Switzerland's practice of information exchange regarding stolen data

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Introduction

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) decided in mid-March 2015 that Switzerland should enter Phase 2 of the Peer Review. This decision represents a clear statement by the OECD that Switzerland's legal and regulatory framework for information exchange complies with internationally agreed standards reflected in Art. 26 of the OECD Model Tax Convention on Income and on Capital (OECD-MA).

Switzerland is now eligible for Phase 2 of the Peer Review examining the practical implementation of that framework. The only member state of the Global Forum that withheld its consent to Switzerland's entry into Phase 2 was India, which accuses Switzerland of refusing to cooperate in relation to the approximately 400 requests for information exchange recently submitted by India. Switzerland takes the position that these requests are based on stolen data (essentially stemming from a CD that is said to have originated at HSBC) and that, as matter of principle, Switzerland does not cooperate in respect of requests based on stolen data. At issue is whether Switzerland's position can be upheld against the increasing international pressure.

Legal basis

Under the double taxation treaties (DTA) containing information exchange provisions in accordance with Art. 26 OECD-MC, information will be provided, if such information is foreseeably relevant for performing the provisions of the treaty or enforcing domestic law. Certain limitations are set forth in paragraph 3 of Art. 26. For instance, the requested state is not obliged to supply information that is not obtainable under the laws or in the normal course of the administration of either contracting state. In other words, Switzerland does not need to go so far as to carry out administrative measures that would not be permitted under domestic law. However, this limitation under domestic law is limited or overridden by paragraph 5 of Art. 26, which is intended to ensure that the limitations of paragraph 3 cannot be used to generally prevent the exchange of information held by banks or other financial institutions protected by banking secrecy. In other words, Switzerland may not decline to supply information to a treaty partner solely because the information is protected by banking secrecy. Accordingly, the obstacles to exchange of information must be found elsewhere.

Pursuant to Art. 7 of the Federal Act on International Administrative Assistance in Tax Matters (TAAA), a request submitted by a foreign state will not be considered if (a) it amounts to a fishing expedition; (b) it requests information not covered by the administrative assistance provisions of the applicable agreement; or (c) it violates the principle of good faith, particularly if it is based on information obtained through a criminal offense under Swiss law.

Use of information obtained through a criminal offense

The Federal Tax Administration (FTA) deems Art. 7c TAAA applicable, if there are reasons to suspect that the requesting state submitted its request on the basis of stolen data. The FTA's legal position is in line with the legislator's intentions: Following an intense debate, the Swiss parliament decided that there should be no distinction between actively and passively obtained information (e.g. via another country). Thus, if a criminal offense leads to the discovery of specific physical evidence of a possible tax evasion or tax fraud, neither the criminal offense nor the physical evidence as "fruit" of the criminal offense may be used as a basis for the request for exchange of information. As a result, if there is a suspicion that the requesting state might have based its request on stolen data, it must deliver evidence showing that it discovered the evidence other than on the basis of stolen data.

The legal position taken by the FTA is not universally shared across the Swiss doctrine on the use of evidence gathered with the assistance of illegally obtained information. Also, according to the Swiss Supreme Court, Swiss law does not embody a general rule excluding the introduction of evidence seized or acquired during an unlawful criminal procedure. In 2007, the Swiss Supreme Court ruled that evidence obtained from a Liechtenstein trust company through the violation of a business secret could be used in Swiss tax procedures. The Court argued that the Swiss tax authorities would have been able to gather the information directly from the Liechtenstein trust company because of its duty to cooperate.

Next to the fact that Swiss law does not contain a general exclusionary rule restricting the use of stolen data, related domestic law and case law rest on weak foundations. In particular, it is highly questionable whether Art. 7c TAAA complies with Art. 26 OECD-MC. However, as long as the FTA upholds its legal position, that question will probably not be submitted to the Swiss courts, as requesting states have no right to appeal against an order refusing the exchange of information.

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