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BANKING SECRECY: AN ENDANGERED SPECIES

Geneva, February 11 - 13, 2010

**Banking secrecy and Exchange of information
SWITZERLAND**

Aliasghar Kanani

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I. INTRODUCTION

II. AS IT IS

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V. SWISS BANKING SECRECY STILL ALIVE?

Philosophy of banking secrecy in Switzerland:

- The State is at the service of its citizens and not the contrary.
 - Citizens are not primarily tax payers, but human beings with the right to privacy.
 - Everyone has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications (art 13 of the Swiss Federal Constitution).
 - Banking secrecy protects financial privacy from unauthorized access by other individuals and by the State.
 - It does not protect criminals (e.g. Anti-money laundering Act)
 - Consequences of the violation of banking secrecy:
 - Criminal offence (written law)
 - Civil damage of the taxpayer has been denied in tax matters (jurisprudence)
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Ways to exchange information:

- Switzerland has two ways to exchange information for tax matters:
 - Administrative assistance based on DTT
 - Mutual Assistance in Criminal Matters based on a specific Federal Act

History:

- 1996: USA-CH DTT: introduction of « tax fraud or the like »
 - 2004: Exchange of information i) for the purpose of the DTT ii) in case of fraud iii) in case of Swiss Holding Status
 - 2006: Spain-CH DTT « most favored nation clause »
 - 2006: Austria-CH DTT « mutual assistance for collection of taxes »
 - 2008: Lichtenstein case
 - 2009: UBS case
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Facts:

- March 13, 2009 Swiss Government announced the extension of its exchange of information policy to meet the standards of the OECD (art. 26/5 of the OECD Model Convention).
 - As of today, no treaty with new article 26 has been ratified by the Swiss Parliament yet.
 - Until then, the distinction between tax fraud and tax avoidance is still applicable (see e.g. the UBS case).
 - Until new treaties enter into force, Switzerland only exchanges information related to tax fraud cases (and for Swiss Holdings Status and for the application of the treaty).
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Highlights of the changing tax climate in Switzerland 2008 – 2009:

- Thomas Jefferson said :
« In matters of style, swim with the current, in matters of principle, stand like a rock »
 - March 13, 2009: Switzerland fully adopted article 26 of the OECD Model Convention
 - September 25, 2010: Switzerland announced the magic number - the 12th renegotiated DTT has been signed – Switzerland was then removed from the OECD grey list!
 - As of today, 18 DTT have been signed, including Spain which contains a “*most favored nation clause*”
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III. AS IT WILL LOOK LIKE

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- Upon request – No automatic exchange of information
 - Limited to taxes covered by the DTT (exceptions F and UK)
 - Limited to individual cases - No fishing expeditions (expressly mentioned in the protocols)
 - Information required such as name of the taxpayer, name and address of the person/institution holding the information, purpose, etc.
 - Domestic law provides for procedural rights protecting taxpayers, Swiss and foreigners alike
 - Principle of subsidiarity must be respected
 - No modification of Swiss domestic rules – Banking Secrecy remains (like a rock...)!
 - Entry into force after ratification by the Swiss Parliament (optional referendum; exceptions for USA and Spain)
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Specificities:

- Extended exchange of information agreements cover all type of taxes:
 - Protocols with France and UK (also Spain?)
 - Individual cases with some flexibility:
 - Protocol with France (also Spain?) provides that *“dans la mesure où ils sont connus, les nom et adresses de toute personne dont il y a lieu de penser qu’elle est en possession des renseignements demandés”*.
 - Protocol with the USA provides that *“information sufficient to identify the person under examination or investigation (typically, name and, to the extent known, address, account number, or similar identifying information)”*.
 - Entry into force:
 - Year following the signing (France – 1.1.2010)
 - Since signatory date (USA – 23 September 2009)
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Swiss Ratification Procedure:

- May be subject to optional referendum (If 50'000 Swiss voters require so, a popular vote will be held)
 - Only the first one or all new treaties
 - Will be discussed during the next Parliament session during Spring 2010
 - Parliamentary and referendum procedures may delay entry into force of some treaties
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Historic:

- July 1st, 2008 Notification to UBS of the “John Doe Summons” (JDS) by the Miami Tribunal
 - July 16, 2008 Administrative Assistance Request based on the 1996 CH-USA DTT
 - February 18, 2009 Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) orders UBS to transfer information to the IRS
 - March 5, 2009 Administrative Federal Court rules that conditions of exchange of information are not met...Too late, information already exchanged!
 - June 18, 2009 CH-USA agreed upon a new protocol with extended information exchange clause (initialed)
 - August 19, 2009 Agreement between CH and USA to suspend the JDS
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IV. UBS CASE

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- August 31, 2009 New exchange of information request regarding 4'450 names of UBS clients, based on 1996 USA-CH DTT!
 - September 1, 2009 Federal Tax Authority requests UBS to provide information requested by the IRS regarding the 4'450 names
 - September 23, 2009 The new protocol is signed between CH-USA
 - January 5, 2010 Administrative Federal Court rules that FINMA's ordinance is illegal
 - January 21, 2010 Administrative Federal Court rules that Agreement concluded between CH and USA concerning UBS is violating internal law and is therefore illegal. Approx. 4'200 of the 4'450 cases are covered by this decision.
 - January 27, 2010
 - a) Swiss Government explains the Court decision to the USA
 - b) The Agreement may be subject to Swiss Parliament's agreement with a retroactive effect (?)
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- Federal Administrative Court acted (and hopefully will continue) as “recovery unit” for the Swiss banking secrecy
 - No changes for Swiss residents (including foreign nationals!)
 - The coming exchange of information method will be:
 - on the one hand more restrictive as the identity of the taxpayer and of the information holder must be provided (exceptions F and USA ?)
 - on the other hand available in case of tax avoidance.
 - Only tax evasion is discussed, but the new exchange of information provisions have a much wider scope – Will certainly lead to exchange of information e.g. for Transfer Pricing purposes.
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Aliasghar Kanani

Attorney at Law, Geneva Office

kanani@altenburger.ch

ALTENBURGER LTD legal + tax

Zurich

Seestrasse 39

CH - 8700 Küsnacht

Tel. +41 44 914 88 88

zurich@altenburger.ch

www.altenburger.ch

Geneva

Rue Rodolphe-Toepffer 11bis

CH - 1206 Geneva

Tel. +41 22 789 50 20

geneva@altenburger.ch

www.altenburger.ch
