

Update

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Mandatory spontaneous exchange of tax rulings

As part of the OECD Base erosion and profit shifting project (“BEPS”), the mandatory spontaneous exchange of tax rulings has become an international standard that all G20 and OECD member States are politically committed to. The publication of the definitive version of the Tax Administrative Assistance Ordinance on November 23rd, 2016 completes the international and national legal framework which will become effective in Switzerland as of January 1st, 2017. As a consequence, the spontaneous exchange of tax rulings will in most cases take place starting January 1st, 2018.

1. Introduction

In the last few years, BEPS has constantly been on the international tax agenda. BEPS Action 5 introduces the mandatory minimum standard for a spontaneous exchange of information on tax rulings. Incorporating BEPS transparency standards, a multilateral “Convention on Mutual Administrative Assistance in Tax Matters” (the “**Convention**”) was signed on October 15th, 2013.

This Convention contains, amongst others, provisions on exchange of information on demand, automatic exchange of information, as well as spontaneous exchange of information.

Swiss ratification instruments for the Convention were deposited on September 26th, 2016, and the Convention will enter into force for Switzerland on January 1st, 2017.

Based on the Convention, the Swiss Parliament amended the Swiss Federal Act on International Administrative Assistance on Tax Matters (“**TAAA**”) and the Tax Administrative Assistance Ordinance (“**TAAO**”) in order to integrate,

amongst others measures, spontaneous exchange of rulings. The definitive version of the TAAO has now been published by the Federal Council on November 23rd and will enter into force on January 1st 2017, as will the TAAA.

2. Rulings and taxes covered

The definition of covered tax rulings is broad and includes all anticipated tax decisions – even oral, in e-mails or other forms – on which a taxpayer may rely, issued by a tax authority and concerning the tax consequences of a specific fact/transaction presented by him. General and abstract information published, as well as assurances given during the tax procedure will not be considered as rulings covered by the spontaneous exchange.

In order to be subject to spontaneous exchange, rulings must also fall into one or more of the following categories of tax rulings:

- › Preferential regimes (e.g. holding and auxiliary companies);
- › Cross-border transfer prices;

- › Downward adjustments to the taxpayer's taxable profits that are not directly reflected in the taxpayer's annual accounts and that entail cross-border implications;
- › Permanent establishments;
- › Conduit companies.

Not all taxes will be subject to spontaneous exchange of tax rulings: Federal and Cantonal direct taxes (such as income, wealth and/or capital tax), as well as withholding taxes are expressly covered by the exchange of tax rulings. Capital gain tax on real estate is also concerned. Other taxes such as inheritance and gift taxes are expressly excluded. The same applies for indirect taxes such as stamp duties and value-added tax, for example.

3. Temporal aspects

Rulings should be exchanged by Switzerland starting January 1st, 2018. However, Switzerland has the possibility to individually agree with another contracting State requesting so to an exchange already as from 2017, but no such agreement is known yet.

In order to be subject to spontaneous exchange, a tax ruling has to be issued on January 1st, 2010 or later, and must still be in force on January 1st, 2018 (in general), respectively on January 1st, 2017 (in case of a specific agreement if any).

In addition, a "retroactive" application for rulings in force on January 1st, 2014 has been provided, to the extent that they entail intentional acts that could be qualified as criminal infractions under the Law of the requesting State.

4. Jurisdictions receiving the information

On the one hand, for all categories of rulings, exchange is mandatory with the contracting State where the direct and ultimate parent companies or entities are located.

On the other hand, additional jurisdictions receiving the information are defined for each category of tax rulings. For instance, rulings concerning preferential regimes, transfer pricing

and profit reduction in Switzerland, will also be exchanged with the contracting States of related parties or permanent establishments/head offices with whom the taxpayer enters into transactions that are covered by the ruling or that will generate profit for the company benefiting from the ruling.

Parties are considered related if an entity holds, directly or indirectly, 25% or greater investment in another or if a third party holds 25% or greater investment in both.

5. Procedural aspects

The implementation of the spontaneous exchange of tax rulings will be conducted by the Service for Exchange of Information in Tax Matters ("SEI"), which is a division of the Swiss Federal Tax Administration ("SFTA").

The SEI has to notify the relevant taxpayer before the exchange of information takes place. This allows the taxpayer to participate in the procedure and request access to relevant files. He may also appeal against the final decision of the SEI deciding whether the exchange of information is taking place or not. In general, the exchange of information does not take place as long as the appealing procedure is still pending.

Spontaneous exchange of tax rulings will, in a first step, be conducted by the filing of a standard form (Cf. xml format e-file) containing in particular the identification of the company and related parties, direct and indirect parent companies, ruling type, date of issue, years covered, as well as a summary of the matter at hand. The ruling *per se* will at this point not be communicated.

In a second step, the ruling could be communicated upon request, following the relevant procedure regarding exchange of information on request.

6. Possible reactions of taxpayers

Tax rulings play a major role in the Swiss tax system. Therefore, the new rules on mandatory spontaneous exchange of tax rulings will bring significant changes.

The companies concerned should first draw up a list of the existing tax rulings. At the same time, it is necessary to have an overview of the information that was made available to the responsible tax administration.

Due to the extended definition of the notion of tax rulings (including their possible forms), it should also be examined which binding information was obtained from the competent tax administration on specific issues. They may also fall into the sphere of spontaneous exchange of tax rulings.

Regarding the relevant tax rulings, it should then be assessed whether these are still applicable and if so, if they are still necessary.

If there are still uncertainties in the case of special circumstances, it is advisable to clarify these with the competent tax office before the spontaneous exchange becomes effective.

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

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