Fiscal Treatment of Investment Foundations

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1 Investment Foundations

Investment Foundations (a body that is only known in Switzerland) are investment vehicles which offer *investment* groups (specific collective investment schemes) that are tailored to the needs of pension funds. They are *institutions providing occupational pension plans*. They are ancillary facilities in the form of a Foundation according to the Swiss Civil Code with the purpose of the joint investment and management (art. 53g para. 1 of the Federal Law on Occupational Old Age, Survivors' and Invalidity Pensions (BVG). Investment Foundations were first regulated by law as of 1 January 2012 (art. 53g to 53k BVG) and are to be typified as a specific form of a common investment. The scope of application of the Federal Act on Collective Investment Schemes of 23 June 2006 (KAG) excludes Investment Foundations (art. 2 para. 2 lit a KAG) and are therefore not subject to supervision by FINMA, but are placed under direct oversight of the watchdog commission of the occupational pension plan insurance (OAK BV) (art. 62 para. 1 lit. b BVG). The legal provisions are substantiated in the regulation on Investment Foundations (ASV), which entered into force simultaneously with the legal provisions. The circle of investors of the Investment Foundations is limited to tax-exempt institutions of the occupational pension plan and persons who manage collective investment of the occupational pension plan institutions. The circle of investors therefore includes pension funds, vested benefits foundations, financing and banking foundations of the pillar 3a scheme, welfare funds, the security fund, the suppletory occupational benefit institution, and institutional investment funds, whose circle of investors are limited to institutions of the occupational benefit plan (art. 1 ASV).

2 Tax Exemption

The fiscal and tax treatment occupies a pivotal position in Investment Foundations.[1] It is reflected in the fact that the very first article of the regulation on Investment Foundations (ASV) it is stated that only *Investment Foundations and other tax-exempt institutions established in Switzerland providing occupational pension plans* can build the circle of investments of Investment Foundations.[2] It may be inferred from this, that also Investment Foundations – just like their investors – must be tax-exempt. Yet, strictly speaking, the statutory basis for tax exemption of Investment Foundations cannot be found.[3] However, the doctrine and practice connive at this gap in the legislation[4] and qualify *Investment Foundations as* exempt from *direct* federal tax. Nevertheless, in case of the formation of an Investment Foundation it is advisable to request tax exemption at the tax authorities.[5]

[1] KRIEMLER ROLAND, Anlagevorschriften der Anlagestiftungen (Investment regulations of Investment Foundations), Zürich/Basel/Genf 2019, p. 308.

[2] Strictly speaking, the regulations in art. 1 para. 1 lit a ASV is incomplete. Investment Foundations not only provide services in the area of occupational pension plan insurance (2nd pillar) but also in the area of private (restricted) tax-exempt pension plan (pillar 3a). According to art. 6 of the ordinance on the tax deductibility of contributions to recognized forms of benefit schemes of 13 November 1985 (BVV3), 3a (bank) foundations are equal to pension funds in terms of tax liability according to art. 80 BVG. According to art. 5 para. 3 BVV 3 the investment regulations for pension funds (art. 49 – 58 BVV 2) are to be applied accordingly. However, according to the wording of ASV, 3a (bank) foundations are not part of the circle of investors. However, it was not the intention of the legislator to exclude the 3a (bank) foundations from the circle of investors. There is therefore an unintended gap in the provisions (in contrast to intended legal gap). In the *Erläuterungen zur Verordnung über die Anlagestiftungen* (notes on the ordinance on Investment Foundations) of 10 and 22 June 2011, it is however stated in art. 1 ASV that «bank foundations of the pillar 3a scheme» are to be included in the circle of investors of Investment Foundations. However, this solution is unsatisfactory as no new rights and obligations are to be established in the material and more particularly in the notes.

[3] UTTINGER/ULMER, Die Anlagestiftung (The Investment Foundations), AJP 2012, p. 1521.

[4] HESS TONI, Steuern kollektiver Kapitalanlagen, die Besteuerung kollektiver Kapitalanlagen und deren Anleger (Taxes of Collective Capital Investments and their Investors), Basel 2015, § 39, Rz. 4, p. 653; KRATZ-ULMER, Die Anlagestiftung (The Investment Foundation), Basel 2016, p. 108; see also UTTINGER/ULMER, Die Anlagestiftung (The Investment Foundations), AJP 2012, p. 1521.

[5] According to the information sheet of the cantonal tax authority of the canton of Zurich, legal department, of July 2018, the conditions for approving tax exemption, which are stated in the circular no. 12 cypher II 1 of the Federal Tax Administration (FTA) of 8 July 1994 concerning tax exemption of legal entities, still apply (However, this circular is no longer on the website of the FTA and therefore no longer valid). Therefore, the request for tax exemption on direct federal tax is to be submitted to the cantonal authorities.

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Only the decision of the cantonal tax authority gives enhanced legal certainty.

3 Income and Capital Tax

Income and capital taxes are regulated in the Swiss federal law on direct tax of 14 December 1990 (DBG), in the Federal Act on Harmonisation of Direct Taxes of the Cantons and Communities of 14 December 1990 (StHG), as well as in the cantonal ordinances. Income tax is collected by the federal government, the cantons and the municipalities. Since 1 January 1998, the federal government has resigned from the capital taxation of legal entities while the cantons are required to so according to StHG[6].

However, according to art. 80 para. 2 BVG, pension funds, insofar as their revenues and assets exclusively serve occupational pension plan insurance – and as we have also witnessed in investment foundations – are exempt from direct taxes of the federal government, the cantons and the municipalities. In the event of a merger or a division of a pension fund, there are no taxes on property gains. Yet, properties with property tax and property transfer tax and added values from property sales may be taxed with profit tax or taxes on property gains.[7]

4 Stamp Duties

Stamp duties are regulated in the Swiss Federal Law on Stamp Duties of 27 June 1973 (StG) and substantiated in the ordinances on stamp duties of 3 December 1983 (StV). Stamp duties are taxes on legal transactions that are levied on specified business transactions. As opposed to the direct federal tax, the federal government is entitled to the net proceeds from the duty in its entirety. Stamp duties belong to the *indirect* taxes.

4.1 Issue Tax and Tax on Insurance Premiums

The establishment and issuance of capital and claims are not subject to issue tax on equity. Likewise, taxes on insurance premiums are not owed either. This «insurance stamp» is only levied by domestic insurers and domestic policy holders. It is therefore a pure «trade tax». Investment foundations however are liable for turnover tax for purchases and sales of domestic and foreign securities.

4.2 Turnover Tax

4.2.1 Turnover Tax on Taxable Instruments

According to art. 13 para. 4 StG, investment foundations are fiscally qualified as security traders.[8] Within the meaning of art. 17a StG, they are therefore *not* to be treated as exempted investors.[9] Accordingly, purchases and sales of taxable instruments[10] are liable for turnover tax.[11] The tax is of 1,5‰ for domestic and 3,0‰ for foreign securities.

However, according to art. 14 para 1 lit i StG, the transfer of taxable instruments in connection with restructuring is exempt from turnover tax. Material expenses of taxable instruments to investors by an investment foundation is, however, subject to turnover tax.

4.2.2 Primary Market

In terms of art. 13 para. 2 StG, entitlements against investment foundations are claims and are therefore not taxable instruments. The issuing of entitlements is therefore not subject to turnover tax.

Conversely, material expenses of taxable instruments (shares, bonds and other taxable instruments according to art. 13 para. 2 StG) in view of pay-up of entitlements represent a taxable transaction. Thus, material expenses are subject

to turnover tax for investment foundations as well as for investors.[12]

4.2.3 Secondary Market

The trade[13] and the redemption of claims are not affected by turnover tax.

4.3 Disadvantage Compared with Funds

The fiscal qualification of the investment foundation as security trader constitutes a disadvantage compared with the collective investments according to KAG. In parliamentary discussions, it was apparent at a very early stage, there exists a lack of political will to abolish those disadvantages, as can be seen in the following examples.[14]

4.3.1 Initial situation

The *federal decision on urgent measures regarding turnover tax* of 19 March 1999 (*Bundesbeschluss dringliche Massnahmen 1999*) consisted of releases from stamp duties. However, it was decided they were not applicable to investment foundations. This decision should remain limited until the entry into force of a federal law that is suitable to substitute it, albeit however, not later than 31 December 2020.[15]

4.3.2 First Venture to Reduce the Tax Burden

At the beginning of the years 2000, the Parliament and the Federal Council discussed the exemption of pension funds from stamp duties (and in a different context also from value ad-

6 Art. 2 para. 1 lit. b StHG.

7 For more details see 7. Property Transfer Tax and Taxes on Property Gains.

8 The security trader according to the fiscal definition must not be confused with the qualification as a security trader in stock exchange law. According to this natural and legal entities, and business partnerships that professionally purchase and sell securities on the secondary market for their own account for a short-term resale or for a third party's account and/or publicly offer them on the primary market or create derivatives themselves and publicly offer them, are considered security brokers governed by stock exchange regulations. The legal definition is provided in art. 2 lit. d Federal Act on Stock Exchanges and Securities of 24 March 1995 (BEHG).

9 What is noteworthy in this context is the unequal treatment of foreign and domestic institutions of the occupational pension plan insurance. Based on art. 17a para. 1 lit f StG, foreign institutions of the occupational pension plan insurance are exempt from turnover tax. In accordance with art. 17a para. 3 StG, such institutions are occupational old-age, survivor's and disability insurance companies whose means are permanently and exclusively intended for the occupational pension plan insurance and are subject to a supervisory authority comparable with a federal supervisory authority.

10 The definition of taxable instruments is to be found in art. 13 para. 2 StG.

11 For discrimination against an investment foundation in relation to funds, see 4.3 Disadvantage Compared with Funds.

12 FTA circular no. 24 of 1 January 2009, p. 25. The circular was updated as of 20 November 2017. The currently valid version does not mention investment foundations any more. However, the statements concerning the treatment of investment foundations in relation to turnover tax are still valid.

13 In the secondary market, the FTA speaks of *trade*, but means more precisely the *issuing of entitlements*. According to art. 18 para. 2 ASV *trading entitlements* is not permitted. For purely technical tax reasons, the term *trade* in the circular no. 24 of 1 January 2009 is to be viewed as *purchase*, the term *redemption in the sense of sale*.

14 For detailed information on the evolution of the discussion and on the reasons and their evaluation which led to the reclassification of investment foundations to become security traders, see KRIEMLER ROLAND, Anlagestiftungen und Stempelabgabe, dringender Reformbedarf (Investment foundations and stamp duties, urgent need for reform), Der Schweizer Treuhänder 4/2013, p. 192 ff.

15 See cypher II para. *3 Bundesbeschluss dringliche Massnahmen 1999 (federal decision on urgent measures 1999)*.

ded tax). Both the *report of the task force revision of the turnover tax* and the explanatory *statement by the Federal Council regarding a new Federal law on new urgent measures in the area of turnover tax* recommended, as early as in the year 2000, relief measures, primarily for business conducted with institutional investors.

However, profound changes were undertaken in the councils. Contrary to the suggestion of the Federal Council and other domestic institutional investor, the first council (Council of States) decided not to exempt pension funds and other domestic institutional investors from stamp duties but rather to equate them with security traders (liable to stamp duty). As a result of this reclassification, pension funds were deprived of the possibility they had often used to process security transactions without turnover tax abroad. The second council (National Council) followed the proposal of the first council in its final vote. The decision was justified by the *unclear question of reciprocal financing, an unnecessary socio-political need*, the claim that, *based on the well-functioning financial centre, exemption from stamp duties were not necessary and there was no competitive disadvantage and stamp duties and value added tax fitted into the system*. Finally, it was also stated that pension funds and investment foundations did not have the possibility to move abroad due to the fact that they were based in Switzerland, unlike funds that did have that possibility (and as has happened before).[16] The *federal law on new urgent measures in the area of turnover tax* of 15 December 2000 (*Federal law urgent measures 2000*) was then put into effect as of 1 January 2001. This decision remained limited until the entry into force of a federal law suitable to substitute it, albeit however, not later than 31 December 2002.[17]

Initially, the investment foundations, which were reclassified to become security traders, did not negatively assess this disadvantage. The representatives of the sector were convinced that the stamp duty burden on investment foundations had made institutional funds more interesting for Investment pension funds, the investment foundations would, however, maintain their position.[18]

4.3.3 Second Venture to Reduce the Tax Burden

A second venture in 2002 with the same aim (the relief of stamp duties for pension funds) took place simultaneously with the expiry of the *federal decision on urgent measures regarding* 1999[19] and the *federal law on new urgent measures in the area of turnover tax (federal law urgent measures 2002)*[20] as of 31 December 2002. However, the parliamentary discussions only took place half a year before the expiry of the federal decision on urgent measures. Finally, the decision by the federal council to extend the urgent measures was adapted in the final vote of both councils (and moreover in an accelerated procedure) until the end of 2005. Consequently, no re-evaluation of the situation was effected as originally announced by the Federal Council and therefore the adverse provision for the pension funds was extended through to the 31 December 2005. A parliamentary discussion on the consequences of this discrimination of pension funds and investment foundations did not take place at that point in time, either. The federal law on urgent measures 2002 of 21 June 2002 finally entered into force as of 1 January 2003 and had a period of validity until the entry into force of a federal legislation suitable to substitute it, albeit however, not later than 31 December 2005.[21]

4.3.4 Third Venture to Reduce the Tax Burden

When the federal law regarding stamp duty was discussed, tax relief for pension funds was discussed one more time. The treatment of the draft provision concerning federal stamp duties was

undertaken – just as during the second venture – shortly before the expiry of the federal law on urgent measures 2002 with expiry date on 31 December 2005. The motion to exempt pension funds and investment foundations from tax was finally rejected again. The justifications were – amongst others – that the procedure for reconciliation between the two councils would cause an important loss of time and that foreign institutional investors were already exempt. Both arguments ensured incomprehension among the affected parties. Nevertheless, the federal council pointed out that the entire abolishment of the «stamp duties» had to be reviewed in the longer term[22].

4.3.5 Self-Aid by Means of Master-Feeder Structures

Five years after the enactment of the federal law on urgent measures 2000 of 1 January 2001, the investment foundations revised their original assessment of the situation. Contrary to their first assessment of 2001 they namely registered important financial outflows in the securities investment groups. For the most part, these funds went into investment funds which were exempt from stamp duties and value added tax. On the basis of the indistinguishable will by the parliament to find a matching solution and so that the discussions would not be postponed indefinitely as evidenced by the Federal Council to that date, the investment foundations started seeking another solution from 2006. In order not to be disadvantaged compared to investment funds any longer, they underlay their investment groups with institutional funds which were already exempt from stamp duties and value added tax. This cascade construction, which is referred to *as Master Feeder Structure*[23] is to the advantage of investors, as the additional costs of the Master Feeder are lower than the stamp duties which would normally be due, yet some further costs[24] occurred for the investment foundation (Feeder) and for the underlying investment fund (Master).

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16 In other words: Investment foundations were and have been captive and therefore liable to stamp duties. In my opinion this is the decisive reason why the Parliament did not want to exempt investment foundations from tax and, as a consequence, the federal government did not have to forego taxes.

17 See cypher II para. *2 Bundesgesetz dringliche Massnahmen 2000 (federal law urgent measures 2000)*.

18 AEBERLI URS, Institutionelle Fonds versus Anlagestiftungen (Institutional funds versus investment foundations), Schweizer Versicherung 03/01 vom 15. März 2001, p. 19 ff.

19 See cypher II para. 3 *Bundesbeschluss dringliche Massnahmen 1999 (federal decision on urgent measures 1999)*.

20 See cypher II para. 2 *Bundesgesetz dringliche Massnahmen 2000 (federal law urgent measures 2000)*.

21 See cypher II para. 3 *Bundesgesetz dringliche Massnahmen 2002 (federal law urgent measures 2000)*.

22 Correctly speaking it should be talked about «Abgabe» (duties) and not of «Steuer» (tax).

23 In the case of Master Feeder Structures, the funds (Master) listed securities and the investment groups (Feeder) only hold parts of the funds. According to art. 17a para. 1 StG, domestic collective capital investments (including the Master) are therefore exempt from stamp duties. As the issuance of entitlements according to art. 14 para. 1 lit a StG and the redemption of claims according to art. 14 para. 1 lit. e StG are exempt from turnover tax, there is no obligation on the level of the Feeders (investment groups) to pay turnover tax on the fund shares of the Masters. There is a further positive impact on such structures is that management fees for the administration of assets of funds are exempt to VAT according to art. 21 para. 2 lit. f MWSTG. Therefore, if the management fee is only levied on the Master, the Feeder is not subject to value added tax.

24 Costs relating to administration, revision, supervision etc.

4.3.6 Effects of the Self-Aid

Based on the Master Feeder Concept, neither turnover tax obligations nor value added tax debts arise for investment foundations. However, the concept causes additional costs based on the double structure that are in turn directly deducted from the earnings of the investment foundations. Other disadvantages exist p. ex. when launching an investment group as a compartment of a fund requires to be launched simultaneously. This requires an authorisation by FINMA and leads to time delays. Factually, an unjustified dual supervision is therewith established (OAK BV and FINMA). This also further limits the investment universe. On the one hand, the requirements of (i) KAG and the corresponding prescriptions are to be observed; on the other hand, the (ii) BVG provisions with their provisions on investment regulations on investment rules, the provisions on the occupational old-age, survivor's and disability insurance of 18 April 1984 (BVV 2) and further in alignment with the (iii) investment regulations of ASV.

The Master Feeder Concept also leads to a partial loss of autonomy. Thus, investment foundations are no longer allowed to decide on the securities lending programmes. This competence is transferred to the investment companies that have drawn up the corresponding compartments. The investment foundations can only propose their voting right preferences in the sense of a recommendation to the investment companies. Only the investment companies may exercise the voting rights at the general meetings.[25]

Contributions in kind in securities investment groups are taxable transactions, which is why an investor, who wants to introduce taxable instruments, avoids investment groups (Feeder) and invests directly into the sublayer compartment of the stamp tax exempt funds (Master). This is another business segment that was terminated for investment foundations.[26]

The Master Feeder Constructions of the investment foundations are now more critically regarded as at the beginning of their introduction. They could not stop the outflow of assets in the securities investment groups. The outflows were, at the most, delayed by a few years. In addition, the savings in taxes and duties do not fully compensate the additional disadvantages that the Master Feeder Structures imply.

Nowadays, investment foundations are much more reserved than a few years ago when it comes to use Master Feeder Structures when launching new securities investment groups. As a consequence, when launching a product, directly investing security investment groups' preference are to apply Master Feeder Structures and accepted stamp duties and value added tax. However, this burdens the profit and therefore also the attractiveness of investment foundation solutions.

5 Value Added Tax

5.1 Investment Foundations' Liability to Pay Value Added Tax

The competence of the federal government to collect value added tax is based on art. 130 of the federal constitution. According to the transitional provision of art. 196 cypher 14 para. 1 of the federal constitution, the power to levy value added tax is limited until the end of 2020. The value added tax is regulated in the regulated in the Federal Act on Value Added Tax of 12 June 2009 (MWSTG) and is substantiated in the Ordinance on Value Added Tax of 27 November 2009 (MWStV).

The *distribution of entitlements* to investment groups is not qualified as *services/administrative tasks that are exempt from value added tax*.[27] In comparison and according to art. 21 para.2 cypher 19 lit. f MWSTG, sales turnover of investment fund units is not subject to value added tax.[28]

However, investment foundations that levy All-in Fees[29] directly on their investment groups only

on *supplies that are not exempt from tax*, meaning only on a (greater) part of the levied fee *are liable to value added tax*. The All-in Fee is therefore to be divided into independent (i) taxable supplies and (ii) supplies exempt from tax.[30] According to art. 19 para. 1 MWSTG, every provided supply is to be seen as fiscally independent. The value division of the different supplies is to be documented and itemised. Based on their investment strategy, each investment group has to do this differently by using different distribution keys. The distribution keys are to be reviewed periodically.

5.2 Disadvantage Compared with Funds

The unequal treatment in terms of value added tax of investment foundations and collective capital investments is one of the competitive disadvantages worth mentioning. Art. 21 para. 2 MWSTG lists value added tax exempt performances. According to cypher 19 lit. f of the provisions, included among these are also the distribution of units from collective capital investments according to art. 3 para. 1 KAG, activities according to art. 3 para 2 KAG and the management of collective capital investments according to KAG by persons who manage or store them, the fund management companies, custodian banks and their representatives.
This unfavourable treatment of investment foundations can equally be avoided by using optimised Master Feeder Structures. To regulate the exemption of value added tax also for investment foundations at federal act level would be a more expedient solution, as it is more cost-effective. The Conference of Managers of Investment Foundations KGAST (Investment Foundations Association) has also requested on several occasions that tax discrimination[31] with regard to value added tax (and stamp duties) should be abolished. However, even during the debate on the partial revision of the MWSTG from 2013, the concerns of the investment foundations were not taken into consideration. Eventually, during the final votes of 30 September 2016, the councils adopted the partially revised MWSTG without taking into account the equal treatment between collective capital investments and investment foundations in terms of value added tax.[32]

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25 See art. 23 para. 1 KAG, according to which member and creditor rights are exercised independently and exclusively in the interest of the investors.

26 On contributions in kind, see above 4.2.2 Primary Market.

27 The management of domestic collective investment schemes that are not subject to KAG are not liable to the exemption clauses of art. 21 para. 2 cypher 19 lit. f MWSTG.

28 For more information on the complex treatment of supply and administrative tasks, and capital investments that are exempt from taxes, see MERZ MICHAELA/SCHAER MARTIN, Anlagefonds und Mehrwertsteuer (investment funds and value added tax), Der Schweizer Treuhänder 3/2002, p. 243 ff.

29 When using the All-in-Fee, often referred to as flat fee, certain fees for the asset management by the portfolio manager, the investment foundation's management, the distribution of the investment foundation products, and the portfolio management are to be levied in advance. The FTA calls this constellation «Leistungskombination» (service combination), in which several independent taxable and tax exempt services are offered as a service package at a total charge.

30 For value added taxes exempt administrative tasks see MWST-Brancheninfo Nr. 14 (value added tax sector information), Eidgenössische Steuerverwaltung ESTV, Bern, 2012, p. 37 f., for administrative tasks subject to tax see p. 39.

31 See 5.2 Disadvantage Compared with funds. Also see position paper KGAST, «Anlagestiftungen fordern gleichlange Spiesse [...] und steuerliche Gleichbehandlung» (Investment foundations request equal opportunities [...] and equal tax treatment) of October 2014.

32 KRIEMLER ROLAND, Anlagevorschriften der Anlagestiftungen (Investment regulations of Investment Foundations), Zürich/Basel/Genf 2019, p. 319.

6 Withholding Tax

According to the FTA circular no. 24 of 1. January 2009, investment income from investments into investment foundations are, owing to the absence of a statutory basis, not subject to withholding tax[33], which is why retained income that is distributed to the investors is not subject to taxes. However, according to the FTA circular, investment foundations are entitled to claim tax refund in favour of the corresponding investment groups in accordance with art. 24 para. 2 of the Federal Law on Withholding Tax of 13 October (VStG).[34]

7 Property Transfer Tax and Taxes on Property Gains

The tax relief of investment foundations according to art. 23 para. 1 StHG does not categorically include property transfer tax and taxes on property gain. According to art. 23 para. 4 StHG they are obligatorily subject to taxes on property gains, however only optionally to property transfer tax. Thus, according to art. 80 para. 3 BVG, property taxes and property transfer tax may be levied for properties from investment foundations. According to art. 80 para. 4 BVG, added value resulting from property sales may incur general profits tax (dualist system) or a special tax on property gains (monistic system).
Based on the missing regulation in the StHG concerning an obligatory property transfer tax, the cantons may, however, exempt investment foundations from property transfer tax.[35] However, most cantons levy taxes on property gains. Considering this constellation, the question arises whether it is possible to offset losses from purchases of property with gains from other property sales.[36] There is no cantonal legal provision in answer to this question. The result is that the cantons do not allow for the offset of losses with gains from property sales, which therefore leads to *cut-off losses*. However, the BGer states in its decision of 5 July 2016[37] that a loss account legally prescribes to be harmonized. According to the BGer, the reference in art. 23 para. 4 StHG to art. 10 para. 1 lit. c StHG is pertinent. Thus, the tax harmonization law prescribes loss distribution despite the absence of a cantonal legal foundation. However, it must be kept in mind that the BGer only covers the *internal* cantonal offsetting. However, the BGer does not comment on *inter* cantonal offsetting. Yet, based on the clear application of the federal tax harmonization law, the BGer should reach the same conclusion concerning the question on *inter* cantonal offsetting.

8 Investment Foundations' Exemption from Withholding Tax

8.1 Exemption from Withholding Tax with Contracting States

Investment foundations can – provided that there are double taxation agreements (DTAs) with the relevant State – claim for a full refund of the withholding tax levied abroad at one's own behalf. The procedure conforms with the corresponding DTAs, the mutual agreements and the amending protocols with the relevant States.

8.2 Exemption from Withholding Tax with the USA

Based on the agreement between the Swiss Confederation and the United States of America for the avoidance of double taxation with respect to taxes on income of 19 December 1997 (DBA-USA), the treatment of withholding taxes of investment foundations is of significant importance. With regard to US dividends, investment foundations are exempt from withholding tax as long as they only serve the establishment of the occupational pension plan insurance (2nd

pillar).[38] According to the mutual agreement 2004 on DBA-USA, investment foundations can claim the zero rate (exemption from withholding tax) for US dividends only if the associates are establishments of the occupational pension plan insurance (2nd pillar). «Mixed investment foundations[39]», that manage funds of the 2nd, as well as funds of the pillar 3a (and welfare funds) do not have this possibility.[40]

8.2.1 No Considerations for 3a Foundations and Welfare Funds

According to the draft of the amending protocols of DBA-USA 2009[41], also dividends to individual pension plans (3a solutions) should also have benefited from the exemption of withholding tax. Welfare funds, however, were not mentioned in the amending protocols. In Switzerland, the amending protocols 2009 were ratified in June 2010 by the Federal Assembly. However, the US Senate postponed treatment. As a result, they were not ratified by the USA. As a consequence, neither 3a foundations nor welfare funds are exempt from withholding tax at present.

8.2.2 Latest Developments in 3a Foundations and Welfare Funds

In July 2019, after ten years, the US Senate has approved the amending protocol of DBA-USA 2009. The State Secretariat for International Finance (SIF) then entered into contact with the Internal Revenue Service (IRS). An adapted draft on the mutual agreement in terms of exemption from withholding tax on dividends is suggested.

Based on the venture of KGAST, the SIF wants to add a new regulation concerning the equal treatment of welfare funds into the pending

33 See FTA circular no. 24 of 1 January 2009, p. 26, no longer in force. See also the following 34.

34 The FTA circular no. 24 was updated as of 20 November 2017. The currently valid version does not mention investment foundations any more. However, the statement that the income from investments of investment foundations are not subject to withholding tax due to the absence of a statutory basis are still valid.

35 For instance, the canton of Schwyz made use of this. It completely exempt pension funds and investment foundations from property transfer tax (Gesetz über die Erhebung der Handänderungssteuer § 5 Abs. 1 lit. a HstG des Kanton Schwyz – law on levying of property transfer tax § 5 para. 1 lit. a HstG of the canton of Schwyz) Finally, the law was completely abolished as of 18 October 2008, without providing for substitute measures. In Switzerland – except for the canton of SZ, which, due to the abolishment of the HstG does not levy property transfer tax – property transfer tax is levied by the cantons and/or the municipalities, but not by the federal government. The cantons of Zurich, Uri, Glaris, Zoug and Shaffhouse solely levy registration fees.

36 Only the cantons of Argovie, Grisons, Valais and Vaud have created a legal basis to offset taxes on property gains and losses.

37 According to the federal court judgement 2C_1080/2014 of 5 July 2016, a provision institution based in Zurich is not allowed to offset the gains from the sale of three properties in the canton of St. Gallen with a loss from the sale of another property that was also conducted in the canton of St. Gallen.

38 Exemption from withholding tax on dividends for pension funds is based on article 10 para. 3 of the DBA-USA.

39 Terminology of the FTA.

40 An overview on the different treatment of investment foundations that have expanded their investment circle with foundations of the 3a pillar and investment foundations that only invest funds of the occupational pension plan insurance (2nd pillar, can be found in the KGAST-Mitteilung DBA-USA, p. 1 to 3.

41 Dated on 23 September 2009, it is also called *Zusatzprotokoll* (additional protocol) or *Revisionsprotokoll* (revision protocol).

mutual agreement. After that, such a new regulation could for instance mean that welfare funds who affiliate to investment foundations also qualify to be exempt from withholding tax. This, because Investment Foundations are *tax exempt establishments based in Switzerland* that provide *occupational pension plans*. No withholding tax exemption would be granted if welfare funds invest directly into US equities. According to SIF's statement the negotiations should conclude by the end of 2019. Application of the adapted mutual agreement is aspired as of 1 January 2020.