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**Administrative assistance in tax matters**

# Subsidiarity, a principle without substance ?

Par Adrien Pasquarello le 23 October 2025

The principle of subsidiarity does not require a state to consult the taxpayer prior to requesting international administrative assistance in tax matters, as long as its domestic law does not require it to do so. This was the ruling of the Federal Court on the legal question of principle raised in case 2C_352/2024 (intended for publication).

In 2020, the Israeli Tax Information Exchange Service requested the FTA to provide it with various information (identity of account holders, identity of beneficial owners, total account assets, etc.) on 794 accounts held by Israeli residents suspected of having undeclared bank accounts with a Swiss bank. The requesting authority stated that it had exhausted all the usual sources of information available under national tax procedure. At the same time, it specified that it was not required by Israeli tax law to approach the taxpayer to obtain the information prior to submitting its request.

The bank forwarded the information to the FTA, which granted the requested assistance. The person concerned, who contested the proceedings, was initially dismissed by the Federal Administrative Court before appealing to the Federal Supreme Court, which accepted the case, recognising that it raised a legal question of principle (Art. 84*a* LTF).

First, the Federal Court noted that, contrary to the OECD standard, the CH-IL DTA allows information to be obtained that is useful only for the application of the DTA and not for the application of domestic law. Only the MAC allows for the obtaining of banking information concerning Israeli residents in order to verify whether they have fulfilled their tax obligations in Israel. It is further specified that the more restrictive wording of the CH-IL DTA does not constitute an obstacle to assistance based on the MAC. Furthermore, the requesting State remains free to invoke the treaty of its choice.

Secondly, it is recalled that a State party may request information from Switzerland as of 1 January 2014 in tax matters involving an intentional act punishable by criminal proceedings (Art. 28, para. 7 *cum* 30, para. 1, let. f MAC). Such a classification is a matter for the requesting State to determine in good faith. There is no evidence to call this into question in the present case.

The Federal Court then addresses the central issue in this case. It reaffirms the purpose of the principle of subsidiarity, which is that the requesting State should not impose the burden of obtaining information on the requested State when that information is within its own reach. It

then sets out its response in three points.

First, it held that treaty law (Art. 21(2)(g) MAC) does not prohibit the granting of assistance in cases where the requested State has not exhausted its resources, but confers the power to refuse it. Domestic law is no more restrictive (see Art. 7 LAAF). It must therefore be concluded that even if the principle of subsidiarity is not respected, Switzerland remains free to grant assistance.

Secondly, the Federal Court explains that the requesting State is required to take all reasonable measures provided for by its legislation or administrative practice. However, since Israeli domestic law does not require the requesting State to contact the taxpayer before submitting a request for assistance, the Federal Court concludes that this State cannot be criticised for not having done so.

Thirdly, it is noted that the principle of subsidiarity does not require the requesting State to implement measures that would give rise to 'disproportionate difficulties' (see Art. 21(2)(g) MAC). In other words, the requesting State must only be required to take steps that do not appear from the outset to be unlikely to succeed. In a criminal context of suspected tax evasion, and in view of the right not to incriminate oneself, a prior request to the taxpayer seems unlikely to guarantee that the information will be obtained. The Federal Court emphasises that the appellant's opposition to the transmission of information corroborates its analysis. For all these reasons, the violation of the principle of subsidiarity must be denied.

Finally, the appellant argues that the information in question is unlikely to be relevant. She argues that she was neither the beneficiary nor the beneficial owner of the bank accounts, that almost all of them had been closed and that she had complied with her tax obligations in Israel. Our High Court rejects this complaint, considering that these arguments should be raised in proceedings on the merits in Israel and that, given the suspicions relating to undeclared accounts, the banking documentation transmitted to the FTA will be useful in clarifying the tax situation in question.

In summary, it should be noted from this ruling that the principle of subsidiarity, as previously defined by the requirement to use all usual sources of information (*'alle üblichen Mittel'* ; 2C_493/2019 of 17 August 2020, consid. 5.5.1), has now been weakened. On the one hand, the refusal to transmit information in the event of a violation of the principle of subsidiarity is discretionary for the Swiss authorities, and on the other hand, the fact that this principle is not established in the domestic law of the requesting State exempts it from complying with it. It should also be noted that the context, particularly in criminal matters, plays an important role in the strictness with which this principle is assessed. Finally, it should be noted that although this judgment was handed down in the context of a request based on the MAC, it remains relevant for the interpretation of all DTAs that include this principle.

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