**International Administrative Assistance in Tax Matters – Group Requests**

by

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Three types of request for administrative assistance in tax matters can be discerned – individual requests concerning a specific person, multiple requests concerning several identified or identifiable persons and group requests through which a state asks for information about several persons who have adopted an identical pattern of behaviour and who are identifiable using specific data. It should be noted that multiple requests – which are also known as collective requests – are effectively just a number of individual requests grouped together and are therefore subject to the same provisions.

As far as administrative assistance in Switzerland is concerned, it should be noted that the Federal Council decided on Friday 13 (!) March 2009 to withdraw its reservation to the exchange of information in accordance with article 26 of the OECD’s model tax convention on income and on capital (OECD model convention). At the time, this meant that the Swiss government would, in the future, process individual requests from states with which it had concluded a double taxation treaty providing for this type of administrative assistance. Subsequently – without amending article 26 of the OECD’s model convention – the authors of the commentary of this model convention stipulated on 17 July 2012 that administrative assistance could concern one single taxpayer, identified by their name or other means, as well as several taxpayers identified by their names or other means. It might be said – to use a colloquial turn of phrase – that the OECD introduced group administrative assistance *through the back door* when amending the commentary.

This amendment was made when the legislative process to implement the aforementioned Federal Council decision was in progress in Switzerland. Parliament adopted the Federal Act on International Administrative Assistance on Tax Matters (TAAA) on 28 September 2012, which aims to govern the implementation of requests for information. While not excluding them, the TAAA did not contain any specific provisions on group requests. Only having just entered into force on 1 February 2013, the act was subject to an amendment which was adopted by Parliament on 21 March 2014 and entered into force on 1 August of the same year. The new provisions set out, in particular, the procedure to be followed as part of a group request and specify the right to information of the persons concerned. They also assign competence to the Federal Council for determining the content required for such requests which it did in the Ordinance of 23 November 2016 on International Administrative Assistance in Tax Matters. Article 3 of this ordinance stipulates that – providing there are no exemption clauses in the applicable double taxation treaty – the group requests may be admitted for information about matters from 1 February 2013.

The TAAA and its related ordinance are important in understanding how the administrative assistance procedure is carried out. It is nevertheless crucial to bear in mind that the most important legal text to take into account is the applicable double taxation treaty. The Federal Supreme Court stated in a judgement on 12 September 2016 that the TAAA “governs the procedure and execution of administrative assistance. Its material definitions are only of interest to the extent that they explain the provisions of the applicable international treaties. The provisions of the TAAA on group requests are therefore only taken into consideration provided the applicable treaty itself permits group requests. No inference can be made from the TAAA that it constitutes an independent legal basis for autonomous administrative assistance.” In other words, unless permitted by the applicable double taxation treaty in the case concerned, a request for assistance in tax matters cannot be based solely on the provisions of the TAAA and its related ordinance. Below this article, we briefly outline the provisions governing group requests set out in the TAAA and the ordinance. However, it should be underlined that in specific cases reference must be expressly made to the double taxation treaty concluded between Switzerland and the requesting state.

Article 3 para. 1 TAAA sets out what requesting states are expected to include in their request. The following is required in particular – a detailed description of the group who are the subject of the request and the facts and circumstances on which the request is based; a summary of the applicable tax law and a clear and substantiated justification of the assumption that the taxpayers in the group targeted by the request have failed to comply with it; an explanation indicating how the information requested will help to determine whether the conduct of the taxpayers in the group complies with the law.

Without going into the details of the procedure, it should be noted that, according to article 14a TAAA, the holder of the information must – at the request of the Federal Tax Administration (FTA) – identify the persons concerned by a request for information. The FTA informs the persons with the right to appeal who are domiciled in Switzerland or who have their registered office there, requests the holder of the information to inform those domiciled abroad or who have their registered office there and requests them to designate a representative in Switzerland authorized to receive notifications. Finally, it informs the persons concerned by the group request through anonymous publication in the Federal Gazette. The period permitted for indicating an address, in particular that of a representative in Switzerland authorized to receive notifications, is 20 days from the day after publication in the Federal Gazette.

The Federal Supreme Court recently pronounced judgement on a request for group administrative assistance submitted by the Netherlands concerning the holders of accounts opened with UBS (the aforementioned decree of 12 September 2016). In short, the requesting state asked for information about persons who, during the period from 1 February 2013 to 31 December 2014, held one or more accounts with UBS while being domiciled in the Netherlands according to the bank’s internal documentation and did not provide sufficient proof of their tax compliance despite a letter from the bank requesting such proof. The federal judges considered whether the request constituted a fishing expedition and whether the applicable double taxation treaty authorized group requests for administrative assistance without indicating names.

With regard to group requests, the qualification of the conduct permitting the circle of persons concerned to be defined is extremely important. The boundary between an admissible group request and an inadmissible fishing expedition is sometimes tenuous. To determine this matter, the Federal Supreme Court deemed that reference had to be made to the commentary of the OECD’s model convention. One of the examples of prohibited searches for evidence mentioned in the commentary is very similar to the Dutch case, the difference being that the request made by the Netherlands contained some additional elements of identification. The Swiss Supreme Court therefore admitted the request while acknowledging that it was a borderline case.

Upon reading the double taxation treaty between Switzerland and the Netherlands and its protocol, one might have concluded that the administrative assistance could not be granted if the requesting state does not have the name of the account holders which was the verdict reached by the lower court. The Supreme Court interpreted the treaty much more broadly and concluded that the indication of the names was not necessary.

This decision suggests the Supreme Court will adopt a relatively liberal approach towards granting group administrative assistance.

In conclusion, persons domiciled abroad who have not yet regularized their undeclared assets in Switzerland and who did not close their accounts by 1 February 2013 (or before depending on the applicable treaty) should not underestimate the possibility of the information concerning their bank accounts being sent to the state where they are domiciled as part of a group request even if they think they have been very careful and are not at risk of being subject to an individual request for administrative assistance.