

Sources of information for foreign tax authorities: Group requests, AEOI, TIEA and spontaneous exchange of information

Executive Summary

In the past, foreign tax authorities could obtain information relating to a Swiss Bank account only with a request for administrative assistance for a clearly identified person and based on an initial suspicion of tax fraud, while Switzerland did not provide assistance for tax evasion.

With the adherence to the standard of Article 26 OECD Model Tax Convention (OECD-MTC) and the accession to the OECD Convention on Mutual Assistance, which provides for the exchange of information on request, the spontaneous exchange of information and the automatic exchange of information, the following new options are now available:

- Administrative assistance for tax evasion based on a group request due to the adoption of the OECD standard (Art. 26 OECD-MTC) and the OECD Administrative Assistance Convention
- AEOI based on the OECD Common Reporting Standards (CRS)
- Tax Information Exchange Agreement (TIEA)
- Spontaneous exchange of information

By 21.03.2016 Switzerland has signed 53 Double Tax Treaties (DTT) according to international standard and 10 Tax Information Exchange Agreements (TIEA). With the implementation of these new tools, account holders and beneficial owners (including trusts, foundations and their beneficiaries) of Swiss bank accounts have no alternative to tax compliance anymore. In addition to early planning of the AEOI's implementation, Financial Institutions should analyze the development of the customer base, including account closings, since 1.2.2013 with regard to tax compliance risks against the background of the concept of aiding and abetting of tax evasion followed in many countries, which are home to large numbers of Swiss Private Banking Clients.

Administrative assistance for tax evasion based on a group request

Previously, Switzerland granted administrative assistance, if the requesting country could demonstrate an initial suspicion of tax fraud (not tax evasion) for a clearly identified person. Since the full adherence to the OECD-Standard of Art. 26 in 2009, which also includes group requests since 2012, administrative assistance in tax matters can now be granted, if the following conditions are met:

- Switzerland and the requesting State have signed a DTT according to the current OECD standard. In this case, a retroactive effect since 1.2.2013 is possible. Currently this is the case with the majority of EU Member States, India, Canada, Mexico, Russia, South Korea and Japan. Alternatively, starting from 1.1.2017 the request for administrative assistance, with retroactive effect since 1.1.2014, can be based on the OECD administrative assistance convention
- A detailed description of the group of taxpayers and a clear and fact-based explanation for the relating initial suspicion of tax evasion

The Tax Administrative Assistance Act (TAAA) and the Tax Administrative Assistance Ordinance (TAAO) transpose these international standards and conventions into the Swiss Legal framework.

Group request of the Netherlands

On 23.7.2015 the tax authorities of the Netherlands asked the Swiss Federal Tax Administration (SFTA) for administrative assistance based on a group request relating to individuals, which in the period 1.2.2013 to 31.12.2014 owned one or more accounts at UBS, had a domicile address in the Netherlands and on the Bank's request, neither opted for the disclosing reporting under the EU Savings Tax Agreement nor proved their tax compliance. On 25.11.2015 the SFTA ruled against a person opposing the administrative assistance stating that it might be granted.

On 21.3.2016 the Swiss Administrative Court approved this complaint for the following reasons:

- The DTT of 26.2.2010 (with mutual agreement of 31.10.2011) between Switzerland and the Netherlands, in force since 9.11.2011, explicitly states that administrative assistance might be granted only for clearly identified persons
- This clear wording prevents an interpretation based on the OECD Commentary of 17 July 2012 on the admissibility group requests under the Article 26 OECD-MTC
- The concept of group request contained in the subsequent Tax Administrative Assistance Act (TAAA) of 28.9.2012 cannot be applied, because the conditions for the application of the so-called "Schubert - practice" are not met in the given case

The following remarks have to be considered regarding this judgement:

- The final judgment by the Swiss Federal Court is pending
- Had the DTT between Switzerland and the Netherlands come into force after the OECD Commentary of 17 July 2012 on the admissibility group requests under the Article 26 OECD-MTC, then the judgement might have been different
- Group requests will be permitted at the latest as of 1.1.2017 (with retroactive effect from 1.1.2014) based on the OECD Convention on mutual assistance. Therefore, the Netherlands could successfully submit the same request in January 2017

Other possible categories of persons subject of a group request

In addition to the taxpayer's group targeted by the Dutch tax authorities other categories of persons could be subject of a group request based on other features.

The following categories represent a starting point:

- Contracting Partner with retained correspondence, mail delivery via e- banking or postal delivery to an address outside the country of domicile of the contracting party or the beneficial owner
- Accounts closed with cash withdrawal
- Insurance Wrappers

By adding additional features (e.g. no consent to disclosing reporting under the EU Savings Tax Agreement, the account holder is a domiciliary company with a beneficial owner domiciled in the EU) to these categories there could be an indication for fiscal non-compliance. In the final chapter "Risk analysis of tax risks within the customer base" these features serve as a basis for the risk analysis.

Automatic exchange of information

The AEOI has been implemented by the OECD Common Reporting Standard (CRS). This set of rules recommends how financial and personal data of account owners should be reported by financial institutions to their respective national tax authorities. Accordingly, they are the basis for the bilateral treaties between adopting states, which in turn are transposed into national law by the respective treaty partners.

The AEOI provides for the information being transmitted between tax authorities analogue to the IGA1 system of FATCA. Consequently, the Bank has not to ask for the consent of the contracting partner as it was the case with the FATCA implementation in Switzerland based on an IGA2.

Some 50 countries have agreed as "early adopters" to implement the first reporting in 2017 (for the calendar year 2016), while Switzerland will be next in line in 2018 for the calendar year 2017.

Tax Information Exchange Agreement (TIEA)

A Tax information exchange agreement governs the exchange of information upon request of either party in tax matters. The tax information object of a TIEA can be related to individuals, companies or any other body of persons, corporations or any entity that is treated as a body corporate for tax purposes.

Art 5. para. 1 of the TIEA between Switzerland and Brazil states: "...Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party..."

Moreover, according to art. 5 para. 4 litt. b the competent authority has to provide upon request: *"the information regarding the legal and beneficial ownership of companies, partnerships, trusts, foundations and other persons, including ownership information on all such persons in an ownership chain, in accordance with the internationally agreed standard; in the case of trusts, information on settlors, trustees, protectors and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries..."*

Switzerland has so far concluded TIEAs with numerous offshore jurisdictions (Andorra, Greenland, Grenada, Guernsey, Isle of Man, Jersey, San Marino, Seychelles) and with Brazil. More agreements are planned.

Spontaneous exchange of information

In this case, the information is transmitted neither at the request of a foreign tax authority, nor based on an implemented AEOI, but rather if a country is in possession of information, of which it assumes another State could be interested in.

Article 7 para. 1 of the Convention on mutual administrative assistance in tax matters mentions five cases for which *"A Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances:*

- a) *the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party;*
- b) *a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party;*
- c) *business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both;*
- d) *a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;*
- e) *information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party."*

Risk analysis of tax risks within the customer base

Financial Institutions should analyze the development of the customer base, including closed accounts, since 1.2.2013 with regard to tax compliance risks against the background of the concept of aiding and abetting of tax evasion known in many home countries of large numbers of Swiss Private Banking Clients. In addition, taxpayers providing information regarding its Bank's business practices can expect milder conditions at the end of a tax proceeding for tax fraud and/or tax offenses.

No physical mail delivery

Based on accounts with retained correspondence, mail delivery via e-banking or postal delivery to an address outside the country of domicile of the contracting party or the beneficial owner and the additional features described below, the following categories should be numerically assessed:

- individuals which have not consented to disclosing reporting under the EU Savings Tax Agreement
- the account holder is a domiciliary company with a beneficial owner domiciled in the EU
- accounts which have consented to disclosing reporting under the EU Savings Tax Agreement, but for which – in absence of any interest income – a disclosing report has never occurred
- Account closed with a transfer in favour of an account at another Swiss Bank or in a Bank in an offshore-jurisdiction

Accounts closed with cash withdrawal

How many accounts of individuals, domiciliary companies, trusts, foundations or insurance wrappers with account holders and beneficial owners domiciled abroad (especially in the EU) have formally or in substance been closed by cash withdrawal? Banks where this happened in large numbers after 1.2.2013 (and even more after 1.1.2014) could be particularly exposed.

Insurance Wrapper

For insurance wrappers, apart from the already mentioned account closing with cash withdrawal, every form of account closing, which is not executed by a transfer in favor of the contracting partner, that is the life insurance company, should be analyzed. Examples for a Luxemburg life insurance policy with a separately managed account in Switzerland:

- For the liquidation and payout of the policy, the Luxembourg life insurance company requires from the policy holder a tax compliance proof, which he can't deliver. So he asks the Bank for alternatives. Thus, an individual account in his name is opened, on which the payout transfer for the Police's liquidation, upon agreement with the insurance company, is credited. Afterwards this account is closed.
- Same case, however, the account of the life insurance policy is closed by issuing a crossed check
- Same case, however, the account of the life insurance policy is closed by a transfer in favor of a domiciliary company

If you have more questions regarding the implementation of the AEOI, please contact the following persons:

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