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Double taxation squared: The latest about the unconstitutional circular no. 40 (part II)

Dear Sir or Madam,

In the artax newsletter published [2 February 2016](#) we covered the unconstitutional practice regarding the Federal Act on withholding tax. In November 2015 specialist magazine "Finanz- und Rechnungswesen" (by publishing house WEKA) published an article by this author with the headline "Unconstitutional Circular No. 40 – Entitlement to Reimbursement of Withholding tax". Reaction suggested that this is a major problem and that annually around 50 to 100 million Swiss Francs have been collected unconstitutionally.

In practice, Circular no. 40 leads to a refusal to reimburse withholding tax in situations of incorrect declarations even when the taxpayer would be worse off with a forgotten declaration than he would have been, had he declared everything in an orderly way. The Federal Act on withholding tax assumes cooperation between tax authorities and taxpayer (what had been called the mixed method). However, Circular no. 40 is in contradiction to the Federal Act on withholding tax as it states that an incorrect declaration immediately and directly leads to forfeiture of any claim for reimbursement after the submission of the tax declaration.

Orderly taxation of qualifying participants

The tax circumstances of an owner of an SME for the declaration of his participations look as follows:

Dividends from financial year 2014, agreed upon in spring 2015 and paid out in spring 2015.

The dividend voucher looks as follows:

Dividend credit: 100'000
Minus withholding tax: - 35'000
Net credit: 65'000

Entered into tax declaration 2015, shown here in a simplified way:

Income 2015 dividend 100'000, of which 50% taxable, thus 50, approximated 10% federal tax and 20% cantonal tax, thus tax to be paid 15'000
Credit of withholding tax: 35'000

The tax return looks as follows:

Tax to pay: 15'000

Credit withholding tax: 35'000

Net credit: 20'000

Dividend after tax and credit withholding tax: 85'000

Pro memoria I: net tax burden = 15%, hence 15'000.

Pro memoria II: for a profit of 100'000 to be distributed, tax needs to be paid on this profit, which means that around 20'000 to 25'000 in profit tax has already been paid by the owner's SME. The accumulated tax burden thus corresponds with the direct tax burden as if the whole profit base would have been drawn by the owner as salary. The aim of the Business Tax Reform Act II was to minimise the double tax burden on SME and owner, which it basically succeeded in with the reduced taxation. The example here has just been a simplified presentation, depending on canton and progression, the results must be calculated individually.

Omitted declaration

Not every omitted declaration leads to a tax reduction. In fact, here it is the other way round. If a shareholder forgets to declare his or her dividends, the following happens:

Dividend credit: 100'000

Minus withholding tax: - 35'000

Net credit: 65'000

Had he or she declared, the result would be:

Tax to pay: 15'000

Credit withholding tax: 35'000

Net credit: 85'000

Tax disadvantage:

Net 65'000 compared to net 85'000, thus a loss of 20'000.

Conclusion: it is in every SME owner's interest to declare dividends out of his or her own company to avoid a major loss.

Unconstitutional circular no. 40

Now, if the tax administration discovers a declaration error regarding dividends, it immediately leads to forfeiture of any claim for reimbursement of withholding tax. From 1965 when the Federal Act on withholding tax was introduced until the questionable decision by the Federal Supreme Court in 2010, any differences within the declaration of revenue liable to withholding tax were dealt with during the mixed method. Only once the ruling had come into force would any claim for reimbursement become null and void. Now any error immediately leads to forfeiture. Thus the tax return looks as follows:

Dividend: 100'000

Minus income tax: 15'000

Minus withholding tax: 35'000

Reimbursement withholding tax: 0

Remaining net: 50'000

Tax disadvantage:

Net 50'000 compared to net 85'000, thus a loss of 35'000.

Although any declaration deficiency can never be in a taxpayer's interest, a penalty is immediately imposed on him or her: the forfeiture of any claim to reimbursement. A procedural fine – for example 500 – and the full credit would be constitutional. A penalty on profit was abolished with the introduction of the Swiss Criminal Code at the beginning of last century, but not in taxation.

New additional penalty taxes

The creativity of tax authorities in collecting more money has gained momentum with the practice of imposing penalty taxes in cases of declaration error. For example the canton of Graubünden has started to impose penalty taxes in such situations (StV GR, commissioner's department, in the matter of xy, 30/06/2016).

Thus the tax returns looks as follows:

Dividends: 100'000

Minus income tax: 15'000

Minus penalty tax, usually 100%: 15'000

Minus withholding tax: 35'000

Reimbursement withholding tax: 0

Net remaining: 35'000

Tax disadvantage:

Net 35'000 compared to net 85'000, thus a loss of 50'000.

Although here, an erroneous declaration has not led to the taxpayer's advantage, he or she is nevertheless penalised twice, once via the penalty tax and once via the refusal to reimburse the withholding tax.

The next step could then be a fine according to the Federal Act on withholding tax, for example 5'000 following Art 64 FAWT.

Glimmer of hope

Amongst the Federal Council, the current practice has led to submissions: the motion of Daniela Schneeberger "No forfeiture of Withholding Tax", and the parliamentary initiative by Luzi Stamm "Federal Act on Withholding Tax, mixed method". Their aim is the reintroduction of the practice that had been applied previously: a fair practice, with the tax administration and the taxpayer jointly working together, in order to get fair taxation in the end.

Kind regards

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