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1. Introduction

With growing internationalisation, the need for a uniform tax treatment of trusts has been increasingly voiced both by taxpayers and the authorities. The prevailing different taxation practices in various cantons leads to problems which have proven detrimental to transparency and legal certainty.

The objective of this circular is to encourage the move from the present variable tax treatment to a uniform system. Due to the varying forms of trusts, the following explanations are limited to the features necessary for the assessment of tax. As a first step, the basic legal nature of a trust and the terms used in connection with a trust relationship are explained. Based on that, the appropriate tax results are then reached.

2. Trust

2.1. *Main features of the trust*

The term describes a legal relationship which arises when the settlor transfers certain assets to one or more persons (trustees) on the basis of a trust deed with the obligation to administer and use such assets for a purpose pre-determined by the settlor for the benefit of one or more third parties (beneficiaries).

The trust is a legal relationship which originated historically in England and consequently it has developed mainly in the common-law states (Great Britain, United States, Australia, Canada, South Africa, New Zealand). In addition, institutions similar to trusts can be found in other countries such as, for example, Japan, Panama, Liechtenstein, Mexico, Colombia, Israel and Argentina.

In practice, the trust has proved to be an extremely flexible instrument. It is frequently used in connection with estate planning and for so-called asset protection for individuals. In addition, trusts in the Anglo-Saxon legal world are among the most frequently used structure for charitable institutions, and employee pension plans and also to implement employee stock option plans for companies listed on the stock exchange. In view of the variety of possible forms of the trust, listing all types of trust would be an impossible undertaking and would also be of little use for determining their treatment for tax purposes. It is preferable to fix the principles of the tax treatment of trusts independently from the type of trust concerned.

The trust can either be set up by way of a legal act between living persons or by way of a testamentary instrument.

Even if its structure is similar to a Swiss foundation, the trust does not have separate legal personality. From a formal point of view, the trustee is the holder, on a fiduciary basis, of the trust assets. However, the trust is, on the other hand, not just a mere contract. Although the trust is originally set up by the settlor, it is, after its creation, essentially a legal relationship between the trustee and the beneficiaries which is principally governed by the trust deed and secondarily by the specific rules of the applicable legal system. In organising the trust, the settlor has a comparatively extensive freedom. Once the trust is set up, however, the settlor

has only a limited degree of influence over the trust, as in the case of a founder of a Swiss foundation. After the trust is created, the trustee's primary duty is to safeguard the interests of the beneficiaries and not those of the settlor. Another typical feature of a trust is the complex legal relationship which exists with respect to the trust assets. The trustee is the owner in civil law (common law: legal interest) of the trust assets, but he is required to administer the assets held on trust separately from his own assets and, in the event of death or bankruptcy of the trustee, the assets are not regarded as his own but are still subject to the law applicable to the trust and are held separately for the beneficiaries or the new trustee to be appointed.

2.2. *Differences between the trust and the foundation*

The Swiss foundation serves the purpose, similar to the trust, of endowing assets to a specified purpose (art. 80 ZGB). Once set up, the foundation acquires the status of a legal entity. On the other hand, the trust does not have legal personality. The trust has no legal capacity and therefore cannot own assets. In contrast to the trust, the foundation becomes the owner of the assets endowed for the particular purpose.

2.3. *Differences between the trust and the 'fiducia'*

The Swiss trust (fiducia) is based on a contractual relationship (a mandate in accordance with art. 394 et seq. OR). The trustee has to accept the mandate so that the contractual relationship can come into being. The agreement of the trustee is, on the other hand, not necessary for the creation of a trust. For this reason, the settlor can designate any person as trustee by a unilateral instrument during his lifetime or by testamentary instrument to take effect on death. Such nomination is comparable to the appointment of the executor of a will in accordance with Swiss inheritance law which gives him the position of an independent fiduciary in his own right.

The trust is not a (mere) contract. Although the trust is originally set up by the settlor, it is, after its creation, mainly a legal relationship between the trustee and the beneficiaries. After setting up the trust, the prime obligation of the trustee is to protect the interests of the beneficiaries and not those of the settlor.

2.4. *Establishment, foundation and fiducia in Liechtenstein*

The establishment, foundation and fiducia of Liechtenstein law differ significantly from the trust and are therefore not referred to further in this circular.

2.5. *Hague Convention on the law applicable to trusts and on their recognition*

The Hague Convention on the law applicable to trusts and on their recognition came into force in Switzerland on 1 July 2007. It enables the recognition of foreign trusts in civil law on the basis of internationally recognised norms and should, thus, increase legal certainty in this area.

The tax treatment of trusts is to be determined exclusively under Swiss tax law. Art. 19 of the Hague Convention provides expressly that the Convention does not prejudice the powers of States in fiscal matters. Ratification of the Hague Convention thus has no effect on the tax treatment of trusts.

3. Terms defined

3.1. *Settlor*

The settlor is that person who creates the trust by way of a legal act between living persons or upon death. Where he establishes an irrevocable trust, he relinquishes ownership definitively and, in principle, has no more rights and duties in respect of the trust assets. Alternatively, the settlor can create a revocable trust. In this case he still has control over the assets of the trust.

3.2. *Beneficiary*

The beneficiary is the person who benefits from the distributions of the trust. The settlor can appoint himself or any other natural or legal entity, domestic or foreign, as a beneficiary. The assets of the trust can be distributed to the beneficiary during the lifetime of the settlor or after his death. The beneficiary can legally sue both for claims to payments from the trust assets and for the dutiful administration of the trust by the trustees. He has the economic ownership of the trust assets (common-law: equitable interest). Further, he has a right to claim the segregation of the assets of the trust in the event of bankruptcy of the trustee.

The beneficiary thus has not only an actionable right with respect to benefits but also certain rights of supervision and oversight which make him a kind of supervisory authority.

If the trustee mislays the trust assets, the beneficiary can demand restitution of the trust assets to the trust or to the trustee.

3.3. *Trustee*

Through the creation of a trust, certain assets are transferred to one or more natural or legal persons (trustees) who are required to administer them and use them for the purpose predetermined by the settlor. The trustee has full authority to dispose (ownership in civil law) of the trust assets but he is obliged to administer the trust assets in the interests of the beneficiaries in accordance with the provisions of the trust. He administers and uses the trust assets within the framework of the provisions of the trust in his own name as an independent legal holder towards all third parties but separately from his own assets.

The trustee is obliged to allow the beneficiaries (but not the settlor) and any protector, to have access to the records concerning the administration and management of the trust.

3.4. *Protector*

The protector is a natural or legal person who can be appointed by the settlor if he so wishes to monitor whether the trustee is fulfilling his obligations in accordance with the settlor's intent. The authority and the functions of the protector can be greater or smaller depending on the wishes of the settlor. This will be described in detail in the provisions of the trust.

3.5. *Trust deed*

Formally, the trust must be created by way of a written instrument signed by the settlor and the trustee (the agreement of the trustee is not, however, necessary for the creation of the trust). In this trust document (trust deed), which is binding on the trustee, the provisions with

respect to the administration and preservation of the value of the trust assets are stipulated in favour of the designated beneficiaries nominated.

3.6. Letter of wishes

The settlor can communicate his wishes and guidance to the trustees by means of a letter of wishes. The letter of wishes is, in contrast to the trust deed, not legally binding and thus only represents an indication as to how the settlor wishes to have his trust administered. Essentially, the letter of wishes has only practical significance in the case of irrevocable and discretionary trusts.

3.7. Revocable / irrevocable trust

A difference has to be made between revocable and the irrevocable trusts. The latter are then divided into so-called discretionary and fixed interest trusts.

It is essential for tax purposes to determine whether the settlor, on the creation of the trust, fully divests himself of his assets or whether he has reserved the right (legally or economically) to resort to the trust assets.

If the settlor establishes an irrevocable trust, he divests himself definitively of the trust assets, and in principle he basically has no more rights or duties in respect of those assets. Alternatively, the settlor can form a revocable trust. In general, there is no irrevocable divestment if the settlor has appointed himself as trustee or beneficiary. Furthermore, divestment is not recognised if the settlor retains any influence over the trust, in whatever form. The following factors (derived by way of example from the Federal Court's practice concerning family foundations) allow the distinction to be made between revocable and irrevocable trusts.

Can the settlor

- benefit from capital distributions from the trust assets?
- benefit from distributions of income of the trust assets?

Does the settlor have the right

- to remove the trustee and to appoint another one?
- to appoint or cause the appointment of new beneficiaries?
- to replace the protector who in turn has powers comparable to those of a trustee?
- to amend the trust deed or cause it to be amended?
- to revoke the trust?
- to require liquidation of the trust?
- to exercise a veto over the trustee's decisions with respect to the trust assets?

An affirmative reply to any one of the above questions will lead to the trust being treated as a revocable trust for tax purposes.

3.7.1. Revocable trust

In the case of a revocable trust, the settlor reserves the right to revoke the trust at a future date and to recover the remaining assets or have them transferred to a third party. The settlor has therefore not definitively divested himself of his assets.

For tax purposes, it is not the designation in the trust deed which is conclusive but rather the economic reality. A trust designated as «irrevocable» may also fall into the category of a revocable trust if the divestment is not absolute.

Revocable trusts become irrevocable trusts following the death of the settlor unless the right of revocation is exercisable by another person or is transferred to someone else.

3.7.2. Irrevocable fixed interest trust

In the case of a fixed-interest trust, the provisions relating to the beneficiaries and their respective rights are to be found in the trust deed. With this type of trust the trustee thus has no freedom of discretion in the distribution of the income and/or capital of the trust. The trustee has neither the economic ownership of the trust assets nor does he have any independent freedom of disposition over the assets. In setting up an irrevocable fixed interest trust, the settlor has definitively divested himself of his assets.

In contrast to the discretionary trust in which case the rights of the beneficiary are merely in the nature of an expectancy, the beneficiary of a fixed interest trust has a legally enforceable actionable claim to the assets. Consequently, the beneficiary of a fixed interest trust can be considered by analogy to be an usufructuary.

3.7.3. Irrevocable discretionary trust

In general, the trust deed of a discretionary trust only includes a broad class of beneficiaries. The decision as to whether who, ultimately, is to receive distributions from the trust is left to the trustee.

The settlor may in a letter of wishes indicate to the trustee his reasons for creating the trust and can suggest to him, in a way that is not legally binding, how he would wish the trustee to exercise his powers.

If the settlor places particular importance on certain specific issues, it can be provided in the deed that certain decisions of the trustee require the prior approval of a protector.

When a discretionary trust is created, there is no enrichment of the beneficiary as it is not yet certain which persons will receive a distribution, and of how much and at what time. The rights of the beneficiary are thus merely in the nature of an expectancy.

4. Tax treatment of trust, trustee and protector

4.1. Tax treatment of the trust

Foreign law does consider the trust to be a legal entity. Applying private international law (IPRG, incorporation theory), Swiss tax law cannot consider a trust to be a legal entity.

A trust is also not a «foreign legal entity» in the terms of art. 49 sub-section 3 DBG and art. 20 sub-section 2 StHG as this statutory provision only covers bodies of persons to which Swiss private law confers legal personality. Swiss private law does not make the trust a legal entity.

In accordance with general doctrine, a trust does not fall within the application of article 11 DBG and 20 sub-section 2 StHG. The separate body tax treatment covered by these provisions only covers bodies whose members are in a «personal relationship» to one another. It includes, for example, a community of heirs or a «partnership» under Anglo-Saxon law. The feature of a common relationship typical of these institutions does not exist in a trust.

Under current Swiss tax law, there is therefore no statutory basis which would allow a foreign trust to be treated as a legal entity for tax purposes. Consequently, it has to be assumed that the question of the limited or unlimited taxation of the trust (e.g. based on the argument that one or more trustees are resident in Switzerland) does not even arise.

4.2. Tax treatment of the trustee and the protector

In principle, the assets transferred to the trust and the income arising from them are not to be assessed on the trustee for tax purposes. This view is compatible with the principle of taxation in accordance with economic capacity. This principle demands that no element of income or capital over which he has no power of disposal can be attributed to a taxpayer. From an economic view, the trustee has, in spite of formal ownership, no right to the assets.¹ In addition, the trustee is exposed to risk only in relation to his liability for prudent management, as in the case of the mandate relationship.

In view of the above, the question as to the effective place of management, sometimes invoked to support the argument of the non-taxability of the trustee, is not relevant either.

These principles also apply to a natural or legal entity acting as protector of a trust whose residence or statutory seat or effective administration is in Switzerland. A person who acts solely as a protector has no more legal or economic entitlement to the assets than the trustee. Consequently he cannot be assessed on those assets.

Clearly, the fees which the trustee or the protector receives for his activities must be accounted for and are taxable. They should be declared in detail and may be subject to audit.

5. Tax treatment of the settlor and beneficiary

The fact patterns of trusts are very varied. It is therefore not possible to explain the tax treatment of each type of trust. Only the principles for individual treatment of the settlor and beneficiary are presented below. It is assumed that the trust is used for estate planning or so-called «asset protection» for natural persons (the most frequent uses of trusts).

5.1. Principles applicable to tax treatment

The assets and the income of the trust (capital, capital gains, current income) are allocated for tax purposes either to the beneficiaries or the settlor (principle of transparency). This results from the fact that the corresponding assets cannot be allocated either to the trust or the trustee in accordance with current Swiss tax law.

¹ See here the distinction between “legal interest“ and “equitable interest“ under no. 2.1 or 3.2

In Swiss tax law income is defined on the basis of the so-called incremental growth theory which states that income includes the «addition» to the net assets (including rights for use) during a certain period. Income is not considered as having been received when it accrues but only on realisation. According to consistent doctrine and practice, income is regarded as a rule in taxation terms as having been received and added to the assets at any point of time at which the taxpayer collects a payment or has acquired a fixed claim which he can dispose of unless fulfilment of the claim is particularly uncertain. In this case, the point of time of actual fulfilment is decisive. The prerequisite for taxable receipt is therefore an absolute acquisition of a right which can be either in the form of a claim or outright ownership. Mere expectancies and conditional claims do not, on the other hand, constitute the receipt of income.

In principle, all distributions from a trust represent taxable income of the beneficiary, due to the general income clause (art., 16 sub-section 1 DBG, art. 7 sub-section StHG), unless the distribution is deemed to be a gift (art. 24 letter a DBG and art. 7 sub-section 4 letter c StHG).

The term gift does not follow the definitions of the cantonal, non-harmonised inheritance and gift tax laws. It is defined, in contrast with the concept of income (taxable), in accordance with DBG and StHG. It is based on the civil law notion according to which, for a gift, four prerequisites have to be fulfilled, namely a transfer between living persons, the element of enrichment from the assets of another party, bounty and an intention to give, or to obtain an advantage.

In the tax assessment process, the generally recognised principle applies, according to doctrine and jurisprudence, namely that the tax authority bears the onus of proof for demonstrating the facts upon which liability is based while the taxpayer bears the bonus of proof of facts which eliminate or reduce the tax owed.

Moreover, rules against tax evasion and cases of abuse remain applicable.

5.1.1. Treatment of the settlor

5.1.1.1. General

Taxation of the settlor depends on whether he sets up a revocable or an irrevocable trust. In contrast to the irrevocable trust, the settlor who creates a revocable trust does not irrevocably divest himself of the assets contributed to the trust. See example in 5.2.

5.1.1.2. Settlor resident in Switzerland

In most cases, the settlor is usually resident abroad when the trust is created but he can also be resident in Switzerland. If the settlor is resident in Switzerland, according to Swiss tax law there would only be a reduction in his wealth if there is a corresponding increase in the wealth of another tax payer. This would only be the case on the establishment of an irrevocable fixed interest trust (see 5.1.2). In all other cases the assets in trust and income deriving therefrom will continue to be attributed to the settlor (see also Art. 335 ZGB, under the general reservation of tax evasion). This attribution is subject to a reservation in cases where taxation is based on the taxpayer's expenses (Art. 14 DBG and Art. 6 StHG) [lump-sum taxation], because in such cases, only wealth in Switzerland, and income from Swiss sources are taken into account for the purposes of the control calculation.

5.1.2. Treatment of the beneficiary

For irrevocable fixed interest trusts, the class of beneficiaries, the amount and timing of distributions to the beneficiaries are fixed. Since there is an existing and determined entitlement, an assessment can thus be made on the beneficiary in proportion to his/her interest in the trust assets. At the moment of the distribution, it is appropriate to determine whether it represents income or a gift exempt from income tax. (art. 24 letter c DBG, art 7 sub-section 4 letter c StHG).

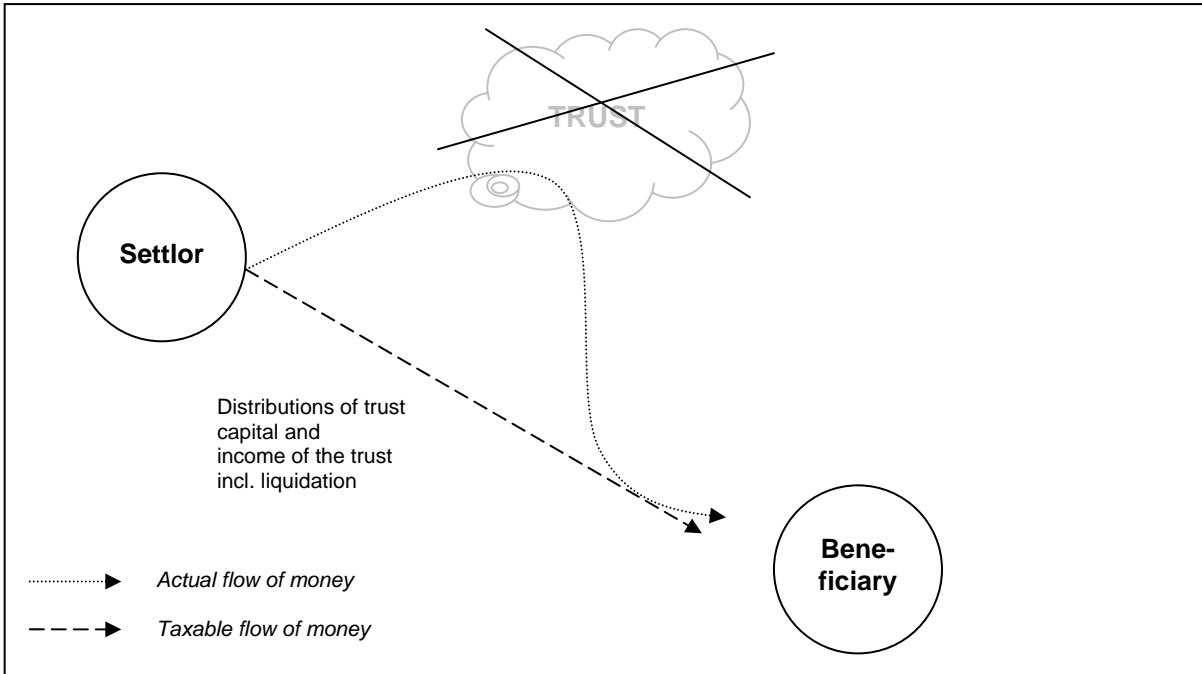
The rights of the beneficiaries of irrevocable discretionary trusts are in the nature of a mere expectancy. The time and the amount of any possible distributions are not determined as they lie within the discretion of the trustees. Sometimes the beneficiaries do not even know that they are beneficiaries of a trust. For this reason, the distribution can only be subject to tax at the point of time of effective payment. It can then be determined whether it represents taxable income or a gift not subject to income tax (art . 24 letter a DBG, art. 7 sub-section 4 letter c StHG). In the rarest of cases in which the amount and timing of the distribution have been determined with legal certainty or take place on a regular basis, the same treatment can be applied as for the fixed interest trust. See example in 5.2.

5.2. Examples:

Due to the great diversity of cases, the examples cannot cover all variations. They are limited to the taxation of the three basic variations (revocable trust, irrevocable fixed-interest trust, irrevocable discretionary trust). Assessment is made in accordance with the taxation principles described above. It is assumed that the settlor creates a trust during his lifetime (inter vivos trust) and that it relates to a case of estate planning or so called asset protection for a natural person (the most frequent uses of trusts). In addition the reservation in paragraph 5.1.1.2 should be noted.

5.2.1. Revocable trust

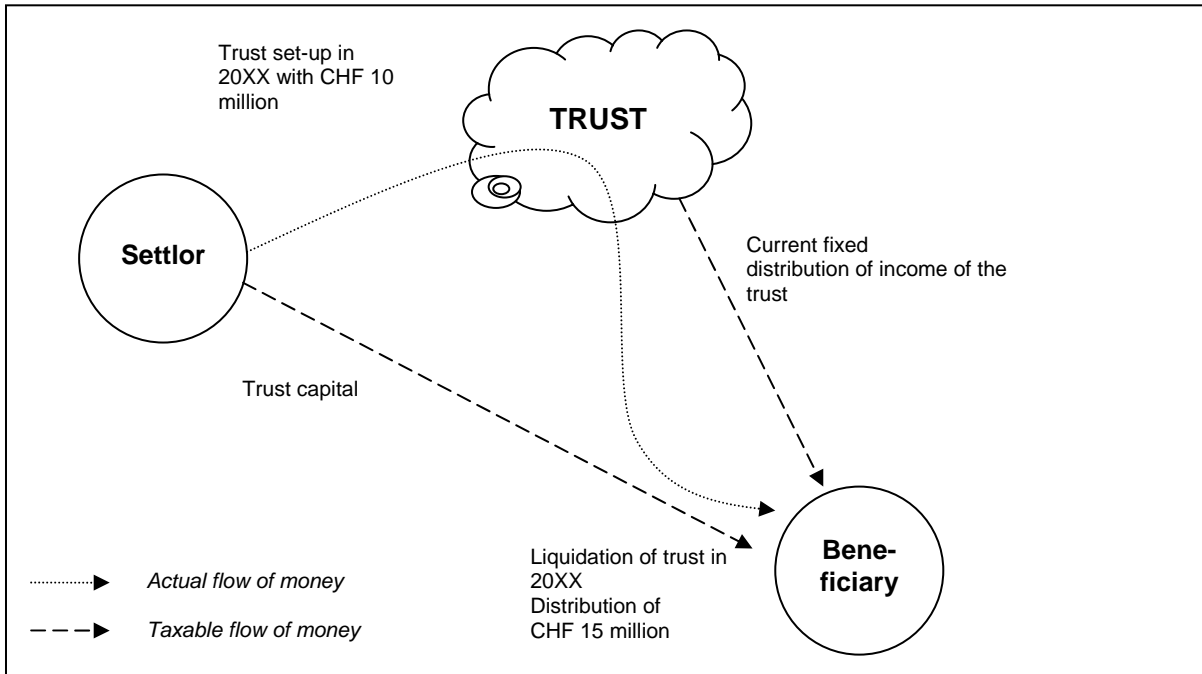
Transparent tax treatment applies as there is no irrevocable divesting of the trust assets (attribution of the trust assets and income to the settlor). This results in the following tax treatment:



During life of the trust	Tax treatment
Formation	No tax consequences. The assets and their income remain taxable on the settlor at his place of residence.
Distributions to a beneficiary	Treated as a gift The applicable rate of tax is left to competence of the cantons (in particular in the case of several beneficiaries as the distributions effectively flow as a whole)
Liquidation	In case of return of funds to the settlor: no tax. In the case of distribution to the beneficiary, see above distributions to a beneficiary

5.2.2. Irrevocable fixed interest trust

The beneficiary of the trust can be equated to a usufructuary (see ASA 55, 657 et seq and consequently the trust assets and income are attributed for tax purposes to the beneficiary. This results in the following tax treatment:



During life of the trust	Tax treatment
Formation	<p>There is a gift from the settlor to the beneficiary in the amount of the trust capital. ²</p> <p>The rate of tax is left to the competent canton (in particular in the case of different beneficiaries).</p>
Distributions to the beneficiary	<p>Distributions to the beneficiaries basically represent taxable income (art. 16 sub-section 1 DBG, art. 7 sub – section StHG). The income is regarded as having been received at that point of time at which the beneficiary has acquired a fixed claim to the trust income or at which he receives the distribution.</p> <p>The beneficiary is subject to wealth tax corresponding to his share in the trust assets. If this share cannot be determined, the income can be capitalised.</p> <p>It follows from the attribution of the trust assets to the</p>

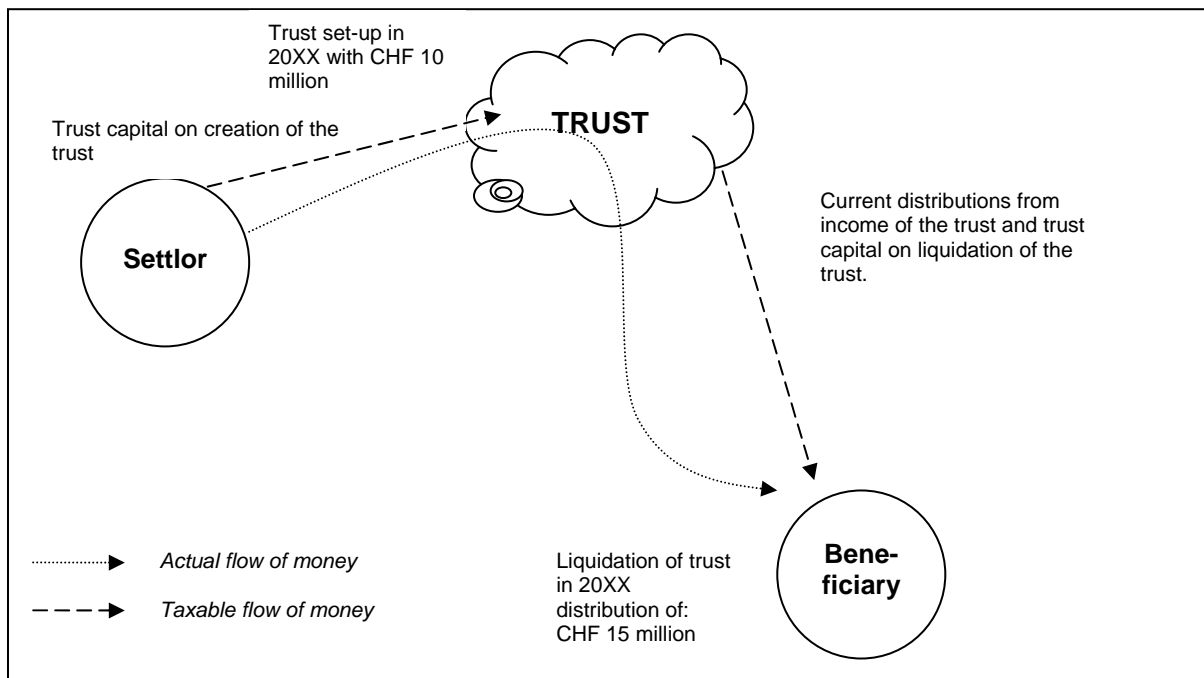
² To the extent that cantonal taxing competence applies.

	<p>beneficiary for tax purposes that the distribution of capital gains (insofar as these are private assets) and the initial trust capital is tax-free (art. 16 sub-section DBG and art. 7 sub-section 4 letter b StHG or art. 24 letter a DBG and art. 7 sub-section 4 letter c StHG). If it cannot be shown that, in a given case, there are tax-free capital gains or distribution of the trust capital, the general principle applies whereby the entire distribution represents taxable income.</p> <p>The trust is, by its legal nature, an enduring entity so that the trust capital contributed can only be distributed after distribution of all trust income.</p>
Liquidation	For treatment of the process of liquidation, see above «distributions to the beneficiary».

5.2.3. Irrevocable discretionary trust

If, at the time of creation of the trust, the settlor is resident in Switzerland the assets in trust and the income deriving therefrom will continue to be attributable to him (see 5.1.1.2.). The tax consequences are the same as for a revocable trust.

If at the time of creation of the trust, the settlor is resident outside Switzerland, the trust fund cannot be attributed to the settlor or a beneficiary (as to the question whether it is really an irrevocable discretionary trust, see no. 3.7 above). The consequences are as follows:



During life of the trust	Tax treatment (subject to of 5.1.1.2 above)
Formation	<p>The transfer of the assets from the settlor to the trust or to the trustees is regarded as a gift of the settlor in the amount of the trust capital.³</p> <p>The rate of tax is left to the competent canton (in particular in the case of different beneficiaries).⁴</p>
Distributions to the beneficiary	<p>The beneficiary is not taxable for wealth tax on any share in the assets of the trust.</p> <p>Distributions from the trust assets to the beneficiary can only be taxed on receipt or on receipt of the fixed legal entitlement claim to the payment.</p> <p>Distributions are always to be regarded as income of the beneficiary (art. 16 sub-section 1 DBG, art. 7 sub-section 1 StHG). Taxation of the income is subject to the contrary proof that none or only part of the distribution constitutes income (by proof that it is initial trust capital which was already treated as a gift on contribution; art. 24 letter a DBG and art. 7 sub-section 4 letter c StHG; this treatment refers, however, only to the initial or subsequently contributed capital and the burden of proof is on the taxpayer).</p> <p>It should also be noted that the trust, by its nature, is an enduring entity so that the trust capital can only be distributed after distribution of all trust income.</p> <p>Since the capital of the trust is not attributed for tax purposes to the beneficiary, the distribution cannot be fully or partly exempted from tax as the private capital gains of the beneficiary.</p>
Liquidation	<p>For the treatment of the liquidation proceeds, see above «distributions to the beneficiary».</p>

6. Duty of information and of co-operation

The settlors, trustees or beneficiaries liable for tax in Switzerland are required, on the basis of article 126 DBG or art. 42 StHG, to provide all necessary information and submit

³ To the extent that cantonal taxing competence applies.

⁴ The tax rate for gifts varies according to the canton. Individual cantons levy the maximum rate, other cantons the maximum applicable rate or a mixed rate depending on the relationship.

documents, vouchers or certifications of third parties to prove the existence of a trust and distributions of a corresponding monetary value, or expenses.

It should be added that in the context of an examination of relevant facts during an external tax audit, the trustee may not invoke professional secrecy. He must disclose all documents relating to the trust. This also applies to those cases in which the trustee is a lawyer since the administration of a trust does not form part of a lawyer's activity in strict terms.

7. Notes on withholding tax

The practice of the Swiss Tax Administration (ESTV) is as follows:

7.1. *Income arising from the trust assets*

Distributions from the trust to beneficiaries cannot be subject to withholding tax because trusts are not mentioned in art 4 sub-section 1 VStG.

7.2. *Refund of withholding tax*

Since a trust is not a legal entity, it cannot itself apply for refund of the withholding tax. Neither can the trust qualify as a commercial enterprise entitled to refunds not being a legal entity.⁵ Art. 55 letter c VstV cannot be applied to the trust as the trust does not constitute an "estate".

In international relations, the explanations given under no. 8 below ("double taxation agreements") remain applicable.

7.2.1. Revocable trust

A revocable trust is for tax purposes to be attributed to the settlor who – subject to exceptions for possible tax evasion – qualifies as the person entitled. Therefore, the settlor must fulfil the prerequisites which entitle him to refund of the withholding tax levied on the income of the trust assets.

7.2.2. Irrevocable fixed-interest trust

Insofar as the trustee can prove the trust relationship by presentation of the trust deed, the trust assets cannot be attributed to him for tax purposes. In this case, the beneficiary is regarded as the person entitled. If the beneficiary was resident in Switzerland at the time of the taxable payment in Switzerland (art. 22 sub-section 1 VStG), he can claim reimbursement of the withholding tax by analogy of the rules applicable to fiduciary relationships (art. 61 sub-section 2 VStV).

7.2.3. Irrevocable discretionary trust

In the case of the discretionary trust, the trust deed does not grant the beneficiary any claim to distributions of the trust. On the contrary, it lies within the discretion of the trustee how much he wishes to pay to the beneficiaries, named in the trust deed. Between the time of the creation of the trust and that of effective payment, the trust assets and the income accrued by it are not allocated to the beneficiaries because they have mere expectancies. For tax

⁵ Above, no. 4.1

purposes, the trust assets cannot either be allocated to the settlor as he has finally divested himself of the trust assets. As long as the trust assets cannot be allocated to any person, there is no possibility for a refund of the withholding tax until effective distribution. This practice is also in keeping with direct tax treatment in accordance with which for discretionary trusts, no taxation liability accrues until effective distribution.

If the settlor, is resident in Switzerland at the time of creation of the trust, and because the wealth of another tax payer is not correspondingly increased, there will no deemed reduction in the wealth of the settlor, with the consequence that the trust fund, as well as the income deriving therefrom, will continue to be attributed to the settlor. Accordingly the same regulation for reimbursement of withholding tax will apply as for a revocable trust, and the settlor will be required to fulfil the same conditions as would be required to claim reimbursement of withholding tax levied on the income deriving from the trust fund.

8. Information regarding the Double Taxation Agreements (DTA)

8.1. General

The double taxation agreements concluded by Switzerland govern the right to reimbursement of Swiss anticipatory taxes on dividends and interest payable to foreign residents and the right to reimbursement of foreign tax withheld at source for residents of Switzerland.

As the trust is not a « person » under Swiss law, the provisions of the agreement would not generally apply. Each specific case should be examined individually as it arises in the light of the applicable agreement.

Some agreements, such as the double taxation agreements with the USA, Canada and the UK (by interpretation), contain provisions relating to trusts (providing in particular that the trust is a 'person' under the terms of the agreement), but this provision alone does not in itself mean that reimbursement can be claimed. The benefit of the treaties is given to persons who are (a) residents in the fiscal sense of the term in accordance with the treaty and (b) the real beneficiaries of the income.

8.2. Reimbursement of Swiss withholding tax

If a trust established under a foreign law claims reimbursement of Swiss withholding tax, the Federal Tax Authority first checks whether the trust is, within the meaning of the law of the other State a "person" who is a taxable resident of that State (subject to tax) either as a taxable entity itself or because one or more of the trustees are resident in that State and thus subject to tax there. In this case the Federal Tax Authority regards the application of the DTA in respect of dividends and interest to be correct, and makes a refund of part of the withholding tax; the fact that the trust is not regarded as a 'person' under Swiss law is not relevant. The only relevant condition is that the trust is fully liable in the other contracting state for taxation on its income.

The question is less clear when a trust is subject to ordinary taxation in a country which is partner to a double taxation agreement but where a deduction mechanism for income

transferred to the beneficiaries, or a tax credit mechanism, could result in whole or partial *de facto* transparency in relation to certain income (and accordingly no taxation). Under this hypothesis, persons with no right to the benefits of the agreement (non-residents of the country of the trust that is presenting the request for reimbursement) could be the effective beneficiaries of the income from a Swiss source. This is just one example among many which illustrates the difficulty of applying the provisions of the agreement and the need to examine each specific case in the light of the applicable DTA. In all cases, it is the responsibility of the foreign beneficiary or any other person subject to a double taxation agreement to provide the Swiss Federal Tax Administration with the information necessary to process his/her request.

8.3. *Reimbursement of foreign tax*

As Switzerland is not acquainted with the institution of the 'trust', the question of a request by a trust resident in Switzerland for reimbursement of foreign tax in accordance with a DTA does not arise. However, from the moment that the Swiss tax authorities levy tax on the beneficiaries who are resident in Switzerland, on income from a trust, the question may be asked whether they would have the right to partial reimbursement (possibly pro rata) of foreign tax at source on income that has been distributed by a trust.

In such a case, from the strict point of view of the Swiss tax authorities, if the person presenting the demand is subject to ordinary taxation in Switzerland and if the income in question has been attributed to the person under application of the law and principles of taxation specified in the present notice, the Swiss tax authorities will uphold the request and, in accordance with the specific procedure applicable, return the funds to the beneficiary or forward the request to the competent fiscal authorities who deducted the tax on the income in the source country. The degree to which this request for reimbursement will be allowed by the country in question will depend, in that event, on whether and how, the trust and income from the trust, and its beneficiaries, will be regarded in the other contracting state.

8.4. *Agreement with the EU on savings taxation*

The regulations on 'trusts' to be found in the directives of the AFC concerning the withholding of tax on savings interest of 25 June 2005, are only relevant in respect of the deduction of tax and the voluntary declaration in the relevant agreement with the European Community.