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International Exchange of Financial Information in Tax Matters

An Overview with Focus on China

I. Overview of the Treaties and Legislation in Switzerland

The most relevant multilateral instruments regarding international exchange of financial information in tax matters are the following two treaties:

- a) Convention on Mutual Administrative Assistance in Tax Matters (“MAC”) developed jointly by the OECD and the council of Europe;
- b) Multilateral Competent Authority Agreement for the Common Reporting Standard on Automatic Exchange of Financial Account Information (“MCAA”).

Both treaties came into force on 1 January 2017 in Switzerland. Information about financial accounts is collected in Switzerland since that effective date.

With the adoption of MAC by the Swiss Federal Parliament, the Swiss Federal Act on Administrative Assistance on Tax Matters (“StAhiG”) was amended. Both, the treaty and the Federal Act came into force on 1 January 2017.

Also, the Swiss Federal Act on the International Automatic Exchange of Financial Account Information on Tax Matters (“AIAG”), regulating the automatic exchange of financial account information came into force on 1 January 2017.

Hence, first exchange of data (financial account information) may start with some signatory states as of 1 January 2018.

II. Current State in China

China has also joined international efforts to end tax evasion and signed the MAC (in force since 1 February 2016) on 27 August 2013, while it signed the MCAA on 17 December 2015.

The legal grounds for the establishment of the automatic exchange of financial account information based on the MAC and MCAA have thus several been set in China.

China has declared its intention to start the first exchange of data in accordance with the MCAA by September 2018.

III. Administrative Assistance

3.1 Swiss Federal Act on Administrative Assistance on Tax Matters (“StAhiG”)

MAC provides three types of information exchange principles:

(i) **Information Exchange on Request**, (Article 5) that is in accordance with the OECD principles as adopted in 2009, that have been implemented in several double taxation treaties concluded between Switzerland and other countries; (ii) **Spontaneous Exchange of Financial Account Information** (Article 7) provides that information shall be submitted if the reporting State assumes that the referring information is of interest to another State; (iii) **Automatic Exchange of financial Account Information** that requires particular treaties, e.g. the MCAA (see section 5 below).

All these three principles complement each other.

The procedural execution of administrative assistance is governed by the national laws of the respective country.

The StAhiG governs the execution of administrative assistance regarding the exchange of information on request as well as the spontaneous exchange of financial account information in accordance with double taxation treaties and other international treaties on the exchange of information in tax matters.

Before its revision, the StAhiG provided three principles: (i) administrative assistance is achieved only on request, (ii) administrative assistance procedure is carried out swiftly, (iii) it is forbidden to provide information on persons not concerned by the request.

The revised StAhiG has now included the spontaneous exchange of financial account information in Swiss law. Principle (i) that stipulated that administrative assistance in tax matters shall happen upon request only, is repealed. The principle (iii) was amended and now provides that it is forbidden to provide information on persons not concerned by the request unless this information is foreseeably relevant to the assessment of the tax situation of the person concerned or the legitimate interests of persons who are not persons concerned outweigh the interest of the requesting party in the transmission of the information.

3.2 Example: Chinese Entrepreneur has a Bank Account in Switzerland

The following example shall illustrate the application of the different agreements and acts.

Variation 1: The Chinese tax authorities are deemed to assume that the Chinese entrepreneur has significant assets in an “undeclared” bank account at a major Swiss bank. However, the authorities do not know at which bank these assets were deposited. What may the Chinese tax authorities consider to do, in accordance with the law applicable, to find out about the financial account information?

MAC came into effect on 1 February 2016 in China and on 1 January 2017 in Switzerland. Hence, the exchange of financial account information based on MAC is expected to take place no earlier than 1 January 2018.

The exchange of financial account information between Switzerland and China is stipulated in the Double Taxation Agreement (“DTA”, Article 27) between Switzerland and China (in force since 15 November 2014), and provides the mutual administrative assistance on request.

The StAhiG requires that any request for administrative assistance must be made in writing in one of the official languages of Switzerland or in English and provide the information required by the DTA. The information are: (i) the identity of the person involved in the examination or investigation; (ii) the period for which the examination or investigation is requested; (iii) description of the information requested as well as particulars with regard to the form, in which the requesting State wishes to receive the information from the requested State; (iv) the tax purpose for which the information is sought; and (v) the name and address of the presumed information holder, if known. „Fishing expeditions“ are not permitted.

If the request encloses the information mentioned above, and non-consideration of the procurement of the requested information (Article 7 StAhiG) does not apply, the Federal Tax Administration (“ESTV”) shall contact persons who are deemed to have such information. In the present case, the financial account information could eventually be provided by one of the major Swiss banks. On the other hand, the issue will be whether the bank would act in accordance with Article 47 of the Banking Act providing for the bank-client-secrecy. Article 8 of the StAhiG stipulates that information that is in the possession of a bank, another financial institution, a mandated or authorised person or a fiduciary, or information concerning a participation in a legal entity may be requested if the applicable treaty provides for the transmission of such information.

Thus, the DTA between China and Switzerland provides that a contracting state shall not decline to supply information solely because the information is held by a bank (Article 27). Notwithstanding any provisions of the national law, the tax authorities of the requested partner state have the power to enforce the disclosure of bank information.

For the present case, this means that the ESTV is entitled to demand the needed information from any of the two major Swiss banks. The banks concerned are obligated to provide the respective information about the assets of the Chinese entrepreneur in as much as he or she has an account with the

concerned bank. If the bank refuses to provide the respective information, compulsory measures shall be ordered by the ESTV.

The ESTV may only order the following compulsory measures to obtain information: (i) searching of the premises, documents, records and data carriers; (ii) the seizure of objects, documents, records and data carriers; (iii) subpoena of summoned witnesses (Article 13 StAhiG).

Variation 2: The Chinese entrepreneur has only limited tax liability in Switzerland, because he or she has only a business property in Switzerland. He or she is not liable to pay taxes in Switzerland solely because of his or her assets of the bank account. The Swiss authorities know about this bank account and that a large amount of money has regularly been transferred from another bank account in Hong Kong. They think that this financial account information may be of interest for the Chinese tax authorities, since they suspect the Chinese entrepreneur not to pay taxes on these assets in China. Do the Swiss authorities have the right to inform the Chinese authorities without a respective request (spontaneously)?

There is no legal basis for a spontaneous or an automatic exchange of information in the DTA (Protocol to the DTA, Article 9). Swiss authorities are not (yet) entitled to provide any financial account information to the Chinese authorities without legally valid request.

IV. Spontaneous Exchange of Information (“SEI”)

StAhiG provides the details for the spontaneous exchange of financial account information. Spontaneous exchange of financial account information applies if the informing authorities conclude that the information supposed to be submitted may be of interest to the competent foreign authority, when the information was not previously requested by such state. Such information must be on hand for the informing authority already, since there is no obligation to obtain any such information from any holder of eventual information for spontaneous exchange of information purposes.

The MAC applies to administrative assistance related to taxable periods from or after 1 January of the year following the year in which MAC comes into effect for the respective states (Article 28). Thus, the Swiss tax authorities will only exchange financial account information with foreign authorities spontaneously after 1 January 2018.

Despite of the fact that MAC is a multilateral agreement, the time frame in which administrative assistance procedure may legitimately carried out, shall be determined for every bilateral relationship. MAC shall only apply when it came into force for both contracting states. The contracting states, however, may mutually agree that the Convention shall have effect for administrative assistance related to earlier taxable periods or charges to tax.

MAC came into force in China on 1 February 2016 and in Switzerland, MAC effective date is 1 January 2017. Hence, the first spontaneous exchange of financial account information between Switzerland and China may take place after 1 January 2018.

Notwithstanding Article 28 MAC, for tax matters involving intentional conduct MAC shall have effect for earlier taxable periods or criminal charges from the date when it came into force in the respective state. Switzerland has restricted such pre-application, in any event, for tax periods after 1 January 2014.

Looking at the present example and its Variation 2: In line with the principles of MAC, ESTV shall exchange financial account information spontaneously with the Chinese tax authorities after 1 January 2018. The ESTV shall notify the Chinese entrepreneur of the planned SEI.

IV. Automatic Exchange of Information (“AEI”)

Automatic exchange of financial account information will be granted in accordance with MCAA and AIAG that came into force on 1 January 2017. AEI may be carried out based on either the MCAA or another international treaty that provides the automatic submission of financial account information.

AEI means that the tax authorities of a contracting state will submit financial account information to the tax authorities of another contracting state.

By March 2017 about 100 countries, including China, have declared their intention to adopt the standards of MCAA. However, the adoption of the MCAA does not necessarily imply the AEI. Besides the adoption of the MCAA of the contracting states, it is required that the contracting states have registered their tax authorities mutually on the list according to Section 7 cipher 2.2 of the MCAA. Switzerland may apply the principle of Common Reporting Standards of the tax authorities as the key criteria for the registration on that list. Confidentiality shall be ensured too.

The Swiss Government intends to register the tax authorities of China on the MCAA list by the end of the year 2018.

Besides MCAA, the EU-Switzerland treaties also provide provisions on administrative assistance in tax matters. The execution and application of the treaty in respect of administrative assistance is pending; the referring agreement is not yet adopted by the Swiss Parliament.

Regarding the Variation 2 in aforementioned section 3.2 example: Once the MAC has come into force in Switzerland and China, and both countries have registered their tax authorities, AEI will apply to the

Swiss bank account of the Chinese entrepreneur. The bank will have to file financial account information with the ESTV and the ESTV shall submit such information to the Chinese tax authorities.

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