

# IATJ Assembly 4th/5th September 2015

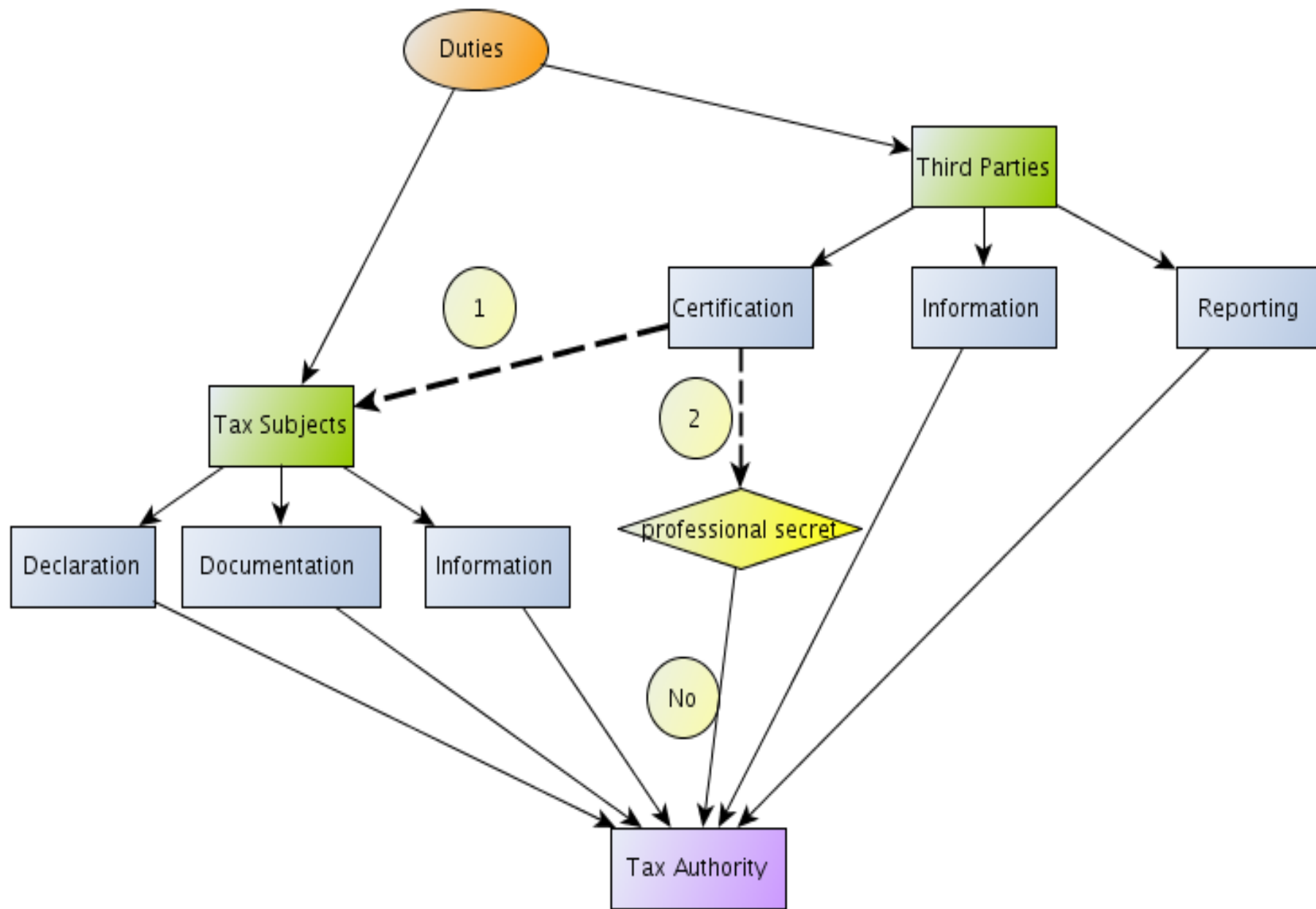
## Cross-Border Information

Switzerland

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# Tax Declaration

Art. 124 Federal Law on the Direct Federal Tax (14.12.1990; DFTL)

1 Tax subjects shall be requested, through public notice or delivery of the form, to file the tax declaration. Tax subjects who do not receive a form shall be required to demand the same from the competent authority.

2 The tax subject shall be required to fill out the tax declaration form truthfully and complete, personally sign it and file it on a timely basis, together with all prescribed exhibits, with the competent authority.

3 A tax subject who fails to file a tax declaration or who files an inadequately completed tax declaration shall be requested to correct the omission within an appropriate time period.

4 [...]

# Exhibits to the Tax Declaration

## Art. 125 DFTL

1 Individuals must attach to the tax declaration as exhibits, in particular:

a. [...]

b. certificates as to all earnings as the member of a board of directors or other executive organ of a legal entity;

c. schedules of all securities, claims and debts.

2 Individuals with income from gainful self-employment and legal entities must attach to the tax declaration the signed annual accounts (balance sheets, profit and loss accounts) for the tax period or, if no commercial accounts are kept, a schedule of assets and liabilities, earnings and expenditures and private withdrawals and private deposits.

3 [...]

# Additional Duties to Assist

## Art. 126 DFTL

- 1 The tax subject must do everything possible to facilitate a complete and accurate assessment.
- 2 At the request of the assessment authorities, he must, in particular, provide oral or written information and produce business accounts, receipts, further certificates and documents relating to the course of business.
- 3 Individuals with income from gainful self- employed activity and legal entities must preserve documents and other evidence relating to their activities for a ten year period. The way of bookkeeping and safeguarding has to comply with the Code of Obligations.

# Certification Duty of Third Parties

## Art. 127 DFTL

1 The following persons shall be required to issue written certificates to the tax subject:

- a. employers, with respect to their payment to employees;
- b. creditors and debtors, with respect to the existence of, the amount of interest on and security relating to claims;
- c. insurers, with respect to the redemption value of insurance policies and the benefits already paid out or owed based on the insurance relationship;
- d. trustees, asset managers, pledges, agents and other persons who have or had possession of management control over assets of the tax subject, with respect to these assets and the profits thereon;
- e. persons who engage or engaged in business transactions with the tax subject, with respect to the mutual claims and payments.

2 If, notwithstanding a warning notice, the tax subject fails to file the required certificates, the assessment authority may demand these from third parties. Professional confidentiality protected by the law shall take precedence.

# Informational Duty of Third Parties

Art. 128 DFTL

Shareholders, partners, co-owners and joint owners must, upon request of the tax authorities, provide information concerning their legal relationship to the tax subject, in particular with respect to the tax subject's shares, claims and drawings.



# Third Party Reporting Duty

Art. 129 DFTL

1 A certificate must be filed with the assessment authorities for each tax period by:

a. legal entities, with respect to payments made to members of the board of directors and other executive organs. In addition, foundations must file certificates with respect to payments made to their beneficiaries.

b. [...]

c. simple, limited and general partnerships, with respect to all circumstances of importance in connection with the assessment of the partners, in particular with respect to the partners' shares in the partnership income and assets.

d. [...]

# Forseeable relevant Information

1. SSC Case 2A.41/1997, 11.1.1999

Life Insurance Company; obligation to present details on individual premium deposits of clients

2. SSC Case 2C\_1174/2014, ??? (= SFAC Case A-3294/2014, 8.12.2014)

Swiss residents. French request for administrative assistance in tax matters. Demand of information about swiss bank accounts. Disputed if taxpayers where residents of France.

## Professional Secret (in part. banking confidentiality) (1)

- Only for professional secrets protected by Swiss Legislation

=> Banking Information of foreign banks situated abroad are not protected by the banking secrecy ( Tax Appeal Commission Zurich, 28.9.2006)

- (Direct) Access to Banking Information (de lege lata):

TAAA Art. 8

2 Information that is in the possession of a bank, another financial institution, a mandated or authorised person or a fiduciary, or information concerning a participation in a legal entity may be requested if the applicable agreement provides for the transfer of such.

	Internal	Exchange of Information
Tax Fraud	X	X
massive Tax Violation	X	X
Tax Evasion		X
ord. Assessment		X

## Professional Secret (in part. banking confidentiality) (2)

- SSC Case 2C\_963/2014, ??? (= SFAC A-1606/2014 7.10.2014)

Dutch request for administrative assistance in tax matters. Demand of information about Swiss bank accounts of a Dutch taxpayer, his BV in the Netherlands and of to Companies in Switzerland, controlled by the Dutch taxpayer.

Disputed if the exception from banking confidentiality takes place  
(Art. 26 Par. 5 DTT CH-NL according to OECD MC Art. 26 Par. 5)

# Obligation of disclosure (1)

Cf. Constitution Art. 29 General procedural guarantees

1 Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

2 Each party to a case has the right to be heard.

3 [...]

## Obligation of disclosure (2)

Art. 114 DFTL and 110 DFTL (regarding empirical values etc)

### 114 Inspection of Records

1 Tax subjects shall be entitled to inspect records which they have filed or signed. Spouses who are assessed jointly shall have a mutual right to inspect records.

2 Other records may be inspected by the tax subject to the extent that the factual inquiry has been completed and no opposing public or private interests exist.

3 If a tax subject is refused the right to inspect a particular document, such document may be relied on to the detriment of the tax subject only if the authority has provided him oral or written notice as to the substance of the document which is of significance in the matter and, further, given him the opportunity to respond and describe counterevidence.

4 The authorities shall, at the tax subject's request, confirm the denial of inspection of the record by means of an order which may be contested on appeal.

## Obligation of disclosure (3)

Art. 114 DFTL and 110 DFTL (regarding empirical values etc)

### 110 Duty of Confidentiality

1 Whoever is entrusted with the enforcement of this law or is called upon to assist therein shall be required to maintain silence concerning facts which become known to him in the performance of his duties and concerning negotiations by the authorities and to deny third parties access to official records.

The provision of information shall be permissible to the extent that a legal basis exists therefor under federal law.

=> SSC Case 2A.651/2005, 21.11.2006 (concerning VAT)

# Obligation of disclosure (4)

Tax Administrative Assistance Act, TAAA

Section 4a: Procedure with Deferred Notification of Persons entitled to Appeal

Art. 21a

1 Exceptionally, the FTA shall notify persons entitled to appeal about a request by means of a decree after the information has been transmitted if the requesting authority demonstrates that the purpose of the administrative assistance would be defeated and the success of its investigation would be thwarted by prior notification.

2 If an appeal is filed against the decree, only a declaration of unlawfulness can be requested.

3 The FTA shall inform the information holders and authorities who were made aware of the request about the deferred notification. These persons and authorities may not inform persons entitled to appeal about the request until after their deferred notification.

[...]



# "nemo tenetur se ipsum accusare" (1)

- SSC 138 IV 47  
Principle in Art. 14 Par. 3 lit. G UN International Covenant on Civil and Political Rights and Art. 6 Par. 2 ECHR
- in (all) criminal procedures  
(cf. ECHR Engel and others v/The Netherlands 8.6.1976: a) internal law; b) oppressive purpose; c) kind and severity of sanction)
- => internal Law : splitting ordinary assessment respectively procedure for collecting a supplementary versus criminal proceeding for tax evasion
- => ECHR Chambaz c. Suisse (11663/04) 5.4.2012  
18.6.1991 taxation (discretionary assessment); appeal proceedings, calling additional documents; 17.8.2004 penalty for not submitting; 2.10.2003 conformation by SSC.  
25.2.1999 launching of investigation regarding tax evasion

## "nemo tenetur se ipsum accusare" (2)

### Art. 9 TAAA Procurement of information from the person concerned

1 If the person concerned has limited or unlimited tax liability in Switzerland, the FTA shall ask him to produce the information in his possession that is likely to be necessary to respond to the request for administrative assistance. It shall prescribe a deadline for this.

2 It shall inform the person concerned of the content of the request insofar as this is necessary for procurement of the information.

3 The person concerned must produce all relevant information that is in his possession or under his control.

4 The FTA shall undertake administrative measures such as audits or inspections insofar as this is necessary to respond to the request for administrative assistance. It shall inform the cantonal tax administration responsible for assessing the person concerned of the measures envisaged and allow it to participate in their execution.

5 If the person concerned willfully fails to comply with an enforceable order to produce information issued by the FTA that gives notice of the penalties under this provision, he shall be liable to a fine not exceeding 10,000 francs.

"nemo tenetur se ipsum accusare" (3)

Art. 26 OECD MC Exchange of Information

1 [...]

2 Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

[...]

# "Fruit of the poisonous tree,, (1)

## Art. 141 Swiss Criminal Procedure Code Admissibility of unlawfully obtained evidence

1 Evidence obtained in violation of Article 140 is not admissible under any circumstances. The foregoing also applies where this Code declares evidence to be inadmissible.

2 Evidence that criminal justice authorities have obtained by criminal methods or by violating regulations on admissibility is inadmissible unless it is essential that it be admitted in order to secure a conviction for a serious offence.

3 Evidence that has been obtained in violation of administrative regulations is admissible.

4 Where evidence that is inadmissible under paragraph 2 has made it possible to obtain additional evidence, such evidence is not admissible if it would have been impossible to obtain had the previous evidence not been obtained.

5 Records relating to inadmissible evidence shall be removed from the case documents, held in safekeeping until a final judgment has concluded the proceedings, and then destroyed.

## "Fruit of the poisonous tree,, (2)

- Case SSC 2C\_180/2013, 5.11.2013

Abroad illegally obtained evidence may be used in Switzerland, if the Swiss authorities did not participate to the illegal act and didn't behave against good faith

- Art. 7 TAAA 7 Non-consideration

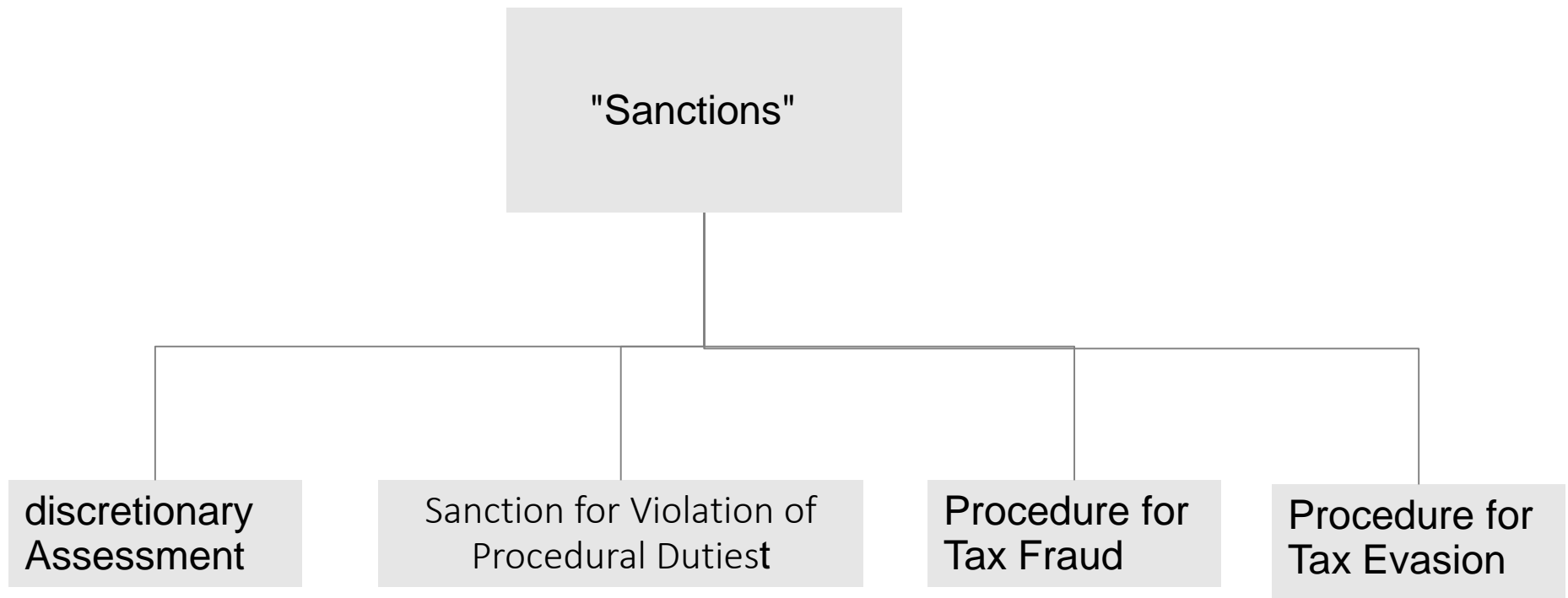
The request will not be considered if:

- a. it constitutes a fishing expedition;
- b. it requests information not covered by the administrative assistance provisions of the applicable agreement; or
- c. it violates the principle of good faith, particularly if it is based on information obtained through a criminal offence under Swiss law.

Proposal of the Swiss Federal Council 14.8.2013:

...

- c. it violates the principle of good faith, particularly if it is based on information obtained by the requesting state actively through a criminal offence under Swiss law.



# Assessment - Execution

## Art. 130 DFTL

1 The assessment authorities shall review the tax declaration and carry out the necessary investigations.

2 If the tax subject has, notwithstanding a warning notice, failed to fulfil his procedural duties or if the tax factors cannot be determined beyond doubt due to the absence of reliable documentation, the assessment authorities shall carry out a discretionary assessment. They may thereby take into account empirical figures, changes in wealth and the living expenses of the tax subject.

# Violation of Procedural Duties

Art. 174 DFTL

1 Whoever intentionally or negligently fails, despite a warning notice, to comply with a duty to which he is subject under either the provisions of this law or an order issued hereunder, in particular, whoever:

- a. fails to file the tax declaration or the required exhibits thereto,
- b. fails to comply with a certification, informational or reporting duty.
- c. [...]

shall be punished with a fine.

2 [...]



# Tax Evasion

Art. 175 and 176 DFTL

175

1 Any tax subject who intentionally or negligently causes an assessment to be wrongfully omitted or a final assessment to be incomplete;

[...]

shall be punished with a fine.

2 [...]

176

1 Whoever attempts to evade a tax shall be punished with a fine.

2 [...]

# Tax Fraud

## Art. 186 DFTL

1 Whoever uses, for the purpose of tax evasion within the meaning of Arts. 175 – 177, forged, falsified or substantively incorrect documents, such as business books, balance sheets, profit and loss statements and salary certificates or other third party certifications, shall be punished with imprisonment or a fine up to Sfr. 30,000.

2 Punishment on the basis of tax evasion shall take precedence.