

Proposed Tightening of the Fiscal Penal Regulations

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Who has not heard of somebody who ever cheated on taxes? The tricks used by seemingly clever tax evaders range from claiming excessive allowances in the tax return, through concealing an income or a savings account, to an inherited fortune of which the tax authorities are not aware. Whilst such cheating was considered peccadillos so far, it could result in prison sentence in the near future – also for involved asset managers and other advisors. The Swiss government recently proposed respective legislation.

Current legislation

The current legislation in Switzerland distinguishes tax evasion and tax fraud. The examples given in the introduction usually qualify as tax evasion. Accordingly, the sinners expose themselves – besides the payment of the unpaid taxes and interests – only to a fine, should his or her conduct be revealed to the tax authority. Such fine amounts to one third to up to three times the unpaid tax. On the other hand, tax fraud takes place when for the purposes of tax evasion, falsified or non-genuine documents are used to deceive. As the tax return itself does not qualify as a document in the terminology of Swiss fiscal penal law, the mere concealing of income in tax returns usually does not qualify as tax fraud. The same holds true if excessive allowances are claimed in the tax return. Only if falsified receipts or other supporting documents are filed, the act may qualify as tax fraud. Tax fraud is threatened by imprisonment.

The tax authorities often have their hands tied when it comes to fighting tax evasion. Under current law, their investigative powers are limited, and in particular, they may not request information from banks as the latter are protected by the banking secrecy.

New fiscal criminal offenses

According to draft legislation published on 29 May 2013 by the Swiss government, three types of tax offenses are defined: Tax evasion as defined by current legislation will continue to be the base offense. Tax evasion is assumed if a taxpayer either intentionally or negligently achieves an unjustifiable low tax burden. Also, the legal consequences of tax evasion remain unchanged: besides the retroactive taxation a mere fine – which, in specific cases could be high – may be imposed.

The draft legislation, however, proposes two additional (qualified) tax evasion offenses, both of which are referred to as tax fraud:

The threat of punishment is prison sentence of up to three years if the tax evasion is achieved by using falsified or non-genuine documents or if malicious conduct results in tax evasion. This definition of qualified tax evasion seems to be congruent with the definition of tax fraud under current law, but actually goes beyond it. The factual elements are not only fulfilled if document fraud is committed. Rather, malicious conduct is sufficient. The tax authorities and the courts will have to define what is considered to be malicious conduct in the future. On the basis of Swiss case law relating to fraud in general penal law, it could well be that malicious conduct is assumed if the information provided by the taxpayer cannot – or only with special efforts – be verified by the tax

authorities. Non-disclosure of a savings account in the tax return could, under the proposed legislation, qualify as malicious conduct, as a verification of the completeness of the tax return is generally not possible – in particular if structures involving trusts or offshore companies are used. It is therefore possible that the tricks as outlined at the very beginning of this essay qualify as malicious conduct.

Up to five years of prison sentence are threatened if, in addition to malicious conduct, the undeclared tax basis exceeds the amount of CHF 600,000. In general penal law terms, tax evasion becomes a crime in such cases. The heir who inherits an undeclared bank account in excess of this amount and does not immediately report the account to the tax authorities therefore may risk prison sentence of up to five years according to the new regulations.

Prison sentence for asset managers, attorneys-at-law and tax advisors

Under current law, instigation to, facilitation of, and complicity in, tax evasion are threatened with a fine. In addition, an instigator, facilitator or accomplice is severally liable for the unpaid tax. According to the draft legislation, however, tax evasion may qualify as an offence or crime and thus, instigation, facilitation and complicity would be punishable. Tax advisors, asset managers and attorneys-at-law may therefore face imprisonment if they support their clients in tax evasion.

Enhanced investigation competences of the tax authorities

The Swiss government also proposes provisions according to which the tax authorities may request information directly from banks in the future. In other words, bank secrets will be revealed towards tax authorities (and only towards tax authorities). As a matter of course, the authorities will not be empowered to request information from banks at their discretion. Rather, clear grounds for suspected tax evasion are required. Besides these enhanced information rights, the authorities may order other measures which the Swiss newspaper reader may know from neighbouring countries: it is expressly foreseen that the tax authorities may order seizure of objects, house searches as well as provisional arrest of persons.

Implementation

An implementation schedule has not been published and it is not foreseeable whether the draft legislation will be amended or changed by the Swiss government prior to implementation. The consultation process will end in September 2013. The debate in the parliament will likely not be held before 2014. Therefore, an enactment is not expected before 2015.

Relevance of the proposed law

The Cantons carry out a few thousand tax evasion proceedings per year. In particular due to the new criterion of malicious conduct it is probable that in the future many of these proceedings will deal with qualified tax evasion and accordingly will be threatened with prison sentence. Although many of these proceedings may not end with a prison sentence, both tax payers and advisors need to be aware that a conviction leads to an entry in the criminal records. Also, tax evaders may want to consider the following:

According to the Swiss government's proposal, advisors, asset managers and attorneys-at-law expose themselves to prosecution if they assist in (qualified) tax evasion. The draft legislation provides for the possibility of a voluntary disclosure that will remain unpunished for the disclosing person. Should an advisor, for fear of being punished, decide to voluntarily disclose his or her involvement in tax evasion, such advisor will in principle remain unpunished. The tax evader, however, will most likely face the full force of the law.

Everybody who is subject to tax in Switzerland has, under certain circumstances, the right to clean up his or her tax sins once in a lifetime without being punished. Tax payers having a guilty conscience are best advised to undertake such voluntary disclosure, ideally before the new provisions are enacted.