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Web exclusive: Swiss court limits assistance to India

Dr Simone Nadelhofer, Alexander Troller and Héloïse Rordorf
explain the SFAC's decision to restrict retroactivity for
administrative assistance in tax matters

2010 protocol to Swiss-Indian DTA

On 30 August 2010, Switzerland and India signed a protocol to amend their existing double-taxation agreement (IN-CH DTA). The re-negotiated IN-CH DTA includes a new provision on the exchange of information in tax matters compliant with the OECD Model Tax Convention (Article 26). According thereto, Switzerland and India shall exchange information foreseeably relevant to the correct application of the IN-CH DTA as well as for the administration and enforcement of their domestic laws relating to the taxes covered by the agreement. In other words, the amended IN-CH DTA extends the assistance between the two states to cases of tax evasion. This is in contrast to Switzerland's past tradition of limiting the exchange of information on Swiss bank accounts only to cases of serious crimes (such as fraud, money laundering, corruption, etc.). These developments came when the Indian government was under increasing pressure from both opposition parties and the Indian Supreme Court to reveal the names of individuals suspected of holding undeclared assets abroad.

Repeated attempts were made by the Indian tax authorities to obtain information from their Swiss counterparts regarding Indian accountholders whose names appeared in stolen data handed over by the French authorities to the Indian government. These attempts proved unsuccessful given Switzerland's policy of not permitting administrative assistance requests based on stolen data.

Pilot decision of the SFAC

With the recent Swiss Federal Administrative Court (SFAC) pilot decision of 17 December 2013, India's attempts to track down potential tax dodgers with Swiss bank accounts were once again frustrated. In its decision, the SFAC was called to assess the merits of an appeal filed by the affected taxpayer against a decision of the Swiss Federal Tax Administration (SFTA) granting a request for assistance filed by the Indian authorities based on the new Article 26 IN-CH DTA. The Indian authorities were requesting information on an account allegedly held with a Swiss private bank and relating to the fiscal years 2001/2002 to 2012/2013.

In its appeal, the taxpayer had argued that Article 26 IN-CH DTA had no retroactive effect and that any information could only be exchanged with the Indian tax authorities for the fiscal years 2011/2012 onwards. The appellant had based his legal arguments on the wording of Article 14(3) 2010 Protocol, which provides that the exchange of information between the two states will only apply to information relating to any 'fiscal year' beginning on or after 1 January of the year following the signature of the 2010 Protocol.

With the appellant, the SFAC noted that the term 'fiscal year' had been precisely defined by the contracting states in Article 3(1)(k) IN-CH DTA. The SFAC held that since the 2010 Protocol had been signed on 30 August 2010, Article 26 IN-CH DTA could only apply to information relating to the Indian fiscal year which started on 1 April 2011 (i.e. the fiscal year 2011/2012). As a result, the SFAC

ruled that Article 26 IN-CH DTA had no retroactive effect beyond this date.

The SFAC moreover rejected the Indian tax authorities' somehow optimistic interpretation of Indian tax law according to which income earned but not taxed in preceding years should be added to the current fiscal year. The SFAC underlined that such an interpretation would allow for the removal of any temporal limitation in the application of Article 26 IN-CH DTA. In all good faith, this could however not be considered as the true meaning of Article 14(3) 2010 Protocol, the purpose of which was precisely to prohibit retroactive application of the amended exchange of information rules.

As a result, the SFAC annulled the SFTA's decision and ruled that, based on Article 26 IN-CH DTA, no administrative assistance should be provided to India for fiscal years prior to 2011/2012.

The SFAC's pilot decision is the first one to address the principle of non-retroactivity in the exchange of information based on DTAs that reflect Article 26 of the OECD Model Tax Convention. Since March 2009, Switzerland has re-negotiated more than 40 DTAs with administrative assistance clauses in compliance with internationally applicable standards. As a result, the SFAC's decision is likely to have an impact on administrative assistance proceedings with several other countries.

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