



# Decision impact statement

## A. AG v Federal Tax Administration

### **❶ Relying on this Decision impact statement**

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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| <b>Venue:</b>              | Federal Supreme Court of Switzerland |
| <b>Venue reference No:</b> | 2C_219/2024                          |
| <b>Judgment date:</b>      | 8 May 2024                           |

### Summary of decision

1. This Decision impact statement outlines the Commissioner's response to a decision of the Federal Supreme Court of Switzerland (Court). In its decision, the Court dismissed a Swiss company's appeal against a lower Swiss court's earlier decision to uphold the fulfillment of a request for information relevant to a transfer pricing audit that the ATO made to the Swiss Federal Tax Administration (SFTA) under Article 25 of the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, with Protocol* [2014] ATS 33 (Swiss Convention).
2. All judgment references in this Decision impact statement are to the judgment of *A. AG v Federal Tax Administration*, unless otherwise indicated.

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## Overview of facts

3. The ATO commenced an audit on an income tax consolidated group that operated franchises in Australia. The audit examined whether the group's Australian resident head company obtained a transfer pricing benefit under Australia's transfer pricing laws in Subdivision 815-B of the *Income Tax Assessment Act 1997* (ITAA 1997).<sup>1</sup>

4. The audit's scope included considering if a difference existed between the actual conditions and the arm's length conditions of the head company's commercial or financial relations with the Swiss company that supplied the head company's trading stock (Swiss supplier).<sup>2</sup> In its decision, the Court referred to the head company as B, and to the Swiss supplier as A. AG.

5. Under Article 25 of the Swiss Convention, the ATO requested the SFTA to provide information concerning the Swiss supplier's dealings with the head company and the head company's Australian subsidiaries (Australian companies).<sup>3</sup> In its request, the ATO informed the SFTA that the Australian transfer pricing laws at issue in the audit (Subdivision 815-B of the ITAA 1997) applied the arm's length principle to transactions between affiliated and non-affiliated companies.<sup>4</sup>

6. Article 25 of the Swiss Convention concerns the provision of administrative assistance by competent authorities of the SFTA and the ATO. Under Article 25, administrative assistance involves the exchange of information (EOI) between competent authorities that is foreseeably relevant to administering or enforcing domestic laws concerning taxes imposed in Switzerland or Australia, provided that taxation under such laws is not contrary to the Swiss Convention.

7. The Swiss supplier objected to the SFTA providing the ATO with the requested information.<sup>5</sup> The Swiss Federal Administrative Court rejected the Swiss supplier's challenge<sup>6</sup>, finding that the requested information would serve the ATO in the application of Australia's transfer pricing laws.<sup>7</sup> The Swiss supplier then appealed to the Court.<sup>8</sup>

8. On appeal, the Swiss supplier contended that the ATO should be refused the information, because it was requested for an audit that contemplated making adjustments contrary to Article 9 of the Swiss Convention, which deals with the arm's length allocation of profits between associated enterprises.<sup>9</sup> The Swiss supplier contended that the audit adjustments contemplated by the ATO were contrary to Article 9, because they concerned prices charged by the Swiss supplier to the head company in circumstances where the Swiss supplier and the head company had no affiliation in terms of capital, and therefore no association, for the purposes of Article 9.

## Issues decided

9. The Court dismissed the Swiss supplier's appeal<sup>10</sup>, having regard to the foreseeable relevance of the request and the trust principle under international law.<sup>11</sup>

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<sup>1</sup> At [A].

<sup>2</sup> At [A].

<sup>3</sup> At [A].

<sup>4</sup> At [1.4.2].

<sup>5</sup> At [B].

<sup>6</sup> At [B].

<sup>7</sup> At [1.4.1].

<sup>8</sup> At [C].

<sup>9</sup> At [1.2].

<sup>10</sup> At [2].

<sup>11</sup> At [1.4].

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## **Foreseeable relevance**

10. The Court held that:

- For administrative assistance to be provided by EOI under Article 25 of the Swiss Convention, the request for information had to have likely relevance to a transfer pricing review.<sup>12</sup>
- It was well settled that the requested information will satisfy this requirement, if it relates to the application of the domestic transfer pricing laws in the jurisdiction of the tax administration that makes the request, or if the requested information otherwise appears to be potentially suitable for use in proceedings in that jurisdiction concerning such laws.<sup>13</sup>
- To succeed in its appeal, the Swiss supplier had to demonstrate the existence of a legal question of fundamental importance.<sup>14</sup> As the Swiss supplier did not argue that the requested information was unsuitable for use in connection with Australia's domestic transfer pricing laws, there was no legal question of fundamental importance underlying the appeal.<sup>15</sup>

11. Notably, the Court also held that the Swiss supplier's contention that it was not affiliated by capital with the Australian companies, did not assist its appeal against fulfillment of the information request, and was a matter to be raised with the ATO for consideration in relation to the application of the transfer pricing laws in Australia.<sup>16</sup>

## **Trust principle**

12. The Court held that the principle of trust under international law requires the state from which the information is requested to rely on the information provided to it by the requesting state.<sup>17</sup>

13. The Court noted and did not express any concern with the Swiss Federal Administrative Court's view that an intention for taxation contrary to the Swiss Convention could not be inferred from the ATO's disclosure to the SFTA, which explained that Australian transfer pricing laws can apply to transactions between affiliated and non-affiliated entities.<sup>18</sup>

14. The Court considered that any taxation contrary to the Swiss Convention was a matter to be clarified directly between the contracting states and not an issue for resolution as part of the EOI framework.<sup>19</sup>

## **ATO view of this decision**

15. This decision demonstrates that the application of Australia's transfer pricing laws in Subdivision 815-B of the ITAA 1997 to the commercial or financial relations of cross-border entities – whether or not they are associated enterprises for tax treaty purposes – should not limit our ability to request information under tax treaties, where that information is foreseeably relevant to ensuring compliance with those laws.

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<sup>12</sup> At [1.4.1].

<sup>13</sup> At [1.4.1].

<sup>14</sup> At [1.1].

<sup>15</sup> At [1.4.1].

<sup>16</sup> At [1.4.2] and [1.5].

<sup>17</sup> At [1.4.2].

<sup>18</sup> At [1.4.2].

<sup>19</sup> At [1.5].

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16. We welcome this decision. It supports our use, in appropriate cases, of EOI powers under Australia's income tax treaties, to request information from foreign jurisdictions which we consider relevant to administering or enforcing Australia's transfer pricing laws.

## Implications for affected advice or guidance

17. We are reviewing the impact of this decision on related advice or guidance.

## Comments

18. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

**Date issued:** 10 October 2025

Contact officer details have been removed as the comments period has ended.

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**Commissioner of Taxation**  
10 October 2025

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## References

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### *Legislative references:*

- ITAA 1997 Subdiv 815-B

### *Cases relied on:*

- A. AG v Federal Tax Administration 2C\_219/2024

### *Other references:*

- Convention between Australia and the Swiss Confederation for the Avoidance of Double

Taxation with respect to Taxes on Income, with Protocol [2014] ATS 33 Article 9

- Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, with Protocol [2014] ATS 33 Article 25

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### ATO references

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