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CONTACT

Marco Villa

mvilla@fbt.ch
T. +41 (0)22 849 60 40
www.fbt.ch

PERIODIC LEGAL AND TAX INFORMATION REVIEW

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CERTAIN FRENCH SOCIAL CONTRIBUTIONS PROHIBITED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION: CLAIM THEM BACK!

It is difficult to forget the outcry over the famous Amending Finance Law for 2012 (Law No. 2012-958 of 16 August 2012, Art. 29), which subjected to social contributions real-estate income as well as capital gains on immovable property from French source realised by French non-residents. Less than three years after this law was published, the Court of Justice of the European Union (CJEU) was asked to give a preliminary ruling by the Council of State; the CJEU has stated in its decision of 26 February 2015 that this French law was contrary to Community Law (CJEU No. C-623/13), which was confirmed by the Council of State in its decision of 27 July 2015 (No. 334551). ***These decisions have a rather substantial scope, since they concern in general all taxpayers, French residents or not, who have been wrongly paying social contributions.***

The CJEU has ruled on the legal status of French social contributions *(CSC – Generalized social contribution, CRDS – Contribution for the reimbursement of the social debt, social contributions, additional social security contributions)* to determine if these contributions fall within the scope of bilateral tax conventions, or of the amended version of the Community Regulation of 14 June 1971 (No. 1408/71).

Assessing that these contributions participate in the financing of mandatory social security programs, the CJEU considered that they are social contributions and thus arise from the Community Regulation.

Now, this Regulation enshrines the principle of the prohibition of cumulative social contribution legislations (Art. 13.1 of the Regulation). Thus, as a general rule, the applicable social security legislation is the legislation of the State where the person performs his employee or self-employed activity, regardless of his country of residence.

Accordingly, the judges of the CJEU ruled that once a person is liable to the social legislation of a member State of the European Union (EU) other than France *(or is subject to the social legislation of Island, Norway, Liechtenstein or Switzerland)* pursuant to community law, this person's real estate income shall not be subject to social contributions in France. Hence, the CJEU has extended the solution it had already retained in 2000 for employment income and substitute income in two judgments *(C34/98 and C 169/98)*.

This decision does not release the taxpayers concerned from the duty to pay social contributions on their income from French source. They must continue to pay them until the law is amended.

However, when an internal law tax provision contradicts a higher standard of law resulting notably from a jurisdictional decision, it opens the possibility to file a claim for the reimbursement of taxes that were not due!

As a consequence, in the event where under Community Regulations, French social security legislation does not apply, the person who has paid social contributions on his income is entitled to claim a tax relief and a reimbursement.

This judgement highlights mainly two situations in which a person is entitled to file a claim:

- The non-resident who receives real estate income from French source on a secondary residence or on a rented property and who falls within the scope of the social security legislation of another member State of the EU, of Island, Norway, Liechtenstein or Switzerland. He may claim the reimbursement of the social contributions levied on his real estate income and on his capital gains on immovable property.
- The cross-border worker who lives in France and performs a professional activity in another member State of the EU, in Island, Norway, Liechtenstein or Switzerland, and who falls within the scope of the foreign social security legislation. He may claim the reimbursement of the social contributions

levied on his real estate income and on his capital gains on immovable property, **but also on the overall income subject to social contributions (capital gains, capital gains on the sale of securities, capital gains on disposal of securities, income from the rental of furbished properties on a non-professional basis, income on life-insurance contracts…).**

Since the determining criteria is the affiliation to the social security legislation of another member State of the EU, of Island, Norway, Liechtenstein or Switzerland, there are other hypotheses in which a claim may be filed, as numerous as varied, which require expertise in this area.

We may mention the special case of a person who is not domiciled in France and who performs a professional activity in several States, among which France; that of a public officer who performs an activity in France and falls within the scope of a foreign administration; or the case of a retired person who receives a pension or annuity from another State, and who chooses the non-application of the French social security legislation.

Moreover, it is worth mentioning that an agreement between one or two States may «derogate» from the rules of coordination provided in the Community Law under certain conditions. In this situation, the applicable social security legislation shall be determined by applying this agreement, on which the success or the failure of a claim will then depend. **When by the effect of certain agreements, the person may choose his affiliation to one social security regime, and he chooses the French social security legislation, he decides de facto to be subject to social contributions on his income!**

Let us not forget the problematic case of a person wrongly liable to the French social security regime, in breach of the Community coordination rules. In this situation, it will be relevant to think about the opportunity of filing a claim for the reimbursement of the social contributions on employment income and substitute income, notably, in addition to a claim for the reimbursement of social contributions levied on other income.

PERSPECTIVES

Regarding real estate gains, the taxpayer should be able to file a claim until the 31 December of the second year following the payment of the tax. The taxpayer may thus file a claim on the 31 December 2015 at the latest to ask for a tax relief on the social contributions levied on gains realised in 2013 and 2014.

As for other income, the time limitation for filing a claim is in principle two years after the notification of the collection notice. Concretely, it is possible to claim the reimbursement of the overall social contributions paid since 2012, for as long as the claim is sent to the tax administration on 31 December 2015 at the latest.

As a reminder, these social contributions rate amount to 13,5% between 1 January and 30 June 2012 and 15,5% since 1 July 2012.

Since the contested law of 2012 aimed notably at increasing public revenues, it is uncertain whether the French tax administration will immediately give a favourable answer and renounce the corresponding revenue. This being said, the deadline to file a claim is very short and it must be imperatively complied with, even if one risks receiving a negative answer from the tax administration before succeeding with the administrative courts with the assistance of an experimented tax advisor. Claim them back!

Contacts: Stéphanie Barreira and Jérôme Bissardon

SWISS CIVIL PROCEDURE: THE DIFFICULT TASK OF QUESTIONING WITNESSES

The Geneva practice with regard to witnesses before civil jurisdictions has changed since the entry into force of the Swiss Civil Procedure Code (SCPC). Some magistrates, with a view to strictly implementing the «maxime des débats» (rule that the parties control the subject matter of the proceedings and may present the case as they see fit), now refuse questions which do not result from a regular and timely offer to produce evidence. Others are more flexible in favour of establishing the facts. These different approaches trigger uncertainty.

Article 172 SCPC sets forth the content of the witnesses' hearing. It is divided into three themes.

Firstly, witnesses shall state their identity (Art. 172 para. 1 SCPC). It is a question of verifying whether the right person is heard and whether this person can be heard as a witness and not as a party.

Secondly, witnesses shall be asked about their personal relationships with the parties and other circumstances that may be relevant to the credibility of their testimony (Art. 172 para. 2 SCPC). This should allow notably to find out possible interests related to the outcome of the proceedings, such as the existence of contractual relationships, or other personal relationships. It may also allow to test the cognitive and memory capacities of the witnesses and to unveil a possible knowledge of the dispute's object they may have previously acquired.

Thirdly, witnesses must state the facts of the case as they have observed them (Art. 172 para. 3 SCPC). First of all, the fact must be relevant and disputed (Art. 150 SCPC). Then, this fact must have been alleged and the party that has alleged it must have proposed to prove it through a testimony, regularly and timely, i.e. according to the form and within the deadline set forth in the SCPC pursuant to the «maxime des débats» (Art. 221, 222 and 229 SCPC). Finally, the witnesses must have observed it, which excludes notably that the witnesses may issue assumptions or express an opinion on the case.

The possibility to ask questions to the witnesses of the opposing party results from the right to be heard. However, it must be a cross-examination, which means the questions must concern the same allegations on which the witnesses were interrogated by the party having summoned them. Failing that, it would be a means of proof likely to be refused.

Since the witnesses are required to state facts and not to confirm or invalidate allegations, the questions asked may vary a lot and their link to the assumption may be more or less strong.

This flexibility being intended by the SCPC, in our opinion the Courts should take it into account when deciding on the acceptability of a question asked by a lawyer to his witness or the opposing party's witness. It is a question of finding a balance between the purpose of establishing the facts and the rule of explanation of positions.

PERSPECTIVES

The lawyer must always be in a position to prove that there is a link between his question and an allegation for which the testimony has been regularly and timely asked, or that it is a cross-examination. If, despite having proved it, the Court rejects his question, it belongs to the lawyer to have it recorded in the minutes (Art. 176 SCPC) to reserve the possibility to claim a breach of the right to be heard.

Contacts: Serge Fasel and Alexis Dubois-Ferrière

SWISS BANK ALLOWED TO FREEZE ITS CLIENT'S ASSETS AS SECURITY AGAINST CLAW-BACK CLAIMS FILED IN THE UNITED STATES WITHIN THE FRAMEWORK OF THE MADOFF CASE

The Swiss Federal Court has issued on 20 July 2015 decision No. 4A_429/2014 in which it confirmed the right of a bank to freeze the assets of a client as security against claims it faces in the United States within the framework of the Madoff case. This decision marks the end of a Zurich dispute which had led to decision No. 4A_443/2011 of 22 February 2012 which was limited to the question of the existence of a clear case.

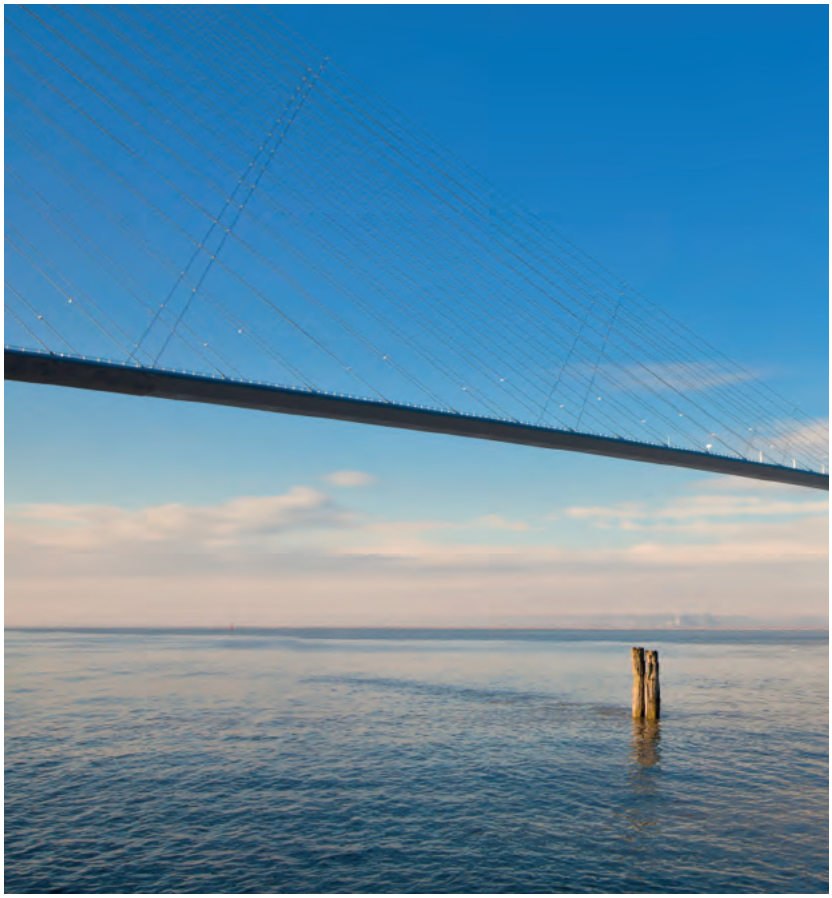
The facts are the following: in February 2000, a client of a Swiss bank instructed the bank to invest an amount of USD 499,998.86 in the Fairfield Sentry fund. In September 2008, the client instructed the bank to sell her units of the above mentioned fund. After the bank executed the sale as instructed by the client, the latter's account was credited with an amount of USD 994,996.21. A couple of weeks later, further to the unveiling of the Bernard Madoff fraud, the Fairfield Sentry fund, which had largely invested in the latter's companies, went bankrupt. Since April 2010, the bank has been the object of a claw-back claim filed in the United States by the liquidator of the Fairfield Sentry fund, aiming at the reimbursement of the amount credited on its client's account further to the sale of her units. Due to these proceedings, in 2011 the bank refused to refund to the client an amount of EUR 120,000 while her accounts

showed a credit balance of EUR 461,191.01 and USD 153,503.09. The client then brought her claim against the bank to the courts.

After her claim was deemed inadmissible by the Federal Tribunal on the grounds that there was no clear case (ATF 4A_443/2011), the client filed ordinary proceedings against the bank.

In its decision of 27 March 2014, the Zurich Commercial Court considered the liquidator of the Fairfield Sentry fund's claim in the United-States against the bank as an *acquired claim* within the meaning of Article 102 para. 1 of the Swiss Code of Obligations (CO), of which the bank should be released by the client; as a result, the bank had a claim against the client which justified the freezing of the client's assets as a security against this claim.

The client appealed against this decision on the grounds that the liquidator of the Fairfield Sentry fund's claim against the bank was at the most *damages* within the meaning of Article 402 para. 2 CO and that, since no fault could be assigned to the client, and pursuant to the above mentioned provision, the bank could not require to be released therefrom. According to the client, the bank did not have a claim against the client against which it could demand to be secured by freezing her assets.



In its decision of 20 July 2015, the Federal Tribunal rejected the client's appeal. However, it did not respond the question whether the claim of the liquidator of the Fairfield Sentry fund fell within the scope of the second paragraph of Article 402 CO. Indeed, it simply considered that the right of the bank to be released resulted from an agreement between the parties and, accordingly, it was not necessary to look into the grounds of the general rules of the mandate.

Hence, according to the Federal Tribunal, since the bank had acquired, kept and sold the units of the Fairfield Sentry fund in its name but on behalf of the client, on a regular basis and pursuant to the agreement, it was not up to the bank to assume the risks related to these transactions. In particular, the loss of value of fund units resulting from a fraud already realised at the time of the sale for the account of the client shall be borne by the client not by the bank.

PERSPECTIVES

This long-awaited decision should become case-law within the framework of pending litigations relating to similar facts in which a bank has acted in its quality as commissioner, i.e. in its name but on behalf of the client.

Contacts: Serge Fasel and Alexis Dubois-Ferrière

NEW REPORTING DUTIES OF SWISS COMPANIES AND THEIR SHAREHOLDERS

On December 12, 2014, The Swiss Parliament adopted the Federal Act for Implementing the Revised Financial Action Task Force Recommendations («FATF Act») which introduced important amendments to the anti-money laundering Swiss legislation. Among them, a first set of rules aiming at increasing transparency of entities entered into force on July 1, 2015. The Swiss Code of Obligations (CO) now imposes two reporting duties: the duty for the holders of bearer shares to identify themselves, and the duty for the purchaser of bearer or registered shares whose participation exceeds a certain threshold to disclose the identity of the beneficial owners. A second set of rules, which amends the Anti-Money Laundering Act (AMLA), will enter into force on January 1, 2016 and will impose on financial intermediaries the duty to disclose the identity of the beneficial owners of operating companies, thus amending the principles prevailing to date. The present article deals only the first set of rules.

Since July 1, 2015 **any person who purchases bearer shares of a Swiss non-listed company** must, within three months as from acquisition, report his participation to the company, regardless of the percentage of shares acquired, and identify the actual holder of these shares. The new shareholder must identify himself with the company and communicate his/its name or registered name, as well as his/its address by presenting official identification, respectively an excerpt of the commercial register or any other document deemed equivalent. This duty to report also applies to **any person holding this kind of shares as at July 1, 2015.**

Moreover, **purchasers of shares of non-listed Swiss companies whose participation, alone or with a third party, equals or exceeds 25% of the share capi-**

tal or of the voting rights shall now disclose the beneficial owner(s) behind the purchasers. This duty to report applies both to bearer or registered shares and shares of limited liability companies or cooperatives and reflects, at the level of the Swiss company law, the new duty imposed on financial intermediaries to disclose the identity of beneficial owners of more than 25% of the shares of commercial companies. It applies **to all transfers made after July 1, 2015;** the law does not impose the disclosure of the beneficial owners of existing shareholders.

Swiss companies must now hold a **register** of their beneficial owners and, should the case be, a list of the holders of bearer shares and keep all documenting evidence.

However, it is worth mentioning that the new provisions allow the company to appoint a financial intermediary to which the reporting of bearer shares is made (this possibility is not available for registered shares), which allows to safeguard the anonymity of the shareholders and their beneficial owners vis-à-vis the company.

The violation by a shareholder of his reporting duties may have significant consequences. Indeed, the law provides for the deprivation of the exercise of his social and patrimonial rights, the latter extinguishing even if the shareholder does not report within the period of one month. In order to strengthen the system, the board of directors shall ensure that the reporting duties of the concerned shareholders have been fulfilled before they exercise their rights.

PERSPECTIVES

These new duties extend the due diligence imposed to date on financial intermediaries to all Swiss companies, which now have the duty to know all their shareholders and, in certain circumstances, the individuals behind these shareholders. The new rules try to prevent the abusive use of bearer shares while maintaining the possibility to use them. The new law thus provides for a facilitated mechanism of conversion of bearer shares into registered shares, conceived to force companies to progressively abandon bearer shares. In a lot of cases this conversion will indeed be the easiest solution to relieve the duties resulting from the new rules.

Contacts: Frédérique Bensahel and Véronique Chatelain Gomez

THE DANGEROUS TAX INVESTIGATION LEGAL PROCEEDINGS IN FRANCE

On June 23, 2015, the French government disclosed the 2014 figures of the voluntary disclosure proceedings: 1.4 million euros of taxes recovered and 40,000 files registered. The 2015 figures should be even better. In parallel to these «voluntary» disclosures, the number of «forced» disclosures spurred by the Criminal Judge has been increasing; they are conducted by rather unknown counterparts: ***the judicial tax officers of the tax police.***

In France, until the creation of the tax investigation legal proceedings, the resources available for the judicial police could only be used to combat tax fraud after the implementation of an administrative procedure followed by the filing of a criminal complaint by the tax administration. Now, the judicial police may take action **upstream and by surprise,** the taxpayers not being aware of the imminence of the contemplated investigative and constraint measures such as a search.

A new service was created within the framework of these criminal proceedings: the national brigade for the punishment of tax crimes *(brigade nationale de répression de la délinquance fiscale – BNRDF)*, generally known as «tax police». This service has national jurisdiction and is composed of judicial police officers and tax inspectors, who have the status of judicial tax officers.

The tax police may intervene, under the direction of a public prosecutor, in case of **suspicion of serious tax fraud,** i.e. mainly:

- in case of holding of a bank account abroad;
- in case of tax fraud committed in an organised group (in collusion with lawyers, notaries, bank officers, asset managers, fiduciaries, etc.);
- in case of existence – in relation to the taxpayer's assets – of intermediary artificial or fictive structures located abroad (trusts, foundations, offshore companies, notably);
- finally, in the event the taxpayer is fictively or artificially domiciled abroad.

It should be noted that the tax police may also intervene on the grounds of **serious laundering of tax fraud,** which authorises the criminal jurisdictions to initiate proceedings for laundering without the previous filing of a complaint by the administration, as it is the case in the event of tax fraud offences.

From a practical point of view, taxpayers become aware of the tax

investigation legal proceedings open against them when the BNRDF officers come to their domicile, often early in the morning, to inform them that a search will be performed. This search may be extended to several domiciles of the taxpayer (secondary residence, office) as well as to the private or professional residence of third parties who either participate or are likely to hold documents.

Further to the search, **the taxpayer is often taken into custody** at the police station of his place of residence or in the premises of the BNRDF in Nanterre. The custody is a key moment of the procedure. Indeed, while the search operations are of a material nature and consist in collecting documents (which, as regards the holding of financial assets abroad, are rarely kept in the domicile of the taxpayer), custody is the **first time the taxpayer is directly confronted** to the judicial tax officers. The latter have 48 hours to obtain a «detailed confession».

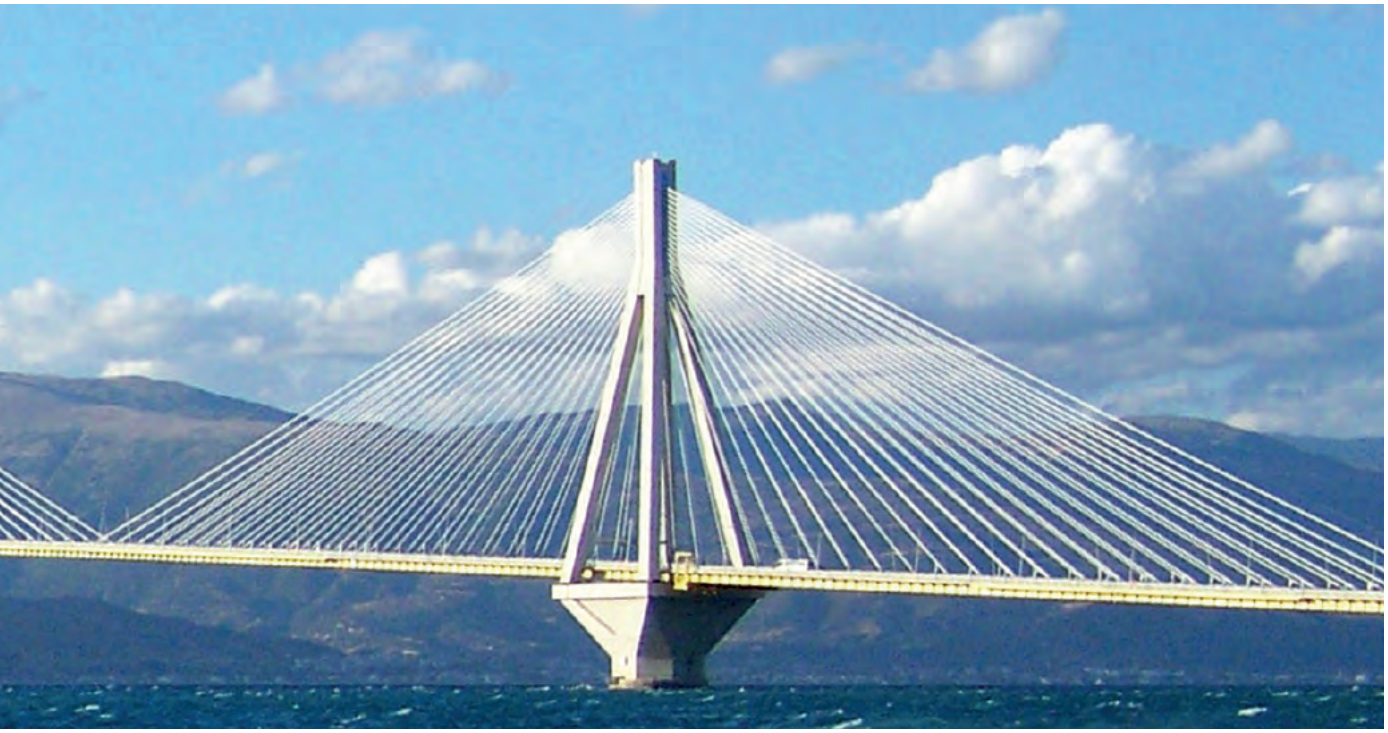
PERSPECTIVES

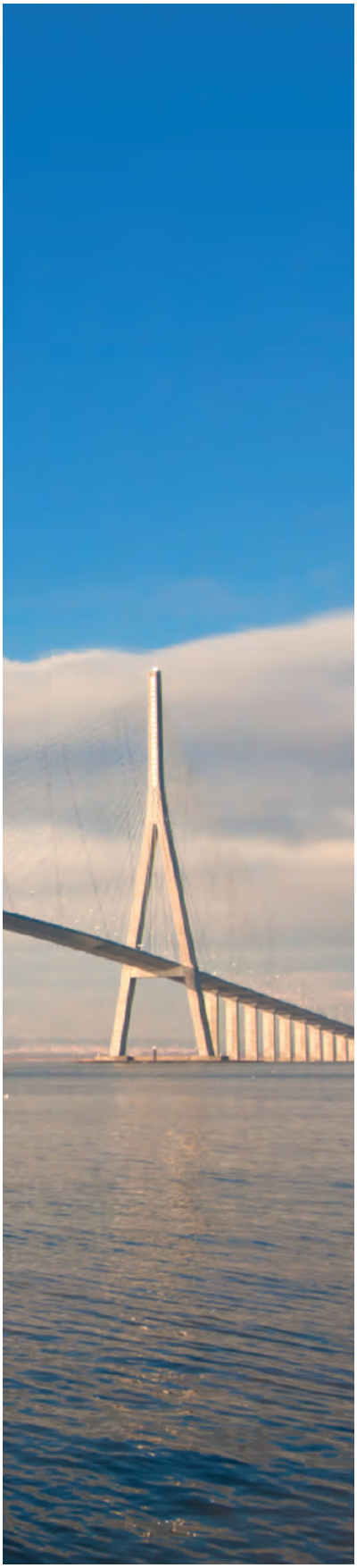
We can conclude from our experience with the tax police that after having been the object of an early and traumatising search, followed by an arrest of up to 48 hours, even the toughest client will often confess and give a lot of details, talking about the schemes that have been proposed by different services providers as an alternative to disclosure. Hence, the lawyer, who will be able to assist the detained person as from the first hour, has a key role.

Depending on the nature of each file and on the evidence already in the hands of the tax police – notably thanks to the previous recourse to wiretapping, capture and interception of correspondence, e-mails, SMS, etc. – the lawyer will have to skilfully guide his client towards an appropriate strategy of defence in a crisis situation.

The acknowledgement of relevant facts and the commitment to regularizing the assets as soon as possible may often avoid the sequestration of French assets. The inter-ministerial circular (Ministry of Internal Affairs / Ministry of Budget) of 22 May 2014 encourages the Public Prosecutors to be tougher when the accused's attitude shows no willingness to amend (absence of cooperation, manoeuvre aiming at hindering the action of the administration).

Contact: Alain Moreau





Even when the lawyer performs an activity typical of his profession, i.e. legal advice and representation before the courts, he may face delicate questions when, once he is mandated by a client, he discovers that the latter intends to pay or has paid the retainer fee or his fees with funds whose origin is unlawful, or at least with funds whose origin the lawyer suspects to be unlawful. Which behaviour should the lawyer adopt and how would this behaviour affect the rights of his client?

The question arises with regard to the rules applying to money laundering, which aim at punishing any person having committed an act likely to undermine the identification of the origin, the discovery and the seizure of assets which this person knows or should assume stem from a crime.

Firstly we could consider that the lawyer who accepts to receive, as retainer fee or fees, funds whose source appears to be questionable adds an additional step to the establishment of the criminal origin of the funds, and thus that his behaviour is likely to hinder the process of seizure of the assets he has accepted. However, the Federal Tribunal has luckily opted for a less restrictive interpretation of the criminal standard and considered that the act must, concretely, be likely to hinder the origin of the funds. For the act to fall within the scope of criminal provisions, it must not only be likely to hinder the seizure, but also characterise as an act of dissimulation, as a thief who hides the object of his theft by burying it in his garden or the criminal who gives his funds to an acquaintance in view of hiding them.

The Federal Tribunal reminded that the fact of hiding cash, investing it or still exchanging it is undeniably an obstacle to the identification of the funds. However, the mere transfer of funds stemming from crime on one's personal account, in the person's place or residence, is not in itself an obstacle to the identification or the seizure of these funds. In the same way, one may reasonably consider that the use of these funds for lawful purposes such as the payment of lawyer's fees, provided they justify, would not trigger a criminal treatment less favourable than the transfer by the person of these funds on his personal account or the fact that the person uses it to perform his current payments.

Accordingly, the risk that the lawyer be held liable for money laundering in relation to the collection of his fees, save if these are excessive, is relatively low.

The question of the seizure of the amounts paid as retainer or as fees when the authority finds out

their origin is more delicate. In which circumstances can the authority seize them and decide to confiscate them?

In Switzerland, the judge has the duty to confiscate the assets stemming from an offence. Nonetheless, he must renounce to confiscating these assets when the person who has acquired them ignored their criminal origin and has provided an appropriate consideration. In other words, the lawyer, as any other individual who provided a service in good faith may oppose the seizure of the amounts received. It goes without saying that the judge will order the seizure of the overall assets received by a person who willingly and knowingly accepts funds of unlawful source.

The case would be more complicated when in the course of a mandate, the lawyer finds out the unlawful source of the funds he has accepted, or at least he suspects the funds may stem from a criminal source. Since in this case he cannot allege his good faith, which behaviour should he adopt?

Within the framework of legal proceedings and in case of doubt, the lawyer could ask the competent authorities to grant his client a public defence. The lawyer who has already been mandated by his client would thus request that the Court appoints him as public defendant and that he be remunerated by the State in order to avoid the confiscation of his fees. However, this solution triggers a lot of problems. Firstly, the Court could appoint a different lawyer than the one who made the request, since the will of the accused is not binding. Secondly, the public defence does not always imply the granting of free legal assistance; accordingly, this request offers no guarantee and, since the client is creditworthy, this request could be considered, at least implicitly, as a confession of guilt.

Moreover, the lawyer could simply refuse the mandate he has been entrusted with or renounce to it. However, this solution is not satisfactory since the lawyer has a limited termination right. Indeed, and notably within the framework of criminal proceedings, this termination would be inappropriate and could harm the right to an effective defence, which includes the right to be assisted by a lawyer. Besides, it is not acceptable to impose on the lawyers the duty to refuse to represent a person each time this person would be accused of offences likely to having stemmed unlawful income.

Finally, the lawyer could contemplate returning the balance of the retainer fees he has received. However, this solution must be dismissed since it would deprive the lawyer from the guarantee of payment and would expose him to a criminal risk since the restitution could be deemed as an act of money laundering.

In order to solve these different problems, some authors prefer the American solution in which the lawyer is remunerated only at the end of the proceedings, which avoids that he receives directly money from a crime. However, this solution would require an important change of practice since currently, the lawyer who does not request a retainer fee is guilty of professional misconduct.

Others think that it is necessary that lawyers be granted the privilege consisting in authorising them to be remunerated for their services with money of criminal source. Even if at first this solution may seem unjustified, it would allow to efficiently guarantee the rights of the defence, which goes beyond the pecuniary interests of lawyers. Indeed, the lawyer is a key element to the defence of a citizen of a State governed by the rule of law. The right to a fair trial provided for in Article 6 of the Convention for the Protection of Human Rights would be illusory if the lawyer would find himself in a position where his own interests (notably the payment of his fees) would oppose those of his client.

Certain authors go even further and propose to grant total immunity for lawyers both regarding money laundering and seizure measures, as it is the case in Canada.

Finally, one could consider a remodelling of legal assistance which would allow it to be granted to persons whose assets have been frozen or are suspected to be of unlawful source.

PERSPECTIVES

The activity of the lawyers is an important contribution to the good functioning of the justice in a State governed by the rule of law. This specific activity is performed not only in the interest of the client, but also more generally for the benefit of all citizens who can count on an effective defence. The specificities of this activity must be taken into account. Indeed, it is of the utmost importance to find a satisfactory solution to the issue of the lawyer's position when faced with crime money in relation to the payment of his fees or retainer fees. Even if concrete cases are rare, the development of regulations which tend to combatting money laundering should trigger an increase of the number of cases where this question may arise, and consequently of the legal insecurity resulting therefrom, to the detriment of all persons seeking justice.

Contacts: Serge Fasel and Emmanuel Badoud

NEGOTIATION OF SOCIAL PLAN WITH WORKERS PURSUANT TO SWISS LAW

In our Newslex No. 7 of May 2014, we presented the duty to negotiate a social plan set forth in Article 335i of the Swiss Code of Obligations (CO) of January 1, 2014 and highlighted the existence of several unanswered questions raised by this duty. In this context, thanks to our first feedback we are in a position to highlight the difficulties that may arise in the absence of representatives of workers and of collective employment agreements with one or several unions.

As a reminder, Article 335i CO provides for the obligation for the employer – who usually employs at least 250 employees and intends to make at least 30 employees redundant for managerial reasons that have no personal connection with these employees – to hold negotiations with the employees aiming at preparing a social plan. If the parties do not reach an agreement, the case must be brought before an arbitral court. Within the meaning of the above mentioned provision, parties are on one side the employer and on the other side the unions that are parties to the collective agreement if such an agreement exists, or representatives of the company's employees, or, in their absence, the employees themselves (Art. 335i. para. 3 CO).

This third category includes all the employees of a company and not only those who could be the object of mass redundancy. Thus, in the absence of unions and employee representation bodies, the employer must contact each employee individually in order to establish a social plan.

Accordingly, only when an agreement is concluded with each employee may we consider that the parties have reached an agreement with respect to the social plan, which waives the duty to bring the case before an arbitral court. Indeed, only agreements concluded with the representatives of the employees or with the unions have a normative effect and are binding on all employees.

It goes without saying that this implies a significant logistic effort, even if doctrine admits the validity of an individual social plan concluded by tacit agreement of the employee further to an unilateral offer made by the employer. In addition, the offers – whose content must comply with the principle of equality of treatment – must be carefully drafted since they aim at amending the employment contracts.

Taking these difficulties into account, the question arises as to whether there is a risk that the employer incurs a sanction, mainly for unfair dismissal, in the event of mass redundancy when one or several employees have not accepted the social plan unilaterally offered and that the case has not been brought before any arbitral tribunal. The cases provided for in Article 336 CO do not include a new case of unfair dismissal specifically related to the social plan; moreover, doctrine and case law do not address this issue.

PERSPECTIVES

In our opinion, the argument of mass redundancy may only be successfully invoked when it is evident that the employer acted in bad faith when renouncing to bring the case before an arbitral tribunal. This could be the case if a majority of the employees refuse the unilateral social plan offers and the employer does not take any other steps in this sense. In any case, account taken of the uncertainties in this matter, it is important to be careful.

Besides, even beyond the specific case of the mandatory social plan, there are numerous situations where it is appropriate to have a representative of the employees as contact person. Large companies which do not have one should contemplate the creation of a staff committee.

Contacts: Serge Fasel and Alexis Dubois-Ferrière

KEY AMENDMENTS TO THE SWISS ANTI-MONEY LAUNDERING ACT (AMLA)

The Financial Action Task Force (FATF) has revised its recommendations on the fight against money laundering on February 16, 2012. These recommendations are international reference standards in this regard. The revised recommendations triggered in Switzerland the introduction of new provisions in several laws, notably the Anti-Money Laundering Act (AMLA). This adaptation was made through the adoption, on 12 December 2014, of the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendation.

Several amendments were introduced in the AMLA by the adoption of the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations. These amendments will enter into force in January 2016.

Firstly, the law introduces a new subject: the «dealer». The dealer is defined as a person who, in a professional capacity, trades goods and receives payment in cash in consideration. When the dealer receives cash payments exceeding CHF 100,000.00, for example for the sale of movable or immovable property, he has the duty to comply with certain due diligence duties, notably regarding the verification of the co-contractor's identity, the identification of the beneficial owner or the drafting and keeping of documents.

However, the dealer is not subject to supervision (no affiliation to a SRO and no FINMA license). Moreover, the dealer has no regulatory duty if the transaction exceeding CHF 100,000.00 is made through a financial intermediary.

Secondly, the revision of the FATF Recommendations will introduce, for financial intermediaries, the duty to identify politically exposed persons (PEPs) in Switzerland and abroad, as well as PEPs of intergovernmental organisations and within international sports federations. Besides, the revision will extend the duties of diligence to the newly created categories according to the principle of the risk-based approach.

Thirdly, this revision will introduce the strengthening of the duty for financial intermediaries to identify the beneficial owners of companies. To date, the beneficial owner of an operative company is the company itself. This will no longer be the case as from the entry into force of the Revised Recommendations of the FATF. Indeed, as from January 2016, the financial intermediary will have the duty to identify the persons in control of an operative company.

In this regard, the law provides for a cascade system of definitions: the beneficial owner(s) of an operative company is(are) deemed to be the shareholder(s)

(individuals) who hold(s) directly or indirectly at least 25% of the company's voting rights or of the share capital. If they cannot be identified, the beneficial owner is deemed to be the person who controls the company by other discernible means or, if the identification of the latter is not possible, the highest managing director.

Fourthly, the system of reporting to the Money Laundering Reporting Office (MROS) will be reinforced. The financial intermediary will no longer have to freeze the assets simultaneously to the reporting of suspicion of money laundering to the MROS (which often had the undesirable effect of allowing the person whose assets were suddenly frozen to guess a procedure of reporting to the MROS was ongoing). The freezing will only intervene if the MROS reports the case to the criminal authorities. However, the account will be automatically frozen if the account holder is mentioned in the list of persons who are the object of international sanctions.

PERSPECTIVES

These new duties will inevitably trigger an additional regulatory burden for financial intermediaries. Moreover, the fact that the AMLA shall also apply to «dealers» who are not affiliated to a SRO and who will not be otherwise supervised with regard to the implementation of this regulation (subject to the mandate the «dealers» will grant to an auditor in this regard) is a promise of practical difficulties; indeed, contrary to classical financial intermediaries which have been confronted to the issue of money laundering and trained to face it, an important number of «dealers» are on the verge of entering a world they totally ignore and which risks to entail heavy criminal sanctions for those who did not benefit from relevant legal counselling.

Contacts: Marco Villa and Victoria Surer

AMENDED AGREEMENT ON THE BANKS' CODE OF CONDUCT WITH REGARD TO THE EXERCISE OF DUE DILIGENCE (CDB16)

The Swiss Bankers Association («SBA») has revised its Agreement on the banks' Code of Conduct with regard to the exercise of due diligence («CDB 16»). The new CDB 16 implements notably the last recommendations of the Financial Action Task Force (FATF) with regard to the identification of the beneficial owners of operative companies. It also introduces new provisions on the modalities of identification of the co-contractor and of the beneficial owner.

The main novelty of the CDB 16 consists in the duty of the banks and securities dealers to identify the beneficial owners of operating and non-listed legal entities or Swiss or foreign private companies (including foundations, except for simple partnerships) (chapter 3 CDB 16). In this regard, the SBA has elaborated the concept of «controlling person».

Controlling persons are individuals who hold directly or indirectly at least 25% of the company's share capital or the voting rights. If these persons cannot be identified, the bank shall identify the persons who exercise control over the legal entity or, if they cannot be determined, the senior member of the company's management, i.e. in principle its CEO (Art. 20 CDB 16). The controlling persons shall be identified through Form K, newly created.

Moreover, the CDB 16 introduced a provision aiming at facilitating the distant opening of bank accounts, especially via the Internet, by allowing the electronic identification of natural persons. The authentication of the identity of the client may be made by obtaining an authenticated copy of an identification document of the client certified by a body authorised to provide authentication recognised according to the Federal Law on the Certification of Electronic Signatures (CertES), with which the client will have previously been electronically authenticated (Art. 11 para. 2).

The CDB 16 also contains two new provisions on the identifica-

tion of trusts and foundations (Art 40 and 41), which refer to the utilisation of Form T, as well as of a new Form S applicable to foundations and similar structures, Form T shall be filled in each time a trust is the co-contractor of the financial institution, even in cases where the beneficiaries of the trust are established (non-discretionary trusts). Form T has also been amended in order to take into account different types of trusts (discretionary/nondiscretionary; revocable /irrevocable). New Form S is based on the same model as Form T. Moreover, the modalities of identification of asset holding vehicles do not undergo any material changes.

Besides, a new provision on the identification of the beneficial owners of collective investment schemes with more than 20 investors has been introduced (Art. 30 para. 2 CDB 16): identification will be required when the collective investment scheme is not subject to appropriate supervision with respect to combatting money laundering. The other exceptions to the duty to identify the beneficial owners of collective investment schemes provided for in the CDB 08 are reflected in the CDB 16.

The identification of life insurance policies with separate accounts/securities account («insurance wrappers») is mentioned in the CDB 16. Article 42 codifies the requirements set forth by the FINMA in its communication 18 (2010) regarding the duty to identify the insured person, as well as the actual premium payer if they are not the same person, using Form I.

The CDB 16 shall apply to banks and securities dealers as from January 1, 2016 for all business relationships open after this date.

It shall apply to the existing business relationships at the time the identification of the co-contractor and of the beneficial owner will have to be renewed.

PERSPECTIVES

The new rules on the identification of the beneficial owners of commercial companies represent a real paradigm change for financial institutions. The concept of controlling person may be difficult to implement in practice, especially when the co-contractor is a commercial company belonging to an international group with different holding levels. The opening of a business relationship with this kind of client will also become more complex and require a good understanding of the client's shareholding structure. Banking institutions will have to adapt their compliance procedures and their internal documentation to these new requirements.

Contacts: Pierre-Olivier Etique and Laurent Schmidt, Geneva

FBT Avocats SA
Genève | Paris

www.fbt.ch

Rue du 31-Décembre 47
Case postale 6120
CH-1211 Genève 6
T. +41 22 849 60 40
F. +41 22 849 60 50

37-39 rue de la Bienfaisance
F-75008 Paris
T. +33 1 45 61 18 00
F. +33 1 45 61 73 99