THE REVISED SWISS-RUSSIAN DOUBLE TAX TREATY: THE END OF SWISS BANKING SECRECY ?

On September 24, 2011, Switzerland and Russia signed a Protocol to amend the Swiss-Russian Double Taxation Agreement of 15 November 1995. Russian News Agencies commented widely on this development with regard to new possibilities for obtaining information on bank accounts of Russian citizens in Switzerland. We will examine how this affects Swiss bank secrecy for Russian taxpayers holding assets in Switzerland, although changes are not limited to the exchange of tax information.

I. THE CONTEXT

The **G-20 summit** held in London in April 2009 decided to globally enforce an international standard relating to the exchange of tax information devised by the OECD. Under the thinly veiled threat of "defensive measures" to be carried out by the large countries, a number of smaller jurisdictions – including Austria, Belgium, Luxembourg, Singapore, Switzerland and many others – decided to scale down their rules on financial privacy. This has been a challenge for Switzerland, but the country has coped.

As a result of the new international environment, Switzerland has re-negotiated more than 30 double taxation agreements (the "DTA(s)"), including those with most of its major trading partners. The **revised DTAs** provide for wide exchange of information relevant to the administration and enforcement of taxes. Prior to this, Switzerland supplied information only for the implementation of its DTAs and in cases of "tax fraud"[1]. But Switzerland will still exchange information upon request only, and not spontaneously or automatically. So-called "fishing expeditions" remain prohibited in Switzerland.

Russian press reports alleged that the Protocol meant "the end of Swiss bank secrecy". In fact, the Protocol does not regulate or abolish the statutory obligation of Swiss banks (Article 47 of the Swiss Federal Law on Banks and Savings Banks) to keep information on their clients' assets and transactions confidential, which remains in full force. The Protocol merely brings Switzerland's tax information exchange policy in line with **the current OECD standards**, thereby limiting the bank secrecy, which has never been absolute.

Most of Russia's 77 DTAs (e.g. with the Netherlands, Luxembourg) always included the OECD standard on information exchange. Unlike Switzerland numerous countries exchange tax information on an automatic or spontaneous basis. Many DTAs (including Russia's DTA with Cyprus) also contain provisions on mutual assistance with tax collection, which will not be the case for Switzerland.

The Protocol was signed on 24 September 2011 and must now be **ratified** by the Parliaments of both countries. The revised Agreement (the "RF-CH DTA") will have no retroactive effect, but will apply only to requests for information relating to taxable periods starting on the first day of the year following ratification[2] although the use of information thus obtained in relation to earlier fiscal years cannot be excluded.

[1] i.e. positive action by the taxpayer, with the intent to mislead the tax authority, such as counterfeiting documents or false statements (unlike tax evasion and tax avoidance, tax fraud is a criminal offense under Swiss law).

[2] As ratification is not likely to occur in 2011, the Protocol will probably not be effective before 1 January 2013.

II. WHAT ARE THE RELEVANT CHANGES?

The revised DTA applies to the following **Russian taxes**:

(1) corporate profit tax;
(2) corporate asset tax;
(3) income tax of individuals;
(4) wealth tax of individuals (currently limited to Russian real estate).

The RF-CH DTA provisions on tax information exchange will apply not only to these taxes, but to **VAT** (including VAT raised on imports) as well.

The exchange of tax information is not restricted to taxation matters concerning **residents** of either Switzerland or Russia, although only residents can claim benefits under the DTA. For instance, tax information about the Swiss bank account of a UK company can be requested if such information is deemed necessary for assessing Russian tax, even though the company is neither a resident of Switzerland nor Russia.

Under Swiss law, the Swiss tax authorities cannot access bank information through ordinary taxation procedures. This will probably remain unchanged with regard to the taxation of domestic taxpayers.

In order to implement the OECD standard, the **Swiss** Government adopted **special legislation** (the Ordinance on the Administrative Assistance according to Double Taxation Conventions, in force since October 1, 2010) which allows the Federal Tax Administration to obtain the information requested by foreign States under DTAs from all persons in possession of such information (**information holders**), including banks and fiduciaries. The information must be given notwithstanding statutory provisions on bank and professional secrecy, if the request is made in compliance with the DTA.

As indicated above, Switzerland will, at this stage at least, exchange information only **upon request**. Since the Swiss Federal Tax Administration does not have direct access to bank information, for instance, a request may be rejected, if it does not contain sufficient information to **identify the information holder**. Indeed, it is unrealistic that the Swiss authority will request information from all banks in the country.

A crucial issue is whether the Russian authorities will gain access to information on direct or indirect ownership kept in bank records, particularly the so-called **Bank Form "A" (stating the "beneficial owner")**. The Russian authorities would need to demonstrate that such information is "foreseeably relevant" for Russian taxation, for instance in order to implement income tax[3] or transfer pricing rules or to determine the beneficiary of dividends, interest and royalties where the DTA exempts such income from Russian tax, etc. Outside of these cases, information about ownership is not automatically relevant, but the Swiss authorities will provide it if the foreign country can argue credibly that it is required for taxation purposes.

[3] Reminder: there is no wealth tax in Russia, and no obligation to declare (foreign) wealth. In other words, individuals holding property abroad or shares in foreign companies do not need to declare such property, unless they receive income from its sale or otherwise (dividends, interest, royalties, rent, etc.).

III. SWISS IMPLEMENTING LEGISLATION

The Ordinance provides that the request will be rejected, if it is based on **information obtained or transmitted through criminal acts** (e.g. theft of bank data, as it occurred in several highly publicized instances in the last few years) or if it is too vague, such as a "fishing expedition".

A request must contain the following information:

(1) the identity of the person under examination or investigation;
(2) to the extent known, the name and address of any person believed to be in possession of the requested information (information holder);
(3) the tax purpose for which the information is sought;
(4) the period of time for which the information is requested; and
(5) a statement of the information sought, including the form in which the requested state wishes to receive the information from the requested State.

The information can be requested from the person concerned or the information holder or both. **Coercive measures** (search warrant, seizure of records, etc.) can be taken, but only by the Director of the Swiss Tax Administration, his authorized representative or, in cases of imminent danger, the person in charge. The foreign authorities have no right to participate in the investigation or to access the file.

The person who is targeted by the investigation has the **right to be heard** and must therefore be properly notified. A person domiciled abroad will in principle be notified through the information holder, a representative can be designated for that purpose. The order on the transmission of the information to the requesting foreign State (but not investigative or coercive measures taken to gather the information requested) can be appealed by the person concerned, the information holder or other affected parties. The information is transmitted only after the order has become "final", i.e. if it is not appealed or if the appeal was unsuccessful.

IV. CONCLUSION

The revised RF-CH DTA will provide Russian tax authorities with new possibilities to obtain information on Swiss bank accounts held directly or indirectly by Russian citizens.

While losing attractiveness for persons wishing to hide assets from the Russian tax inspector, Switzerland remains an attractive jurisdiction for properly structured asset protection and wealth management.

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