

Current News

Swiss Bank Secrecy: why USA Taxpayers are more in trouble than others.

In a previous article we have explained that foreign clients of Swiss Banks need to seek advice as to the best way to protect their interests in the future¹. While Switzerland still makes the distinction for domestic tax purposes between not declaring assets to the tax authorities, which is not a fraud under Swiss law, and tax fraud, which implies typically the use of false contracts or false balance sheets or similar documents this distinction is no longer upheld in new treaties or amended of treaties concluded by Switzerland to avoid double taxation. The distinction remains applicable in the international context as long as the existing treaties have not been renegotiated and the amendments ratified by the parliament².

This, however, is not true for US-based clients because the Swiss Federal Administrative Court held in its decision of March 5, 2009 (A-7342/2008 and A-7426/2008)³ that in the context of the Swiss-USA Treaty acquiring an offshore company to hold the assets under the name of said company for the sole purpose of escaping the US taxes was a fraudulent activity, if at the same time the US resident continued in fact to exert control over the assets transferred on an account in the name of the offshore company, and if the US person managed those assets by way of instructions given directly to the Swiss Bank, without going through the directors or officers of the offshore company. This very broad Swiss interpretation of fraud in the US context is due to the fact that under the Qualified Intermediaries agreements entered into by Swiss banks with the US Tax Administration in 2003, the Swiss banks specifically undertook towards the US Authorities to identify the US beneficiaries, thus creating indirectly, according to the Swiss Federal Administrative Court, a higher duty of diligence than in relation to other countries. The scope of disclosure was further extended by way of the USA-Swiss Agreement of August 31, 2009, approved by the Swiss parliament on June 17, 2010. All 4500 concerned UBS clients have by now been in principle notified of the request to have their banking records transferred to the US authorities, and of their rights to oppose such request, but clients of other banks who are US tax

payers could also be targeted in the future.

Whenever judicial or administrative assistance is granted, the Swiss banks are ordered to put at the disposal of the Swiss authorities copies of all banking documents, including the names of the beneficial owner, settlor, protector, and beneficiaries, if in the bank's files. This is followed by a review of what documents are relevant to meet the request for information presented by the foreign state.

The Swiss authorities will not check if the request is legitimate, but only if the request meets the formal requirements for assistance and if the banking documents are potentially relevant in the context of the investigation described by the foreign state.

The legal owner of the bank account may then object to the forwarding of the information, for instance if it discloses the names of third parties, who may have made payments on the account or who may have received funds from said account, but unrelated to the foreign investigation.

Such objections will however only be successful if the information is obviously outside the scope of the investigations described by the foreign authorities.

An appeal for judicial review of the Swiss administrative decision is possible, but only very few appeals are upheld in practice, because the Swiss courts have been extremely lax in their interpretation of what was a fishing expedition.

Normally the name of the person investigated must be stated in the request and must correspond to a name found in the banking records as well as the name from whom the information is to be requested. But this condition was waived in the context of the request for assistance from the USA dated August 31, 2009⁴, and the Agreement between the Swiss and US government was finally reluctantly approved on June 17, 2010 by the Swiss Parliament (<http://www.news.admin.ch/message/?lang=fr&msg-id=33742>).

¹ *Swiss Bank Secrecy: Hide or Disclose but do not Panic!*
<http://www.stswiss.com/index.php?cat=4>

² *Procedure before new or amended treaties enter into force and timetable of what information becomes available*
<http://www.efd.admin.ch/00468/index.html?land=en&msg-id=28889>

³ *March 5, 2009 Swiss Federal Administrative Court Decision*
http://www.bundesverwaltungsgericht.ch/fr/7.3.5._pressemitteilung20090306_beschwerdevfamtshilfe.pdf

⁴ *USA requests administrative assistance in UBS case*
http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=28799&print-_styl

The Swiss government has insisted that this practice of requiring the name of the person investigated must be maintained in the future in respect to countries other than the USA. The agreement signed on August 27, 2009 with France is however already the subject of differing interpretations between Switzerland and France⁵.

As indicated above, in the March 5, 2009 case related to the US request for information, the Swiss Federal Administrative Court held that a description of the account, even without a specific name, could be sufficient to grant the requested assistance at least in the USA context, but the Federal Department of Finance indicated on March 13, 2009 that it intended to handle restrictively the conditions for granting administrative assistance in fiscal matters⁶.

It remains to be tested if the government will be able to impose its views and if the Courts will really adopt again a more restrictive practice in the future.

Swiss law is therefore moving quickly to be more in line with international practice. This does not mean that more requests for administrative assistance will necessarily be successful in the future, provided the clients take appropriate steps now to protect themselves, and provided the Swiss government is able to define strategic principles for a clear line of defense as advocated by Dr. Konrad Hummler of Bank Wegelin & Co. in St.Gallen⁷.

Protective measures for clients include a stricter separation of the disclosed personal assets of a taxpayer from assets held by trusts or foundations or offshore corporations for long term estate planning purposes. This topic is the subject of a separate article⁸.

Eric W. Fiechter / 07.09.2009- / 17.06.2010

⁵ *La Suisse et la France signent une convention révisée de double imposition*
<http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=28729>

⁶ *Switzerland to adopt OECD standard on administrative assistance in fiscal matters*
<http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863>

⁷ *The Wegelin Investment Commentary No. 264 "States under Stress"*
http://www.wegelin.ch/download/medien/presse/Wegelin_Investment_Commentary_264_Media_release.pdf

⁸ *Swiss Bank Secrecy: Protect your assets!*
<http://www.stswiss.com/index.php?cat=4>