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http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/tax_recovery/index_en.htm

Reference recommendation: *EU & Int. Tax Coll. News*

ACTIVITIES

EU - New Commission Action Plan on VAT, including actions to improve tax collection and recovery assistance

On 7 April 2016 the Commission adopted an Action plan on VAT (document COM(2016)148, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT – Towards a single EU VAT area – Time to decide).

The VAT gap in the EU is stable (at 16%), but differs considerably among Member States, which continue to lose revenues while fraudsters put compliant businesses in a disadvantaged position. Tackling the VAT gap calls for urgent action on three fronts: enhancing administrative cooperation, collectively improving the performance of European tax administrations and improving voluntary compliance.

The Commission has presented a series of actions that it intends to pursue together with the Member States and other interested parties.

Enhancing cooperation within the EU and with third countries

The measures announced also include an action to "strengthen mutual assistance for the recovery of tax debts. As effective collection of VAT is a cornerstone of the fight against fraud, the Commission is evaluating the use of Directive 2010/24/EU on mutual recovery assistance. The Commission also intends to amend the implementing legislation in the field of administrative cooperation and recovery assistance to facilitate the exchange of information with regard to vehicles as well as the cross-border use of precautionary measures safeguarding the recovery of VAT claims."

The Commission also emphasized the need to "enhance cooperation with third countries in the area of VAT by negotiating agreements between the EU and third countries on administrative cooperation and mutual assistance in recovery of VAT claims, based on Council mandates. This will enable tax administrations to obtain more information on non-established traders liable for VAT in the EU and fight VAT fraud more effectively, notably to ensure effective taxation of e-commerce."

Towards more efficient tax administrations

"As the European Semester Specific Country recommendations and experience demonstrate, there are differences in the way tax administrations work, which affects the proper collection of the tax and the

business environment. There is a need to build trust and collectively improve the level of performance of European tax administrations, in order to strengthen the European tax system and fight against VAT fraud in the single market."

The Commission will, inter alia, develop new approaches with Member States on tax collection by exchanging best practices about new reporting and auditing tools; and monitor the tax administration's performance in collecting and controlling VAT.

IOTA - Debt Management Area Group: new mandate

The IOTA Debt Management Area Group was created in March 2012 seeking to promote improvements in the management of tax debts through sharing of knowledge and experiences between IOTA member tax administrations and, where possible, further contribute to:

- development of sustainable long term strategies that will lead to effective treatment of the outstanding tax debts in the face of current compliance risks;
- enhancement of legislative, administrative and operational measures taken by IOTA tax administrations to optimise tax debt collection processes, and
- measuring the effectiveness and efficiency of debt enforcement methods and techniques.

The Area Group, currently consisting of permanent representatives from 32 tax administrations of IOTA, meets twice a year and serves as an incubator for the creation and development of networks of officials specialising in debt management. Both the meetings and networks facilitate discussions among participating tax administrations on new and innovative working methods of tax debt collection and recovery.

The work of the Area Group is defined in two-year mandates. Recently a third mandate, covering 2017 and 2018, was approved by IOTA's Executive Council. Under this mandate, activities will be carried out to support the following priority areas:

- automation of tax debt management processes;
- enhancing bankruptcy and insolvency procedures;
- use of data from automatic exchange of information in order to improve national debt collection and recovery process;
- measuring effects and outcomes of tax debt management;
- creation of a glossary of debt management related terms and definitions for the use in tax administrations.

For more information: <http://www.iota-tax.org>

LEGISLATION

Ireland - Tax clearance certificates: new procedure to avoid abuse

From 1 January 2016 Ireland applies a new electronic tax clearance system. Any individual or business who seeks State grants or participates in a public procurement procedure is required to hold a valid tax clearance certificate.

In the past, a tax clearance certificate was valid for 12 months from the date of issue. It was possible that traders did not honour the instalment arrangements agreed, while remaining in the possession of the tax clearance certificate which they had obtained before they stopped to respect the instalment agreement.

Under the new system, traders applying for tax clearance in the new electronic tax clearance system are given a tax clearance access number which must be given to any public or state body who needs to verify their tax clearance status. Using this access number and the tax reference number, the public or status body can verify via the Revenue online service that the applicant holds a valid tax clearance certificate. The tax clearance status is up-to-date at the moment of this verification, as the tax clearance status is removed as soon as the trader does not honour his instalment arrangement.

EU - National implementation of the new EU Directive on public procurement

From 18 April 2016, all EU Member States are required to have legislation in place to implement the new Directive 2014/24/EU of 26 February 2014 on public procurement. This Directive has introduced new public procurement rules in order to simplify procedures for public administrations and companies. The European Single Procurement Document (ESPD) reduces the administrative burden for business by enabling them to electronically self-declare that they fulfil the required conditions to participate in a public procurement procedure. Only the successful tenderer will need to provide full documentary evidence (but in the future, even this obligation could be lifted once evidence can be linked electronically to national databases). In order to qualify for the contract, the winning company needs to prove inter alia that it is not in breach of its obligations relating to the payment of taxes or social security contributions.

Relevant provisions of this directive:

Article 57

Exclusion grounds

(...)

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security

contributions due, including, where applicable, any interest accrued or fines.

3. Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

(...)

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

(...)

Article 59

European Single Procurement Document

1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(...)

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-

date supporting documents in accordance with Article 60 and, where appropriate, Article 62. The contracting authority may invite economic operators to supplement or clarify the certificates received pursuant to Articles 60 and 62.

5. Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system.

Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents where the contracting authority having awarded the contract or concluded the framework agreement already possesses these documents.

For the purpose of the first subparagraph, Member States shall ensure that databases which contain relevant information on economic operators and which may be consulted by their contracting authorities may also be consulted, under the same conditions, by contracting authorities of other Member States.

6. Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article.

Article 60

Means of proof

1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

2. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in Article 57 apply to the economic operator:

(...)

(b) as regards paragraph 2 (...) of that Article, a certificate issued by the competent authority in the Member State or country concerned.

Where the Member State or country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2 and point (b) of paragraph 4 of Article 57, they may be replaced by a declaration on oath or, in Member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the Member State or country of origin or in the Member State or country where the economic operator is established.

A Member State shall, where relevant, provide an official declaration stating that the documents or certificates referred to in this paragraph are not issued or that they do not cover all the cases specified in paragraphs 1 and 2 and point (b) of paragraph 4 of Article 57. Such official declarations shall be made available through the online repository of certificates (e-Certis) referred to in Article 61.

3. Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

Where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

4. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.

5. Upon request, Member States shall make available to other Member States any information relating to the grounds for exclusion listed in Article 57, the suitability to pursue the professional activity, and the financial and technical capacities of tenderers referred to in Article 58, and any information relating to the means of proof referred to in this Article.

CASE LAW

Spain

Audiencia nacional, Sala de lo Contencioso- Administrativo (National court for administrative matters)

12 March 2015

ROJ:SAN 983/2015

ECLI:ES:AN:201:983

Original language: Spanish

Notification of tax claims – Taxable person not fulfilling his obligation to inform the Tax Agency about his address change – Obligation of the tax authorities to act with diligence and good faith – Unvalidity of notification by public disclosure if the tax authorities knew or should have known that the debtor could no longer be reached at a former address

Summary

Article 24(1) of the Spanish Constitution provides that "All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence".

If the taxable person fails to communicate a residence change, any actual change of residence has no consequences towards the authorities until the relevant tax declaration is submitted. Accordingly, service by publication does not infringe Article 24(1) of the Spanish Constitution in situations where the residence changes without the tax authorities being informed, provided that the tax authorities acted with the appropriate diligence and good faith.

In particular, this good faith requires the authorities to ensure that, even where the taxable person concerned failed to act with all due diligence in notifying a change of residence, before resorting to service by publication or summons, they attempt to serve notice at the appropriate address, either because it is stated in the file or because it is extremely easy to find, usually by means of public offices or registers, especially where the notice concerns administrative penalties.

(...)

The contested order states that no lack of proper defence occurred, given that the attempts to serve notice were made at the location stipulated by the law, i.e. the place where the property is situated (Article 11(1) of Royal Legislative Decree 5/2004 of 5 March, revising the Act on Income Tax for Non-Residents, IRNR), and that taxable persons are required to inform the tax authorities of any change of tax residence.

(...)

The claimant contends that the authorities failed to exhaust all possibilities for properly serving notice, since they were aware that he could not be located at the property at issue given that it had been sold and was undergoing inspection, a fact established by the self-assessments appearing in the record, which contain the name of the new buyer.

Moreover, the authorities were well aware of the taxable person's other addresses in Germany, which is indicated in the documents included in the file. This is proven by the fact that the authorities had no difficulty, when initiating enforcement proceedings, in notifying him at his address in Germany, which was the first time the claimant had been notified of the proceedings.

(...)

The act of serving notice "plays a significant role as, by informing the person concerned of the corresponding resolutions, it allows him or her to take all appropriate measures in his or her interest, specifically the lodging of an appropriate appeal".

(...)

Not all failures to serve notice necessarily imply an infringement of Article 24(1) of the Spanish Constitution; nor, in contrast, does notice served in a correct and formal manner mean that its purpose has been fulfilled, i.e. that it has respected the constitutional guarantees established by the above Article, which would occur, for example, in cases where the authorities do not sufficiently investigate the true residence of the person concerned before resorting to service by publication, or where, after notice has been served to a third party in accordance with the established legal requirements, it is proven that the third party did not deliver the notice to the person concerned.

For this reason, lack of a proper material defence cannot be claimed when the person contributed to it arising, nor when he personally refused the notification.

Next, the Court expresses its opinion on the obligation of the taxable persons to communicate to the Tax Agency their residence and any residence changes, the obligation of the Tax Agency to act with diligence and in good faith, and the subsidiary nature of the notification by public disclosure.

This Court has already emphasized the obligation of the taxable persons to communicate to the Tax Agency any address change. In particular, this court has clearly confirmed that inasmuch as responsibility for establishing and communicating the residence 'falls, by law, to the taxable person', 'if the taxable person does not fulfil this responsibility, any actual change of residence has no consequences towards the authorities until the relevant tax declaration is submitted'. Accordingly, the suggestion that service by publication would infringe Article 24(1) of the Spanish Constitution in situations where the residence changes without the tax authorities being informed was rejected, but - it should be emphasised - provided that the tax authorities acted with the appropriate diligence and good faith.

(...)

Good faith is not merely required of the taxable persons, but also of the authorities. In particular, this good faith requires the authorities to ensure that, even where the taxable persons concerned failed to act with all due diligence in notifying a change of residence (either because they failed to give an address for notification purposes, or because the attempts to serve notice at the stated address were unsuccessful), before resorting to service by publication or summons, they attempt to serve notice at the appropriate address, either because it is stated in the same file or because it is extremely easy to find, usually by means of public offices or registers, especially where the notice concerns administrative penalties.

(...)

As regards the authorities' obligation to use all available means to serve notice, in accordance with the principle of good faith required of administrative proceedings, the Court holds that the tax authorities - which were aware that the taxable person was living abroad, that he was not represented and that the address given for notices, although valid, was neither appropriate nor efficient in view of the fact that the property had been sold, a fact of which the authorities must have been aware given that it was the subject of the inspection procedure - failed to demonstrate the necessary good faith as they merely sent all notices to the address given, which proved fruitless on each occasion.

It should be added that the tax authorities were aware that the claimant had another residence in Germany,

since he is named on the deed of sale for a property, included in the file, which was issued on 20 June 2003 by Mr F., Notary of the Colegio de Baleares (Balearic Islands bar association), on which Mr W.J.S. is named as resident of (... → address in Germany) and pursuant to which he sells to another German citizen the full title of this property, which is the same residence that appears on the claimant's non-residents' income tax form indicating the transfer of said property. This document is also included in the file.

Accordingly, in this case, it cannot be claimed that the authorities exhausted all available means to serve notice to the taxable person at another of his addresses, of which they were aware, and to make sure the taxable person was fully informed of the administrative act served before resorting to service by publication, in the light of the latter's nature as a supplementary, alternative measure.

Clear proof of the ease with which notice could have been served at the address in Germany is the fact that the same authorities initiated recovery proceedings with the mutual assistance of the German authorities, in accordance with the EU rules.

Finally, the Court holds that the supplementary nature of service by publication would have required the authorities to have exhausted all available means of serving notice and, before resorting to service by publication, to have attempted to serve notice at other addresses appearing in public registers, since it was to such an address that enforcement notices were subsequently sent, taking into account the fact that, in the relevant box on the non-residents' tax declaration form relating to the transfer of the property at issue, the claimant had declared his residence as the address in Germany. Consequently, as the authorities failed to act with due diligence, they caused the taxable person to suffer a lack of proper defence, as he was deprived of his right to a full and proper defence since he was unable to submit in due time that which he may have deemed appropriate to defend his rights and, in particular, as specified in the document belatedly submitted by his representative, obtain the deduction of the costs incurred through the sale.

Therefore, the Court decides that the tax authorities did not act with appropriate diligence, and thus created a situation where the taxable person could not fully exercise his right of defence (...).

In light of the above, the petition is sustained and the contested order declared unlawful and therefore null and void, with all legal consequences arising from this declaration.

Netherlands

Court of Appeal, Arnhem-Leeuwarden

15 December 2015

Nr. 14/01117

ECLI:NL-GHARL:2015:9639

Original language: Dutch

March 2013. This is to be considered as "sending or issuing" the decision as referred to in Article 3:41 of the General Administrative Law Act. The further comments of the debtor concerning notification do not change the above opinion of the Court. This means that the objection period had begun to run on 20 March 2013 and that 1 May 2013 was the last day of that period.

Notification of tax claims – Personal deposit in the letter box of the debtor – Valid notification – Proof of this notification

Summary

If the tax official personally deposits a decision in the letter box of the debtor, this has to be considered as a valid notification, i.e. "sending or issuing" of the decision.

The evidence of such a personal deposit can be provided in the form of statements of the official concerned, his agenda and correspondence between the interested party and this official.

The deadline for submitting the notice of objection is six weeks (Article 6:7 of the General Administrative Law Act). That period shall begin on the day following that of the date of a decision that is open to appeal, unless that day precedes the day of notification. The notification of a decision is done by sending or issuing it to the party concerned (Article 3:41 of the General Administrative Law Act).

The debtor stated that he has been informed about the decision on 11 July 2013.

The inspector stated that the decision has been delivered to the debtor on 19 March 2013 by a control officer, Mr. D., who personally deposited the decision in the debtor's letter box, and that Mr. D., in the presence of his colleague E., deposited a copy of the inspection form in the same letter box on 21 March 2013. Mr. D. has stated that the post box was empty at the time that he filed that control report in the letter box. The inspector has provided evidence of these personal visits in the form of statements by Mr. D., the agenda of Mr. D. and correspondence (e-mail and SMS) between the interested party and Mr. D.

According to the Court, the inspector with what he claimed demonstrated that the decision has been deposited in the mailbox of the interested party on 19

Australia

Federal Court Victoria District Registry General Division

28 August 2015
McManus

Nr. VID356/2015
Original language: English

Notification in another State – Order for substituted or deemed service – Condition that service by another means was not successful

Summary

According to Australian law, if service of a document concerning tax related liabilities was not successful on a person in a foreign country, the tax authority may apply to the Court for an order substituting another method of service, or specifying that the document is taken to have been served on the happening of a specified event or at the end of a specified time. Cases where prompt service may be necessary to prevent the dissipation of assets may warrant orders for substituted service in addition to personal service.

However, an order for substituted service under the above rule is generally conditioned upon service by another means not having been successful. This condition should not be disregarded if there is no urgency that would warrant the disregarding (points 13-14 of the judgment).

1 The Deputy Commissioner of Taxation (“Commissioner”) has commenced proceedings against Mr McManus for recovery of \$1,018,467.50 together with further general interest charges and costs. The Commissioner’s proceeding was commenced by originating application filed on 9 July 2015 and was accompanied by a statement of claim filed on the same date. On 6 August 2015 the originating application and statement of claim were amended to correct errors in the calculation of the amounts which the Commissioner seeks to recover. The Commissioner, however, has not been able to serve the documents and seeks by interlocutory application leave to serve them on Mr McManus in the Republic of Indonesia pursuant to r 10.43(2) of the *Federal Court Rules 2011* (Cth) and relies, in part, upon

the *Convention between the United Kingdom and the Netherlands regarding Legal Proceedings in Civil and Commercial Matters*, signed 31 May 1932, [1935] ATS 4 (entered into force on 29 July 1933) (the “*UK/Dutch Convention*”). The Commissioner seeks leave also to serve the documents on Mr McManus pursuant to r 10.49 of the *Federal Court Rules 2011* (Cth) both by post to his last known residential address and by email to his last known email address.

2 The Commissioner’s interlocutory application is supported by an affidavit by Ms Man Chuen Law dated 6 August 2015. The affidavit states that the originating application in the proceeding has not yet been served on Mr McManus as he is believed to be currently residing in Indonesia. The last contact between the Commissioner and Mr McManus appears to have been by email on 6 November 2012 when Mr McManus indicated that he resided in Indonesia. That email also expressed a willingness by Mr McManus to correspond by traditional mail for formal matters rather than by email and stated that, at that stage, he no longer retained counsel to act for him. The email from Mr McManus on that day was in response to an email sent by an officer of the Commissioner in the objections section of the Australian Taxation Office (“the ATO”) informing Mr McManus that letters had been sent to his postal address. The email from the ATO asked Mr McManus for certain information to be sent by letter and asked also whether Mr McManus preferred communicating by email.

3 The *Federal Court Rules 2011* (Cth) includes rules dealing with service outside of Australia of an originating application. Rule 10.42 provides that an originating application may be served on a person in a foreign country in a proceeding that consists of, or includes, a proceeding based on a cause of action arising in Australia or seeking any relief or remedy under an Act including the *Judiciary Act 1903* (Cth). Rule 10.42 is subject to r 10.43 which provides that service of an originating application on a person in a foreign country is effective for the purpose of a proceeding “only if”, among other things, the Court has granted leave under sub-rule (2) before the application is served. Rule 10.43(2) provides:

A party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

Rule 10.43(3) sets out the requirements of an affidavit which must accompany an application under sub-rule (2), and r 10.43(4) provides that an applicant seeking leave under sub-rule (2) must satisfy the Court that it has jurisdiction in the proceeding, that it is a proceeding of a kind mentioned in r 10.42, and that the party has a *prima facie* case for all or any of the relief claimed in the proceeding.

4 The affidavit of Ms Law establishes most of the matters about which the Court is to be satisfied as set

out in r 10.43(4). The Court has jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) in respect of the recovery of tax related liabilities arising under s 255-50 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). The proceeding against Mr McManus is based on a cause of action arising in Australia in which the Commissioner seeks relief under an Act of the kind referred to in r 10.42. The Commissioner's claim in the proceeding is to recover tax related liabilities based on notices of assessment for income tax issued by him in accordance with the *Income Tax Assessment Act 1936* (Cth), notices of shortfall penalties assessed in accordance with the *Taxation Administration Act 1953* (Cth) and liabilities of Mr McManus to pay the general interest charge under s 204 of the *Income Tax Assessment Act 1936* (Cth), s 5-15 of the *Income Tax Assessment Act 1997* (Cth), and Part IIA of the *Taxation Administration Act 1953* (Cth). The affidavit of Ms Law also makes out a *prima facie* case for all or any of the relief claimed in the proceeding as required by r 10.43(4)(c). Her affidavit exhibits a certificate dated 6 August 2015 by a Deputy Commissioner of Taxation as a delegate of the Commissioner of Taxation made pursuant to s 255-45 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). That certificate provides *prima facie* evidence of the tax related liability of Mr McManus as set out in the originating application, of the fact that notices of assessment were served upon him, and of the fact that the full amount of the tax related liability remains unpaid as a debt due and payable by Mr McManus to the Commonwealth.

5 An application under r 10.43(2) may be made for service of an originating application on a person in a foreign country "in accordance with a convention, the Hague Convention or the law of the foreign country". Indonesia is not a party to the Hague Convention but the Commissioner contends that the proposed method of service is either permitted by an applicable convention between Australia and Indonesia, or permitted by the laws of Indonesia. The convention relied upon by the Commissioner is the *UK/Dutch Convention* which the Commissioner contends applies by extension to Australia and Indonesia. That convention, if it applies, contemplates the service of process in Indonesia by formal letter of request through diplomatic channels seeking the assistance of the competent authorities in Indonesia to serve the documents. The affidavit of Ms Law indicates that the Commissioner has previously received "advice" from the Attorney-General's Department to the effect that Australia's service arrangements with Indonesia "are based on" the *UK/Dutch Convention* under which the Commissioner can deploy diplomatic channels for service of process in Indonesia. It seems, however, that that position may no longer be available and that the Commissioner is not able to have process served upon Mr McManus in Indonesia through the competent authority in that country.

6 The Attorney-General's Department publishes a list of bilateral treaties between Australia and other countries. A copy of that list was annexed to the affidavit of Ms Law. That list identifies Indonesia as a country to which the *UK/Dutch Convention* applies between Australia and Indonesia by succession from the Netherlands. The Attorney-General publication explains that Australia is a party to bilateral service conventions as a result of the United Kingdom extending conventions to external territories including Australia. On 31 May 1932 the *UK/Dutch Convention* was entered into between the governments of the United Kingdom and the Netherlands regarding legal procedure in civil and commercial matters. It entered into force on 29 July 1933 in the United Kingdom and the Netherlands, and entered into force for Australia on 8 April 1935. The treaty was extended to the then Dutch East Indies, now Indonesia, with effect from 21 March 1935 pursuant to an exchange of notes between the relevant contracting countries between 21 December 1934 and 8 January 1935. Indonesia is no longer a Dutch territory but an independent country. It is not itself a party to the *UK/Dutch Convention* but the Commissioner submits that it still applies between Australia and Indonesia.

7 The Commissioner relies primarily upon information received from the Attorney-General's Department which the Commissioner contends shows that the *UK/Dutch Convention* applies by extension to Australia and Indonesia. The importance for the Commissioner to establish that fact lies in the need for the Court to be confident both that the means of service to be ordered is available and also, importantly, that it is permitted under the law of the country in which service of process of the court of this country is to be effected. The Court should not sanction a step in a foreign country in the furtherance of its process which is not lawful in the foreign country. An effect of the requirements in r 10.43(3)(c) is to require an applicant to satisfy the Court that what it is asked to sanction is permitted in the foreign country. The publication by the Attorney-General's Department relied upon by the Commissioner, however, does not say that the *UK/Dutch Convention* continues to be in force in Indonesia but only that "in many instances" conventions continue in force by succession from former colonial powers in territories which have since become independent states, including Indonesia.

8 The Commissioner also relies upon an email dated 16 September 2013 from Ms Rashid, an officer of the Private International Law Section of the Attorney-General's Department, to Mr Vorreiter, on behalf of the ATO. Ms Rashid considered whether the *UK/Dutch Convention* applied and, with the caveat that legal "advice" was not being provided, said about the *UK/Dutch Convention*:

This Convention was later extended by the Netherlands to the Dutch East Indies (now the Republic of Indonesia). Under this Convention, a party in Australia who wishes to serve documents issued by an Australian Court in civil proceedings on a party in Indonesia may send a formal request through the diplomatic channels seeking the assistance of the competent authorities in Indonesia to serve the documents.

The material exhibited in support of the Commissioner's application also included a letter from the Department of Foreign Affairs and Trade addressed to the Foreign Service Desk of the Supreme Court of Victoria, dated 6 February 2015, which informed the Supreme Court that there "is no agreement between Australia and Indonesia regarding the service of documents in civil and commercial matters". The letter also said that it had become the practice of the Indonesian Ministry of Foreign Affairs to accept responsibility for service of judicial documents only (a) from foreign courts to Indonesian citizens and Indonesian entities in Indonesia or (b) from courts in Indonesia to foreign citizens abroad. That letter went on to say that the Indonesian Ministry's responsibility did not extend to documents from foreign courts to foreign nationals in Indonesia and in such a case it was unable to assist any further with the request which appears to have been made.

9 On 6 August 2015 Ms Rashid (who had written the email on 16 September 2013 previously referred to) wrote to Ms Law in response to a request concerning service of process in Indonesia. In that email Ms Law was informed that diplomatic practice in Indonesia had changed and service under the *UK/Dutch Convention* was no longer assured. The relevant email provided:

Thank you for your email. Please note that the Private International Law Section does not provide legal advice, therefore the following information should be treated as information only.

In June 2015, we received information from the Department of Foreign Affairs and Trade that Indonesia permits the service of documents via the diplomatic channels. The Indonesian Ministry of Foreign Affairs and Trade has advised that it is the Ministry's responsibility for the service of documents only if service is to be effected on Indonesian citizens and/or Indonesian entities in Indonesia. Alternatively, Indonesia permits the use of a private process server or private agent in the service of documents in Indonesia.

Information on our file seems to suggest that translations in Bahasa Indonesia of the request and documents to be served would be required by the Indonesian authorities.

As for the Convention between the United Kingdom and the Netherlands regarding Legal Proceedings in Civil and Commercial Matters 1932 referred to in

my email to Mr Vorreiter, diplomatic practice in this area has shifted and the status of this avenue of service is no longer assured. For this reason we do not recommend attempting service in this way.

I hope the above information is of assistance.

The Commissioner relies upon this email in support of the proposition that the *UK/Dutch Convention* is still applicable between Australia and Indonesia. However, I am not satisfied that the email establishes that the diplomatic channels available in Indonesia will permit service upon Mr McManus. The first sentence in the second paragraph appears to be general but the two succeeding sentences are directed to the same matter as the first sentence and appear to be a rather substantial restriction on the extent to which Indonesia permits the service of documents via diplomatic channels. The June 2015 information referred to in the email is not specified but the email taken as a whole is consistent with the view that the *UK/Dutch Convention* is no longer available for service of Australian process upon persons such as Mr McManus. That is the burden of the last paragraph in the email which states that diplomatic practice has shifted and that reliance upon the *UK/Dutch Convention* for service is no longer assured.

10 On 6 August 2015 Ms Law also received legal advice from Professor Frans Winarta, an Indonesian lawyer, in respect of the availability of the *UK/Dutch Convention* as a means of effecting service of process in civil proceedings in Indonesia. Ms Law's affidavit deposes to the fact that the email from Professor Winarta was in response to a request for confirmation that personal service of documents in civil proceedings by a local agent or process server was an accepted method of service under Indonesian law. The advice, however, began by informing Ms Law that the *UK/Dutch Convention* could no longer be used for service of documents in Indonesia. The email from Professor Winarta is not without ambiguity but it seems clear enough that his opinion was that the *UK/Dutch Convention* was no longer a means available for service of process in Indonesia. Counsel for the Commissioner informed the Court that the Attorney-General's Department was approached after receiving Professor Winarta's advice for confirmation that the position regarding service in Indonesia in reliance upon the *UK/Dutch Convention* remained as it had been expressed by Ms Rashid in the 16 September 2013 email but the Commissioner had not received a response as at the date of the hearing of the present application. It is not possible in these circumstances to be sufficiently confident that service may be effected in Indonesia by a method permitted by a convention.

11 The Commissioner relied upon a number of previous decisions which were said to be consistent with the Commissioner's reliance upon the *UK/Dutch Convention*. In none of the cases, however, was the evidence as it is before me. In *Australian Competition*

and *Consumer Commission v April International Marketing Services Australia Pty Ltd* [2009] FCA 735 Bennett] gave leave for service in Indonesia where her Honour had evidence adduced by the Australian Competition and Consumer Commission that the proposed method of service in Indonesia was permitted by “the relevant convention between Australia and Indonesia”. A comparable order was made by Katzmann J in *Commissioner of Taxation v Zeitouni* (2013) 306 ALR 603 where, however, the evidence before her Honour was that the *UK/Dutch Convention* was available as a means of service upon a non-Indonesian national in Indonesia. At [35]-[38] her Honour said in relation to an affidavit filed in support of an application for service under r 10.43:

[35]First, it discloses that the brothers are most likely in Indonesia. Mr Vorreiter said that on 2 September 2013 Mr Davis telephoned him and informed him that “he had emailed his clients in Indonesia and advised them to cooperate with the ATO”.

[36]Second, it discloses that Indonesia is not a party to the Hague convention. The evidence given by Mr Vorreiter shows that Australia’s service arrangements with Indonesia pre-date Indonesian independence and are based on the bilateral convention.

[37]At first, Mr O’Brien challenged the evidence upon which Mr Vorreiter relied, but ultimately withdrew his challenge and accepted that the bilateral convention applies to service in Indonesia.

[38]Articles 2 and 3 of the bilateral convention provide for service through diplomatic channels. Mr Vorreiter obtained advice from the Commonwealth Attorney-General’s department that this method of service “can result in some delay”. But service through diplomatic channels is not the only method of service permitted by the convention. Article 4 relevantly provides:

(a) The provisions of Articles 2 and 3 in no way prejudice the liberty to use in the territory of either High Contracting Party, without any request to or intervention of the authorities of the country, where service is effected, any of the following methods of service in connexion with judicial or extra-judicial documents:

(1) Service by a Consular Officer of the High Contracting Party on whose territory the documents emanate;

(2) Service by an agent appointed for the purpose either by the judicial authority by whom service of the document is required or by the party on whose initiative service of the documents is required;

(3) Service by the competent officials or officers of the country where the documents are to be served, acting directly at the request of the party on whose initiative service of the documents is required;

(4) Service through the post;

(5) Any other mode of service recognised by the law existing at the time of service in the country from which the documents emanate.

[Emphasis in the judgment of Katzmann J.]

The evidence before her Honour did not include the contrary evidence which is before me to the effect that the *UK/Dutch Convention* is no longer available for service of court proceedings upon non-Indonesian nationals in Indonesia. The same is also true of the decisions in *Sumampow v Mercator Property Consultants Pty Ltd* [2005] WASCA 64 and *Mercator Property Consultants Pty Ltd v Christmas Island Resorts Pty Ltd* (unreported, Federal Court of Australia, Nicholson J, 14 July 1998). In the latter Nicholson J at p 5 said:

There is evidence in the form of advice from the Commonwealth Attorney General’s Department that there is no convention or other treaty in force between Australia and Singapore. There is further evidence that Australia and Indonesia are parties by succession to the Convention between the United Kingdom and the Netherlands regarding legal proceedings in civil and commercial matters made on 31 May 1932. The effect of that convention is that it permits service through the diplomatic channels, service by mail or service by private agent.

In *Sumampow* the Full Court of the Supreme Court of Western Australia similarly acted upon uncontradicted evidence that the *UK/Dutch Convention* “continued to apply between Australia and Indonesia”. It may be that further inquiry will produce evidence that removes doubt about whether the *UK/Dutch Convention* continues to apply but at present the evidence before me is not sufficient to establish that the proposed method of service in Indonesia is permitted under that Convention.

12 Leave may be granted under r 10.43(2) even if the convention does not apply provided that service on a person be permitted by the laws of Indonesia: r 10.43(3)(c)(iii). Ms Law’s affidavit states that Indonesia permits the use of a private process server or private agent for the service of documents in Indonesia. An email to her from Ms Rashid dated 6 August 2015 stated that “Indonesia permits the use of a private process server or private agent in the service of documents in Indonesia”. The advice Ms Law received from Professor Winarta is ambiguous about this but is not inconsistent with what Ms Rashid had said when the Professor informed Ms Law that “personal service of civil proceedings by a local agent or process server is not an accepted method of service under Indonesian law”. The reason that there may be no inconsistency between what Ms Rashid said and what Professor Winarta advised is that the latter advice related to what was permitted under a Memorandum of Understanding (“MOU”) and was not,

in terms, additional to the same question addressed by Ms Rashid. The Professor's advice to Ms Law in this regard was:

For your information personal service of civil proceedings by a local agent or process server is not an accepted method of service under Indonesian Law. Referring to the Memorandum of Understanding No. 162/PAN/KH.00/II/2013, No. NK/HI/01/022013/58, dated 19 February 2013 between the Supreme Court and the Ministry of Foreign Affairs of the Republic of Indonesia on the Handling of Rogatory Letter and Request for Service of Process in Civil Case from a Foreign Court to an Indonesian Court and from an Indonesian Court to a Foreign Court ("MOU"), any service of documents from a foreign court (including service of civil proceedings) on individuals residing in Indonesia shall be conducted through diplomatic channels.

The MOU attached to Professor Winarta's email of advice appears not to apply to the circumstances of Mr McManus for a number of reasons including that he is not an Indonesian citizen. The observation preceding the reference in Professor Winarta's advice to the MOU that personal service "by a local agent or process server is not an accepted method of service under Indonesian law" appears to be based upon his analysis of the MOU and does not appear to be a general statement about whether personal service by a local agent or process server was permitted by Indonesian law. The advice by Professor Winarta in this respect is, in any event, ambiguous and not sufficient to cast doubt upon the clear and direct statement from Ms Rashid to the contrary. Personal service of originating process is generally required by r 8.06 of the *Federal Court Rules 2011* (Cth) and there is no prohibition under Australian law on service being carried out by a process server or other agent. The evidence that service may be effected by a process server or agent is also consistent with the email of 16 September 2013 from the Attorney-General's Department previously referred to. Accordingly leave will be granted to effect service upon Mr McManus by a process server or other agent in Indonesia.

13 The Commissioner also seeks leave to serve the amended originating application and statement of claim on Mr McManus pursuant to r 10.49 by posting the documents to his last known residential address and by emailing a copy of them to his last known email address. The Commissioner's application is that leave should be granted for this alternative form of service simultaneously with leave to serve upon him by a process server or other agent. Rule 10.49 provides:

If service was not successful on a person in a foreign country, in accordance with a convention, the Hague Convention or the law of a foreign country, a party may apply to the Court without notice for an order:

- (a) substituting another method of service; or*
- (b) specifying that, instead of being served, certain steps be taken to bring the document to the attention of the person; or*
- (c) specifying that the document is taken to have been served:*
 - (i) on the happening of a specified event; or*
 - (ii) at the end of a specified time.*

An order for substituted service under this rule is generally conditioned upon service by another means not having been successful. There is at this stage no basis to conclude that service which has not yet been effected will not be successful. There may be circumstances where the interests of efficient case management may justify an otherwise anticipatory order for substituted service where personal service has not yet been attempted but I am not satisfied that this case is one of them. In *Deputy Commissioner of Taxation v Seabrooke* [2012] FCA 1158 Siopis J made orders for substituted service as well as personal service outside of Australia (but not by email) in circumstances where it was desirable to have the documents brought to the respondent's attention promptly. Cases where prompt service may be necessary to prevent the dissipation of assets may warrant orders for substituted service in addition to personal service (see *Commissioner of Taxation v Zeitouni* (2013) 306 ALR 603, [80]-[84]) but there is no urgency of that kind in this case that would warrant disregarding the usual precondition contemplated in r 10.49, namely, that service not had been successful on a person in a foreign country.

14 Accordingly there will be orders for service in Indonesia by an agent or process server.

France

Cour de Cassation

21 January 2016

Nr. 15-10193

ECLI:FR:CCASS:2016:C200149

Original language: French

International recovery assistance – Request for precautionary measures – Basis for the request – Decision of a judge in the applicant State – No competence of this judge to decide which measures should be taken in the requested State.

Summary

In accordance with the principle of independence and sovereignty of States, the French judge cannot impose or authorise an enforcement measure or a precautionary measure to be executed in another State, unless he has the power to do so under an international convention or EU law.

Whereas the tax recovery authority of Paris West has requested a local judge dealing with execution matters (juge de l'exécution du tribunal de grande instance) to get an authorisation for a precautionary measure, in accordance with the Spanish legislation, consisting in the seizure of the bank account which was held by Mr. X at the Spanish bank Banco Popular Español;

Whereas this request was rejected by the judge concerned on 28 May 2014;

Whereas the recovery authority brought an appeal against this judgment;

Whereas the Court of Appeal of Paris rejected the appeal and confirmed the first judgment on 6 November 2014;

Arguments of the tax recovery authority

Whereas the tax recovery authority relies on the following arguments:

1°/ Article L. 283 C XI of the French Code of Tax Proceedings provides that, at the request of the French authorities, the requested authority of another Member State shall take precautionary measures to ensure recovery where a claim is not yet the subject of

an instrument permitting enforcement, insofar as allowed under the legislation of the applicant Member State;

in accordance with Article R 183 C-2 (in reality R. 283 C-2) of the French Code of Tax Proceedings, the request for precautionary measures is accompanied by a document, established by the applicant authority, authorising this applicant authority to take such measures in accordance with its own legislation;

in the absence of an instrument permitting enforcement, Article R. 511. 1. (in reality L. 511-1) of the French Code of civil execution proceedings requires that the judge dealing with execution matters authorises the precautionary measures;

Therefore, the Court of Appeal has violated the provisions of Articles L. 283.A, L. 283 C VI, L. 283 C XI and R. 283 C-2 of the French Code of tax proceedings, and Article L. 511-1 of the French Code of civil execution proceedings, insofar as it decided that an authorisation by the judge dealing with execution matters is not needed;

2°/ Article L 283 C VI of the French Code of tax proceedings provides that the uniform instrument made by the applicant Member State and allowing precautionary measures constitutes the sole basis for recovery and precautionary measures;

On the basis of Article R. 283 C-2 of the French Code of tax proceedings, the request for precautionary measures sent by the applicant Member State shall be accompanied by the uniform instrument referred to in Article L. 283 C VI;

Therefore, the Court of Appeal has violated the Articles L. 283 C VI and R. 283 C-2 of the French Code of tax proceedings, insofar as it has decided that the above form does not relate to precautionary measures, and as it has concluded that this form does not correspond to the request referred to in Article R. 283 C-2 III.

Decision of the Court

In accordance with the principle of independence and sovereignty of States, the French judge cannot impose or authorise an enforcement measure or a precautionary measure to be executed in another State, unless he has the power to do so under an international convention or EU law;

The Court of Appeal has rightly decided that, although the Articles 3 and 16 of Directive 2010/24/EU of 16 March 2010 provide that, at the request of the applicant authority of an EU Member State, the requested authority of another Member State shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, so that Article L. 283 of the French Code of tax proceedings correctly states that the French authorities can ask another Member State to take

precautionary measures with regard to all claims relating to taxes and duties of any kind, thus allowing these authorities to request that the Spanish authorities take precautionary measures against Mr. X., on his assets in Spain, just as the Spanish authorities can request the French authorities to take precautionary measures in France against a debtor who is subject to a recovery action in Spain with regard to a claim falling within the scope of Article L. 283 A II of the same Code, these provisions do not allow a French judge to authorize precautionary measures with regard to a bank account in Spain.

Therefore, the Court of Appeal rightly rejected the request introduced by the tax recovery authority.

(...)

Comments:

This judgment basically confirms that a judge of the applicant EU Member State has no competence to decide which enforcement or precautionary measures should be taken in another EU Member State, which is requested to provide assistance on the basis of Directive 2010/24/EU.

Netherlands

Court of first instance of Zeeland - West-Brabant

27 November 2015

Nr. BRE 14/2830

ECLI:NLRBZWB:2015:7765

Original language: Dutch

International recovery assistance – 1. No obligation for the tax collector in the requested State to inform the debtor before starting the recovery – 2. Notification costs – Due by the debtor if he does not prove that a payment deferral had been agreed.

Summary

If a claim is the object of an instrument permitting enforcement in the Member State which requests mutual recovery assistance for this claim, the tax collector in the requested Member State does not have to inform the debtor about his recovery actions before starting his recovery measures. Neither does he have to remind the person concerned in advance about his debts.

In the absence of proof that a payment deferral has been agreed, the debtor has to pay the notification costs made by the tax collector in the requested Member State.

Facts

2.1. On 15 April 2013 the German tax authorities (Finanzamt Kleve) sent a request for mutual recovery assistance relating to the tax claims of the debtor. On the basis of this request, a notification has been made to the debtor on 16 December 2013. The costs of this notification amount to 2435 €.

2.2. The debtor does not agree with these costs and has objected on 18 December 2013. In his objection he also asked to delay the payment. This objection has been rejected by the tax collector.

Dispute

2.3. The parties do not agree whether the notification costs were validly charged on the debtor.

Considerations of the Court

2.4. In accordance with Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, rules have been implemented for mutual assistance between the Member States relating to the recovery of tax claims of other Member States. In the Netherlands, the implementing law (Law on mutual assistance) has entered into force on 1 January 2012. (...)

2.5. The German tax authorities (Finanzamt Kleve) sent a mutual assistance request for the recovery of several tax debts of this debtor.

2.6. In accordance with Art. 12 of the Law on mutual assistance, the Netherlands can provide assistance for the recovery of claims for which an instrument permitting enforcement exists in the applicant Member State. The tax collector holds – and it is not disputed – that such an instrument exists for the tax claims concerned. This instrument dates from 2012. So the tax collector can immediately proceed with recovery measures. Contrary to what is argued by the debtor, the tax collector does not have to inform the debtor about the recovery actions before starting the recovery measures, neither to remind him about his debts.

2.7. The debtor argues that a procedure concerning these claims was on-going in Germany at the moment of the recovery.

As the debtor invokes to be in an exceptional situation, he has the burden of proving this argument. In this respect, the debtor submits a copy of a document "Erörterungstermin" of a German court (Finanzgericht Düsseldorf) of 1 April 2014. At the audience, the debtor's attorney declared that the debtor has asked the German tax authorities (Finanzamt Kleve) to postpone the payment. There is no written evidence of this allegation. At the audience, the tax collector has declared that it has been verified whether the German authorities have agreed any postponement. The tax collector holds this has not been agreed.

2.8. The Tribunal is of the opinion that the tax collector was right to assume that no postponement has been agreed in Germany. There is no proof of such agreement and it has not been mentioned in the request for assistance. As the document submitted to the Tribunal is of a later date, it cannot be accepted as proof of an earlier agreed postponement.

France

Conseil d'Etat

17 January 2014

Expatrium International

Nr. 372282

ECLI: FR:CESSR:2014:372282.20140117

Original language: French

Guarantees for tax collection – Special seizure measure in case of manifest fraud – Not precluded by the possibility to request international recovery assistance

Summary

In special cases of manifest and blatant fraud ("tax flagrancy"), the French tax authorities may act immediately to seize assets and impose substantial fines. This special measure is expected to be used only if there is a risk that the tax authorities may not be able to recover unpaid taxes if they do not act immediately.

The fact that the tax authorities may have recourse to the assistance of a Member State of the European Union (EU) for the recovery of tax claims, on the basis of Council Directive 2010/24/EU of 16 March 2010, does not preclude the implementation of the tax flagrancy procedure.

Having regard to the appeal, summary and the supplementary pleading registered on 18 September and 3 October 2013 at the Judicial Affairs Secretariat of the Conseil d'Etat, on behalf of Expatrium International Ltd, based (...) London, Great Britain;

The company requested the Court (Conseil d'Etat) to annul the judgment No 1306052 of 4 September 2013 by which the administrative Court of Cergy-Pontoise dismissed its appeal for annulment of the order No 1305110 of the President of the Court of 8 July 2013 rejecting her request to stop the tax flagrancy procedure that was initiated on 19 June 2013, on the basis of Article L. 16-0BA of the Tax Procedures Code and to discharge of the fine imposed on the basis of Article 1740 B of the General Tax Code;

(...)

Having regard to the other documents in the file;

Having regard to the Treaty on the Functioning of the European Union;

Having regard to Council Directive 2010/24/EU of 16 March 2010;

Having regard to the General Tax Code and the Code of tax procedures;

Having regard to Law No 2011-1978 of 28 December 2011, Supplementary Finance Act for 2011;

Having regard to the Code of Administrative Justice;

After having heard in a public session: (...)

1. Whereas it is apparent from the documents in the file submitted to the administrative Court of Cergy-Pontoise, during a procedure of access and seizure carried out on 19 June 2013 at the home of Mr. A... on the basis of Article L. 16 B of the Code of Tax Procedures, officials of the National Directorate for Tax investigation drew up a certificate of tax flagrancy, under Article L. 16 0-BA of the same Code against Expatrium International Ltd, the company of which Mr. A was the leader; that the company brings an appeal in cassation against the judgment of 4 September 2013 by which the administrative court dismissed its appeal for annulment of the order of 8 July 2013 by which the President of the General Court rejected its request to terminate the procedure of tax flagrancy and discharge of the fine imposed on the basis of Article 1740 B of the General Tax Code;

2. Whereas under the terms of Article L. 16-0BA, I, of the Code of Tax Procedures: "Where, in the context of the procedures referred to in Articles L. 16 B, L 16 D and L. 80 F, (...) the tax administration officials of at least the grade of inspector find that a taxpayer engaged in a professional activity and for the periods for which one of the reporting obligations provided for in Articles 170, 172, 223 and 287 of the General Tax Code has not expired, is doing at least one of the following: 1° the exercise of an activity that the taxpayer did not declare at a Business Formalities Centre or registry of the commercial Court, unless he has met any of his tax obligations relating to returns for an earlier period (...), they may, if circumstances likely to threaten the recovery of a tax claim of the kind referred to in the first paragraph, draw up against the taxpayer a tax flagrancy certificate (...);

Whereas under part V of this provision: "the judge hearing applications for administrative interim measures referred to in Article L. 279, shall stop the tax flagrancy procedure if this is requested within eight days of receiving the certificate of tax flagrancy and if, in that stage of the investigation, he has serious doubts as to the regularity of the procedure. The judge shall take a decision within fifteen days. By failing to act within that period, this judge declines jurisdiction in favour of the administrative Court which shall handle the case as a matter of urgency. The decision of the judge may be appealed to the administrative Court

within eight days. The Court shall handle the case as a matter of urgency. ... “;

It follows from those provisions that the implementation of the procedure of tax flagrancy is subject *inter alia* to the establishment of circumstances likely to endanger the recovery of tax claims arising from the activity pursued by the taxpayer; It is for the judge hearing the application for interim measures, on a request to terminate that procedure, as for the administrative Court ruling on appeal, to judge whether there are serious arguments to create, in that stage of the investigation, serious doubts as to the regularity of the procedure, in particular whether, in the light of the evidence submitted to it by the parties, the existence of those special circumstances is sufficiently demonstrated by the tax administration in the certificate of tax flagrancy;

3. The company Expatrium International Ltd submits, first, that the administrative Court of Cergy-Pontoise failed to rule on the plea that the options offered by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance between Member States in the recovery of taxes would eliminate any risk of non-recovery. However, it is clear from its pleadings that it stated itself that this Directive has been transposed by Article 59 of the Finance (Amendment) Act for 2011 of 28 December 2011 in Articles L. 283 A ff. of the Tax Procedures Code. Thus, in holding that Article L. 283 A did not preclude the application of the tax flagrancy procedure, the administrative court gave sufficient reasons for the response to the plea before it on this point. It did not err in law in dismissing this plea, since the option of having recourse to the assistance from a Member State of the European Union does not constitute an obstacle to the implementation of the tax flagrancy procedure laid down by the provisions cited in paragraph 2 above;

4. In the second place, the company submits that the administrative Court did not adjudicate on the circumstances likely to threaten the recovery of a tax claim. In this regard, it is apparent from the documents in the file submitted to it that the company confined itself to rely, on the basis of Article L. 80 A of the Tax Procedures Code, on the particulars of paragraph No 10 of the basic administrative documentation referenced BOI-CF-COM-20-30 of 12 September 2012. In holding that Article L. 80 A of this code was not applicable to the taxation procedure, the administrative Court of Cergy-Pontoise gave sufficient reasons for its judgment on this point;

5. Thirdly, the administrative Court of Cergy-Pontoise did not infringe Article L. 16-0BA of the Tax Procedures Code, in holding that the mere fact that the administration knew since 2009 the situation of the company and of its director, was not capable of affecting the regularity of the procedure;

6. In the fourth place, the administrative Court, which was seized of a plea that the consultancy in international mobility was not carried out by the company but personally by its manager, noted that the certificate of tax flagrancy of 19 June 2013 referred to the existence, in the manager's computer (which was seized at his home in France), of documents showing all the elements of the commercial and accounting management of the company Expatrium International Ltd. The administrative Court, assessing these facts, could decide that the company did not provide any evidence to show that this consultancy was not exercised by the company itself. So the administrative Court was able to deduce that the certificate was not tainted by an irregularity in this respect;

7. In the fifth place, the plea alleging an infringement of the principles of freedom of movement and freedom of establishment was not raised before the administrative Court. As a result, the applicant cannot effectively criticise the merits of the judgment which it challenges on this point;

8. In the sixth place, it is not for the judge hearing the application for interim measures, pursuant to the provisions mentioned in paragraph 2 of the Article L. 16-0BA V of the Tax Procedures Code, to rule on the merits of the fine imposed pursuant to Article 1740 B of the General Tax Code. Therefore, in dismissing the claim of the company seeking remission of the fine that would have been imposed on the basis of those provisions, the administrative Court did not commit an error of law;

9. Whereas it follows from all of the foregoing that the company Expatrium International Ltd is not entitled to seek the annulment of the judgment which it contests;

Whereas it is necessary, consequently, to reject its claim for the application of Article L. 761-1 of the Code of Administrative Justice;

DECIDES:

Article 1: The appeal of the company Expatrium International Ltd is rejected.

Article 2: This decision will be notified to the company Expatrium International Ltd and the Minister of Economy and Finance.

Netherlands

Rotterdam district court

26 November 2014

Nr. C/10/448085/HA ZA 14-369

ECLI:NL:RBROT:2014:10503

Original language: Dutch

International recovery assistance – Contestation of the recovery measures in the requested State – EU law – Contestation to be brought before the competent bodies of the applicant EU Member State

Summary

Opposition against tax recovery measures is only possible if the substantive liability is so doubtful that the tax collector could not reasonably decide to enforce the claim. By merely contending that (1°) the debtor was not informed of the tax claim for which recovery assistance was requested by another EU Member State, and (2°) that the tax collector of the requested EU Member State did not justify the lawfulness of the claims for which the applicant EU Member State sent him a uniform instrument permitting enforcement, the plaintiff has not fulfilled his obligation to prove that the tax collector could not reasonably decide to enforce the claim.

Substantive grounds of defence against a tax claim have to be brought before the competent bodies of the applicant EU Member State. The fact that the debtor did not use this opportunity cannot be relied on against the tax collector in the requested EU Member State.

In the case of:

[the plaintiff],

Against

Tax collector of the Tax department Rijnmond,
established in Rotterdam,

2 Facts

2.1.

[The plaintiff] lived in the period 2002-2010 in Derby, United Kingdom. Her partner was trader. In 2010, [the applicant] returned to the Netherlands, after her relationship came to an end.

2.2.

In accordance with the EU Directive 2010/24 of 16 March 2010 (the Directive), the competent United Kingdom authority on 26 September 2012 asked the Dutch State to recover three income and capital tax assessments in respect of the period 2003-2006.

The uniform instruments, which were attached to this request, state:

Uniform instrument permitting enforcement of claims covered by Directive 2010/24/EU.

Date of issue: 2012/09/27

Reference: [Reference]

EU Member State where this document is issued:
United Kingdom

Each EU Member State can request recovery assistance from other EU Member States for unpaid claims referred to in Article 2 of Council Directive 2010/24/EU of 16 March 2010. The Directive was adopted by the Council of the European Union on 16 March 2010 and should be applied in all EU Member States. The recovery actions taken by the requested Member State are based on:

- a uniform instrument permitting enforcement in accordance with Article 12 of this Directive.

This document is the uniform instrument permitting enforcement. It concerns the claim(s) mentioned below, which remain(s) unpaid in the applicant Member State (United Kingdom). The initial instrument for the enforcement of this/these claim(s) has been notified in so far as required under the national law of the requesting Member State (United Kingdom). Disputes concerning the claim(s) fall exclusively within the competence of the competent bodies of the applicant Member State (United Kingdom), in accordance with Article 14 of Directive 2010/24/EU. They must be brought before them in accordance with the procedural and language rules in force in the applicant Member State (United Kingdom).

Description of the claim(s) as well as of the relevant person(s).

Identification claim 1

1. Reference: [Reference]

2. Type of claim(s) concerned: (d) taxes on income or capital

3. Name of the tax/duty concerned: Direct tax (self-assessment)

4. Period or date concerned: 2003/04/06-2004/04/05

5. Date establishment of the claim: 2008/11/05

6. Date on which enforcement becomes possible: 2008/12/04

7. Amount of the claim still due: Still due

(...) (...) (...)

Total amount of this claim: GBP 80 407,01 – EUR 100912,41

8. (...)

9. Further information concerning the claim:

The office responsible for the assessment of the claim:

Name: Her Majesty's Revenue and Customs, MARD team

Street and number: Centenary Court, 1st Blaise way

Postal code and locality: [address]

Member State: GB — United Kingdom

Telephone: [Telephone number]

10. Further information concerning the claim or the possibilities for contesting the payment obligation can be obtained from: the above-mentioned body

Identification of the relevant person(s) in the national instrument(s) permitting enforcement:

Natural person

First name(s): [the plaintiff]

Surname: [the plaintiff]

Date of birth: [date of birth]

Tax identification number: [Reference]

Address: Presumptive

Street and number: [address]

Details of address: [address]

Postal code and locality: [address]

Member State: NL — The Netherlands

Cause of liability: Principal debtor

(...)

Identification claim 2

1. Reference: [Reference]

2. Type of claim(s) concerned:

(d) taxes on income or capital

(g) national taxes and duties on immovable property, other than the above-mentioned ones,

(l) other tax-based claim

3. Name of the tax/duty concerned: Direct tax (self-assessment)

4. Period or date concerned: 2004/04/06-2005/04/05

5. Date establishment of the claim: 2008/06/12

6. Date on which enforcement becomes possible: 2008/07/11

7. Amount of the claim still due: Still due

(...) (...) (...)

Total amount of this claim: GBP 83 247,68 – EUR 104477,51

(...)

Identification claim 3

1. Reference: [Reference]

2. Type of claim(s) concerned:

(d) taxes on income or capital

3. Name of the tax/duty concerned: Direct tax (self-assessment)

4. Period or date concerned: 2005/04/06-2006/04/05

5. Date establishment of the claim: 2012/03/07

6. Date on which enforcement becomes possible: 2012/04/06

7. Amount of the claim still due: Still due

(...) (...) (...)

Total amount of this claim: GBP 81 800,03 – EUR 102660,68

(...)

2.3.

On 24 May 2013, the central liaison office (CLO), acting on behalf of the tax collector, issued an enforcement order. This was served to [the plaintiff] on 9 July 2013 at her expense.

3 The dispute

3.1.

[The plaintiff] claims that the Court:

- will declare that the enforcement orders issued in respect of taxes on income and wealth/contributions for 2003-2004, 2004-2005, 2005-2006 have no legal effects;
- will rule that the tax collector by means of issuing the enforcement order acted unlawfully towards [the plaintiff] and is liable for the damage suffered by [the plaintiff];
- will condemn the tax collector to pay the costs of the judicial proceedings.

3.2.

[The plaintiff] takes the view that there is so much doubt about the question whether the taxes are really due – she does not understand the amounts taken into account and further explanation of the assessments is lacking – that the tax collector could not reasonably decide to proceed with the enforcement of the claims. She also holds that the tax collector acted in breach of the general principles of good administration, in particular the principle of due care and the obligation to state reasons and thus acted unlawfully towards [the plaintiff]. The tax collector did not provide any further explanation about the assessments, despite the fact that the lawyer of [the plaintiff] had asked for it. Furthermore, [the plaintiff] holds that the limitation period of the contested tax assessments has come to its end.

3.3.

The tax collector holds that the opposition of [the plaintiff] is unfounded. [The plaintiff] had to address the competent United Kingdom authority. The uniform enforcement orders have been automatically recognised and enforced by the Dutch State. Moreover, the objection to enforcement on the basis of Article 17 paragraph 3 of the Income Tax Law is not possible as it is directed against the tax assessments. The question concerning the limitation period is a matter to be assessed by the competent United Kingdom authority according to the applicable English law. If it is decided that Netherlands law applies, then the limitation period must be considered to be interrupted by the enforcement order issued pursuant to Article 4:104 of the General Act on Administrative Law. (...)

4 Considerations of the Court

4.1.

Pursuant to Article 12 of the 2012 Law on mutual assistance for the recovery of taxes in the EU (Law Mutual Assistance 2012), tax claims of other Member States are recovered in the Netherlands, at the request of the authorities of these other Member States. Pursuant to Article 13 paragraph 3 of the Law Mutual Assistance 2012, the uniform instrument mentioned under point 2.2. is directly recognised and treated as an instrument permitting enforcement. Article 14 of the Law Mutual Assistance 2012 provides that the Minister shall decide on recovery. Pursuant to Article 15 of the same law, the Law on the Collection of Taxes 1990 applies to the recovery of such a tax debt.

4.2.

Pursuant to Article 17 paragraph 3 of that law, any proceedings against the enforcement of an order for recovery of a tax assessment cannot be based on the argument that the tax assessment is unjustified or that its amount is excessive. Opposition is only possible against the enforcement of an enforcement order in respect of a tax assessment of which the substantive liability is so doubtful that the tax collector could not reasonably decide to enforce it. This is also confirmed in Article 17 § 1 (3) of the Guide on Recovery 2008.

4.3.

In this context, [the plaintiff] has an extra burden of proof. By merely contending that [the plaintiff] was not informed of the tax claims (see Section 2.2 claims 1, 2 and 3) and that the tax collector did not justify the lawfulness of those debts, the plaintiff has not fulfilled her obligation to provide this extra proof. In the period concerned by the assessments, [the plaintiff] was resident in the United Kingdom where she lived with her partner, who was an entrepreneur. The fact that she was not aware of the tax debts does not imply that the substantive chargeability is so doubtful that the tax collector should refrain from taking recovery measures. As regards her assertion that the tax collector has not substantiated the claims, it follows

from the Law Mutual Assistance 2012 that the actions of the Netherlands must respect the uniform instruments sent by the requesting State. (...).

4.4.

There is no unjustified action by the tax collector to [the plaintiff]. In accordance with the Law Mutual Assistance 2012, the tax collector has informed the lawyer representing [the plaintiff] that an objection had to be addressed to the English tax authorities. He has even suspended the recovery measures, offering sufficient time to do so.

In this regard, the tax collector has referred to the contact persons in both the CLO and the competent English authorities. The legal protection of the citizen is assured, as the tax collector does not proceed with recovery measures as soon and as long as the tax assessments are contested in the requesting Member State. The fact that the lawyer of [the plaintiff] did not use this opportunity cannot be relied on against the tax collector. The practical arguments invoked by [the plaintiff], *inter alia*, that she did not have the financial resources and expertise to launch an objection procedure in the United Kingdom, are not relevant in this case.

It follows from the foregoing that the tax collector did not act unlawfully towards [the plaintiff] nor acted in disregard of the general principles of sound administration.

4.5.

With regard to the argument that the limitation period has expired, it is observed that [the plaintiff] should also have raised this argument before the competent English authorities. This argument also constitutes a substantive ground of defence against the assessments.

According to the Directive, this defence is to be considered by the competent authorities of the requesting Member State (cf. Article 14 (1) Directive), on the basis of the national law of that Member State (cf. Article 19 (1) Directive). [The plaintiff] is liable for the consequences of the fact that she did not submit an objection to the competent United Kingdom authority. [The plaintiff] has not raised any facts or circumstances that would result in a decision derogating from the criteria of the Directive.

4.6.

In the light of the foregoing, the action of [the plaintiff] is unfounded and it is rejected.

(...)

**United States District Court for the
Northern District of Georgia
Atlanta Division**

15 January 2016

**Torben Dileng v. Commissioner of
Internal Revenue Service**

1:15-cv-1777-WSD

International recovery assistance – USA-Denmark Convention – Contestation of the claim in the requesting State – Certification by the requesting State that the taxes are "finally determined" and immediately collectable – Requested State's authority to collect the taxes

Summary

Art. 27 of the USA-Denmark income tax convention provides for assistance in the collection of taxes.

Art. 27, §2 provides that: "An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted."

Art. 27, § 5 provides that: "Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection."

A Danish citizen was legally residing in the USA with his family. The Danish tax authorities determined that he owed approximately \$2.5 million in unpaid taxes, and they asked the US authorities to provide assistance to collect these taxes. The Danish citizen asked the Internal Revenue Service to stop its collection efforts in the light of the action he filed in Denmark challenging his liability for these taxes.

The Court observed that Denmark had certified that the taxes were "finally determined" and immediately collectable. That the plaintiff continued to challenge his tax liability in Denmark did not, by itself, mean that his tax liability had not been "finally determined". The treaty thus required the USA to treat the accepted revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes. The treaty did not provide an alternative means to challenge, in United States courts, the validity of the tax assessed by Denmark.

The plaintiff failed to make the requisite showing that there were no circumstances under which the USA could prevail in its assertion that it had the legal authority to collect the taxes under the treaty.

**TORBEN DILENG,
Plaintiff,
COMMISSIONER OF INTERNAL REVENUE SERVICE,
Defendant.**

OPINION AND ORDER

This matter is before the Court on the United States'¹ Motion to Dismiss [7] (the "Motion"). Also before this Court is Plaintiff Dileng Torben's ("Plaintiff") Motion for Leave to Amend [10] (the "Motion to Amend"),² and his Emergency Motion for Preliminary Injunction [2] ("Injunction Motion").

I. INTRODUCTION

This case involves the collection of taxes owed to the Kingdom of Denmark by Plaintiff, a Danish citizen legally residing in the United States. Denmark requests, under the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Protocol, U.S.-Denmark (the "Treaty"),³ that the United States collect these Danish taxes from Plaintiff. Plaintiff is challenging the tax assessment in an action he filed in Denmark. Plaintiff argues that the United States is not permitted to assist in collecting the taxes until the challenge it concluded. The United States argues that it is authorized to collect the taxes because Denmark certified, under the Treaty, that the taxes have been "finally determined" and thus the United States is required by the Treaty to collect them. The United States also argues that the Court lacks jurisdiction over Plaintiff's claims because: (i) the United States

¹ Plaintiff, by listing the Commissioner of the Internal Revenue Service as a defendant, has made the United States the real party of interest in this action. See *Bateman v. Depczynski*, No. 1:12-CV-04118-SCJ, 2013 WL 7121195, at *3 (N.D. Ga. July 8, 2013); (Plaintiff's Resp. to Mot. [10] at 3 n.3).

² Plaintiff's Motion to Amend is contained as an alternative request for relief in his Response in Opposition to the United States' Motion to Dismiss.

³ A copy of the Treaty can be found at <http://www.state.gov/documents/organization/124446.pdf>. The Treaty became effective on March 31, 2000.

did not waive its sovereign immunity to allow this action, and (ii) the Declaratory Judgment Act, 28 U.S.C. § 2201 (the “DJA”) and the Anti-Injunction Act, 26 U.S.C. § 7421 (the “AIA”) bar the Court from granting the relief Plaintiff seeks. Plaintiff claims that certain judicial exceptions to the DJA and the AIA apply to allow the Court to exercise jurisdiction over this case. (Compl. ¶¶ 1-2).

II. BACKGROUND

On May 19, 2015, Plaintiff filed his Complaint for Declaratory Judgment and Injunctive Relief [1] (the “Complaint”). Plaintiff legally resides in the United States with his family. (Compl. ¶ 4).⁴ Before this action was filed, the Skatteministeriet (the “SKAT”), Denmark’s Ministry of Taxation, determined that Plaintiff owes it approximately \$2.5 million in unpaid taxes (the “Taxes”). (Id. ¶¶ 7, 13). Plaintiff filed an action in Denmark to challenge this tax liability. (Id. ¶ 7). The Danish suit is pending.⁵ (Id.).

The SKAT requested, under the Treaty, that the Internal Revenue Service (the “Service”) assist it to collect the Taxes from Plaintiff. (Id. ¶¶ 8-9, 11). The Service informed Plaintiff that to collect the taxes it intended to begin levying on assets Plaintiff owns in the United States. (Id. ¶ 8). Plaintiff responded to the notification of levy by filing a Collection Appeal Request (the “Request”) proceeding, asking that the Service stop its collection efforts in light of the action Plaintiff filed in Denmark challenging his liability for the Taxes. (Id. ¶ 9). The Service denied the Request on the grounds that the Service is required by the Treaty to collect the taxes the SKAT determined are owed by, and immediately collectable from, Plaintiff. (Id.). Plaintiff asserts that the collection of the \$2.5 million in taxes “would be financially ruinous” for him and would “destroy his ability to [] care for his family” (Id. ¶ 13). Plaintiff argues he is entitled to a declaratory judgment that the Service cannot collect the Taxes until the Danish courts fully and finally adjudicate his tax liability. (Id. ¶¶ 14-18). Plaintiff also seeks to enjoin collection of the Taxes until his case in Denmark is concluded. (Id. ¶¶ 19-27).

On June 3, 2015, the Court held a hearing on Plaintiff’s request for injunctive relief. At the hearing, the Court stated it first has to address the United States’ claims that the Court does not have jurisdiction to consider Plaintiff’s Injunction Motion. The United States represented it did not intend to take action to collect the Taxes until the Court rules on its Motion to Dismiss.

⁴ Before Plaintiff came to the United States, he conducted business in Denmark, and paid taxes as assessed by the SKAT. (Compl. ¶ 4).

⁵ Plaintiff’s counsel has informed the Court that trial in this matter was set to begin on January 14, 2016, with a decision expected in February 2016.

III. DISCUSSION

A. Legal Standard

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits litigants to move for dismissal when the court lacks jurisdiction over the subject matter of the dispute. “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be either a “facial” or “factual” attack. Morrison v. Amway Corp., 323 F.3d 920, 924-25 n.5 (11th Cir. 2003). A facial attack challenges subject matter jurisdiction on the basis of the allegations in a Complaint, and the district court takes the allegations as true in deciding whether to grant the motion. Id.

Factual attacks challenge subject matter jurisdiction in fact. Id. When resolving a factual attack, the Court may consider extrinsic evidence, such as testimony and affidavits. Id. In a factual attack, the presumption of truthfulness afforded a plaintiff under Federal Rule of Civil Procedure 12(b)(6) does not apply, Scarfo v. Ginsberg, 175 F.3d 957, 960-61 (11th Cir. 1999). The plaintiff has the burden to prove that jurisdiction exists. Elend v. Basham, 471 F.3d 1199, 1206 (11th Cir. 2006).

The United States here asserts a factual challenge to the Court’s jurisdiction over Plaintiff’s claims. The United States contends that Denmark certified that it had reached a final determination that the Taxes are due and owing and that the Treaty requires the United States to assist in their collection. (Mot. at 7). This factual attack allows the Court to consider facts outside the Complaint to determine if it has subject-matter jurisdiction over this case. See Morrison, 323 F.3d at 924-25 n.5.

B. Analysis

1. Sovereign Immunity and the Adjudication of Matters Concerning Federal Taxation

“The United States, as a sovereign entity, is immune from suit unless it consents to be sued.” Christian Coalition of Florida, Inc. v. United States, 662 F.3d 1182, 1188 (11th Cir. 2011) (citing United States v. Dalm, 494 U.S. 596, 608 (1990)). “[T]he terms of its consent to be sued in any court,” as expressed by statute, “define that court’s jurisdiction to entertain the suit.” Id. (citing United States v. Sherwood, 312 U.S. 584, 586 (1941)). “[T]he terms of the statute or statutes waiving immunity are construed strictly, and courts may only entertain suits that are in full accord with such statutes.” Id. “[T]he plaintiff bears the burden of establishing subject matter jurisdiction, and, thus, must prove an explicit waiver of immunity.”

Ishler v. Internal Revenue, 237 F. App'x 394, 398 (11th Cir. 2007) (citations omitted).

The principal jurisdictional statute governing judicial review of federal tax decisions is 28 U.S.C. § 1346(a). It provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]

28 U.S.C. § 1346(a)(1). Section 1346(a)(1) grants the district courts original jurisdiction where a taxpayer is seeking to recover an internal-revenue tax “alleged to have been erroneously or illegally assessed or collected.” 28 U.S.C. § 1346(a)(1); *see also, e.g., Stovall ex rel. Talbot v. U.S. ex rel. C.I.R.*, 471 F. App'x 852, 853 (11th Cir. 2012) (finding that district court lacked jurisdiction over action because plaintiff had not made a “full payment of the assessment”) (quoting Flora v. United States, 362 U.S. 145 (1960)).

For the purpose of the collection assistance provided under the Treaty, the “Treaty explicitly requires the revenue claim by the Danish to be treated like U.S. federal income taxes for purposes of domestic U.S. law.” (Mot. at 10);⁶ *see also* Treaty Art. 27 ¶ 4(a) (“Where an application for collection of a revenue claim in respect to a taxpayer is accepted . . . by the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received”).⁷ The Treaty, however, does not provide that a citizen of the applicant country against whom collection efforts for foreign taxes are

⁶ Plaintiff argues that the United States is trying to “have it both ways” by treating the Danish tax assessment as if it were an assessment of United States taxes by the Service for the purpose of applying the DJA and the AIA, but at the same time arguing that the United States’ courts cannot provide relief to Plaintiff because the taxes are Danish taxes.

The Court disagrees with Plaintiff’s presentation of the United States’ position. There is nothing inconsistent in the United States’ application of the Treaty, which requires both that the requested State, here the United States, treat the revenue claim as if it were a claim for domestic taxes under domestic law, while at the same time arguing that Plaintiff, under the Treaty, must contest the validity of the Danish tax assessment in Denmark.

⁷ The Department of the Treasury’s Technical Explanation of the Treaty interprets this section to mean that “when the United States accepts a request for assistance in collection, the claim will be treated by the United States as an assessment as of the time the application was received. Similarly, when Denmark accepts a request, a revenue claim shall be treated by Denmark as an assessment under Danish laws against the taxpayer as of the time the application is received.” Technical Explanation of U.S.-Danish Tax Treaty at 91. A copy of the Technical Explanation can be found at <https://www.irs.gov/pub/irs-trty/dentech.pdf>.

directed is afforded all of the rights and challenge mechanisms that a citizen of the requested country might have to challenge the assessed tax in the requested country. Indeed, the Treaty requires the requested country to accept that the taxes are due upon certification by the applicant country. Even treating the accepted revenue claim from Denmark as if it were an assessment of United States internal-revenue taxes, Section 1346(a)(1) does not apply, and Plaintiff does not argue that it does. The Court does not have original jurisdiction over Plaintiff’s claims under Section 1346(a)(1). The Court thus turns to Plaintiff’s main argument that certain judicially-created exceptions to the DJA and AIA apply. (*See* Compl. ¶¶ 1-2). The Court begins with the historical backdrop behind these statutes.

There also has been a long-standing Congressional policy excluding various types of federal tax disputes from judicial review. *See Christian Coalition*, 662 F.3d at 1188. “The Declaratory Judgment Act (“DJA”), 28 U.S.C. § 2201, which generally authorizes courts to issue declaratory judgments as a remedy, excludes federal tax matters from its remedial scheme.” *Id.* at 1188-89; *see also Raulerson v. United States*, 786 F.2d 1090, 1093 n.7 (11th Cir. 1986). That is, the DJA “proscribes judicial declaration of the rights and legal relations of any interested parties in disputes involving federal taxes.” *Raulerson*, 786 F.2d at 1093 n.7 (internal quotation marks omitted).

In enacting the AIA, Congress provided that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a).⁸ The purpose of the AIA “is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund.” Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962). In short, the statutory grant of jurisdiction to the Court to hear a challenge to a tax assessment and liability is narrow and limited to an action for a refund of taxes fully paid. *See* 28 U.S.C. § 1346(a).

2. The Treaty

Plaintiff’s argument that the Court has jurisdiction to adjudicate his claims relies on his interpretation of the Treaty, requiring the Court to review the sections of the Treaty relevant to Plaintiff’s claims.

The Treaty determines the agreement between the United States and Denmark relating to assistance these two sovereigns have agreed to provide each other in the collection of taxes. The Treaty provides

⁸ Section 7421 contains certain limited exceptions to this prohibition against injunctive relief that do not apply here.

that the United States and Denmark will “undertake to lend assistance to each other in the collection of taxes ... together with interest, costs, additions to such taxes, and civil penalties, referred to in this Article as a ‘revenue claim.’” Treaty Art. 27 ¶ 1.

The Treaty provides further:

An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.

Id. ¶ 2. The Treaty states that it should not be construed as:

creating or providing any rights of administrative or judicial review of the applicant State’s finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.

Id. ¶ 5.

The Treaty provides that the requested State may accept a finally determined revenue claim and, if accepted, the revenue claim “shall be collected as though such revenue claim were the requested State’s own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.” Id. ¶ 3. Where the revenue claim is accepted by the United States, the United States is required to treat the revenue claim “as an assessment under United States laws against the taxpayer as of the time the application is received.” Id. ¶ 4(a). In other words, as the United States correctly argues, a revenue claim, if accepted, is treated by the United States as if it were an assessment of taxes owed to the United States itself, subject to the laws of the United States in collecting its own taxes, including the DJA and the AIA. See id.; see also Technical Explanation of U.S.-Danish Tax Treaty at 91. It is undisputed that the United States has accepted Denmark’s revenue claim against Plaintiff.

3. Jurisdiction Over Plaintiff’s Claims

Plaintiff acknowledges the significant limitations to jurisdiction of the United States courts over tax disputes, recognizing that the DJA expressly “excludes federal tax matters from its remedial scheme,” and the

AIA provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” (Resp. at 2-3)’ see also Christian Coalition, 662 F.3d at 1188; 26 U.S.C. § 7421(a). Plaintiff thus relies instead on two judicially-created exceptions to the AIA that he argues allows the Court to exercise jurisdiction over his claims.⁹ These exceptions were carved out in Williams Packing and S. Carolina v. Regan, 465 U.S. 367, 378 (1984). The Court addresses each in turn and evaluates whether they apply here.

a) Williams Packing Exception to the AIA

In Williams Packing, the Supreme Court developed a judicial exception to the AIA in certain actions challenging the collection of United States taxes. The exception is limited. It allows a party to avoid the general prohibition against injunctions against collection of federal taxes when two conditions are met: (i) “it is clear that under no circumstances could the Government ultimately prevail” and (ii) “equity jurisdiction otherwise exists.” Williams Packing, 370 U.S. at 7 (1962).

The first prong requires that the taxpayer show that the “claim of liability [is] without foundation.” Id. at 8. In other words, a federal district court may enjoin the Service from collecting taxes alleged to be due to the United States on if it is clear there are no circumstances under which the United States could ultimately prevail on establishing that the taxpayer is liable for the assessed taxes. Id. at 7-8. The second prong requires the taxpayer to show that, in the absence of an injunction, he will suffer irreparable injury and has no adequate remedy at law. See, e.g., Gulden v. United States, 287 F. App’x 813, 816 (11th Cir. 2008) (discussing equity jurisdiction). In the case here, it is the Plaintiff’s burden to establish jurisdiction and he must show this exception applies. He is unable to do so.

Plaintiff focuses largely on the first prong, arguing that the United States cannot prevail on its claim that it is entitled to assist in collection of the Taxes. Plaintiff argues that the revenue claim is not “finally determined” under the Treaty, and, thus, is not immediately collectable. (Resp. at 5-12). By failing to provide him with the ability to challenge the collection of the Taxes in the United States courts, Plaintiff contends his Due Process rights are violated. (Id.).

⁹ To the extent Plaintiff may have claimed jurisdiction could be exercised under the DJA, the Court deems that argument abandoned. Plaintiff’s only reference to the DJA is an unsupported assertion, contained in a single footnote of his Response, that if the Taxes are not to be treated as “federal taxes” under the Treaty, the prohibition against declaratory judgments for federal tax matters does not apply. The Treaty clearly requires that Taxes be treated like U.S. federal income taxes for purposes of domestic U.S. law. Treaty Art. 27 ¶ 4(a). The DJA, thus, applies to this matter and bars the Court from considering Plaintiff’s claim for declaratory relief.

Plaintiff, however, fails to meet the first prong test, which is exacting. Plaintiff does not and cannot show that the “claim of liability [is] without foundation.” See Williams Packing, 370 U.S. at 8. Plaintiff’s Treaty-based argument sidesteps the required showing that this narrow exception provides for a limited waiver of the United States’ sovereign immunity in this case. The exception allows a challenge to a tax assessment only where a plaintiff can show that the United States will not prevail on the tax assessed. Plaintiff here does not challenge the underlying validity of the Taxes in the United States, and does not assert in his Complaint, or in his Response, that there are no circumstances under which he can be found liable for the Taxes in Denmark. Plaintiff’s claim that certain Treaty provisions were not met to allow collection assistance does not satisfy the first prong of the narrow Williams Packing exception that allows a limited challenge to the assessment of taxes.

Even if the Williams Packing exception applied to actions contesting only the lawfulness of the immediate collection of taxes, as opposed to their underlying validity, Plaintiff still does not meet the requirements of the exception’s first prong. Plaintiff argues that the United States cannot prevail on its interpretation that it is obligated under the Treaty to provide collection assistance because (1) the Taxes were not, in fact, “finally determined;” and (2) the collection of the Taxes before the Danish courts have finished adjudicating his liability violates his Due Process rights.

(1) Finally Determined Revenue Claims

The Treaty states that “a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.” Treaty Art. 27 ¶ 2.

Plaintiff’s argument is that the pending action in the Danish court on Plaintiff’s tax challenge shows that the SKAT certification to the United States under the Treaty that the Taxes are collectible and “finally determined” was wrong, and that this is sufficient to show the United States “cannot prevail” in its interpretation of the Treaty. This argument is illogical and does not meet Williams Packing’s first prong. To require the United States to determine the status of Denmark’s tax claim would violate the Treaty, which states that nothing in Article 27 “shall be construed as creating or providing any rights of administrative or judicial review of the applicant State’s finally determined revenue claim by the requested State, based on any such right that may be available under the laws of either Contracting state.” Treaty Art. 27 ¶ 5.¹⁰ More importantly, the Danish court may well

¹⁰ The Department of the Treasury’s Technical Explanation of the Treaty interprets this section to mean that “when an application for collection assistance has been accepted, the substantive validity of

reject Plaintiff’s challenge to the Taxes and, in doing so, the United States would prevail in its interpretation that collection assistance is required to be given under the Treaty.

Plaintiff’s argument that his claim has not been “finally determined” is not supported by Danish law. Plaintiff seeks in his action in Denmark that the SKAT forbear on its collection efforts. (Resp. at 7-9). His request is one for “henstand,” which means “forbearance” or “postponement.” (Id. at 7). Plaintiff describes this action as follows: “[i]n sum, by an Act of Denmark’s Parliament, a taxpayer may ask the Danish taxing authorities to postpone or forbear collection” (Id. at 8). Plaintiff does not assert, or provide any authority to support, that a mere request for henstand precludes the SKAT’s right to immediately collect taxes it has assessed, or that henstand constitutes a “right to restrain collection” as discussed in the Treaty. Plaintiff’s request for “henstand” does not impact the obligation of the Plaintiff to pay the Taxes which Denmark requested the Service to assist it in collecting.^{11, 12}

In short, Denmark certified more than once that Plaintiff has a “finally determined” tax liability that is immediately collectable, and has requested, under the terms of the Treaty, that the United States assist it in collecting the unpaid taxes. (See Declaration of Peter Woodburn [7.1] ¶¶ 2-12). For these reasons alone, Plaintiff cannot rely on the Williams Packing exception.

(2) Due Process Claim

Plaintiff argues also that the Williams Packing exception applies because the collection of the Taxes by the United States violates his Due Process rights, and that the United States, thus, cannot prevail in its

the applicant State’s revenue claim cannot be challenged in an action in the requested State.” Technical Explanation of U.S.-Danish Tax Treaty at 91. “It is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’” Abbott v. Abbott, 560 U.S. 1, 15 (2010) (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).

¹¹ The correspondence between the SKAT and the Service supports that Plaintiff is obligated, in Denmark, to immediately pay the Taxes. On February 18, 2015, Ms. H.B., of SKAT, e-mailed Mr. T.B., of the Service. ([7.2] at 3). Ms. Bendixen noted that Plaintiff was appealing his tax liability in Denmark, but that, according to Danish law, Plaintiff was obligated to pay the tax even if the tax liability was disputed. (Id.). Ms. H.B. noted further that the only way to avoid collection was to get a deferment, which Plaintiff did not obtain. (Id.).

¹² That Plaintiff continues to challenge his tax liability in Denmark does not, by itself, mean that his tax liability has not been “finally determined.” The Treaty states that where “the applicant State loses the right under its internal law to collect [a] revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.” Treaty Art. 27 ¶ 5. This provision implies that a taxpayer may continue to challenge a tax assessment in the applicant State after the applicant State requests collection assistance, without rendering the request for collection assistance invalid. Denmark has not withdrawn its collection assistance request because it did not lose right to collect the revenue claim based on the Taxes. See id.

collection efforts.¹³ (Resp. at 8-12). Plaintiff claims, under United States law, that the Service cannot collect taxes until the taxpayer has had an opportunity to exhaust his administrative remedies, including his right to litigate his tax liability fully in Tax Court. (Resp. at 9). He contends that the United States is bound by United States law to refrain from collecting the Taxes until Plaintiff has fully litigated his tax claim in the Danish equivalent of the Tax Court. (Resp. at 10-11). The collection of the Taxes before Plaintiff's tax liability is fully adjudicated in Denmark would, Plaintiff argues, violate his Due Process rights.

Plaintiff's Due Process argument is unprecedented and unconvincing. Plaintiff asserts that the Danish court adjudicating his tax liability is the equivalent of the United States Tax Court. United States taxpayers, however, may only bring a pre-collection challenge to a tax assessment in Tax Court when the Service has issued a notice of deficiency to a taxpayer. *See* 26 U.S.C. §§ 6212, 6213. The collection of the allegedly unpaid taxes may be enjoined while the taxpayer challenges the alleged deficiency in Tax Court. 26 U.S.C. § 6213.

Plaintiff does not provide any authority for his argument that his challenge in the Danish courts is in an equivalent court or procedural posture to that of a challenge by a United States taxpayer to a notice of deficiency in the Tax Court. His wishful equating of the Danish court and the United States Tax Court is discredited by the fact that Denmark certified that the Taxes are "finally determined" and immediately collectable. The Treaty requires the United States to treat an accepted revenue claim "as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes." Treaty Art. 27 ¶ 3. Denmark's tax assessment, thus, is not at the notice of deficiency stage, but is a finally determined tax liability subject to immediate collection. Plaintiff, like a United States taxpayer, has the right to challenge the validity of the Taxes post-collection. *See* 28 U.S.C. § 1346(a)(1). That Plaintiff must assert this right in Denmark, where the Taxes were assessed and where the Treaty requires, does not change this analysis.

Plaintiff failed to make the requisite showing that there are no circumstances under which the United States can prevail in its assertion that it has the legal

¹³ Plaintiff does not assert that the Due Process Clause of the Fifth Amendment provides a separate ground for jurisdiction that would overcome the United States' sovereign immunity. To the extent that Plaintiff did seek to raise this argument, the Court notes that requiring the immediate payment of taxes, subject to the taxpayer's ability to challenge the validity of the taxes and to seek a refund, does not create a Due Process violation where the taxing authority "has any chance of ultimately prevailing." *C. I. R. v. Shapiro*, 424 U.S. 614, 631-32 (1976). It is undisputed that Plaintiff has the ability, and is currently exercising his ability, to challenge the Danish tax assessment in the Danish courts.

authority to collect the Taxes under the Treaty.¹⁴ The Court does not have jurisdiction to adjudicate Plaintiff's claims under the Williams Packing exception.¹⁵

b) Regan Exception to the AIA

In Regan, the Supreme Court determined there is a further exception to the AIA where "Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax." Regan, 465 U.S. at 373. Plaintiff argues that the AIA exception in Regan applies in this case.

Regan involved a challenge by South Carolina to an amendment to Section 103(a) of the Internal Revenue Code, exempting interest earned on State bonds from a taxpayer's gross income. Id. at 370-71. The amendment required that bonds be issued in registered, not bearer, form to qualify for the Section 103(a) exemption. Id. at 371.

The Supreme Court observed that the taxation of interest on State-issued bearer bonds would require the States to pay bondholders a higher rate of interest on these bonds because the bond purchasers were not eligible for the Section 103(a) exemption. Id. South Carolina brought suit, arguing that the practical impact caused by the denial of the Section 103(a) exemption infringed on states' right to issue bonds in the form they chose, and this infringement violated the Tenth Amendment. Id. at 371-72.

Defendant Regan argued that the AIA barred the Supreme Court from adjudicating the claim asserted by South Carolina. Id. at 372. The Supreme Court disagreed. The Regan Court found that because South Carolina would not incur any tax liability by issuing non-exempt bearer bonds, the state would not have standing to contest the constitutionality of the amendment to Section 103(a) because it was not injured. Id. at 379-80. The Regan Court concluded that the AIA applies only "when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." Id. at 381. Because South Carolina did not have an alternative means to litigate the validity of the tax, because it did not incur it,¹⁶ the

¹⁴ Plaintiff's remedy is to continue to contest his tax liability in Denmark, and to contest, in Denmark, the SKAT's determination that its tax assessment is immediately collectable. *See United States v. Stuart*, 489 U.S. 353, 370 (1989) (Finding that the Service does not need to review the underlying facts behind a Canadian request for treaty assistance in issuing a summons pursuant to the tax treaty)

¹⁵ Having concluded that Plaintiff has not shown that there are no circumstances upon which the United States can prevail, the Court does not address whether equity jurisdiction is present, the second part of the Williams Packing exception to the AIA.

¹⁶ The Regan Court rejected Defendant Regan's argument that South Carolina had an adequate alternative remedy in that it could urge a purchaser of any bearer bonds to bring a suit challenging the constitutionality of the amendment to Section 103(a). Regan, 465 U.S. at 381.

Regan Court concluded that the AIA did not bar South Carolina's suit. Id. at 373, 381.

Plaintiff here is litigating in Denmark the SKAT's tax assessment. (Compl. ¶ 7; Resp. at 14). Plaintiff argues that his ability to challenge his tax liability in Denmark does not qualify as an "alternative avenue." (Resp. at 15). Plaintiff argues further that because Congress did not create an alternative method for him to challenge the SKAT's tax assessment in the United States, the Regan exception to the AIA applies. The Court disagrees.

"Because of the strong policy animating the [AIA], and the sympathetic, almost unique, facts in Regan, courts have construed the Regan exception very narrowly . . ." Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 408 n.3 (4th Cir. 2003). The Eleventh Circuit has refused to expand the Regan AIA exception, noting that Regan "involved the rights of third parties to litigate the tax liability of persons against whom the tax was assessed." Leves v. I.R.S., Comm'r, 796 F.2d 1433, 1434 (11th Cir. 1986). Plaintiff is not a third party seeking to litigate another person's tax liability—Plaintiff is the taxpayer against whom the tax was assessed, and is currently pursuing legal remedies in Denmark.

The Regan Court found a limited exception to the AIA only where there was no "alternative legal way to challenge the validity of a tax." Regan, 465 U.S. at 373 (emphasis added). Plaintiff here, however, is not seeking to challenge the validity of the Taxes in this Court, but instead challenges its collection. The Regan Court exemption should not be extended to apply here.

Even if Regan applied to collection efforts, Plaintiff's argument is not persuasive. It ignores that the Treaty provides that a taxpayer must challenge the validity of an assessed tax in the applicant State seeking United States collection assistance. See Treaty Art. 27 ¶ 5. The Treaty does not provide an alternative means to challenge, in United States courts, the validity of a tax assessed by Denmark. Plaintiff here has an alternative means, in Denmark, to challenge the validity of the Taxes, or to seek an injunction against the SKAT's enforcement efforts.

The AIA, thus, applies to this case, and the Court lacks jurisdiction to consider Plaintiff's claims.¹⁷

¹⁷ Even if the Court had jurisdiction to consider Plaintiff's claims, Plaintiff's Complaint would be required to be dismissed. The Treaty is clear that the United States is obligated to collect the Taxes upon Denmark's certification that they have been "finally determined." Treaty Art. 27 ¶¶ 2, 3. The Treaty does not allow the United States courts to review this determination by Denmark, specifically providing that there is no right "of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State . . ."

Id. ¶ 5. The Court must, under the terms of the Treaty, accept that the Taxes have been "finally determined" and the United States is obligated to assist in their collection, and cannot review Denmark's certification.

Assuming, arguendo, that the Court was entitled to review Denmark's certification under the Treaty, Plaintiff's sole argument

4. Plaintiff's Motion to Amend

Plaintiff requests leave to amend his Complaint to include the additional facts alleged in his Response. (Resp. at 15-17).

Rule 15 of the Federal Rules of Civil Procedure provides that, after a responsive pleading has been served, a party may amend only by leave of court or by written consent of the adverse party. Fed.R.Civ.P. 15(a). Although the rule instructs that "leave shall be freely given when justice so requires," a district court may deny leave to amend for a number of reasons, including undue delay, bad faith, or when such amendment would be futile. Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1263 (11th Cir. 2004). The decision whether to grant leave to amend rests in the sound discretion of the district court. Hall, 367 F.3d at 1262.

In this case, the Court considered the United States' factual challenge to Plaintiff's Complaint based on the Court's lack of subject matter jurisdiction. The Court considered the facts alleged in Plaintiff's Response, and considered his proposed amended complaint, in concluding that it lacked subject matter jurisdiction over Plaintiff's claims. Plaintiff's proposed amendments do not affect the conclusion that the United States' sovereign immunity precludes jurisdiction over this matter. Plaintiff's Motion to Amend, therefore, is denied because the proposed amendment would be futile. See Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir. 1999) ("[T]he denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal."); Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1255 (11th Cir. 2008) ("Because justice does not require district courts to waste their time on hopeless cases, leave may be denied if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim.").

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the United States' Motion to Dismiss [7] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to Amend [10] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Emergency Motion for Preliminary Injunction [2] is **DENIED AS MOOT**.¹⁸

that the Taxes are not immediately collectible and, thus, not "finally determined," is based on his request for *henstand*. This is not a factual allegation but, rather, a legal conclusion under Danish law for which Plaintiff has not provided any supporting legal authority. (See supra at 16-17). Even if the Court had jurisdiction over this matter, Plaintiff does not have a cognizable claim, and his Complaint is required to be dismissed.

¹⁸ As the Court noted at the June 3, 2015, hearing, because the Court find that it lacks jurisdiction to adjudicate Plaintiff's claims, the Court cannot consider Plaintiff's Injunction Motion.

Switzerland - European Court of Human Rights

22 December 2015

G.S.B. v. Switzerland

N° 28601/11

ECLI:CE:ECHR:2015:1222JUD002860111

Original language of the judgment: French

Human rights - International exchange of information – Agreement between Switzerland and the USA - Disclosure of a person's bank account details – No violation of his right to respect for his private life.

Summary

Transmission to the US Tax authorities of a US national's bank account details, on the basis of a mutual assistance agreement in tax matters between Switzerland and the United States did not breach Article 8 of the European Convention on Human Rights (right to respect for private and family life), nor Article 14 (prohibition of discrimination).

ECHR press release 406 (2015) of 22.12.2015:

In today's **Chamber** judgment in the case of G.S.B. v. Switzerland (application no. 28601/11) the European Court of Human Rights held, unanimously, that there had been:

- **no violation of Article 8** (right to respect for private and family life) of the European Convention on Human Rights;
- **no violation of Article 14** (prohibition of discrimination) taken in conjunction with Article 8 of the Convention.

The case concerned the transmission to the US tax authorities of the applicant's bank account details in connection with an administrative cooperation agreement between Switzerland and the USA.

In 2008 the US tax authorities had discovered that the bank UBS SA had allowed US taxpayers to conceal their assets and income from them and had advised customers who had not declared their accounts to those authorities.

Following an agreement which, in its consolidated form with a protocol, was entitled "Convention 10", the Swiss federal tax authority had ordered UBS to transmit the applicant's file in the context of that authority's cooperation with the US Internal Revenue Service.

The applicant had appealed against that measure, arguing that it had no basis in law and that it breached the European Convention on Human Rights and other international treaties. The Federal Administrative Court had dismissed his appeals, finding that "Convention 10" was binding on the Swiss authorities, which did not need to verify its conformity with Federal law or prior conventions.

It declared that the economic interests at stake had been important for the country and emphasised that Switzerland's interest in fulfilling its international commitments prevailed over the individual interest of those concerned by the measure.

The Court accepted that Switzerland had had a major interest in acceding to the US request for administrative cooperation in order to enable the US authorities to identify any assets which might have been concealed in Switzerland. At the procedural level, the Court noted that the applicant had had access to several effective and genuine procedural safeguards in order to contest the transmission of his bank details and to secure protection against arbitrary implementation of agreements concluded between Switzerland and the US.

Principal facts

The applicant, G.S.B., is a Saudi and US national who was born in 1960 and lives in Miami (United States of America).

In 2008 the US tax authorities (Internal Revenue Service - IRS) had discovered that thousands of US taxpayers held bank accounts in the Swiss bank UBS SA which had not been declared to their national authorities. Being exposed to a risk of criminal proceedings, UBS concluded an "agreement to suspend criminal prosecution" with the US Justice Department. Proceedings were discontinued in return for the payment of a transaction amount of 780 million US dollars.

On 19 February 2009 the IRS brought civil proceedings to order UBS to hand over the identities of its 52,000 US customers and a number of data on the accounts held by the latter. Switzerland was concerned that the dispute between the US authorities and UBS might give rise to a conflict between Swiss and US law should the IRS obtain that information, and the civil proceedings were therefore suspended pending extra-judicial reconciliation.

With a view to identifying the taxpayers in question, the Government of the Swiss Confederation and the United States concluded an agreement entitled "Agreement 09".

On 31 August 2009 the IRS sent the Federal tax authority (AFC) a request for administrative cooperation with a view to obtaining information on the US taxpayers who had been authorised to open bank accounts with UBS.

On 1 September 2009 the AFC decided to instigate an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to Convention 09.

By judgment of 21 January 2010 the Federal Administrative Court allowed an appeal against an AFC decision, resulting in the invalidation of all decisions issued by the AFC on the basis of Convention 09. The entry into force of that judgment called into question the implementation of Convention 09.

In order to avoid such a situation, on 31 March 2010, following fresh negotiations with the United States, the Federal Council concluded a "Protocol modifying the Agreement between Switzerland and the United States" known as "Protocol 10". The provisions of that Protocol were incorporated into Agreement 09, and the consolidated version of Agreement 09 as amended by the Protocol 10 is referred to as "Convention 10".

On 19 January 2010 UBS transmitted the applicant's file to the AFC. In its final decision of 7 June 2010 the AFC stated that all the conditions had been met for affording administrative cooperation to the IRS and for ordering the requested documents to be handed over to the latter. On 8 December 2010 the applicant appealed to the Federal Administrative Court against that decision. The latter Court set aside the 7 June 2010 decision, finding that the applicant's right to be heard had not been respected. It referred the case back to the AFC. In its final decision of 4 November 2010 the AFC held that all the conditions had been met for affording administrative cooperation to the IRS and for ordering UBS to forward the requested documents. The applicant appealed to the Federal Administrative Court, which, adjudicating at last instance, found that Convention 10 was binding upon the Swiss authorities, which did not have to verify the conformity of that text to Federal law or previous conventions. The Federal Administrative Court dismissed the applicant's appeal.

On 24 March 2011 the applicant lodged a public-law appeal with the Federal Court on the ground that the considerations set out in the impugned judgment were relevant to criminal-law cooperation but not to administrative cooperation. The Federal Court declared that appeal inadmissible, with reference to a previous judgment to the effect that appeals against decisions which the AFC had given in pursuance of agreements concluded with the US did indeed relate to administrative cooperation.

On 14 December 2012 the applicant's bank account details were transmitted to the US tax authorities.

Complaints, procedure and composition of the Court Relying on Article 8 (right to respect for private and family life), the applicant complained that the disclosure of his bank details had amounted to a violation of his right to respect for his private life.

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, he considered himself a victim of discrimination as an UBS customer with US taxpayer status, as compared with the customers of other banks who had not, at the relevant time, been covered by administrative cooperation in tax matters.

The application was lodged with the European Court of Human Rights on 4 May 2011.

Judgment was given by a Chamber of seven judges.

Decision of the Court

Article 8

As regards the legal basis for the measure, the Court reiterated that Agreement 09 and Protocol 10 had been negotiated and concluded by the Federal Council, approved by the Federal Parliament and then ratified by the Government in accordance with the procedure for concluding treaties set out in constitutional law. Inasmuch as the applicant submitted that the AFC's decision of 1 September 2009 lacked any basis in law because Parliament had not yet approved Agreement 09 at the time, the Court agreed with the Government that the AFC had only taken the decision so that it could assess whether the conditions for affording cooperation had been met. At all events, the immediate implementation of Agreement 09 on a provisional basis had been confirmed by the Government at the time of its approval, and that of Protocol 10 had been confirmed by the Federal Parliament on 17 June 2010.

As regards the foreseeability of the impugned measure, the Court reiterated that the European Convention of Human Rights should be interpreted in line with the general principles of international law. Indeed, under the 1969 Vienna Convention on the Law of Treaties regard should be had to "any relevant rules of international law applicable in the relations between the parties". In the present case the Court considered relevant the Federal Court's and the Government's argument that Article 28 of the Vienna Convention allows the parties to an international treaty to go against the principle of non-retroactivity and provide for the consideration of acts or facts which occurred before the treaty in question entered into force.

In the present case the Federal Court had settled case-law to the effect that provisions on administrative and criminal-law cooperation requiring third parties to

provide specific information were procedural in nature and consequently applied, in principle, to all present or future proceedings, including those relating to tax periods predating their adoption. The applicant, assisted by a lawyer, could not reasonably have been unaware of that judicial practice. He therefore could not validly submit to the Court that the interference had occurred in a manner which he could not have foreseen. The impugned measure could therefore be regarded as being “prescribed by law”.

As regards the legitimacy of the aim pursued by the measure, in the knowledge that the banking sector is an economic branch of great importance to Switzerland, the Court held that the impugned measure formed part of an all-out effort by the Swiss Government to settle the conflict between the bank UBS and the US tax authorities. The measure might validly be considered as conducive to protecting the country’s economic well-being. The Court accepted the Government’s argument that the US tax authorities’ allegations against Swiss banks were liable to jeopardise the very survival of UBS, a major player in the Swiss economy employing a large number of persons. Therefore, given Switzerland’s interest in finding an effective legal solution in cooperation with the US, it had pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

As regards whether the measure had been “necessary in a democratic society”, the Court noted that the Federal Administrative Court had ruled that the conditions set out in Article 8 for any interference with private or family life had been met in the instant case. The major economic interests at stake for the country and the Swiss interest in being able to honour its international undertakings had taken precedence over the individual interests of the persons concerned by the measure.

With particular regard to the applicant’s situation, it should be noted that only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. His bank details had been forwarded to the relevant US authorities so that they could use standard procedures to ascertain whether the applicant had in fact honoured his tax obligations, and if not, to take the requisite legal action.

Finally, the Court observed that the applicant had benefited from various procedural safeguards. He had been able to lodge an appeal with the Federal Administrative Court against the AFC’s 7 June 2010 decision. The latter court had subsequently set aside the said decision on the grounds of violation of the applicant’s right to a hearing. The AFC had invited the applicant to transmit any comments he might have, of which right the applicant had availed himself. On 4 November 2010 the AFC had given a fresh decision finding that all the conditions had been met for

affording administrative cooperation. The applicant had subsequently lodged a second appeal with the Federal Administrative Court, which dismissed it. The applicant had consequently benefited from several effective and genuine procedural guarantees to challenge the disclosure of his bank details and obtain protection against the arbitrary implementation of agreements concluded between Switzerland and the United States.

It follows that there had been no violation of Article 8 of the Convention.

Article 14 in conjunction with Article 8

The Court found, essentially on the same grounds as those mentioned above in support of the absence of violation of Article 8, that the applicant had not suffered discriminatory treatment for the purposes of Article 14 in conjunction with Article 8. It added that the applicant had provided no evidence to permit an assessment of whether his treatment would have been any different in another Swiss bank.

Therefore, there had been no violation of Article 14 in conjunction with Article 8 of the Convention.
