

French 'Accidental Americans' Seek to Advance FATCA Fight

by Jennifer McLoughlin

The EU's highest court could wade into an ongoing overseas battle by birthright citizens to cut tax ties with the United States.

Since 2017 the France-based Association of Accidental Americans (AAA) has been fighting against the U.S. Foreign Account Tax Compliance Act, a sweeping law enacted in 2010 to curb tax evasion through exchange of financial information related to U.S. taxpayers.

In a legal action pending before the French Administrative Supreme Court (Conseil d'État), the AAA is contesting a decree implementing the FATCA intergovernmental agreement between France and the United States. The claims broadly allege violations of EU data protection laws and infringement of the French Constitution for lack of reciprocity.

The Conseil d'État canceled a hearing previously scheduled for January to seek additional information from the French National Commission for Data Protection and Freedoms, AAA founder Fabien Lehagre told *Tax Notes*.

Given the potential political ramifications, the French court might be inclined to refer the EU data protection dispute to the Court of Justice of the European Union, according to Régis Bismuth, a professor of public law with the Sciences Po Law School. Bismuth authored a paper that informed the AAA's legal action.

"It's a highly sensitive issue from a political standpoint because the decision of the French Council of State could basically invalidate to some extent a treaty that has been negotiated by the French executive," Bismuth told *Tax Notes*.

There is ample evidence demonstrating the lack of reciprocity, Bismuth noted, but a decision on those grounds would isolate France with its FATCA challenge, whereas a potential CJEU preliminary ruling on FATCA's compliance with EU laws would have far-reaching repercussions beyond the dispute arising out of France.

"This would have an impact for the 28 member states of the European Union," Bismuth said. "Because the other 27 member states would not be in the position to ignore the ruling of the [CJEU], even though it concerns the specific act

implementing FATCA in the French legal system."

The pending French lawsuit is not the only courtroom battle over FATCA. Other suits have been unsuccessful, including one in the United States and another in Israel. Also, the Federal Court of Canada in Vancouver is assessing a FATCA constitutional challenge after previously dismissing other claims.

Accidental Consequences

Under FATCA, foreign financial institutions must report on accounts held by U.S. persons or otherwise face a 30 percent withholding tax on U.S.-source payments. U.S. persons who fail to report their foreign-held assets are also subject to penalties.

Caught up in FATCA's global reporting regime are so-called accidental Americans, which include nationals residing overseas who are U.S. citizens because they were born on American soil but have had negligible links to the United States. A typical accidental American left the United States at a young age and never returned to study, work, or otherwise live in the country.

Because of the United States' system of citizenship-based taxation, individuals who accidentally inherited U.S. citizenship are liable for taxes on their global income.

Lehagre is one of the accidental Americans. Born in the United States in 1984, Lehagre returned to France with his French father in 1986. When his bank requested his identification number for U.S. tax purposes in 2014, Lehagre believed the request was in error until further research revealed his obligations under the United States' worldwide tax system.

The burdens that birthright citizens face under FATCA extend beyond the general reporting and tax obligations, Lehagre explained.

For example, financial institutions can be reluctant or unable to assume the FATCA burdens and costs and risk noncompliance penalties, leading them to close accounts and deny access to banking services, insurance coverage, and investment opportunities. Anyone seeking to renounce their U.S. citizenship must pay an administrative fee of \$2,350, with taxes and legal fees often adding to the final bill.

Lehagre said the AAA is working toward removing the taxpayer status for dual French-American nationals living permanently outside the United States. Another goal is a “streamlined and free-of-charge procedure managed by [the] French Foreign Affairs Ministry” for individuals seeking to renounce their U.S. citizenship, he said.

These issues have not escaped the attention of French and European officials and stakeholders, many of whom have engaged in efforts to probe or protest the FATCA fallout. France’s National Assembly, for example, established a special committee to study the tax liability of dual nationals living in France.

At the European level, members of the European Parliament passed a July 2018 resolution that raised, in part, the potential breach of EU data protection laws and called for negotiations with the United States to ease the process of renouncing U.S. citizenship for accidental Americans. And in an August 2018 letter addressed to U.S. Treasury officials, the European Banking Federation voiced concerns about FATCA’s “unintended consequences” and stressed the need for a “permanent solution to address the issue of the ‘Accidental Americans.’”

2 Flaws

It was an accidental American who in early 2017 wrote to Bismuth, who has written on the extraterritorial reach of U.S. law, which led to discussions with Lehagre regarding a legal and political strategy to undo the burdens arising out of FATCA. Bismuth authored the paper assessing FATCA’s flaws, which was intended as a tool that the accidental Americans could use to communicate with political officials and explore legal options.

“I told them it’s really a collective issue, so I cannot advise you to write a specific letter to financial institutions basically saying that there is discrimination based on nationality. This is not going to work this way,” Bismuth said.

FATCA in part emerged from the 2009 banking scandal involving Switzerland’s UBS AG, which paid \$780 million in fines and taxes as part of a deferred prosecution agreement following allegations that it helped conceal an estimated \$17 billion in undisclosed accounts for around 17,000 U.S. clients.

According to Bismuth, FATCA’s indiscriminate demand for a disproportionate volume of data is inconsistent and incompatible with EU laws protecting personal data. FATCA is not “necessarily targeting those who are not in compliance with U.S. tax regulations, but it goes far beyond the question of being compliant with the [IRS] basically,” he said.

Further, Bismuth explained that the United States has not implemented FATCA on a reciprocal basis because it does not collect the same categories of information.

As with other FATCA intergovernmental agreements, French financial institutions have broader reporting requirements under the France-United States IGA, which acknowledges the lack of full reciprocity:

The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with France. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with France by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.

Article 55 of the French Constitution provides that ratified treaties or agreements implemented on a reciprocal basis supersede domestic law. Therefore, the FATCA agreement has no legal effect without mutuality and the implementing decree is invalid under French law, according to Bismuth.

However, annulment of the implementing decree would not revoke the IGA between France and the United States. Bismuth explained that while the Conseil d’État may find that the IGA lacks legal effect under French law, consequently nullifying the implementing decree, the IGA would still exist.

Annulment of the French implementing decree would leave financial institutions “in a very tricky situation,” Lehagre noted. “[The banking institutions] could no longer comply with U.S. legislation because there would no

longer be a legal basis in France authorizing this transfer of information to the United States," he said. "However, in the event of a refusal to comply, French banking institutions could be subject to a 30 percent penalty imposed by the United States on all financial transactions issued by the United States."

Repealing Citizenship-Based Taxation

Accidental Americans are also hopeful that FATCA will fall to the wayside under President Trump's administration, Lehagre noted, pointing to the 2016 Republican platform, which called for FATCA's repeal. A July 2018 report highlighting the costs and shortcomings with the IRS's implementation of FATCA further favors repeal, he added.

Meanwhile, a U.S. House bill introduced in December 2018 proposed a residence-based tax regime in the United States. The measure is a "huge first step for everyone," said Marylouise Serrato, executive director of American Citizens Abroad.

The Tax Fairness for Americans Abroad Act of 2018, H.R. 7358, would provide a tax exemption for foreign-source income of nonresident citizens who secure qualified nonresident citizen status.

Qualifying individuals must be U.S. citizens with a foreign tax home who have complied with U.S. income tax laws for the previous three years. While this requisite would prove problematic for accidental Americans who didn't realize their tax obligations, Serrato noted that future deliberations over the bill likely will touch on compliance issues and the community of accidental Americans.

American Citizens Abroad will also continue to advocate for a same-country exemption from FATCA reporting, Serrato said, explaining that the Tax Fairness for Americans Abroad Act would not repeal FATCA. American Citizens Abroad has long supported a same-country exemption that would remove the reporting requirement for accounts held by U.S. citizens residing overseas. ■