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## **LEGAL ASSISTANCE PROCEEDINGS IN THE CASE OF UBS**

### **A-4013/2010: Verdict of the Federal Administrative Court in the matter of a UBS client versus the Federal Tax Administration**

**In a pilot verdict of July 15, 2010, the Federal Administrative Court rejected a complaint with which a UBS client wanted to prevent the release of her client data to the American tax authorities. The Federal Administrative Court came to the conclusion that the agreement, approved by parliament, with the United States of America regarding a request by the Internal Revenue Service for administrative assistance concerning UBS AG (State Agreement 10) is binding for the Federal Administrative Court in the sense of article 190 of the Federal Constitution. Even if there were a violation of the European Convention on Human Rights, the Federal Constitution and federal laws, the agreement would still be applicable. In the case to be judged, the preconditions for the granting of administrative assistance defined in the agreement were given. The verdict cannot be referred on to the Federal Supreme Court.**

On August 19 2009, the Swiss Confederation (Switzerland) and the United States of America (USA) concluded an agreement with regard to an application from the Internal Revenue Service of the USA for administrative assistance regarding UBS AG, a corporation limited by shares under Swiss law (Agreement 09, AS 2009 5669). Following the verdict of the Federal Administrative Court (A-7789/2009) of January 21 2010, the Federal Council, on March 31 2010, agreed with the USA a protocol to amend Agreement 09 (Protocol 10, AS 2010 1459). The Agreement 09 and Protocol 10 were approved by the Federal parliament by means of a resolution dated June 17 2010 (AS 2010 2907). The consolidated version of Agreement 09 and Protocol 10 are referred to as "State Agreement 10" in the following text (SR 0.672.933.612).

The Federal Administrative Court determined that the authorities applying the law as per article 190 of the Federal Constitution must apply international law. This includes State Agreement 10. International law must not, in any case, be examined for consistency with the Federal Constitution and federal laws if the international law is younger. Therefore, State Agreement 10 is even then to be applied if it infringes the Federal Constitution and federal laws.

For the case under discussion here regarding the delivery of bank data within the framework of an administrative assistance process under tax law, the stipulations of various international legal agreements prove to be relevant; apart from State Agreement 10, they include others such as article 26 of the Double Taxation Treaty concluded with the US in 1996 (DTT-USA 96) as well as article 8 of the European Convention on Human Rights (ECHR, SR 0.101) which encompasses, among other things, the protection of personal data. As far as the relationship between the individual state agreements is concerned, it is to be determined solely in accordance with the rules of article 30 of the Vienna Convention on the Law of Treaties of May 23 1969 (VCLT, SR 0.111). International law recognizes - with the exception of precedence of the so-called *ius cogens* - no material hierarchy. The rules of State Agreement 10 therefore take precedence over all other international legal regulations, particularly article 8 ECHR because it does not include any *ius cogens*.

However, the Federal Administrative Court also determined that even in the case of applicability of article 8, paragraph 1 of the ECHR, the preconditions foreseen for its restriction in paragraph 2 would have been fulfilled: State Agreement 10 proves itself to be an adequate legal basis in view of the prevailing case law of the European Court of Human Rights, given that the stipulations regarding administrative assistance fall under the category of procedural law. In addition, the economic interests of Switzerland as well as the interests in fulfilling obligations that have been entered into in international law are of major significance and outweigh the individual interests of the complainant in this case with regard to the confidentiality of assets owned.

Thereafter, the Federal Administrative Court affirmed that the circumstances in this case equated to those covered by Category 2/A/b as per the appendix to State Agreement 10. The Court determined that the request for administrative assistance complied with the legal requirements. Furthermore, it determined that the circumstances to be judged were given under the criteria defined in the Agreement for the granting of administrative assistance. There was no leeway to check whether the calculation of the income was appropriate because the Federal Administrative Court is also bound to those criteria defined in State Agreement 10 as per article 190 of the Federal Constitution.

### **The Federal Administrative Court**

The Federal Administrative Court judges complaints against ordinances issued by federal authorities. In certain cases the Court is also responsible for reviewing cantonal decisions, and it also rules on complaints procedures. If the Federal Administrative Court does not rule as the final court of appeal, it is possible to appeal against its decisions in Lausanne and in Lucerne. The Federal Administrative Court, with its locations in Bern and Zollikofen (from 2012 St Gallen), consists of five sections and of a General Secretariat. The Federal Administrative Court has 70 judges and 300 employees and is thus the largest court in Switzerland.

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