EXCHANGING TIMES

Inbal Faibish Wassmer and Ruth Bloch-Riemer examine Switzerland's implementation of exchange of information legislation, using Israel as an example

KEY POINTS

WHAT IS THE ISSUE?
The current methods by which Switzerland and Israel share and exchange information, including recent case law and practice.

WHAT DOES IT MEAN FOR ME?
Those assisting and managing Israeli families and assets in Switzerland, or Swiss families holding assets or structures in Israel, must be aware of the current exchange of information.

WHAT CAN I TAKE AWAY?
Advisors can check which of the families or assets under their supervision may be affected by exchange of information rules, and make informed decisions about the appropriate course of action going forward.

Since 1 January 2017, the following have come into force in Switzerland: the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (MCMAAT); the *Multilateral Competent Authority Agreement* (MCAA); the *Federal Act on the Automatic Exchange of Information*; the *Ordinance on the International Automatic Exchange of Information in Tax Matters* (AEOI Ordinance); and the final version of the Swiss Federal Tax Administration's (SFTA's) *Guidelines on the Automatic Exchange of Information* (AEOI Guidelines). As a result, data for the automatic exchange of information (AEOI), in particular with EU Member States, may be collected as of 2017, and will be exchanged between the involved tax authorities as of 2018.

Under AEOI legislation, Swiss financial institutions (FIs) will be required to report financial information to the SFTA regarding account holders residing in AEOI partner states, with the exception of listed companies, governmental legal entities, international organisations, central banks and FIs. The list of partners for Swiss AEOI purposes currently includes 58 partner states (including all 28 EU Member States), and important hubs such as Australia, Canada, Guernsey, the Isle of Man, Japan and Jersey. In 2018, AEOI will also be introduced with, among others, the largest South American states (Argentina and Brazil), Bermuda, the British Virgin Islands, Israel, Mexico and South Africa, with the first data to be exchanged in 2019.

For all countries affected, AEOI will also result in reporting obligations on FIs regarding those involved in wealth and estate planning structures, such as trust protectors, beneficiaries, board members and foundations. Further, trustees will be required to assess whether or not the trust itself may qualify as a financial institution obliged to fulfil the compliance requirements under AEOI.

The Swiss legislation and the AEOI Guidelines contain important specifications on the treatment of wealth and estate planning tools:

- The AEOI Ordinance qualifies associations and foundations established and organised in Switzerland as non-reporting FIs.
- The AEOI Guidelines clarify certain aspects regarding trusts. Non-profit/charitable trusts are those whose main focus is the distribution of assets, rather than the investment in financial assets. Further, they must be identified as an FI or a non-financial

entity, depending on whether or not they are managed by an FI with decision-making discretion. A trust is usually deemed as being professionally managed if it is managed by a corporate trustee (qualifies as an FI), another FI or a discretionary fund manager.
- Reporting Swiss FIs may treat the accounts of Swiss associations not pursuing economic purposes and Swiss tax-exempt foundations as non-reporting accounts.

The AEOI Guidelines are important not only in the Swiss context: they are expected to be used in various jurisdictions worldwide as a role model, and may well be further amended and developed as more cases and queries arise, on domestic, bilateral or multilateral levels.

It is worth noting, however, that three additional formats of information exchange are already possible: exchange based on the various double-taxation treaties; spontaneous exchange of information; and exchange on demand. These may provide tax authorities with more extensive information than that received automatically.

EXAMPLE: ISRAEL

In this context, Israel serves as an interesting example for the current and future exchange of information. In November 2015, the law in Israel was amended to allow the Israeli Tax Authority (ITA) to enter into multilateral treaties and conventions, and sign information-exchange agreements. Subsequently, Israel joined the MCAA and the MCMAAT. The exchange of information between Israel and other countries is, however, subject to some important prerequisites and limitations, including that:
- information requested by another country must be required only in order to enforce domestic tax laws, and will be used only for that purpose;
- Israel could have used the same information to enforce its domestic tax laws;
- confidentiality and data security is guaranteed by the requesting country;
- a request can be rejected if it may potentially affect security, public safety or any other vital matter in Israel, or if it is against pubic order;
- non-cooperative countries will not have access; and
- the transfer of information exchanged to another country is not allowed.

The ITA notified that it would exchange information on request and spontaneously from 1 January 2017. As a late adopter, Israel committed to automatically exchange information from 2019, and to provide information collected as of 1 January 2018. So far, no additional guidelines or clarifications, in general or with specific reference to trusts and foundations, have been published.

To date, the only official move by Israel towards signing an exchange of information agreement was made with Switzerland. In November 2016, both countries published a joint declaration on their intention to enter into a formal information-exchange agreement based on the OECD's Common Reporting Standard at the beginning of 2018, with the first transmission of data to take place probably in September 2019.

The gap between the specific guidance provided by the SFTA and the general legal framework available under the Israeli legislation may create uncertainties and complexities, but information can nonetheless be exchanged between the two countries' tax authorities under the forthcoming AEOI. Trust and foundation assets held by FIs in Switzerland that have Israeli settlors, beneficiaries or protectors will be reported to the ITA; trust and foundation assets held by FIs in Israel that have a Swiss settlor or beneficiaries will be reported to the SFTA.

Therefore, whereas the current domestic and international legal frameworks provide certain guidance on how the exchange of information, and particularly AEOI, will be implemented in practice, uncertainties, particularly with regard to wealth and estate planning structures, will be resolved in the near future. As always, the generality is an obstacle, and the specific situation of each involved person in such structure under the tax legislation in the respective jurisdiction must be assessed. This will allow, if needed, adaptation of existing and future structures to reflect the current circumstances and needs of individuals and families; to communicate and come to an agreement with the local tax authorities; and to avoid double reporting or any other tax consequences.

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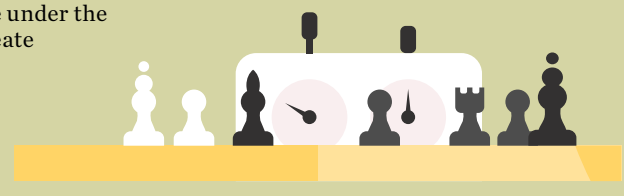

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