

Court Decision Expands Admissibility of Group Information Requests

by Peter R. Altenburger

Reprinted from *Tax Notes Int'l*, July 1, 2013, p. 44

COUNTRY DIGEST

Court Decision Expands Admissibility Of Group Information Requests

A recent decision (A-6385/2012) by the Swiss Federal Administrative Court opens the door to “group” information requests covering past tax periods under the 1996 Switzerland-U.S. tax treaty and many other Swiss tax treaties. The court further held that a rejected information request may be updated and resubmitted.

A group request is an administrative assistance request for information about a group of taxpayers from a single country who might hold financial assets in a second jurisdiction and cannot be identified individually. The court’s June 6 decision involved a second, restated request by U.S. authorities for information about accounts held by U.S. individuals at Credit Suisse. The request covered tax years 2002-2010.

U.S. authorities’ first request, on September 26, 2011, was rejected by the Federal Administrative Court in April 2012 because it did not allege any circumstances of tax “fraud or the like.” According to the court, the facts presented indicated only tax evasion, which is insufficient to allow information to be exchanged under the Switzerland-U.S. treaty. (Prior coverage: *Tax Notes Int'l*, Aug. 13, 2012, p. 604; related analysis: *Tax Notes Int'l*, June 10, 2013, p. 1113.)

In its June 6 decision, the court held that under the Switzerland-U.S. treaty, “fraud or the like” is only possible when the U.S. taxpayer concerned holds U.S. securities exceeding \$50,000 in a single account. These requirements are closely linked to the qualified intermediary system that was put in place for accounts of U.S. persons opened after January 1, 2001.

However, the court also held that group requests (regarding a specific pattern of behavior) are permitted under the Switzerland-U.S. treaty, despite the fact that the Swiss parliament did not permit group requests under the treaty until a special report (*Zusatzbericht*) was passed on August 8, 2011. Thus, the court rejected the argument that group requests cannot apply to tax years starting before August 8, 2011.

The decision further states that the *ne bis in idem* principle does not apply in matters of cross-border requests for exchange of information. Therefore, a rejected request can be updated and resubmitted.

Application to Other Treaties

Unlike the Switzerland-U.S. treaty, which still relies on a “fraud or the like” standard, several treaties entered into by Switzerland contain an exchange of information provision that corresponds to article 26 of the OECD model convention. Whenever a tax treaty contains a provision corresponding to article 26, paragraph 5 of the OECD model convention (indicating that exchange of information cannot be refused solely because the information is held by a financial intermediary), exchange of information is not restricted to “fraud or the like” circumstances but applies to any tax offense.

What is admissible under the Switzerland-U.S. treaty applies *mutatis mutandis* to all Swiss tax treaties with an exchange of information provision based on article 26 of the OECD model convention. This means that by virtue of this important decision, group requests covering past tax periods are generally admissible. ◆

◆ *Peter R. Altenburger, LTD legal & tax, Zurich*