

## SWITZERLAND

### Swiss Court Denies Request for Exchange Of Third-Party Bank Data

by William Hoke

A Swiss court has ruled that the Federal Tax Administration (FTA) cannot automatically provide its foreign counterparts with the names of third parties when complying with requests for the financial information of domestic bank clients.

In October 2018 the Federal Data Protection and Information Commissioner (FDPIC) asked the Federal Administrative Court (FAC) to block the automatic exchange of information with U.S. authorities, which had asked for the financial details on over 100 people, if persons named in the requested documents — including bankers, lawyers, and accountants — were not covered by the mutual assistance agreement between Switzerland and the United States, because their names appeared only “by chance” in the files.

The FTA argued that the FDPIC’s position was incompatible with Switzerland’s obligations under international law to ensure the effective exchange of information.

In a decision dated September 3 but published September 10, the FAC said the FTA can exchange third-party information with a foreign tax authority only if the third party was notified in advance and either failed to challenge the exchange or lost an appeal. The court based its decision on the right to privacy under the European Convention on Human Rights, the Swiss Constitution, and Switzerland’s Data Protection Act.

“The Court concluded that, in the field of international tax assistance, persons who are not formally concerned by the request for administrative assistance must in principle be informed in advance of the transmission of their names, in accordance with the law on tax assistance,” the FDPIC said in a statement September 10. “The [commissioner] welcomes this judgment because it protects the fundamental rights of employees of banks and other third parties.”

Frédéric Neukomm, a tax lawyer with Lenz & Staehelin, said in an email that there have been cases in which a person’s name was not redacted

in an exchange of information because the individual did not qualify as an unrelated third party. “But there was no notification to that person, as the FTA considered that he was not ‘affected,’” Neukomm said. “The distinction between the two concepts was indeed rather surprising. This decision confirms that, in a nutshell, a person can no longer be ‘in between.’”

Marc Buchmann, a tax lawyer with Fischer Ramp Partner AG, said the FTA is reviewing the decision. “In the event of an appeal, the questions would be whether the constitutive rights of the employees or a swift execution of information requests are deemed more relevant,” he said.

Neukomm said an appeal is likely because of the “huge administrative burden” that the FTA will otherwise face. “Having to review thousands of pages to either redact a name or notify the person is a nightmare,” he said. “The FTA is typically putting that burden on the information holder — the bank. It orders [banks] to make redaction proposals and/or to notify the person, [but] the FTA is not allowed to directly notify persons residing outside of Switzerland.”

Even if the bank does the redacting, the process will be time-consuming, Neukomm said. “The FTA is stuck between a hammer and a hard place,” he said. “There are regular peer reviews, and the FTA is criticized for the time it takes it to turn around when there is a request for information. It should handle a request within three months [from the time] it is lodged. This deadline may be impossible to comply with if there is a huge [amount of] redaction/notification work.”

Guillaume Grisel, a tax lawyer with Bonnard Lawson, agreed that an appeal is likely. “The government is in favor of broadening the exchange of information to satisfy foreign countries, the EU, and the OECD,” he said. “I think the recent decision is legally correct, but if it is appealed in the Federal Court, it could very well be reversed, as the Federal Court is now in favor of a broad exchange of information too.”

In 2017 Switzerland’s Federal Court ruled that the FTA can’t automatically give the United States the names of third parties who might have helped U.S. residents evade taxes. “Both decisions are [part of] the same trend,” Neukomm said. “In the first decision, the [Federal] Court handled a

specific case. In the latest decision, the appellant is the federal office for data protection. It is thus not connected to a specific case.”

Grisel said that if the FAC decision survives an appeal, it might cause problems for Switzerland with the United States and other countries seeking information on possible third-party involvement in helping their residents evade their tax reporting obligations. “Perhaps [it could], if it is construed as meaning that exchange of third-party data can absolutely never be granted,” he said. “But third countries will perhaps be able to circumvent this new case law by broadening the scope of their requests to the effect of expressly including third parties and explaining in their requests why they need such third-party information.” ■