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The latest on unconstitutional Circular no. 40 (part IV)

Dear Sir or Madam,

In [artax newsletter dated 2 February 2016](#) we reported on the unconstitutional practice concerning the Federal Act on Withholding Tax. You can find all our newsletters on our [homepage](#). In our [newsletter dated 25 October 2016](#) we reported about current decisions regarding this issue. On 10 January 2017 we were able, with [newsletter III](#), to report about the success of our critical review regarding this issue as the Federal Government initiated a law revision to end the unconstitutional practice. With this newsletter we will be reporting on the current status of the legislative process.

On 28 March 2018 the Federal Council passed the dispatch about an amendment to the Federal Act on Withholding Tax and the relevant draft legislation respectively. According to this draft, Art 23 para 2 Withholding Tax should be amended as follows:

"A forfeiture does not occur if either income or assets had, due to negligence, not been entered into the tax declaration form, but then, prior to the expiry of the deadline for appealing against the assessment regarding income and property tax,

- a) had subsequently been declared; or*
- b) had, after its own observations, been added by the tax authority to either income or assets."*

The new element now is that claims for tax refunds can no longer be forfeited. According to the proposal by the Federal Council, the new regulation shall be applied to all instances in which the period for appeal has not yet expired at the time the legislative change comes into effect (Art. 70d draft Withholding Tax).

However, it remains unclear whether this transitional provision really implements the intention of the Federal Council. In its dispatch from 28 March 2018, not yet published in the Federal Gazette, it says: *"However, what is central here is the fact that the application of the new legislation on all proceedings that have not been closed yet is secured. This regulation is in accordance with the legal principle which says that, in absence of an explicit regulation, new legislation is applicable to ongoing administrative proceedings. An application of the amendment beyond that on final judgements would constitute an inadmissible rejection and thus needs to be dismissed."*

As can clearly be seen from these explanations, the Federal Council rejects the application of the new regulation on final judgements. On the other hand, it is not quite

clear yet whether the Federal Council really intended the new law to be applied on all proceedings that have not yet been legally closed.

However, even if the Federal Council had not intended that the new law should not be applied to all proceedings that have not yet been legally closed it cannot be excluded that parliament will extend a retroactive effect on all proceedings that have not been legally closed. Furthermore, neither can it be excluded that parliament will put the planned legislative amendment into effect on 1 January 2019. For this reason, the Federal Council, in its dispatch on 28 March 2018, explained that parliament would need to pass the revision in its autumn session 2018 if it intends implementation as of 1 January 2019 (advance copy of dispatch, *ibid.*, 16). The autumn session will take place from 10 to 28 September 2018.

The refusal of a refund is a "true" retribution that has been set irrespective of fault. A sanctioning irrespective of fault, however, is in breach of Art. 6 ECHR. According to the jurisdiction of the European Court of Human Rights, not only does a criminal charge, leading to the application of Art. 6 ECHR, exist if domestic law considers violation to be part of (criminal) tax law, but also, under certain circumstances, if domestic law qualifies a proceeding as an administrative proceedings rather than a criminal proceedings (see also STEFAN OESTERHELT, application of Art. 6 ECHR on tax proceedings, ASA 75, 593 ff, p 610 – in German only). You really have to agree with the cantonal court of Fribourg which has qualified the refusal of a refund as a retribution to be issued in a proceeding in order to maintain the guarantees given by art. 6 ECHR (Cantonal Court of Fribourg, Judgement 604 2017 13, dated 27. July 2017, E. 3.c).

Kind regards

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