PERIODIC LEGAL AND TAX INFORMATION REVIEW

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NEW DEVELOPMENTS FOR SWISS RESIDENTS HOLDING REAL ESTATE THROUGH AN SCI

A simple and tax efficient investment vehicle, the French "Société civile immobilière" (SCI) has been used for many years by non-resident aliens to acquire real estate in France. However, recent French tax developments raise questions as to the effectiveness of such structures.

To begin with, it should be remembered that an SCI is easy to organize and has a low level of corporate structure maintenance requirements.

Upon incorporation, if the company places its property free of charge at the disposal of its shareholders, no accounting records need to be kept and the only requirement is an annual shareholders' meeting.

An SCI also provides for numerous tax benefits to non-residents:

- as to income tax:

In the absence of revenues derived from real estate, notably when the property is used for private purposes by shareholders, no income tax is due (as a counterpart, no expenses may be deducted). One has to be more careful when income is collected, lest such income cause an SCI to become liable to business related taxes including corporate profit tax. That could be the case when rent payments are collected from seasonal rentals;

- as to wealth tax:

In many cases, non-residents, including Swiss residents, were able to avoid wealth tax on their French real estate. If they were able to show a shareholder's loan, generally granted with a view to financing a property's purchase by a company, that loan constituted a debt of the company. From a purely accounting point of view, the company was indebted towards its shareholder and that debt thus reduced the company's value for wealth tax purposes;

- as to inheritance taxes:

The Inheritance Tax Convention on inheritance taxes signed between France and Switzerland on December 31, 1953 provided, and still provides, that when a Swiss resident holds French real estate through an SCI, taxes shall be levied solely in Switzerland, often practically meaning a full exemption of inheritance taxes upon the death of a Swiss shareholder.
The situation was thus almost ideal for those investors.

Unfortunately, two recent amendments marred that favourable picture:

- as to wealth tax:

Shareholders' loans are no longer deductible for purposes of wealth tax base computation, regardless of whether loans are granted by a shareholder directly or through an intermediary company (new Article 885 T ter of the "Code Général des Impôts - "CGI"). That new provision is applicable starting with the 2012 wealth tax, computed on July 16, 2012 returns filed by Swiss residents;

- as to inheritance taxes:

The 1953 Treaty should be substituted by a new Treaty signed on July 9, 2012 (or by a new draft in case of renegotiation of the current draft between the two States). The principal consequence of an entry into force of that new Treaty would be to subject henceforth real estate located in France - even if held through a corporate entity, including an SCI - to French inheritance taxes. Even if Switzerland refused to ratify a new draft Treaty, the consequences would be exactly the same because France would then apply its domestic law (Article 750 ter CGI).

Contacts: Alain Moreau and Jean-Luc Bochatay

OUR OPINION

In view of these two amendments directly impacting Swiss residents, we are of the opinion that the position of each and every Swiss shareholder of a French SCI should be systematically reviewed.

Upon identification of the risks, a possible solution in order to maintain a full exemption, covering both wealth and inheritance taxes, might be a refinancing through a bank loan directly covering real estate located in France located in France.

EXCLUSION OF THE FRENCH-SWISS DOUBLE TAXATION TREATY BENEFITS FOR PERSONS TAXED ON AN EXPENDITURE BASIS

The French tax authorities revoked the amicable solution in force for over 40 years, under which a Swiss resident taxed on an expenditure basis may benefit from the French-Swiss Tax Treaty, provided his Swiss taxation basis meets certain criteria.

Under Article 4, 6-b of the French-Swiss Double Taxation Agreement (DTA) on income and wealth taxation of September 9, 1966, individuals taxable in either State on a flat amount based on the rental value of the home(s) which they own may not be treated as residents of that State.

Through an amicable solution formulated within the framework of Article 27 of the said treaty, the French (DB 14 B-2211 No 7, December 10, 1972) and Swiss (AFC Circular of February 1968) tax authorities agreed that a person taxable in Switzerland on an expenditure basis might benefit from the DTA only if the federal, cantonal and municipal tax basis (i) are computed on an amount exceeding five times the rental value (in practice plus 30 %, i.e. an increased flat amount) and (ii) do not essentially depart from what is prescribed by Federal law.

On December 26, 2012, the French tax authorities announced that the above-described solution (which they term toleration) was revoked as from September 12, 2012. They however agreed that it shall remain applicable to income earned in 2012 (included).

As an introductory note, it seems worthwhile remembering that originally Article 4, 6-b was introduced to exclude from the treaty benefits persons domiciled in Switzerland who owned a place of abode in France and were subject to lump-sum taxation by virtue of French domestic law (Article 164 C of the current CGI) on a flat amount based on the rental value of their dwelling (see Federal Council Message on the DTA, FF 1966). To our knowledge, there was never any mention of persons taxed in Switzerland on an expenditure basis during the negotiations between the two States, let alone regarding the adoption of Article 4, 6-b. Only after the entry into force of the treaty did the French tax authorities purport to interpret Article 4, 6-b as targeted at persons taxed in Switzerland on an expenditure basis.

This historical analysis is moreover confirmed by a literal reading of the relevant texts. Indeed, under Swiss law, a person taxed on an expenditure basis pays taxes on the basis of annual expenses connected with his and his household's lifestyle, not on the rental value of his dwelling (the latter being used only in order to determine the minimum taxable expenditure). We are therefore of the opinion that the French position under which persons taxed in Switzerland on an expenditure basis may not benefit from the treaty because of Article 4, 6-b which targets only persons subject to lump-sum taxation based on the rental value is open to criticism.

From a formal point of view, what the French tax authorities regard as toleration is indeed the result of an agreement with the Swiss authorities, made within the framework of Article 27 of the treaty, which in our opinion could not be revoked unilaterally by the French authorities without consultation of their Swiss counterparts.
Questionable as it may be, the French tax authorities' position clearly shows their resolve to deny the benefits of the DTA to persons taxed on an expenditure basis.

In our opinion, if that position was upheld, the "tie-breaker" conflict of residence rules (i.e. meant to prevent that one and the same person be treated as a resident of both Switzerland and France) listed in Article 4 of the treaty could no longer be invoked. The major risk would be a possible requalification as French tax residents of persons taxed in Switzerland on an expenditure basis, if any of the criteria set by Article 4 B CGI were met (home, main place of residence, or center of economic interests) thus triggering, in addition to Swiss taxation (on expenditure) a French taxation (on worldwide income and wealth).

That French residence requalification risk does not seem to extend so far to inheritance tax because neither the French-Swiss treaty on that matter, dated December 31, 1953, nor the draft new treaty signed on July 9, 2012 (not yet in force) contains any provision similar to the above-mentioned Article 4, 6-b.

Even if persons taxed on an expenditure basis were not treated as French residents, this new position of the French authorities denying treaty benefits might still entail a tax burden increase for these taxpayers as a result thereof. That burden would impact French source income, which would become subject to full withholding taxes (e.g. 30 % on dividends) on their realized capital gains on French real estate (at a rate of 33.33 % instead of 19 %, plus 15.5 % social taxes) and on movable assets (taxable in France when realized on participations exceeding 25 %), as well as to a possible extension of their taxation base for French wealth tax. These taxpayers would furthermore face an additional risk of French taxation, at the progressive income tax rate, on an amount of three times the rental value of their French dwelling (Article 164 CGI).

Contacts: Jean-Luc Bochatay and Guillaume Aubineau

OUR OPINION

Even if the position of the French tax authorities appears questionable from a legal viewpoint, it shows their resolve to deny treaty benefits to persons taxed on an expenditure basis (and, more generally to any person not taxed on an actual income basis). In fact, it creates a direct "threat" for those who still have interests in France, such as those who perform professional activities in France or own income producing French assets.

In this context, it would be advisable to thoroughly analyse the situation of the persons concerned so as to determine on a case by case basis what solutions could be implemented (restructuring of French assets or activities, renegotiation of expenditure computation criteria, switch to ordinary taxation…).

SWISS TAXATION: DEDUCTIBILITY OF EXPENSES REQUIRED FOR INCOME ACQUISITION, TREATMENT OF LEGAL FEES

In a decision of August 21, 2012, the Administrative Division of the Geneva Court of Justice broadly interpreted in favor of a taxpayer the concept of expenses required to acquire an item of income: legal fees paid by a taxpayer in order to obtain an alimony are treated as directly related to the income item awarded and may thus be deducted as expenses necessary for income acquisition.

The Geneva tax authorities took the view that deductible **legal fees** were restricted to those required for protection of a business income. On appeal, this restrictive interpretation was reversed by the Administrative Division of the Geneva Cantonal Court of Justice: even though such fees are paid in connection with a family law lawsuit, they are connected with the acquisition of a taxable income item, i.e. **alimony** paid by a former spouse.

Based on the general provisions of Articles 9 of the Swiss Federal Law on Harmonization of Cantonal and Municipal Direct Taxes (LHID) and 25 of the Swiss Federal Law on Income Taxation (LFD) pursuant to which expenses necessary for income acquisition are deductible for income tax purposes, the Administrative Chamber reasoned that the connection between the relevant expense and the income item awarded was close enough to allow the **deductibility of that expense**.

The Federal Tribunal (Swiss Supreme Court), in several precedents, had elaborated on that general provision: expenses made in direct connection with the acquisition of an income item are treated as necessary and are therefore tax-deductible. However, the concept of necessity has to be broadly interpreted. The fact that neither Federal nor Cantonal laws expressly refer to certain expenditure items is thus irrelevant for the refusal of their deductibility.

As a result, legal fees paid by taxpayers during divorce or separation proceedings leading to alimony payments to themselves or in favor of children under their parental authority may be deducted from taxable income.

Contacts: Alain Moreau and Jean-Luc Bochatay

OUR OPINION

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Upon identification of the risks, a possible solution in order to maintain a full exemption, covering both wealth and inheritance taxes, might be a refinancing through a bank loan directly covering real estate located in France located in France.

ENTRY INTO FORCE OF THE REVISED SWISS COLLECTIVE INVESTMENT SCHEMES ACT (CISA) AND ITS IMPLEMENTING ORDINANCE

After a two-year legislative process, the revised CISA and its implementing ordinance entered into force on March 1, 2013. This new regime enables Swiss managers of foreign funds to continue managing European funds, ensures a better protection of the investor and maintains the competitiveness of Switzerland as a financial center.

Triggered by the AIFM Directive, the amended CISA comes into force two years after the publication of the first draft revised law by the Federal Council. The enacted text is less restrictive than its first draft and is globally satisfactory to all stakeholders. Its implementing provisions (Swiss Collective Investment schemes Ordinance, CISO) were finally enacted, with no real surprise for the industry, which had been deeply involved in the legislative process.

In a nutshell, the Law subjects all fund managers to supervision by the FINMA. **Foreign fund managers**, who were so far exempted, are covered if they engage in the collective management of assets with an aggregate value exceeding CHF 100 million (leverage included) or CHF 500 million for private equity funds.

New provisions apply to liability and **organization of custodian** banks. This is a first step towards convergence with new European requirements. Furthermore, the revised law introduces the duty to disclose to investors in fund prospectuses, the risks deriving from the delegation of the custody of the fund's assets to sub-custodians not subject supervision. The concept of **distribution** was thoroughly revised. After an extremely liberal regime, the revised law introduces a somewhat less flexible framework, also covering distribution to qualified investors. Only proposals or advertisements made by a financial intermediary regulated by the FINMA or by an independent portfolio manager within the framework of a long term management or advisory agreement entered into in writing for a fee are exempted from the distribution rules. Any solicitation beyond that narrowly described frame is treated as a distribution, requiring that for each and every fund thus offered a representative and a paying agent be appointed in Switzerland. This new requirement means an additional administrative burden and ensuing costs for an activity so far not regulated. Furthermore any financial intermediary distributing funds has a duty to keep a written record of client requirements and to make it available to the client.

The definition of **qualified investors** was also amended. The institutional investor category remains essentially untouched but the definition of high-net-worth individuals is broadly revised. Those are no longer automatically treated as qualified investors but have to apply for that status (opting in). They have to confirm in writing that they own assets of at least CHF 5 million or show evidence of assets of CHF 500,000 and of skills required to understand the risks connected to investments. These skills may be inferred from their education and/or business experience. Investors having entered into an asset management agreement with a regulated financial intermediary or with an independent asset manager continue to be defined as qualified investors but may henceforth declare in writing that they no longer wish to be treated as such (opting out). Within the framework of an asset management agreement, a financial intermediary has to draw his clients' attention to the risks connected with their status as qualified investors and to disclose the option to waive it.

The **qualified investor** status has no bearing as to the question of whether a solicitation thereof is a distribution, except that solicitation of regulated qualified investors is not treated as distribution. On the other hand, that status is relevant to determine whether a regulated foreign intermediary subject to a foreign supervision deemed equivalent to the Swiss one may undertake solicitations from abroad without holding a Swiss distribution license. This status also governs the issue of funds solely targeted at qualified investors. Finally, in case of distribution to non-qualified investors, the law requires that the relevant foreign authority and the FINMA enter into a cooperation and information exchange agreement; that will generally be the case if the FINMA approves a foreign fund.

Contacts: Frédérique Bensahel and Pierre-Olivier Etique

OUR OPINION

Whereas globally the revision of the CISA LPCC was welcome, it still brought some disappointments: the most important is for independent asset managers and for Swiss or foreign promoters soliciting them: independent asset managers are not treated as qualified investors pursuant to the law or the ordinance, so that they may not be freely solicited by foreign fund managers or distributors unless these hold a distribution license in Switzerland. The industry is waiting for the FINMA to amend its Distribution Circular. This regulatory document - even though it does not have the same legal force as a law or an ordinance - could, as in the past, bring some adjustments to the revised law and to its ordinance. Independent portfolio managers could thus keep their qualified investor status and, as a result, might be freely solicited, provided they do not engage in distribution.

The principle of prohibition against work on Sundays and public holidays and the restrictive interpretation of possible exemptions were reaffirmed by the Federal Tribunal (Swiss Supreme Court) in its decision of March 17, 2012.

The Federal Council ruled on the following case regarding a Geneva-based Swiss company.

The activities of the Swiss-based company consist in the acquisition of perfumes abroad and their import to Switzerland, and subsequent their export to France, following client orders transmitted through the Internet. The company employs 26 staff members, mainly French frontier workers. The company filed a request for a permit to have 8 of its employees work on April 2, 2011, Good Friday, which is a public holiday in Switzerland. The company explained that it used to receive many orders from clients on that day and the impossibility to help its clients would be a source of major inconveniences and render it less attractive. The Cantonal Office, followed by the Court of Justice denied its request. The company appealed to the Federal Tribunal.

The rule of Article 18 of the Federal Law on Labor (LTr) sets forth the prohibition against work on Sundays (from Saturday 11.00 p.m. to Sunday 11.00 p.m.). The Swiss National Day is treated like a Sunday. The Cantons may designate eight days per year to be treated like Sundays. This principle is subject to that of Article 19 LTr which distinguishes between regular or periodic Sunday work and temporary Sunday work and provides for some exceptions to be granted upon request.

Regular or periodic Sunday work is subject to a permit by the competent Federal office and may be authorized when technical or economic reasons require it. There is a technical requirement when a process or works cannot be interrupted or postponed without entailing major and inacceptable inconveniences. There is an economic requirement when the interruption and subsequent resumption of a work process entail important additional costs likely to jeopardize competitiveness or when a work process necessarily involves a huge investment that cannot be profitably exploited without night or Sunday work or else when the competitiveness of a business is strongly jeopardized towards countries with a comparable social level where work duration is longer and work conditions are different, and when the issuance of a permit shall in all likelihood preserve jobs.

Temporary Sunday work is subject to a permit by the competent Cantonal offices and may be authorized in case of proven urgent need. This is essentially the case when additional unforeseen works are needed or works have to be carried out during nights or Sundays for reasons of public or technical safety or for night or Sunday assignments of limited duration, within the framework of company's events or cultural or sport events.

In its March 17, 2012 decision (SJ 2012 I 491), the Federal Tribunal clearly recited the above principles. It held that exceptions have to be interpreted narrowly, not broadly, even if consumer habits have changed since these rules were enacted.

As to an urgent need justifying a temporary Sunday work, the Federal Tribunal held that the company had not put down unforeseen additional works or public or technical safety reasons in its request. Moreover, the company had not mentioned any company or cultural event triggering client solicitation on Good Friday. The fact that Good Friday is not a holiday a France, its main business partner country, does not justify an exemption based on an urgent need.

As to economic reasons that would justify a regular or periodic Sunday work authorization, the Federal Tribunal noted that the company had filed a temporary exemption request with the Cantonal authority, which could not be treated as a regular exemption request.

As to a possible breach of economic freedom, the Federal Tribunal emphasized that the prohibition against Sunday and public holiday work serves a social policy purpose and grants workers additional leisure time. As the relevant company is located in Switzerland, it is governed by Swiss laws and may not avoid abiding by the laws of the country where it performs its activities.

Contacts: Christophe Wilhelm and Sandra Gerber

OUR OPINION

Every Swiss company, located on the Swiss territory, has to abide by Swiss law, including prohibition against Sunday and public holiday work (even it most of its personnel are French resident and citizen cross-border employees, Good Friday is not a public holiday in France and the company receives many client orders on that day).

Under Swiss law, the social policy object of the prohibition against Sunday work and of thus workers' protection takes precedence over consumer habits which have changed since the rule was enacted.

SWISS CONTRACT LAW REVISION EXTENDS TO TWO YEARS THE LIMITATION PERIOD FOR CLAIMS UNDER GUARANTEES FOR DEFECTS IN FAVOR OF BUYERS AND CONTRACTORS' CUSTOMERS

From January 1, 2013, Article 210 of the Swiss Code of Obligations (CO) governing **sale of goods** was amended, **extending to two years** the limitation period for a buyer to bring a claim under a guarantee for defects of goods sold. As far as a sale of real estate is concerned, the limitation period remains five years.

The same applies to contracts for works and services regarding goods, the statute of limitations of which was extended from one to two years by the amended Article 371 CO, included in the same statute of March 16, 2012. However if the object incorporated in an immovable work in a manner consistent with its nature and purpose has caused the work to be defective, , the limitation period amounts to five years, so as to conform with the five year guarantee applicable to real estate sales. This measure aims at allowing the contractor, should he be sued by a client for defects in an immovable work caused by objects incorporated therein, to be able to sue sub-contractors for contribution without risking the defense of a shorter time limitation period.

The limitation period starts to run upon delivery to a buyer, even if the latter discovers the defect at a later point, unless he can demonstrate that the vendor intentionally misled him. Needless to say, buyer and seller may agree on a longer limitation.

Cultural goods, however, are governed by a specific regime: claims for guarantee become barred one year upon discovery of defects (Article 210 para. 3 CO).

Article 210 para. 4 CO furthermore provides that any provision of an agreement providing for a shorter limitation period
"[…] shall be void if the following conditions are met:

a) a) it provides for a limitation period shorter than two years, or in the event of sale of second hand goods, shorter than one year;
b) the object is meant for personal or household use;
c) the seller acts within the frame of a commercial or professional activity."

In our opinion, these three conditions are cumulative. If only one or two of these conditions had been sufficient to void any restriction of the limitation period, the wording of Article 210 CO would have clearly said so. Furthermore, as will be shown below, the purpose of that provision is a better **consumer protection**. A contrario, in professional or business transactions, a limitation period inferior to two years may be lawfully agreed between the parties. The specific rule regarding sale of second hand items is noteworthy: in spite of the general two year limitation, it is legally permitted, even in the case of a sale between a professional seller and a private consumer, to shorten the period to one year only.

The same consumer protection rules also apply mutatis mutandis to contracts for services regarding goods (see Article 371 para. 3 CO).

For a buyer of goods or services, this statute amendment is an improvement as the buyer had formerly to bring a claim within one year only. That is indeed the purpose of the said amendment, which expressly refers to "consumer protection". The Federal Parliament was of the opinion that the previous one year limitation was too short, all the more as it starts to run from delivery. The purpose was also to align Swiss contract law with the provisions of Article 39 para. 2 of the Vienna Convention on the International Sale of Goods and of those of Article 5 cipher 1 of the European Directive 1900/44/CE regarding certain aspects of the sale of consumer goods and associated guarantees.

For sellers or contractors, on the other hand, it is a deterioration as they face longer limitation periods.

This revision entered into force on January 1, 2013 and is **applicable immediately**. It thus extends the one year limitation period under the former law having not yet expired on January 1, 2013, for the difference between two years and the time elapsed between delivery and January 1, 2013. Thus if a delivery was made on January 3, 2012, a guarantee claim which would have formerly been barred on January 2, 2013 will be permissible through January 2, 2014.

This revision governs solely the statute of limitations of guarantee claims. It does not alter the substantive elements of guarantees for defects in the framework of a sale of goods or of a contract for works or services on goods. In that context, a buyer of goods or services, pursuant to the unchanged Articles 201 or 367 CO, as the case may be, remains under a duty to inspect the goods immediately upon delivery and to notify any defect promptly to the seller or contractor, failing which he may be barred from any claim, the goods being deemed to have been accepted as they are. One should add that these rules are applicable **only to the extent a guarantee was not excluded** altogether by a seller or contractor, which in our opinion, still remains legally permissible, even under the new law.

Contacts: Christophe Wilhelm

OUR OPINION

The extension of the limitation period to two years for claims under guarantees for defects improves Swiss contract law in favor of consumers without (unduly) penalizing sellers or contractors. The latter still benefit from the immediate notice requirement under Articles 201 and 367 CO; they may also benefit from the limitation extension to assert cross guarantee claims against their own suppliers. Furthermore, in professional or business transactions, the parties may still agree on a guarantee limitation period shorter than two years. That being said, the effectiveness of the new law as a consumer protection means should be put into perspective insofar as a total guarantee exclusion still remains legally permitted, with the risk that certain professional suppliers prefer to exclude any guarantee entirely rather than to face a limitation period which they might regard as too long.

SWISS LABOR LAW: RIGHT OF ACCESS OF EMPLOYEES TO THEIR PERSONNEL FILES

Access right of employees to their personnel file is a frequent labour law issue. This paper aims at reminding the outlines of this right and establishing the conditions of legitimate reliance thereon.

The issue is governed by Article 328b of the Code of Obligations (CO; RS 220) and by the Federal Law on Data Protection (LPD; RS 235.1). Access to personnel files is based on the general principle set forth in Article 8 LPD.

The Federal Tribunal (Swiss Supreme Court) refrained from defining the concept of "personnel file", simply noting that it was not contained in the statute and adding that one needs to examine in each individual case if the protection of an employee's personality rights makes it necessary for that employee to have access to a given document. The majority of scholars propose a broad definition of personnel file, comprising all individual data pertaining to an employee in his relationship with his employer, regardless of their location. In other words, all data on an employee's skills or pertaining to the performance of an employment agreement are deemed to be part of a personnel file. Thus, data recorded in several paper or electronic files are covered by that definition; the same applies to parallel unofficial files (so-called "grey" or "black" files) regarding employees. On the other hand, e-mails sent by an employee during working hours, or contracts or other business documents signed by an employee in his relations with suppliers, clients or service providers are excluded from the definition of personnel file.

Does that mean that an employer has to disclose the entirety of a personnel file to an employee upon request? In this context, the Federal Data Protection "Préposé" (head) is of the opinion that an employer may refuse, restrict of defer disclosure of requested documents only in exceptional cases and for serious reasons (Article 9 para.4 LPD). However, the employer's overriding interest justifies that employees have no access to personal notes of their employer if they are not available to third parties. They do not have access either to files regarding staff planning needs, career plans or documents regarding pending lawsuits. Nevertheless, the Federal Tribunal recently held that the interest of a file owner (such as an employer) not to disclose documents which the access right holder (e.g. an employee) might eventually use against him in a lawsuit is not a sufficient reason to deny access thereto.

Contacts: ***Serge Fasel and Michael Biot***

OUR OPINION

In view of these two amendments directly impacting Swiss residents, we are of the opinion that the position of each and every Swiss shareholder of a French SCI should be systematically reviewed.

Upon identification of the risks, a possible solution in order to maintain a full exemption, covering both wealth and inheritance taxes, might be a refinancing through a bank loan directly covering real estate located in France located in France An employer has to pay particular attention to his employees' personnel files for two main reasons. Firstly, employees have a full right of access to their personnel files and to all documents therein, which they may eventually use in a lawsuit against their employer, for example in case of dismissal. Moreover if an employer wrongly denies access to certain documents to a requesting employee, he may have problems using those documents in a lawsuit before a Labor Court..

UPDATE ON SWISS INTERNATIONAL CRIMINAL AND ADMINISTRATIVE MUTUAL ASSISTANCE IN THE EVENT OF TAX OFFENCES

The practice of mutual assistance in criminal matters has long considered that a country had no duty to protect its neighbor's treasury. The first international treaties governing mutual assistance in criminal matters contained no provision for cooperation in the event of tax offences. For many years, Switzerland refused to provide assistance to foreign authorities prosecuting breach of tax laws. This principle not only tends to disappear, but this issue's evolution is accelerating.

The European Convention on **Mutual Assistance in Criminal Matters** (CEEJ, RS 0.351.1) expressly excludes assistance for tax offences in its Article 2 lit. a. Furthermore, Switzerland did not ratify the First Additional Protocol to the CEEJ eliminating that provision.

Consequently, the Swiss authorities have no duty to comply with such requests for assistance. However there is a long history of an important exception granted when the elements of a tax fraud are given. In such case, assistance has to be granted pursuant to an extensive interpretation of Article 3 para. 3 of the Federal Law on International Mutual Judicial Assistance in Criminal Matters (EIMP, RS 351.1) by the Federal Tribunal (Swiss Supreme Court).

Since the conclusion of the second series of Swiss-EU bilateral agreements of 2004, mutual assistance in criminal matters was extended to customs and indirect tax matters pursuant to the Convention of Application of the Schengen Agreement and to the Agreement on the Fight against Fraud.

On its side, **administrative assistance** was extended as from 2009 through the amendment of certain double taxation treaties, including that with France (RS 0.672.934.91). As a result, Switzerland shall grant administrative assistance in cases of tax evasion (even though the conditions of a tax fraud are not fulfilled) to States with which Switzerland entered into an agreement introducing this amendment.

Switzerland thus cooperates with foreign countries (including France) in administrative matters in cases involving direct tax evasion, even though under the current applicable law no criminal assistance would be granted in the same matter.

The Federal Council intends to unify the rules by an amendment to the EIMP. A first draft was sent for consultation on June 15, 2012. This text eliminates from the EIMP the exception regarding tax offences and extends criminal law enforcement measures to all cases of tax evasion in favor of countries with which Switzerland shall have entered into an agreement, enabling these countries to request administrative assistance. In the same vein, the Federal Council proposes to ratify the Additional Protocol to the CEEJ, which would extend mutual assistance in criminal matters to about thirty States with which Switzerland did not enter into double taxation treaties including an administrative assistance provision.

Faced with a lot of criticism voiced during the previous consultation procedure, the Federal Council decided on February 20, 2013 to adjourn temporarily that proposed legislation procedure in order to prepare a draft in line with the most recent FATF recommendations and with the new criminal tax law, the consultation procedure of which is planned for the spring of 2013

Contacts: *Serge Fasel and Aurélien Bill*

OUR OPINION

In the past, breaches of tax rules were deemed to be purely administrative matters.
The consequence of the trend towards criminalization of tax violations is that these are no longer automatically excluded from international mutual assistance in criminal matters.

In Switzerland, prosecution of tax evasion lies within the competence of administrative authorities whereas elsewhere it is generally entrusted to criminal authorities.
The signature of new double taxation treaties in 2009 created a first element of imbalance between Swiss and foreign tax authorities. Since then, foreign tax authorities may obtain disclosure of banking data in cases of tax evasion, while Swiss authorities do not have the same rights of access.

The first draft amendment to the EIMP, meant to introduce harmonization between mutual assistance in criminal and in administrative matters, just increases the inequality between foreign and Swiss authorities.

In fact, under the proposed amendment, foreign authorities, in cases of direct tax evasion, would have the benefit of all Swiss criminal law enforcement and evidence search measures. On the other hand, Swiss enforcement authorities, being administrative authorities, would only dispose of administrative enforcement measures.

Besides, the position of foreign residents would deteriorate in matters of tax evasion,
as the said foreign authorities, with the benefit of Swiss criminal law enforcement measures, would be in a position to request custody and extradition of suspects.

The draft was temporarily adjourned and will surface again. By that time, will tax evasion have become a criminal offence in Switzerland?