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## **INSIGHT: Groundbreaking Swiss Supreme Court Decision on Tax Administrative Assistance—The End of ‘Foreseeable Relevance’?**

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On July 26, 2019, the Swiss Federal Supreme Court rendered a groundbreaking judgment in the field of administrative assistance in tax matters. Reversing a 2018 ruling of the Swiss Federal Administrative Court, the Supreme Court decided that information regarding tens of thousands of UBS account holders presumed to have tax residence in France could be transmitted to the French tax authorities.

The decision was rendered by a panel of five judges, who held public deliberations—a rare occurrence at the Supreme Court that only takes place when the panel’s opinions are divided—before approving the exchange of information by a narrow vote of 3-2.

The judgment may well turn out to be a turning point in tax administrative assistance practice in Switzerland. Even before the Supreme Court’s written reasoning becomes available, the decision has already given rise to concerns among the banking community that foreign tax authorities will be able to submit broad requests to the Swiss Federal Tax Administration (FTA) without having to demonstrate concrete indications of alleged tax transgressions by account holders at Swiss banks.

Indeed, the judgment risks to undermine the concept of “foreseeable relevance” and the prohibition of fishing expeditions in tax administrative assistance. In addition, with the new decision, the distinction between individual requests and group requests has become even blurrier. The decision also raises the question of how individual and group requests will be distinguished from pure fishing expeditions in the future.

### **Background**

In May 2016, the French tax authorities sent an administrative assistance request to the FTA. The request was based on lists of bank-internal identification numbers that had been confiscated at German UBS branches in 2012-2013 and later passed on to the French authorities. The lists contained around 40,000 account and bank-internal numbers relating to account holders at UBS presumed to have tax residence in France. The French request thus aimed at obtaining identifying information—including names, addresses and account balances, about these account holders.

The FTA agreed to transfer the requested information to the French tax authorities in February 2018, but UBS and various account holders filed an appeal against the FTA’s decision to the Administrative Court, which decided in favor of the appellants. The FTA then appealed the Administrative Court’s decision before the Supreme Court.

### **New Leading Case**

Now, the Supreme Court has decided that the French authorities’ request is not an inadmissible fishing expedition, but rather a permissible “list request,” despite the fact that the French tax authorities did not have any concrete suspicion of tax evasion or other tax infractions for most of the 40,000 account and other numbers concerned by the request.

UBS voiced fears that the information obtained through administrative assistance could be used in the criminal proceedings currently pending against the bank in France concerning alleged abetting of tax evasion and money laundering. In an important aspect of the decision, the Supreme Court held that the FTA has to receive guarantees from the French authorities that the information provided would not be used by France in violation of the specialty principle, i.e., that any use of the information transmitted in the criminal proceedings pending against UBS in France is excluded.

### **Consequences of the Supreme Court’s Judgment**

Although the Supreme Court’s reasoning has not yet been published, the decision is already making waves in the Swiss banking and legal community.

One of the most important conditions for administrative assistance in tax matters is that the information requested by the foreign tax authorities must be foreseeably relevant. In other words, fishing expeditions—speculative requests which have no apparent connection to an open inquiry or investigation in the requesting country—are not permitted. In this respect, the Administrative Court, in its July 2018 decision, determined that the French tax authorities had insufficiently specified what grounds exist for suspecting that the UBS account holders had not fulfilled their tax obligations in France. It noted that the request was similar to a classic fishing expedition, which is given, for example, if the foreign tax authorities request information on all account holders that are tax residents of that state.

Now, however, the Supreme Court has decided in favor of a very broad interpretation of foreseeable relevance. This means that there is a risk that foreign tax authorities will be able to submit general requests to the

FTA without having to present concrete indications of alleged tax transgressions by account holders at Swiss banks. Furthermore, the FTA has suspended cases in the past year in order to await the Supreme Court decision. Now that the decision has been handed down, the FTA will likely grant administrative assistance in many of these cases.

The written judgment will be published by the Supreme Court in the coming weeks and will be analyzed carefully for more indications as to the Supreme

Court's future practice in matters of foreseeable relevance and fishing expeditions in tax administrative assistance cases.

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