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Current Notes

Article 26 of the OECD Model Tax Convention—group requests—the birth of a new international standard? Recent developments in Switzerland and potential ramifications for other jurisdictions

Introduction

In a recent decision, the Swiss Federal Court held that a group request from the Inland Revenue Service (IRS) which did not name the taxpayer was not a fishing expedition.[1]

Accordingly, Credit Suisse was ordered to hand over information relating to US taxpayers who hold bank accounts with the bank through offshore vehicles. In a separate move, the legality of which has been called into question by legal commentators, the Swiss Government held that group requests based on a factual pattern represent a generally accepted international standard which binds Switzerland, at least going forward.

This note considers whether the Swiss Court has effectively imported US legal principles into Swiss law and whether its reasoning is confined to the US treaty or whether it may be extended to other existing double tax treaties entered into by Switzerland. This note also considers the wider implications of Switzerland's current position on group requests for other jurisdictions. The writer's conclusion is that, rather than importing a generally accepted international standard (which is the justification given by the Swiss Government for the new rules), Switzerland is effectively contributing to its development. The circumstances surrounding the recent group requests from the IRS indicate that the business practices deployed by certain Swiss professionals and institutions may help explain what may otherwise appear as a politically awkward overreaction for a country long committed to confidentiality.

The political sacrifice of confidentiality on the altar of global transparency has produced winners and losers. The losers are compliant taxpayers with legitimate confidentiality requirements who are at risk of being inadvertently caught up in a wide group request net. These taxpayers risk being pushed into obscure jurisdictions in the search for confidentiality. For non-compliant taxpayers, the message is clear: you can run, but you can't hide. These taxpayers should actively consider registering under any existing amnesty or voluntary disclosure programme to clean up their act before the taxman comes knocking at their door.

1. Background

In February 2009, Singapore and Hong Kong announced that they would amend their tax transparency rules and relax their bank secrecy laws for tax purposes. On March 13, 2009, Switzerland made a similar announcement.

[1] BGE 2C 269/2013 dated July 5, 2013 (in German).

The date of these announcements was not down to chance. In particular, Switzerland's move took place only a few days before the G-20 meeting of April 2, 2009 called by Gordon Brown to discuss the effects of the credit crunch which saw the demise of Lehman Brothers in September 2008. Unsurprisingly, in its announcement the Swiss Government noted that

> "with the globalisation of financial markets and in particular the current financial crisis, international cooperation in tax matters has become increasingly important."[2]

There were also other—self inflicted—reasons why Switzerland felt it had no other option at the time of the announcement in March 2009, notably (note the chronology):

1. the arrest nearly a year earlier (on May 7, 2008) of Brad Birkenfeld (a former UBS employee);
2. the release, on July 17, 2008, of the Levin Report, in which the US senate outlined the practices uncovered at UBS, as well as LGT (a Liechtenstein bank engulfed in a scandal following the sale of stolen data to various tax authorities)[3];
3. the indictment four months later (that is, in November 2008) of the former head of UBS's global wealth management business for conspiracy to defraud the US[4];
4. the prospect of UBS itself being indicted for the same offence, which the bank only managed to avoid by entering into a deferred prosecution agreement dated February 18, 2009[5] (that is, *less than a month* before the Swiss Government's announcement relating to the acceptance of the OECD standard) by which the bank (a) accepted knowledge and responsibility for its conduct; (b) agreed to pay $780 million in fines, penalties, interest and restitution; and (c) agreed to

   > "provide or cause to be provided to the [US] Government the identities and account information of certain United States clients (the 'Disclosed Accounts') as set forth in a letter between UBS and the Government, dated […]"; and

5. the signing, six months later (that is, August 19, 2009) of an Agreement between the United States of America and the Swiss Confederation on the request of information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under the laws of the Swiss Confederation,[6] by which Switzerland agreed to disclose 4,450 accounts to the US authorities.

[2] Federal Department of Finance FDF, *Switzerland to adopt OECD standard on administrative assistance in fiscal matters*, available at: *http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863* [Accessed January 27, 2014].

[3] US Senate Permanent Subcommittee on Investigations. Committee on Homeland Security and Governmental Affairs, *Tax Haven Banks and US Tax Compliance* (July 17, 2008) (the Levin Report), available at: *http://www.hsgac.senate.gov//imo/media/doc/071708PSIReport.pdf* [Accessed January 27, 2014].

[4] Available online at: *http://online.wsj.com/public/resources/documents/WeilRaoulIndictment1112.pdf* [Accessed February 18, 2014].

[5] US District Court Southern District of Florida. Case No.09-60033-CR-Cohn. *USA v UBS AG (Defendant)*—Deferred Prosecution Agreement, available at: *http://www.justice.gov/tax/UBS_Signed_Deferred_Prosecution_Agreement.pdf* [Accessed January 27, 2014].

[6] Agreement between the United States of America and the Swiss Confederation on the request of information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under

While the diplomatic and judicial drama with the US was unfolding, the Swiss Government was also busy dealing with the consequences of the sub-prime crisis for UBS. On October 16, 2008 (that is, a few months after the arrest of Mr Birkenfeld and the release of the Levin Report), the Swiss Government and the Swiss National Bank (SNB) took the unprecedented step of injecting CHF 60 billion into UBS.[7]

Therefore, at the time Switzerland was battling against the prospect of losing UBS to its creditors or to confiscatory measures as a result of a possible indictment in the US (which is what happened to Bank Wegelin, another Swiss institution that was indicted on February 2, 2012[8] and closed its doors shortly after pleading guilty on January 4, 2013).

These events are important to an understanding of the circumstances that led to the sudden announcement that Switzerland was to withdraw its reservation to Article 26 of the OECD Model Tax Treaty shortly before the G-20 meeting organised by Gordon Brown and hot on the heels of the announcements made by Singapore and Hong Kong.

2. Adoption of OECD standard (but not to group requests) March 13, 2009

At first it seemed that the Swiss Government would concede as little as possible in order for the storm to go away. In its initial statement dated March 13, 2009, the Government stated that

> "the following aspects are indispensable for its future policy on administrative assistance in tax matters:
>
> - Respect for established administrative assistance procedures
> - Restriction of administrative assistance to *individual cases (no fishing expedition)*
> - Fair transitional solutions
> - Limitation to taxes covered by the OECD Model Tax Convention
> - Willingness to eliminate discrimination.
>
> In the future, the Federal Council will endeavour to ensure that international cooperation in tax matters is carried out *exclusively within the framework of contractually agreed channels*." (Emphasis added.)[9]

The reference to "restriction to individual cases (no fishing expedition)" is a clear indication that, at the time, the Swiss Government equated group requests with inadmissible fishing expeditions—possibly with the exception of the US (given that at the time the Swiss Government was aware of the deferred prosecution agreement entered into by UBS two weeks earlier and was in all likelihood already working on the bilateral agreement with the US concerning the 4,450 UBS accounts). The reference to "international cooperation … exclusively within the

the laws of the Swiss Confederation (Agreement between the United States of America and the Swiss Confederation), available at: *http://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf* [Accessed January 27, 2014].

[7] See the SNB's press release "Steps to strengthen the Swiss financial system" (2008), available at: *http://www.snb.ch/en/mmr/reference/pre_20081016_1/source/* [Accessed January 27, 2014].

[8] *U.S. v Wegelin et al*, U.S. District Court, Southern District of New York, No. S1 12 Cr 02, available at: *http://www.justice.gov/usao/nys/pressreleases/January13/WegelinPleaPR/Wegelin%20S1%20indictment.pdf* [Accessed January 27, 2014].

[9] The Federal Council, *Switzerland to adopt OECD standard on administrative assistance in fiscal matters* (Bern: The Federal Authorities of the Swiss Confederation, March 13, 2009), available at: *http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=25863* [Accessed January 27, 2014].

framework of contractually agreed channels" may have been a subtle way of referring to the US, although it is more likely that at the time the Swiss Government was merely seeking to increase its bargaining power vis-à-vis the international community by indicating that any concession would need to be negotiated.

3. Recent case law on group requests (Swiss-US treaty)

3.1 Credit Suisse case (July 5, 2013)

A recent decision by Switzerland's highest court (Federal Court)[10] has confirmed that foreign tax authorities (in the case in hand: the US IRS) may obtain information concerning unknown Swiss bank accounts beneficially owned by unknown taxpayers (that is, without having to identify the taxpayers behind the relevant accounts), provided the foreign tax authority can show conduct/a pattern that indicates, based on reasonable suspicion,[11] that a tax offence may have been committed.

In the case in hand, the IRS had originally asked to obtain information relating to any US taxpayer who had authority over bank accounts held at Credit Suisse at any time between 2002 and 2010. That initial request had been shot down by the Federal Administrative Court on the basis that the mere non-disclosure of a bank account did not qualify as "tax fraud", which was a requirement under the existing double tax agreement of 1996.[12] This led the US tax authorities to file a new information request concerning taxpayers who had engaged in active tax fraud by sheltering accounts via offshore companies and other entities with the help of their Swiss bankers and other advisers, so as to evade taxes. It is this subsequent request that the Swiss Supreme Court upheld.

Most of the old double tax agreements entered into by Switzerland: 1. prevented any information exchange that would result in a violation of banking secrecy; and/or 2. limited the request of information to the extent necessary for the correct application of the relevant treaty.[13]

[10] BGE 2C 269/2013, above fn.1. For a press release in English, see "Press Release of the Swiss Federal Supreme Court Judgement of 5 July 2013 (2C_269/2013). *Exchange of information in Tax Matters with the United States—The Federal Supreme Court rejects a first appeal*" (2013), available at: *http://www.bger.ch/press-news-2c_269_2013-eng-t.pdf* [Accessed January 27, 2014].

[11] "*hinreichende Anhaltspunkte [sufficient clues]*", "*hinreichende Verdachtsmomente [reasonable suspicion moments]*."

[12] Until recently, Switzerland drew a distinction between tax evasion—i.e. mere non-disclosure (for which no exchange of information was provided)—and serious "tax fraud"—i.e. the use of false documents or another act of deception that amount to what the Swiss call a "castle of lies." With the announcement made in 2009 that it would comply with the OECD standards, the Swiss Government indicated that it would drop the distinction between mere tax evasion and tax fraud, although the distinction continues to apply to older treaties.

[13] See e.g.:

- Art.25 of the Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on cooperation in the area of taxation (UK Treaty of 1977): "The competent authorities of the Contracting States *shall exchange such information* (being information which is at their disposal under their respective taxation laws in the normal course of administration) *as is necessary for carrying out the provisions of this Convention (...). No information as aforesaid shall be exchanged which would disclose any trade, business, banking, industrial or professional secret or trade process*."
- Art.28 of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and France for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (French Treaty of 1966): "*Les autorités compétentes des Etats contractants pourront, sur demande, échanger les renseignements (que les législations fiscales des deux Etats permettent d'obtenir dans le cadre de la pratique administrative normale)* nécessaires pour une application régulière de la présente

Accordingly, under the old treaties, the evasion of any tax due in the other Contracting State or which would require access to banking information would, typically, not be allowed.

However, the 1996 treaty with the US (the one concluded in 2009 is not yet in force) is atypical in that it already provided that—in addition to enabling the correct application of the provisions of the convention, exchange of information could also be used to prevent tax fraud (in the sense outlined above). In addition, the US treaty of 1996 does not make any reference to banking secrecy:

> "The competent authorities of the Contracting States shall exchange such information (being information available under the respective taxation laws of the Contracting States) as is necessary for carrying out the provisions of the present Convention *or for the prevention of tax fraud or the like* in relation to the taxes which are the subject of the present Convention (…). *No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process*."[14] (Emphasis added.)

In its decision concerning Credit Suisse, the Federal Court held inter alia that:

> "It should be noted that the duty to exchange information under Art. 26 of the 1996 Convention is different from the provision of administrative assistance for the purpose of assessing tax as is provided by newer double tax treaties. It [i.e. the duty to exchange information under Art. 26 of the 1996 Convention] is designed to enable the prosecution of criminal behaviour, the features[15] of which are well known, so that from a description of the action taken one may draw an inference/a conclusion[16] concerning the actual perpetrators and their identity.
>
> By contrast, the provision of administrative assistance according to the OECD standard is designed to provide data which is relevant in the context of the ordinary tax assessment/a control of such ordinary tax assessment, without the requirement of a tax crime. In this case, the relevant taxpayers may not easily be identified merely on the basis of their conduct, so that a higher standard is required in relation to their identification.
>
> Thus, the special wording contained in Art 26 [of the US treaty] and the absence of any supplemental protocol which defines the requirements of the exchange of information under that treaty enables requests, which do not contain any names."[17]

In addition, the Federal Court held that:

convention *(…). Il ne ourra pas être échangé de renseignements qui dévoileraient un* secret *commercial,* bancaire, *industriel ou professionnel ou un procédé commercial*."

- Art.27 of the Italian Treaty of 1979: "*Les autorités compétentes des Etats contractants pourront échanger les renseignements (que les législations fiscales des deux Etats permettent d'obtenir dans le cadre de la pratique administrative normale)* nécessaires pour une application régulière de la présente Convention. *Tout renseignement échangé de cette manière (...). Il ne pourra pas être échangé de renseignements qui dévoileraient un* secret *commercial,* bancaire, *industriel ou professionnel ou un procédé commercial*. "

[14] Convention between the USA and the Swiss Confederation for the Avoidance of Double Taxation with respect to taxes on income, signed at Washington, October 2nd, 1996, Art.26—Exchange of Information.
[15] BGE 2C 269/2013, above fn.1. "*Vorgehensweise*", "*approach*"/"*way of proceeding*."
[16] "*Rückschluss*—"*conclusion*"/"*inference*."
[17] Writer's translation.

> "Whilst the authorities of the requesting State must provide a description of the relevant facts, they should not be expected, in the information request, to support such facts with evidence that is complete (does not have any gaps[18]) and is free from any inconsistencies. This would go against the grain of administrative assistance, as its purpose is to enable the requesting authorities to throw light on certain aspects over which they have been kept in the dark. Accordingly, the fact that the names of the relevant taxpayers are not mentioned in the information request is irrelevant, provided one may conclude on the basis of the described facts that they have been involved in the matter. What counts is initial suspicion based on the facts. The existence of grounds of suspicion in relation to a specific person as perpetrator is not required."[19]

The Federal Court went on to discuss the boundaries with unacceptable fishing expeditions as follows:

> "The prohibition of fishing expeditions is a manifestation of the principle of proportionality. Art 26(1) of the OECD Model Tax Convention refers to 'information as is foreseeably relevant (…).' To the extent that it does not contain any names, an information request must describe the other facts with as much detail as possible, so as to enable the requested authorities to assess the necessity/foreseeable relevance of the information to be exchanged and prevent any prohibited fishing expedition."[20]

The information request lodged by the IRS is not attached to the Federal Court's decision, but it is reasonable to assume that it contained a substantial body of information which the US tax authorities gathered over the past few years. In addition to the information relating to the 4,450 accounts that the US tax authorities obtained as a result of the so-called "UBS treaty" with Switzerland,[21] the US tax authorities have gathered evidence from taxpayers who have applied under the various voluntary disclosure programmes offered by the US. A reading of the Levin Report,[22] UBS's deferred prosecution agreement, the US Government's memorandum of law in support of its petition to enforce a so-called John Doe summons against UBS (as to which see paragraph 5 below), as well as the indictment[23] in the case concerning Edgar Paltzer and Stefan Buck (respectively a partner of a Swiss law firm and a banker with Zurich-based Bank Frey & Co who assisted US taxpayers in hiding assets using fraudulent methods) shows that the US have gathered a plethora of information concerning US clients of Swiss banks which in turn enabled the US tax authorities to put forward the argument described in the decision of the

[18] "*lückenlos*"—"*complete*"/"*uninterrupted*."
[19] BGE 2C 269/2013, above fn.1.
[20] BGE 2C 269/2013, above fn.1.
[21] Agreement between the United States of America and the Swiss Confederation, above fn.6.
[22] The Levin Report, above fn.3.
[23] *U.S. v Paltzer et al,* U.S. District Court, Southern District of New York, No. 13-cr-282, available at: *http://www.justice.gov/usao/nys/pressreleases/April13/PaltzerandBuckIndictmentPR/Paltzer,%20Edgar%20and%20Stefan%20Buck%20Indictment%2013%20Cr%20282.pdf* [Accessed February 18, 2014].

Federal Court according to which "Credit Suisse applied a business model that enabled US clients to hide and fund undeclared bank accounts held at that bank."[24]

3.2 United States v UBS AG (March 5, 2009)

This is not the first time that the Swiss courts have had to deal with anonymous group requests. In a decision from 2009[25] concerning UBS clients, the Federal Administrative Court (without having formally to decide the case, as the relevant information had already been delivered to the US tax authorities) went on record as saying that what mattered was the existence of sufficient suspicion that tax fraud had been committed. As to *by whom* such tax fraud had been committed, this could be established on the basis of the information received relying on the initial grounds of suspicion.

It is noteworthy that the information request was based on the revelation of a Swiss banker (Brad Birkenfeld) who was familiar with the internal practices adopted by UBS bankers, which would help explain why the group request was held to be permissible.

4. Relevance of case law for other (older) treaties

Requests for administrative assistance made after February 1, 2013 are governed by new statutory rules (as to which see below). However, requests made before that date in relation to treaties concluded before October 1, 2010 are outside the scope of these rules. This was also the position in relation to the UBS cases, as the US treaty was concluded before 2010 and the group requests were made before February 1, 2013. Therefore, the question arises as to whether the Swiss courts would apply the reasoning developed in the UBS cases to any pending request relating to other older treaties.

By reading the decisions in the UBS cases, it seems relatively clear that the Federal Court would have come to a different conclusion had the treaty with the US not contained any reference to the prevention of tax fraud. Accordingly, the writer's tentative conclusion is that any pending request concerning an old treaty would be rejected to the extent that the relevant provision for administrative assistance does not go beyond the standard wording used in the old treaties, according to which administrative assistance shall only be provided "as is necessary for carrying out the provisions of this Convention."

5. Have the Swiss courts imported US legal principles into Swiss law?

When the Federal Administrative Court was first asked to deal with the *UBS Case*,[26] it was at the height of UBS's legal drama in the US. The UBS decision was handed down a couple of weeks after the deferred prosecution agreement was signed (the former is dated February 18, 2009 and the latter March 5, 2009). Also, it is likely that the Swiss judges were aware that on

[24] The US Government contended that Credit Suisse had actively pursued illicit business from non-compliant US clients by offering them numbered accounts and structures such as offshore companies and trusts/foundations behind which the US clients could "hide."
[25] *United States v UBS AG* (*UBS Case*) U.S. District Court for the Southern District of Florida, Case No.09-60033 (February 18, 2009).
[26] *UBS Case*, above fn.25, Case No.09-60033 (February 18, 2009).

July 1, 2008 the US courts had issued an order authorising the IRS to serve upon UBS a "John Doe" summons seeking records that would identify all US taxpayers with undisclosed accounts at UBS.[27]

A "John Doe" summons is, in essence, a direction to a third party to hand over information concerning taxpayers whose identity is currently unknown to the IRS. § 7609(f) of the Internal Revenue Code (Title 26 of the US Code) provides as follows[28]:

> **"26 U.S.C. §7609—Special procedures for third party summonses**
>
> (f) Additional requirement in the case of a John Doe summons
> Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served *only after a court proceeding* in which the Secretary establishes that—
> (1) *the summons relates to the investigation of* a particular person or *ascertainable group or class of persons*,
> (2) *there is a reasonable basis for believing that such person or group or class of persons* may fail or *may have failed to comply* with any provision of any internal revenue law, and
> (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is *not readily available from other sources*." (Emphasis added.)

Interestingly, this provision was inserted by Congress in 1976 to prevent speculative fishing expeditions by the IRS—in the words of the US Court of Appeals for the Sixth Circuit[29]:

> "Until 1976, there was no statutory restraint on the Commissioner's use of this device. However, as part of the Tax Reform Act of 1976, Congress added to the Code § 7609(f) and (h), entitled 'Special Procedures for Third Party Summonses.' 26 U.S.C. § 7609(f) and (h) (…)
>
> *Congress apparently enacted § 7609(f) and (h) of the Code in response to the Supreme Court's decision in United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975). In Bisceglia, the Court upheld the Service's use of the John Doe summons device in its investigation of an unidentified taxpayer who had made two $20,000 bank deposits in worn $100 bills. *The Court's Bisceglia holding left undefined the limits of the Service's*

[27] The US Government's petition dated February 19, 2009 is accessible online, at: *http://online.wsj.com/public/resources/documents/UBSPetitonofJohnDoe20090219.pdf* [Accessed February 18, 2014], as is the Memorandum of law in support of the petition, at: *http://www.financialtransparency.org/wp-content/uploads/2009/07/DOJ-court-filing.pdf?80f948* [Accessed February 18, 2014]. See also the press release from the Department of Justice, "Federal Judge Approves IRS Summons For UBS Swiss Bank Account Records" (July 1, 2008), available at: *http://www.justice.gov/tax/txdv08584.htm* [Accessed January 27, 2014].

[28] See Title 26 of the US Revenue Code, available at: *http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleF-chap78-subchapA-sec7609.pdf* [Accessed January 27, 2014].

[29] *In the Matter of The Tax Liabilities of John DOES, Members of the Columbus Trade Exchange in the Years 1977 and 1978 United States of America, Petitioner-Appellant* (671 F.2d977 (1982)) (*In the Matter of The Tax Liabilities of John DOES*), available at: *http://www.leagle.com/decision/19821648671F2d977_11473* [Accessed January 27, 2014].

power to issue John Doe summonses. Congress, however, was unwilling to leave the exercise of this power to the untrammelled discretion of administrative personnel, and so added § 7609(f) and (h) to the Tax Code.

The House Committee Report on the legislation reveals a 'common sense' approach to the issuance of John Doe summonses: (Emphasis added.)[30]

> 'Where there are unusual (or possibly suspicious) circumstances, and the Service needs to learn more details of the situation in order to determine whether tax liability should be assessed against some person (as well as the identity of the person who may be liable for tax), use of the John Doe summons may be appropriate.
>
> While the committee believes it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, at the same time, *the committee does not intend that the John Doe summons is to be available for purposes of enabling the Service to engage in a possible "fishing expedition."* For this reason, the committee intends that when the Service does seek court authorization to serve (a) John Doe summons, it will have specific facts concerning a specific situation to present to the court.
>
> *On the other hand, the committee does not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction (in the context of such facts as may be known to the Service at that time) is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported* (or might not be reported in the case of a current year transaction, with respect to which a return is not yet due).'"

The US Court of Appeals for the Sixth Circuit went on to say that:

> *"We cannot construe this passage from the legislative history to mean that Congress intended to require the IRS to produce conclusive evidence of an actual tax violation as a prerequisite to obtaining a John Doe summons.* On the contrary, we believe this language indicates only an intent to prevent the Service from exercising its summons power in an arbitrary or quixotic manner."[31]

Whilst the UBS decisions do not make specific reference to the John Doe applications served on UBS by the IRS, the reasoning contained in those decisions is reminiscent of the arguments mentioned in the US judgment mentioned above.

6. The Swiss Governments' current love affair with group requests

Since making its original announcement in 2009, the Swiss Government has made a complete U-turn in relation to group requests. This change of attitude culminated in the enactment of a

[30] *In the Matter of The Tax Liabilities of John DOES*, above fn.29, 671 F.2d977 (1982).
[31] *In the Matter of The Tax Liabilities of John DOES*, above fn.29, 671 F.2d977 (1982).

new federal law on administrative assistance in tax matters on February 1, 2013.[32] As mentioned above, the new law only applies to requests made following that date (which explains why the Credit Suisse case[33] was decided without reference to the new law) and in addition only in relation to treaties concluded after October 1, 2010 (mainly to ensure that Switzerland maintains its bargaining power vis-à-vis those countries that wish to update their double tax treaties to include the OECD standard).

Although the new law does not contain any reference to group requests, the press release that accompanied the announcement of the entry into force of the new law stated that

> "group requests in accordance with the international standard are also permitted with the entry into force of the [new law]. Such requests require a description of the action taken by bank clients to avoid taxation and must be clearly distinct from fishing expeditions."[34]

Subsequent to the enactment of the new law, the Swiss Government enacted a statutory instrument ("Ordinance"[35]) which clarified that

> "requests made pursuant to international tax treaties, which describe the relevant persons by reference to behavioural pattern, are admissible in relation to information about facts that concern the period following the entry into force of the federal law on administrative assistance in tax matters [i.e. information about facts that concern the period after 1 February 2013]."

As an Ordinance may not create new law (instead, its purpose is to implement primary legislation), the Swiss Government has manifestly come to the conclusion that group requests are covered by the new law on administrative assistance.

This had not always been the case. The original explanatory memorandum[36] dated July 6, 2011 (that is, over two years after the Federal Administrative Court had allowed a group request against UBS on the basis of the specific wording of the US treaty of 1996) explained that (writer's translation):

> "administrative assistance will only be provided upon request and in specific cases. Thus, any automatic/spontaneous exchange of information will be excluded. *Also excluded are so-called group requests*, based on which the foreign authorities seek to obtain information in relation to an unspecified number of persons based on alleged facts. Currently, such requests do not fall under the internationally recognised standard and, therefore, they should be excluded for the time being." (Emphasis added.)

Accordingly, the original Bill (also issued on July 6, 2011) provided that (writer's translation):

[32] Federal Tax Administrative Assistance Act 2013.
[33] BGE 2C 269/2013, above fn.1.
[34] Press release, The Federal Council, "Federal Council brings Tax Administrative Assistance Act into force" (2013), available at: *http://www.news.admin.ch/message/index.html?lang=en&msg-id=47479* [Accessed January 27, 2014].
[35] Ordinance on the Provision of Administrative Assistance in Accordance with Double Taxation Agreements dated September 1, 2010. For an unofficial translation, see: *http://www.news.admin.ch/NSBSubscriber/message/attachments/21549.pdf* [Accessed on January 27, 2014].
[36] *Federal Gazette* ("Bundesblatt") BBl 2011 6193, available at: *http://www.admin.ch/opc/de/federal-gazette/2011/6193.pdf* [Accessed on January 27, 2014].

"Art. 4—General principles

(1) Administrative assistance shall only be provided upon request *and in specific cases.*" (Emphasis added.)[37]

However, the words "in specific cases" do not appear in the final version of the law that was enacted in 2013 (writer's translation):

"Art. 4—General principles

(1) Administrative assistance shall only be provided upon request."[38]

2011 Bill	**2013 Law**
Administrative assistance shall only be provided upon request *and in specific cases.*	*Administrative assistance shall only be provided upon request.*

7. What happened?

As the UBS decision of March 5, 2009[39] predates the release of the Bill by four months, there can be no doubt that, at the time, the Swiss Government took a conscious decision that the outcome in the *UBS Case* should not be adopted as a general principle. On the other hand, the final version of the law entered into force on February 1, 2013, that is, six months before the latest decision concerning Credit Suisse (which was handed down on July 5, 2013).[40] Therefore, its reasoning cannot be at the root of the decision to extend administrative assistance to cover group requests with no mention of specific taxpayers.

A clue to what happened is contained in the explanatory memorandum that accompanied the original Bill. In it, the Swiss Government explained that (writer's translation):

> "Currently, [group] requests do not fall under the internationally recognised standard and, therefore, they should be excluded for the time being. In this context it should be noted that the commentary to Art. 26 is in the course of being overhauled. The commentary enjoys wide recognition internationally, so that one can expect the administrative authorities to follow it as literally as possible. It is planned that the relevant working group within the OECD will complete its work in October 2011 and that the new commentary will enter into force [sic!] during the course of 2012. It is to be expected that group requests will be covered by the new commentary. Accordingly, at this stage it is possible to predict that the new law will have to be amended in the near future. The chosen definition of group request and the boundaries between group requests and fishing expeditions will play a central role from a Swiss perspective. In that context it will also important to ensure that each person that

[37] *Federal Gazette* BBl 2011 6233, available at: *http://www.admin.ch/opc/de/federal-gazette/2011/6233.pdf* [Accessed on January 27, 2014].
[38] Federal Law on the Administrative Assistance in Tax Matters dated September 28, 2012, available at: *http://www.admin.ch/opc/de/federal-gazette/2012/8237.pdf* [Accessed on January 27, 2014].
[39] See para.3.2 above.
[40] BGE 2C 269/2013, above fn.1.

comes within a group may be clearly ascertained and that they may enjoy their procedural rights."[41]

8. Is the Swiss Government's position compatible with Swiss law?

In a recent article,[42] a Swiss commentator has formulated the view that the Swiss Government has gone overboard and that the adoption of the position according to which group requests are admissible may not withstand judicial scrutiny. The main reason for this argument is that the new federal law on administrative assistance in tax matters represents an enabling piece of legislation, that is, it enables the administration of requests of information by setting out a procedure, subject to the substantive terms contained in the relevant double tax treaty. The commentator's contention is that the double tax agreements and the tax information exchange agreements entered into by Switzerland since the announcement of March 13, 2009[43] (specifically that it was to 1. drop its reservation to Article 26 of the OECD Model Income Tax Convention; and 2. conduct a tax treaty policy based on the standards contained in that Article), do not allow for group requests. Thus, in the absence of a provision that enables a group request *under the relevant treaty*, the contention is that there can be no room for a group request under an enabling piece of legislation. In particular, the Swiss commentator argues that the new Swiss treaties have been negotiated on the basis of the OECD Model Tax Information Exchange Agreement (TIEA) which was produced by the OECD together with a Commentary,[44] which according to the commentator contains more specific rules on information exchange and therefore supersedes the generic comments contained in the commentary to Article 26 of the OECD Model Income Tax Convention.

Article 5(5) of the Model TIAE provides that:

> "The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:
> (a) *the identity of the person under examination or investigation*;
> (b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;
> (c) the tax purpose for which the information is sought;
> (d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;
> (e) to the extent known, the name and address of any person believed to be in possession of the requested information (…)." (Emphasis added.)

[41] *Federal Gazette*, above fn.36, 6205.
[42] R. Waldburger, *Sind Gruppenersuchen an die Schweiz rechtlich zulässig?* (IFF Forum für Steuerrecht, University of St Gallen, 2013/2).
[43] Announcement made by the Swiss Federal Council on March 13, 2009.
[44] OECD, *Agreement on Exchange of Information on Tax Matters*, available at: *http://www.oecd.org/tax/exchange-of-tax-information/2082215.pdf* [Accessed January 27, 2014].

9. Implications for other jurisdictions

9.1 The UK

In the UK group requests are nothing new. In 2005–2007, HMRC were able to rely on section 20 of the Taxes Management Act 1970 to obtain information from UK banks on the basis of notices which did not name the taxpayers on the basis that there were reasonable grounds for believing that the class of taxpayers to whom the notices related might have failed to comply with their UK tax obligations. These cases concerned:

- seeking information from a bank about credit card customers with UK addresses who had cards associated with offshore bank accounts: *Re an application by HMRC to serve section 20 Notice* (2005) SpC 517;
- seeking information from a bank about customers with UK addresses holding non-UK bank accounts: *Re an application by HMRC to serve section 20 Notice (No2)* (2006) SpC 536;
- seeking information about a group of resident traders trading shares through a nominee company registered in the British Virgin Islands (BVI) and using a UK investment bank as prime broker to provide the account used to fund the purchase and sale of shares: *A Tax Haven Company v HMRC* (2006) SpC 533 and;
- seeking information concerning unnamed customers with UK addresses who held non-UK bank accounts with financial institutions: *Re an application by HMRC to serve a section 20 Notice on Financial institutions Nos 1–4* (2007) SpC 580–583.

In addition, the writer is aware of a number of letters written by HMRC to customers of HSBC Switzerland which appear to be based on information provided by Hervé Falciani (a French software engineer) to HMRC and other European tax authorities. However, the position in relation to other jurisdictions remains less clear.

9.2 Jersey

In Jersey, the only reported case concerning a request for information under a tax information exchange agreement (TIAE) related to a specific individual (a Norwegian taxpayer), who lost on appeal.[45] Whilst group requests raise complex issues that will need to be addressed by the local courts, prima facie it would appear that the Jersey rules require the identification of a specific taxpayer. Article 1 of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (the 2008 Regulations) defines "taxpayer" as "*the person* who is the subject of a request". In addition, "tax information" is defined as

> "information that is foreseeably relevant to the administration and enforcement, *in the case of the person who is the subject of a request*, of the domestic laws of the third country whose competent authority is making the request (…)."

[45] *Volaw Trust & Corporate Services Ltd and Larsen v The Office of the Comptroller of Taxes* [2013] JRC 095, available at: *https://www.jerseylaw.je/Judgments/UnreportedJudgments/Documents/Display.aspx?url=2013/13-05-16_Volaw_Trust_and_Corporate_Services__Limited__and__Mr__B__Larsen-v-Income_Tax_095.htm&JudgementNo=%5B2013%5DJRC095* [Accessed February 18, 2014].

Also, Article 2(1) of the 2008 Regulations provides that

> "where the competent authority for Jersey decides that it is reasonable to respond to *a request concerning a taxpayer*, the competent authority for Jersey *may require the taxpayer* to provide tax information that the competent authority for Jersey reasonably requires for that purpose."

Obviously, requiring a taxpayer to provide tax information implies that his identity is known, which would seem to exclude group requests that do not name the taxpayers. On the other hand, group requests are, by definition, addressed to third parties (for example, a bank). Article 3(1) of the 2008 Regulations ("Provision by other person of tax information about taxpayer") provides that

> "where the competent authority for Jersey decides that it is reasonable to respond to a request *concerning a taxpayer*, the competent authority for Jersey may require a third party, being a person other than the taxpayer, to provide tax information that the competent authority for Jersey reasonably requires for that purpose."

Crucially, Article 3(2) of the 2008 Regulations provides that

> *"where a third party notice does not name the taxpayer to whom it relates, it must provide an account number or other, similar, identification for the tax information required*."

On the other hand, Article 3(8) of the 2008 Regulations deals with the case where the competent authority "*does not know the taxpayer's name and address*." In this case, the local authorities may apply to the Bailiff to waive the requirement to give the taxpayer the information obtained by the third party. Whilst group requests are formulated on the basis that the requesting tax authorities do not know the taxpayers' identity, normally the third party who holds the information (typically, a bank) does. Therefore, it is difficult to see how Article 3(8) may be used to support a group request.

9.3 More generally

More generally, given Switzerland's pre-eminent position within the international private banking world, it is to be expected that the OECD and a number of its constituents will point at the Swiss approach as evidence of the existence of an internationally recognised principle in favour of group requests, when in fact the Swiss thought that they were relying on an internationally recognised standard when, in fact, there was no such standard (at least, not yet). In particular, it is to be expected that the US will be influenced by the existence of a long-standing (and highly effective) legal tradition in relation to "John Doe" summons when approaching the issue of group requests. The UK is likely to take a similar approach based on its own experience with section 20 notices and its general attitude towards exchange of information. Within the EU, the introduction of automatic exchange of information under the EU Savings Tax Directive in 2005 and the extension of automatic exchange in relation to other income types from January 1, 2015

(when the provisions of the Administrative Cooperation Directive[46] will become effective) will provide an additional push towards total tax transparency, at which point group requests will be likely to appear obsolete or at any rate part of the "*acquis*" of international tax law.

10. Final remarks

At the time of the initial announcement of March 13, 2009, it was unclear how far (and how fast) Switzerland would go in adopting the OECD standard on administrative assistance in tax matters. The tone of the announcement was rather reactive, as opposed to proactive:

> "The Federal council acknowledges that the wish of the people of Switzerland for appropriate protection of personal privacy is still firmly entrenched. *For this reason, it fully endorses banking secrecy and resolutely rejects any form of automatic exchange of information. The privacy of customers will continue to be protected from unauthorised access to information concerning private assets.* Banking secrecy, however, does not protect from any form of tax offence." (Emphasis added.)

Four years on, the endorsement of banking secrecy and the rejection of unauthorised access to information takes on a new light. It is likely that the Swiss Government was forced into action by the widely publicised excesses perpetrated by some Swiss institutions. On the other hand, it would also seem that Switzerland has gone beyond what was expected of it. It is quite possible that the Swiss Government felt that it had no choice in the wake of recent events. A more plausible explanation is that Switzerland recognised the risks of untaxed funds and consciously decided to accelerate the transition to a "white money" policy.

This is a welcome development. However, there are also losers. The net cast by group requests is very wide and innocent taxpayers who have legitimate confidentiality requirements are at risk of being caught. The legitimacy of privacy was recognised inter alia by the Italian Government as it enables taxpayers to hold funds anonymously through qualified intermediaries ("*fiduciarie*") under a system whereby the qualified intermediary acts as a tax agent for the Italian state. Similarly, the recent UK-Swiss tax cooperation agreement[47] (in force since January 1, 2013) strikes a balance between transparency and the need of a country to collect its fair share of tax, on the one hand, and the taxpayer's legitimate expectation of confidentiality. Thus, under the new tax cooperation agreement, a UK resident taxpayer has the choice between automatic exchange of information and the anonymous levy of withholding tax at rates which are close to those which apply to additional rate taxpayers.

[46] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[47] Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on cooperation in the area of taxation.

It remains to be seen how the Swiss courts will react to future group requests. Unless the bar against inadmissible fishing expeditions is to be set reasonably high, Switzerland risks driving away legitimate business.

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Bankers' duties; Comparative law; Fraud; International co-operation; Switzerland; Tax administration; Tax evasion; Tax information exchange agreements; United States

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