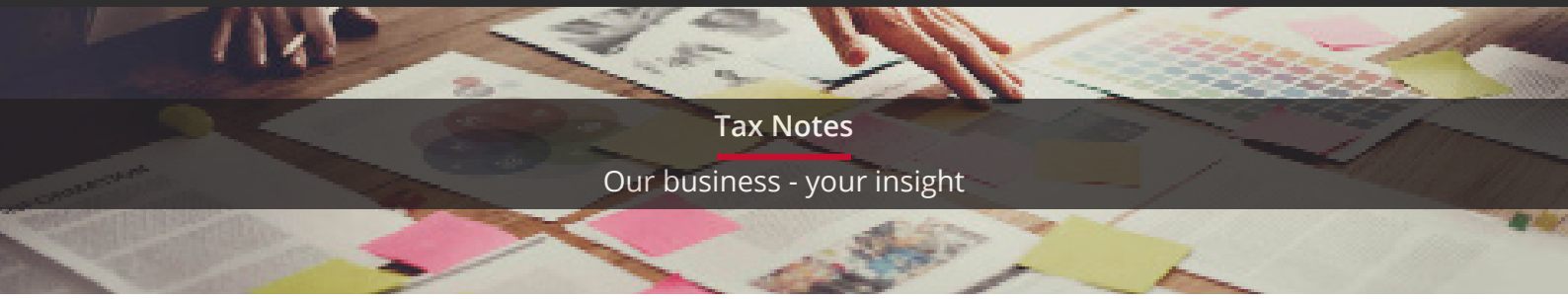


Tax Notes

Our business - your insight

Stefanie Gugger *stefanie.gugger@primetax.ch*
Dominic Nazareno *dominic.nazareno@primetax.ch*

On July 17, 2019, the American Senate approved the long-blocked protocol of amendment of September 23, 2009, on the double taxation agreement between Switzerland and the U.S. (DTA U.S.). The main object of the protocol is to include a provision on the exchange of information in accordance with the OECD standard. The Swiss Federal Assembly approved the protocol already on June 18, 2010. It will enter into force with the exchange of the instruments of ratification.

In addition to the agreement on the protocol of amendment, it was also agreed at that time to start further negotiations on a general revision of the DTAs. In this way, improvements such as the reduction of the withholding tax on dividends from qualifying investments to 0% (so-called „zero rate") were to be achieved. It can be concluded that the ratification of the protocol of amendment will now allow these outstanding renegotiations to begin. In relation to the U.S., besides the DTA provision on the exchange of information, other regulations must also be observed when it comes to the transmission of information in the fiscal area. It is therefore worth taking a closer look at them.

Administrative assistance

Mutual assistance shall mean international cooperation in administrative procedures. In the fiscal area, this includes cooperation between the tax authorities. Administrative assistance must therefore be distinguished from mutual legal assistance, which regulates intergovernmental cooperation in criminal proceedings. However, it only covers cases of tax fraud and not cases of tax evasion. In the area of administrative assistance, the standard for the exchange of information in tax matters developed by the OECD and adopted by Switzerland provides for automatic exchange of information (AEOI) and spontaneous exchange of information (SEOI) in addition to exchange of information on request. In Switzerland, all three forms of administrative assistance are implemented in various laws and ordinances. The U.S. is currently not participating in the AEOI standard. The legal bases for administrative assistance in tax matters can be found in the DTA U.S. of 1996, which, however, only cover administrative assistance in tax matters. In the area of automatic exchange of information, exists other regulations such as the Qualified Intermediary Agreement (QI) and the Foreign Account Tax Compliance Act (FATCA). These unilateral U.S. regulations, on the other hand, lack the element of reciprocity, i.e. the automatic exchange of information only takes place from Switzerland to the U.S.

Automatic exchange of information (QI and FATCA)

Under the QI, Swiss financial institutions are required to collect a tax from their U.S. customers and forward it to the U.S. authorities without disclosing the customer data. The agreement is primarily aimed at the taxation of undeclared income from U.S. sources. The introduction of FATCA was significantly influenced by the fact that the QI is not in a position to effectively combat tax evasion taking place outside the U.S. Under FATCA, Swiss financial institutions are required to identify and document all their customers and to proactively, i.e. automatically, report certain account information about so-called „U.S. accounts" to the U.S. tax authorities (IRS). According to the currently valid Model 2, Swiss financial institutions report the reportable account data directly to the IRS with the consent of the customers concerned. Without consent, certain account information is reported anonymously and aggregated. On the basis of this aggregated report, the IRS can request the transmission of specific customer and account data by means of a normal administrative assistance request under the DTA U.S.

Assistance on request (DTA U.S.; Protocol of amendment)

With the approval of the protocol of amendment to the U.S. DTA, essential elements of the existing DTA were adapted. The exchange of information on request according to the international standard of the OECD is now introduced.

According to this, administrative assistance should help the tax authorities to enforce domestic (tax) law with the help of information obtained from foreign tax authorities. There is no longer any difference between tax evasion and tax fraud, which under the new provision allows group requests also for cases of tax evasion. Requests for information may be made as from the entry into force of the protocol and must relate to situations which occurred after September 23, 2009. In the case of mutual assistance on request, the exchange of information is not automatic or spontaneous between States, but a State provides information only at the specific and reasoned request of the tax authorities of the requesting State. The practice for the identification of the person concerned is that the requesting state must provide sufficient information so that the person concerned can be identified without excessive effort. This may also be possible without naming the affected person. The Swiss Tax Administrative Assistance Act provides in principle for requests for administrative assistance in individual cases and group requests. In addition, case law has created an additional typology of requests, the so-called „list request". Such requests are used to identify a certain number of persons, e.g. by means of an account number. The difference between a list request and a group request seems small. Both must be distinguished from the frowned upon research of evidence.

Prohibition of fishing expeditions

In a public hearing held on July 26, 2019, the Federal Supreme Court made a landmark decision on the distinction between the so-called „list requests" and the frowned upon search for evidence. UBS can thus be obliged to supply over 40,000 client data to France. The French request contained a list of bank internal system numbers held by persons presumed to be taxable in France. With this request, France wants to know the names and account balances. List requests are in principle admissible if there is evidence that the whole group has failed to comply with tax obligations. However, holding a Swiss bank account alone has not yet given rise to such a suspicion, which is why the Federal Administrative Court found the request from France to be inadmissible. For the majority of federal judges, on the other hand, it was clear that there was a pattern of behaviour, which was sufficient for the granting of administrative assistance. This does not merely lead to a change in case law, but to a real paradigm shift. Group/list requests would no longer be allowed only where there was evidence that the whole group was a tax evader. Now it would suffice if there were suspicions that a small part of this group had not behaved correctly in order to supply all the data.

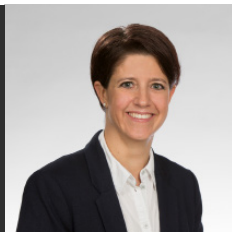
The written decision has not yet been published and it remains to be seen how exactly the federal judges will argue. It is also not entirely clear whether and, if so, how this latest case law will affect relations with the U.S. There is a peculiarity in this area. According to the additional report of August 8, 2011 supplementing the 2009 protocol of amendment, the Federal Council has clearly stated how a request must be made in order not to be considered an inadmissible fishing expedition. The declaration contains an additional criterion: In order to ensure that the group inquiry does not constitute a frowned upon request of evidence, the requesting U.S. authority must substantiate the active and culpable conduct of the information owner or his employees. Parliament approved this amendment by federal decree of March 16, 2012. Thus, the requirements for a group request based on the amendment protocol 2009 are higher than according to the OECD Commentary on Art. 26 OECD Model Tax Convention on Income and on Capital and thus also higher than according to the latest Federal Supreme Court case law.

Further innovations

From January 1, 2020, dividends paid to tied pension funds (pillar 3a) will also be exempt from withholding tax. Previously, this only applied to dividends paid to occupational pension schemes (2nd pillar).

It also introduces a mandatory arbitration clause to avoid double taxation if no agreement is reached under the mutual agreement procedure.

Stefanie Gugger
lic. iur., Certified Tax Expert
Senior Manager
stefanie.gugger@primetax.ch
+41 58 252 22 26



Dominic Nazareno
M.A. HSG, Certified Tax Expert
Senior Manager
dominic.nazareno@primetax.ch
+41 58 252 22 03