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Swiss administrative assistance in tax matters increasingly affecting companies

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Swiss administrative assistance in tax matters increasingly affecting companies

Peter von Burg and **Rolf Wüthrich** of **burckhardt** discuss the administrative assistance procedure in tax matters, which may concern companies with a group-related or a contractual link to Switzerland.

Switzerland may provide administrative assistance in tax matters based on a variety of legal provisions. This article focuses on administrative assistance at the request of an applicant state, which is usually based on a double taxation agreement (DTA) between Switzerland and the requesting state. The spontaneous and automatic exchange of information will not be addressed in this article.

By requesting administrative assistance in tax matters, the requesting state can obtain information from the other state that could be relevant for the administration or enforcement of the requesting state's domestic laws concerning the taxation of an individual or a legal entity as covered by a DTA.

Administrative assistance in tax matters is an important instrument for obtaining information that is located outside the national borders of a jurisdiction and to which access would otherwise remain impossible due to state sovereignty.

Administrative assistance has also become increasingly important for the taxation of companies. Especially between group companies, the pricing for intra-group trades or services must be set at arm's length. In such cases, important information can be obtained by requesting administrative assistance from another state.

Evolution of the exchange of information

After initial implementation of the exchange of information provisions, holders of undeclared bank accounts were mainly the focus of the administrative assistance procedures. However, over the past few years, more and more information requests have been filed by foreign authorities to obtain information from (related or unrelated) Swiss counterparties (information holders) of non-Swiss corporate taxpayers (persons concerned) for transfer pricing audits and profit adjustments for the persons concerned.

In such a situation, even if the information holder is a Swiss taxpayer and the main tax procedure will take place and must be resolved in the residence country of the person concerned, it is advisable to follow the Swiss exchange of information procedure. This involves actively participating in the procedure to verify that the information exchanged is not in contradiction with the conditions of the applicable tax treaty and to obtain, as an extension of the constitutional right to inspect the file, the information to be exchanged.

Switzerland has concluded about 100 DTAs. The majority of Swiss DTAs follow the OECD Model Tax Convention on Income and on Capital. In any case, the respective agreement must always be considered. In general, the model agreement includes, in particular, the following provision: “Information as is foreseeably relevant for carrying out the provisions of DTA shall be exchanged, insofar as the taxation thereunder is not contrary to the DTA. All information received must be kept confidential and may only be used in accordance with the request and agreement. In particular, information need not be disclosed if it would disclose a commercial, industrial, trade or professional secret or a business proceeding, or if its disclosure would be contrary to *ordre public*.”

The procedure regarding administrative assistance in tax matters was implemented in domestic law by the Federal Act on International Administrative Assistance in Tax Matters of September 28 2012, which entered into force on February 1 2013. Due to international developments, this law has already been revised several times, and further adjustments may be expected.

Procedure for administrative assistance in tax matters

A contracting state may request Switzerland to transmit information regarding a person, be it an individual or a legal entity. Information requests must be made in writing in one of the official Swiss languages or in English and include the information required by the applicable agreement. If the applicable agreement does not contain provisions on the content of a request, the request must contain, for instance:

- The identity of the person concerned (which identification may also be made by means other than name and address);
- A description of the information requested; and
- The tax purpose.

The requesting state is not entitled to inspect files or be present during the ensuing proceedings in Switzerland.

Role of the Swiss Federal Tax Administration

Since the Swiss Federal Tax Administration (FTA) is responsible for all administrative assistance in tax matter requests, it carries out a preliminary examination to determine whether the request is admissible.

The FTA requires the holder of the information to submit the requested information, to the extent available, to the

administration. Typically, the holder of the information is a Swiss bank, a cantonal tax authority or a Swiss company.

Swiss banks must provide the information to the FTA and cannot plead banking secrecy. Swiss lawyers may, within certain limits, refuse to provide information on the ground of legal professional privilege. As a general rule, the processing of administrative assistance requests by the FTA does not incur any costs for the person concerned or the information holder.

The FTA requests the information holder (for example, a bank) to inform the person concerned that administrative assistance proceedings are in progress. In the same notice, the non-Swiss person concerned is requested to appoint a Swiss representative.

If the person concerned cannot be reached, the FTA will provide notification by publication in the Official Gazette. It will request the person concerned to designate a representative authorised to receive notification and will set a deadline of 10 days for this purpose. On the other side, the costs involved for an information holder will not be reimbursed by the FTA.

Once informed about the information request, the person concerned, represented by the Swiss representative, should request full access to the file (right to inspect the file) and carefully examine the administrative assistance request and the information to be exchanged. It is the practice of the FTA to grant the right to inspect the file only once the information holder has transmitted the requested information to the FTA.

Given that a large quantity of data/information is often involved, the FTA sends to the person concerned a password-protected USB stick with the information gathered in the file. At the same time, the FTA normally sends the person concerned and the information holder a draft of the answer to the requesting state. Within a deadline of normally 10 days, the person concerned and the information holder can take a position on the draft answer and submit modification proposals. This procedural step is an extension of the constitutional right to be heard, which must be granted to the person concerned and the information holder.

The FTA reviews and considers the modification proposals received and decides whether the draft answers should be modified. The person concerned and/or the information holder still often requests at this stage not to exchange any information with the requesting state. In such a case, the FTA also decides whether information shall be exchanged.

If the FTA concludes that no information shall be exchanged, it informs the information holder, the person concerned, and the requesting state accordingly and closes the file. If the FTA concludes that the conditions for administrative assistance are met, it sends to the person concerned and the information holder the final draft answer to the requesting state.

Response to the FTA

The person concerned and the information holder may:

- Accept the draft answer and sign a declaration of consent to exchange the information (simplified procedure);
- Disagree with the draft answer; or
- Simply not react to the notification by the FTA.

In the latter two situations, the FTA will issue a decision, against which an objection can be filed (ordinary procedure):

- Simplified procedure – if the persons concerned and/or the information holder agree to the information exchange, a declaration of consent is signed by the respective party. Once consent has been given, it is irrevocable, and for the party giving the consent, the procedure is finished. The administrative assistance procedure is closed in the so-called simplified procedure without issuing a decision by the FTA. If all the involved parties agree to the exchange by signing a declaration of consent, then the information will be exchanged with the requesting state. If only one party (for example, the person concerned) but not the other party (for example, the information holder) agrees to the exchange of information, then the procedure is closed in the simplified procedure only for the consenting party. For the non-consenting party, the procedure is continued in an ordinary procedure.
- Ordinary procedure – if the person concerned or the information holder disagrees with the exchange of information or does not react to the notification of the FTA, then the FTA will issue a final decision defining the information to be exchanged. The recipient of the final decision (the person concerned and/or the information holder) has 30 days to file an objection with the Federal Administrative Court.

If the appeal is rejected by the Federal Administrative Court, the person concerned and/or the information holder has 10 days to file an appeal with the Federal Supreme Court. The deadline for appeals to the courts cannot be extended and the Federal Supreme Court will only examine an appeal if a legal question of principle is questioned or if it is a particularly important case for other reasons.

Information to be exchanged

Only information that is foreseeably relevant to the requesting state shall be exchanged. The request will not be considered if:

- It is considered a fishing expedition or if information is requested which is not covered by the administrative assistance provisions of the applicable DTA;
- It violates the principle of good faith, in particular; or
- It is based on information obtained through a criminal offence under Swiss law.



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After completing his commercial training, Peter studied business law at the Zurich University of Applied Sciences and graduated with a master's degree in law at the University of Lucerne in 2012. He completed internships at a large auditing firm, at a renowned commercial law firm and at a civil court, and was admitted to the bar in 2014.

It is the FTA's understanding that its role in assessing the foreseeable relevance of requested information shall be limited to verifying whether the information and documents requested by the foreign authorities are related to the facts presented in the request and whether they can be used in the foreign proceedings.

According to case law, Switzerland may only refuse to provide information on the ground that the requested information is not foreseeably relevant if a connection between the requested information and the investigation conducted in the requesting state appears unlikely.

Moreover, it is at the discretion of the requesting authority to decide what information it needs to resolve its questions or what evidence is required to substantiate the concrete suspicion.

Switzerland is generally not in a position to judge what information is foreseeably relevant. In so far as the authorities of the requesting state are obliged to describe the relevant facts of a case in the information request, the foreign authorities cannot be expected to do so without any gaps or contradictions. This would not be compatible with the purpose of administrative assistance, as information and documents located in the requested state that are not yet



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known to the requesting authorities shall help to clarify issues that were previously unclear. In practice, the concept of foreseeable relevance does not constitute a particularly high hurdle for a request for administrative assistance.

In accordance with the principle of good faith applicable under international law, the facts described by the foreign authorities in the request for administrative assistance are decisive for the FTA. It is obliged to provide a description of the facts in the request to the extent that these cannot be immediately invalidated due to obvious errors, omissions or contradictions.

Finally, if a question arises in the application of the internal law of the requesting state, such as the statute of limitations of a tax debt, this question must be answered by the authorities of the requesting state. Switzerland does not have the necessary knowledge to verify the correctness of the procedural and material rules of the requesting state. It is up to the taxpayers to assert their procedural remedies before the judicial authorities of the requesting state.

If information to be exchanged contains information from third parties (individuals or companies) that is foreseeably not relevant, then such information will be redacted ex officio. The same applies to information that is not foreseeably relevant in relation to a tax audit conducted by the requesting state and constitutes business secrets of the person involved.

Information for transfer pricing audits

With regard to transfer pricing audits, the Federal Supreme Court has confirmed that, generally, all information that a contracting state requires for a tax assessment of its taxpayers may be relevant.

Furthermore, a request for administrative assistance may also be made by a contracting state to obtain from third parties information on the contractual relationships of a person. For the purpose of domestic tax law, such information may be relevant for the verification of a transfer price agreed between group companies. For example, information that is necessary to verify a transfer price agreed between group companies or service relationships agreed between independent third parties may be essential for the implementation of domestic tax law.

The practice of the FTA has changed in such a way that, as a matter of principle, the administration agrees to the transmission of a copy of an administrative document (for example, a ruling, tax returns, or a tax assessment) with redaction of all information which is likely not foreseeably relevant, provided that the requesting authority sufficiently demonstrates the relevance of the receipt of a copy of such document.

In connection with a request for administrative assistance to verify the economic reality of a Swiss company, the Federal Supreme Court recognised that information on the company's operations, number of employees and premises was likely to be relevant. In another case, it reached the same conclusion with regard to the names and addresses of the employees of a Swiss company and the names of the clients, since this information related to transfer prices and thus enabled the control of the services between the Swiss and a French company.

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations can also serve as an interpretation aid for the review and control of transfer prices agreed between group companies.

With regard to transfer pricing, the Federal Supreme Court expressly states that information on affiliated companies – such as, in particular, the profits of the individual group companies – may prove relevant to verify profit shifts within a group, which, in turn, may affect the group's transfer pricing policy. According to the Federal Supreme Court, this does not mean that it is unlikely that a connection between this information and the asserted tax matter can be established. Rather, this information is likely to be relevant for the transfer pricing test.

Furthermore, the Federal Supreme Court states that balance sheets, information on annual results, information on existing permanent establishments and their international profit or loss allocation, permanent establishment profit allocations, income statements and tax information of the companies must be provided to the requesting authority.

Information of persons not directly concerned

The transmission of information of persons who are not persons concerned is not permitted if this information is not foreseeably relevant for the assessment of the tax situation of the person concerned or if legitimate interests of persons who are not persons concerned predominate over the interest of the requesting authority in the transmission of the information.

The law only allows the names of uninvolved third parties to be passed on if they are likely to be relevant and if their provision is appropriate, so that their redaction would make the request for administrative assistance meaningless. An example of persons who are not involved and whose names

should not be disclosed is bank employees whose names are included in banking documentation and who have nothing to do with the tax matter for which the request is made, or employees of the tax administration and lawyers obtaining a tax ruling.

The person concerned or the information holder may request the redaction of names that appear in the documents. In practice, the FTA is reluctant to approve such requests. However, persons who have nothing to do with the facts described in the request and whose names appear purely by chance in the documents to be forwarded should be redacted.