

Exchange of Information

The OECD Models

I.1. National Law

Law:

§ 117 Abgabenordnung (General Code)

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Regulation:

BMF v. 03.02.1999; IV B 4 S 1320 – 3/99

I.2. National Law

- Any Request and any support as long as according to German Law
- Administrative Cooperation and Legal Cooperation
- Constitutional aim of equal and adequate taxation
- Equal and adequate according to the own and the other countries Law
- scope of constitutional Law - by means protection of individual through tax secrecy and adequacy of procedure

I. 3. Implemented International Law

Law:

§ 117 subsec. 2 AO

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Regulation:

BMF v. 03.02.1999; IV B 4 S 1320 – 3/99

II. 1. International Law

- exchange of information according to bilateral and unilateral implemented agreements
- Bilateral and unilateral
- OECD Model agreements and Directives
- UN Model - no relevance

2. Art. 26 OECD Model (1963)

- 1. The competent authorities of the Contracting States shall **exchange such information as is necessary for the carrying out of this Convention** and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is in accordance with this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of the Convention.
- 2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:
 - a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;
 - b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

3. Art. 26 OECD Model (2003)

- 1. The competent authorities of the Contracting States shall exchange such information as **is necessary for carrying out the provisions of this Convention** or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the first sentence. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
- 2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. Art. 26 OECD Model (2005)

- 1. The competent authorities of the Contracting States shall exchange such information **as is foreseeably relevant for carrying out the provisions** of this Convention or to the administration or enforcement of the domestic laws concerning **taxes of every kind** and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
- 2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
- 3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).
- 4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
- 5. In no case shall the provisions of paragraph 3 be construed **to permit a Contracting State to decline to supply information solely because the information is held by a bank**, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

5. Scope

Art. 26 Exchange of Information (2003)

1. The competent authorities of the Contracting States shall exchange such information as **necessary**

- for the **carrying out of the provisions** of this Agreement;
- for the administration or enforcement of the domestic laws in relation to the taxes which are the subject of this Agreement in cases of holding companies, but only upon request;
- for the carrying out of the provisions of domestic law **concerning tax fraud** in relation to the taxes which are the subject of this Agreement.

6. Scope

Art. 26 Exchange of Information (2005)

1. The competent authorities of the Contracting States shall exchange such information **as is foreseeably relevant**

- for carrying out the provisions of this Agreement
- or to the administration or enforcement of the domestic laws concerning taxes covered by the Agreement insofar as the taxation there under is not contrary to the Agreement. The exchange of information is not restricted by Article 1.
- Tax fraud (?)

7. Ordre Public

Art. 26 subsec. 2 OECD Model

2. In no case shall the provisions of this Article be construed as imposing ... practice ... which would be contrary to its sovereignty, security or public policy (ordre public) ...

8. Qualification Conflict - Tax Fraud

Swiss Definition:

- Tax fraud is a criminal offence punishable by imprisonment.
- Tax fraud is committed when, for the purpose of tax evasion, falsified documents are used to deceive tax authorities.
- Tax evasion occurs, when the taxpayer fails to submit a tax return or submits it incorrectly.

9. Banking Secrecy vs. Ordre Public

(5.) In no case shall the provisions of paragraph 3 (former 2) be construed to permit a Contracting State to **decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity** or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State shall have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

10. Commentary OECD Model (2005)

- **“Switzerland reserves its position on paragraphs 1 and 5.** It will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention. This reservation shall not apply in cases involving acts of fraud subject to imprisonment according to the laws of both Contracting States.”
- **“Luxembourg reserves the right not to include paragraph 5 in its conventions.”**
- **Commentary OECD Model (2010) (-)**

11. Historical Background

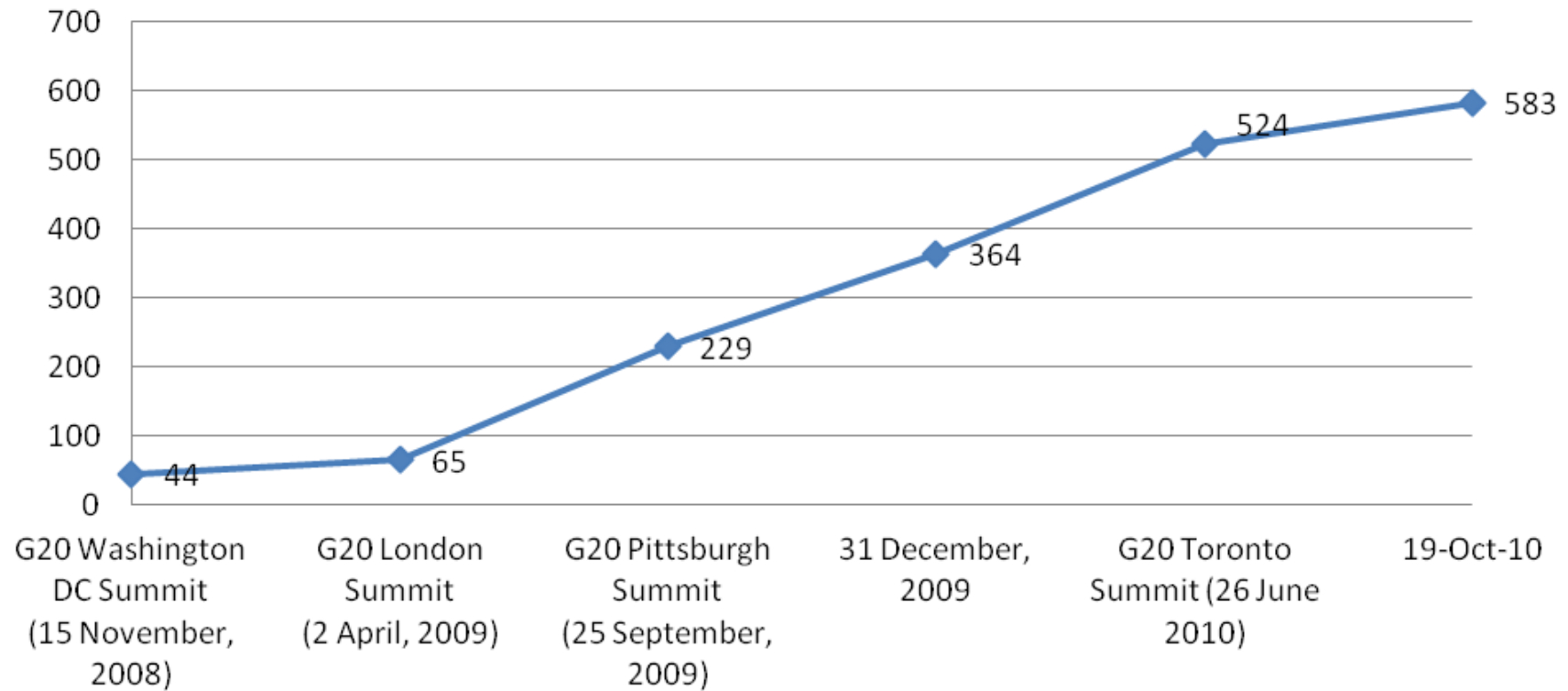
- Political Development US/Germany/France
- Germans are the biggest clients of Swiss money managers with assets of about 260 billion francs (€ 194 billion)
- Grey List

12. Recent Bilateral Development

- OECD Agreement on Exchange of Information on Tax Matters (2002) – TIEA's
- Art. 26 OECD Model (2005) changed accordingly

13. Recent Development

TIEAs/DTCs Signed between G20 Summits



14a. Procedure

Tax Authorities are authorised to request information needed in order to fulfil the obligations out of the DTT

- On any tax
- No fishing expedition
- No automatic response

14b. Procedure

1. the **identity** of the person (taxpayer) under examination or investigation;
2. the **taxable period** for which the information is sought;
3. a statement of the information sought including its **nature**;
4. the matter under the applicant **parties tax law**;
5. the grounds for believing that the information requested is “**foreseeable relevant**” to the taxation;
6. grounds for believing that the information requested is **held in the requested party** or is in the possession or **control of a person within the jurisdiction of the requested party**;

15. Peer Review

- First Phase – detecting deficits with regard to
 - **AVAILABILITY OF INFORMATION**
 - **ACCESS TO INFORMATION**
 - **EXCHANGING INFORMATION**
- Second Phase – checking changes

16. Peer Review Switzerland

FINMA (Swiss Financial Administration) - Press Release

Requirements for administrative assistance in tax matters are to be revised Bern, 15.02.2011

- The administrative assistance provisions in double taxation agreements (DTAs) are to be revised in this spirit. In the DTA negotiations up to now, Switzerland has assumed that the structure of the Federal Council's key points on the ban on fishing expeditions, whereby the name and address of not only the taxpayer but also the holder of the information (e.g. a bank) is required in the administrative assistance request, was OECD compliant. This assessment was not confirmed, as initial signals from the peer review process show.
- The Global Forum on Transparency and Exchange of Information for Tax Purposes examines compliance with the administrative assistance standard in countries affiliated to it by means of peer reviews. The first phase of Switzerland's peer review started at the end of October 2010. **It was discovered in this context that Switzerland's requirements for administrative assistance, which were deemed to be appropriate up to now, are too restrictive and could prove to be a possible hindrance to an effective exchange of information.** In order to pass the first phase of the peer review, the requirements on identifying the taxpayer and the holder of the information should therefore be revised accordingly. With the revision, Switzerland is in line with the globally applicable standard, without going beyond it. Even the competitors to Switzerland as a financial centre must meet the same minimum conditions. In this way, **a level playing field** is achieved, which means that the same conditions apply to all countries and territories

Thank you.

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DER FORSCHUNG | DER LEHRE | DER BILDUNG

