

Tax News

Spontaneous exchange of information on tax rulings

As part of the OECD's Base Erosion and Profit Shifting (BEPS) Project, the spontaneous exchange of information on certain categories of tax rulings is being introduced as a minimum standard. In Switzerland, the legal basis for this becomes effective as of January 1, 2017. The actual exchange of information on tax rulings is expected to begin on January 1, 2018.

The OECD minimum standard regarding the exchange of information on tax rulings.

Driven by the OECD and supported by the G20 countries, the international exchange of information in tax matters has been constantly expanded in the last few years. Now, along with the BEPS Report 2015 on Action 5, the mandatory minimum standard for a spontaneous exchange of information on tax rulings is being introduced. Switzerland, as a member of the OECD, is in the process of implementing this required minimum standard. The spontaneous information exchange marks a new form of international administrative assistance for Switzerland, which so far has provided administrative assistance upon request and is also a party to the automatic information exchange (e.g., collection of financial account information from January 1, 2017).

The EU countries, on their part, are introducing an automatic exchange of information on tax rulings effective from January 1, 2017, which reaches beyond the OECD minimum standard (expanded scope of tax rulings to be exchanged and expanded range of recipient countries).

Tax ruling information to be exchanged

The main focus here is on the provision of information on Swiss tax rulings to foreign countries. But information on foreign tax rulings may also be provided to Switzerland.

The spontaneous information exchange based on the OECD minimum standard and in line with country-specific tax administrative assistance acts covers five categories of tax rulings:

- 1) Rulings on preferential tax treatments, e.g., rulings on the abolition of tax privileges for holding / domiciliary / mixed / or principal companies or rulings on the patent box system that is to govern the taxation of intellectual property rights;
- 2) Unilateral rulings with cross-border implications regarding transfer pricing;
- 3) Rulings with cross-border implications regarding the reduction of taxable profit that is not being disclosed in the commercial balance sheet;
- 4) Rulings regarding the existence or non-existence of permanent establishments and related profit allocation;
- 5) Rulings regarding transfer companies.

The OECD reserves the right to designate, at a later time, other categories of tax rulings for the spontaneous information exchange.

Tax rulings concerning the income tax of natural persons are not generally exchanged spontaneously. The situation is somewhat hazy when it comes to the business assets of a natural person.

What is being exchanged is an OECD-designed model form with relevant information but not the tax ruling itself. The model form contains, among others, the name and address of the Swiss legal entity, the names of the multinational group of companies, issue date, tax ruling category, a summary of the matter at hand, and names and addresses of the legal entities in the recipient countries.

Spatial scope of application / recipient countries

Rulings are being exchanged between those countries that have ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("the Administrative Assistance Convention") and have committed to the OECD minimum standard. This includes the OECD countries and the G20 countries.

The OECD minimum standard and, accordingly, the country-specific tax administrative assistance acts define the recipient countries for each category of tax rulings. In all five categories, the country of domicile of the group parent company and the country of domicile of the direct parent company are among the recipient countries. In the case of a ruling on preferential taxation, the recipients will also include the countries of domicile of those group companies (with at least 25% participation) whose transactions are subject to the preferential treatment. Not among the recipients are the countries of domicile of an independent third party.

As regards the tax rulings in existence to date, the spontaneous exchange of information extends only to those recipient countries that appear in the tax ruling or in the tax authorities' documents. For these tax rulings, the OECD minimum standard requires the tax authorities only to act to their "best efforts". It does not require them to ascertain all potentially affected recipient countries.

Temporal scope of application

Switzerland deposited its instrument of ratification of the Administrative Assistance Convention on September 26, 2016. The convention and the amendments to the country-specific legislation (in this case Switzerland's Tax Administrative Assistance Act and Ordinance) enter into force on January 1, 2017. In principle, the information exchange starts a year later, i.e., on January 1, 2018. However, the Federal Council is free to strike a deal with individual parties to the Administrative Assistance Convention and start the information exchange as soon as the convention enters into force, i.e., from January 1, 2017. No such individual agreement is on the horizon to date, and it is not likely that any might be struck in time. One can therefore assume that the spontaneous information exchange will start on January 1, 2018.

The spontaneous information exchange covers tax rulings that were issued after January 1, 2010 and which will still be applicable or will apply as of the presumed effectiveness date of the information exchange, i.e., January 1, 2018.

Procedural rights of the taxpayers

The taxpayers have the same procedural rights in connection with the exchange of tax rulings as apply under the exchange of information upon request. They have the right to be pre-informed and to access the files, and also have a right to appeal to the Federal Administrative Court or the Federal Supreme Court.

Our assessment

The potential consequences of the spontaneous information exchange on tax rulings have to be assessed individually. It has to be examined whether an existing tax ruling should be rescinded in order to avoid an exchange. Notwithstanding the unlikely event of an agreement with another country to start the information exchange already on January 1, 2017, a rescission by the end of 2017 should be sufficient. To be on the safe side, a taxpayer may opt to rescind a tax ruling before the end of 2016.

Both foreign and Swiss tax authorities will generally possess more information on individual taxpayers as a result of the expanded exchange of information (upon request, spontaneous, automatic). The proliferation of available tax information in the various countries will increase the risk of add-backs and international double taxation.

At the same time, the spontaneous information exchange also constitutes a chance for Switzerland as a tax domicile. The OECD minimum standard applies to all OECD countries as well as all G20 countries and generally increases tax transparency. All countries should therefore enjoy a level playing field. This means that international tax competition will focus mainly on ordinary income tax rates and the general tax environment. Political stability also plays an important role here. In this regard, Switzerland offers – and will sustain into the future – attractive conditions for business.

Tax Partner AG

Zurich, November 2016

Tax Partner AG, Taxand Switzerland

Tax Partner AG, Taxand Switzerland, is focused on Swiss and international tax law and is recognised as an important independent tax boutique. With currently 12 partners and a total of 38 professionals, the firm has been advising multi-national and national corporate clients as well as individuals since it was established in 1997.

Tax Partner offers the full range of tax advice thereby offering a unique in-depth service quality to its clients.

As a part of its growth and continuously expanding international relationships, Tax Partner co-founded Taxand in 2005. Taxand is the world's largest independent tax organisation delivering high quality integrated tax advice worldwide.

Tax Partner has repeatedly been nominated as a leading tax firm in Switzerland in several international rankings.

Tax Partner AG

Talstrasse 80
8001 Zurich
Switzerland

Phone +41 44 215 77 77
Fax +41 44 215 77 70
www.taxpartner.ch

 **TAXAND**

Your global tax partner
www.taxand.com

DISCLAIMER

This publication highlights certain issues and is not intended to be comprehensive or to provide tax or legal advice. Tax Partner AG is not liable for any damage resulting from the information provided. To unsubscribe, send an e-mail to unsubscribe@taxpartner.ch.