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Administrative assistance in tax matters

Serious doubt about the identity of the person concerned

Par Fabien Liégeois le 10 December 2021

India sends a request for administrative assistance to Switzerland. The request apparently concerns Alain, who has lost his father (the late Denis). This circumstance is going to be a source of confusion : is India interested in Alain or in the inheritance of the late Denis ? Before delving into this question, let us note that three bank accounts have been identified as relevant in Switzerland.

- Alain and the late Denis were joint holders of account number 1.
- The company ‘C.’ is the holder of account number 2, of which Alain is the beneficial owner.
- The Trust ‘G.’ is the holder of account number 3, the late Denis was its settlor, and Alain was one of the beneficiaries.

Again by way of introduction, let us note that the Federal Court refers, in the judgement that concerns us (2C_901/2020 and 2C_903/2020 of 5 November 2021), to the ‘economic beneficiary’ of the accounts, no doubt because of the English term beneficial owner. When it comes to identifying the taxpayer, we prefer the concept of ‘beneficial owner’ to avoid confusion with that of ‘effective beneficiary’, which relates to the allocation of income. This remark, which is of a terminological nature, has no bearing on the resolution of the dispute. Let us return to it.

The request, which must be described as ambiguous, gives rise to an eventful procedure : the FTA makes an initial final decision in favour of India (i), which it goes on to revoke (ii), before revoking its own revocation (iii). Alain maintains stubbornly that no tax audit has been opened against him in India. In short, one of two things :

- Either the request is aimed at him, in which case it violates the principle of subsidiarity.
- Or the request is aimed at the heirs of the late Denis, in which case it violates the heirs’ right to be heard.

Before the FAC, Alain and others produced a judgement of the Indian Income Tax Appellate Tribunal which shows that the request is in fact aimed at the heirs of the late Denis. This judgement was handed down after the third final decision of the FTA. The FAC therefore examined this new piece of evidence, which it related to the request, to satisfy itself that India was targeting the heirs. It then proceeded to substitute the person concerned before deciding that only information relating to the estate of the late Denis fulfilled the condition of probable

relevance. The appeal was partially upheld.

Neither Alain (and his associates) nor the AFC were satisfied with this decision. They appealed to the Federal Supreme Court, which recognised that the dispute raised a question of principle. The problem is to know whether the Federal Administrative Court can, after having questioned the identity of the person targeted by the request, substitute another person without violating his right to be heard.

Formally, the requesting state, which satisfies the requirements listed in the DTA (art. 26 DTA CH-IN cum ch. 10 of the Protocol), is deemed to have provided sufficient information. Specifically, the person targeted by the request must be the person who is the subject of an investigation in the requesting state. The requesting state must provide this information when it requests mutual assistance from its counterpart, because a request for assistance that targets a person who is not the subject of such an investigation or such an audit would constitute a prohibited fishing expedition.

In other words, respect for the principle of subsidiarity gives concrete form to the prohibition of fishing expeditions.

We know that the requesting state is presumed to be acting in good faith when it indicates the identity of the person who is the subject of an inspection. The principle of trust does not, however, exclude the requested state from requesting clarification in the event of serious doubt. To give rise to such doubt, the allegation of the person concerned is necessary, but not sufficient : the person must provide precise and convincing explanations and support his or her allegations with documents.

Where serious doubt remains despite the request for clarification, the request must be rejected. A substitution of persons concerned during the proceedings is not conceivable in the name of respect for the full procedural rights of the new party.

In casu, the Indian judgement relates to the same set of facts as the request, notes the Federal Court. This judgement finds against the Indian authorities on the question of the identity of the person targeted by the tax proceedings. While designating Alain as the legal heir of the late Denis, India curiously indicated the Indian tax identification number of the estate of the late Denis in its request. These elements are likely to raise serious doubts as to the identity of the person targeted.

The Federal Supreme Court thus ruled, on the one hand, that the FTA’s appeal was partly well-founded insofar as it criticised the FAC for having changed the identity of the person targeted by the request and restricted the transmission to the requesting authority to information concerning the estate of the late Denis only. On the other hand, he considers that Alain’s appeal is partly well-founded insofar as he criticises the TAF for having allowed the transmission of information concerning the estate of the late Denis without the latter having been able to determine it.

The following elements of this new decision of principle are noteworthy.

- In case of serious doubt as to the identity of the person concerned, the FTA or the FAC must request clarification from the requesting authority.
- Neither the FTA nor the FAC may substitute the persons concerned.

- If serious doubt remains despite the clarification, the request must be rejected. This forces the requesting state to file a new one.

In practice, it is not uncommon for the State of residence to approach Switzerland before even having questioned the taxpayer in question. This haste (or tactical choice) is regrettable. The declaration of respect for the principle of subsidiarity is not a mere formality. Administrative assistance aims to extend the means of gathering information provided for by domestic law, not to replace it.

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