



Newsletter – April 2017

Spontaneous exchange of information of tax rulings as of 1.1.2018

Introduction

In order to remain compatible internationally, Switzerland has implemented several measures as part of its "clean money strategy". This includes, inter alia, the accession to the Convention of the Council of Europe and the OECD on Mutual Assistance in Tax Matters ("Convention on Mutual Assistance"). With regards to the exchange of certain information of tax rulings, both the Convention on Mutual Assistance and the BEPS Action 5 of the OECD ("Base Erosion and Profit Shifting"-Project of the OECD) are applicable. Switzerland has equally committed to implement the latter. The fundamentals of future exchange of information are examined hereinafter.

According to Swiss understanding, a tax ruling is a preliminary information given by a tax authority on the basis of the protection of legitimate expectations. Any information, confirmation or guarantee concerning tax implications of facts presented, which the tax payer can invoke, is deemed to be a tax ruling. Swiss law does not stipulate formal requirements of a tax ruling; therefore, an oral statement may also be qualified as tax ruling.

Delimitation between exchange of information upon request – spontaneous exchange of information – automatic exchange of information

In Switzerland, the *automatic exchange of information* of country-by-country reports by multinational corporations, which results from BEPS Action 13, will be governed by the Federal Act on the International Automatic Exchange of Country-by-Country Reports of Multinationals ("CbCR-Act") as of January 1, 2018. As of January 1, 2017, the *automatic exchange of information* of financial accounts will be governed by the unilateral Act on International Exchange of Information in Tax Matters ("AEI-Act") and by the multilateral AEI-Agreement, respectively. This newsletter does not contain further information on this matter. In the *spontaneous exchange of information*, information is not transmitted upon request, rather, information is transmitted in cases where a state assumes a possible interest of another state in a pre-existing information. The spontaneous exchange of information is governed by the revised Federal Act on International Administrative Assistance in Tax Matters ("TAA-Act") and the according Ordinance ("TAA-Ordinance") respectively. *Exchange of information upon request* is governed by the respective double taxation agreement. Currently, Switzerland has more than 50 tax treaties containing an extended information exchange clause in place. The unilateral details of the exchange of information upon request are regulated by the TAA-Act and the TAA-Ordinance, which are not the topic of this newsletter.

Spontaneous exchange of information of tax rulings

Tax rulings issued after January 1, 2010 which still apply after January 1, 2018, as well as new tax rulings, will generally be covered by the spontaneous exchange of information. The following aspects will substantively be a part of spontaneous exchange of information: (1) taxation as a holding-, domiciliary-, or mixed company, (2) tax reduction for revenue deriving from intellectual property rights, (3) taxation as principal company according to the SFTA/Circular Nr. 8/2001, (4) regulation of cross-border transfer prices for performance relationships with affiliated foreign companies, (5) reduction of the Swiss tax basis with cross-border effect, without detectability of said effect in the annual financial statement, (6) findings on the existence or non-existence of a permanent establishment abroad or in Switzerland, or (7) the structuring of cross-border financing within a group company. Whether the circumstances on which the tax ruling is based have materialised or not, has no effect on the obligation to exchange.

The circle of information recipients depends on the applicable regulation according to the catalogue above. Principally, the respective counter-state of the transaction in question shall be informed; according to the Swiss minimum requirement, the counter-state must be committed to the OECD-standard regarding the spontaneous exchange of information of preliminary tax assessments. Rulings are exchanged between countries, where the Multilateral Convention is in force and which commit themselves to an OECD-minimum standard. These include the OECD-countries and the G20 nations.

Constellations (1) and (3) of the above catalogue, would be abolished in the course of the corporate tax reform III, which may come into effect on January 1, 2020 at the earliest. The remaining constellations (including the patent box) will also be relevant after entry into force of the corporate tax reform. The OECD has compiled a form in the course of BEPS Action 5 which queries certain basic information on the tax payer. This form will also apply directly to the spontaneous information exchange according to the Swiss concept.

Intended procedure in the Canton of Zurich

In the course of the year 2017, the cantonal tax office of Zurich will determine if the spontaneous exchange of information will apply to existing tax rulings. If so, the tax-payers or their consultants will be contacted and they will be asked about their intentions on structuring as of December 31, 2017. If the tax ruling affected by the reporting obligation shall continue to apply, the OECD form must be filled out electronically and be forwarded to the SFTA (SEI, *Service d'échange d'informations en matière fiscale*). Certain cantons are more active (for example termination of all tax rulings with a request to get in touch if the tax ruling shall continue to apply) and certain cantons are awaiting further instructions by the FTA.

Exchange of information and the rights of taxpayers

Tax rulings subject to the spontaneous exchange of information on January 1, 2018 must be notified to the SFTA/SEI by the cantons within nine months. The SFTA/SEI must inform the foreign recipient state no later than December 31, 2018. New rulings (concluded after January 1, 2018) must be notified to the SFTA/SEI by cantons on an ongoing basis and no later than 60 days after their issuance. The SFTA/SEI then informs the recipient state within three months. In principle, the right to be heard must be respected in advance. The recipient state then has the possibility to attain the ruling in full-text by way of admin-

istrative assistance or administrative assistance request either based on the applicable tax treaty or according to the Convention on Mutual Assistance, respectively. In this procedure the right to be heard shall also be respected.

Important measures throughout 2017

The tax payer would be well-advised to examine all existing tax rulings with regard to the spontaneous exchange of information as soon as possible, in order to have enough time for an appropriate implementation of alternative measures - if needed. A possible termination of the tax ruling has to be declared before the end of 2017 to not arrive at a spontaneous exchange of information.

Further steps shall be determined on a case-by-case basis and shall be discussed with the appropriate tax authority if necessary. Tax rulings continue to be an attractive instrument to obtain timely fiscal planning security for future cross-border matters. Henceforth, this must be balanced with the risk of foreign tax authorities requesting additional information, which could be used in a tax audit.



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