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Mutual legal assistance in tax matters
A Swiss revolution

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1. Introduction:

Switzerland has consistently expressed reluctance to grant judicial assistance for tax offenses on the basis that tax evasion does not constitute a criminal offense in Switzerland.

Although it has been subject for some years, to criticism in this respect, being considered as a *tax haven*, Switzerland resisted to the international pressure, determined to protect its bank secrecy and financial market by all means.

However, recent events, widely reported in the Swiss and international press, have raised many questions about the protection of bank secrecy in Switzerland and the Swiss policy in mutual assistance in tax matters.

2. Current situation:

The most important reservation made by Switzerland in MLA cases is that assistance is conditional on respect of the principle of dual criminality. According to this principle the conduct being investigated must also constitute an offence under Swiss law.

This reservation has important consequences in the framework of tax offences, since a distinction is made in Swiss law between tax evasion and tax fraud. Since under Swiss law, only tax fraud is a criminal offence (tax evasion being solely an administrative offence), Switzerland grants judicial assistance only when the foreign procedure involves elements of an offence tantamount to tax fraud in Switzerland.

Tax evasion occurs when a taxpayer fails to submit a tax return or submits an incomplete tax return (e.g. as a result of false or incomplete entries). It is generally punishable under Swiss law by fine and is therefore an infraction rather than a criminal offence, under the Swiss Criminal Code. It is a matter for the tax authorities to pursue cases of tax evasion and not for the prosecuting authorities.

Tax fraud is committed, according to Swiss law, when for the purposes of tax evasion, falsified or non-genuine records, including accounts, balance sheets or income statements and other statements of third parties are used to deceive. A tax return is not of itself considered a document. Tax fraud can arise without the falsification of documents where wilful deceit is employed for the purpose of evading tax. Tax fraud is treated as a crime and is punishable by fine or imprisonment. It is the prosecuting authorities of the respective canton, rather than tax authorities, that handle these cases. For purely domestic purposes tax fraud is the use of forged or falsified documents, excluding tax declarations.

Currently, Switzerland will grant legal assistance, whether administrative or criminal, only for tax fraud and not in cases of tax evasion.

Article 3 para. 3 of the Swiss Federal Law on International Mutual Assistance in Criminal Matters confirms that assistance shall not be granted if the subject of the proceeding is an offence which appears to aim at reducing fiscal duties or taxes. It specifies however that a judicial assistance request may be granted if the subject of the proceeding is a duty or tax fraud.

The Swiss Federal Supreme Court has indeed ruled that when the request is with regards to tax fraud, Switzerland has the obligation to grant judicial assistance. Assets resulting from tax fraud can even be seized in the framework of such a judicial assistance request.

The Swiss bank secrecy will therefore protect foreign assets which have been concealed from foreign tax authorities. In cases of tax fraud however, Swiss banking secrecy does not hinder the gathering of documentary evidence from banks.

Switzerland has therefore excluded assistance for tax evasion in all agreement it concluded, in particular. In particular, it made important reservations to the European Convention on Mutual

Assistance in Criminal Matters of the Council of Europe (ECMA), Switzerland benefits from a special treatment under the Schengen agreement and it excluded fiscal evasion from all double taxation agreement it signed.

3. Breaking point

3.1 The UBS scandal

Beginning of this year, the American administration asked UBS, according to the commitments which the Swiss bank had taken, to provide information on American citizens who had accounts in the bank. The American administration threatened UBS with heavy pecuniary penalties if it did not cooperate, and threatened to withdraw UBS's license of operation in the United States.

For the UBS group, the American market represents a third of its activities and of its revenues.

On 18 February 2009, an agreement was reached pursuant to which UBS would pay a fine of an amount of USD 780 mio and transmit to the American authorities the names of 250 American clients suspected of tax fraud.

The *Finma* (the Swiss financial intermediary supervisory authority) had previously ordered that a limited quantity of client data be handed over to the US authorities immediately.

On 20 February, on the basis of several claims, the Federal Administrative Tribunal issued an interim order prohibiting the Finma to transmit the relevant information to the US authorities until it had all necessary elements to decide on the merits of the claim. It further stated that for the time being, the information from the UBS clients was still protected by the bank secrecy.

A few hours after this decision was issued, UBS and the Finma announced that the names of the 250 American clients had already been transmitted to the US Department of Justice.

At that time, an administrative assistance proceeding of the Swiss Federal Tax Administration was pending in the same matter. By directly providing the names, the normal legal assistance proceeding was bypassed.

It should be stressed that although providing the names of the clients in such a manner clearly violated the rules applicable in the framework of mutual administrative and criminal assistance, the names provided, all related, according to the authorities, to cases of tax fraud and not merely of tax evasion.

Not only did this create a huge scandal within Switzerland, many EU countries asked to be, in the future, treated equally and to benefit of the same proceeding.

3.2 The OCED lists

Then, beginning of March, discussions began about the list of tax havens which the G20 and the Organisation for Economic Co-operation and Development (OCED) planned to update.

On 2 April 2009, the OECD published a progress report on the jurisdictions surveyed by the OCED Global Forum in implementing the internationally agreed tax standards.

The same day, the G20 declared in their final statement at the London summit that they would take action against non-cooperative jurisdictions, including tax havens and that they would deploy sanctions to protect their public finances and financial systems.

The OECD progress report contains three lists:

- The jurisdictions that have substantially implemented the internationally agreed tax standard
- The jurisdictions that have committed themselves to the internationally agreed tax standard, but have not yet substantially implemented (grey list)
- The jurisdictions that have not committed themselves to the internationally agreed tax standard

Switzerland was put onto the grey list and not the black list only because it reached an agreement overnight with the OECD.

4. Future developments

Beginning of March, after the UBS had transmitted 250 names of clients suspected of tax fraud and due to the pressure from the United States and several EU countries related to the Swiss policy with respect to tax evasion, Swiss authorities were talking about granting mutual judicial assistance in cases of particularly grave tax evasion.

Then, under the pressure of the OCED lists, Switzerland, after having continuously insisted on the distinction between tax evasion and tax fraud during many years, finally agreed to extend its international cooperation in tax matters to fiscal evasion and to respond in the future, to foreign requests for information in cases of suspected tax evasion, and not just tax fraud.

This is the first time it has agreed to sign up to the OECD rules, having previously stated that the rules would compromise its long-standing banking secrecy principles.

Switzerland will therefore renegotiate the double taxation agreements in order to include international administrative assistance in cases of tax evasion. Each agreement will be renegotiated separately.

Furthermore, and in particular with European countries, the negotiations will be rather complicated since the question of assistance in cases of tax maters is closely connected with several agreements, among other Schengen Agreements and the ECMA.

Switzerland will also have to abandon double incrimination with respect to fiscal evasion since the distinction between tax evasion and tax fraud will be maintained internally.

Therefore, Swiss bank secrecy will no longer cover tax evasion.

This, however, does not mean the end of Swiss bank secrecy.

Judicial or administrative assistance will indeed be granted only upon presentation, by the requesting State, of evidence or tangible indications and not only on the base of vague suspicions – no fishing expeditions. The indications given by the requesting State will further have to be examined, upon request of the holder of the account, by a Court.

Finally, Switzerland will continue to refuse the automatic exchange of information as well as a complete renunciation of the bank secrecy. The Swiss government states that it would still protect banking customers from "unjustified watching from abroad".

It is estimated that Swiss banks manage CHF 1.1 trillion of global wealth held abroad.