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ATTORNEYS AT LAW

Tax Fraud as Predicate Offense to Money Laundering in Switzerland

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- Qualified tax offenses as predicate offenses to money laundering
- Whether commited in Switzerland or abroad
- Reporting duties and reporting rights

1. Summary

In line with the Federal Act of the 2012 FATF Recommendations (FATF-Implementation Act), the amendments to the relevant provisions of both the Swiss Penal Code (PC) and the Anti-Money Laundering Act (AMLA) entered into force on 1 January 2016.

Certain tax offenses (see below) are now considered predicate offenses to money laundering in Switzerland, whether or not these offenses are committed in Switzerland or abroad.

This qualification means that financial intermediaries render themselves liable to prosecution if they do not adequately react to these offenses.

By no later than 1 January 2016, the financial intermediaries had to internalize and adapt the amendments to both the PC and AMLA.

The amended PC applies to qualified tax offenses from 1 January 2016 onwards and has no retroactive effect.

2. Tax Offense as Predicate Offense to Money Laundering

According to the amended PC, there are two categories that are regarded as predicate offenses to money laundering, i.e., "felony" and (newly) "qualified tax offense".

A felony is an offense that carries a custodial sentence of more than three years. As regards tax offenses, neither tax evasion nor tax fraud qualify as a felony.

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

From 1 January 2016, tax evasion are considered a qualified tax offense under the amended PC and as such, a predicate offense to money laundering if the following requirements are met:

- tax evasion qualifies as tax fraud under Swiss tax law. More specifically, whoever submits, for the purpose of evading taxes in the sense of article 186 of the Federal Income Taxation Act (FITA) or according to Article 59 para. 1 of the Communal and Cantonal Income Tax Harmonization Act (CCITHA), with fraudulent intent, forged or (substantially) falsified documents that have a qualified evidentiary value (e.g., salary certificates, balance sheets or business records) can be considered to have committed tax fraud (in regards to direct taxes); and
- this sort of tax fraud must exceed the sum of CHF 300,000 per tax period. In other words, the amount of income taxes, wealth taxes, profit and capital taxes, or real property gains taxes evaded must exceed CHF 300'000 in the same tax period.

For example, if a bank employee knows that the bank's client assets originate from fraudulent practices with respect to evading income and the wealth taxes exceed CHF 300'000 per tax period and, despite his knowledge, the bank employee carries out any transactions to obstruct the identification or seizure of these assets, the bank employee may also be held liable under the amended PC.

Tax offense committed abroad will also qualify as a predicate offense to money laundering if the requirements of double incrimination are met. This means that:

- the tax offense committed abroad must be punishable under the foreign laws of the respective state; and
- the foreign tax offense must fulfill the requirements for a qualified tax offense from a Swiss law perspective.

Thus, as regards the evasion of foreign taxes, such a tax evasion will qualify only as a predicate offense to money laundering under the amended PC, if the foreign tax offense exceeds CHF 300,000 per tax period, and also constitutes a tax fraud under the amended PC.

3. Reporting Duties and Reporting Rights

According to the amended AMLA, if a financial intermediary (or dealer) knows or has reasonable grounds to suspect that assets involved in the business relationship are connected to a qualified tax offense in terms of the amended PC, the financial intermediary (or dealer) must immediately file a report (reporting duty) with the Money Laundering Reporting Office (MROS). If, however, the financial intermediary has no reasonable grounds for such a suspicion, but only doubts whether the assets result from a qualified tax offense, the financial intermediary is entitled (but not obliged) to file a report with the MROS (reporting right).

While the MROS analyses the reported assets (or transactions), the financial intermediary may continue to carry out transactions provided that it maintains the paper trial. In contrast to the rules having effect prior to 1 January 2016, the financial intermediary is not obliged to immediately freeze the relevant assets; it can continue to carry out the client's orders to avoid that the financial intermediary's report to the MROS comes to the client's knowledge.

In no case, may the financial intermediary inform the persons affected (or third parties subject to some exceptions) about the filing (tipping off).

The financial intermediary must, however, freeze the assets as soon as MROS notifies the financial intermediary that MROS has filed a report with the prosecutor. MROS must notify the appropriate financial intermediary within 20 working days starting from the day on which the financial intermediary filed the report with MROS.

Unless the financial intermediary receives an order from the competent prosecution authority within five (5) business days (starting from the date of MROS' notification to the financial intermediary) to extend the freeze, the financial intermediary may release the assets.

Like the rules having effect prior to 1 January 2016, a financial intermediary who violates the reporting duty and duty to freeze the questionable assets may incur penalties, irrespective of the correctness of the

4. Key Points for Financial Intermediaries

Financial intermediaries should be aware that a risk-based analysis of client relationships and asset transactions will also include reviewing the managed assets from a tax compliance perspective taking into account the new rules.

In a timely manner, Client advisors, compliance officers and/or the management must know what they have to do if, for example, it is unclear whether certain assets deposited with the institution or the proceeds thereof, or one or more transactions (smurfing) exceed the threshold of CHF 300'000.

Even though the tax amount evaded does not contaminate the taxpayer's other assets i.e., the entire assets minus the tax amount evaded, bank employees may have difficulty making such a distinction and drawing a line between "mere" tax evasion and disclosable tax fraud.

Urs Kloeti

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 92
urs.kloeti@pestalozzilaw.com

Robert Furter

Senior Counsel
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 91 55
robert.furter@pestalozzilaw.com