

## 14. Exchange of Tax Rulings: The Swiss and US View

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### Background

The spontaneous exchange of selected tax rulings is a result of one of the 15 action items of the OECD/G20's endeavours to combat Base Erosion and Profit Shifting ("BEPS"). Action 5<sup>1)</sup> addresses measures for "Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance", which, among other items, provides a framework for improving transparency through the spontaneous exchange of information with respect to certain tax rulings.

The exchange of tax rulings is one of the four minimum standards of the BEPS project. Switzerland and the US have committed to implement this measure. According to BEPS Action 5, the exchange of information shall take place from April 1, 2016 for future rulings, and, with respect to past rulings granted after January 1, 2010 that remain in existence on January 1, 2014, the exchange is required to have been completed by December 31, 2016. A deviation from this timeline is permitted in case countries, such as Switzerland, did not have in place the necessary legal basis to permit the transfer of the subject rulings to another country.

The spontaneous exchange of rulings is limited to six categories of rulings<sup>2)</sup>. A standardized IT format for the exchange of tax rulings<sup>3)</sup> and released guidance on the methodology to perform a peer review regarding the implementation of BEPS Action 5 is contained in the OECD guidance<sup>4)</sup>. Action 5 also recommended that the information be sent spontaneously to (i) the countries of residence of all related parties with which the taxpayer enters into a transaction for which a ruling is granted or which gives rise to income from related parties benefiting from a preferential treatment and (ii) the residence country of the ultimate parent company and the immediate parent company.

### Swiss View

#### Legal Basis

The legal basis for the spontaneous exchange of tax rulings in Switzerland is based on the EU Council's and OECD's Convention on Mutual Administrative Assistance in Tax Matters ("Convention"), which, inter alia, covers the spontaneous exchange of information on tax matters<sup>5)</sup>. The spontaneous exchange of information was implemented by way of revision of the Federal Act on International Administrative Assistance in Tax Matters ("Act"), accompanied by an Ordinance on International Administrative Assistance in Tax Matters ("Ordinance"), both of which are effective January 1, 2017. The Ordinance contains detailed provisions on the exchange of information. It focuses on the cases established by BEPS Action 5 and is closely aligned to the minimum standard. The international practice and other areas for a spontaneous exchange of information based on the Convention will be monitored and then addressed in an amended Ordinance, where necessary.

It should be noted that the Convention generally has a much broader scope for the spontaneous exchange of information

than BEPS Action 5 as it is not limited to tax rulings. Under the Convention, a spontaneous exchange encompasses the passing on of information obtained during examination of a taxpayer's affairs or otherwise, which *might be of interest to the receiving state* (emphasis supplied).

#### Scope of Exchange of Tax Rulings

In order for a spontaneous exchange to occur under the Ordinance, several requirements must exist. There must be: (i) a tax ruling, (ii) in one of the first five categories enumerated in BEPS Action 5 and (iii) the ruling must have been issued after January 1, 2010 and must be in force on January 1, 2018.

Only a summary of the tax ruling ("template", according to BEPS Action 5<sup>6)</sup>) will be exchanged. The Ordinance also provides guidance with respect to (i) the procedural aspects, (ii) timing of the collection, (iii) transmission by the cantonal or federal tax authorities to the central department of the federal tax authority in charge of the exchange, (iv) determination of the foreign tax administration as recipients, (v) information duties and (vi) rights to appeal for the concerned taxpayer.

Tax rulings on the following topics are covered:

- a) Preferential regimes, e.g., holding company, domiciliary company, principal company, mixed company, the license/patent box in Nidwalden, and IP regimes subsequently introduced.
- b) Unilateral tax rulings dealing with related party cross-border transfer pricing.
- c) Unilateral, downward adjustments of taxable profit not reflected in financial statements, e.g., finance branch regimes.
- d) Cross-border permanent establishment or profit allocation rulings with respect to permanent establishments.
- e) Cross-border related party conduit rulings.

The actual exchange of information requires reciprocity, meaning that the receiving state has implemented the legal basis to spontaneously exchange information on tax matters with Switzerland.

Consistent with the general Swiss procedural rules with respect to exchange of information, taxpayers will be notified prior to the exchange of information and may file an appeal to block the exchange.

#### Current Status

In view of the Swiss federalist system, the cantons have taken varying approaches to comply with their duties to collect tax ruling information potentially covered by the spontaneous exchange.

- Most cantonal tax authorities will review available tax rulings in the course of the 2017 tax assessment, inform the taxpayer about the exchange of ruling information, request that the taxpayer prepares a summary in the template or, in the alternative, that the taxpayer withdraws/cancels the ruling with effect prior to January 1, 2018.
- Other tax authorities have contacted taxpayers and informed them that the tax ruling will be cancelled unless the taxpayer requests otherwise (and he completes the respective template).

Taxpayers have commenced their review of existing tax rulings to assess whether: (i) the ruling is within one of the categories enumerated above; (ii) the ruling will have effect on January 1, 2018 or only for specific transactions before this date; (iii) the taxpayer still requires the tax ruling.

Certain tax rulings, such as for transactional taxes (e.g., the securities transfer tax) or purely domestic Swiss tax rulings are not covered by the spontaneous exchange of ruling requirements. Further, certain past tax rulings may not be in line with current best practices<sup>7)</sup> and therefore should be updated or amended before January 1, 2018.

The Swiss tax administration is currently discussing an on-line-tool for the respective taxpayers to complete their tax ruling templates to ensure compliance with BEPS Action 5 and the Swiss timetable according to which tax rulings granted between January 1, 2010 and December 31, 2016 must be submitted to the federal tax authority by September 30, 2018 and tax rulings granted between January 1, 2017 and December 31, 2017 by March 2, 2018. The Swiss tax authorities will publish further guidance in April/May 2017.

It is anticipated that first tax ruling information from foreign states will be received during 2017 and thereafter analyzed by the Swiss tax administration. In this respect, non-compliant taxpayers should be aware of the opportunity to voluntarily come forward and self-declare a prior tax evasion so as to avoid or mitigate criminal charges. A pre-condition of this procedure in Switzerland is that the tax administration has not become aware of a taxpayer's tax evasion prior to the taxpayer voluntarily self-disclosing its omissions or other culpable behavior.

## US View

The US has agreed to exchange summaries of unilateral APAs issued on or after April 1, 2016 and has exchanged summaries of unilateral APAs issued after January 1, 2010 that remain in effect as of January 1, 2014. A country, after reviewing the summary, as prepared pursuant to the OECD template, can request a copy of the actual APA<sup>8)</sup> pursuant to the exchange of information provision of the applicable international agreement under which the template was sent.

In reviewing the categories of rulings subject to spontaneous exchange, the US has limited the exchanges to unilateral APA rulings. Thus, private letter rulings issued to taxpayers would not be exchangeable.

Contrary to Switzerland, the US does not provide any notification or appeals process in respect of the exchange of rulings.

As a general matter, exchanges of US tax-related information can occur only under the provisions of international agreements, including (i) Bilateral Tax Treaties, (ii) Tax Information Exchange Agreements and (iii) Multilateral Agreements. Exchanges of information must occur through formal channels for several reasons, particularly Internal Revenue Code Section 6103, which generally forbids the U.S. government from disclosing tax returns and tax return information<sup>9)</sup>. Central to the exchange of information is the confidentiality of the information exchanged and restrictions on use to tax related purposes. The US takes these requirements extremely seriously.

## Summary

The spontaneous exchange of selected rulings under BEPS Action 5 is reflective of the increasing trend towards fiscal transparency, thereby enabling governments to better assess the tax compliance of their residents. In today's environment, taxpayers engaging in cross-border transactions not only have to be aware of the fiscal transparency requirements

related to their past and current actions and activities, but the increasing focus by governments globally to prevent and require reporting of aggressive tax planning and criminalize the facilitation of tax evasion in the home country or abroad.

Tax rulings historically have been, and are likely to continue to be, a useful means to provide advance certainty with respect to specific tax consequences, especially in the complex, global, ever changing, tax environment<sup>10)</sup>. It will be interesting to see whether enhanced fiscal transparency will have a chilling effect on taxpayers continuing to seek tax rulings as they have in the past, and how tax administrations will react in coming years to the information received from the information exchange.

- 1) OECD/G20 Base Erosion and Profit Shifting Project, Action 5, Final Report dated 5 October 2015.
- 2) (i) preferential regime rulings; (ii) cross-border unilateral advance pricing arrangements ("APAs") or other unilateral transfer pricing rulings; (iii) rulings providing a downward adjustment to profits; (iv) permanent establishment rulings; (v) conduit rulings; and (vi) any other type of rulings where the Forum on Harmful Tax Practices agrees in the future that the absence of exchange would give rise to BEPS concerns.
- 3) Exchange of tax rulings (ETR) XML Schema, July 2016.
- 4) BEPS Action 5 on Harmful Tax Practices: Transparency Framework, Peer Review Documents, February 2017.
- 5) The Swiss Federal Council signed the Convention in October 2013 and both Swiss councils approved the Convention in December 2015, effective 1 January 2017.
- 6) See BEPS action 5, Annex C, p. 74.
- 7) Certain Swiss tax authorities, e.g., Schwyz, Basel-Stadt, Zurich, have published best practices; BEPS Action 5 also includes best practices, see p. 56 et seq.
- 8) See Bloomberg BNA's Daily Tax Report (210 DTR G-6, 2016), 31 October 2016, reported this agreement, which also had been announced by IRS representatives at the American Bar Association Tax Section 4th Annual International Tax Enforcement and Controversy Conference, held on 28 October 2016, in Washington, DC
- 9) Improper disclosure may result in civil or criminal liabilities. An exception exists for the disclosure of information to the competent authority of a foreign government to the extent provided in, and subject to the terms and conditions of, tax conventions or bilateral agreements relating to the exchange of information.
- 10) See also recent OECD/IMF report on tax certainty, March 2017, p. 7, 47, "increasing predictability and consistency by tax administrations, through timely issuance of tax rulings and technical interpretations."

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