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Group requests, fishing expeditions and Lex USA



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Banking secrecy and international exchange of tax information is an area of law that has changed dramatically in Switzerland and globally over the last four years. With the exception of fraud, we have entered an era of tax transparency after decades of strict banking secrecy. The new approach started in March 2009 when Switzerland decided to grant international tax assistance in accordance with OECD rules. This meant the amendment of a number of double taxation treaties (“DTT”) that allow the communication of banking information to foreign tax authorities in order that they can verify whether their taxpayers have duly reported their Swiss banking assets and revenues.

The framework set for tax exchange information at that time was clearly limited to individual cases. Swiss authorities insisted that requests mention the name of an individual tax payer suspected to be non-tax compliant.

This was the OECD standard in 2009. The rules have been amended since then, and now include group requests.

What does group request mean? What is the limit with the fishing expeditions? What are the criteria for a

valid group request?

The Parliament has debated the proposed Lex USA at length. The Federal government suggested that US authorities be given an opportunity to present group requests based on information they would receive through the settlement programme offered to Swiss banks by the Department of Justice (DoJ).

The first time the notion of group request appears in history was in the case of UBS. On July 16, 2008, the IRS presented a group request regarding UBS clients. There were obviously no names in that group request because the taxpayers in question were unknown to the IRS. The Swiss Administrative Federal Court (TAF) confirmed in its decision of March 5, 2009, saying that a failure to include names was not a problem since the DTT with the USA of 1996 (DTT-US96) did not impose the nominative designation of US taxpayers under scrutiny. The group request was born. This UBS matter and Swiss court decision were certainly a source of inspiration to the OECD, which brought the notion of group request in its Commentary on Article 26 of its Treaty Model. Group request then became an international OECD standard. Switzerland as an OECD Member State declared adherence to that new standard on July 18, 2012. This principle was thereafter brought in Swiss Federal law. The Federal legislation on tax administrative assistance (LAAF) was enacted in September 2012 and came into force in February 2013. It does not expressly mention group requests. The LAAF imposes that a request for tax assistance must include inter alia “the identity of the concerned person” but specifies that “the identification can be done by other means than the name and address”. The law further makes a specific reservation for fishing expeditions, which are expressly prohibited.

More guidance is given by the Ordinance of the Federal Council issued on January 16, 2013, wherein group requests are defined as being requests directed at persons who have shown a particular specific behaviour. The Federal Department explained in a press release that group requests require a description of the scheme applied by the bank’s customers to avoid taxation. Group requests must be clearly distinguished from fishing expeditions that are not based on concrete indicators.

The commentary on Article 26 OECD Treaty Model points out that it is essential that a requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in said group have been non-compliant with that law. The Commentary gives a few examples of where a contracting State is not obligated to provide information in case of group requests. A request, for instance, that is aimed at obtaining the names of all the residents of a requesting State with accounts at a given bank based in the requesting State would not be a sufficient group request. The requesting State would not be obligated to provide information because it would be a mere fishing expedition.

A group request is valid if it describes a typical behaviour or a scheme applied by the customer that would amount to a justified suspicion of tax fraud or evasion.

The request from the IRS on July 16, 2008 in the UBS matter provided the description of a typical behaviour, a description of a scheme and concrete indicators of tax fraud or the like as stated in Article 26 DTT-US96. The scheme in question was the (ab)use of an offshore company presented as the beneficial owner in the W-8BEN form – in order to avoid the tax obligation of UBS towards the IRS – whereas the true beneficial owner behind the offshore company was a US person subject to US taxes. That US person was often shown as beneficiary in the A-form of the bank. It has been suggested by the Swiss Federal government that the information provided by Swiss banks in the course of the DoJ settlement program will allow the US authorities to make group requests directed at different banks. What is the typical behaviour that allows for such group requests? Simply holding an account with such banks in Switzerland will not be sufficient grounds to form a valid group request, because it would amount to a prohibited fishing expedition. An individual previously holding an account with UBS would not be sufficient grounds either.

At this point, the exchange of information between Switzerland and the USA is subject to the DTT-US96, which is limited to cases of tax fraud or the like. It does not allow for mutual assistance in cases of mere tax evasion. An amendment to this 1996 DTT has been ratified by Switzerland but awaits United States approval. This amendment proposes to extend mutual assistance in cases of simple tax evasion with retroactive effect to September 23, 2009. The Swiss authorities decided to expressly include group requests in the proposed amendment to US DTT on March 16, 2012. According to this proposal, the identification of tax payers can be done through a description of typical behaviour that indicates taxpayer non-compliance. However, the draft proposal adds a second condition, which states that the bank or its employees have contributed to such behaviour. The proposed amendment of the 1996 DTT is, in other words, more stringent than the domestic legislation on group requests.

Switzerland will soon have to cooperate more extensively in the area of tax information exchange because tax transparency is now considered an international standard of virtue. Automatic exchange of information is likely to become a reality for a number of countries; but we are not there yet. In the meantime, it is crucial to apply the current legislation to the letter, and reject group requests that would amount to automatic exchange of information or fishing expeditions.

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