

Banking - Switzerland

Mutual assistance regarding bank accounts: new ruling establishes criteria

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Introduction

On March 13 2013 the Federal Administrative Court ruled on the conditions that must be fulfilled in order for Switzerland to grant administrative assistance to the United States with regard to banking clients which have allegedly committed tax fraud with the help of a bank (A-6011/2012).

Background

With the help of Crédit Suisse employees, A and B - both US citizens - deposited assets in an account in Switzerland on behalf of a domiciliary company C, of which they were beneficial owners.

On July 3 2012, after a first failed attempt, the US Internal Revenue Service (IRS) filed a new group request for mutual assistance at the Swiss Federal Tax Administration (SFTA), regarding certain Crédit Suisse bank accounts. The key facts described by the IRS in its request were based on, among other things:

- information given by Crédit Suisse to the US Department of Justice;
- information given by US taxpayers that had spontaneously denounced themselves to the US authorities; and
- information published by different branches of Crédit Suisse.

On that basis, the mutual assistance request filed by the IRS specified exhaustively the selection criteria for the bank accounts affected by the request of mutual assistance as follows:

- The accounts were opened under the name of a domiciliary company, of which the US citizens were beneficial owners;
- The accounts contained US securities;
- There was over \$50,000 in the accounts at some point between 2002 and 2010;
- No Form 1009 was correctly completed and given to Crédit Suisse;
- There was a contradiction between Form A and Form W-8BEN (or equivalent), or these forms were not submitted;
- There were indications that the US beneficial owners had the power to control the accounts, in violation of corporate governance rules - for example, by giving instructions to the bank on behalf of the domiciliary company without being the representative, the trustee or the manager or without the benefit of a written proxy, or by using company assets for their personal benefit.

As beneficial owners of a Crédit Suisse bank account, A and B were informed by the SFTA that mutual assistance would be granted to the IRS regarding the account in the name of C opened at Crédit Suisse. A and B appealed the SFTA decision at the Federal Administrative Court.

Requirements for mutual assistance

The court emphasised that mutual assistance must be consistent with the principle of proportionality. Fishing expeditions are therefore prohibited and the request of mutual

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assistance must contain enough information for the SFTA to examine whether the suspected fraud offence is sufficiently justified.

A mutual assistance request must contain references to:

- the requesting authority;
- the competent authority concerned;
- the object and purpose of the request;
- the legal basis on which the investigation and facts are based; and
- a concrete description of the required information, of the required documents respectively.

The level of detail of the facts must not be unreasonable, as the requesting authority requires new information. Therefore, only the existence of a reasonable suspicion of an offence need be proved by the requesting authority.

The requirements are more stringent with regard to tax offences, and even more so with regard to the establishment of tax fraud or similar. Moreover, if the requesting authority does not specify the name of the affected person in the mutual assistance request, the statement of facts must be very detailed in order for the bank to be able to identify the concerned persons or accounts.

Sufficient proof

The court had to examine whether the IRS mutual assistance request met the requirements. Formally, the IRS request:

- indicates the competent authorities;
- indicates the object and purpose of the request;
- exposes the situation; and
- lists the applicable provisions of US law.

Therefore, in this case the IRS request met the formal requirements.

Regarding the requirement for reasonable suspicion of the commission of tax fraud or the like, the court considered that this was sufficient, as the employees of Crédit Suisse had helped US residents to violate US law, even though Crédit Suisse is considered by US authorities as a 'qualified intermediary' within the meaning of the US qualified intermediary system.

If no names are indicated in a mutual assistance request, the group of accounts or persons affected by the request shall be identified on the basis of the key facts or some other criteria. The IRS therefore gave a very detailed list of selection criteria in order to enable the identification of the affected accounts and persons. The court pointed out that such selection criteria must be assessed as a whole in order to determine whether the suspicion of an alleged offence – tax fraud – is sufficient, as regards the group of persons affected by the decision.

The court held that the selection criteria listed in the IRS request were sufficiently accurate and that, assessed as a whole, they would prevent persons not affected by the IRS request from being included. Further, the selection criteria made possible the identification of persons who were suspected of having committed tax fraud. The identification of the group of persons affected by the IRS request through the selection criteria was therefore consistent with the mutual assistance requirements. Finally, the court considered that the documents required by the IRS on the basis of the request for mutual assistance were relevant in the context of the US authorities' investigation. A and B's appeal was therefore rejected.

Comment

It is as yet unknown whether one of the parties has appealed to the Federal Supreme Court. That said, the Federal Administrative Court ruling still offers a good example of the grounds on which a group mutual assistance request concerning banking clients will be granted, and of the facts or criteria that must be invoked by the US authorities in their mutual assistance requests in order for mutual assistance to be granted by Switzerland.

The requirements set out in the ruling will still be relevant to the application of the new Tax Administrative Assistance Act, which entered into force on February 1 2013. The act governs the execution of administrative assistance under double tax agreements and replaces the existing ordinance governing the implementation of double taxation. Moreover, the possibility to file group requests in accordance with the international standard has been confirmed with the entry into force of the act. Group requests require a description of the action taken by bank clients to avoid taxation and must be distinct from fishing expeditions. In this regard, the new ruling of the court provides clear

guidelines for governmental authorities that would be willing to file a group request.

The decision could also affect the application of the Foreign Account Tax Compliance Act (FATCA) agreement that was concluded with the United States on February 14 2013, as the FATCA agreement ensures that accounts held by US persons with Swiss financial institutions are disclosed to US tax authorities either with the consent of the account holder or through normal administrative mutual assistance channels.

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