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lic. iur. Bigna Gadola

Legal Counsel
Licensed Auditor RAB

Michael Hasler

Certified Fiduciary Specialist
Licensed Audit Expert RAB

The impending review of the fiscal penal law

Dear Ladies and Gentlemen,

Status Quo

The fiscal penal law is part of the supplementary penal provisions and includes the penalty clauses of the different tax laws. Depending on the form of taxation (e.g. income tax or withholding tax), offences and proceedings can differ, leading to legal uncertainty among those affected. Should a tax offence relate to several forms of taxation, for example, if income from dividends is not declared and consequently, withholding tax is not declared either, then it will be subject to different legal proceedings and also to different legal remedies. In case of direct federal tax it is possible, under certain circumstances, that with the current system, an offence can fall under the "ne bis in idem" principle (double punishment), since tax evasion and tax fraud are separate offences. Art. 186, section 2, of the Direct Federal Taxation Act (DFTA) explicitly states: "*Tax evasion remains subject to punishment.*"

The two forms differ as follows:

Tax evasion, Art. 175 DFTA	Tax fraud, Art. 186 DFTA
<ul style="list-style-type: none">- Concealment of facts relating to tax	<ul style="list-style-type: none">- Creating and using fake, falsified or inaccurate documents – or having them created – for the purpose of tax evasion
<ul style="list-style-type: none">- Missing or incomplete declaration of such facts to the authorities	<ul style="list-style-type: none">- e.g.: annual reviews, salary statements, with the exception of the tax declaration form itself
<ul style="list-style-type: none">- Penalty: fine	<ul style="list-style-type: none">- Penalty: imprisonment

Aim of the review

The aim of the review of the fiscal penal law is to get rid of currently differing regulations, investigative measures, and competencies of taxation types, in order to standardise proceedings and what actually constitutes an offence, and also to put an end to double punishment. Once the reviewed fiscal penal law comes into effect, tax evasion should be regarded as the basic offence (misdemeanour) and tax fraud as a qualified, i.e. a serious form of tax evasion (serious offence). Anyone committing tax evasion by using fake, falsified or factually inaccurate documents, or by acting with malicious intent shall be prosecuted for committing a serious offence. Acting with malicious intent includes the use of incorrect data, already a prerequisite for committing tax fraud under current law. A more comprehensive specification still needs to be defined by law and by the courts. In case of minor offences, i.e. where there is minimal fault and only a minimal result due to the minor offence, either criminal proceedings or punishment can be dispensed with.

As the cantonal authorities are responsible for criminal proceedings should apply criminal procedure law in cases of direct taxation, they can, due to extended investigative means, interview defendants, as well as witnesses, and request written statements. Additionally coercive measures like house searches, requisitioning and - in exceptional cases - even arrests, can be enforced, though arrests are only possible with an arrest warrant issued by a court. These rather drastic measures, however, are limited to a considerable extent, as they can only be applied if performed by qualified experts and in an appropriate way. A more comprehensive definition of these two terms shall be reflected in the message about the upcoming review.

A further and not unimportant amendment would mean that in criminal proceedings cantonal authorities are allowed to have access to banking data of taxpayers which would put an end to bank secrecy. However, this would only be possible after prior authorisation through a cantonal authority without any ties to the tax authorities.

According to a notification by the Federal Department of Finance issued 2 July 2014 the review of the fiscal penal law should improve legal protection of all persons affected as criminal law procedure supplies the legal means to not only have investigative measures but also forfeits and fines reviewed via appeal upheld by the criminal court.

These new regulations are of particular importance not only to those affected, but also to tax advisors and asset managers: should tax evasion, with malicious intent, be deemed a serious offence, then instigators, assistants and accomplices are also liable to prosecution and consequently could risk imprisonment, instead of just a fine, as under current law.

Timing

The consultation proceedings ran from 29 May to 30 September 2013. Early in July 2014, the Federal Council considered the evaluation report documenting the results of the consultation proceedings, and ordered the Department of Finance to issue a statement by the end of 2015. This means it is unclear when, and in what form, the proposed regulations will come into effect.

Conclusion

Although the authorities emphasise that the impending review of the fiscal penal law will lead to a standardisation, and thus to an improvement, which removes legal uncertainties and strengthens legal protection for the taxpayer, it should not be ignored that the draft version includes significant changes, such as the annulment of banking secrecy. However, the draft version was amended after the findings of the consultation proceedings to such an extent that cantonal tax authorities themselves cannot initiate an annulment of banking secrecy, this can only be done by independent authorities. Nevertheless, the effects of this draft law should not be underestimated – this goes particularly for tax advisors who, on the one hand, are increasingly turning into “accomplices” of the tax authorities and on the other hand, are convenient scapegoats for those customers who want to walk away scot-free.

artax Fide Consult AG

Member of Morison International

Gartenstrasse 95, Postfach, 4002 Basel
Tel: +41 61 225 66 66, Fax: +41 61 225 66 67
info@artax.ch, www.artax.ch