Executive summary

Switzerland has signed the Organisation for Economic Co-operation and Development (OECD)/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (the MAC) and will introduce the international spontaneous exchange of information in tax matters into domestic legislation. The spontaneous exchange of information will be implemented by way of a revision of the Federal Act on International Administrative Assistance in Tax Matters (Revised Federal Act), which is set to come into force on 1 January 2017.

As a further step towards the spontaneous exchange of information, the Federal Council published the draft of the revised Ordinance on International Administrative Assistance in Tax Matters (draft Ordinance), including an explanatory report, on 20 April 2016. The draft Ordinance contains detailed provisions on the exchange of information upon request and on the spontaneous exchange of information. The draft provisions on the spontaneous exchange of information are discussed in more detail below.
Detailed discussion

Spontaneous exchange of information on tax rulings

According to the Revised Federal Act, Switzerland will follow international standards and the practices of other states as regards the spontaneous exchange of information. Therefore, the draft Ordinance focuses on the spontaneous exchange of information relating to tax rulings.

The draft Ordinance defines a tax ruling as (oral or written) advice, confirmation or assurance of a tax administration that: (i) is given to a taxpayer upon request; (ii) covers the tax consequences of a set of facts described by the taxpayer; and (iii) on which the taxpayer can rely.

In general, only information on tax rulings issued from 1 January 2010 and still applicable on 1 January 2018 may be exchanged.

In line with the recommendations of the OECD, the Federal Council has provided detailed guidance on the types of tax rulings covered by the spontaneous exchange of information. It refers to tax rulings relating to the following circumstances and tax regimes:

- Rulings relating to the taxation as a holding company, a domicile company, a principal company or a mixed company
- Rulings relating to the reduced taxation of revenue from intellectual property (Patent Box of the canton of Nidwalden and Patent Box proposed to be introduced as part of the Corporate Tax Reform III)
- Unilateral tax rulings covering cross-border transfer prices
- Cross-border rulings providing for a unilateral downward adjustment of the taxable income in Switzerland that is not directly reflected in the taxpayer’s financial accounts
- Cross-border rulings concerning the existence or absence of, and/or the attribution of profits to, a permanent establishment
- Cross-border related party conduit rulings

Within 60 days after having been issued, the rulings subject to the spontaneous exchange of information will be submitted together with a brief summary and further relevant information by the cantonal tax administration and the Swiss Federal Tax Administration (SFTA) to the Service for Exchange of Information in Tax Matters (SEI), which is a division of the SFTA.

The SEI analyzes the submitted rulings and forwards the information (but not the ruling itself) to the relevant recipient states within three months. The ruling as such may be exchanged upon a separate request for assistance.

In general, the SEI notifies the taxpayer before the exchange of the information with the recipient state takes place. The taxpayer may participate in the procedure and request the inspection of records. The procedure ends if the taxpayer agrees to the exchange of information or with a final decision of the SEI. The taxpayer can appeal the decision, and generally any information is exchanged only after the completion of the appeals process. In exceptional cases - where there is the risk of circumvention - the SEI may exchange the information before the taxpayer is notified.

The draft Ordinance provides taxpayers with some clarity. Nevertheless, a number of questions remain open. It is not yet clear if only information related to tax rulings will be spontaneously exchanged, or other information as well.

Furthermore, it is uncertain if and how the cantonal tax administrations and the SEI will take into account whether there is a supposed loss of tax revenue in the other state due to a tax ruling. Article 7 of the MAC provides that a state shall forward to another state information if e.g., the state providing the information has grounds for supposing that there may be a loss of tax in the other state. For the implementation of the Revised Federal Act, the explanatory report to the Ordinance refers to two interpretative documents:

- The OECD/G20 Final Report on Base Erosion and Profit Shifting (BEPS), Action 5

The documents contain different interpretations and emphasis regarding the question of whether the loss of tax revenue in another state is required to trigger the spontaneous exchange of information.

Finally, the final report on BEPS Action 5 provides a broader description of the term “ruling” than the draft Ordinance.

Taxpayers should consider discussing proactively the application and interpretation of these central elements with the competent cantonal tax authority in order to determine the scope of the ruling information to be exchanged. Otherwise a court may have to assess at the appeals stage if Article 7 of the MAC is applicable in a particular circumstance.
Legislative process
The Federal Council invited the cantons and interested parties to comment on the draft Ordinance (the consultation process) by 10 August 2016. Based on an analysis of the comments received, the Ordinance will then be finalized so that it can enter into force at the same time as the Revised Federal Act, i.e., on 1 January 2017.

Endnotes
1. Switzerland can limit the exchange to states that have committed to the OECD's Standard, particularly (i) the OECD states: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States; (ii) the G20 States that are not part of the OECD: Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia, South Africa; and (iii) other associated states: Colombia, Latvia.
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