

Tax News

Movement in the Tax Dispute and Relocation to Switzerland

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Dear Reader,

In this issue of Tax News, we would like to bring to your attention the latest trends and legislative changes in tax issues in Switzerland and the international community. Furthermore, we will throw the spotlight on the issue of "relocation", which poses considerable challenges for many enterprises, not only because of the tax aspects.

In our article, "Proposals by Switzerland to settle the dispute with the EU about taxation of holding companies", we will be looking at the attempt by Switzerland's Federal Council to once and for all settle the ongoing conflict with the EU in relation to certain tax regulations.

The relocation of an enterprise and its employees from one country to another is a complex, multi-disciplinary process. To protect companies from unpleasant surprises in terms of risk and costs, and to prevent the undesired loss of employees, various personnel related issues must be clearly identified in advance and taken into account.

You can read more about this and other topics in this issue of Tax News. I hope you enjoy reading this stimulating issue.



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The completion of VAT returns as of 1 January 2010

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One of the main goals of the reform of the Swiss Value Added Tax Law (VATL) is to increase legal certainty.

The amount of VAT due, for a given calendar year or business year should be defined easily. In order to achieve this, the tax claim will in future be determined annually. Under the current law the tax claim is established on a quarterly (or monthly) basis and no final taxation intervenes even if an official VAT audit is performed by the Federal Tax Administration (FTA). In practice, companies welcome this reinforcement of legal certainty. However, they also need to consider that the implementation of this new rule requires the modification of internal procedures concerning the establishment of VAT returns and turnover reconciliations and the filing of the supporting documentation which needs to be kept by the taxable person.

New definition of tax claim

Under the new Swiss VATL, the tax claim is established as the difference between output VAT on supplies performed within Swiss territory (increased by self-assessed VAT on services purchased from abroad and import VAT whose payment has been deferred) and input VAT. The tax claim will be established on an annual basis, the tax period that may refer either to the calendar year or to the business year. The amounts reflected in VAT returns (monthly, quarterly or biannually) will not be considered as finally determined but as a provisional calculation of the VAT due.

Establishment of the tax claim

The monthly, quarterly or biannually declaration must also in future be correct and in principle complete. VAT registered persons may however amend any mistake before the finalization of the tax claim without any adverse consequences (late payment interest, prosecutions). This is no longer the case once the tax claim has been finalized. The taxable persons are allowed - but also required - to correct any mistake before the "finalization" takes place.

VAT registered persons have to determine the final tax claim by means of the so called "finalization" at the end of each tax period. They have the right but also the obligation to amend any mistake incurred in the VAT returns within 180 days from the end of the business year. The wording of the new VATL refers to "mistakes which have been noted during the establishment of the financial statements". In order to avoid late payment interests and the risk of prosecution, VAT registered persons should - in their own interest - reconcile the VAT returns of a given tax period with the financial statements. The role of the turnover reconciliation will thus be even more important than under the current VATL. A proper documentation is required in order to prove that the legal requirements in connection with the finalization were followed.

New requirements in connection with VAT returns and supporting documentation

The Federal Tax Administration (FTA) has the right and the obligation to verify the accuracy of the calculation of the VAT declared by the VAT registered person. For this verification, the FTA bases its considerations on the books of the VAT registered person. However, the FTA has also the right to ask for other supporting documentation which may be relevant for the establishment of the tax claim. These supporting documents are required, for example, in order to determine the turnover exempt without credit for which the taxable person has opted for taxation since under the new VATL it is no longer required to fill in a option form with the FTA. Another area where supporting documents are required is the fictive deduction of input VAT introduced by the new Swiss VATL.

In the ordinance concerning the new VATL - currently available in draft format - the Federal Council specifies which "figures" need to be identified and documented in the VAT return. Even if it has to be expected that more information will have to be disclosed than under the current law, not every data

relevant for VAT purposes will be necessarily reflected in the VAT returns. However, the taxable person needs to keep this information available in order to be able to prove that the VAT due has been computed correctly whenever requested by the FTA. The ordinance clarifies which kind of supporting documentation the FTA is allowed to request from VAT registered persons. Even if it should not be a big issue to make the respective information and documentation available, it has to be considered that these new prescriptions may entail further efforts for taxable persons implementing the reform in their ERP and archiving systems.

VAT registered persons will face the challenge to adapt their VAT systems in a way allowing to gather the figures needed for the correct computation of the VAT due and the accurate supporting documentation at the lowest possible cost and expenditure of time. In order to meet this goal it is strongly recommended to start the implementation process as soon as possible in order to ensure that the new internal procedures are operational when the first VAT return has to be filed according to the new VATL and for the determination of the definitive tax claim in 2011.

Germany

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Two developments in German tax law are of interest to Swiss readers: The Citizen Relief Act contains tax relief measures for companies in Germany – and for Swiss companies. The German Act to Combat Tax Evasion does not currently affect Switzerland.

Citizen Relief Act of July 16, 2009, BGBl (Federal Law Gazette). I 2009, pp. 1959ff.

The Citizen Relief Act (Bürgerentlastungsgesetz) contains relief measures for companies, the application of which is generally limited to the years 2008 and 2009. In concrete terms, the following measures are implemented:

- ▶ For the relief of medium-sized companies in particular, the **interest barrier**, which restricts the deductibility of interest on debt as operating expenses, **is relaxed**. The tax threshold for the interest barrier is raised from EUR 1 to 3 million. The interest barrier is therefore not taken into account if interest expenses, which exceed interest income, amount to less than EUR 3 million.
- ▶ Currently, loss carryovers of German companies can be lost in restructurings – for instance in Switzerland. For 2008 until the end of 2009, the extinguishment of loss carryovers is to be excluded according to a **restructuring clause** when shareholders change, if investors interested in restructuring wish to rescue the company.

Act to Combat Tax Evasion of July 29, 2009, BGBl (Federal Law Gazette). I 2009, pp. 2302ff.

The Act to Combat Tax Evasion primarily relates to business relationships between persons and companies in “non-cooperating jurisdictions” and authorizes the Federal government, amongst others, by means of a statutory ordinance, to regulate cooperation and burden of proof obligations if taxpayers maintain business relationships of this kind. The statutory ordinance is likely to still come into effect in 2009; the measures will be applicable as of 2010 in principle.

1. Countries covered: Business relationships with States, which have not agreed to a “broad” exchange of information clause¹ with Germany, will be sanctioned if these States do not provide a comparable scope of information, or if they are not prepared to provide appropriate information. The Federal Finance Ministry will publish “non-cooperating jurisdictions” in the Federal Tax Gazette (BStBl) with the approval of the highest fiscal authorities in the States, as well as in agreement with the Foreign Office and the Federal Ministry for Economy and Technology. However, states will only be included if, after having been requested to do so by diplomatic means, they are not prepared to enter into negotiation for the conclusion of a bilateral agreement for the implementation of an exchange of information clause according to the OECD standard, and if they have not implemented the OECD standard with Germany in other ways. Business relationships with **Switzerland** are thus only affected if Switzerland does not enter into the “broad” exchange of information clause with Germany, bilaterally or unilaterally, or if it is not prepared to enter into discussions for concluding a corresponding bilateral agreement. However, this is the case with the discussions entered into in August 2009, as these discussions target the inclusion of the OECD standard in a new DTA between Germany and Switzerland². The Act to Combat Tax Evasion and its ordinance, with its comprehensive catalog of measures, should therefore not currently

affect business relationships with Switzerland.

2. Catalog of Measures: As things stand at present, comprehensive measures are provided for, which concern business relationships with “non-cooperating jurisdictions”. The following applies among other things:

- ▶ **Operating expenses/advertising costs** can only be applied if certain cooperation and recording obligations have been fulfilled. These include the prompt recording of foreign business relationships with related persons (with other persons³ if the total of the consideration for services and supplies from the business relationship exceeds EUR 10,000 in the financial year) and the prompt recording of profit allocations between companies and establishments.
- ▶ If the taxpayer maintains **business relationships with banks** in a “non-cooperating jurisdiction”, or if there are any objectively identifiable points of reference for such, the taxpayer must assure the German finance authorities of the correctness/completeness of its disclosures by means of a statutory declaration and authorize the finance authorities to assert claims to any information rights on its behalf to the designated banks. If the taxpayer does not comply, it will be rebuttably assumed that taxable income exists/is higher than declared in the “non-cooperating jurisdictions”. The withholding tax/partial income procedure, if any, is excluded.
- ▶ The **tax exemptions on dividends** from shareholdings (Section 8b para. 1 Corporate Tax Act (KStG), or according to DTA requirements, will likewise be dependent on expanded cooperation/burden of proof obligations.
- ▶ Full or partial **relief from German tax deduction** (Section 50d para. 1, para. 2, Section 44a para. 9 Income Tax Act (EStG)) will – in addition to the German “Anti-Treaty Shopping Standard”⁴ only be granted if the company discloses the

¹ The “narrow” exchange of information clause permits the exchange of information for the execution of a DTA; the “broad” exchange of information clause permits the exchange of information for the execution of a DTA and national tax law. Art. 26 of the OECD Model Convention follows the principle of the “broad” exchange of information clause.

² NZZ of August 8, 2009.

³ Direct/indirect shareholders must also be recorded here (exceptions exist in the case of stock market trading)

⁴ See Jakob/Kubaile, IFF 2007, pp. 209ff.

names and residential addresses of natural persons which have direct/indirect shareholdings of more than 10%. The German finance authorities can request a certificate of residence.

- ▶ Taxpayers whose positive income from profits amounts to more than EUR 500,000 in a calendar year must fulfill special **retention obligations**. **Tax audits** are permitted.

The measures apply pressure on “non-cooperating jurisdictions” - but currently not on cooperative Switzerland.

People considerations in permanent group relocations to Switzerland

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A relocation of a business and its employees from one country to another is a complex and multidisciplinary change process. Many companies are experienced in moving individual employees (“expats”) from location a to b, but they struggle with dynamics of moving groups of people. Retaining a company’s key talent and avoiding business disruption is closely linked with the corporate objectives of the move. There are various people issues which need to be clearly identified and dealt with in advance to eliminate any surprises in risk and cost, and to avoid ultimate people failure.

Location analysis

As a first step company needs to decide which location to choose, especially in Switzerland where taxation and legal framework, availability of office space, housing and international schooling can vary significantly among cantons and communes. Therefore companies tend to have a whole catalogue of criteria that they check for the ideal HR location for their operations, which plays an important role in supplementing the business decision which is primarily driven by the corporate tax advantages.

Designing a relocation strategy and packages

Once a suitable location is identified, the HR project team starts designing its group relocation strategy and packages to incentivize the move in line with the company’s international HR strategy and the culture of the organization. Here it is important to find the right balance between long-term cost efficiency for the company and attractiveness to the employees and families. Consistent, equitable and competitive relocation packages and benefits can play a significant role

in gaining a maximum “pick-up” rate of the employees targeted for relocation. When evaluating your investment in people, consider both one-off and ongoing costs as well as severance, replacement and training costs for non movers. Loss of talent is one of the biggest business risks for any company, which may not only mean loss of revenue and intellectual capital but may also have associated direct costs relating to severance payments, recruitment and training of a new local hire. Employee replacement costs are estimated to be about two to three times that of an annual salary.

Individual tax, social security and legal implications

The tax and social security cost of relocation benefits is another crucial aspect that needs to be carefully planned in advance. Especially today, multinationals require more efficient ways of managing their global mobility in terms of cost pressures and pressure for better compliance and at the same time managing the continuing business need for relocating and sending employees around the globe.

The risks of operating a globally mobile workforce are multiplying, and so is the likelihood of those risks materializing as tax and immigration authorities around the globe cooperate to investigate any cases of non-compliance. Some of the key risks evolving from people relocations are around cost control, regulatory compliance, risk of prosecution, permanent establishment risk (as cross-border commuting gains popularity) and business reputation risk. On the one side companies need take measures to mitigate these risks and other side they can benefit from the various individual tax rulings available in

Switzerland if submitted and negotiated with the local tax authorities beforehand. Besides, the consequences and potentials gaps when departing from home country tax and social security schemes and entering into new plans in Switzerland have to be analyzed and explained to the employees.

Project timelines and coordination

The HR work-stream has a strong impact on business continuity as well as the timeline for relocation. For example, work councils in the home country may present additional legal requirements concerning the terms and conditions of the move and thereby cause delays in the project’s overall timeline. Also, the timely submission of international schooling applications is critical to relocate employees with families to Switzerland. For a smooth move, internal functional work-streams as well as third party service providers, i.e. compensation and cost of living providers, relocation agencies, shipping companies, recruitment agencies, training providers, insurance brokers, etc., all need to be well integrated within the project.

Communication plays a key role

Last but not least, for a successful group move wherein multiple business units, functions and individuals are affected, communication is key. During the initial project stages emphasis should be placed on ensuring confidentiality of your relocation plans to avoid any miscommunication and resistance to change. During the course of the project, the focus should be on delivering consistent and transparent messages to set realistic expectations and generate enthusiasm and a positive atmosphere around the move.

Revision of Industry Brochure (Branchenbroschüre) No.14 "Finance" ("Finanzbereich")

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It is indeed welcomed that the FTA (Swiss Federal Tax Administration) published a type of status quo of its administration practices in the area of finance with the revision of its Practice Notice on Industry Brochure (Branchenbroschüre) No. 14 "Finance" ("Finanzbereich") (BB14 2009) shortly before the expected coming into force of the new Value Added Tax Act. After all, no other industry has undergone as many changes, and as quickly, in its market environment and its products in the past as the finance industry. In BB14 2009, the FTA undertook numerous practice specifications and changes in procedure in order to do justice to these developments. BB14 2009 will come into effect on October 1, 2009. Changes in procedure, which have already occurred in the interim in individual areas, are designated as such in BB14 2009 (incl. the date of their coming into effect).

The most significant changes took place in the following four areas.

Due to the coming into force of the Collective Investment Schemes Act on January 1, 2007, the FTA also revised its administration procedures in this regard, in particular, because new legal forms of collective capital investments were permitted. The FTA already included this procedure in its draft of Industry Brochure No. 14, dated November 30, 2007. However, in BB14 2009, the FTA complied with a further key requirement of these pressure groups. Previously, the delegation of administrative and sales activities to agents required a direct representation relationship. As from October 1, 2009, indirect representation will be sufficient in order for the tax exemptions of Art. 18 (Point 19) (f) MWSTG (Swiss VAT Act) to be applicable.

As from October 1, 2009, the FTA will also fundamentally change its **administrative procedure for trusts**. Three types of trusts must now be differentiated between in the determination of the place of performance. The objective is to levy taxes at the domicile of the persons deriving a financial benefit from trust assets. In the case of a *revocable trust*, the settlor is regarded as the economic participant and thus as the beneficiary. In the case of an *irrevocable fixed interest trust*, or an *irrevocable discretionary trust*, the beneficiaries are primarily regarded as the economic participants and thus as the recipients of the benefits. If these and/or their domicile are unknown, or not credibly determinable in a discretionary trust, the place of performance is deemed to be the domicile of the trustee.

In the **cross-border deployment of employees within a group**, the FTA has, since January 1, 2008, no longer regarded these intra-group settlements as consideration for taxable services, but as a mere "reimbursement of costs" not subject to VAT. No fur-

ther surcharges are permitted to be included in the settlement besides the employee costs incurred, consisting of wages, social security levies and associated expenses. These earnings and expenses, therefore, do not represent sales or earnings from services subject to VAT. Consequently, this would also not affect the input tax deduction, which is potentially not guaranteed to its full extent in the application of the lump sum input tax for banks.

Even if merely designated as a procedural update and not as a change, the FTA appears to have granted taxpayers a greater room for maneuver in the **area of outsourcing** services exempt from VAT. Previously, the contracting entity of the actual service provision by the third party was not permitted to add even the slightest of its own services in the outsourcing of exempted services. Otherwise, the service components rendered by the third party would be regarded as taxable advance performances. According to the reformulation of its already applicable administration practice, "merely" an independent whole, which fulfills the specific and significant characteristics of a VAT-exempted service in the area of monetary and capital transactions, must now be outsourced. The revision of the administrative procedure is reminiscent of legal practice in the European Court of Justice.

Swiss proposals to terminate conflict with EU on holding taxation

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According to recent news reports, last week the EU Commission informed the competent diplomats and subject-matter experts of the EU Member States of Swiss proposals for a revision of domestic law regarding the taxation of Swiss holding, mixed and domiciliary companies. These proposals have been elaborated by the Swiss Federal Government in an attempt to bring the ongoing conflict with the EU on certain Swiss tax regimes finally to an end.

Even though not initiating formal negotiations, Switzerland's objective seems to be to arrive at a mutual understanding with the current EU Commission (i.e. before end of October). Switzerland wishes to obtain a clear signal that Brussels will be satisfied with the contemplated revision of domestic tax law.

Background

In December 2008, the Swiss Federal Government revealed its intention to propose a third corporate tax reform, which is envisaged to be debated in parliament's fall session. The reform would include:

- ▶ new withholding and stamp tax exemptions for group financing and investments;
- ▶ the repeal of one-time capital duty;
- ▶ delegate the decision to levy an annual capital tax to the cantons;
- ▶ further enhancements to the participation exemption system;
- ▶ the repeal of the domiciliary company ("mailbox company") status and targeted amendments to the special cantonal tax statuses for holding and mixed companies, which have been the subject of criticism by the EU for more than three years.

Switzerland has always maintained that the cantonal tax statuses do not violate the 1972 Swiss-EC Free Trade Agreement, but

has engaged into a discreet dialogue with the EU over the last several months to design amendments that would be acceptable to both parties. While the Swiss government has made no public pronouncements regarding the proposed measures since December 2008, some additional features of the Swiss proposal have become available from EU sources.

New Swiss proposals

As regards the status as "mixed company", the proposals seem to aim at a more harmonized taxation amongst the different Cantons. Currently, the foreign source income of mixed companies benefits from a partial exemption from cantonal/municipal corporate income taxes. The different cantonal laws apply different systems to reduce the tax burden on the foreign source income. In the future, federal guidelines would reportedly assure that in addition to the full federal corporate income tax, a certain minimum quota - reportedly 20% - of foreign source income would be subject to ordinary corporate income tax at the cantonal/municipal level. The impact of such a measure would depend on current cantonal rules.

It is also envisaged to provide for some limited cantonal taxation of interest and royalty income of holding companies and to ban any business/commercial activity for holding companies, whether exercised in Switzerland or abroad in any form. Swiss holding companies are currently prohibited from having commercial activities in Switzerland (only), but some administrative and group management activities are allowed as long as they are marginal in relation to the actual holding activities. In addition, Swiss holding companies are currently exempt from cantonal/municipal corporate income taxes, on the federal level, income from qualifying participations (dividend income, capital gains) benefits from the participation exemption. While generating income from interest and royalties would still be possible under the proposed changes, such income would be subject not only to the full federal corporate

income tax, but also to a minimum taxation on the level of cantonal/municipal corporate income taxes. Reportedly, a quota of 15% of such ancillary income would be taxable at cantonal/municipal level, thus leading to an effective tax burden on such income comparable to that of an mixed company. Income from qualifying participations would benefit from the participation exemption also on the cantonal/municipal level and, thus, effectively be exempt from taxation.

Outlook

Although further details are not yet public, the nature of the Swiss proposals clearly reflects the Swiss government's commitment to find a swift and viable solution for all parties being involved in this conflict. i.e. the EU, the Swiss Confederation, the Cantons and, last but not least, the affected taxpayers. Whether this balancing act will bring a palatable result for every involved party's taste remains to be seen, though Brussels has (exactly as in December 2008) welcomed the proposals as "a step in the right direction". In any case, the proposed amendments to the special cantonal tax statuses will be the subject of a lengthy political process within Switzerland. Tax payers currently enjoying one of the tax statuses mentioned should monitor the developments, but for the time being it appears to be premature to make a more in-depth analysis.

Draft of a new IFRS on Income Taxes Replacement of IAS 12 (Income Taxes)

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General

On March 31, 2009, the International Accounting Standards Board (IASB) published the long-awaited exposure draft of a new IFRS which is to replace the current IAS 12 (Income Taxes).

After the comment phase, which expired on July 31, 2009, the IASB will enter into further consultation. The new standard is expected to become effective on January 1, 2011 at the earliest.

The following depicts the changes in accounting for and disclosure of uncertain tax items in particular. Further significant changes are also briefly presented.

Accounting for and disclosing tax risks

The greatest challenges are expected to arise from the changes concerning the accounting for and disclosure of tax risks. IAS

12 provides no direct regulations for the recognition and measurement/recoverability of uncertain tax items. The exposure draft now provides concrete regulations in this regard.

Tax obligations which are uncertain must, in principle, always be included in the balance sheet. The probability of the tax authorities examining the underlying item need not be taken into account. Rather, it should be assumed that the tax authorities will examine, as well as have comprehensive knowledge of, the facts.

Uncertainties concerning the amount of the obligation and the probability of its occurrence are only taken into account in the context of measurement/recoverability. This is achieved using the weighted average amount of all possible scenarios of avai-

Other Changes

The exposure draft proposes further changes, particularly in the following areas:

Recognition of deferred tax assets

IAS 12 requires that deferred tax assets are only recognized to the amount of the expected realization (net approach). The exposure draft proposes a separation of recognition and measurement/recoverability. Irrecoverable amounts are shown by the creation of valuation allowances.

Definition of taxable value and temporary differences

The management's intentions regarding utilization are no longer relevant for determining the taxable value.

Deferred taxes on certain shareholdings (outside basis differences)

IAS 12 contained exemption provisions relating to deferred taxes on certain shareholdings. According to the new regulation, among other things, this exception only continues to apply to foreign subsidiaries and joint ventures.

Deferred taxes directly recognized in equity

According to the new regulation, backward tracing is no longer provided for. Rather, changes to deferred taxes previously recorded without affecting profit or loss must now in principle be recognized in profit or loss.

Classification

In future, deferred tax assets and liabilities must be recognized consistent with the maturity terms of the underlying assets and liabilities (current or non-current).

Disclosures in the notes

The exposure draft proposes various changes to the disclosures in the notes.

Final Remarks

It remains to be seen how the IASB will take the criticisms of the exposure draft from the comment phase into account. It can, however, be assumed that the new regulations, in particular those relating to uncertain tax items, will make system adjustments necessary in order to be able to process all the required information and data.

Example:

Company A pays 2% annually of its sales in the form of management fees to a group company. In 200X, this expense amounts to CHF 2 million, and the tax rate applied is 20%. The tax administration could (partly) question the deductibility of these management fees.

The following scenarios are taken into account for the calculation of the actual tax provisions:

in kCHF				
Recognized as deductible	Offset	Additional Taxes	Probability	Expected value
0	2'000	400	10%	40
1'000	1'000	200	20%	40
1'500	500	100	60%	60
2'000	0	0	10%	0
			100%	140

The company must thus post tax provisions for uncertain tax items of kCHF 140.

During the comment phase, the new approach (weighted average amount) was in part heavily criticized. In particular, there were calls for exemption regulations to be

introduced for situations where there is a single best estimate (single best estimate approach).

Exchange of Information in accordance with Art.26 of the OECD Model Convention

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1. Introduction

In 1998, the OECD passed a report concerning harmful tax practices in OECD states, as well as in so-called tax havens. In particular, the smaller states had, in the face of increasing capital mobility, improved their tax climates and thus also their competitiveness. The OECD report regarded lacking or inadequate administrative assistance as harmful.

2. Article 26 of the OECD Model Tax Convention (OECD MTC)

2.1 Delimitation of administrative assistance and judicial assistance

Art. 26 of the OECD MTC deals with the exchange of information, which forms part of administrative assistance. This is understood as including the support provided between administrative authorities (e.g. tax authorities). International judicial assistance, in contrast, means the collaboration between the judicial and/or law enforcement authorities in pending criminal proceedings.

2.2 Administrative assistance

Art. 26 of the OECD MTC contains rules for the broadest possible exchange of information. It is thus sandwiched between the conflicting interests of the petitioning state and the taxpayer's legitimate interests. This controversy characterizes the interpretation and application of the provision.

2.3 The narrow and broad exchange-of-information clauses

Swiss interpretation basically distinguishes between two types of information exchange. The narrow exchange of information clause provides for the exchange of information for the execution and implementation of the respective agreement. In contrast, the broad exchange of information clause also provides for the exchange of information in the enforcement of national law in cases of fraud or in connection with Swiss holding companies. Switzerland had added an exception to Art. 26 of the OECD MTC which

provides for extensive administrative assistance in tax matters. According to the previous Swiss view, only the narrow exchange of information clause applied to double taxation agreements.

In 2000, the OECD published a further report to improve access to bank information for tax purposes. Switzerland also endorsed this report and subsequently changed its tax agreement practice by going over to the broad exchange of information clause. This was the price that Switzerland had to pay to not appear on an OECD list of countries with harmful tax regimes.

2.4 Dual criminality in tax fraud "and similar offenses"

Administrative assistance is only considered, once the principle of dual criminality is fulfilled. This means that an offense committed abroad must constitute tax fraud if perpetrated in Switzerland. Additionally a direct connection between the criminal conduct and the administrative assistance is required. Each case must be tested as to whether this applies.

In connection with the UBS case, the Federal Administrative Court stated that - in the sense of Art. 26 Swiss-US double taxation agreement (DTA) - "tax fraud and the like" offenses are to be understood as offenses which have the same degree of wrongdoing. A similar offense could also be the ongoing evasion of large tax amounts.

3. Latest Developments

3.1 Extension of administrative assistance

At the G20 conference in April 2009, the OECD announced a list of countries which, in the view of the large industrial nations, have harmful tax practices. In March 2009, Switzerland declared itself willing to retract the previous exception to Art. 26 of the OECD MTC in order to avoid being included on this list. Switzerland will therefore not only provide administrative assistance in cases of tax fraud, but now also in cases of

tax evasion in accordance with Swiss understanding of the law.

In accordance with this decision, Switzerland has meanwhile initialed DTAs containing the expanded administrative assistance clause with 13 countries (Denmark, Luxembourg, Norway, France, Mexico, USA, Japan, The Netherlands, Poland, United Kingdom, Austria, Finland and Qatar). As of September 4, 2009, the amended DTAs had already been signed with Denmark, Luxembourg, France, Norway and Austria.

3.2 Extension of judicial assistance

Finally, the Federal Council wishes to go one step further and also extend judicial assistance in order to guarantee extensive collaboration in the case of fiscal offenses. This will initially occur via treaties - later the Swiss Judicial Assistance Act (IRSG) would have to be amended accordingly.

On the other hand, the EU Commission advocates expanding the Agreement on the Prevention of Fraud (*Betrugsbekämpfungsabkommen*) to income and property taxes as well. Conclusion of an agreement of that kind would further increase the pressure for an automatic exchange of information without offering Switzerland any tax advantages.

4. Conclusion

In the opinion of the Federal Council, administrative assistance should remain limited to individual cases, and no "fishing expeditions" should be permitted. Due to the initialing of 13 revised DTAs and the signing of the first two DTAs, it is reasonable to expect that Switzerland will quickly disappear from the "grey list" of the G20 states. The Federal Council has also set itself the objective of signing twelve DTAs by the end of September 2009.

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