

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

GEORGE S. HARRINGTON,)
)
Petitioner(s),) **BD**
)
v.) Docket No. 13531-18.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

This case was calendared for trial on February 7, 2020, in San Francisco, California. The issues for decision are whether petitioner is liable for deficiencies and fraud penalties due to his alleged receipt of unreported income during 2005-2010. On January 28, 2020, respondent filed a Motion in Limine seeking admission into evidence of business records from the United Bank of Switzerland (UBS) to prove the truth of the matters asserted therein. Petitioner objects on grounds of hearsay and authentication. We will grant the motion.

In 2009 the U.S. Department of Justice reached an agreement with the Swiss Government concerning “accounts of interest” held by U.S. citizens and residents. Pursuant to this agreement the Internal Revenue Service (IRS) submitted to the Swiss Government, under the bilateral income tax treaty between the two nations, a request for information concerning specific accounts believed to be beneficially owned by U.S. taxpayers. The Swiss Government directed UBS to initiate procedures that would lead to turning over to the IRS information in UBS files concerning bank-only accounts, custody accounts in which securities or other investment assets were held, and offshore nominee accounts beneficially owned indirectly by U.S. persons. See U.S. Department of Justice, Press Release, U.S. Discloses Terms of Agreement with Swiss Government Regarding UBS (Aug. 19, 2009), at <http://www.usdoj.gov/opa/pr/2009/August/09-tax-818.html>. The parties acknowledged that the Swiss Federal Office of Justice would oversee UBS’ compliance with its commitments.

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Pursuant to this agreement the U.S. Competent Authority received from the Swiss Government information concerning numerous U.S. taxpayers. In September 2011 the IRS received 844 pages of information concerning UBS accounts held by or associated with petitioner. This material includes bank records, investment account statements, letters, emails between petitioner and UBS bankers, summaries of telephone calls, and documentation concerning entities through which assets were held.

Respondent has submitted with the UBS documents a “Certification of Business Records” executed by Britta Delmas, legal counsel for UBS. Ms. Delmas attached to her certification an index listing 844 Bates-numbered pages as UBS records associated with petitioner. Ms. Delmas avers that these records are original records or true copies of records that: (1) were made at or near the time of the occurrence of the matters set forth therein by persons with knowledge of those matters; (2) were kept in the course of UBS’ regularly conducted business activity; and (3) were “made by the said business activity as a regular practice.” At the bottom of her certification Ms. Delmas “declares under penalty of perjury under the laws of Switzerland that the foregoing is true and correct.”

Having considered the origin and nature of the UBS records along with the certification of Ms. Delmas, we are satisfied that the records are authentic business records of UBS and that they were used and kept in the course of UBS’ regularly conducted business activities. Respondent provided fair notice to petitioner of his intent to introduce them as such. See Fed. R. Evid. 901(11). And Ms. Delmas signed the records “in a manner that, if falsely made, would subject [her] to a criminal penalty in the country where the certification is signed.” Fed. R. Evid. 902(12). Accordingly, we will admit the documents into evidence as self-authenticating foreign business records. See Fed. R. Evid. 801(d)(2), 803(6), 902(11), (12).¹

¹It is significant that the UBS records were provided pursuant to an agreement between the United States and a foreign government. See United States v. Johnson, 971 F.2d 562, 571 (10th Cir. 1992) (“A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements.”) (quoting Federal Deposit Ins. Corp. v. Staudinger, 797 F.2d 908, 910 (10th Cir. 1986)).

Petitioner contends that Ms. Delmas cannot certify that the UBS records were business records because she is not a “custodian of records or other qualified witness.” Fed. R. Evid. 803(6), 902(11). But “[a]ll that is required of [a qualified] witness is that he or she be familiar with the record-keeping procedures of the organization.” United States v. Baker, 458 F.3d 513, 518 (6th Cir. 2006). Ms. Delmas’ experience as in-house legal counsel for UBS indicates that she has familiarity with UBS’ routine procedures for the preservation of business records. She has certified the authenticity of documents on behalf of UBS in other cases. See, e.g., United States v. Melina Ali, Docket No. 13-cv-03398-PWG (D. Md.) (2013) (ECF-39-11: 1-7). And she has filed sworn declarations on behalf of UBS in her capacity as Global Head of E-Discovery at UBS. See Olenicoff et al. v. UBS AG et al., Docket No. 8:15cv02116 (C.D. Cal.) (ECF 481) (filed Sept. 12, 2011); see also Fed. R. Evid. 201. As a lawyer tasked with supervising production of UBS records for internal investigation and discovery, Ms. Delmas was well-equipped to make the certification involved here.

Petitioner next contends that the Delmas certification lacks sufficient information to establish that the accompanying records were created as part of UBS’ regularly conducted business activity. Petitioner appears to concede that the bank statements and investment account statements constitute business records. But he questions the admissibility of documents such as emails, letters, third party communications, and summaries of “client contacts.”

Pursuant to the U.S.-Swiss agreement UBS was directed to produce to the IRS all records from its files associated with specified U.S. clients. UBS performed for its clients services well beyond those that banks typically discharge in connection with ordinary checking accounts. UBS helped to create trusts, corporations, and other entities to hold its clients’ investments, solicited its clients’ investment goals, and attempted to manage the investments in a manner consistent with its clients’ objectives. It is thus not surprising that UBS would retain, as part of its regularly conducted business activity, records of communications with its clients. See United States v. Johnson, 971 F.2d 562, 571 (10th Cir. 1992) (“[B]ank records are particularly suitable for admission under Rule 803(6) in light of the fastidious nature of record keeping in financial institutions, which is often required by governmental regulation.”)

Petitioner urges that emails are an informal mode of communication and lack the badges of trustworthiness that accompany other business records. But much of modern commerce is accomplished by email. UBS was headquartered in Switzerland and had clients in the United States and throughout the world. It is to

be expected UBS bankers in the normal course of business would communicate with their clients by email and summarize those communications in their files. Many of the emails were sent by petitioner to, or received by petitioner from, UBS bankers. Petitioner was free to dispute at trial the contents of particular communications included in the UBS records, but he did not do so.

Finally, petitioner notes that certain communications refer to other documents that are not included among the 844 pages that UBS produced. But petitioner does not explain why this is problematic. Pursuant to the U.S.-Swiss agreement, UBS produced to the IRS all records associated with petitioner that it could locate in its files. The Swiss Federal Office of Justice was tasked with overseeing UBS' compliance with its commitments. It is conceivable that UBS' search failed to locate certain documents, and its bankers may not necessarily have kept copies of every document of which they were aware. If petitioner knew of other relevant documents, he was free to bring them to the Court's attention. But it seems clear to us that the 844 pages of documents that UBS did produce were authentic business records maintained by UBS in the ordinary course of its business, and that these records may properly be admitted into evidence in this case.

In consideration of the foregoing, it is

ORDERED that Respondent's Motion In Limine, filed January 28, 2020, is granted.

(Signed) Albert G. Lauber
Judge

Dated: San Francisco, CA
February 7, 2020