Kellerhals Carrard

Short & Simple

2/2016

Qualified tax offences as new predicate offences to money laundering

On 12 December 2014, the Swiss Parliament adopted the Federal Act on the Implementation the Revised Recommendations of the Financial Action Task Force (the FATF Implementation Act), which adapted various laws to the FATF Recommendations.

The goal of the FATF is to develop uniform international standards in the areas of combating money laundering and terrorism financing. The member states, which include Switzerland, are periodically evaluated as to the correct implementation of and effectiveness of the relevant legal provisions. The new FATF Implementation Act aims to introduce the latest revision to the FATF Recommendations into Swiss law and to close gaps identified during the 2005 country evaluation of Switzerland. Some of the provisions, in particular the measures aimed at improving the transparency of legal persons and of bearer shares, already entered into force on 1 July 2015 (see our May 2015 issue of «Kurz & Bündig» (only in German) [Link]). The second part of the Act entered into force on 1 January 2016. The focus of this issue of «Short & Simple» lies on qualified tax offences in respect of direct taxes, which, as of 1 January 2016, have newly become predicate offences to money laundering.

The previous legal situation as to tax offences as predicate offences to money laundering

In the criminal provision on money laundering that was valid until the end of 2015, only felonies as the most serious offences («Verbrechen»), which can be punished by a prison sentence of over three years (art. 10 para. 2 Swiss Penal Code, SPC), were defined as predicate offences to money laundering (Art. 305bis Abs. 1 SPC). Thus, as concerns tax offences, only aggravated tax fraud in respect of indirect taxes pursuant to art. 14 para. 4 of the Federal Act on Administrative Penal Law (VStrR) was classified as a felony and therefore a predicate offence to money laundering. However, this predicate tax offence was largely insignificant in practice, in particular because it was limited to cross-border trafficking of goods (smuggling) and only concerned value added tax upon import, customs duties and special excise duties such as tobacco and beer taxes. Outside of this limited field of application and especially in respect of direct taxes, tax evasion and tax fraud were not classified as felonies and thus were not predicate offences to money laundering.

However, the FATF recommends that, in order to combat money laundering as broadly and efficiently as possible, all serious crimes, and in particular serious tax offences in respect of both direct and indirect taxes, be classified as predicate offences to money laundering.

Against this backdrop, Switzerland had two options. It could either have adapted certain other serious tax offences besides those mentioned in art. 14 para. 4 VStrR, and especially those in respect of direct taxes, to be felonies, so that they would automatically count as predicate offences pursuant to the money laundering provision in the SPC. Or it could have adapted art. 305bis SPC so that certain tax offences that lie under the threshold of felonies qualify as predicate offences to money laundering.

New predicate offence to money laundering in respect of direct taxes: The qualified tax offence

With the FATF Implementation Act, the second option has prevailed. In order to not prejudice the planned revision of Swiss tax law, which has been deferred, lawmakers decided not to redefine tax fraud as a felony per se and thereby change the maximum threatened punishment in the tax laws, but rather to lay down a independent definition of qualified tax offences in art. 305bis nr. 1bis SPC.

Pursuant to the revised art. 305bis nr. 1bis SPC, a qualified tax offence in respect of direct taxes is given if forged or falsified documents or documents with untrue content, such as accounting records, balance sheets, income statements, wage statements or other statements of third parties, are used to deceive the authorities for the purpose of tax evasion. In addition, the amount of taxes evaded must be over CHF 300'000.– per tax period. The qualified tax offence must be committed wilfully; it suffices if the offender considers it possible that he or she may be committing the tax offence through his or her actions and accepts this possibility.

The following differentiation is important: the tax fraud offences sanctioned in the tax laws are offences that are considered committed purely through the act of using falsified documents, that is, through submitting the falsified documents to the tax authorities for the purpose of tax evasion. The duty to pay taxes does not actually have to be evaded (in other words, the tax evasion does not actually have to succeed). In contrast to this, money laundering is conceived in Swiss law as a «frustration of the seizure» of funds. In order for a money laundering offence to be given, there must be something to seize. For predicate tax offences, this means that the tax offence must have led to a result: taxes must effectively have been evaded.

Qualified tax offences are applicable both in respect of the income and property taxes of natural persons and the profits and capital taxes of legal persons as well as in respect of property gains taxes. ***Moreover, tax offences committed abroad can also count as predicate offences to money laundering in Switzerland.*** This is the case provided that the foreign offence is classified as a qualified tax offence in Switzerland (meaning the use of forged or falsified documents or documents with untrue content as well as tax evasion in the amount of at least CHF 300'000.–) and is also punishable abroad. Although the Federal Council's Dispatch could be interpreted as stating that the principle of dual criminality does not apply in this case, it does indeed apply, as (ex-)Federal Councillor Widmer-Schlumpf made clear during the parliamentary debates on the law.

Two further issues are noteworthy.

Issue 1: Which assets are «contaminated»?

The concept underlying the offence of money laundering is not completely consistent with the way the new predicate tax offences are designed. The classic conception of money laundering is based on the premise that its predicate offence has yielded contaminated assets (that is, assets that have been acquired through criminal acts and that can be seized as such, e.g. money obtained through a fraudulent act). In contrast, a qualified tax offence as a predicate offence

does not lead to the acquisition of criminal assets, but to a criminally sanctioned avoidance of expenses by the taxpayer. It therefore leads to the taxpayer being inadmissibly «enriched through savings». Questions thus arise as to how assets that are subject to seizure by law enforcement authorities should be defined. According to the usual conception, these are only assets that have been acquired through the criminal act itself. However, in the case of tax offences, as mentioned above, the enrichment does not manifest itself in an inflow of assets, but in an avoidance of expenditures in the form of tax liabilities. Based on the Federal Council's Dispatch, it seems clear that qualified tax offences do not lead to a contamination of all of the taxpayer's assets. Rather, only those assets that the tax authorities have been deprived of (i.e. the tax savings) through the qualified tax offence can be the object of subsequent money laundering. It is striking that the Dispatch equates assets obtained through criminal acts («assets the authorities have been deprived of») with avoided expenditures («tax savings»). The Dispatch also does not explain how «tax savings» as part of one's assets can lead to the assumption that these are assets that authorities have been deprived of and that they are thus able to seize. Because of this issue, it will be difficult for intermediaries (e.g. banks, insurance companies and asset managers) to identify exactly which assets could be the potential object of money laundering and must be frozen in accordance with notification requirements.

Issue 2: Temporal scope?

According to the transitional provisions of the FATF Implementation Act, art. 305bis SPC is not applicable to qualified tax offences committed prior to 1 January 2016. However, the question arises whether a final tax assessment issued by the authorities in the year 2016 for the tax periods 2014 or 2015, and which shows that over CHF 300'000.– in taxes were evaded, can form the basis for a predicate offence to money laundering, or whether this is only the case if all of the acts carried out for the purpose of tax evasion, i.e. submitting forged, falsified or untrue documents, were carried out after 1 January 2016. In view of the fact that the wording of the transitional provisions refers to offences «committed», that the Dispatch expressly mentions a prohibition of retroactivity and because tax fraud is a criminal offence that is committed purely through an act on the part of the offender, it appears more likely that an evasion of taxes that only succeeds after 1 January 2016 is not enough, and that the action that actually leads to the evasion (submitting forged, falsified or untrue documents) must be carried out after this date. This interpretation is further justified by the case law of the Swiss Supreme Court, which holds that a limitation period begins to run not when the criminal act succeeds, but at the point in time that the relevant action is carried out by the offender. However, actions carried out in 2016 that lead to a qualified tax offence can, in some cases, concern earlier tax periods.

New predicate offences to money laundering in respect of indirect taxes

Finally, it is worth mentioning that art. 14 para. 4 VStrR, concerning indirect taxes, was also expanded beyond customs smuggling as of 1 January 2016. This provision (qualified duty fraud) is now generally applicable to all qualified duty offences and not only to those in the realm of the international movement of goods. As of 1 January 2016, the provision is also applicable to the withholding tax and stamp duties and also includes VAT on inland deliveries, provision of services and alcohol, beer and tobacco taxes on inland production. Criminal offences in respect of indirect taxes that fulfil the conditions of art. 14 para. 4 VStrR (commercial character or cooperation with third parties and a significant unlawful advantage or significant damage caused to public authorities) are now subject to punishment by prison sentence of up to 5 years and thereby constitute predicate offences to money laundering pursuant to art. 305bis nr. 1bis SPC. This is in particular the case for qualified duty fraud committed abroad pursuant to art. 305bis nr. 3 SPC.

We are glad to answer any questions related to the topics addressed in this newsletter.

Zurich, March 2016

Dr. Florian Baumann, Attorney at Law
MLaw Lea Ruckstuhl, Attorney at Law