

Distinction between administrative assistance in tax matters and legal assistance in criminal matters

February 26 2018 | Contributed by [CMS von Erlach Poncet Ltd](#)

[Introduction](#)
[Dispute](#)
[Supreme Court](#)
[Comment](#)

Introduction

On December 18 2017 the Federal Supreme Court rendered a landmark decision preventing the Swiss Federal Tax Administration (SFTA) from transmitting un-redacted bank files to the US Internal Revenue Service (IRS) which contained information on third parties which had allegedly helped a US taxpayer to defraud the IRS (Decision 2C_640/2016). In essence, the Supreme Court decided that the names of bank employees and the attorney/notary who were involved with the setting up and management of the account, and likewise other information that would allow identification of those individuals, needed to be redacted, as such information was not pertinent to the question of taxation of the US taxpayer. This decision comes as a surprise and marks a turning point in the protracted and heated discussion about the extent of information that the IRS may obtain by way of administrative assistance under the US-Switzerland Double Taxation Treaty. What is of particular interest to white collar crime practitioners is the emphasis put on the distinction between administrative assistance in tax matters versus legal assistance in criminal matters.

Dispute

The bank concerned had signed a non-prosecution agreement with the Department of Justice in 2015 under the US Programme for Non-prosecution Agreements or Non-target Letters for Swiss Banks and, as a so-called 'category 2 bank', thereby agreed to provide additional information about various bank accounts, in particular:

"the name and function of any relationship manager, client advisor, asset manager, fiscal advisor, trustee, fiduciary, nominee, attorney, accountant, or other individual or entity functioning in a similar capacity known by the Bank to be affiliated with said account at any time during the Applicable Period."

On March 17 2015 the IRS asked the SFTA by way of a request for administrative assistance to procure information relating to two bank accounts which it alleged had been used by a US taxpayer to commit tax fraud. The SFTA ordered the disclosure of the information by the bank and decided to transmit the entire files to the IRS. On appeal, the Swiss Federal Administrative Court found that information on third parties which was unlikely to be relevant for the proper application of the double taxation treaty or the investigation and prosecution of tax fraud allegedly committed by the US taxpayer (eg, the names of employees of the bank, attorney or notary involved with the banking relationship, or information that would allow identification of any of these individuals) had to be redacted before transmission of the files to the IRS. The SFTA appealed the Administrative Court judgment to the Supreme Court, noting that the verdict would significantly impair a central element of the programme, namely the ability of the US authorities to use administrative assistance under the double taxation treaty to collect information pertinent to identifying and prosecuting individuals who had helped US taxpayers to commit and disguise fraud.

AUTHORS

[Bernhard Löttscher](#)



[Aline Wey Speirs](#)



Supreme Court

On analysis of the pertinent DTA provisions, its own jurisprudence and recent changes to the Federal Act on International Administrative Assistance in Tax Matters, the Supreme Court held that administrative assistance would allow the disclosure of the identity of third parties (hence parties not subject to taxation by the requesting state) only if such information was foreseeably relevant with respect to the assessment of the fiscal situation and the (possibly unlawful) conduct of the taxpayer concerned.

With a view to the particular facts, the Supreme Court found that information about the bank's employee and the attorney/notary contained in the files added nothing in furtherance of the purpose of the request as filed by the IRS. Conversely, it concluded that the redaction of such information in the bank files would not have impeded their usability to assess the tax situation of the US taxpayer or to evaluate whether the taxpayer's conduct constituted a criminal offence under US law.

Most notably, the Supreme Court underlined that Article 26 of the double taxation treaty could serve as a basis for assistance among (administrative) tax authorities only, and that it would not constitute an avenue for foreign authorities to obtain information for criminal prosecution of parties other than the taxpayer concerned. It underpinned its opinion by reference to Article 26 of the Organisation for Economic Cooperation and Development Model Tax Convention, expressly restricting administrative assistance to information that is likely to be relevant for the administration of internal tax laws (or to apply the double taxation treaty). Administrative assistance in pursuit of objectives such as obtaining information about possible accomplices of a taxpayer in order to bring those accomplices to criminal justice would amount to an abuse of the treaty process.

Comment

The Administrative Court decision (upheld by the Supreme Court) may become a major obstacle for the United States to obtain information necessary in future to track down so-called 'facilitators' of tax fraud. Administrative assistance seems no longer to be available, unless the IRS can show compelling reasons which demonstrate that information about facilitators is necessary to assess the conduct of the actual perpetrator in each specific case. Going forward, in a significant number of cases the US authorities will have no choice other than to take recourse to the much more tortuous procedure of mutual legal assistance in criminal matters.

For further information on this topic please contact [Bernhard Loetscher](#) or [Aline Wey Speirs](#) at CMS von Erlach Poncet Ltd by telephone (+41 44 285 11 11) or email (bernhard.loetscher@cms-vep.com or aline.vey@cms-vep.com). The CMS von Erlach Poncet website can be accessed at www.cms-vep.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).