
3.1.3.2.2.3.	Criteria for the allocation of profits	118
3.1.3.2.2.4.	Rate of taxation	119
3.1.3.2.2.5.	Example	119
3.1.3.2.3.	Partnerships	121
3.1.3.2.4.	Individuals	121
3.1.4.	Swiss treatment of foreign losses	122
3.1.4.1.	Swiss businesses with permanent establishments abroad	122
3.1.4.2.	Non-resident businesses with permanent establishments in Switzerland	123
3.2.	Income from immovable property	123
3.2.1.	Principles of taxation	123
3.2.2.	Allocation of income	125
3.2.2.1.	Immovable property held by individuals	125
3.2.2.1.1.	Total taxable income attributable to immovable property	126
3.2.2.1.2.	Deductions attributable to immovable property	126
3.2.2.1.3.	Allocation of mortgage interest and social deductions	126
3.2.2.1.4.	Rate of taxation	128
3.2.2.2.	Immovable property held by businesses	128
3.2.2.2.1.	Operational property	128
3.2.2.2.2.	Traders in property	129
3.2.2.2.3.	Investment property	129
3.3.	Investment income	130
3.3.1.	Dividends	130

3.3.1.1.	Definition	130
3.3.1.2.	Taxation in the state of the beneficiary	131
3.3.1.3.	Taxation in the state of source	132
3.3.1.3.1.	Limited tax liability	132
3.3.1.3.2.	Beneficial ownership	133
3.3.1.3.3.	Treaty abuse	133
3.3.1.3.4.	Extraterritoriality	134
3.3.1.4.	Relief from economic double taxation	135
3.3.1.5.	Procedural issues	136
3.3.1.5.1.	General principles	136
3.3.1.5.2.	Net remittance procedure	137
3.3.1.5.2.1.	Legal basis	137
3.3.1.5.2.2.	Scope	139
3.3.1.5.2.3.	Qualifying dividends	139
3.3.1.5.2.4.	Harmonized procedures	141
3.3.1.5.2.5.	United States and Germany	141
3.3.2.	Interest	144
3.3.2.1.	Definition	144
3.3.2.2.	Rules of taxation	145
3.3.3.	Royalties	146
3.3.4.	Capital gains	146
3.4.	Personal services income	148
3.4.1.	Independent personal services	148
3.4.2.	Dependent personal services	149
3.4.2.1.	General rules	149
3.4.2.2.	Short-term employment (international transfers)	149
3.4.2.3.	Employment in international transport	153
3.4.2.4.	Frontier workers	154
3.4.2.4.1.	France	154
3.4.2.4.3.	Germany	155
3.4.2.4.4.	Italy	155
3.4.2.4.5.	Liechtenstein	155
3.4.3.	Directors' fees	156
3.4.5.	Government service and members of diplomatic missions and consular posts	158
3.4.6.	Students	159
3.5.	Pension income	160
3.5.1.	Private pensions	160
3.5.2.	Public pensions	162
3.6.	Other income	162
3.7.	Bibliography	163

Chapter 4: Double Taxation Relief	169
4.1. Double taxation defined	169
4.2. Relief from concurrent full tax liability	170
4.2.1. Introduction	170
4.2.2. Individuals	170
4.2.3. Other persons	171
4.3. Relief from concurrent limited tax liability	172
4.4. Relief from concurrent full and limited tax liability	172
4.4.1. Introduction to commonly used methods	172
4.4.1.1. Deduction method	172
4.4.1.2. Exemption method	173
4.4.1.3. Credit method	173
4.4.1.4. Comparative chart	173
4.4.2. Methods applied in Switzerland	174
4.4.2.1. Swiss domestic law	174
4.4.2.1.1. Swiss residents	174
4.4.2.1.2. Non-residents	175
4.4.2.2. Swiss treaty law	175
4.5. Credit method applied in Switzerland	177
4.5.1. Introduction	177
4.5.2. Sources of law	177
4.5.3. Eligibility	178
4.5.3.1. Swiss residents	178
4.5.3.2. Foreign tax at source	179
4.5.3.3. Recognition of income	179
4.5.3.4. Swiss income tax	179
4.5.3.5. Absence of treaty abuse	181
4.5.4. Calculation	181
4.5.4.1. Foreign tax at source	181
4.5.4.2. Swiss income tax	181
4.5.4.2.1. Gross treaty-favoured income	182
4.5.4.2.2. Net treaty-favoured income	182
4.5.4.2.3. Swiss tax rate	183
4.5.5. Examples	183
4.5.5.1. Companies without Swiss tax relief	184
4.5.5.2. Companies with qualifying dividends	184
4.5.5.3. Holding companies	184
4.5.5.4. Auxiliary companies	185
4.5.6. Procedure	186
4.6. Bibliography	187

Chapter 5: Anti-Abuse Provisions	189
5.1. Anti-abuse provisions in Swiss domestic law	189
5.1.1. Introduction	189
5.1.2. Sources of law	190
5.1.3. Treaty abuse in the 1962 Abuse Decree	191
5.1.3.1. Scope of application	191
5.1.3.2. Broad definition of treaty abuse	192
5.1.3.3. The 1962 Abuse Circular	193
5.1.3.3.1. Abusive transfer of income to non-qualifying persons	193
5.1.3.3.1.1. Fifty per cent base erosion	193
5.1.3.3.1.2. Expenditure	195
5.1.3.3.2. Inappropriate profit distributions	196
5.1.3.3.2.1. Twenty-five per cent distribution rule	196
5.1.3.3.2.2. Financing and interest rate	197
5.1.3.3.3. Fiduciary relationships	198
5.1.3.3.4. Foreign-controlled family foundations or partnerships	199
5.1.3.4. The 1999, 2001 and 2010 Abuse Circulars	200
5.1.3.4.1. Qualifying companies	200
5.1.3.4.1.1. Active trade or business test	200
5.1.3.4.1.2. Direct stock exchange test	203
5.1.3.4.1.3. Indirect stock exchange test	204
5.1.3.4.1.4. Pure holding company test	204
5.1.3.4.2. Conditions of the 1999 and 2001 Abuse Circulars	205
5.1.3.4.2.1. Base erosion	205
5.1.3.4.2.2. Expenditure	206
5.1.3.4.2.3. Dividend distribution	206
5.1.3.4.2.4. Financing and interest rate	207
5.1.4. Consequences of non-compliance	207
5.2. Anti-abuse provisions in Swiss tax treaties	209
5.2.1. Treaties which refer to the 1962 Abuse Decree	209
5.2.2. Treaties which include 1962 Abuse Decree	210
5.2.3. Other anti-abuse provisions	211
5.2.4. General anti-abuse principle	214
5.2.5. The United States–Switzerland tax treaty	215
5.2.5.1. Introduction	215
5.2.5.2. Individuals	215
5.2.5.3. Public establishments	216
5.2.5.4. Companies (total benefits)	216
5.2.5.4.1. Active trade or business test	217

5.2.5.4.2.	Headquarters test	220
5.2.5.4.2.1.	Overall supervision and administration	220
5.2.5.4.2.2.	Active trade or business	221
5.2.5.4.2.3.	Single country limitation	221
5.2.5.4.2.4.	Other-state gross income limitation	222
5.2.5.4.2.5.	Independent discretionary authority	222
5.2.5.4.2.6.	Income taxation rules	222
5.2.5.4.2.7.	In connection with or incidental to trade or business	223
5.2.5.4.3.	Stock exchange test	223
5.2.5.4.3.1.	Direct stock exchange test	223
5.2.5.4.3.2.	Indirect stock exchange test	224
5.2.5.4.4.	Predominant interest test	224
5.2.5.4.5.	Derivative benefits test	225
5.2.5.4.5.1.	Shareholder test	225
5.2.5.4.5.2.	Base erosion test	226
5.2.5.5.	Companies (limited benefits)	227
5.2.5.5.1.	Shareholder test	227
5.2.5.5.2.	Base erosion test	228
5.2.5.6.	Partnerships	229
5.2.5.7.	Trusts and estates	230
5.2.5.8.	Family foundations	230
5.2.5.9.	Pension trusts and not-for-profit organizations	230
5.3.	Bibliography	232
Chapter 6: Transfer Pricing		237
6.1.	Introduction	237
6.2.	Arm's length prices	239
6.2.1.	Introduction	239
6.2.2.	Arm's length methods	240
6.2.2.1.	Traditional transaction methods	240
6.2.2.1.1.	Comparable uncontrolled price method (CUP)	240
6.2.2.1.2.	Resale price method	241
6.2.2.1.3.	Cost-plus method	241
6.2.2.2.	Transactional Profit Methods	241
6.2.2.2.1.	Profit split method	241
6.2.2.2.2.	Transactional net margin method	242
6.2.3.	The Swiss approach	242
6.2.3.1.	In general	242
6.2.3.2.	The methods applied	243
6.3.	Consequences of inappropriate transfer pricing practices	245

6.3.1.	Initial adjustment	245
6.3.1.1.	Income tax	246
6.3.1.2.	Withholding tax	246
6.3.2.	Corresponding adjustment	246
6.3.3.	Secondary adjustment	248
6.4.	Bibliography	248
Chapter 7: Non-Discrimination		251
7.1.	Introduction	251
7.2.	Treaty law	252
7.2.1.	Scope of application	252
7.2.2.	Unlawful discrimination	252
7.2.2.1.	Discrimination on the grounds of nationality	252
7.2.2.2.	Discrimination against businesses	254
7.2.2.2.1.	Introduction	254
7.2.2.2.2.	Permanent establishments	254
7.2.2.2.3.	Deductibility of disbursements	256
7.2.2.2.4.	Enterprises owned and controlled by non-residents	257
7.3.	Swiss domestic law	257
7.4.	Bibliography	258
Chapter 8: Mutual Agreement Procedure		261
8.1.	Introduction	261
8.2.	Request by taxpayers	263
8.2.1.	Conditions	263
8.2.2.	Procedure	264
8.2.2.1.	Presentation of taxpayer's objections	265
8.2.2.2.	Examination by the competent authority	265
8.2.2.3.	The mutual agreement procedure proper	266
8.2.2.4.	Application of the mutual agreement	267
8.4.	Request by competent authorities	268
8.4.	Arbitration Procedure	268
8.5.	Bibliography	270
Chapter 9: International Exchange of Information and Assistance in Tax Matters		271
9.1.	Introduction	271
9.2.	OECD Model Treaty	272
9.2.1.	Outline	272
9.2.2.	Treaty application	274

9.2.3.	Implementation of domestic laws	274
9.2.4.	Limitations	275
9.2.5.	Reservations	276
9.3.	The OECD Model Agreement on Exchange of Information in Tax Matters	277
9.4.	International exchange of information in Switzerland	278
9.4.2.	Specific examples	280
9.4.2.1.	The United States–Switzerland tax treaty	280
9.4.2.2.	The France–Switzerland tax treaty	283
9.4.2.3.	The Germany–Switzerland tax treaty	284
9.4.3.	Procedure	285
9.5.	International judicial assistance in tax matters	286
9.5.1.	General principles	286
9.5.2.	Procedure	287
9.6.	International assistance in the recovery of tax claims	287
9.7.	Bibliography	287
Chapter 10:	Swiss-EU Bilateral Agreements	291
10.1.	The agreement on the free movement of persons	291
10.2.	The agreement against fraud	293
10.3	The Schengen Agreement	294
10.4	The Savings Agreement	295
10.4.1.	Introduction	296
10.4.2.	The retention on interest	298
10.4.2.1.	Introduction	298
10.4.2.2.	Conditions	298
10.4.2.2.1.	Interest	299
10.4.2.2.2.	Paying agent	301
10.4.2.2.3.	Interest paid to a resident of an EU Member State	302
10.4.2.2.4.	The individual is the beneficial owner	302
10.4.2.3.	Basis of retention	304
10.4.2.4.	Elimination of double taxation and revenue sharing	304
10.4.3.	Exchange of information	305
10.4.3.1.	Introduction	305
10.4.3.2.	Tax fraud and the like	306
10.4.4.	Extension of rules comparable to the EC Parent-Subsidiary Directive	307
10.4.4.1.	Introduction	307

10.4.4.2.	Legal basis and administrative regulations	308
10.4.4.3.	Scope	310
10.4.4.3.1.	Territoriality and the EU accession states	310
10.4.4.3.2.	“Tax at source” defined	311
10.4.4.3.3.	Developments regarding the Parent-Subsidiary Directive	311
10.4.4.4.	Jurisdiction	312
10.4.4.5.	Interpretation	312
10.4.4.6.	Qualifying dividends	314
10.4.4.6.1.	Dividends defined	314
10.4.4.6.2.	Legal form	314
10.4.4.6.3.	Fiscal residence	315
10.4.4.6.4.	Direct shareholding	315
10.4.4.6.5.	Subject to tax	315
10.4.4.6.6.	Participation threshold	318
10.4.4.6.7.	Minimum holding period	319
10.4.4.6.8.	Anti-abuse regulations	320
10.4.4.6.9.	Treaty provisions	322
10.4.4.7.	Procedures	323
10.4.4.7.1.	Net remittance procedures	323
10.4.4.7.2.	Minimum holding period procedures	323
10.4.5.	Extension of rules comparable to the EC Interest and Royalties Directive	324
10.5.	Bibliography	325

Appendices

Swiss Tax Treaties

Appendix I.	International tax treaties signed by Switzerland	331
Appendix II.	Treaty relief from Swiss withholding tax	341
Appendix III.	Treaty relief from foreign tax at source	349

OECD Model treaty

Appendix IV.	Summary of the rights to tax under the OECD Model Treaty	355
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Tax credit mechanism

Appendix V.	Tax credit ordinance of 22 August 1967, modified on 9 March 2001 (TCO)	357
Appendix VI.	First ordinance of application, dated 6 December 1967, modified on 23 March 2001 (TCO 1)	369

Appendix VII. Second ordinance of application, dated 12 February 1973 (TCO 2)	383
Appendix VIII. Notice concerning tax credits of (DA-M)	384
Appendix IX. Federal decree on measures against the improper use of tax treaties (The 1962 Abuse Decree)	388
Appendix X. Federal circular of explanation, dated 31 December 1962 (The 1962 Abuse Circular)	394
Appendix XI. Federal circular of explanation, dated 17 December 1998 (The 1999 Abuse Circular)	412
Appendix XII. Annexe à la circulaire 2010	416
 Swiss-EU Agreements	
Appendix XIII. Swiss withholding tax relief under Swiss-EU agreement	417
 Abbreviations	419
Translations of Frequently Used Terms	421
General Bibliography	427

International Allocation of Taxable Income

3.1. Business profits

3.1.1. Principles of taxation

International businesses are companies, partnerships or individuals which operate in more than one state. The principles of taxation for the international treaty allocation of taxable business profits are covered by Arts. 7(1) and 8 of the OECD Model Treaty.

3.1.1.1. General principle

Under the general principles, an enterprise of one contracting state is not taxable in the other state until it is considered to have set up a permanent establishment in the other state. Once it has been determined that there exists a permanent establishment in the other state, the other state may only subject the international enterprise to taxation on profits which are attributable to the permanent establishment. Therefore, the right to tax does not extend to profits that the enterprise may derive from that state otherwise than through the permanent establishment.

Most Swiss tax treaties have adopted a similar provision. Some Swiss treaties further allow the contracting state of a permanent establishment to levy a branch profit tax on the profit generated by such enterprise (in particular, *Australia*, *Canada* and the *United States*). Swiss domestic law allows for Swiss resident businesses to obtain relief on income which is attributable to a foreign enterprise or permanent establishment (Arts. 6(1), and 52(1) DTL). In addition, non-resident businesses are exempt from Swiss taxation unless their income is attributable to a Swiss enterprise or permanent establishment (Arts. 4(1) and 51(1) DTL).

Simple in appearance, this general principle raises two questions. First, it is necessary to define permanent establishments (see 3.1.2.). Second, where a permanent establishment exists, the rules of allocation of profits to the permanent establishment must be clarified (see 3.1.3.).

3.1.1.2. Shipping, inland waterways transport and air transport

Business profits in the field of shipping, inland waterways transport and air transport have special rules governing the place of taxation. These are laid down in Art. 8 of the OECD Model Treaty.

This article allows for the taxation of profits from shipping and air transport in international traffic as well as from transport on rivers, canals and lakes in the state in which the effective management of the enterprise is situated (Paras. 1 and 2). This is the case regardless of the fact that such profits may be attributed to various different beneficiaries on the basis of a pooling arrangement or other contract of a similar nature (Para. 4). Enterprises which are not exclusively engaged in this type of activity may take advantage of these rules of allocation with regard to profits arising to them from the operation of ships, boats or aircraft belonging to them (Art. 8, Para. 18 OECD Commentary). If the place of effective management of the enterprise is aboard a ship or a boat, tax will only be charged by the state where the harbour of the ship or boat is situated or, if there is no such home harbour, in the contracting state of which the operator of the ship or boat is a resident (Para. 3).

Most Swiss treaties, following the OECD Model, attribute the right to tax to the state in which the effective management of the enterprise is situated. There are some exceptions, however. In particular the tax treaties with Australia, Canada, Korea (Rep.), Finland, Japan, Malaysia, Portugal, Singapore and the United States grant the right to tax shipping, waterways transport and air transport in international traffic to the state of residence of the enterprise.¹⁵⁶ In addition, Switzerland has concluded separate bilateral reciprocal declarations in this area with many states.

3.1.2. Permanent establishment defined

3.1.2.1. Legal basis

Due to the importance of permanent establishments for international enterprises, it is necessary to formulate a precise definition of what a permanent establishment is and is not. Indeed, it is now widely recognized that a permanent establishment is the minimal threshold which allows a state to tax a foreign enterprise conducting business activities within the territory of

¹⁵⁶ Oberson (2009), p. 108; Locher (2005), p. 360.

that state. The definition of permanent establishments in Swiss tax treaties largely follows the rules of Art. 5 of the OECD Model Treaty, which reads as follows:

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term “permanent establishment” includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop, and
 - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
 - e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 6 applies – is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this

fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

It follows from this definition that an enterprise which is a resident of one contracting state is considered to have a permanent establishment in the other contracting state either because it has a fixed place of business through which it operates in the other state (see 3.1.2.2.) or because there is a person acting for it in the other state (see 3.1.2.3.). There are special rules with regard to subsidiaries (see 3.1.2.4.).

3.1.2.2. Fixed place of business

3.1.2.2.1. *Treaty definition*

A *place* of business may be a facility, such as premises or, in certain instances, machinery or equipment. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise.

This place of business must be *fixed*, i.e. it must be established at a distinct place with a certain degree of permanence (Art. 5, Para. 2 OECD Commentary). However, if the place of business is not set up merely for a temporary purpose, it can constitute a permanent establishment, even though it exists, in reality, only for a very short period of time because of the special nature of the activity of the enterprise or because, as a consequence of special circumstances (e.g. death of the taxpayer, investment failure), it was prematurely liquidated (Art. 5, Para. 6.3 OECD Commentary). Para. 3 helps to determine whether a building site or construction or installation project is considered as being “fixed”, by characterizing such activities as permanent establishments only if they last more than 12 months.

The enterprise must carry on its *business* through the fixed place of business. This means usually that “persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated” (Art. 5, Para. 2 OECD Commentary). Treaty dispositions prevent activities of a purely preparatory or auxiliary character from being considered permanent establishments. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case must be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity (Art. 5, Para. 24 OECD Commentary).

With regard to activities of a preparatory or auxiliary nature, on 17 September 1976¹⁵⁷ the Swiss Supreme Court had the occasion to confirm the application of Art. 5(3)(e) of the Spain–Switzerland tax treaty. A Spanish bank had set up a representation office in Geneva. Its mission was to explain to banks and Swiss businesses the services that the Spanish bank can render, to establish contacts with Swiss businessmen in view of Spanish business, and to provide the Spanish head office with information concerning the Swiss economy. The representation office had not negotiated or signed any contracts on behalf of the Spanish bank. The question had been raised as to whether the Geneva operations constituted a permanent establishment. The Swiss Supreme Court concluded that the mere fact of having an office in Switzerland was not sufficient to constitute a permanent establishment. It was moreover necessary to analyse the activity in Switzerland. Based on the above-mentioned facts, the Swiss Supreme Court judged that the bank did not conduct any of its banking business through the Swiss office and that the activities of the Swiss office could only be characterized as being of a preparatory or auxiliary nature. It was therefore not considered a permanent establishment.

3.1.2.2.2. *Swiss domestic law*

Under Swiss domestic law, at the *federal* level, Arts. 4(2) and 51(2) of the DTL define permanent establishments as being fixed places of business which are wholly or partially engaged in the business activities of an enter-

157. Supreme Court judgement of 17 September 1976, ATF 102 Ib 264, Archives 45,602.

prise or an independent profession. They include, in particular, branches, manufacturing plants, workshops, sales offices, permanent agencies, mines and other plants for the extraction of mineral resources and building or installation projects with a duration of at least 12 months. As per leading opinion, this definition does not necessarily exclude activities that are preparatory or auxiliary.¹⁵⁸

At the *cantonal* level, the concept of permanent establishment, even if it is not defined in the THL, should correspond to the usually applied definition at the intercantonal and international levels.¹⁵⁹ In a long-standing series of cases, the Supreme Court has defined permanent establishment for the intercantonal allocation of profits as a fixed place of business with which an enterprise engages in an essential qualitative and quantitative part of its technical or commercial activity.¹⁶⁰ Under Swiss practice, a piece of equipment could be regarded as a *place of business*. The presence of human personnel is in particular not a requirement for the definition of a place of business. For instance, even though this case was rendered in an intercantonal situation, the Supreme Court judged in a 1903 case that vending machines (*Automaten*), which distributed goods against payment at the place of location, must be characterized as permanent establishments of an enterprise whose registered office was in another canton.¹⁶¹

Swiss legislation governing VAT requires taxable persons without domicile or place of business within Swiss territory to appoint a representative for the fulfilment of their obligations (Art. 17, 67 NVATL). However, this does not give rise to a permanent establishment with regard to direct taxation (Art. 67(3) NVATL).

3.1.2.3. Representatives

Although an enterprise in one contracting state may not have a fixed place of business in the other contracting state through which the business of an enterprise is wholly or partly carried on, there may nevertheless be a permanent establishment in the other state if a person habitually acts on behalf of the enterprise and concludes contracts in the name of the enterprise.

158. Oberson (2009), p. 123.

159. See Message of the Federal Council pertaining to the DTL and THL, 25 May 1983, FF 1983 III, p. 87.

160. See Supreme Court judgement of 2 November 1984, *L.A.G.*, ATF 110 Ia 190, 193.

161. Supreme Court judgement of 25 March 1906, ATF 29 I 8.

This is confirmed by Art. 5(5) of the OECD Model Treaty. Persons concerned by this provision are so-called dependent agents (Art. 5, Para. 32 OECD Commentary). They may be either individuals or companies.

There is no permanent establishment if the representative is an independent broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business (Art. 5(6) OECD Model Treaty). In addition, activities undertaken by a dependent agent of a purely preparatory or auxiliary character (as defined by Para. 4) shall not constitute a permanent establishment.

Under Swiss domestic law, however, a dependent permanent agent may be characterized as a permanent establishment only to the extent that it exercises its activity in a fixed place of business.¹⁶²

3.1.2.4. Subsidiaries

It is mentioned in Art. 5(7) of the OECD Model Treaty that the existence of a subsidiary company does not, of itself, constitute a permanent establishment.

A subsidiary is an independent legal entity and does not usually constitute a permanent establishment. However, the OECD Committee on Fiscal Affairs specifically mentions that a subsidiary company will constitute a permanent establishment for its parent company under the same conditions stipulated in Para. 5 as are valid for any other unrelated company, i.e. if it cannot be regarded as an independent agent in the meaning of Para. 6, and if it has and habitually exercises an authority to conclude contracts in the name of the parent company (Art. 5, Para. 41 OECD Commentary).

3.1.2.5. The impact of e-commerce

A very important question, which has caused a lot of discussion and controversy, is to what extent a “web site” or an Internet server could constitute a permanent establishment.¹⁶³ The OECD has somewhat clarified this

162. Oberson (2009), p. 126; Athanas/Widmer in: *Kommentar DBG*, Art. 51 N 29.

163. Literature on the subject is extremely broad. See among many others, Doernberg/Hinneken (1998); Hinneken (1999), p. 3; Skaar, A., “Erosion of the Concept of Permanent Establishment: Electronic Commerce”, *Intertax* (2000), p. 188.

issue.¹⁶⁴ As a general rule, Switzerland follows the OECD recommendations in this field.

As we have seen above, a permanent establishment requires premises or, at least, machinery or equipment located in Switzerland. The simple fact that customers access an *Internet web site* cannot be deemed to be a fixed place of business. As such, a web site is not tangible property, but a combination of electronic data¹⁶⁵ and cannot constitute a place of business.

The situation is more difficult in the case where a foreign enterprise uses *servers* located within Switzerland. A *server* could be treated as a place of business, since under Swiss practice, the presence of human personnel is not a requirement in the definition of place of business. It is not relevant whether this equipment is owned or rented (wholly or partly) by the foreign resident company, provided it is at the disposal of the company. Nevertheless, only in rare situations can a server be qualified as a permanent establishment. First, in order to be treated as a *fixed* place of business, the server should effectively remain in the same place for a certain period of time. Second, and more importantly, assuming that a server is considered to be fixed, the functions fulfilled by the equipment located in Switzerland must fulfil all or part of the *core business* of the enterprise. As a consequence, in most cases this condition can disqualify the server from being a permanent establishment because its functions are limited to the transfer of data. Third, the treaty definition of permanent establishment would disqualify all servers whose scope is limited to services which are considered to be *preparatory and ancillary*. We therefore tend to believe that a server can only exist as a permanent establishment when the equipment fulfils all the main elements of a contract (conclusion, payment, and delivery of digitized goods).¹⁶⁶

Finally, in most cases, the presence of the Internet service provider (ISP) in Switzerland will not be regarded as an agent of the foreign enterprise. Indeed, among other considerations, the ISP will have no authority to conclude contracts on behalf of the foreign enterprise operating the web site.

164. OECD Commentary on Art. 5.

165. See OECD, revised draft of 3 March 2000, of a proposed clarification of the Commentary on Art. 5 of the OECD Model.

166. Oberson (2009), p. 122; OECD Commentary.

3.1.3. Allocation of profits

3.1.3.1. Principles of international treaty law

3.1.3.1.1. *In general*

Once it has been ascertained that a business has a permanent establishment in another jurisdiction, it is necessary to determine the amount of taxable income which is to be allocated to that permanent establishment. The main methods used for the allocation of profits are the direct and the indirect methods. The third method, called the force-of-attraction principle, is nowadays clearly rejected (C(7), Para. 12 OECD Commentary).

Under the *direct method*, profits which are to be attributed to each permanent establishment are those which it would have made if the permanent establishment had been a separate, unrelated and distinct enterprise engaged in the same or similar activities under the same or similar circumstances. Income is therefore determined on the basis of separate accounts pertaining to the permanent establishment.

Under the *indirect method*, the income of the permanent establishment is calculated as a fraction of the total profits earned by the enterprise. The permanent establishment's participation in the total income is quantified by applying coefficients based on a comparison of assets, turnover, number of hours worked or other appropriate factors.

The fundamental difference between the direct and indirect methods is that, under the direct method, a permanent establishment is treated as an independent entity. As a consequence, in a loss situation it does not participate in the allocation of the total net income. Under the indirect method, on the other hand, a permanent establishment running at a loss may very well participate in the total net income. This is due to the fact that the permanent establishment is treated as a part of the enterprise as a whole and that the latter may not be taxed more than on its global profits.

In order to ensure a more consistent interpretation and application of the rules governing the allocation of profits between head offices and permanent establishments, the OECD Committee on Fiscal Affairs issued a report in 2008 titled "Attribution of Profits to Permanent Establishments".¹⁶⁷ The report deals with the attribution of profits both to permanent establishments

167. Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.

in general (Part I of the Report) and, in particular, to permanent establishments of businesses operating in the financial sector, where trading through a permanent establishment is widespread (Part II of the Report deals with permanent establishments of banks; Part III deals with permanent establishments of global trading; and Part IV deals with permanent establishments of enterprises carrying on insurance activities)(C(7), Para. 9 OECD Commentary).

The OECD Model Treaty of 22 July 2010 reflects the approach developed in the 2008 report. The allocation of profits between head offices and permanent establishments is now covered by Art. 7, Paras. 2 to 4 of the OECD Model Treaty as follows:

2. For the purposes of this Article and Article (23A)(23B), the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.
3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other.
4. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Para. 2 attributes the profits to a permanent establishment that it might be expected to make if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed. There is therefore a fiction that the permanent establishment is a separate enterprise acting independently from the rest of the enterprise of which it is a part – which corresponds to the arm's length principle, which is also applicable, under the provisions of Art. 9, for the purpose of adjusting the profits of associated enterprises (C(7), Para. 16 OECD Commentary).

This very clearly advocated the application of the direct method of allocation. As a consequence, if the enterprise as a whole is in a loss situation, profits may nevertheless be allocated to the permanent establishment, as it does not participate in the allocation of total net losses. Conversely, if the enterprise as a whole is profitable, there may be no profits allocated to the permanent establishment that is in a loss situation.

Prior to 2010, the OECD Model Treaty read as follows:

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.
3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.
4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.
5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

The pre-2010 OECD Model Treaty therefore included wording about the indirect method of allocation, stating that it is not forbidden, but that it is applicable only if it is “customary” in a contracting state. Thus, countries which did not habitually attribute profits on the basis of separate accounts, but by apportioning the total profits of the enterprise by reference to various formulae (indirect method), may do so. The OECD Committee on Fiscal Affairs nevertheless had previously mentioned that this method should be used only where, exceptionally, it has as a matter of history been customary

in the past and is accepted in the country concerned by both the tax authorities and taxpayers generally there as being satisfactory (C(7)-12, Para. 25 OECD Commentary before 22 July 2010). In the 2010 version, the Committee has wholly deleted any reference to the indirect method because “its application had become very exceptional and because of concerns that it was extremely difficult to ensure that the result of its application would be in accordance with the arm’s length principle” (C(7), Para. 41 OECD Commentary).

The 2008 Report provides a detailed guide as to how the profits attributable to a permanent establishment should be determined using a two-step approach. The first step is to undertake a functional and factual analysis. The second step is to price any transactions with associated enterprises attributed to the permanent establishment by means of the OECD Transfer Pricing Guidelines (see Chapter 6).

Under a principle commonly known as the “*force of attraction*” of permanent establishments, states in which there is a permanent establishment levy taxes on all income sourced in that state. In other words, the permanent establishment “attracts” all income sourced in the state in which there is a permanent establishment. This principle is not accepted by the OECD Model Treaty or Swiss treaty policy. Indeed, business profits are only taxable in a state if they are effectively connected to that permanent establishment. This is confirmed by the special provisions in the OECD Model Treaty covering dividends (Art. 10(4)), interest (Art. 11(4)) and royalties (Art. 12(3)), whereby such income which is paid by a person in one contracting state to a resident of the other contracting state, shall be subject to the articles concerning dividends, interest and royalties, respectively, unless it is “effectively connected” to a permanent establishment or fixed base in the state of which the paying entity is a resident.

Therefore, on the one hand, if not effectively connected to a permanent establishment or fixed base in the state of which the paying entity is a resident, such income shall be considered dividends, interest or royalties for the application of the tax treaty. On the other hand, if effectively connected to a permanent establishment or fixed base in the state of which the paying entity is a resident, such income shall be considered business profits or independent personal services for the application of the tax treaty.

While the OECD Guidelines ensure a more consistent interpretation and application of the rules of allocation of profits to permanent establishments, it is the domestic law of each contracting state that determines how

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