



Newsletter – March 2016

Administrative Assistance in Tax Matters – Group Requests

Background

Recently, the Netherlands issued an administrative assistance request in the form of a so-called "group request" to the Swiss Federal Tax Administration (SFTA). In their group request, they asked the SFTA to provide them with data of (former) UBS clients who were domiciled in the Netherlands whose account balance had been over EUR 1'500 in the period between February 2013 and December 2014. The request was based on a letter by UBS allegedly sent to its Dutch domiciled clients that had come into the possession of the Dutch tax authorities. In that letter the bank allegedly informed these clients to provide to it evidence about their tax compliance or close their accounts.

The Dutch tax authorities took the position that every UBS client who had received such a letter might not be fully tax compliant in the eyes of the bank. Therefore, the Dutch tax authorities submitted a request for administrative assistance to the SFTA encompassing a potentially wide group of individuals. Based on the formulation of the group request, all bank customers to whom such a letter had been sent and who had not provided sufficient evidence of tax compliance to the bank were considered to be part of the targeted group.

The SFTA has in the meantime granted the Dutch group request. This is the first time since the US case with the UBS in 2009, which had a specific legal basis enacted by the Swiss parliament, that a group request has been submitted to SFTA and accepted. However, appeals against the decision of the SFTA are pending. During the pendency of the appeal proceedings, the data of persons having filed such an appeal are not transmitted.

Procedure

The procedure in Switzerland with regard to such broad administrative assistance requests is usually as follows: The bank informs its concerned client(s) about the request and firstly asks them to either designate a representative or a current address in Switzerland. Following a request by the chosen representative of the affected client, access to the file is granted with the possibility of filing a statement. Within a deadline set by the SFTA, arguments can be submitted to the SFTA why administrative assistance should not be granted or limited to certain documents.

Thereafter, the SFTA issues its final order. If the request by the foreign tax authority is granted, the documents identified in the final order are transferred to the requesting authority, if no appeal is lodged

by the client. An appeal is possible and must be filed within 30 days of the final order to the Swiss Federal Administrative Court. This appeal has suspensive effect, meaning that the data is not submitted to the foreign tax authority until the rendering of the decision by the court. The decision of the Swiss Federal Administrative Court can only be appealed in very limited cases where there is a legal issue of fundamental importance at stake or if it is a particularly significant case for other reasons.

Legal Issues

The current group request is based on the Double Taxation Agreement (DTA) between the Netherlands and Switzerland. This DTA was concluded before the Organisation for Economic Co-operation and Development (OECD) introduced the concept of group requests in its most recent edition of the respective commentary. The Dutch request is also the first group request since Switzerland passed national rules regarding such requests. Therefore, the Swiss courts will have to decide whether there is a sufficient legal basis for granting this group request and whether the specific requirements are fulfilled. Furthermore, a clear distinction between group requests and so-called fishing expeditions is not available. According to the OECD, a fishing expedition is a speculative request that has no apparent nexus to an open inquiry or investigation. It is understood that the national courts will assess whether the Dutch group request represents such a fishing expedition.

Practical Advice

The OECD's Common Reporting Standard (CRS) is currently being implemented in many jurisdictions around the world, inter alia also in the Netherlands (as an early adopter) and in Switzerland. After the implementation of the CRS, the information which is currently sought by the Dutch authorities by means of the group request will spontaneously be provided on an annual basis to the participating tax administration. The current group request therefore only focuses on the past. In case the Swiss courts allow the Dutch group request, it appears likely that the Dutch authorities might submit similar requests with regard to other banks or other countries might also consider to make similar group requests concerning persons domiciled in their country with regard to Swiss bank accounts. Time is becoming of the essence. It is up to the clients to take advantage of the remaining period of time and to arrange the necessary to become compliant (i.e. to make use of possible voluntary disclosure programs). Prager Dreifuss is happy to provide any information or assistance in relation to these options, including administrative assistance requests or judicial mutual legal assistance requests.



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