

Administrative Assistance

The information on an irrevocable and discretionary trust is relevant

Par Fabien Liégeois le 15 March 2022

India requests information from Switzerland about Anne. Anne is said to hold an account with bank 'B.' through trust structures (*Truststrukturen*). After a procedural mishap, the FTA agrees to pass on to its counterpart the information that the person concerned is a '*beneficiary of the overlying trust of the company holding the account with the number xxx [...]*'. Anne challenges this decision before the Federal Administrative Court, which partially upholds her appeal. Still dissatisfied, she appealed to the Federal Court ([2C 936/2020 of 28.12.2021](#)), asking the following question of principle :

Is the condition of probable relevance of the information [...] met in the case where the person targeted by the administrative assistance is only the beneficiary of a discretionary and irrevocable trust ?

The question is whether, and if so to what extent, the information relating to the account held by a natural person who is the beneficiary of a trust – through an *underlying company* – is likely to be relevant.

According to the CDI-IN, 'the purpose of the reference to information that may be relevant is to ensure the widest possible exchange of information for tax purposes without allowing the Contracting States to engage in "fishing expeditions"' ([CDI-IN 26 § 1 cum Protocol ch. 10 let. d](#)). At the time the request is filed, there must be a 'reasonable possibility' that the information will prove relevant.

In casu, the previous instance noted that the beneficiaries of a discretionary and irrevocable trust only have a right of expectancy as long as a distribution has not been made. From the Swiss point of view, the beneficiary of such a trust is not subject to [fiscal] transparency taxation on the assets and returns (*Erträge*) of the trust. He is only subject to it after the distribution has taken place.

Anne maintains that this assessment should also be followed in terms of administrative assistance. She is of the opinion that the information is not relevant in the presence of a discretionary and irrevocable trust, as long as a distribution has not been made in favour of the beneficiary.

The TF does not share this position.

The fact that it concerns information about a trust, i.e. a third party, does not preclude the exchange of information ([LAAF 4 III](#)), especially since the trust itself [through its *Trustee*] has not asserted any legal means and Anne is not entitled to act in its place.

With regard to the tax treatment of the trust, it should be emphasised that the question falls under Indian law.

It would not be compatible with the purpose of administrative assistance for the requested authority (in this case, the FTA) to examine the characteristics of the trust itself from the point of view of income tax in India. Such verifications would exceed the plausibility check to which the requested authority is bound. Specifically, the FTA does not, for example, have to analyse the *trust deed*. Nor is it required to take into account the case law of the Indian Supreme Court : it therefore matters little that this court has ruled that the beneficiaries of discretionary and irrevocable trusts do not have to declare them for income tax purposes before obtaining a distribution.

The Federal Court thus ruled that the documents provided by bank 'B' are likely to be relevant. In short, it will be up to Anne to defend her position before the competent authorities in India.

Let us make four comments.

1. The interesting thing about this case is that it concerns a relatively common structure in the banking and financial world : an account is held by a company underlying a trust. However, the result is not surprising. Like Prof Oberson, we have argued since 13 March 2009 that Art. 26(5) of the OECD Model Tax Convention on Income and on Capital (MC OECD) prevents the beneficiaries of a trust, even a discretionary and irrevocable one, from invoking this structure to oppose the exchange of information. It may be surprising that the Federal Supreme Court does not use this provision to support its reasoning.
 2. Practitioners know that it is tricky to use the requesting state's law as an argument to oppose the exchange. The doctrine does not completely (*ganzlich*) rule out this avenue. The Federal Court leaves the question open because, in this case, the verifications to be carried out would exceed what can be expected of a *prima facie* check.
 3. The Federal Supreme Court has just confirmed this case law in another case ([2C_918/2020 of 28 December 2021](#)). This latest decision contains additional developments on the types of trust – revocable or irrevocable (*fixed interest* and discretionary). Notice to interested parties.
 4. Finally, this ruling once again illustrates the importance of the distinction between identification of the taxpayer and attribution of income : Art. 26 OECD MC raises the issue of identification of the taxpayer, while Arts. 10 (dividends), 11 (interest) and 12 (royalties) OECD MC raise that of attribution of income. In concrete terms, the bank that opens an account for an *underlying company* of a trust must identify all the stakeholders in this legal relationship (*settlor, protector, trustee, beneficiaries*) using the T formula. That being said, the duty to identify these actors from the point of view of anti-money laundering rules does not imply that each of them will be allocated the assets or income of the trust from a tax point of view.
-

Reproduction autorisée avec la référence suivante: Fabien Liégeois, The information on an irrevocable and discretionary trust is relevant, publié le 15 March 2022 par le Centre de droit bancaire et financier, <https://cdbf.ch/en/1227/>