

Group requests for exchange of information in tax matters: Bank clients failing to prove tax compliance.

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- **White money customer relationship**
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- **Non-tax compliant bank customers form a group**

The Case

On October 27, 2015, the Swiss Federal Tax Administration approved a request from the Dutch tax authorities, the Belastingdienst, requesting exchange of tax information on all persons who: (1) have been a client of a certain Swiss bank in the period from February 2013 until December 2014, (2) have had their domicile in the Netherlands, according to the documentation of this bank, (3) have been requested by this bank to give evidence on tax compliance, and (4) have failed to provide sufficient evidence of tax compliance. Except for the USA, this exchange of information request has been the first information request concerning a group of persons (instead of individually specified persons) admitted by the Swiss Federal Tax Administration. On March 21, 2016, the first instance court, the Swiss Federal Administrative Court, approved an appeal against admitting the Dutch group request, qualifying it as unlawful. The Swiss Federal Tax Administration filed an appeal with the Federal Supreme Court against this first instance court's decision. Unlike to the first instance court, the Swiss Federal Supreme Court concluded that group requests that do not mention the names of the concerned persons are indeed admissible under the tax treaty between Switzerland and the Netherlands. This conclusion, despite the fact that the relevant protocol to this tax treaty explicitly provides that exchange of information requests must mention the names of the concerned persons. While the court has not yet published its detailed reasoning, it has stated that the purpose of the exchange of information clause is to enable exchange of information as far as possible, unless a request qualifies as a fishing expedition.

Background

On July 17, 2012, the OECD council approved an amendment of the commentary to the exchange of information clause in the OECD model tax convention, providing for group requests to become admissible. As per February 2013, Switzerland amended its domestic legislation allowing group requests. According to the relevant provisions of Swiss domestic tax law, a group request is basically admissible without specifying the names of the concerned persons, provided the group request relates to an identical pattern of behavior within a group of persons and which can be clearly identified. This criterion of the identical pattern of behavior serves

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Pestalozzi Update September 2016 Page 2 www.pestalozzilaw.com/regulatory to distinguish admissible group requests from unlawful fishing expeditions. An identical pattern of behavior is particularly at hand if the group request aims at a group of persons who (or whose internal or external advisor) took certain actions to veil (the ultimate beneficial owner of) their assets. Group requests aiming at all clients of a certain bank, however, have been regarded as unlawful fishing expeditions.

Practical Consequences for Swiss Financial Institutions

The Swiss Federal Supreme Court has approved a group request concerning all clients of a bank being tax resident in the requesting state who have not sufficiently provided evidence on tax compliance. As a consequence, not following a bank's request to give evidence on tax compliance qualifies as an identical pattern of behavior that allows a group request concerning all noncompliant clients of the affected bank. Because Swiss domestic tax law provides for group requests, all of the currently more than 60 countries that have entered into a tax treaty with Switzerland and that provide for exchange of information may basically request information towards a whole group of persons, regardless of whether the treaty explicitly provides for group requests. As a result, by requesting that their clients give evidence on their tax compliance, Swiss financial institutions create groups of persons with an identical pattern of behavior, who become potentially subject to a group request that will likely be admitted because of the new Supreme Court's decision. In this context, we advise Swiss financial institutions to carefully analyze their procedures, documentation, and forms to ensure their clients' tax compliance. Moreover, Swiss financial institutions may point out to their clients that ignoring a request to give evidence on tax compliance could result in a group request.

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