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Lifting Bank Secrecy for Tax Purposes
(Recent Developments and Current State of Affairs in Portugal)

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1. On August 14 2007, as has been widely reported in the media, the Constitutional Court held that some of the features of the most recent legislative proposal on lifting bank secrecy were unconstitutional since they were not proportionate to the ends to be achieved, that is to say, direct access to taxpayers' bank account information, with or without their consent, during the course of an administrative or judicial claim.

Under the approved wording, access to bank information would have been allowed without the consent of the taxpayer and without prior judicial authorisation if this were justifiable in view of the allegations made by the claimant, if it were presented as a supplementary procedure which would be absolutely indispensable to uncover the truth, and the information and the documents were relevant to the tax issue in question.

With this decision, the Constitutional Court has gone some way towards limiting the widely progressive trend in lifting bank secrecy for tax purposes which began with the tax amendments in 2000 and which some have argued is in direct conflict with the rights and guarantees enshrined in the Constitution.

Apart from those mentioned above, Parliament has also passed an entire range of other amendments on this matter, which were not reproved by the Court or queried by the President of the Republic. Consequently, these amendments should enter into force as soon as the unconstitutional provisions referred to above have been expunged; or after the respective wording has been confirmed by a qualified majority of parliamentary deputies: the possibility of the tax authorities having access to bank documents and information without requiring the consent of the holder of the protected details when the taxpayer, after having been notified to produce the legally required declaration, fails to do so, and also the widening of the scope of access in cases of a refusal to produce or authorise the inspection of information provided to justify recourse to credit.

The legislative amendments which have been declared unconstitutional would undoubtedly have reduced the number of litigation proceedings, in terms of the number of administrative and/or judicial claims which would not be filed. However, this reduction would only have come about as a result of the intimidation which would arise from the enactment and application of such a provision, which does not appear appropriate to us to be a suitable solution either.
«In our view, the most propitious moment for balance both in terms of the lifting of the bank secrecy regime introduced at that time and the numerous amendments thereafter, would have been some years after the entry into force of the tax amendments made in 2000 (where the actual regime originated), as only then could it actually be perfected, and always with a view to obtaining a regime which is more appropriate for a correct balance between the powers of the tax authorities and the guarantees of the taxpayers.

2. The Constitutional Court did not deem the unconstitutionality of another legislative amendment which was also submitted for inspection, and which provides that a final decision determining taxable income on the basis of external signs of wealth would be communicated not only to the Public Prosecutors' Office but also if the employee or position holder were accountable to a public body, to the respective body for investigation.

This provision gave the President of the Republic some cause for doubt as to its conformity with the principle of equality, by virtue of it establishing a distinctly different regime for workers or position holders with a public entity than that applicable to other citizens.

It appears to be an unnecessary measure, lacking in prudence as well as being somewhat excessive, as it adds nothing significant to the disciplinary status of civil servants and may in fact give rise to likely misunderstandings and suspicions at their expense, particularly when confirmation of the above-mentioned external signs of wealth does not necessarily point to a disciplinary offence, let alone constitute proof or beginning of proof, nor could it reasonably lead to an assumption of or point to such a practice, as there must always be conduct that might have enabled the extraordinary enrichment, in violation of duties.

Here the Constitutional Court deemed that there were grounds for such positive discrimination by the fact of the circumstances

of such persons, in comparison to other taxpayers, and differentiating them from one point of view would not be arbitrary or unreasonably discriminatory.

3. Consequently, in accordance with the existing regime inherited from the amendments introduced in 2000 and expanded by successive legislation, it remains the case that bank secrecy may be lifted for tax reasons in a wide range of situations.

Firstly, the tax authorities have the power to access taxpayers' bank information or documents directly (deeming these to be any document or record, regardless of shape or form, which evidences or records a transaction carried out by credit institutions or financial companies) without being dependent on the consent of the taxpayer or even needing to hear the taxpayer in advance, whenever there is a suspicion that tax crimes are being committed or there are specifically identified facts which point to any deliberately incorrect amounts declared by the taxpayer.

The tax authorities also have the power to access directly the bank documents (but not as yet bank information) of the taxpayer after the necessary hearing if the taxpayer refuses to allow them to be presented or inspected, and the situation is one of the following: the documents are supporting documents for accounting records of IRS or IRC taxable persons subject to the organised accounting records regime or fundamental to the assumptions for attributing tax benefits or being eligible for a privileged tax regime.

In such situations, the tax authorities also have the power to access taxpayers' bank documents whenever the assumptions for making rectifications using the indicated methods are confirmed, in cases of obvious signs of wealth and other unjustified asset increases, or whenever it is necessary to control, for tax purposes, the grant of State subsidies.

The access of the tax authorities to bank information and documents in the situations described is, however, subject to certain taxpayers' guarantees being met:

1. The need to ground the decision expressly stating the specific justificatory reasons;
2. The right of the taxpayer to be heard in advance, except in cases where there is evidence of a crime or details that point to inaccurate amounts being declared by the taxpayer;
3. The exclusive jurisdiction of the Director General of Taxes or the Director General of Customs and Excise taxes (and any of their successors) in the decision to lift bank secrecy;
4. The possibility for appeal to a court, which will only have a suspensory effect on the decision in cases of rectification using indirect methods, signs of wealth and other unjustified asset increases or control of the use of public subsides.

Finally, the law allows the tax authorities access to bank information belonging to family members and third parties with whom the taxpayer has a special relationship, but in such cases, access is subject to a prior express court order and the taxpayer in question must be heard in advance.

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