

Administrative assistance in tax matters

Information by edict of the existence of an assistance procedure

Par Julien Witzig le 17 January 2023

When a foreign company holding a bank account has elected domicile with an agent in Switzerland in the context of an administrative assistance procedure, can the Federal Tax Administration (FTA) use the edict procedure to inform its beneficial owner of the existence of the procedure ? The Swiss Federal Supreme Court answered this question in the affirmative in a ruling dated November 8, 2022 (2C_772/2021 and 2C_773/2021).

The references of the company's bank accounts appeared on the list appended by France to its request for so-called "collective" administrative assistance made in 2016 and covering more than 45,000 bank numbers. The last known address of the company's beneficial owner was in France. In July 2016, the persons concerned by this procedure were informed by the FTA by means of a publication in the *Feuille fédérale*, inviting them to communicate an address in Switzerland, in order to avoid being notified of a final decision by way of an edict. Following this publication, a Swiss lawyer announced that he had been consulted by the company, which objected to any exchange of information and elected domicile in his office.

In May 2020, the FTA issued a final decision to the persons entitled to appeal who had not communicated the name of a representative in Switzerland authorized to receive notifications. The decision concerning the company and its beneficial owner was published in the *Feuille Fédérale*, as the beneficial owner had failed to provide a communication address in Switzerland. The decision published in the *Feuille fédérale* was not contested by the company's beneficial owner.

In October 2020, this decision was notified to the company at its elected domicile in Switzerland, through its lawyer. An appeal against this decision was lodged by the company and its beneficial owner. The Federal Administrative Court rejected the appeal lodged by the company and ruled that the appeal lodged by its beneficial owner was inadmissible, since the decision had been validly notified to it by edict five months earlier.

In its decision, the Federal Court confirms that the FTA cannot be criticized for not having directly contacted the person concerned by the French request, i.e. the company's beneficial owner, and for having limited itself to informing him of the procedure by publication in the *Feuille fédérale*. As the French request was not nominative, such publication was authorized (art. 14 para. 5 LAAF). Moreover, the fact that the beneficial owner was domiciled in France was mentioned in the documentation sent by the holder of the information. The Federal Court

therefore considers that the FTA can rely on the information received regarding the domicile of the person concerned, since the LAAF does not require it to verify this information, in particular with a view to determining whether this person would have taken up residence in Switzerland, as was the case here. In addition, the Federal Court held that when only the holder of a bank account has appointed a representative in Switzerland authorized to receive notifications, the FTA does not have to enquire of him whether he also represents the beneficial owner of the account. On this basis, the Federal Supreme Court confirms that the notification of the decision by edict was legally correct, and consequently that the appeal period for the beneficial owner of the accounts began to run following this publication.

With this decision, the Federal Court thus validates the possibility for the FTA to determine the mode of communication of an administrative assistance decision by relying on the information transmitted by the person concerned or by the person holding the information. In this context, no particular duty of investigation is incumbent on the FTA, even if information relevant to the notification of the decision could easily have been obtained, either because the person concerned is domiciled in Switzerland, or because another party holding the information is involved in the proceedings.

As a result of this decision, we hold that the election of domicile made by a company holding an account is not valid for its beneficial owner. Furthermore, the FTA is not obliged to verify whether the domicile elected by this company is also valid for its beneficial owner. Consequently, the beneficial owner who has not notified an election of domicile must expect an edict publication which will start the appeal period for him. In fact, he will not be able to appeal against the decision at the time of a subsequent notification to the domicile elected by the company.

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