

Multi-sided marketplace platforms in Swiss international taxation

Marcel R Jung of MLL Meyerlustenberger Lachenal Frieriep considers the impact and implications of international taxation on digital platforms in Switzerland.

In 1999, *Doernberg / Hinnekens* published a report on the implications of the growth of electronic commerce for domestic and international taxation. The report explored the concern that existing taxation rules may not be equipped to deal with the challenges posed by electronic commerce. Twenty years later, digital platforms have become one of the most distinct tax challenges arising from digital business models. Multi-sided marketplace platforms that benefit from indirect network effects play a key role in the strong growth cross-border online sales of digital and non-digital goods.

The OECD Interim Report 2018 on ‘Tax Challenges Arising from Digitalisation’ listed multi-sided platforms and resellers as new business models. Multi-sided platforms allow end-users to exchange and transact while leaving control rights and liabilities towards customers mostly with the supplier rather than the platform. A particular type are multi-sided marketplace platforms for goods and services (e.g. Uber, Airbnb, Hotels.com, Bookings.com, eBay, Amazon Marketplace).

The user groups of multi-sided marketplace platforms, suppliers and customers, deal directly with each other. The provider of the marketplace platform generate revenue through commission fees charged to the supplier, subscription fees, listing and advertising fees. Multi-sided marketplace platforms may involve business-to-business (B2B) transactions, business-to-consumer (B2C) transactions, digital products (e.g. software, e-books, videos, music), physical products (e.g. books, golf clubs, shoes), electronic services (video-based courses, etc.) and services delivered offline.

Resellers do not use a multi-sided platform. Resellers are businesses that acquire products, including control rights, from suppliers and resell them to customers. Resellers control prices and assume liability towards customers. They do not allow for the interaction of the two groups of end-users and they do not necessarily require customers to affiliate to the online platform (e.g. Amazon e-commerce, Alibaba, JD.com, Spotify, Tencent’s music distribution, Netflix). A number of the larger digitalised companies started with a single line of business that was a multi-sided platform and developed hybrid structures with additional business lines such as reselling.

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Triangular situation: Base cases

In a particular case, the multi-sided marketplace platform is a triangular situation: A supplier, a customer, and a platform provider. The Swiss customer purchases services and goods from the foreign supplier through the platform that is provided by the foreign platform provider.

Taxation of multi-sided marketplace platforms is fascinating. It raises questions under Swiss domestic income tax, Swiss double tax treaty and Swiss value added tax law. The key question is: Who pays Swiss taxes? To answer the key question, four base cases may be distinguished:

- Base case I: The foreign supplier sells *electronic services* (e.g. software, e-books, videos, music) to a Swiss customer. The foreign platform provider either acts as a broker (*Mäkler*) not on behalf of the foreign supplier (no representation) or acts as a representative with proxy in the name and for the account of the foreign supplier (direct representation).
- Base case II: The foreign supplier sells *electronic services* to a Swiss customer. The foreign platform provider acts as commissioner (*Kommissionär*) in its own name, but for the account of the foreign supplier (indirect representation).
- Base case III: The foreign supplier sells *physical goods* (e.g. books, golf clubs, shoes) to a Swiss customer. The foreign platform provider either acts as a broker not on behalf of the foreign supplier or acts as a representative with proxy in the name and for the account of the foreign supplier.
- Base case IV: The foreign supplier sells *physical goods* to a Swiss customer. The foreign platform provider acts as commissioner in its own name, but for the account of the foreign supplier.

The foreign provider of the marketplace platform generates revenue in particular through commission fees charged to the foreign supplier.

The civil law concept of representation (*Stellvertretung*) plays an important role in Swiss VAT. To understand this concept in Swiss VAT, one has to go back to the Roman public auction room.

The Roman multi-sided marketplace platform

In Roman times, the platform was a public auction room. At that time, the public auctioneer was not able to act as a representative with proxy in the name of the seller as only indirect representation was known. The public auctioneer acted as a commissioner in its own name, but for the account of the supplier.

The sale of goods was subject to Roman VAT that was called *centesima* (*centesima rerum venalium* that means the hundredth of the value of everything sold). After 7 AD, the *centesima* was introduced by Emperor Augustus and was presumably the very first VAT worldwide.

The public auctioneer provided a supply. The tax base was the purchase price. The taxable event was a sale against consideration through public auctions. The Roman Empire was tax jurisdiction. Taxpayer was the public auctioneer who had to pay the VAT to the *praefectus*, not in euros, but in *denarius*. The tax rate was 1%.

Swiss VAT analysis of base cases

In Case I and Case III, the foreign supplier sells *electronic services* or *physical goods* to a Swiss customer. Because the foreign platform provider does not act in its own name, it does not provide a supply. It is the foreign supplier that provides a supply. The place of supply

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of electronic services is at the domicile of the recipient. Therefore, the place of supply is in Switzerland. B2B transactions are exempted (reverse charge procedure). However, the foreign supplier becomes subject to Swiss VAT on all taxable supplies with place in Switzerland if it supplies *electronic services* to at least one private customer and generates an annual turnover of taxable supplies of at least 100,000 CHF (approximately \$108,884) worldwide.

The foreign supplier does not become subject to Swiss VAT if it supplies *non low value goods* (Swiss import VAT exceeds 5 CHF threshold). The Swiss customer is importer and, thus, subject to Swiss import VAT. However, the foreign supplier becomes subject to Swiss VAT if it generates an annual turnover of at least 100,000 CHF from the importation of *low value goods*. In this case, the place of supply of both low value goods and non low value goods is deemed to be in Switzerland. Therefore, the foreign supplier becomes subject to Swiss VAT. Furthermore, the foreign supplier is importer and, thus, subject to Swiss import VAT on the importation of non low value goods that, however, may be reclaimed as Swiss input VAT.

In Case II and Case IV, the foreign supplier sells *electronic services* or *physical goods*. It is the foreign platform provider that provides a supply because it acts in its own name. The same Swiss VAT rules apply to the foreign platform provider as outlined in Case I and Case III.

With the civil law concept of proxy, the burden of Swiss VAT compliance may be planned and shifted either to the foreign supplier or the foreign platform provider.

Proposed Swiss VAT deemed supplier rules

In 2020, a Swiss draft proposed deemed supplier rules following the OECD standards and the EC VAT e-commerce directives. The new rules are expected to enter into force not before January 1 2023.

The deemed supplier rules shall be applicable if an electronic platform brings together buyers and sellers to conclude a contractual agreement for the delivery of *goods*. There are two fictitious deliveries: A first delivery between the foreign supplier and the foreign platform provider and a second delivery between the foreign platform provider and the Swiss customer.

If the foreign platform provider acts as broker not on behalf of the foreign supplier or as a representative with proxy in the name and for the account of the foreign supplier, it is a deemed buyer and a deemed seller. If the place of the first delivery is in Switzerland, the delivery by a foreign supplier is exempted if the foreign platform provider is entered into the Register of VATaxable Persons. The draft shall be applicable to goods only, but not to services. The largest digital platforms that provide electronic services act, as a rule, in its own name and, thus, provide the services themselves.



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Marcel's professional interest focuses on the tax challenges of the digital economy, global tax transparency and cross-border exchange of information. He has further expertise on the BEPS Action Plan of the OECD and its impact on business and group taxation and private investment structures, multilateral agreements in tax matters, tax arbitration and protection of taxpayers' rights.

Marcel has a degree from the University of St Gallen and a doctorate degree from the University of Basel. He has a LLM from Queen Mary University of London, and was a research student at the International Tax programme from the Harvard Law School.

The same Swiss VAT rules shall apply to the foreign platform provider as outlined in Case II and Case IV and Case I and Case III respectively.

Swiss CIT analysis of base cases

The foreign supplier or the foreign platform provider is subject to Swiss corporate income tax (CIT) if it carries on business through a Swiss permanent establishment. A permanent establishment means a fixed place of business in Switzerland. Furthermore, the foreign supplier or the foreign platform provider is subject to Swiss CIT if it is partner of a partnership or a limited partnership in Switzerland. Again, a fixed place of business in Switzerland is required.

In international taxation, where a person is acting in a contracting state on behalf of an enterprise and habitually concludes contracts or habitually plays the principle role leading to the conclusion of contracts, and these contracts are in the name of the enterprise that enterprise shall be deemed to have a permanent establishment in that state. However, Swiss domestic tax law does not provide dependent agent charging provision.

The foreign supplier and the foreign platform provider do not have physical presence in Switzerland. Both are not subject to Swiss corporate income tax.

New nexus rules: User and customer-based tax reforms

The 1920s compromise of the League of Nations that was the outcome arising out of industrialisation is based on taxation at source principle. A company creates taxable income in a source state only if it has a physical nexus to that state (e.g. permanent establishment). Digital business models, however, derive income from business in source states without having a physical presence in that state. In recent years, different multilateral proposals have been developed and unilateral measures introduced that eliminate the requirement of a physical presence in the source state.

In 2018, the EU Commission proposed a digital service tax. It shall tax digital services to which the user makes a decisive contribution in value creation. These services include services of supplying digital platforms that facilitate interaction between sellers and buyers of goods and services (e.g. eBay, Amazon Marketplace). Transactions between sellers and buyers would, however, not be in scope.

The OECD Report 2020 on the pillar one on 'Tax Challenges Arising from Digitalisation' proposes new nexus rules based on users and customers in the market jurisdiction. It is the most far-reaching international tax reform since the 1920s compromise. The 2020s compromise includes two categories of activities in the scope: *automated digital services* (ADS) and *consumer facing businesses* (CFB).

The first type of business provides automated and standardised digital services and shall include online intermediate platforms, including the operation of online marketplaces irrespective of whether used by business or consumers. As the whole economy is digitalising so that it is difficult to ring-fence the digital economy, the scope shall be extended to consumer facing businesses. These businesses generate revenues from selling goods or services, directly or indirectly, to consumers and are more traditional business that increasingly use digital technology to interact more with their customer base.

Whether foreign multinational enterprises (MNEs) providing automated digital services or selling goods or services, directly or indirectly, to consumers will be subject to Swiss corporate income tax depends on threshold tests. On July 1 2021, the key parameters were published. These include a global revenue threshold test of €20 billion (approximately \$23.5 billion) and a special purpose nexus rule according to which a market jurisdiction qualifies for profit allocation if the MNE derives at least €1 million in revenue from that jurisdiction.

Taxation of robots and digital platforms

There are pessimistic views on the impact of robots and digital platforms. Some believe that there will be no more work. No work means no employment income. No employment income means no more tax.

To solve this problem, the idea came up to tax robots. A state may tax the user of the robots or the robots themselves. The proposed Swiss VAT Deemed Supplier Rules could attribute supplies by sellers to the digital platform instead to the foreign platform provider. The foreign robots would become Swiss taxpayers and would have to file Swiss tax returns. It will be the foreign robot who will electronically sign the Swiss tax return. The good news is that it will be also the foreign robot who will pay the Swiss tax.