CENTRE DE DROIT
BANCAIRE ET FINANCIER

Administrative Assistance in Tax Matters

Correspondence between a lawyer or notary and third parties

Par Joël Pahud le 18 June 2026

According to Judgment 2C_506/2024 of May 4, 2026 (scheduled for publication), issued by the Second Public Law Division of the Federal Supreme Court, professional secrecy does not preclude Switzerland from providing a foreign state, in the context of administrative assistance proceedings, with documents held by the cantonal tax administration that it received from an attorney acting on behalf of his client.

In this case, the Spanish tax authorities suspect a taxpayer domiciled in Switzerland of actually being domiciled in Spain. The competent Spanish authority submits requests for administrative assistance to the Federal Tax Administration (FTA) based on the double taxation treaty with Spain (CH-ES DTA), in which it details its suspicions.

In response to these requests, the FTA obtained documents from the Thurgau tax administration, among other sources. The Thurgau tax administration provided the FTA with the tax residence certificates it had issued to the taxpayer, as well as the correspondence it had exchanged with the attorneys the taxpayer had retained in this matter.

The FTA granted the administrative assistance, and the taxpayer unsuccessfully appealed to the Federal Administrative Court (judgment A-5955/2023 of September 26, 2024). He then filed an appeal with the Federal Supreme Court.

The Second Public Law Chamber agreed to hear the case, finding that the appeal raised a legal question of principle (Art. 84*a* LTF). The appellant argues that attorney-client privilege precludes the transmission to Spain of the documents that his attorney had submitted to the Thurgau tax authorities. However, this issue has never been decided by the Federal Supreme Court.

The Second Public Law Division dismisses the appeal.

It first notes that the issue must be resolved in light of the CH-ES DTA. However, Art. 25bis(3)(c) of the CH-ES DTA is modeled on Art. 26(3)(c) of the OECD Model Tax Convention, which provides that the provisions on the exchange of information may under no circumstances be interpreted as imposing on a Contracting State an obligation to provide information that would disclose (among other things) a professional secret. This includes attorney-client privilege.

Referring to the OECD Commentary on the Model Convention, the Second Public Law Court holds that the possibility of refusing to transmit information to the requesting State on the grounds that it is protected by attorney-client privilege is limited to communications between attorneys and their clients. Attorney-client privilege therefore does not apply to information that a tax authority may have received from an attorney, nor to correspondence with the attorney that is in the authority's possession.

Furthermore, the Second Public Law Court notes that domestic law "is consistent with this approach." Art. 8(6) of the Federal Act on the Administration of Justice (LAAF) applies only to documents in the possession of the attorney or his or her assistant. As for Art. 13(1bis) of the Administrative Procedure Act (PA), it protects documents concerning "contacts between a party and his or her attorney," regardless of where those documents are located, but does not apply to correspondence exchanged between an attorney and an authority.

Formulated in this way, this last statement appears too categorical in light of another ruling posted online two days later by the Federal Supreme Court and also intended for publication.

According to this ruling handed down by the Second Criminal Law Chamber (7B_1144/2025 of May 20, 2026), attorney-client privilege protects correspondence between a lawyer and their client *or third parties*. When information protected by attorney-client privilege has been voluntarily disclosed to a third party (e.g., an insurance company or an authority), this does not necessarily mean that such facts will be deemed known or that the holder of the privilege has waived their confidential nature.

The Second Criminal Law Court therefore rules that attorney-client privilege precludes the criminal authority from seizing correspondence between a notary—who does not have the status of a defendant—and third parties, which took place in the course of carrying out a mandate falling within the scope of the notary's typical professional activities. At least, this is the case when the documents in question are obtained from the notary : the Court recalls the case law according to which, to the extent that confidential information has been disclosed voluntarily and knowingly by the attorney or notary (or their client), the third party cannot invoke professional secrecy to refuse to testify or to produce the required evidence in their possession. However, the third party may, where applicable, assert its own grounds for refusal (see ATF 150 IV 470 para. 5).

In our view, these decisions offer a further illustration of the "asymmetrical contours" of attorney-client privilege (Villard *in* https://cdbf.ch/1368/). Correspondence with third parties is indeed protected by attorney-client privilege when it is in the possession of the attorney or notary (decision 7B_1144/2025), whereas it is not protected when in the possession of the third parties in question (decision 2C_506/2024).

It seems correct to us to hold that correspondence between a lawyer or notary and third parties generally falls outside the scope of attorney-client privilege : however, this applies only to the relationship between the lawyer's client and the third parties in question, not in a general sense. Thus, the statement made to the authority loses its confidential nature, but only within the context of the proceedings in question (see CR LLCA Chappuis/Maurer, Art. 13, Note 195). It also seems correct to us to acknowledge that the third parties in question may be required to submit the documents received from the attorney or notary to an administrative, criminal, or civil authority, provided the relevant conditions are met and unless they can invoke their own

grounds for refusal (see, in particular, Art. 16 PA, Art. 165 et seq. CPC, Art. 168 et seq. CPP).

However, as the Federal Supreme Court notes, these principles apply only when the attorney or notary *voluntarily* transmits information to a third party. The reverse scenario, however, is not addressed in the judgments discussed. In our view, this likely covers two scenarios : the information is taken from the attorney or notary against their will (e.g., theft of physical documents or computer hacking). The second scenario : the information was disclosed under duress, within the meaning of the case law regarding the principle of *nemo tenetur* (on this subject, see Hirsch *in* https://cdbf.ch/1269/).

In any event, the lesson from these rulings for practitioners seems clear to us : before handing over documents to a third party (insurance companies, banks, authorities, etc.) on behalf of a client—and unless that third party is an auxiliary of the attorney or notary—one must take into account the risk that these documents will no longer be protected by attorney-client privilege and may, in particular, be used in other proceedings.
