

EXCHANGE OF BANKING INFORMATION FOR TAX PURPOSES: SWITZERLAND WANTS TO BE AN OBEDIENT PUPIL

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INTRODUCTION

For many years, in line with its robust statutory banking secrecy, Switzerland traditionally limited the exchange of information on Swiss bank accounts with foreign states to cases of serious crimes (such as fraud, including tax fraud, money laundering, corruption, etc). This was true not only within the context of mutual legal assistance in criminal matters but also, regarding tax fraud, in the context of international assistance in tax matters and particularly within bilateral agreements entered into with the USA, the EU and its Member States. Conversely, it was Switzerland's strict policy not to exchange banking information with foreign states in cases of mere tax evasion devoid of any fraudulent element (ie when the taxpayer intentionally fails to fulfil his obligation towards the tax authority, for example, by failing to include certain assets in his tax return – with the result that the taxes cannot be determined in part or in full – but without using forged or falsified documents). The only exception to this was in relation to indirect taxes where Switzerland had also agreed to grant assistance to Member States of the EU in cases of tax evasion devoid of any fraudulent element.

However, Switzerland under pressure exerted by its peers and, in particular, the work undertaken within the Organisation for Economic Co-operation and Development (OECD) and the Global Forum, was forced to abandon this former tradition. In 2009, Switzerland indicated that it was willing to adopt the international standard for the exchange of tax-related information (Art 26 of the OECD Model Tax Convention) and since then has renegotiated double taxation agreements (DTAs) with a large number of states, some of which are its most important trading partners, in order to incorporate administrative assistance provisions in those agreements in accordance with this standard (in line with the international standard, the amendments made to the respective DTAs are always increasingly favourable to the granting of the assistance). Accordingly, Switzerland

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is now also allowed and obligated to exchange tax-related information upon request of the contracting state in cases of mere tax evasion. Moreover, on 4 April 2012, the Swiss Government decided to extend the offer of administrative assistance in tax matters to states with which there was no DTA in place, by entering into what is known as tax information exchange agreements (TIEAs). Unlike DTAs, which primarily govern the avoidance of double taxation, TIEAs deal solely with the exchange of information. Overall, Switzerland has signed 49 DTAs in accordance with the international standard, of which 38 are in force, and signed seven TIEAs (as at 28 August 2014).¹

Furthermore, in February 2014, the Swiss Government announced that it was considering unilaterally applying the OECD standard on the exchange of information, upon request, to all DTAs not yet in line with the current international standard and, in October 2014, a consultation procedure was launched with the relevant parliamentary committees and cantons on the Federal Act on the Unilateral Application of the OECD Standard on the Exchange of Information (GASI). According to the GASI, the OECD standard would be applied to the remaining DTAs by means of a unilateral extension subject however to reciprocity and to the principle of confidentiality of the exchanged information. This unilateral application would further only concern exchange of information upon request. The proposed mechanism would only be a transitional measure and would cease to apply when the concerned state can exchange information upon request with Switzerland on the basis of a DTA in line with the standard or another international agreement. The consultation procedure will last until 5 February 2015.²

In parallel, on 15 October 2013, Switzerland signed the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (OECD Convention). The OECD Convention however still needs to go through the standard approval process in Switzerland. While the Convention provides for administrative assistance in tax matters, including automatic exchange of information, only the exchange of information on request and the spontaneous exchange of information

¹ Federal Department of Finance FDF, *Report on international financial and tax matters 2014* (2014), available at <http://www.efd.admin.ch/dokumentation/00737/00782/02690/index.html?lang=en> (accessed 25 July 2014). See also State Secretariat for International Financial Matters, *Double taxation and administrative assistance*, available at <https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/doppelbesteuerung-und-amtshilfe.html> (accessed 26 October 2014), which includes a list of the countries having entered into DTAs and TIEAs with OECD standard with Switzerland.

² 'Application of OECD standard to all double taxation agreements' (19 February 2014), available at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=52061> (accessed 25 July 2014); 'Federal Council launches consultation on unilateral application of OECD standard on exchange of information upon request' (22 October 2014), available at <http://www.efd.admin.ch/00468/index.html?lang=en&msg-id=54902> (accessed 26 October 2014).

are mandatory. The automatic exchange of information requires an additional agreement between two or more contracting states.³

The Swiss Government has nonetheless already shown its willingness – not to say eagerness – to exchange information on an automatic basis. On May 2014, the Swiss Government announced that it had defined draft negotiation mandates for the introduction of such an exchange of information with partner states – in particular with the EU and the USA – by means of separate bilateral agreements. The relevant parliamentary committees and cantons were consulted on the draft mandates and the vast majority supported them. Therefore, on 8 October 2014 the Swiss Government adopted definitive negotiation mandates and announced that negotiations with partner states should commence shortly. Moreover, as the existing domestic legal framework prohibits any automatic exchange of information, the Swiss Federal Department of Finance is currently preparing implementing legislation which will be submitted to Parliament together with the negotiated agreements.⁴

Finally, Switzerland's eagerness to comply with the OECD standard and the recommendations of the Global Forum can also be seen through the recent amendments brought to the Swiss Tax Administrative Assistance Act (TAAC), a domestic act which governs the provisions of administrative assistance under DTAs and other agreements for the exchange of information in relation to tax matters. The major amendments brought to the TAAC, which entered into force on 1 August 2014, include:

- (1) a new provision that sets out a procedure according to which taxpayers who are subject to administrative assistance proceedings may in exceptional cases not be notified of such proceedings until after their data has been communicated to the requesting state; and
- (2) more precise specifications regarding group requests (ie administrative assistance requests for information on two or more people with identical behaviour patterns who are identifiable by means of precise details, Art 3(c) of the TAAC, and which since February 2013 are already possible under the

³ Federal Department of Finance FDF, *Report on international financial and tax matters 2014* (2014), available at <http://www.efd.admin.ch/dokumentation/00737/00782/02690/index.html?lang=en> (accessed 25 July 2014).

⁴ 'Swiss Government defines draft negotiation mandates for introducing automatic exchange of information in tax matters with partner states' (21 May 2014), available at <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53050> (accessed 25 July 2014); 'Automatic exchange of information in tax matters: Federal Council adopts negotiation mandates with partner states' (8 October 2014), available at <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=54768> (accessed 26 October 2014).

TAAC), in particular a notification procedure that is tailored to group requests. Further, the Swiss Government is given the power to establish the required contents for such requests.⁵

It is to be noted that while Switzerland has traditionally strongly opposed the exchange of information where the request was based on stolen data, the first draft of the amended TAAC included a provision under which Switzerland could have responded to such requests on the strict condition that the requesting state acquired stolen data lawfully and passively, for example, via a third country. Switzerland would have continued to refrain from responding to requests based on such data when acquired actively. However, due to strong opposition within Switzerland this amendment was removed from the final draft.⁶ This has an important impact in practice since the number of cases regarding stolen banking data which could be used by a state for the purpose of requesting administrative assistance is far from insignificant, as illustrated in particular by Indian, German and French cases, which have led to many complaints, especially from the Indian authorities.⁷

This article will focus on international administrative assistance between Switzerland and foreign countries as currently applicable based on the recently revised DTAs. The focus will be on six recent decisions⁸ rendered by the Swiss Federal Administrative Court (FAC) in relation to those DTAs (those cases being the only ones examined to date by the FAC which do not relate to the administrative assistance with the USA). The 'specific case' of international administrative assistance with the USA which has already been subjected to considerable attention and countless decisions of the FAC⁹ – not to mention to the Swiss Federal Supreme

⁵ 'Swiss Government adopts dispatch on revision of Tax Administrative Assistance Act' (16 October 2013), available at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=50606> (accessed 25 July 2014); *Dispatch of the Swiss Government on the revision of the Tax Administrative Assistance Act* (16 October 2013), FF 2013 7501ff.

⁶ 'Swiss Government adopts dispatch on revision of Tax Administrative Assistance Act' (16 October 2013), available at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=50606> (accessed 25 July 2014).

⁷ See the Swiss-Indian Joint statement signed on 15 October 2014, available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/36918.pdf> (accessed 26 October 2014).

⁸ For one of those cases, two decisions were rendered by the FAC, both on 11 February 2014, ie A-6547/2013 and A-6600/2013.

⁹ The rulings of the FAC in those decisions are also relevant for any proceedings of administrative assistance in tax matters, being specified that this case-law does not relate to the revised DTA of 2009 between Switzerland and the USA, which provides for an exchange of information provision compliant with the international standard and which is not yet into force.

Court – will not be examined further in this article. Similarly the withholding tax agreements entered into by Switzerland, in particular with the UK and Austria, will not be discussed herein.

After having examined the information which can be requested under DTAs, an analysis of the requirements which a request filed with the Swiss authorities should fulfil will be carried out. The proceedings applicable before the Swiss authorities will also be considered.

WHAT INFORMATION CAN BE REQUESTED UNDER THE DTAS?

No retroactive effect of the new provisions on the exchange of information

In a recent decision, the FAC considered whether a request for assistance filed prior to the entry into force of the revised DTA shall be governed by the 'new' or the 'old' provisions of this DTA in relation to the exchange of information. The FAC ruled that, save for a specific provision providing for retroactive effect, the request filed before the amended DTA entered into force shall be governed by the 'old' provisions. In the case under consideration, the request of the foreign state (Spain) had been filed in April 2013, ie before the new Art 25bis of the DTA between Switzerland and Spain (DTA CH-ES), which provides for an exchange of information compliant with the OECD standard, entered into force (in August 2013) and was hence governed by the 'old version' of Art 25bis. It is noteworthy that in this case the request was eventually governed by the provisions of the DTA between Switzerland and France (DTA CH-FR), since the DTA CH-ES included a most favoured nation clause.¹⁰

Scope of the exchangeable information

The DTAs that were amended in accordance with Art 26 of the OECD Model Tax Convention usually provide that:

- (1) the information exchanged must be 'foreseeably relevant' for carrying out the provisions of the agreement or to the administration or enforcement of the domestic laws in relation to (a) the taxes covered by the agreement or (b) any taxes; as provided by some DTAs such as the DTA CH-FR and the newly revised DTAs;
- (2) the exchange of information is not restricted to information in relation to persons who are residents of one or both of the contracting states;

¹⁰ Decisions of the FAC of 11 February 2014, A-6547/2013 and A-6600/2013.

- (3) the contracting states shall not be coerced into: (a) carrying out administrative measures at variance with, or supplying information which is not obtainable under the laws and administrative practices of either of the contracting states; and/or (b) providing information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or any such information, the disclosure of which would be contrary to public policy;
- (4) notwithstanding and without prejudice to the above, the Swiss authorities cannot invoke bank secrecy to refuse to provide the requested information;¹¹ and
- (5) finally, the requesting state shall not engage in a 'fishing expedition'. The OECD describes fishing expeditions as 'speculative requests for information that have no apparent nexus to an open inquiry or investigation'.¹²

'Foreseeable relevance' and prohibition of a 'fishing expedition'

Therefore, other than the lack of relevance of Swiss banking secrecy within the 'new' framework of administrative assistance in tax matters, the two main issues that shape the granting of such assistance are the prohibition of a 'fishing expedition' and the requirement that the information requested be 'foreseeably relevant'. Both issues are connected and concurrently tied to the principle of proportionality, which, by virtue of its status as a constitutional principle in Switzerland, must be respected by all Swiss authorities.¹³ This being said, the Swiss authorities interpret the notion of a 'fishing expedition' in a rather restrictive manner so as to favour the granting of assistance.

With regard to the standard of 'foreseeable relevance', according to the FAC, this has a double meaning since (1) such relevance must arise from the foreign request, ie the foreign request must demonstrate why the requested information is 'foreseeably relevant', and also (2) Switzerland, as a requested state, must only transfer information which appears 'foreseeably relevant'. As for this last point, the FAC nonetheless considers that the Swiss authorities shall only refuse to communicate

¹¹ As underlined recently by the FAC, this rule does not mean that the requested state shall in any case communicate banking information to the requesting state. The limitations provided under para 3 also apply in the case of communication of banking information as long as the refusal to grant assistance is based on grounds which are not linked to the fact that the information holder is a bank; see decision of the FAC of 7 October 2014, A-1606/2014 (as regards this decision see also below at n 17).

¹² OECD, *Update to Article 26 of the OECD Model Tax Convention and its Commentary* (OECD, July 2012).

¹³ Decisions of the FAC of 11 February 2014, A-6547/2013 and A-6600/2013; decision of the FAC of 7 October 2014, A-1606/2014.

information which is not relevant 'with certainty', since, as a rule, only the requesting state can decide which information is relevant for its taxation purposes.¹⁴

Moreover, as the FAC confirmed, information regarding third parties may appear to be 'foreseeably relevant' for the tax purpose set out regarding the taxpayer about whom the administrative assistance request for information is made (ie the 'person concerned' under Art 3(a) of the TAAC).¹⁵ Hence, information in relation to accounts held by third parties not directly covered by the request could be sought – and consequently be deemed to be 'foreseeably relevant' – where there is a suspicion that the taxpayer under investigation has used this account for transactions.¹⁶ The requesting state must nonetheless provide sufficient elements to show that the information regarding the account of the third party is 'foreseeably relevant' for the tax purpose set out in the request and that it does not engage in a 'fishing expedition'.¹⁷

Based on those principles, as long as the requesting authorities have shown that the request is motivated by an investigation/inquiry against the affected taxpayer, and therefore, that it does not manifestly appear as a 'fishing expedition' and that the other requirements are being met (see below), all information concerning the affected taxpayer (including information in relation to third parties' accounts identified in the request as being relevant to the matter under investigation), which are 'foreseeably relevant' for carrying out the provisions of the revised DTA or to the administration or enforcement of the domestic laws in relation to taxes covered by this agreement and/or any taxes, will be communicated to the requesting state. As regards persons/entities not mentioned in the request but whose names are listed in the information to be communicated, the Swiss authorities have specified that it is prohibited to transfer information in relation to persons who are 'manifestly'¹⁸ not

¹⁴ Decisions of the FAC of 11 February 2014, A-6547/2013 and A-6600/2013; decision of the FAC of 1 April 2014, A-38/2014; decision of the FAC of 7 October 2014, A-1606/2014.

¹⁵ Decision of the FAC of 1 April 2014, A-38/2014; decision of the FAC of 7 October 2014, A-1616/2014.

¹⁶ Decision of the FAC of 1 April 2014, A-38/2014.

¹⁷ Decision of the FAC of 7 October 2014, A-1616/2014. In this decision, the FAC considered that it was questionable that queries from the requesting state in relation to third parties' accounts and which did not refer expressly to the taxpayers concerned by the request were 'foreseeably relevant' for the tax purpose set out in the request. It is noteworthy that in this decision the FAC noted that Swiss authorities were in any case prevented in communicating part of the information (ie whether the taxpayers concerned were beneficial owners of third parties' accounts) since it was not information which could be obtained under Swiss law, in particular as the bank with which the accounts were held had no banking relationship with the taxpayers concerned by the request.

¹⁸ The Swiss authorities hence seem to consider that it would be possible to communicate information where the person is not 'manifestly' not involved.

involved in the matter. This applies, for example, to persons whose name appears by accident in the banking documentation but who would have no link with the tax purpose set out in the request for assistance. According to the FAC, this applies a fortiori when the request for assistance covers information regarding other persons than the taxpayer concerned.¹⁹ However, if the suppression of the information in relation to the person who is not directly concerned would render the assistance useless, communication of the said information could be contemplated as long as this person has a possibility to appeal the decision.²⁰ This seems nonetheless to contravene Swiss law since the TAAC provides that the Swiss authorities cannot act spontaneously and cannot provide information on persons who are not concerned by the request. Accordingly, information regarding persons who are not the subject of the request (for example, joint account holders or the person having a power of attorney on the account) should not be included in the information communicated to the requesting state. It is noteworthy that in two recent decisions the FAC underlined that the Swiss authorities cannot act spontaneously and could not grant assistance in relation to a person or an entity for whose or which a request for assistance was not expressly made.²¹ Similarly, the FAC, referring to Art 4(3) of the TAAC, noted that the information communicated to the requesting state must not include information in relation to the person having a power of attorney regarding the account of the taxpayer covered by the request.²²

Finally, and while the principle of speciality will not be examined in further detail in this article, it is to be noted that it is mandatory for the requesting state to adhere to

¹⁹ Decision of the FAC of 18 September 2014, A-3098/2014, decision of the FAC of 7 October 2014, A-1606/2014.

²⁰ See Art 4 of the TAAC; 'Dispatch of the Swiss Government on the adoption of the Tax Administrative Assistance Act' (6 July 2011), FF 2011 5771ff, as well as decision of the FAC of 18 September 2014, A-3098/2014 and decision of the FAC of 7 October 2014, A-1606/2014. See also the decision of the Swiss Federal Supreme Court of 27 August 2013, ATF 139 II 451, in this case Art 4 of the TAAC however was not applicable. According to this decision, the account holder or the beneficial owner of the account should be able to adduce evidence that he is not concerned by the request for assistance. The Federal Supreme Court further highlighted that according to the DTA between Switzerland and the USA of 1996, which shall be interpreted restrictively, the requested state shall refuse to communicate only the names of the persons, who, are 'manifestly' not involved in the matter from which the request for assistance originates, the burden of proof lying with the concerned taxpayer concerned or the information holder.

²¹ Decision of the FAC of 18 September 2014, A-3098/2014; decision of the FAC of 7 October 2014, A-1606/2014. This applies even if the requesting state has requested information regarding those persons.

²² Decision of the FAC of 7 October 2014, A-1606/2014. The FAC also underlined that it was questionable that information in relation to the person having a power of attorney on the accounts of the person concerned by the request was 'foreseeably relevant' for the tax purpose set out in the request.

this principle. Accordingly, the information communicated can only be used by the authorities of the requesting state for the purposes indicated in the agreement, except in circumstances whereby the express approval of the requested state has been obtained. The principle of speciality is also interconnected with rules of confidentiality, preventing the authorities of the requesting states sharing the information received with authorities which are not competent in taxation matters.²³

Time period covered

Regarding the time period that can be covered by a request, it is usually provided in the respective DTAs that, based on the new provisions, a state can request information that relates to taxable periods beginning on or after the first day of the civil or tax year following the date of signature of the protocol including the new provisions – or the date the protocol entered into force. As a result, the amended DTA shall, in this respect, have no retroactive effect (or only a limited one). This interpretation was confirmed by the FAC in a decision relating to the DTA between Switzerland and India (DTA CH-IN). In this decision, the FAC held that the new Art 26 of the DTA CH-IN (which provides for an exchange of information compliant with the OECD standard) could only apply to information relating to the fiscal year which started on 1 January of the calendar year following the signature of the protocol amending the DTA CH-IN on 30 August 2010, ie as per Indian law, since 1 April 2011 (corresponding to the fiscal year 2011/2012). Accordingly, the FAC emphasised that this provision had no retroactive effect or, more specifically, only a very limited one (from 1 April 2011 to 7 October 2011, ie the date the modifications took effect).²⁴

WHAT IS THE MANDATORY CONTENT OF A VALID REQUEST FOR INFORMATION UNDER THE DTAS?

Mandatory content of the request

DTAs typically contain provisions in their protocol providing that the request shall include the following information (those requirements are also provided for by Art 6 of the TAAC, which applies in case the DTA does not give any indication as to the

²³ See Art 26(2) of the OECD Model Tax Convention and the commentary to this article (OECD, *Update to Article 26 of the OECD Model Tax Convention and its Commentary* (OECD, July 2012)). See also, OECD, *Keeping it safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (OECD, July 2012).

²⁴ Decision of the FAC of 17 December 2013, A-4232/2013.

content of the request and no other regulation can be deducted from the agreement in order to prove, in particular, and as highlighted above, that the requested information is 'foreseeably relevant':

- information allowing the identification of the person(s) or entity(ies) under examination or investigation (ie in particular the name of those person(s) and/or entity(ies)) and, if available, other particulars facilitating the identification, such as the address);
- the period of time for which the information is requested;
- a statement of the information sought including its nature and the form in which the authorities of the requesting states wish to receive the information;
- the tax purpose for which the information is sought; and
- information allowing the identification of any person or entity believed to be in possession of the requested information (ie in particular the name and, if known, the address of this person or entity).

Finally, the foreign authorities may file a request for administrative assistance under the revised DTA only once and only after having used and also, as provided by certain DTAs, exhausted the/all regular means and procedures available under their domestic law to obtain the relevant information. Therefore, the request shall include a statement confirming that all such regular procedures available under their domestic law to obtain the information requested have been used/exhausted. It is to be noted in this regard that, as underlined by the FAC, this requirement is likely to be considered as not met in the case that the foreign authorities request information in relation to a tax year which was still pending at the time the request was filed with the Swiss authorities.²⁵

Favourable interpretation of the requirements for granting assistance

The states parties to the DTAs are usually of the view that the requirements for granting the requested assistance should be interpreted favourably. Consequently, it is also often agreed between the parties that, provided the request is not a 'fishing expedition',²⁶ the identification of the person under examination or investigation may be provided by means other than by specifying the name and address of the

²⁵ Decision of the FAC of 17 December 2013, A-4232/2013.

²⁶ As underlined, the Swiss authorities interpret the notion of 'fishing expedition' in a rather restrictive manner so as to favour the granting of assistance.

concerned person(s); and that the requesting state shall specify the name and the address of any person believed to be in possession of the requested information only to the extent known.

Regarding the identification of the information holder (for example, the bank), the FAC recently established that it is possible for the requesting state to provide only the account number without indicating the name and address of the bank.²⁷

It is to be noted that according to international standards, the requested state is, in principle, bound to respond to requests which do not identify the possible information holder (typically a bank). However, the Swiss Government considers that the international standards authorise the requested state to refuse a request for reasons of proportionality or practicality. Accordingly, if such information is not provided by the requesting state, the Swiss authorities do not need to contact each of the more than 300 banks active in Switzerland to enquire if they hold a particular account. However, according to the Swiss Government, if it is likely that only a limited number of banks are in possession of the relevant information, the Swiss authorities have the obligation to contact those banks (even if their names and addresses are not mentioned in the request) as long as the factual circumstances of the case are described in a credible manner and make it clear that a 'fishing expedition' can reasonably be excluded.²⁸

Finally, it is important to note that the Swiss authorities will neither control the legality nor the legitimacy of the request under the law of the requesting state nor will they verify the veracity of the facts alleged. They will typically only verify that the requirements provided for in the DTA are met and, in particular, that the information appears 'foreseeably relevant' for carrying out the provisions of the revised DTA or to the administration or enforcement of domestic laws of the taxes covered by the agreement, or any taxes. This being said, the principle of mutual trust between states does not, in principle, allow the Swiss authorities to challenge the allegations made within a request. As highlighted by the FAC in recent decisions, a fundamental principle of the assistance is that the information provided by another state may only be challenged in cases of manifest abuse of right or issues in relation to the protection of the Swiss or international public order (*ordre public*). As such, the Swiss authorities are bound by the description of the facts from the requested state except where, at the outset, they appear to be riddled with clear

²⁷ Decision of the FAC of 1 April 2014, A-38/2014.

²⁸ For example, *Dispatch of the Swiss Government on the approval of the protocol amending the DTA between Switzerland and Spain* (23 November 2011), FF 2011 8391ff; *Dispatch of the Swiss Government on the approval of the protocol amending the DTA between Switzerland and Sweden* (31 August 2011), FF 2011 6591ff; *Dispatch of the Swiss Government on the approval of the protocol amending the DTA between Switzerland and Korea* (31 August 2011), FF 2011 6765ff.

mistakes, lacunas or contradictions. The FAC considers nonetheless that while the requested state shall provide the main facts, it shall not be expected that the said facts are comprehensive and devoid of any contradictions. According to the FAC, this would indeed not be compatible with the spirit and purpose of the assistance, especially as some issues which are still 'in the dark' must be clarified by the information and documents provided by the requested state. Furthermore, the requesting state does not need to provide strict proof of the facts alleged; it needs only to demonstrate reasonable grounds for suspecting their existence.²⁹ In other words, while the burden of proof of the requesting state in relation to the information it has to provide within its request is rather low, the burden of proof for the affected taxpayer who wishes to contest the information provided, and/or the facts alleged by the requesting state is extremely high.

Finally, as highlighted above, since February 2013 group requests in accordance with the international standard are also possible.

PROCEEDINGS APPLICABLE BEFORE THE SWISS FEDERAL TAX AUTHORITY

The TAAC, which entered into force on 1 February 2013, governs the terms and conditions for the execution of administrative assistance in Switzerland and applies to all requests for administrative assistance filed after its entry into force (Art 24 of the TAAC *a contrario*).

According to the TAAC, the Federal Tax Administration (FTA), which is the competent authority in Switzerland to carry out administrative assistance based on a request by a foreign state (Art 2 of the TAAC), can exclusively grant administrative assistance under DTAs upon request (Art 4(1) of the TAAC).³⁰ Hence, and contrary to information which has been provided notably in the Indian media,³¹ the FTA is prevented – for the time being – from exchanging information spontaneously.

Refusal of assistance

As a preliminary remark, the request will not be entertained by the FTA if it (1) constitutes a 'fishing expedition', (2) seeks information which is not covered by the

²⁹ Decisions of the FAC of 11 February 2014, A-6547/2013 and A-6600/2013; decision of the FAC of 7 October 2014, A-1606/2014.

³⁰ Decision of the FAC of 18 September 2014, A-3098/2014; decision of the FAC of 7 October 2014, A-1606/2014.

³¹ For example, 'Swiss govt prepares list of Indians with suspected black money' (2014) *The Times of India*, 22 June, available at <http://timesofindia.indiatimes.com/india/Swiss-govt-prepares-list-of-Indians-with-suspected-black-money/articleshow/37014862.cms> (accessed 25 July 2014).

administrative assistance provisions of the applicable DTA, and/or (3) violates the principle of good faith, particularly if it is based on information obtained through a criminal offence under Swiss law (Art 7 of the TAAC). Accordingly, and as underlined above, for the time being, Switzerland cannot grant assistance if the request is based on stolen data, either actively or passively obtained.³² It is to be noted in this regard that, according to the FAC, in case there is a suspicion that the request may be based on stolen information, the FTA shall request an explanation from the requesting authorities as to how they were able to make a selective request.³³

Information/documentation to be provided by the bank

If a preliminary examination of the request shows that an administrative assistance procedure can be initiated, which according to the FTA's practice appears to be the rule, the FTA shall require inter alia the information holder (for example, the bank) to disclose the information and documents which are likely to be necessary to respond to the request for administrative assistance (Arts 9 and 10 of the TAAC). The information holder must disclose all relevant information that is in its possession or under its control (Art 10(3) of the TAAC). As a rule, the FTA will require the bank to provide the information requested by the foreign authorities, for example, details of a specified bank account and/or copies of bank statements for all bank accounts held by the taxpayer who is the subject of the request or of which the taxpayer is beneficial owner or in relation to which he has a power of attorney for a specified period of time. As the FTA is not allowed to act spontaneously, it shall not require and subsequently transmit more information, for example, information from other banks or other accounts, than that requested. Should the requesting state wish to obtain such additional information, it has to send an additional request to the Swiss authorities.

³² In this regard, as underlined above, the Swiss Government was willing to facilitate requests for administrative assistance based on stolen data and thus proposed a new provision of the TAAC according to which Switzerland could have responded to such requests when the requesting state acquired the data lawfully and passively, eg, via a third country (Switzerland continuing to refrain from responding to requests based on data acquired actively). This proposal however met a strong opposition in Switzerland and was then abandoned. See 'Swiss Government adopts dispatch on revision of Tax Administrative Assistance Act' (16 October 2013), available at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=50606> (accessed 25 July 2014).

³³ Decisions of the FAC of 11 February 2014, A-6547/2013 and A-6600/2013.

Right of the affected taxpayer to be informed and to participate to the proceedings

The FTA must inform the person concerned about the main parts of the request (Art 14(1) of the TAAC).³⁴ It must also give notice of the administrative assistance procedure to the other persons whom it must assume on the basis of the files are entitled to appeal (according to Art 19(2) of the TAAC and Art 48 of the Federal Act on Administrative Procedure) such as the joint account holder (Art 14(2) of the TAAC).³⁵ If the taxpayer is not a resident of Switzerland, the FTA shall request that the bank asks the affected taxpayer to designate an agent for service of process in Switzerland (Art 14(3) of the TAAC). If the taxpayer cannot be contacted by the bank, he will be informed of the proceedings – as well as of the final decision – by way of publication in the *Swiss Official Gazette* (Arts 14(5) and 17(3) of the TAAC). A special notification procedure is provided in case of group request (Art 14a of the TAAC).³⁶

The taxpayer as well as any person who is entitled to appeal has the right to participate in the proceedings and to review the procedural files save, in limited circumstances, where the requesting state demonstrates valid grounds for the preservation of secrecy regarding certain parts of the files. In this case, the FTA may refuse to allow a person entitled to appeal to inspect the corresponding files (Art 15 of the TAAC).³⁷ The requesting authorities have no right to inspect the files or to be present during proceedings in Switzerland (Art 8(4) of the TAAC).

The taxpayer's right to be heard under Swiss law as well as the possibility for him to request control of the legal aspects of an exchange of information are usually both expressly guaranteed within the DTAs.

It is to be noted that the FTA seems to follow a practice according to which, if the requesting state asks that part of the file, especially the request, be kept confidential, the FTA refuses to communicate it to the taxpayer – even though the requesting states do not provide sufficient or even any justification – and only provides a summary of the request or of the document to the affected taxpayer. The FTA in such cases usually bases its argument on the Commentary to Art 26 of the OECD Model Tax Convention (particularly section 11 of this Commentary – version of July 2012), which explains the confidentiality rules provided in Art 26(2). Yet, this required confidentiality obligation, as highlighted above, which is a corollary of the principle of speciality, is confidentiality between the authorities of the requested or

³⁴ This amended provision entered into force on 1 August 2014.

³⁵ This amended provision entered into force on 1 August 2014.

³⁶ This new provision entered into force on 1 August 2014.

³⁷ The amended version of Art 15(2) of the TAAC entered into force on 1 August 2014.

the requesting state, or in relation to a third state. This does not have any impact on any possible duty of confidentiality between the authorities of the requested state and the affected taxpayer. The issue of the notification of the request to the affected taxpayer is dealt with by section 14.1 of the Commentary to Art 26 of the OECD Model Tax Convention. However, in this connection, the Swiss Government highlighted that in order to take – partially – into account the international standard, under Swiss law the FTA can only refuse access to part of the proceedings upon request of the requesting state if this state has shown valid grounds for keeping the proceedings or certain parts of the file secret.³⁸ Accordingly, the FTA should refrain from considering too easily that certain elements of the proceedings should be kept confidential. However, and at least in relation to the request, this may not be supported by the revised Art 14(1) of the TAAC, which provides that the FTA informs the person concerned about the 'main parts' of the request.

In the recent decision regarding administrative assistance between Switzerland and India, the taxpayer complained before the FAC that he did not have access to the complete file, and specifically to the amended request of assistance as well as exchanges between the requesting (Indian) and requested state (especially in relation to issues of Indian law). The FAC underlined that a priori there was no overriding public interest to justify that elements of the file which related to interpretation of the provisions of the DTA CH-IN, among other Indian laws, could be considered as secret. Moreover, the mere allegation that an exhibit is decisive for the outcome of the proceedings could not justify keeping it secret. However, the FAC did not delve deeper into the possible breach of the taxpayer's right to be heard since in any case, the taxpayer's appeal was for the most part well founded.³⁹

Finally, while under the former TAAC, a taxpayer had to be notified without exception before any data relating to him was communicated to the requesting state, according to an amendment of the TAAC, which entered into force on 1 August 2014, taxpayers who are subject to administrative assistance proceedings may now, in exceptional circumstances, not be notified of these proceedings until after their data has been communicated to the requesting state. This applies when the requesting state can show that the purpose of the administrative assistance would be defeated and the success of its investigation would be thwarted by prior notification (Art 21a of the TAAC). According to the Swiss Government, such exceptions to the right to be heard of the affected taxpayer would be justified if the requesting state credibly demonstrates, on a case by case basis, that the requirements for such an exceptional procedure are met. The requesting state could,

³⁸ *Dispatch of the Swiss Government on the adoption of the Tax Administrative Assistance Act* (6 July 2011), FF 2011 5771ff.

³⁹ Decision of the FAC of 17 December 2013, A-4232/2013.

for example, claim that the notification to the taxpayer would compromise the purpose of the assistance and, for example, would encourage the affected taxpayer to destroy evidence. The requesting state could also claim that the notification to the affected taxpayer may jeopardise the investigation in case, for example, the request is urgent because of the statute of limitation or when the confidential part of the investigations is not terminated.⁴⁰ This amendment, which also applies to requests filed before 1 August 2014 (Art 24a(2) of the TAAC),⁴¹ is a major impediment to the rights of the affected taxpayer. The only remedy available to the taxpayer would be to request the Swiss courts to acknowledge that the decision to grant assistance and transmit information to the requesting state is not compliant with the law (with a possible claim for compensation from the state) (Art 21a(2) of the TAAC).⁴² It remains to be seen whether the FTA will only apply such proceedings in exceptional cases and what would qualify as exceptional circumstances justifying such a breach of the taxpayer's rights. In this regard, and contrary to claims which have been made in the media,⁴³ the FTA has not used the new provision of Art 21a(2) of the TAAC to date.

Final decision and right to appeal

Unless the taxpayer concerned explicitly consents to having his data disclosed, the FTA examines the information received and decides on its eligibility for administrative assistance. If it is eligible for administrative assistance, it renders a final decision. In this decision, the FTA will decide which information is 'foreseeably relevant' and which shall therefore be communicated to the requesting state.

The final decision (to communicate or not to communicate the information to the requesting state) of the FTA can be appealed with the FAC within 30 days. In this regard, any decision of the FTA preceding the final decision is immediately enforceable and may only be challenged (by appeal before a court) together with the final decision (Art 19(1) of the TAAC). The appeal has a suspensive effect (Art 19(3) of the TAAC). Hence, the FTA will await the end of the appeal period or a final ruling – should its decision not be overruled – before communicating the

⁴⁰ 'Swiss Government adopts dispatch on revision of Tax Administrative Assistance Act' (16 October 2013), available at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=50606> (accessed 25 July 2014); *Dispatch of the Swiss Government on the revision of the Tax Administrative Assistance Act* (16 October 2013), FF 2013 7501ff.

⁴¹ Decision of the FAC of 7 October 2014, A-1606/2014.

⁴² *Dispatch of the Swiss Government on the amendment of the Tax Administrative Assistance Act* (16 October 2013), FF 2013 7501ff.

⁴³ 'Swiss authorities give France documents on 300 UBS customers – SonntagsZeitung' (2014) Reuters, 5 October, available at <http://www.reuters.com/article/2014/10/05/ubs-probe-france-idUSL6N0S00BQ20141005> (accessed 26 October 2014).

information to the requesting state. The FAC's decision can be appealed within 10 days to the Federal Supreme Court only in exceptional circumstances, ie if a question of principle is at stake or if the case is considered as particularly important, for example if there are reasons to suspect that the proceedings abroad appear to breach the equivalent of commonly acknowledged fundamental procedural principles (Arts 100(2) and 84a of the Federal Act on the Federal Supreme Court, FAFSC). According to a recent amendment of the FAFSC, which also entered into force on 1 August 2014, such appeal will also have an automatic suspensive effect (Art 103(2)(d) of the FAFSC).

CONCLUSION

Since 2009 and even more so recently, Switzerland has shown that it has wanted to be an obedient pupil with regard to the exchange of information for tax purposes, and except for the issue of requests based on stolen data, has shown an eagerness in complying with the claims and recommendations of its peers and, in particular, of the Global Forum.

For the majority of the countries concerned, the exchange of information with Switzerland is now based on newly revised DTAs which integrate a provision compliant with Art 26 of the OECD Model Tax Convention. Based on those DTAs, Switzerland cannot invoke its banking secrecy and shall exchange information even in cases of tax evasion devoid of any fraudulent element.

As demonstrated, the assistance based on those new DTAs is shaped by the principle of 'foreseeable relevance' and the prohibition of a 'fishing expedition' on the one hand, and the principle of good faith and trust among states and hence the Swiss willingness to consider and interpret the various applicable principles and requirements favourably to the granting of assistance on the other hand.

Accordingly, as long as the request is not based on stolen data, does not manifestly appear as a 'fishing expedition', includes the required content which shows in particular that the information requested is 'foreseeably relevant' for tax purposes and relates to the time period covered by the agreement, the Swiss authorities will grant assistance without questioning the information and facts provided by the requested state in the request. The burden of proof, which is then much higher, falls upon the affected taxpayer who must prove that the information and facts provided therein are not accurate and that the requirements for the granting of assistance under the relevant DTA and Swiss law are in fact not met.

Based on the above and in view of the recent modifications of the Swiss legislation – particularly the introduction of the transfer of tax information without prior notification to the taxpayer – the future of taxpayers' rights appears quite bleak.

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