

# SPONTANEOUS EXCHANGE OF TAX RULINGS – THE SWISS ANGLE

## Authors

Michael Fischer  
Marc Buchmann

## Tags

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## INTRODUCTION

For the past few years, the spontaneous exchange of information – and tax rulings in particular – has been a major focus of the O.E.C.D. With many countries, including Switzerland, now adopting implementing legislation, the initiative has reached the final phase before first actions will be taken.

For the uninitiated, the term “spontaneous” means that the tax authority discovering the information sends the information to another country’s tax authority on its own volition. It is neither automatic nor requested. Spontaneous exchange is one of three types of information exchange introduced during the last year by means of the O.E.C.D. Convention on Mutual Administrative Assistance in Tax Matters (“C.M.A.A.T.”). Namely, the types are (i) information exchange upon request, (ii) automatic exchange of information, and (iii) spontaneous exchange of information.<sup>1</sup>

Switzerland introduced the spontaneous exchange of tax rulings as of January 1, 2017, on the basis of the C.M.A.A.T. Qualifying tax rulings that were confirmed after January 1, 2010, and are still applicable on January 1, 2018, will be subject to spontaneous exchange by the tax authorities.

## LEGAL BASIS

Swiss tax treaties and tax information exchange agreements (“T.I.E.A.’s”) in their current form do not provide for the spontaneous exchange of information. The legal basis for spontaneous exchange of information is contained in the C.M.A.A.T. as approved in December 2015 by the Swiss legislator. As Switzerland made certain reservations to the C.M.A.A.T., the spontaneous exchange is limited to tax rulings concerning (i) income (of both individuals and corporations), (ii) capital/net wealth (again of individuals and corporations), and/or (iii) withholding tax. Tax rulings covering *inter alia* V.A.T., inheritance or gift taxes, stamp duties, or social contributions will not be exchanged spontaneously, nor on request, as they would not be covered by tax treaties<sup>2</sup> or T.I.E.A.’s.

In order to provide a specific legal basis allowing for spontaneous exchange of tax information, the Swiss Act on International Administrative Assistance in Tax Matters and its respective ordinance required amendments, which came into effect on January 1, 2017.

<sup>1</sup> See C.M.A.A.T. arts. 5, 6, and 7.

<sup>2</sup> Switzerland has nine tax treaties covering inheritance tax, but they do not contain information exchange clauses.

Michael Fischer, certified tax expert and attorney, is a founding partner of Fischer Ramp Partner Ltd. He is an experienced lawyer in Swiss and international tax matters and has extensive knowledge in matters relating to the taxation of private clients and their companies.

Marc Buchmann, certified tax expert and attorney, is a senior associate at Fischer Ramp Partner Ltd. His practice focuses on Swiss and international taxation issues, advising private clients as well as corporations.

# TAX RULINGS

## **In General**

Switzerland boasts a longstanding and reliable tradition of providing advance rulings to taxpayers. Although Swiss legislation does not provide a formal legal basis for the practice,<sup>3</sup> the binding effect of tax rulings was initially derived from constitutional law (*i.e.*, the protection of good faith) and later cemented by case law.

In accordance with Swiss jurisprudence, a tax ruling is binding under the following conditions:

- The ruling was provided by the competent authority or a confirming authority, which the taxpayer could assume is competent.
- The ruling was made with respect to a specific set of fully disclosed facts.
- The ruling was not made subject to reservations.
- The ruling was not obviously incorrect.
- Specific dispositions were made based on the ruling.
- The law did not change since the ruling was granted.

## **Spontaneous Exchange of Tax Rulings**

For the purpose of spontaneous exchange of information, Swiss law contains a definition of tax rulings that must be exchanged spontaneously. (See below regarding the so-called *de minimis* clause.)

Pursuant to that definition, a tax ruling is “an information or confirmation concerning tax consequences on the basis of the facts outlined by the taxpayer, received from the tax authority and the taxpayer relies on the confirmation/information received.”

The form in which a tax ruling was granted is irrelevant with regard to its possible exchange, meaning a ruling may be exchanged whether it was granted in writing or orally (although the latter would clearly be the exception).

Nor is the granting of a tax ruling related to a subsequent implementation of the tax ruling (*e.g.*, execution of a specific transaction). This may result in a tax ruling being exchanged although the taxpayer never implemented the envisaged structure or transaction described in the ruling.

In order to avoid the exchange of rulings, whether regarding an implemented transaction or one that never occurred, the advice is generally to file a request to withdraw the tax ruling prior to December 31, 2017.

## **Types of Rulings to Be Exchanged**

In accordance with current legislation, Swiss tax authorities will not exchange all types of tax rulings on a spontaneous basis. Those subject to spontaneous

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<sup>3</sup> The V.A.T. Act is the only Swiss legislation that provides a specific legal basis for tax rulings.

*“Tax rulings are to be exchanged only if the rulings (i) were granted after January 1, 2010, and are still in force on January 1, 2018, or (ii) are granted after January 1, 2018.”*

exchange are listed in B.E.P.S. Action 5 and specified for Swiss purposes in the domestic law ordinance.

Even though Article 7 of the C.M.A.A.T. may also cover rulings relating to individuals, the Swiss provisions, as currently drafted, seem to mainly affect Swiss corporations. Under the Swiss provisions, the following types of rulings are subject to exchange:

- **Rulings Relating to Preferential Corporate Tax Regimes.** *E.g.*, rulings about holding, mixed, or domiciliary company regimes, principal companies, I.P. boxes, or finance branches are subject to exchange. Although these regimes will most likely be abolished in the course of the ongoing corporate tax reform (“C.T.R.”), existing rulings will still be subject to exchange.
- **Unilateral Transfer Pricing Rulings.** *E.g.*, transfer pricing rulings granted by the Swiss tax authorities without the involvement of other concerned states are subject to exchange.
- **Rulings Reducing Taxable Profit Without Reflection in the Financial Statement.** As the Swiss tax liability of a company is tightly connected to its financial statement, divergences between the profit in accordance with the financial statement and the taxable profit are rare under current legislation. However, as, for example, C.T.R. may introduce an excess deduction for research and development, this type of rulings may become more relevant in future.
- **Rulings on Permanent Establishments (“P.E.’s”).** *E.g.*, rulings about the recognition of a P.E. or profit allocation to a P.E. are subject to exchange.
- **Rulings on Conduit Structures.** *E.g.*, rulings on hybrid structures are subject to exchange. This category applies to circumstances where the structure leads to non-taxation or under-taxation.

The above types of tax rulings are to be exchanged only if the rulings (i) were granted after January 1, 2010, and are still in force on January 1, 2018, or (ii) are granted after January 1, 2018.

### **De Minimis Clause**

Tax rulings need not be exchanged if they are of minor importance to the receiving states due to the tax amounts involved or if the amounts to be paid are disproportionate to the administrative effort of the tax authorities.

## **PROCEDURE**

The cantonal tax authorities have begun issuing information letters to taxpayers whose rulings fall under one of the above categories. In principle, taxpayers have three options to proceed prior to the end of 2017:

- If the taxpayer wishes to rely on the tax ruling after December 31, 2017, an electronic registration and description of the tax ruling is required to be submitted on [a template provided by the O.E.C.D.](#) The

template, and not the tax ruling, will be exchanged with the receiving state(s).

- If the taxpayer does not intend to rely on the tax ruling after December 31, 2017, the tax ruling can be withdrawn.
- If the taxpayer wishes to rely on the tax ruling after 2017 but is of the opinion that the tax ruling is not subject to spontaneous exchange, the taxpayer is invited to make his or her case.

If the taxpayer fails to act altogether or within the requested deadline (in principle, prior to December 31, 2017, at the latest), the cantonal authorities will send the tax ruling to the Federal tax authority (“F.T.A.”). The F.T.A. will then decide if the tax ruling is subject to spontaneous exchange. If so, the F.T.A. will inform the taxpayer accordingly. At that point, the taxpayer has the option to appeal. In a case where advance notification may jeopardise the purpose or success of an exchange, the F.T.A. may inform the taxpayer after the information has been delivered. Legal appeals can be filed once the information is delivered.

The templates will be exchanged by category to states entitled to receive the information, provided that the receiving state has implemented rules for the spontaneous exchanges of tax information. In all of the above tax ruling categories, the state where the direct controlling and top holding company (*i.e.*, headquarters) has its tax residence will receive the information. In the case of a P.E., the state where the P.E. is located will receive the information too.

For tax rulings confirmed after January 1, 2018, the taxpayer is requested to complete the O.E.C.D. template within 60 days following the confirmation of the tax ruling.

## CONCLUSION – TO KEEP OR WITHDRAW?

It is sensible for Swiss taxpayers, and international companies in particular, to analyse any Swiss tax rulings and assess whether the rulings are subject to spontaneous exchange. In cases where information exchange is likely to result in adverse foreign tax consequences, it may be sensible to opt for a withdrawal of the tax ruling.

Additionally, since spontaneous exchange of information is intended to be reciprocal, Switzerland is expected to receive information from other states regarding tax rulings issued to Swiss taxpayers. Therefore, it is also advisable for Swiss taxpayers to review tax rulings granted by other states.

Considering the wealth of information that will become available as a result of spontaneous exchange, it is expected that the number of information exchanges upon request will increase.

