Swiss banking secrecy: A myth has been destroyed – 2012 Update

by Eric Fiechter, Geneva, 7.3.2012

Less than 10 years ago, to answer the mounting pressure from the USA and the EU, the biggest Swiss political party (SVP UDC) proposed to adopt a new article in the Swiss constitution to make banking secrecy a constitutional right[1]. Today, no one talks about that anymore and sooner rather than later banking secrecy, even in purely domestic situations, will be limited along the lines imposed by the USA and the EU in the international context. The issue discussed now is whether or not Switzerland should accept the automatic exchange of information in tax matters with the EU and the USA as the lesser evil. It would generate less revenue for the foreign tax authorities than the proposed agreement with the UK and Germany, but it would enable the Swiss banks to reduce their operating expenses. This will become a key factor in the coming years. Be more competitive in terms of costs will be a most significant factor in an economic environment generating little income for the clients. Things have changed very quickly these last three years, yet the various articles published since 2009 remain largely up-to-date:

The "**Hide or Disclose**" article of September 2009 dealing with the history of Swiss banking Secrecy remains true today, i.e. the Swiss measures have generally no retroactive effect, but with special caveats in the case of Germany and the UK[2] due to the agreements reached (not yet ratified) with those two countries to maintain Swiss bank secrecy. If secrecy is to be maintained towards the tax administrations, then the banks must ensure that taxes are paid on an anonymous basis, even for the past.

We insisted in our article entitled "**Why are USA Taxpayers more in trouble than others"** (2009 -2010)[3] that USA clients are more threatened than others because the Swiss government was reinterpreting the existing Double Taxation Agreement in a broader way, declaring that the mere use of offshore companies to hide assets from the US Tax authorities was already a sign of possible criminal activity in all cases involving substantial amounts. The latest developments with new Swiss banks becoming the targets of the US authorities confirm our warning[4]. The conclusion of that article remains true, i.e. that those concerned should separate strictly their reportable assets from those they may want to have used in favor of others, with a long term planning in mind. Very often the possibility to escape the ever tighter Swiss rules for ensuring that assets held by Swiss Banks are reported has become a costly

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[1] http://www.domainepublic.ch/articles/4613

[2] http://www.stswiss.com/pdf/banking_03.pdf (March 2009)

[3] http://www.stswiss.com/pdf/banking_03.pdf (March 2009)

[4] NZZ, 13.12.2011, p. 27 Juristische Fragenzeichen

illusion for those clients. This does not mean that nothing can be done, as was outlined in the article entitled **"Protect your assets"**[5]. In said 2009 article we warned that the biggest threat came from the GAFI rules against money laundering[6], which are now being implemented and which put the tax evasion at the same criminal level as terrorist activities and drug money[7]. In addition, Anti-Money Laundering agencies, including the Swiss ones, should be authorized to exchange bank information directly and not only through judicial or tax assistance procedures, i.e. pretty much without any control. This is a major change, definitely destroying whatever may be left from Swiss bank secrecy. The OECD will probably take over the GAFI recommendation in 2012 and the Swiss government has already indicated that it will follow the new OECD recommendation, probably by asking each client of a Swiss bank to certify that his assets are reported to the competent tax authorities, with a duty for the bank to investigate further if the client wants the mail to be sent to a place other than his domicile (or even worse, kept at the bank pending his next visit) or if he wants only investments that are not subject to withholding taxes... This is a very significant development, which should again persuade the clients of the Swiss banks to be proactive along the lines indicated in the above mentioned articles.

This is even more true today since our skepticism towards the assurances given by the Swiss government about the conditions under which they would disclose client data under the double taxation treaty has proven to be more than justified. In the article entitled "**Secrecy is not the issue**"[8] we pointed out that Switzerland remains a special place, with public finance in so much better shape than nearly all other OECD or EU countries including France and Germany. We also pointed out the likelihood that those governments would continue confiscatory policies against the wealthy, leading their tax payers to seek protection, even if it is at a higher cost, for instance by moving their residence to Switzerland. This risk is evidenced by the political campaigns in 2012 and the number of new tax related residence permit applications handled by the Geneva lawyers.

In the article "**Be aware of the Risks but do not Panic**"[9] we warned about the risk of disclosure of bank internal information and about the broader interpretation of the conditions under which the Swiss government would accept requests for information from other states. This threat has become true, since it is now well established that the clients need no-longer to be identified by name by the states requesting

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[5] http://www.stswiss.com/pdf/banking_01.pdf (March 2009)

[6] NZZ, 17.02.2012, p. 23, Kampf gegen Geldwäsche and p. 25 Mit einem Fuss in der Geldwäschesteuerdelikte sollen welt weit under die Lupe genommen werden

[7] NZZ, 19.01.2012, p. 11, Bankgeheimnis schütz Geldwäscherei nicht

[8] http://www.stswiss.com/pdf/banking_01.pdf (March 2009)

[9] http://www.stswiss.com/pdf/banking_01.pdf (March 2009

information for tax purposes. It is enough for a requesting state to give a complete and unique bank account number (IBAN), even without naming the bank.

In the Swiss Government Strategy Paper setting out the policy for the years to come in banking and tax matters the federal government explains clearly that the policy of the Swiss government is to ensure that all money managed through Swiss banks is money declared to the competent tax authorities (US, EU other possibly others). In practice, the implementation of that political objective is likely to vary substantially depending on the state involved. Strict compliance will be achieved in case of US Tax payers identified as such (nationals, and green card holders). A certain number of clients of Swiss banks will however hide the fact that they are green card holders or that they have dual nationality to declare only their non-US nationality. In the case of the EU, it is not yet clear if strict banking secrecy will be maintained for those who elect to have their taxes withheld by the Swiss banks, assuming the Rubik Treaties go into force, which is totally uncertain at this time. For other nationals, there may be overriding considerations of protection of privacy in particular for individuals threatened by guerillas or paralegal troops in their home states. Such situations may lead the Swiss government to exclude a number of countries from the list of those to which the "tax compliant policy" will apply.

Based on a recent survey of KPMG[10], Swiss banks expect that 70% of the assets held will be tax compliant in 5 years' time. The international pressure is likely to increase that percentage and shorten the deadline significantly!

This explains why this article is entitled "Swiss banking secrecy: A myth has been destroyed". The century long protection of confidentiality in Switzerland has finished losing its fundamental character during the last three years.

[10] Performance through focus, seizing the global private banking opportunity, KPMG Holding AG 2012