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Finance Act notes: section 218 and Schedule 36: the UK-Switzerland Rubik Agreement

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Finance Act 2012 (c.14) s.218, Sch.36

Section 218 of and Schedule 36 to the Finance Act 2012 (FA 2012) give effect to the Agreement between the UK and Switzerland on co-operation in the area of taxation (generally referred to as one of the "Rubik" Agreements—perhaps because of the different permutations of disclosure and non-disclosure, or because of the complexity of the formula to calculate the initial lump sum payable). This Agreement was signed on October 6, 2011, shortly following a similar agreement between Germany and Switzerland on September 21, 2011. There was some concern expressed as to whether these agreements were consistent with EU law, particularly the European Union Savings Directive,[1] and so a protocol was signed on March 20, 2012, followed by a mutual agreement on April 18, 2012, which seek to bring the original agreement into conformity with European law.

Section 218 of and Schedule 36 to FA 2012 are necessary because the usual provisions for giving effect to double taxation conventions[2] and tax co-operation arrangements[3] do not provide for giving effect to an agreement such as the Rubik Agreement. In effect, the Agreement provides for an amnesty for those who have evaded tax and have funds in an undisclosed Swiss bank account on December 31, 2010, plus the option of maintaining anonymity for the owner of that account going forward.

Section 218(3) FA 2012 provides that the UK-Switzerland agreement does not need to be laid before Parliament before ratification since it will have been scrutinised as part of the Finance Bill process.

Future generations reading this note may wonder why the UK Government concluded the Rubik Agreement with Switzerland. There is not sufficient space in this Note to go into the detail of the Agreement or its background. Suffice to say that Germany was negotiating a similar agreement with Switzerland in order to ensure the effective taxation of undisclosed bank accounts held by German residents in Switzerland, and the UK effectively decided to follow suit (and subsequently other countries in Europe have done so too).

In the Finance Bill Committee Debate the Exchequer Secretary confirmed an estimate that the UK Government would receive an initial amount of between £4 billion and £7 billion as a result of the Agreement, and small amounts would be received subsequently in respect of the withholding tax.[4] Others are far more sceptical whether anything like these figures will be received by the UK Government. The Swiss have agreed to pay an initial amount of £350 million[5] in February 2013 as an advance payment against future sums due under the Agreement. There are those sceptics who doubt whether the UK Government will ever receive any more than this initial payment.

Why was the UK Government prepared to abandon its principles and effectively accept that those who have previously been evading tax will be able to escape liability on payment of a lump sum, and that those benefiting from the Agreement could continue to sign false tax returns going forward, secure in the knowledge that the Agreement allowed them to continue not disclosing anonymous bank accounts? The reasons are complex but a partial explanation may be that budgetary deficits can lead governments to do strange things.

Schedule 36 to FA 2012 contains the main operative provisions. It has three principal parts.

Part 2 of Schedule 36 to FA 2012 deals with "the past" and provides for clearance to be given to amounts sitting in a Swiss bank account which is eligible for clearance on the basis of a lump sum payment made by the Swiss paying agent. In effect, under the UK-Swiss Agreement, a UK resident who has an undisclosed bank account in Switzerland has two choices: either he can authorise the Swiss bank to disclose his details to HMRC, or he can instruct the bank to make a lump sum payment on his behalf. The amount of the lump sum payment is calculated in accordance with a mind-bogglingly complex formula originally attached to the Agreement with Switzerland, but subsequently amended by the mutual agreement of April 18, 2012. The simplest way of understanding this is that the lump sum will be a percentage of the value in the account varying between 21 per cent and 41 per cent, depending on various factors including the size of the account and how long the money has remained in the account.[6] Assuming that the account is eligible for clearance, then the payment of this lump sum removes liability to income tax, capital gains tax, inheritance tax and VAT on the funds in the account. Paragraph 5 of Schedule 36 to FA 2012 explains which sums are eligible for clearance; paragraph 6 explains the effect of being eligible for clearance and a lump sum being paid; and paragraph 7, helpfully, explains what is meant by "ceasing to be liable" to tax. There are also provisions dealing with the circumstance where a lump sum is paid but, in the final analysis, the account is not eligible for clearance: the lump sum is treated as a credit against the tax normally due in those circumstances.

Thus, by permitting the lump sum to be paid, the beneficial owner of the undisclosed Swiss bank account clears his liability to the four taxes for all the years covered by the agreement to the end of December 2012. One supposes that there may be people who will now work out how much better off they would be had they not properly paid these four taxes each year for, say, the last 20 years and instead secreted the money away in a bank account in Switzerland, and now had the option of simply paying a lump sum between 21 per cent and 41 per cent!

Part 2 of the Schedule deals with "the future" so far as income tax and capital gains tax are concerned. Again, the beneficial owner of the Swiss account has two options: he can authorise the bank to disclose his details to HMRC, or he will suffer a withholding tax on income and gains arising in the account. The rate of the withholding tax is set slightly below the top rate of income tax and capital gains tax on the particular type of income concerned: the thinking is that this tax will be withheld and paid over at a slightly earlier date than the tax would otherwise be payable if it were declared and paid by its beneficial owner. Because of the slightly earlier payment, the tax rate is slightly lower (for example, 43 per cent on interest, as opposed to 45 per cent in the 2013–14 tax year). Again, the Schedule contains provisions to give effect to certificates issued by the Swiss paying agent to prove that tax has been withheld on the income or capital gains.

Finally, Part 4 deals with "the future" so far as it concerns inheritance tax. If a Swiss bank learns that the beneficial owner of a bank account has died, the bank is required to freeze and (if the account is not otherwise disclosed by the personal representatives) pay over 40 per cent of the value of the account to the UK Government. This is regarded as a rather important aspect of the operation of the Agreement so far as HMRC are concerned: assuming an initial lump sum of up to 41 per cent is paid on an account, and there is a potential liability to 40 per cent when the accountholder dies, then it is thought that these two charges together constitute a major incentive to declare the account. Of course, that always assumes that the account is in the name of an individual and not a discretionary trust, for example, which is not covered by the Rubik Agreement.

In effect, Schedule 36 to FA 2012 shows us what legislation to give effect to a tax amnesty looks like. An interesting issue that goes beyond the scope of a Finance Act Note is to see whether in a few years' time HMRC will disclose how much money has actually been received from Switzerland under the Rubik Agreement, and whether and if so how far that falls short of the estimate given to Parliament.

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1.Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.
2.TIOPA 2010 s.2.
3.FA 2006 s.173.
4.See *Hansard, Public Bill Committee, Finance (No.4) Bill, Eighteenth Sitting, col 638 (June 26, 2012)*.
5.The Swiss have agreed to pay four times as much to the German Government—something the Parliamentary scrutiny committee seems to have missed.
6.These minimum and maximum percentages were adjusted as a result of the mutual agreement—see *Hansard, above fn.4, col 640*.