

#16: Fishing expeditions, or not?

Transparency is a keyword these days. The banking secrecy is something that belongs to the past. All over the world information is exchanged between countries and tax authorities in order to counteract tax evasion. Also in the Netherlands, the Dutch Tax Authorities have intensified their efforts to prevent tax evasion. However, it is up for debate whether these authorities are overreaching their powers. In this article we take a closer look at two recent cases in which the Dutch Tax Authorities pushed the limits in their attempt to receive information from UBS and American Express by submitting information requests to foreign tax authorities. Although the Courts in these two cases allowed the information exchange, we have some critical notes.

On [12 September 2016](#) the Federal Court of Switzerland (Bundesgericht) judged that the requested information by the Dutch Tax Authorities about Dutch UBS bank account holders in Switzerland could be provided. This request was based upon the existing [tax treaty](#) to prevent double taxation between both countries. In their request the Dutch authorities asked for names and the annual balances over the period of 1 February 2013 to 31 December 2014 of residents of the Netherlands who were holding an account at UBS. The request concerns the persons who did not complete the declaration that their assets are taxed as required by UBS.

A customer of UBS objected to the permission granted by the responsible Swiss tax authority (Dienst für Informationsaustausch in Steuersachen: SEI), stating that this request was not specific enough. Therefore it should be qualified as a fishing expedition. The customer referred to the commentary of article 26 of the Treaty stating that an information request should contain enough information to

identify a person, more specifically their name. The 'Bundesgericht' refers to the commentary of the treaty, which states that tax authorities of the requesting state must provide sufficient data to identify the person who is subject of the investigation. In particular their name and, if known, their address etc. However, the Court continues by stating that this provision should be interpreted in a way that it does not frustrate or restrict the effectiveness of the information exchange. Requests for information should be allowed "to the widest possible extent". From that perspective the Court concludes that although in principle the names of the taxable persons must be provided, it may be sufficient if other information is available to identify someone.

The Court then considers whether the request in this case is specific enough or should be qualified as a fishing expedition. For that purpose it takes a look at the examples given in the commentary on the [OECD Model Tax Convention](#) as updated in 2012, which seeks to clarify the definition of a fishing expedition by providing several examples. Some examples are the following:

- Information can be exchanged, for example, in case State A has obtained information on all transactions involving foreign credit cards of its residents but was not able to obtain the names of the credit card holders. In that case State A can send a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards that were issued at a bank in state B. State A then has to supply the relevant individual credit card numbers and convincing information showing that the users of these cards were tax residents of State A.
- The same goes for the situation in which bank B is established in State B and offers a tax wise questionable product in State A. State A has discovered several resident taxpayers that invested in the product

and all of them had failed to report the resulting income. State A was not able to identify those individuals and therefor requests information from State B.

- No obligation to provide information exists in the situation in which Bank B is a bank established in State B and State A requests that State B provides the names, date and place of birth, of residents of State A that have an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any explanatory facts and circumstances for a specific suspicion of a tax infringement.

In the present case the Dutch request merely asks for names and balances of accounts of all persons who were holding an account at UBS, who were residents of the Netherlands and who did not comply with the form that UBS sent to its customers to proof that the balances on the account were subjected to taxes. The Dutch information request is comparable to the situation between the first and last example given above. It seems like a matter of personal appreciation whether or not to qualify the Dutch information request as being precise enough. The Court comes to the conclusion that the present case is a 'borderline situation' that is only just permissible under the scope of the treaty.

The second case we want to discuss takes place in the United States. On [31 March 2017](#) the U.S. District Court for the Western District of Texas El Paso Division, ruled that American Express must provide information to U.S. tax authorities seeking the names of Dutch residents with credit cards linked to bank accounts outside the Netherlands.

In this case the Dutch Tax Authorities sent an information request, based upon article 30 of [the Convention Between the Government of the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the](#)

[Prevention of Fiscal Evasion](#), to the 'Internal Revenue Service' (IRS). The Dutch Tax authorities requested the names of Dutch tax payers, who at any time during the period January 1, 2009 through December 31, 2016, held an American Express payment card linked to a bank account located outside the Netherlands. The Court authorized a so-called 'John Doe' summon. A John Doe summon may be issued by the Internal Revenue Service to a third party to provide information on an unnamed, unknown tax payer with potential tax liability. According to the [Internal Revenue Code Section 7609\(f\)](#) a John Doe summon may be issued 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.”

Regarding the ascertainable group the Court considers that the request is targeting Dutch tax payers, who at any time during the period January 1, 2009, through December 31, 2016, held an American Express payment card linked to a bank account located outside the Netherlands. American Express should be able to identify which of its Dutch clients held an account linked to a bank account outside the Netherlands and, thus, which of its clients fall within the ambit of the “John Doe” summons. Further, the group request was narrowed to only those who used the card for at least 75 days in the Netherlands and the total amount charged or paid for all transactions together was greater than 10,000 euros. Due to these specifications the group was sufficient ascertainable according to the Court.

Furthermore, the Netherlands Tax and Customs Administration (NTCA) has provided the IRS with information that shows that it began a pilot project in which information on the use of payment cards (debit and credit cards) issued by foreign financial institutions is used to identify non-compliant Dutch tax payers. This was to test whether it is possible to effectively identify Dutch tax payers with undisclosed foreign bank accounts by analyzing payment transactions taking place in the Netherlands with cards issued by financial institutions outside the Netherlands. According to the NTCA the pilot project successfully identified the cardholders of 75 percent of the cards and two-thirds of the identified cardholders confessed to having undisclosed offshore bank accounts linked to payment card in question. For the Court this offers a reasonable basis to believe the targeted group could have failed to comply with the Dutch tax duties.

The Court decided that the IRS could force American Express to provide the requested information.

Both the UBS and the American Express case relate to an approved information request targeting a large and non-specific group of persons. However, each of the cases have their own grounds which makes it at least questionable whether or not the potential evidence obtained from those requests is admissible in the Dutch Courts. The information request directed to UBS might lack sufficient identifiability to get qualified as a permissible group request, since both specific personalia and account numbers are missing.

In the case of American Express it is questionable whether the group request is justified if the suspicion is only motivated by previous research results, indicating that only a certain percentage of the addressed group might fail to comply with the tax laws. Therefore, it is questionable if the second criteria to issue a John Doe summon is met. Furthermore, the pilot project shows that the Dutch authorities could identify foreign card holders. For this reason we believe the third

criteria to issue a John Doe summon is also not met since the information sought is readily available from other sources.

Although the Court decisions allowed these specific information requests, we believe that these types of requests are too broad and do not fulfill the criteria set out in the international tax treaties. Therefore there are still arguments to go against these broad information requests.

If you have any questions about this subject or you would like to discuss this, please contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl