

France's prosecutors cannot use stolen HSBC client data

France's Supreme Court has ruled that information stolen from HSBC Private Bank's Geneva branch cannot be used in the prosecution of alleged tax evaders.

An HSBC employee, Herve Falciani, illicitly copied the details of thousands of client accounts in 2007 and took it to France. The Swiss government issued a warrant for his arrest, and in 2009 the French authorities used this warrant to raid Falciani's home and seize the data. Falciani has since been placed under a witness protection programme.

France subsequently made the confidential information available to tax enforcement agencies of many other countries, as well as using it to investigate its own tax residents, including searching their homes.

However, it now turns out that these searches were all illegitimate. One of the targeted individuals complained to France's lower appeal court and in February last year succeeded in having the tax authorities' actions ruled unlawful. The French Budget Ministry appealed that ruling but has now lost in the Commercial, Financial and Economic Supreme Court (Court de Cassation), the country's highest court. This decision cannot be challenged any further.

A spokesman for HSBC Private Bank Geneva said: "We are pleased with the judgment which confirms that the data was illegally acquired, as we have always maintained."

The Budget Ministry issued a statement to the effect that the Supreme Court decision would only have a limited effect by restricting its search powers. It is likely that the French authorities always knew the information could not be used in evidence, but have used it to pressurize suspects into making admissions.

In line with the UAE's efforts to enhance global financial relations, the Ministry of Finance (MoF) signed a double taxation avoidance agreement with Switzerland on 6 October 2011.

The move reflects the UAE's commitment to enhance economic relations and import and export activities between the two countries, in addition to improving trade through providing full protection from direct and indirect double taxation processes.

A member of the Government, Al Khouri commenting on the agreement saying that "The UAE has signed this agreement with Switzerland as part of its efforts to solidify joint financial and investment efforts with other countries, and to enhance its local economy. Not only do these agreements play a positive role in enhancing global ties, but they also provide benefits for citizens, companies, sovereign wealth funds, private and public companies, residents, and national state-owned air carriers, which are exempt from all taxes."

The Details

Aside from a provision on the exchange of information, Switzerland and the UAE have agreed withholding tax exemption for dividend payments to the other contracting state or state institutions (e.g. sovereign funds), as well as for dividend payments to pension funds.

There will be a residual tax of 5% for dividend payments to companies that hold a stake of at least 10% in the company making the payment, and of 15% in all other cases. Interest and royalty payments will be taxed only in the state of residence.

Interest and royalties arising in one of the States and paid to a resident of the other State shall be taxed only in that state. Gains derived from the alienation of shares in a Company shall be taxable only in the State of which the alienator is a resident (unless the assets of such company consist mainly of immovable property situated in a Contracting State).

Conclusions

The DTT establishes the UAE as a key jurisdiction for investments in Switzerland and this together with the UAE jurisdictions' other advantages e.g. no corporate tax, no tax filings, versatile structuring vehicles, relatively low operating costs, it is therefore anticipated that many companies will take advantage of this very favourable jurisdiction to establish a defacto holding company in the UAE with the purpose of taking participations in Swiss companies.

Any corporate vehicle with a physical presence in the UAE may in principle benefit from the DTT, provided that it meets the requirements of the DTT.

The latter mainly aim at ascertaining that the links of the UAE Company with the country, respectively the Swiss source income (e.g. dividends) are strong enough in order for it to be considered a resident of the UAE, respectively the beneficial owner of the Swiss source income. Other conditions apply (e.g. absence of abuse). The provisions of the DTT shall have effect in respect of:

- Taxes withheld at source, as of 1st Jan of the year in which the DTT has entered into force and
- Other taxes, for taxation years as 1st Jan of the next following year of the entry into force of the DTT.

Please note that even with this DTT, you will still have at least 5% withholding tax to be paid while if the structure also includes a Cyprus holding company then there will be zero withholding tax.

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