



Berne, April 10, 2012

CREDIT SUISSE: IRS REQUEST FOR ADMINISTRATIVE ASSISTANCE NOT SUFFICIENT FOR THE DISCLOSURE OF CLIENT DATA

A-737/2012: Decision of the Federal Administrative Court *in re* Credit Suisse client v. Swiss Federal Tax Administration.

In its decision of April 5, 2012, the Federal Administrative Court affirmed the appeal of a CS client, who wanted to prevent the disclosure of his bank account data to the Internal Revenue Service (IRS). The Federal Administrative Court concluded that the „search criteria“ for the identification of bank clients (category 2), as set out in the request for administrative assistance, are formulated in terms encompassing above all mere tax evasion, for which administrative assistance cannot be granted according to the applicable Double Taxation Convention USA-Switzerland 96. This is inconsistent with the principle of proportionality, which applies to proceedings regarding administrative assistance as well. The verdict cannot be referred on to the Federal Supreme Court.

On September 26, 2011, based on the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income of October 2, 1996 (DTC USA-Switzerland 96; Official Compilation of Federal Legislation 0.672.933.61), the Internal Revenue Service of the United States (IRS) submitted a request for administrative assistance, in which it accused Credit Suisse (CS) that their employees actively assisted their clients, subject to US tax law, to conceal their income and assets from the US tax authority. The request for administrative assistance does not indicate the names of the bank clients, but only describes the above-mentioned conduct of the CS employees. Furthermore, it contains four categories of identification criteria, through which the bank can determine the clients concerned by the request for administrative assistance.

The Federal Administrative Court holds that the conduct of the CS employees, as set forth in the request for administrative assistance, from which the conduct of the clients themselves may also be deduced, is covered by the term “tax fraud or the like” in the sense of the DTC USA-Switzerland 96. The Court furthermore examines whether the Category 2-criteria for the identification of the bank clients concerned (“search criteria”) also fall under the scope of application of this term. Category 2 includes accounts held by a domiciliary company with a U.S. beneficial owner with U.S. securities and with which Form W-9 is not associated. It comes to the conclusion that the wording of the “search

criteria” in the IRS request for administrative assistance essentially includes persons, who at the utmost could be suspected of having committed tax evasion.

In addition, the Swiss Federal Tax Administration (SFTA) examines only *ex post* whether there is fraudulent intent, a necessary element for the existence of fraudulent conduct triggering administrative assistance. Therefore, the “search criteria” are not sufficiently tailored to enable the bank to identify with a high degree of probability those clients who are suspected of fraudulent conduct triggering administrative assistance and to simply leave the task of examining whether the transmitted data are suitable to confirm the suspicion of fraudulent conduct to the SFTA. Such a procedure is inconsistent with the principle of proportionality, which – as a general principle of administrative law – also applies to proceedings regarding administrative assistance.

The Court reaffirms its case law that under the DTC USA-Switzerland 96 administrative assistance shall not be granted for presumed tax evasion, even if high amounts are at stake. It also confirms that the mere failure to declare a bank account may be qualified – at the utmost – as a tax evasion, which is not subject to administrative assistance.

The Swiss Federal Administrative Court

The Swiss Federal Administrative Court rules on appeals against decisions issued by federal authorities in Switzerland. In certain areas, the court reviews cantonal decisions and furthermore judges on complaints. Where the Swiss Federal Administrative Court does not decide as the court of last instance, its judgments can be appealed to the Federal Supreme Court in Lausanne and Lucerne. The Swiss Federal Administrative Court, with locations in Berne and Zollikofen and, from July 2012, in St Gallen, consists of five divisions and a general secretariat. With 75 judges and 320 staff members, it is the largest court in Switzerland.

Further Information:

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