

Update

Newsflash February 2013

Tax Administrative Assistance Act

On February 1, 2013 the Federal Tax Administrative Assistance Act entered into force in order to implement new exchange of information provisions included in tax treaties to accommodate concerns of the OECD. The new federal law replaces the Ordinance on Administrative Assistance which came into force in 2010. The new law confirms that group requests are admissible, however only for information on issues which concern the time after February 1, 2013. Swiss authorities have now the power to limit procedural rights of concerned parties. Swiss authorities may, however, not transmit information that is not foreseeably relevant (such as names of third parties).

I. Introduction

In March 2009 the Federal Council decided to adopt the standards set out in Article 26 of the OECD Model Convention with respect to administrative assistance in tax matters. Since then, several double taxation agreements (DTAs) with an administrative assistance clause in accordance with the OECD standard have been concluded. While the administrative assistance clause in the DTAs contains the substantive legal basis for the exchange of information with the contracting States, the procedural implementation has to ensue under national law.

To this end, a Tax Administrative Assistance Act (hereinafter: "TAAA") was approved by the Swiss parliament on 28 September 2012. The referendum deadline expired on 17 January 2013 without a referendum being called. On 16 January 2013, the Federal Council resolved to bring the new Tax Administrative Assistance Act into force on 1 February 2013. With the entry into force of the TAAA, the Ordinance on Administrative Assistance under Double Taxation Agreements which came into force in October 2010 has been repealed and requests for administrative assistance are now governed by the TAAA.

II. Procedural rules of the TAAA

The TAAA governs the execution of administrative assistance in accordance with double taxation agreements

and other international agreements that make provision for the exchange of information relating to tax matters.

The Federal Tax Administration is the competent authority to provide administrative assistance based on foreign requests and issue Swiss requests. Administrative assistance is provided by Switzerland exclusively upon request. Requests are not considered if, for example, they have been made for the purposes of "fishing expeditions" or if they are based on information that was obtained through acts punishable under Swiss criminal law, such as the illegal acquisition of data.

Group requests in accordance with the international standard are also permitted with the entry into force of the TAAA. Such requests require a description of the action taken by bank clients to avoid taxation and must be clearly distinct from "fishing expeditions". The Ordinance on Administrative Assistance in the Case of Group Requests according to International Tax Agreements entered into force on 1 February as well. According to this Ordinance, Group Requests are admissible for information on issues which concern the period of time from when the law entered into force.

The Act further sets out that the information can be obtained by the Federal Tax Administration from the person concerned, the information holder, the cantonal tax admini-

strations or other Swiss authorities. Information held by a bank can only be transmitted if the applicable DTA provides for its transmission. Lawyers authorised to practice in Switzerland can refuse to transmit information that is covered by the professional secrecy. Except for these cases, the persons or authorities who receive the request have to transmit all the information which is in their possession.

According to the TAAA, the Federal Tax Administration must inform the person concerned of the request unless the foreign tax authority provides it with reasonable grounds that justify keeping the procedure secret. The person concerned can then take part to the procedure and access the file.

The transmission of information can take place via the simplified procedure if the person concerned agrees with it. Absent any consent from the person concerned, the Federal Tax Administration issues a decision which explains the justification for the exchange of information and the extent of the information which is to be transmitted. The Federal Tax Administration cannot transmit the information that is not foreseeably relevant. Upon receipt of the decision, the person concerned, as well as any person who has a legitimate interest to challenge the decision, can appeal against the decision in front of the Federal Adminis-

trative Tribunal. With the TAAA, a second appeal to the Federal Tribunal is now possible if the case concerns a legal question of principle or if it is a particularly important case, e. g. if there are reasons to think that the procedure conducted abroad violates fundamental rights or elementary procedural principles.

If a decision confirming the transmission of information enters into force, the Federal Tax Administration transmits the information to the foreign authority. It reminds the authority of the restrictions on the utilisation of the information and the obligation to maintain secrecy under the applicable provisions of the DTA. Only the information transmitted to the foreign authority can be used to enforce Swiss tax law. However, bank information transmitted abroad may only be used to the extent that it could have been obtained in accordance with Swiss law.

As previously stated, the TAAA entered into force on 1 February 2013. It only applies to requests lodged by foreign authorities after this date. Requests lodged prior to 1 February 2013 hence remain governed by the Ordinance on Administrative Assistance under Double Taxation Agreements.

Please do not hesitate to contact us in case of any questions.

Your Contacts

Geneva / Lausanne

Jean-Blaise Eckert
jean-blaise.eckert@lenzstaehelin.com

Frédéric Neukomm
frederic.neukomm@lenzstaehelin.com

Telephone + 41 58 450 70 00

Zurich

Stefan Breitenstein
stefan.breitenstein@lenzstaehelin.com

Heini Rüdüsühli
heini.ruedisuehli@lenzstaehelin.com

Floran Ponce
floran.ponce@lenzstaehelin.com

Telephone +41 58 450 80 00

Our Offices

Geneva

Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
geneva@lenzstaehelin.com

Zurich

Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01
zurich@lenzstaehelin.com

Lausanne

Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
lausanne@lenzstaehelin.com

Legal Note: The information contained in this Update Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.