tax notes international
Volume 66, Number 5 ■ April 30, 2012

News Analysis: Thoughts on the New Austria-Switzerland Tax Agreement

by Stefanie Steiner and Christian Wimpissinger

Reprinted from *Tax Notes Int'l*, April 30, 2012, p. 412

COUNTRY DIGEST

News Analysis: Thoughts on the New Austria-Switzerland Tax Agreement

The finance ministers of Austria and Switzerland signed a tax agreement between the two countries on April 13. It should enter into force on January 1, 2013, and will be accounted for in the Austrian austerity package from 2012 until 2016. The Austrian federal government estimates there is up to €20 billion of untaxed Austrian funds in Swiss bank accounts, and it hopes to raise about €1 billion by way of the tax agreement. It is expected that much of the money will come in the middle of 2013.[1] Because self-declarations might lead to less tax revenue, it is uncertain how much additional revenue could be raised under the agreement.[2]

The agreement is similar to those negotiated and signed by Switzerland and Germany and Switzerland and the U.K. It consists of two parts:

- A lump sum tax between 15 and 30 percent (in some cases 38 percent) on tax-sheltered income from the past, the funds of which are assumed to be held in Swiss bank accounts; this is expected to raise about €1 billion.
- A withholding tax on future interest or other earnings at a rate of 25 percent generated by the funds deposited in Switzerland; this is expected to raise about €50 million per year.[3]

The tax rate on the income from the past is lower than that in the Germany-Switzerland agreement, which is 41 percent. This is because in Germany, the trade, heritage, and estate tax is also incorporated.[4]

The tax rate will be determined by how the funds were built up: Funds that were completely untaxed will be taxed higher, and funds that were partially taxed will be taxed lower. This rationale assumes that only the capital income was not yet taxed when the funds increased. It also assumes that people avoided paying tax on the underlying funds themselves if they increased substantially.[5] If the funds are extraordinarily high, the rate could be set at 38 percent.

In general, private foundations, partnerships, and limited liability corporations are not affected — only natural persons with their residence in Austria are affected. Money that results from a criminal offense (such as money laundering) is not covered, nor are funds related to a fiscal fraud that was discovered before April 13, 2010. If funds are transferred from Switzerland to another country before January 1, 2013, they would be within the scope of the agreement.

Funds that fall within the scope of the tax agreement have two possibilities:

- The anonymous application of the withholding tax or a voluntary self-declaration as provided for under general Austrian tax law. If the anonymous withholding option is chosen, the Swiss bank calculates the amount of withholding and transfers it to the Austrian authorities.
- Alternatively, self-declaration could be chosen, which would make sense if the withholding would amount to more than the regular taxation or if evidence is at hand that the funds in Switzerland stem from taxed income.

Unlike Switzerland's agreements with Germany and the U.K., the Austrian agreement does not include any advance payments to be made by the Swiss bank. This was welcomed by the Swiss bank community but criticized in Austria. Under the German agreement, an advance payment of about CHF 2 billion (€1.52 billion) applies; under the U.K. agreement, an advance payment of about CHF 500 million applies. The Swiss association of banks hopes that the Austrian agreement will pave the way for similar agreements with other European states.

---

[1] *Der Standard*, ''Österreichs Steuersünder kommen billiger davon,'' Apr. 12, 2012.

[2] *Id.*

[3] ''Schweiz und Deutschland ergänzen Steuerabkommen,'' Press Release, *BMF Germany*, Apr. 5, 2012; *Der Standard*, ''Fekter sieht 'bessere Steuerwelt,''' Apr. 13, 2012.

[4] *Der Standard*, ''Österreichs Steuersünder kommen billiger davon,'' Apr. 12, 2012.

[5] *Der Standard*, ''Fekter sieht 'bessere Steuerwelt,''' Apr. 13, 2012.

According to Swiss Minister of Finance Eveline Widmer-Schlumpf, the agreement strengthens the relationship between Switzerland and Austria and it is a good way to stay anonymous and to let the past be the past. Reinhold Mitterlehner, the Austrian minister of economy and a member of the Austrian People's Party, and Jan Krainer, finance speaker of the Social Democratic Party of Austria, contend that the agreement will have positive budgetary effects and that it is an important step to greater tax equity.[6] However, the opposition parties believe that the agreement supports money laundering.[7] Some fear that the agreement will impede common EU activities. However, Austrian Finance Minister Maria Fekter dismissed those fears, arguing that European solutions would be hard to achieve, since the European Union would get a mandate from Austria for an agreement only if jurisdictions such as Luxembourg, San Marino, and Andorra also assure the exchange of information.[8]

Tax law professor Werner Doralt argued that with this agreement the problems are not permanently solved; an agreement concluded by the European Union would have been the way to go. Also, because of the possibility of staying anonymous, Austria gives up the demand of automatic exchange of information in relation to other countries.[9] Professor Heinz Mayer, an expert on constitutional questions, said that the tax agreement is likely to violate the Austrian Constitution because it is incompatible with the principle of equality, as persons who broke the law are treated better than others. But professor Theo Öhlinger, also an expert on constitutional questions, disagreed, saying that the agreement is not a simple statute; rather, it is an international agreement that must be evaluated differently from purely domestic law. He said that a reason for justification could be that without the help from the other state, Austria could generally not reach out to the persons concerned. The consequence would be that no tax is imposed at all.[10]

The compliance of the tax agreement with EU law is another issue. The European Commission will look into the compliance with EU law, since doubt arose in the context of the U.K. and German agreements.[11] Regarding VAT law, the question arose whether the tax amnesty violates EU law, because under the respective EU directive, it is not possible to grant an amnesty. The Austrian Finance Ministry has argued that the agreement does not provide for an amnesty.[12]

It was surprising how quickly the tax agreement was concluded between Austria and Switzerland. Days before the signing, experts from both countries said it would take months, if not a year, to finalize the agreement. A closer analysis of the situation provides the reason for the speed but leaves another question: Why give up a guaranteed payment that Germany and the U.K. have already negotiated? And there is more uncertainty. Does the agreement violate the Austrian constitution or EU law, and can it be enforced? For those affected by the agreement, these uncertainties should give them pause. ◆

♦ *Stefanie Steiner and Christian Wimpissinger, Binder Grösswang, Vienna*

[6] *Der Standard*, ''Opposition poltert weiter gegen Steuerdeal,'' Apr. 13, 2012.

[7] *Id.*

[8] *Der Standard*, ''Fekter sieht 'bessere Steuerwelt,''' Apr. 13, 2012.

[9] *Der Standard*, ''Doralt: Schweiz-Deal ist 'Schnellschuss,''' Apr. 14, 2012.

[10] *Der Standard*, ''Verfassungsexperten streiten über Steuerdeal,'' Apr. 18, 2012.

[11] *Id.*

[12] *Salzburger Nachrichten*, ''EU-Kommission prüft Steuer-Deal Austria-Switzerland,'' Apr. 18, 2012.