

SWITZERLAND

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Tax treatment of ICOs in Switzerland

Initial coin offerings (ICOs) – the blockchain-based issuance of tokens or crypto-currencies for the purpose of fundraising – are a hot topic at the moment. There is continuing strong demand from mostly young, technology-based companies that seek to tap the capital markets through ICOs as a viable and efficient alternative to traditional fundraising. Switzerland offers an open regulatory framework for ICOs and has therefore developed as a hotspot for token offerings.

While the Swiss Financial Market Supervisory Authority (FINMA) published a first set of guidelines on regulatory aspects to be considered in connection with ICOs on February 16 2018, there has been no comparable publication from the tax authorities as yet. The only official guidance that has been issued by certain local tax authorities deals with the reporting of crypto-currencies or tokens held by Swiss resident individual investors in their annual tax returns.

This article provides a brief summary of the status of discussions in terms of Swiss tax treatment of ICOs. The information is based on informal guidance provided by tax authority officials from public speaking engagements, as well as from our interaction with tax authorities in relation to ICOs.

Classification of tokens from a Swiss tax perspective

In its guidelines, FINMA categorises tokens into three types, while hybrid forms are also possible: asset tokens, payment tokens and utility tokens. Since ICOs commonly use this classification, we will also refer to the tokens in this way for the tax analysis that follows.

Swiss tax law has no specific rules for tokens; the classification therefore needs to be made under the rules applicable to traditional categories of capital raised by a

company, such as debt or equity. The classification is predominately based on an assessment of the economic function of the token, but can take into account certain formal aspects such as the legal form of the issuer (issuers today are mostly corporations; historically, foundations sometimes acted as issuers) or the accounting treatment of the ICO proceeds by the issuer.

Asset tokens

Asset tokens represent financial assets, which confer their holders a financial claim against the issuer. Such tokens can, depending on their features, be assimilated to equity certificates, debt instruments, or derivative instruments in the form of a contractual agreement between the issuer and the holder over an underlying asset. The criteria to be examined in view of a proper classification of the token under tax laws are the ones that are typical to each one of these categories. To the extent a token grants the investor participation rights (e.g. voting rights, profit participation, or a share in liquidation proceeds), it may be assimilated to an equity instrument. If a token confers its holder a claim against the issuer over a fixed principal and bears interest (or offers an issue discount), it may be assimilated to a debt instrument. Where none of the two aforementioned categories apply, but the token grants the investor a future payment linked to an underlying reference asset (e.g. the Earnings Before Interest & Taxes [EBIT] of the issuer, or a specific type of asset held or developed by the issuer), it may qualify as a derivative financial instrument. The tax impact for the issuer and the holder follows the tax rules that apply to the financial instrument with which the token is most closely assimilated; an equity-type token would thus follow the tax treatment of the issuance of an equity instrument, both for the issuer and the holder.

Payment tokens

Payment tokens can be used for value transfer, just like a currency. Payment tokens do not confer its holder any claim against the issuing company; therefore they cannot be assimilated to a security interest, and the ICO proceeds are likely to be income of the issuer, subject to corporate income tax. The issuance of pure payment tokens is a rare

event in the market, and there is not yet an established practice around ICOs of such tokens.

Utility tokens

Utility tokens provide their holders a right for digital access to an application or service. They are comparable to gift vouchers sold by digital companies. The issuing company realises an income from the ICO proceeds, which is generally taxable. The obligation of the issuer to provide a service to the token holders can require, however, that the issuer establishes a provision for the expected future expense for the development or delivery of that service. Since the utility token incorporates a service which is delivered by the issuer, the issuance of such tokens can be subject to value added tax.

Recommendations

By taking the above criteria into consideration, issuers can design tokens that have the tax features that are most suitable for themselves and the token holders under given facts and circumstances. As the Swiss tax practice around ICOs and tokens is still evolving, it is highly recommended that a planned ICO is reviewed from a tax perspective early in the process and tax rulings are applied for in advance of the ICO.

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