

Judgment of December 28, 2021

II. public law division

Composition

Federal Judge Seiler, President,
Federal Judge Aubry Girardin,
Federal Judge Donzallaz,
Federal Judge Hänni,
Federal Judge Hartmann,
Clerk Brunner.

Parties to the proceedings

A._____,
complainant,
represented by Dr. Marc Veit and Dr. Simone Nadelhofer, Attorneys at Law,

against

Federal Tax Administration, Service for the Exchange of Information in Tax Matters SEI,
Eigerstrasse 65, 3003 Bern,
Respondent.

Subject

Administrative assistance DTA (CH-IN),

Appeal against the judgment of the Federal Administrative Court, Division I, of October 28, 2020 (A-4426/2019).

Facts of the case:

A.

A.a. On March 22, 2012, the Indian Ministry of Finance (hereinafter: the Indian Tax Administration) requested the Swiss Federal Tax Administration (FTA), based on Article 26 of the Agreement of November 2, 1994 between the Swiss Confederation and the Republic of India for the Avoidance of Double Taxation in the Field of Taxes on Income (DTA CH-IN; SR 0. 672.942.31; applicable here is the version pursuant to the Protocol of Amendment of 30 August 2010 [Protocol 2010 to DTA CH-IN, AS 2011 4617]) for the administrative assistance transmission of various more detailed information on A._____. The request for administrative assistance relates to account relationships that A._____ is said to maintain (in part indirectly via trust structures) with Bank B._____ SA. Its original purpose was to assess income taxes for the tax periods from April 1, 2011 to December 31, 2011, with the Indian tax administration also requesting information regarding tax periods beginning April 1, 2004. In the latter context, the Indian tax administration stated that under Indian income tax law, income from earlier years could also be included in the current tax period.

A.b. By submission dated December 5, 2012, the Indian tax administration amended its request to ask for administrative assistance without prior notification of the person concerned. It further extended the request to cover the period from April 1, 1995 to March 31, 2012, or the entire 2011/2012 period.

A.c. After the FTA informed the Indian tax administration by letter dated February 20, 2014 that Switzerland could not provide administrative assistance in the present case, the Indian tax administration renewed on October 31, 2018 its request for administrative assistance dated March 22, 2012 and December 5, 2012, respectively; in doing so, it allowed the FTA to contact the data subject directly.

B.

By final order dated July 29, 2020, the FTA stated that it intended to provide the requested administrative assistance to the Indian tax administration to the extent that information as of April 1, 2011 was at issue. Furthermore, the FTA intended to inform the Indian tax administration that the person concerned was "beneficiary of the overlying trust of the company holding the account with the number xxx entitled C._____".

The Federal Administrative Court partially upheld an appeal filed by A._____ against the final ruling of July 29, 2020, in its judgment of October 28, 2020, and ordered the FTA to make marginal redactions in the sense of the recitals; in all other respects, it dismissed the appeal (ruling no. 2). In addition, it instructed the FTA to point out to the Indian tax administration that the information to be provided in the context of the present administrative assistance proceedings may only be used in proceedings concerning A._____ pursuant to Art. 26 para. 2 DTA CH-IN (dispositive point 3).

C.

A._____ appeals to the Federal Supreme Court in public law matters on November 16, 2020. It requests the annulment of the judgment of the Federal Administrative Court of 28 October 2020 and the final order of 29 July 2019; the requests for administrative assistance of the Indian Ministry of Finance of 22 March 2012, 5 December 2012 and 31 October 2018 should not be granted or should be rejected; accordingly, the FTA should be ordered to destroy the documents that would be in the administrative assistance file D._____.

The FTA requests that the appeal be dismissed insofar as it is to be admitted at all. The Federal Administrative Court refrains from commenting on the content. In the second exchange of written submissions, the parties to the proceedings maintain their positions.

D.

In a submission dated May 28, 2021, A._____ requested the President of the Second Department of Public Law, through its legal representatives, to anonymize the heading and the dispositive of the judgment to be issued in the present proceedings. Subsidiarily, the media were to be informed that there were reasons against mentioning their name in public. By letter dated June 1, 2021, A._____ was informed by the Federal Supreme Court that this request would be decided upon in the context of the final decision.

Recitals:

1.

Federal court proceedings are conducted in one of the official languages, usually the language of the contested decision. If the parties use another official language, the proceedings may be conducted in that language (Art. 54 para. 1 Federal Supreme Court Act). It is true that the statement of appeal filed by the appellant's legal representatives is written in French. However, there are no indications that the French language would be more familiar to the complainant personally than the German language. Under these circumstances, there is no reason to deviate from the rule pursuant to Art. 54 para. 1 BGG in the present case.

2.

The Federal Supreme Court examines its jurisdiction and the further prerequisites for entry ex officio (Art. 29 para. 1 BGG) and with free cognition (see BGE 146 II 276 E. 1; 141 II 113 E. 1).

2.1 A. _____'s appeal, filed in due time (Art. 100 para. 1 FSCA) and form (Art. 42 FSCA), is directed against a judgment of the Federal Administrative Court (Art. 86 para. 1 lit. a FSCA) in a matter of public law (Art. 82 lit. a FSCA) which concludes the proceedings (Art. 90 FSCA).

A. _____ is entitled to file an appeal in public law matters as a person affected by the request for administrative assistance (Art. 89 para. 1 FSCA).

2.2 Article 83(h) FSCA provides that appeals in public law matters to the Federal Supreme Court against decisions in the field of international administrative assistance are inadmissible, with the exception of administrative assistance in tax matters. An appeal against a decision in the field of international administrative assistance in tax matters is admissible pursuant to Art. 84a FSCA if a legal question of fundamental importance arises or if, for other reasons, the case is particularly important within the meaning of Art. 84 para. 2 FSCA. The party filing the appeal must explain in the statement of grounds why the respective requirement is met, unless this is quite obvious (Art. 42 para. 2 BGG; cf. BGE 146 II 276 E. 1.2.1; 133 IV 131 E. 3).

2.2.1 The appellant raises two legal questions of fundamental importance. On the one hand, it had to be clarified whether "the condition of the pertinence vraisemblable des informations de documents à transmettre relatifs à des comptes bancaires indirectement détenus par un trust est-elle réalisée dans le cas où la personne visée par l'entraide administrative est uniquement bénéficiaire d'un trust discrétionnaire et irrévocable". Secondly, it must be answered whether "au vu de l'engagement expresse de l'Inde à attendre un changement législatif de l'article 7 let. c LAAF avant de voir ses demandes d'assistance traitées par la Suisse, une nouvelle demande de transmission avant un tel changement est-elle constitutive d'une violation du principe de la bonne foi".

2.2.2 The first legal question raised by the complainant has been attributed fundamental importance by the Federal Supreme Court in proceedings decided in parallel (see for reasons judgment 2C_918/2020 of 28 December 2021 E. 1.2.3). Admittedly, there is a difference between the two proceedings insofar as the lower court did not consider the question of the tax treatment of discretionary trusts to be decisive for the dispute in the judgment appealed against here, because the complainant was not only "bénéficiaire" of the trust in question, but also economically entitled to an account of the "underlying company" held by this trust (cf. contested decision, E. 4.7). However, the complainant does not at any rate implausibly challenge the finding of the lower court that she was the "beneficiary owner" of the banking

relationship in question and that amounts may have accrued to her as arbitrary, so that the legal question recognized as a matter of principle in the judgment 2C_918/2020 of December 28, 2021 may also arise here. This justifies the assumption of a legal question of fundamental importance also in the present case.

2.2.3 Irrespective of whether the second legal question raised by the appellant is also of fundamental importance, the present appeal must in principle be admitted according to what has been said; the appeal must be examined comprehensively (see BGE 141 II 14 E. 1.2.2.4; judgment 2C_703/2020 of March 15, 2021 E. 1.3).

However, it should be added by way of clarification that the decision of the lower court has fully replaced the final ruling of the FTA (so-called devolutive effect; Art. 54 VwVG). Insofar as the appellant in the present proceedings demands the annulment of the final ruling of the FTA, the appeal is therefore not admissible. After all, decisions of lower instances are deemed to be co-appealed in terms of their content (cf. judgment 2C_717/2017 of 25 November 2019, E. 1.2, with further references).

3.

With the appeal, the violation of federal and international law can be alleged in particular (Art. 95 lit. a and lit. b BGG). The Federal Supreme Court applies the law ex officio (Art. 106 para. 1 FSCA). It is therefore bound neither by the arguments put forward in the appeal nor by the considerations of the lower court; it may allow the appeal on a ground other than the one invoked or dismiss it on grounds that differ from those of the lower court (substitution of motives; BGE 141 V 234 E. 1; 139 II 404 E. 3).

4.

The complainant accuses the lower court of having established the facts of the case in a manifestly incorrect manner. It is not true that she is the beneficial owner of the accounts at Bank B. _____ SA. The corresponding information in the "Client Profile" is not correct. The corresponding information in the "Client Profile" of Bank B. _____ SA does not correspond to the facts; it neither had access to this account nor did it exercise control over it. Accordingly, the lower court had wrongly left open whether the "E. _____" was an irrevocable discretionary trust.

In view of the following legal explanations, it is not necessary to examine these complaints in more detail.

5.

The situation to be assessed in the present case is that a foreign state requests administrative assistance with respect to a natural person who is the beneficiary of a trust for which a company ("underlying company") holds an account at a Swiss bank. The legal question that is disputed and needs to be clarified in this context is whether and to what extent bank information relating to this account is likely to be relevant. In particular, the complainant disputes the likely relevance of the portfolio statements/asset statements and the account statements of the "underlying company", which show various credit card withdrawals.

5.1 Pursuant to Art. 26 item 1 DTA CH-IN, the competent authorities of the Contracting States shall exchange information that is likely to be relevant for the implementation of the Agreement or for the application or enforcement of domestic law concerning the taxes covered by the Agreement, provided that the taxation corresponding to such law is not

contrary to the Agreement. According to No. 10 lit. d of the Protocol to the DTA CH-IN, the reference to information that is likely to be relevant is intended to ensure the widest possible exchange of information in tax matters, without allowing the Contracting States to engage in "fishing expeditions" or to request information that is unlikely to be relevant with regard to the tax matters of a taxpayer (see also BGE 146 II 150 E. 6.1.1; 143 II 185 E. 3.3.1; 142 II 161 E. 2.1.1; 141 II 436 E. 4.4.3; judgment 2C_542/2018 of 10 March 2021 E. 4.1.1).

5.2 According to the case law of the Federal Supreme Court, the requirement of probable relevance, which is of primary interest here, is met if, at the time of the request, there is a reasonable possibility that the requested information will prove to be relevant for the taxation with respect to which administrative assistance is requested (see BGE 146 II 150 E. 6.1.1; 143 II 185 E. 3.3.1; 142 II 161 E. 2.1.1; 141 II 436 E. 4.4.3; specifically on the so-called principle of speciality, judgment 2C_750/2020 of 25 March 2021 E. 8.1, with further references). The "presumably" has a double meaning: the requesting state must foresee the materiality and assert it in the request for assistance and the requested state must only transmit those documents that are presumably material (see judgment 2C_616/2018 of 9 July 2019 E. 3.2). The requested tax authority does not have to decide whether the facts presented in the request for assistance correspond entirely to reality, but only has to verify whether the requested information has a connection to those facts; information can only be refused (cf. also Art. 7 StAhiG) if a connection between the requested information and the investigation seems unlikely, because as a rule only the requesting state can conclusively determine whether information is relevant. The role of the authorities of the requested state is therefore essentially limited to examining the plausibility of the request; it only has to examine whether the requested documents have a connection to the facts described in the request and whether they can potentially be used in the context of the foreign tax proceedings (see judgment 2C_703/2020 of 15 March 2021 E. 4.2.2, with further references).

5.3 Whether information obtained through the administrative assistance procedure is actually relevant in foreign tax proceedings depends essentially on the tax (procedural) law of the requesting state. This does not mean, however, according to settled case law of the Federal Supreme Court, that the requested state would have to comment on the internal (procedural) law of the requesting state within the framework of the administrative assistance proceedings. Rather, it is sufficient for the probable relevance that the requested information appears to be potentially suitable for use in the foreign proceedings (see BGE 144 II 206 E. 4.3; judgments 2C_232/2020 of 19 January 2021 E. 3.4; 2C_1162/2016 of October 4, 2017 E. 6.3; 2C_241/2016 of April 7, 2017 E. 5.4). Insofar as the national procedural law of the requesting state precludes the utilization of the information requested in the administrative assistance proceedings, the person concerned must in principle assert this before the authorities of the requesting state (BGE 144 II 206 E. 4.6; 142 II 161 E. 2.2; 142 II 218 E. 3.6 and 3.7; judgment 2C_241/2016 of 7 April 2017 E. 5.4). Things are only different if there are reasons to believe that elementary procedural principles could be violated in the foreign proceedings or that there are otherwise serious deficiencies (see Judgment 2C_241/2016 of 7 April 2017 E. 5.4 in fine; cf. for an application case Judgment 2C_750/2020 of 25 March 2021).

5.4 With regard to the question of interest here, the lower court considered (with reference to its own case law, the circular letter of the Swiss Tax Conference No. 30 of 22 August 2007 "Taxation of Trusts" and the circular letter of the FTA No. 20 of 27 March 2008) that the beneficiaries of a so-called discretionary trust ("irrevocable discretionary trust") generally

only have a so-called expectancy from distributions. In the case of the beneficiary of an irrevocable discretionary trust, there is - at least according to the Swiss view - in principle no transparent taxation of the trust assets and the income of the trust, but only the distributions to the beneficiary are taxed.

The complainant maintains that this approach must also be followed for the present administrative assistance proceedings: While the beneficiary of a non-discretionary irrevocable trust is directly enriched, the beneficiary of a discretionary irrevocable trust is not. Accordingly, bank information concerning a bank account held by such a trust is not likely to be relevant in administrative assistance proceedings against the beneficiary as long as no distributions have been made.

5.5 The complainant's approach cannot be accepted.

5.5.1 It must first be noted that the complainant is undisputedly the beneficial owner of "E. _____" (see E. 4.7 of the judgment under appeal, according to which it is the sole beneficiary of the trust; see for comparable constellations judgment 2C_955/2018 of November 2, 2018 E. 5 and 5.1.2). Thus, the fact that information on bank accounts of a trust is in principle information on a third party does not preclude transmission in the context of the present administrative assistance proceedings (Art. 4 para. 3 StAhiG; BGE 144 II 29 E. 4.2 and 4.3; Judgment 2C_287/2019 and 2C_288/2019 of 13 July 2020 E. 4.1 and 5.3), especially since the "E. _____" itself has not filed an appeal and the complainant is not legitimized to enforce its interests in the present case (see judgment 2C_1037/2019 of August 27, 2020 E. 6.2, not published in: BGE 147 II 116).

5.5.2 For the question of the (tax law) treatment of the "E. _____" in the Indian tax proceedings against the complainant, not Swiss but Indian law will be applicable. It is therefore not up to the Swiss authorities to examine whether the "E. _____" is an "irrevocable discretionary trust" and whether distributions have been made to the complainant from the accounts of the "E. _____" (cf. E. 5.3 above); the question of the relevance of any distributions (credit card withdrawals) under income tax law is also assessed solely under Indian law. If the FTA, as the requested authority, were to clarify such questions, it would be prejudging the tax proceedings in the requesting state, which would not be compatible with the purpose of the administrative assistance proceedings (cf. judgments 2C_823/2020 of 13 October 2020 E. 4.2; 2C_141/2018 of 24 July 2020 E. 7.7.1; 2C_616/2018 of July 9, 2019 E. 3.6.2; 2C_274/2016 of April 7, 2016 E. 4.3).

5.5.3 Next, it should be noted that it would clearly go beyond the scope of a plausibility check (cf. E. 5.2 above) if the FTA, as the requested authority, were required to examine, in constellations such as the present one, how trusts are treated under tax law in the legal system of the requesting state with a view to the likely relevance of the requested information for the foreign tax proceedings (cf. Judgment 2C_918/2020 of 28 December 2021 E. 4.4.2). The same applies to the question of how and with whom inflows and outflows of funds of an account held (indirectly) by a trust are to be recorded for tax purposes. Contrary to the statements of the complainant in her reply (see p. 9), the FTA was not required to edit the "trust deed" of the "E. _____" in order to clarify its legal nature in more detail.

5.5.4 In the doctrine, the position is occasionally taken that it is not completely excluded that in administrative assistance proceedings, the lack of probable relevance of requested

information is concluded by reference to provisions of the law of the requesting state (see ANDREA OPEL, in: Zweifel/Beusch/Oesterhelt [ed.], Amtshilfe, 2020, § 3 n. 126 [example of the statute of limitations]). How this relates can be left open in the present case. In a constellation such as the present one, in which for this purpose detailed substantive clarifications of Indian law would have to be carried out (cf. E. 5.5.2 above) and insofar the framework of a plausibility check would clearly be exceeded (cf. E. 5.5.3 above), this is out of the question. It is also not for the FTA to deal with the case law of the Indian Supreme Court or to interpret its considerations. In this respect, it is irrelevant that, according to the complainant, this court has ruled that irrevocable discretionary trusts are not to be credited to their beneficiaries for income tax purposes as long as no payments have been made to them. Should the legal situation in India really be as alleged by the complainant, and if the "E. _____" were indeed (and also from the perspective of the Indian authorities) an "irrevocable discretionary trust", this would have to be taken into account by the Indian tax authorities.

5.6 In agreement with the lower court and the FTA - and in response to the legal question raised at the outset (see E. 5 above) - it must therefore be assumed that in principle all documents edited by Bank B. _____ AG (and in particular also the portfolio and account statements) are likely to be relevant.

6.

Next, the complainant submits that the present request for administrative assistance violates the principle of good faith under international law. The request for administrative assistance is based on stolen data. As can be seen from an internal note of the FTA, India had given an assurance, among other things, for the present case that it would not submit another request for administrative assistance until after the planned revision of Article 7(c) of the FTA Act. This revision had never taken place.

The question raised by the complainant was dealt with by the Federal Supreme Court in a recently decided case (see judgment 2C_141/2018 of 24 July 2020). The Federal Supreme Court considered "[que] l'Inde n'a pas, contrairement à la France, formulé d'engagement exprès qu'elle s'abstiendrait de formuler une demande d'assistance sur la base de renseignements obtenus par des actes punissables en regard du droit Suisse" (loc. cit., E. 6.2.3); consequently, the Federal Supreme Court thus denied the existence of a breach of trust by India in a constellation such as the present one. Since it is not apparent to what extent assurances by India could be derived from the internal FTA note invoked by the complainants that do not also result from the joint declarations of the Indian Revenue Secretary and the then Swiss State Secretary for International Financial Matters of October 15, 2014 and June 15, 2016, which have already been taken into account in the above-mentioned judgment, the objection of the complainant proves to be unfounded.

7.

In view of the above, the appeal proves to be unfounded. It is to be dismissed insofar as it is to be admitted (see E. 2.2.3 above).

8.

It thus remains to decide on the procedural motion of the complainant, according to which her name must be made anonymous in the version of the headline and the operative part of the present judgment intended for public circulation, or that the media must be informed in a subsidiary manner that there are reasons against her name being mentioned in public.

8.1 Pursuant to Art. 59 para. 3 Federal Supreme Court Act, the Federal Supreme Court shall make the dispositive of decisions that have not been publicly deliberated publicly available for 30 days after they have been issued. This publication shall be made in a non-anonymous form, unless the law requires anonymization (Art. 60 FSCA [SR 173.110.131]); this is intended to comply with the principle of public access contained in Art. 30 para. 3 Federal Constitution, Art. 6 para. 1 ECHR and Art. 14 para. 1 UN Covenant II (SR 0. 103.2), the principle of public pronouncement of the judgment as well as transparency shall be taken into account (BGE 133 I 106 E. 8.2; Judgment 2C_799/2017, 2C_800/2017 of September 18, 2018 E. 7.1; see also BGE 143 I 194 E. 3.1).

8.2 In the present case, there is no statutory provision according to which the dispositive may only be disclosed in anonymized form. Other exceptions are to be assumed very cautiously if the right of personality would be particularly severely impaired by the non-anonymized imposition of the dispositive (see judgments 2C_799/2017, 2C_800/2017 of September 18, 2018 E. 7.2 with references; 2C_949/2010 of May 18, 2011 E. 7.2). It is up to the party demanding the exclusion of the public from the proceedings or the waiver of the publication of the judgment to substantiate and prove its interest worthy of protection in such measures (judgments 2C_799/2017, 2C_800/2017 of September 18, 2018 E. 7.2; 2C_201/2016 of November 3, 2017 E. 3.2, not published in: BGE 144 II 130).

8.3 In the present case, the complainant justifies her request by stating that she had been informed that, in the wake of the Federal Supreme Court decision 2C_321/2021, an article had been published in the medium "Gotham City" in which the name of the complainants there had been revealed; those complainants belonged to the same family as she herself. The journalist responsible for the publication had publicly stated that he had been able to find the name of the complainants on the basis of the public court order in the Federal Court. The reporting had caused a great stir in India in connection with unproven allegations of corruption; the personality of the complainants at the time had been considerably affected by this, as their reputation had been attacked. She - the complainant - was herself a person of public interest in India as the wife of a well-known entrepreneur who had died in the meantime. A report such as the one that followed the judgment 2C_321/2021 would therefore particularly affect her.

8.4 The submission of May 28, 2021 does not substantiate that the complainant's rights of personality would be particularly severely affected if her participation in the present proceedings were to become public. In particular, it is not apparent in what way the complainant would be in a substantially different situation than other persons affected by requests for assistance from the tax office. The articles submitted by the complainant, which appeared in the wake of the judgment 2C_321/2021, do not provide such evidence. Moreover, the complainant is to be held responsible not least on the basis of her own statement that she is a person of public interest in India; as such, she must put up with more (in terms of media law) than other persons (cf. BGE 147 II 185 E. 4.3.3). For this reason, there is also no reason for the Federal Supreme Court to deviate in the present case from the usual procedure for the publication of the judgment or to give the media instructions on how to deal with the name of the complainant. The complainant's procedural motion must be dismissed.

In view of this outcome of the proceedings (see E. 7 above), the costs of the proceedings before the Federal Supreme Court are to be imposed on the complainant (Art. 66 para. 1 Federal Supreme Court Act). No compensation is due to the parties (Art. 68 para. 3 Federal Supreme Court Act).

Accordingly, the Federal Supreme Court finds:

1.

The appeal is dismissed insofar as it is upheld.

2.

The procedural motion regarding publication is dismissed.

3.

The court costs of CHF 3,000.00 are ordered to be paid by the complainant.

4.

This judgment shall be communicated in writing to the parties to the proceedings and to the Federal Administrative Court, Division I.

Lausanne, December 28, 2021

On behalf of the II Public Law Division
of the Swiss Federal Supreme Court

The President: Seiler

The Clerk: Brunner