

Switzerland's new information exchange policy and new Protocol to DTAA India-Switzerland

Bangalore Chamber of Industry and Commerce

30 November 2011

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OVERVIEW OF PRESENTATION

1. Reasons to revise Double Taxation Avoidance Agreement (DTAA)
2. Status of new Protocol to DTAA
3. Application of new Protocol to DTAA
4. Development of Swiss policy of tax information exchange
5. Information exchange under Protocol to India-Switzerland DTAA
6. Swiss attitude to theft of bank data
7. Other provisions in new Protocol
8. Newest developments in tax information exchange

REASONS FOR REVISION OF DTAA

REASONS FOR REVISION OF DTAA (1)

- In the 2009 Indian general elections, the Swiss banking secret was hotly debated.
- Following the decision of the G20, the Swiss Federal Government announced on 13 March 2009 that it is prepared to renegotiate existing DTAA's to bring them in line with the OECD standard on exchange of information in tax matters.

REASONS FOR REVISION OF DTAA (2)

- In April 2009, the Indian Government demanded negotiations to amend the 1994 DTAA.
- Switzerland agreed to renegotiations and demanded to clarify some issues that had arisen since the last revision of the DTAA in 2000.

NEW PROTOCOL TO INDIA-SWITZERLAND DTAA

STATUS

NEW PROTOCOL TO INDIAN-SWITZERLAND DTAA - STATUS

- Protocol signed on 30 August 2010.
- On 7 October 2011, it entered into effect.

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NEW PROTOCOL TO INDIA-SWITZERLAND DTAA

APPLICATION

NEW PROTOCOL TO INDIAN-SWITZERLAND DTAA - APPLICATION

GENERAL APPLICATION

- In **India**: in respect of income arising in fiscal years beginning on or after 1st April 2012.
- In **Switzerland**: in respect of income arising in any fiscal year beginning on or after 1st January 2012

APPLICATION OF EXCHANGE OF INFORMATION

- For information that relates to fiscal years beginning on or after **1st January 2011**.

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (1)

RESERVATION 1963/1977 TO OECD MODEL CONVENTION

„Under the Swiss concept, a double taxation convention aims at avoiding international double taxation; the information necessary for the correct application and for the prevention of an abuse of such a convention can be exchanged already within the existing framework of its provisions on the mutual agreement procedure, the reduction of taxes withheld at source, etc. Switzerland considers a particular provision on the exchange of information as unnecessary.”

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (2)

RESERVATION 1994 TO OECD MODEL CONVENTION

„Switzerland reserves its position on this Article. When negotiating with other Member countries, Switzerland will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention.“

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (3)

RESERVATION 2005 TO OECD MODEL CONVENTION

„Switzerland reserves its position on this Article. 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 to cases involving acts of fraud subject to imprisonment according to the laws of both States.“

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (4)

SWISS FEDERAL GOVERNMENT'S DECISION 13 MARCH 2009

“Switzerland withdraws its reservation to Art. 26 OECD Model Convention. In future negotiations on double taxation conventions, Switzerland will accept the OECD standard on international administrative assistance in tax matters pursuant to Art. 26 OECD Model Convention and provide assistance to the other contracting state on a case-by-case basis upon a specific and motivated request.”

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (5)

OECD STANDARD ON INFORMATION EXCHANGE (I)

- Based on 2002 Model Convention on Information Exchange and Art. 26 OECD MC and Commentary.
- Serves for application of DTAA and internal tax law.
- Based on transparency and exchange of information.
- Exchange of info possible even if not relevant for levy of domestic tax (“*no domestic tax interest requirement*”).

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (6)

OECD STANDARD ON INFORMATION EXCHANGE (II)

- Banking secrecy no obstacle to exchange of information.
- No suspicion or proof of tax fraud required.
- Information only upon request.
- Requested state not required to violate own law.
- No “*fishing expeditions*”.
- Confidentiality and tax secret preserved.

DEVELOPMENT OF SWISS POLICY OF TAX INFORMATION EXCHANGE (7)

NEWLY CONCLUDED DTTAs AS PER OECD STANDARD (as of October 2011)

- **In force: 13**
among which India
- **Approved by Swiss Parliament: 8**
among which Canada, Germany, Greece, Japan, U.S.A.
- **Signed: 9**
among which Hong Kong (new), Singapore, Russia. U.A.E.
- **Initialed: 5**

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**INFORMATION
EXCHANGE
UNDER NEW PROTOCOL**

INFORMATION EXCHANGE UNDER NEW PROTOCOL (1)

OBJECTIVE SCOPE OF INFORMATION EXCHANGE

- Information with respect to taxes covered by the DTAA insofar as the taxation thereunder is not contrary to the DTAA.
- Hence: Income tax only.
- Not: Net-worth tax, inheritance tax, stamp duties, value added tax etc.
- Some other DTAA's entered into by Switzerland extend exchange of information to net-worth taxes or even to all taxes levied by the other contracting state.

INFORMATION EXCHANGE UNDER NEW PROTOCOL (2)

PERSONAL SCOPE OF INFORMATION EXCHANGE

- Information can also be requested with respect to persons that are not residents of either state (provided that the requested state has the information).

INFORMATION EXCHANGE UNDER NEW PROTOCOL (3)

APPLICATION IN TIME

– **Retroactive effect as to procedure:**

Requests filed after entry into effect (1st January 2011) with respect to fiscal years prior to 2011 must also comply with the Protocol.

– **No substantive retroactive effect:**

As stated before, only for fiscal years after 1st January 2011.

INFORMATION EXCHANGE UNDER NEW PROTOCOL (4)

RESTRICTION TO “FORSEEABLE RELEVANCE”

- Information *“as is foreseeably relevant for carrying out the provisions of this Agreement or the administration or enforcement of the domestic laws covering taxes covered by this Agreement ...*
- *...insofar as the taxation thereunder is not contrary to the Agreement”*
- Unclear application as to third-country residents.

INFORMATION EXCHANGE UNDER NEW PROTOCOL (5)

PROHIBITION OF “FISHING EXPEDITIONS”

- The principle of the Commentary to Art. 26 OECD MC has been restated that the exchange of information is excluded if it amounts to a “*fishing expedition*”.
- It must be shown that the person under investigation has a connection to the requested state (indications that he/she/it owns a bank account).

INFORMATION EXCHANGE UNDER NEW PROTOCOL (6)

FORMAL REQUIREMENTS TO REQUESTS

- Name of the person(s) under examination or investigation and, if available, other particulars facilitating that person's identification, such as address, date of birth, marital status, tax identification number
- The period of time for which the information is requested
- Description of the requested information
- Tax purpose for which the information is sought
- The name and, if available, address of any person believed to be in possession of the requested information

INFORMATION EXCHANGE UNDER NEW PROTOCOL (7)

JUDICIAL REVIEW PRESERVED

- Information is not to be remitted without the person under investigation having been given the possibility to challenge the exchange of information under the laws of the requested state.

INFORMATION EXCHANGE UNDER NEW PROTOCOL (8)

LIMITS (I)

- Requested state must not violate own laws and act contrary to its practice (right to be heard and due process of law – e.g. lawful refusal to testify – are reserved).

- Trade, business, industrial, commercial or professional secrets are preserved (but not banking secret).

INFORMATION EXCHANGE UNDER NEW PROTOCOL (8)

LIMITS (II)

- The disclosure must not be contrary to public policy.
- The requesting state must, under its own law, be in a position to obtain the requested information.
- The requesting state must have used all means at its disposal under domestic law.

SWISS ATTITUDE TO STOLEN BANK DATA (1)

PROBLEM

- Recently, CDs with stolen bank data were purchased by governments of European countries and the data were transmitted to other governments.
- The lawfulness of the German government's purchase of stolen has been affirmed by the German Supreme Court.
- A contrary decision has been handed down by a French court of appeals.
- What happens if a request for information is presented to Switzerland based on data stolen from Swiss banks?

SWISS ATTITUDE TO STOLEN BANK DATA (2)

CURRENT SWISS LAW

The Swiss Ordinance of 1st September 2010 on administrative assistance pursuant to DTAAAs expressly excludes exchange of information if:

- administrative assistance cannot be reconciled with fundamental principles of Swiss law (public policy) or essential interests of Switzerland;
- it contradicts the principle of acting in good faith;
- it is based on information obtained or transmitted by acts that are punishable under Swiss law.

SWISS ATTITUDE TO STOLEN BANK DATA (3)

FUTURE SWISS LAW – MEDIUM TERM

In its proposal for a new Administrative Assistance Statute of 6 July 2011, the Swiss Federal Government also stated:

“A request for exchange of information will not be entered upon if it violates the principle of good faith, in particular if it is based on information that was obtained through an act punishable under Swiss law.”

SWISS ATTITUDE TO STOLEN BANK DATA (4)

FUTURE SWISS LAW – LONG TERM

- In its Peer Review of Switzerland, Phase I, the OECD Global Forum expressed doubts whether this attitude towards information requests based on stolen data meets the OECD standard on exchange of information.
- Switzerland may not be in a position to maintain its current position.

OTHER PROVISIONS IN NEW PROTOCOL

OTHER PROVISIONS IN NEW PROTOCOL (1)

OPERATION OF SHIPS IN INTERNATIONAL TRAFFIC (I)

- Was specifically excluded in Art. 7 of the existing DTAA.
- Switzerland took position that Art. 22 (Other Income) applies, hence taxable in country of residence.
- However, a recent Indian case held that the exclusion in Art. 7 brings shipping income outside the scope of the DTAA; hence double taxation is not excluded.

OTHER PROVISIONS IN NEW PROTOCOL (2)

OPERATION OF SHIPS IN INTERNATIONAL TRAFFIC (II)

- Against this background, Switzerland insisted upon a specific provision on international shipping.
- Following the OECD Model Convention, income from shipping can only be taxed in the country where the respective enterprise has its seat.

OTHER PROVISIONS IN NEW PROTOCOL (3)

NO CREDIT OF FICTITIOUS TAX ON INTEREST

- Repeal of provision requiring Switzerland to grant credit for a fictitious tax of 10% of interest on certain tax-free development loans.

OTHER PROVISIONS IN NEW PROTOCOL (4)

MOST-FAVORED NATION CLAUSE

- Under the previous DTAA, if India grants better terms to another OECD country with respect to taxes on interest, dividends, royalties and fees for technical services, *“Switzerland and India shall enter into negotiations without undue delay”*.
- Under the Protocol, there is now an automatic most-favored nation clause.

OTHER PROVISIONS IN NEW PROTOCOL (5)

NON-DISCRIMINATION

- India taxes permanent establishments of non-Indian companies at a higher rate than permanent establishments of Indian companies.
- Under the Protocol, India is still allowed to do so, but the difference in the tax rates must not exceed 10 percentage points.

OTHER PROVISIONS IN NEW PROTOCOL (6)

ANTI-CONDUIT PROVISION (I)

- India requested a general anti-abuse provision for interest, dividends, royalties and fees for technical services.
- Switzerland refused but eventually accepted an anti-conduit provision as already agreed upon with the U.K. (see Message of Federal Government, BBl 2008, 7655).

OTHER PROVISIONS IN NEW PROTOCOL (7)

ANTI-CONDUIT PROVISION (II)

- Treaty benefits for interest, dividends, royalties and fees for technical services are denied if there is a **conduit arrangement** the **main purpose** of which is to obtain benefits under this Agreement.
- A conduit arrangements is a transaction structured so that a resident of the Contracting State receives a treaty benefit, whereupon such resident remits the income received to a non-resident who would not be entitled to such benefit under the DTAA between his country of residence and the country or source of the treaty-protected income.

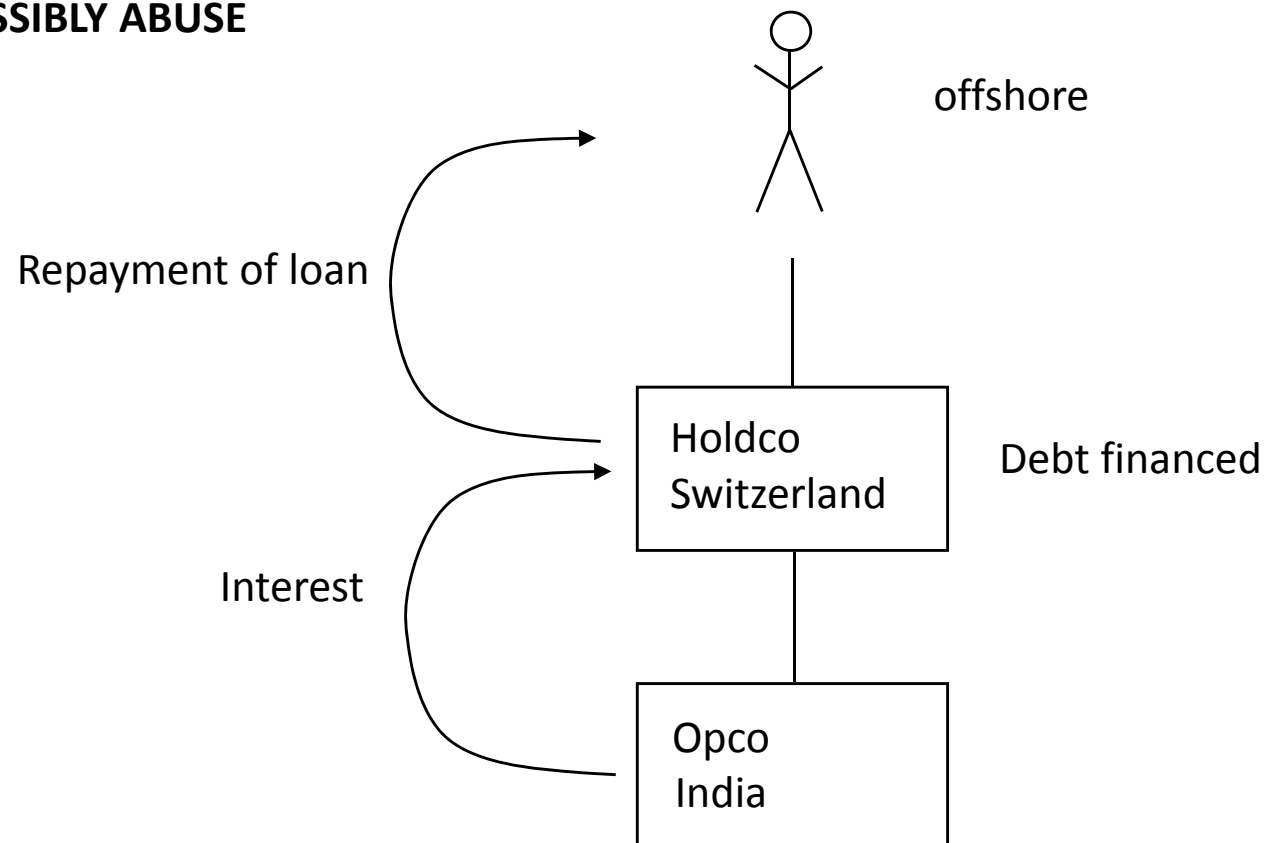
OTHER PROVISIONS IN NEW PROTOCOL (8)

ANTI-CONDUIT PROVISION (III)

- There is little guidance as to the scope of this anti-abuse provision in the Swiss Government's Messages to the DTAAAs with India and the U.K.
- There is also uncertainty as to the extent the Commentary to Art. 1 OECD Model Convention, para. 11 et seq., applies to this new provision.
- It must be noted, however, that the anti-abuse clause only applies if the *"main purpose of such structuring is obtaining benefits under this Agreement"*.

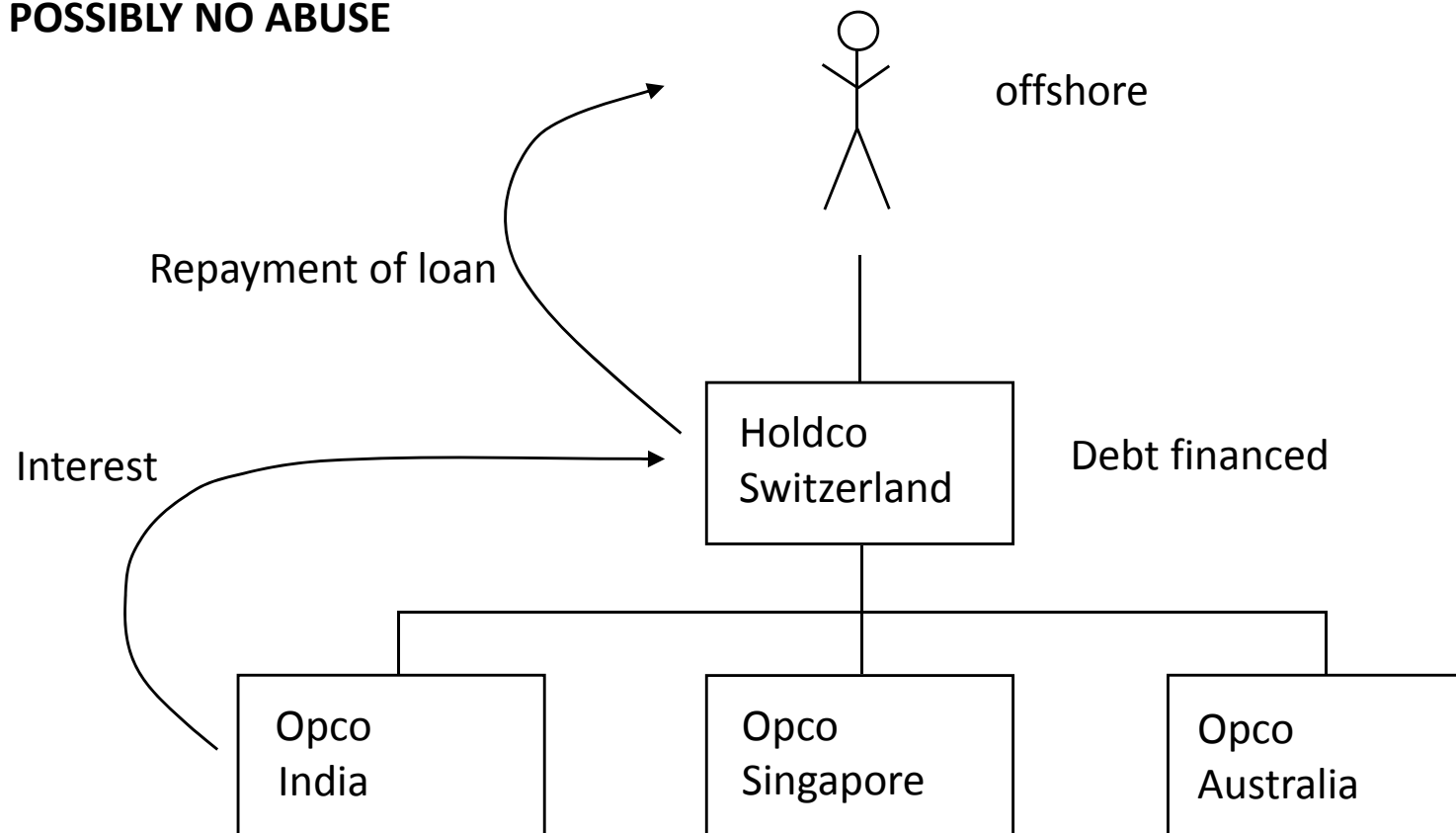
OTHER PROVISIONS IN NEW PROTOCOL (9)

POSSIBLY ABUSE



OTHER PROVISIONS IN NEW PROTOCOL (10)

POSSIBLY NO ABUSE



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NEWEST DEVELOPMENTS IN INFORMATION EXCHANGE

OECD GLOBAL FORUM'S PEER REVIEW PROCESS (1)

REVIEW OF SWITZERLAND IN PHASE I

- Problem of bearer shares: owner must always be ascertainable.
- Judicial review process must not thwart effective exchange of information.
- Too high information requirements must not prevent information exchange.
- *Obiter dictum*: Even if based on stolen data, request for information must be honored.

OECD GLOBAL FORUM'S PEER REVIEW PROCESS (2)

REACTION BY SWITZERLAND TO REVIEW

Switzerland lowered its requirements as to identification of the person under investigation and the holder of the requested information:

- While the person under investigation must be identified, such identification can be done by other means than by name and address.
- The identity and address of the holder of requested information (mainly a bank) must only be indicated to the extent known.

FINAL WITHHOLDING TAX WITH GERMANY AND U.K. (1)

STATUS

- So far agreements reached with Germany and U.K.
- Basic idea: levy of final withholding tax and a one-off payment discharging past tax obligations while anonymity is still preserved.
- Considerable political opposition in Germany.
- European Commission expressed doubts whether the final withholding tax is compatible with European Community law.
- Discussions at technical level are underway with Greece.

FINAL WITHHOLDING TAX WITH GERMANY AND U.K. (2)

REGULARISATION OF THE PAST

- Bank customer has choice of voluntary disclosure or a one-off payment calculated on the basis of a formula.
- If customer does not agree, the bank must terminate the business relationship
- Rate of the tax between 19 and 34 %.
- The longer the banking relationship and the lower the increase of asset value, the lower the tax rate.

FINAL WITHHOLDING TAX WITH GERMANY AND U.K. (3)

FORMULA FOR CALCULATION OF ONE-OFF TAX

$$SB = \max \left\{ s \cdot \left[\frac{2}{3} \cdot \left(K_r - \frac{n}{8} \cdot K_b \right) + \frac{1}{3} \left(\frac{n}{10} \cdot K_r + \frac{2}{10} \cdot \left(\frac{K_9' + K_{10}'}{2} \right) \right) \right] \right. \\ \left. s_{\min} \cdot K_r \right\}$$

FINAL WITHHOLDING TAX WITH GERMANY AND U.K. (4)

WITHHOLDING TAX ON FUTURE EARNINGS (INTEREST, DIVIDENDS, INCOME FROM FUNDS, CAPITAL GAINS)

- Rates of the tax:
 - Germany: 26.375 %
 - UK: 27 to 48 %
- Future inheritance taxes not discharged.

MEMORANDUM OF UNDERSTANDING ON FINANCIAL DIALOG OF 3 OCTOBRE 2011 (1)

OBJECTIVES

- Strengthen the financial and economic relationship between Switzerland and India.
- Promote cooperation in financial sector.
- Build strong relationship between policymakers.
- Serve as a regular forum on bilateral issues in financial and macroeconomic policy.
- Further strengthen relationship in context of strategic partnership for the 21st Century.

MEMORANDUM OF UNDERSTANDING ON FINANCIAL DIALOG OF 3 OCTOBRE 2011 (2)

SCOPE OF THE DIALOGUE

- The dialogue may be initiated at State Secretary level for the Swiss and at Secretary level for the Indian side
- Frequency: once every 12-18 months
- Exchange of views on:
 - domestic and international macroeconomic situations
 - national fiscal and monetary policies
 - financial reforms
 - financial sector policies and regulations

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