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LEGAL ASSISTANCE PROCEEDINGS IN THE CASE OF UBS

A. vs. Federal Tax Administration, A-7789/2009; Decision by the Federal Administrative Court concerning individuals liable to US tax

On January 21, 2010, an UBS AG account holder won a Federal Administrative Court case preventing data from being disclosed to the US Internal Revenue Service (IRS). This ruling involved a single test case on continued and severe tax evasion. The failure by U.S. citizens to provide a Form W-9 or declare income does not constitute "tax fraud or the like" that would require Switzerland to disclose account data, the Federal Administrative Court ruled. The decision may not be appealed to the Swiss Federal Court.

On August 19, 2009, the Swiss Confederation and the United States of America (US) concluded an agreement on a request for legal assistance by the US Internal Revenue Service concerning UBS AG (09 Agreement). Switzerland agreed to process a request for legal assistance on the basis of the Double Taxation Agreement concluded with the US in 1996 (DTA-US 96) and by means of four categories of situations as defined in the Annex to the 09 Agreement. The request concerned an estimated 4,500 current or closed accounts.

The Federal Administrative Court, applying the Vienna Convention on Treaties, qualified the 09 Agreement as a "Memorandum of Understanding," which may neither alter nor amend the DTA-US 96. According to the present decision, legal assistance will only be granted if the actions falling in the categories set forth in the Annex to the 09 Agreement are already covered by the DTA-US 96 itself.

Art. 26 DTA-US states that legal assistance may be granted in cases of "tax fraud and the like." Interpreting this provision, the Court ruled that only such actions which go beyond mere inactivity qualify as "tax fraud or the like". Therefore, the failure by U.S. citizens to provide a Form W-9 does not constitute "tax fraud or the like", despite the fact that large sums may be involved and, as a consequence, legal assistance may not be granted.

This present decision relates solely to one of the four categories mentioned in the Annex to Agreement 09 (category 2/A/b).

The Federal Administrative Court

The Federal Administrative Court states mainly on complaints against decisions issued by federal authorities or on actions launched against federal authorities. Certain conditions met, also cantonal decisions fall under its jurisdiction. Federal Administrative Court decisions may, as a rule, be appealed with the Federal Supreme Court in Lausanne and in

Lucerne; however, the law provides that in certain areas, its decisions are final. The Federal Administrative Court, with its locations in Bern and Zollikofen (from 2012 St Gallen), consists of five sections and of a General Secretariat. The Federal Administrative Court has 70 judges and 300 employees and is thus the largest court in Switzerland.

Further information:

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