

# New Protocol to the Double Tax Treaty Between Switzerland and Russia Effective as of 1 January 2013

## *New Provisions on Exchange of Tax Information*



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### **Introduction**

The existing double tax treaty of 1995 between the Russian Federation and Switzerland (DTT) has been amended by a protocol signed on 24 September 2011. The protocol entered into force on 9 November 2012. The revised DTT contains the new Art. 25a “exchange of information” in accordance with international standards provided by the Art. 26 of the OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention), which allows exchange of tax information between Switzerland and Russia for tax purposes. Exchange of information can be requested at an earlier stage of a tax examination or investigation and without limitation to tax fraud and duty fraud.

The new provisions of the DTT came into effect on 1 January 2013. The DTT has no retrospective effect, i.e., requests may cover tax periods starting on or after January 2013.

### **Differences between administrative assistance and mutual legal assistance**

The administrative assistance in tax matters differs from mutual legal assistance that is covered by the European



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Convention on Mutual Assistance and the International Mutual Assistance Act (IMLA). The IMLA regulates the cooperation between juridical authorities (e.g. criminal judges); it requires that a penal procedure is already initiated before a request can be submitted by the respective authorities and only with regard to cases of tax and duty fraud according to Swiss law, whereas administrative assistance provides for exchange of information in all cases of “foreseeable relevance” in taxation matters and can be requested at any stage of an examination or investigation.

### **Administrative assistance**

The legal basis for administrative assistance in tax matters in Switzerland are double tax treaties and the Ordinance on Administrative Assistance under Double Taxation Treaties (AADTO), which came into force in October 2010. The AADTO will be replaced by the Tax Administrative Assistance Act (TAAA) of 28 September 2012, which will enter into force in Q1 2013. The TAAA governs the execution of administrative assistance in accordance

with double tax treaties and other international agreements that contain provisions for the exchange of information relating to tax matters. The Federal Tax Administration (FTA) provides administrative assistance based on foreign requests.

### **Fishing expeditions versus group requests**

Fishing expeditions are explicitly forbidden by the DTT. However, there is no clear definition of the term “fishing expedition” neither in the DTT nor in the OECD Tax Model Convention. According to prevailing opinion, fishing expeditions are speculative demands for information without any real expectation about the outcome of the demand or its relevance to a specific procedure. The concept of “group request” has been recently recognized by the OECD. In July 2012 Switzerland agreed to apply the modified OECD standards. Even if the TAAA does not explicitly mention the term “group request”, group requests are considered permissible under the TAAA. The term “group request” implies that the taxpayer’s identification shall be possible through description of “pattern of behavior”, which suggest that taxpayers failed to fulfill their duties. According to the prevailing opinion, group requests are possible under the DTT.

The distinction between the permissible group requests and forbidden fishing expeditions is vague. The distinguishing criteria might be of quantitative and qualitative nature. E.g., in a case in which the Russian tax authority will not mention the information holder, the Swiss tax authorities will probably decline collecting the information from 300 Swiss banks due to the prohibition of fishing expeditions. However, in a case in which the Russian tax authority mentions 5 to 6 possible information holders (actually, 5 to 6 major Swiss financial institutions), it is likely that the Swiss tax authorities will admit the request. Other possible (permissible)

criteria for group request could include the gain and/or the amount on the bank account, the use of credit cards and retained mails.

### Exchange of tax information according to the revised DTT

*1. Scope:* The competent authorities shall exchange tax information which is foreseeably relevant for carrying out the provisions of the DTT or to the administration or enforcement of the domestic laws concerning taxes covered by the DTT as well as value-added taxes (not covered are e.g. customs duties). Russian taxes covered by the DTT are: The tax on profits of organizations, the tax on income of individuals, the tax on property of organizations and the tax on property of individuals. I.e., a request is possible not only in the case of suspicion of tax fraud or tax evasion, but in all cases in which the state is seeking information for tax purposes (e.g. verification of tax declaration).

According to the DTT, the tax information may be required not only from a bank or other financial institution, but also from a nominee or person acting in an agency or fiduciary capacity. In order to obtain such information, the tax authorities of the requested state shall have the power to enforce the disclosure of information.

For the exchange of information it is not mandatory that the person about whom information is requested is domiciled in Russia or Switzerland. Relevant is the economical connection to one of the countries. E.g., the person may be taxable due to the location of the effective management or any other similar criteria in Russia or Switzerland.

Tax information may be exchanged only upon a request from the competent tax authority (the DTT does not cover exchange of information on an automatic or spontaneous basis). The request must be made in writing in one of the Swiss official languages or in English. When making a request, the tax authority of the requesting state shall provide the following information:

- the identity of the person under examination or investigation;
- the period of time for which the information is requested;

- a statement of the information sought including the form in which the requesting state wishes to receive the information from the requested state;
- the tax purpose for which the information is sought;
- the name and address of any person believed to be in possession of the requested information, as far as known.

The contracting state shall not be obliged to provide information in the following cases:

- carrying out administrative measures in contradiction with the laws and administrative practice of that or of the other contracting state;
- disclosure of information which is not obtainable under the laws or in the normal course of the administration of that or of the other contracting state;
- disclosure of information which would disclose any trade, business, industrial, commercial or professional secret or trade process;
- disclosure of information which would be contrary to public policy (ordre public).

*2. Procedure:* Once the FTA has received the request, it will conduct a preliminary examination and verify that the prerequisites for the request are fulfilled. Not admissible are requests without any tax relevance, e.g. a request from the intelligence service, anti-monopolies authorities etc. In case the request is not complete, the FTA will inform the Russian Ministry of Finance (MOF) in writing and the MOF gets the opportunity to complete the request. In case the second (amended) request is still not complete, the FTA sends it back to the MOF and the procedure will be closed.

If the request fulfills formal prerequisites, the FTA will forward it to the information holder (e.g. a bank), who will be obliged to submit all requested documents within a limited period. At this time, the request cannot be challenged, neither by the concerned person nor by the information holder.

After receipt of the files, the FTA will, as a general rule, inform the concerned person. Concerned persons besides the account holder could be a co-

owner of the bank account, his legal or tax advisers, asset managers, the bank itself etc. The decisive criterion for contacting concerned persons is that a detrimental outcome may ensue, e.g. criminal prosecution for the concerned person. The concerned person, respectively his lawyer, has the right of access to the file.

In a conclusive decree the FTA explains the administrative assistance measures to the person concerned and informs the person to what extent the information shall be delivered to the requesting state. Information which is not foreseeably relevant for the MOF has to be eliminated from the files. The person concerned may file an appeal with the Federal Administrative Court against the FTA's conclusive decree. The criterion of "foreseeable relevance" is, according to international practices, decisive with regard to administrative assistance based on double tax treaties and can be challenged in court. The court may come to the conclusion that the requested information is not "foreseeably relevant" in tax matters and is not subject to exchange.

However, the TAAA foresees in Art. 14 the possibility not to inform the concerned person about the request in the case that the requesting state provides credible reasons (e.g. that documents may be destroyed). In this case, the concerned person has no possibility to make an appeal with the Federal Administrative Court. Generally, an appeal with the Federal Administrative Court has suspensive effect. Nevertheless, the FTA may, pursuant to Art. 55 of the Administrative Procedure Act, ask the suspensive effect to be waived.

If the concerned person has not appointed an authorized person in Switzerland, the conclusive decree with details regarding the requested tax information will be published in the official gazette. Once the conclusive decree has entered into force the FTA will provide the information to the MOF. There are no legal means for the MOF to challenge any decisions of the FTA or the Federal Administrative Court.

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