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Administrative assistance in tax matters

Lawyers, confidentiality and bank documents

Par Joël Pahud le 5 June 2025

Bank accounts held by a lawyer may contain information protected by professional secrecy, which must not be disclosed to a foreign state in the context of administrative assistance in tax matters. This must be assumed to be the case for client accounts opened using Form R, but it is also possible that other accounts held by the lawyer may contain protected information. These are the principles laid down by the Federal Court in a ruling 2C_116/2023 of 2 May 2025 (publication in the ATF pending), rejecting the approach of the Federal Tax Administration (FTA), which considered that lawyer-client privilege did not extend to documents provided by a bank.

In 2019, the French tax authorities sent administrative assistance requests to the FTA concerning Mr and Mrs A, based on the information exchange clause contained in the double taxation agreement with France (DTA CH-FR). According to the request, Mr A, who practised as a lawyer in France, had allegedly cashed cheques on undeclared accounts opened in Switzerland.

The FTA granted administrative assistance and, with regard to lawyer-client privilege, held that A could not invoke it to oppose the transfer of information. The privilege did not protect documents in the possession of a bank.

The Federal Administrative Court (judgment of 8 February 2023 A-3906/2020) and subsequently the Federal Supreme Court in the judgment under review did not share this interpretation.

The Federal Court began by observing that Art. 28(3)(c) of the CH-FR DTA, which is modelled on Art. 26(3)(c) of the OECD Model Tax Convention on income and capital, allows the requested State to refuse to exchange information if it would reveal a professional privilege. This treaty provision refers in particular to the professional privilege of lawyers, the scope of which is defined by domestic law. According to the OECD Commentary (No. 19.3 ad Art. 26), domestic law must, however, adhere to a ‘narrow’ definition and the privilege must not be invoked abusively.

The Federal Court then notes that under Swiss law, the professional secrecy of lawyers only covers information obtained in the course of their typical activities, a concept that has been the subject of extensive case law. The secrecy covers, among other things, the very existence of the mandate and the fees. Thus, bank accounts held by a lawyer may contain information

protected by professional secrecy.

In this regard, the Federal Court distinguishes between two types of accounts. On the one hand, there is the bank account that the lawyer opens using Form R in order to comply with his obligation to segregate assets entrusted to him by his clients (Art. 12(h) LLCA). Such an account contains, *a priori*, only information protected by professional secrecy. According to the Federal Court, it must be assumed that a lawyer uses the bank account opened using Form R in accordance with its purpose. This presumption is rebuttable.

On the other hand, lawyers may hold other bank accounts. These do not benefit from the above presumption, but are nevertheless covered by lawyer-client privilege if they contain information relating to their typical activities, such as the names of clients in bank statements relating to the payment of fees.

Finally, the Federal Court examines the extent to which a lawyer subject to administrative assistance proceedings may object to the transfer of his bank documents to the requesting authority on the grounds of professional secrecy.

Noting that the Law on Administrative Assistance in Tax Matters (LAAF) does not contain any express rule on this point and that its Article 8(6) only refers to situations where the requested documents are in the possession of the lawyer, the Federal Court ruled that the lawyer must nevertheless be able to invoke professional secrecy. As the person concerned (Art. 3(a) LAAF), the lawyer has the right to participate in the proceedings and to consult the case file (Art. 15(1) LAAF) ; he may therefore, in this context, argue before the FTA that information contained in the bank documents collected is protected by professional secrecy. If this is the case, the FTA must ensure that this information is not passed on to the requesting authority.

In the present case, the Federal Court found that the account opened using Form R was mainly used to cash anonymous cheques, ‘which is difficult to reconcile with the purpose of the account and overturns the presumption that all information contained therein is covered by professional secrecy’. On the other hand, the names of persons (natural or legal) appearing on the statements remain presumed to be covered by secrecy and must therefore be redacted.

As the Federal Court notes, the principles adopted in this case law are motivated by the fact that lawyer-client privilege not only protects the interests of the client, but also serves a public interest, which consists in protecting the legal order, within which lawyers play a special role, and access to justice. The Federal Court also relies on the case law of the European Court of Human Rights (judgment Brito Bexiga Villa-Nova v. Portugal of 1 December 2015, application no. 69436/10).

In our view, this case law should also be welcomed for its consistency with federal procedural codes, since they protect information subject to lawyer-client privilege regardless of where it is located (Art. 264 para. 1 CPP) or who holds it (third party or party ; Art. 160 para. 1 let. b CPC).

Finally, it should be noted that this case law should be fully applicable to bank accounts held by notaries (see Etienne Jeandin, La profession de notaire, 2nd ed. 2023, p. 121 ff.).

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