**International administrative assistance on tax matters**

by

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Since the Swiss Federal Council’s decision of 13 March 2009 to withdraw the reservation against the exchange of information in accordance with article 26 of the OECD Model Tax Convention on Income and Capital (OECD Model Convention), the executive and legislative federal authorities have been heavily engaged in the negotiation and adoption of international agreements and the drawing-up of domestic legal provisions to govern this field of law. The federal judicial authorities have produced an extensive body of jurisprudence in this area. On the eve of the first automatic exchange of information on financial accounts, it is worth looking at the latest developments in terms of legislation and jurisprudence concerning international administrative assistance on tax matters.

**Swiss national law**

The Federal Act of 28 September 2012 on International Administrative Assistance on Tax Matters (TAAA) entered into force on 1 February 2013. It aims to govern the execution of the administrative assistance provided by the Swiss authorities. On 17 July 2012, the authors of the commentary on the OECD Model Convention specified that administrative assistance could also concern several taxpayers identified by their names or any other means. Having only just entered into force on 1 February 2013, the TAAA was amended to include the option of making group requests which are requests concerning an indeterminate number of persons who have adopted an identical pattern of behaviour and who are identifiable by specific data. This amendment entered into force on 1 August 2014.

In its dispatch of 10 June 2016, the Federal Council submitted a new amendment of the TAAA to Parliament seeking to relax Swiss practice with regard to requests for assistance based on stolen data. The approach to requests based on stolen data is governed by art. 7 (c) TAAA which stipulates that a request violating the principle of good faith – in particular if it is based on information obtained by acts punishable under Swiss law – should be rejected. In its dispatch, the Federal Council proposed only not proceeding in cases where the requesting state had actively sought to acquire the stolen data. On 26 October 2016, the National Council’s Economic Affairs and Taxation Committee decided that the draft amendment should be incorporated into a Federal Council dispatch on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). The legal bases of administrative assistance and their implementation underwent a peer review, carried out by the Global Forum, which issued recommendations published in a report on 26 June 2016. The preliminary consultation procedure concerning the draft law on the implementation of these recommendations has just been completed. In the dispatch which will be submitted to Parliament shortly, the amendment to the TAAA concerning stolen data will be identical to that proposed in the dispatch of 10 June 2016.

It should be noted that the TAAA is not an independent legal basis for granting administrative assistance autonomously. Such assistance is only possible if provided for in an international agreement which constitutes the legal basis required for the exchange of information and defines the conditions for it.

**International agreements**

In parallel to the establishment of provisions under national law, various international agreements aimed at avoiding double taxation (DTAs) have been amended or newly concluded to incorporate the required provisions on the implementation of the exchange of information in accordance with the OECD Model Convention.

In addition to the DTAs, Switzerland has signed and ratified two multilateral treaties enabling the exchange of information on request. The agreement of 26 October 2004 between the Swiss Confederation and the European Union on the automatic exchange of financial account information to improve international tax compliance (CH-EU Agreement), on one hand, and the Convention on Mutual Administrative Assistance in Tax Matters of the Council of Europe and the OECD of 25 January 1988 (CE-OECD Convention) on the other. This means that the vast majority of EU Member States have three distinct bases for addressing a request for administrative assistance to Switzerland. These three instruments – the CH-EU Agreement, the CE-OECD Convention and the new DTAs – are equivalent in principle as they are all based on article 26 of the OECD Model Convention. However, there may be differences in terms of their temporal applicability. The requests based on the CH-EU Agreement can go back to 1 January 2017, whereas those based on the CE-OECD Convention can only cover periods of taxation starting from 1 January 2018, for requests addressed to Switzerland. The CE-OECD Convention nevertheless provides for a retroactive effect in two instances. Firstly, if two states provide for this between themselves in a specific agreement and, secondly, if the tax matter involves an intentional act liable for prosecution under criminal law in the requesting state. Making use of the opportunity provided for by this convention, Switzerland has issued several reservations. In particular, it refuses to provide any assistance on tax debt recovery or the service of documents. It has also restricted the retroactive effect in cases of intentional criminal acts to 1 January 2014, at the earliest. The temporal applicability of the DTAs differs depending on the time of their signature, ratification or entry into force in particular.

**Recent jurisprudence**

The courts have had the opportunity to rule on a number of points. The Federal Supreme Court (FSC) has issued two leading decisions concerning requests based on stolen data. In the first which concerned a French request based on lists obtained by employees of UBS France (FSC decision 143 II 202), it indicated that “acts punishable under Swiss law” did not just mean the violation of a Swiss criminal law but also the fact that this violation comes under the jurisdiction of the Swiss criminal authorities. In other words, the offence which enabled the data on which the request is based to be obtained must be liable for criminal prosecution in Switzerland. In the decision concerned, the federal judges deemed that the theft was not liable for prosecution in Switzerland as it had been committed abroad and therefore approved the provision of assistance. In a second decision concerning the “Falciani” affair (FSC decision 143 II 224), the FSC rejected assistance as it deemed that not only had the information on which the request was based comes from acts liable for prosecution under Swiss law but also that the French state had not acted in good faith as it had deliberately decided on a unilateral basis not to use this “Falciani” data to obtain assistance from Switzerland.

In a recent decision, the Federal Administrative Court (FAC decision A-1488-2018) rejected a request for assistance from France. This concerned over 45,000 UBS bank accounts. Based on a recent decision by the Federal Supreme Court on a Norwegian request for assistance (FSC decision 143 II 628), the judges ruled that while it was not a group request, the relevant requirements had to be met as the request was only based on lists of account numbers or internal personal numbers of the bank. Among these requirements, it was deemed that the French authorities had not sufficiently specified the reasons giving rise to suspicion that the persons concerned had not met their tax liability in France. In particular, the FAC deemed that simply holding a bank account in Switzerland did not provide sufficient grounds for suspecting non-compliance on tax matters. This decision is currently the subject of an appeal to the Federal Supreme Court by the Federal Tax Administration (FTA).

In general terms, legal practitioners have observed that the FAC has often adopted a position favourable to the person concerned while the FSC generally adopts the position of the FTA, usually permitting requests for assistance.

Some experts are predicting that administrative assistance on request will become obsolete once the first automatic exchange of information takes place in September 2018. It will be interesting to see whether this turns out to be the case or whether, on the contrary, the information received will only raise new questions resulting in more requests to obtain answers.