

Switzerland

by Thierry Boitelle and Florence Bouvard

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YEAR IN REVIEW
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Tax news in Switzerland this year was dominated by the dispute between the United States and Swiss banking giant UBS. On March 13, in response to international pressure, the Swiss Federal Council made the historic decision to lift its reservations to article 26 of the OECD model tax convention and comply with the OECD standards for the exchange of information. Other important developments included Swiss VAT reform and domestic tax reform to improve corporate taxation and the Swiss investment climate.

The UBS Tax Dispute

On August 19 the Swiss government signed an agreement with the United States regarding the information exchange request relating to UBS. To settle the dispute and the John Doe summons enforcement case, Switzerland agreed to process a U.S. administrative assistance request under article 26 of the Switzerland-U.S. tax treaty relating to an estimated 4,450 U.S. clients of UBS based on criteria established in a secret annex to the agreement.

On August 31 the IRS's treaty request was received by the Swiss Federal Tax Administration. In a separate agreement, UBS committed to cooperating with the request and facilitating the information exchange by submitting the information on the clients to the Swiss Federal Tax Administration for further processing. UBS also agreed to inform the clients in writing, explaining their rights and obligations and encouraging them to use the special voluntary disclosure procedure put in place by the IRS.

On November 17 the details of the secret annex, and thus the criteria for information exchange in the case of UBS, were made public. Consistent with the judgment of the Swiss Federal Administrative Court of March 5, the requirement of clear identification of the persons involved was put aside. That is the key conces-

sion without which the agreement would have had no effect. Also, the concepts of "tax fraud and the like" and "scheme of lies" as defined in older Swiss jurisprudence are enlarged to such an extent that one may doubt whether the subtle difference between tax fraud and tax evasion still exists under Swiss law. What mattered most for the Swiss government was a quick settlement of the tax dispute with the United States and not the preservation of old — and perhaps odd — legal principles.

It is unknown whether the United States and the IRS will be taking similar action against other Swiss banks or against banks in other jurisdictions, but the fight against tax evasion and bank secrecy is expected to continue in 2010.

Information Exchange

The Swiss Federal Council on March 13 lifted its reservation to paragraphs 1 and 5 of article 26 of the OECD model. Switzerland will in the future exchange information necessary for the enforcement of domestic laws of the other contracting state (not limited to the application of the treaty as such).

On September 24, after having signed 12 extended information exchange provisions in accordance with article 26 of the OECD model,¹ Switzerland was upgraded to the white list of compliant jurisdictions. By the end of 2009, Switzerland had initialed information exchange agreements with Japan, Kazakhstan, the Netherlands, Poland, Singapore, and Turkey.

The texts of the new agreements have been submitted to the cantonal authorities and the Swiss business community. On November 27, the Swiss Federal Council approved the texts of a first batch of five new agreements (those with Denmark, France, Mexico, the

¹The 12 jurisdictions are Austria, Denmark, the Faroe Islands, Finland, France, Luxembourg, Mexico, Norway, Spain (through the "most favored nation" clause), Qatar, the United Kingdom, and the United States.

United Kingdom, and the United States) and submitted them to parliament for ratification. Normally, the Swiss Federal Council requires only the first treaty introducing a major change in policy to be subject to the optional referendum. In this particular case, however, the Swiss Federal Council believes that all new agreements should be subject to an optional referendum by Swiss voters. The Swiss parliament has the final power to make that decision and based on comments already made by members of parliament, it is expected that the agreements will be subject to an optional referendum, which means that a popular vote will be held if required by at least 50,000 people. Because of the ratification procedures, which will likely involve a popular vote, the new information exchange agreements cannot enter into force by 2010.

Main Features

The main features of the new information exchange policy have already been covered in these pages (see *Tax Notes Int'l*, Mar. 30, 2009, p. 1189), but with the signing of new income tax treaties, the Swiss government highlighted the following important aspects:

- At the signing of the protocols with the United States and France, the Swiss Federal Council reaffirmed its position that fishing expeditions are excluded even if the wording of a treaty may differ from article 26 of the OECD model (which includes the text “foreseeably relevant,” meaning a request must relate to a given taxpayer).
- The exchange of information is in principle limited to taxes that fall within the scope of the applicable income tax treaty (for example, the Switzerland-U.S. treaty). In some new agreements, such as those with France, Japan, the Netherlands, Poland, and the United Kingdom, the information exchanged applies to all kinds of taxes.
- Retroactivity is avoided as a matter of principle. To guarantee certainty for the taxpayer, the entry into force of the new exchange of information agreements should take place only after the ratification of the new treaty. Under some new income tax treaties, however, such as those with France and the United States, the entry into force takes place the year after the signing of the protocol (France) or on the date of the signing of the protocol (United States).
- The new exchange of information policy will not apply to the presence of foreign agents on Swiss territory, which is one important aspect of the tax dispute with Italy.

The practical consequences of the new Swiss exchange of information policy go far beyond the often publicized cases of tax evaders hiding behind Swiss bank secrecy. Once the new information exchange agreements enter into force, multinational enterprises with a presence in Switzerland will have to take into account that many tax administrations, including the

Swiss tax administration, will lose a powerful investigative tool regarding, for example, intercompany transfer pricing matters or beneficial ownership of treaty-protected income. That will likely result in increased demand for tax advice, opinion letters, and advance rulings. Tax practitioners will have to be more cautious when advising on the use of tax haven companies in connection with Swiss tax planning structures for their clients.

VAT Reform

Swiss VAT law will undergo major reform effective in 2010. As previously reported in these pages (see *Tax Notes Int'l*, July 21, 2008, p. 237), the VAT reform proposals were split into two parts. Part A, which will enter into force January 1, 2010, provides for the greatest possible legal certainty for tax collecting enterprises, an increase in transparency, and enhanced customer service within the VAT authority. Part B, the more radical part of the reform (proposing the introduction of a single VAT rate and the elimination of 20 of the 25 current VAT exemptions), is still the subject of parliamentary debate. Also, in a popular vote on September 27, a constitutional amendment for an increase in the VAT rate was accepted as a separate matter, which means that as of January 1, 2011, the general VAT rate will increase from 7.6 percent to 8 percent to make up for deficits in Switzerland’s disability insurance system.

In an international context, two major changes in Swiss VAT law deserve more attention:

- Subject to specific exceptions, the place of supply of services will generally be at the place where the recipient of the services has its business domicile.
- Input VAT regarding the holding of participations will be deductible if it has been incurred in connection with the acquisition, retention, or sale of participations of at least 10 percent with the intention of long-term investment or for restructuring reasons.

New Tax Breaks

The Enterprise Tax Reform II has entered into force and is being gradually implemented by the last remaining cantons. (For prior coverage, see *Tax Notes Int'l*, Mar. 3, 2008, p. 720.) The reduction of economic double taxation of dividends entered into force on January 1, 2009, and the exemption of taxes on paid-in capital surplus will enter into force in 2011.

The final circular letter of the Swiss Federal Tax Administration regarding the tax treatment of performance fees and carried interest (for prior coverage, see *Tax Notes Int'l*, Feb. 25, 2008, p. 631) is still being prepared, but the tax administration issued circular letters 24 and 25, clarifying the tax treatment of such funds for withholding tax purposes and stamp taxes and for income tax purposes (for the funds themselves and for the investors in the funds). Cantonal tax authorities are

issuing advance tax rulings on performance fees and carried interest, whether based on the draft circular or on different practices, all with the goal of attracting managers of private equity and hedge funds.

In December 2008 the Swiss Federal Council published its main focus for a proposed Enterprise Tax Reform III, including:

- the elimination of capital contribution tax;
- the introduction of new withholding and stamp tax exemptions in the field of intragroup financing and investment transactions;
- the possibility for cantons to eliminate corporate net wealth tax; and
- changes to cantonal tax regimes that are subject to EU state aid inquiries.

Switzerland must consider further tax reform to remain an attractive location for both the financial services industry and multinational companies in order to compensate for revenue that will be lost by its offshore banking industry. It is encouraging to see that in 2009, the tax administration took small steps to relax some of its more rigid antiabuse practices; hopefully more steps will follow, particularly regarding withholding taxes on dividend and interest, capital contribution tax in a reorganization context, and multinational enterprises' use of Swiss income tax treaties. ◆

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