

NOVEMBER 2009

# Newsletter

**Authors:**

Pietro Sansonetti  
Michael Nordin  
Madeleine Simonek  
Stéphane Tanner

## TAX

## To Disclose or not to Disclose? A Discourse on Switzerland's New Federal Tax Act

A new Federal Act on the Simplification of Additional Tax Assessments in Succession matters and the Introduction of a tax amnesty for voluntary Declarations (hereinafter the New Act") will come into force in Switzerland on January 1, 2010. The purpose of the new Act, which will modify the Federal Act on the Federal Direct Tax (LIFD) and the Federal Act on Harmonisation of Direct Taxes (LHID), is to encourage taxpayers (individuals and businesses) to report in their tax returns those elements of wealth, income and/or capital and profits, prior thereto undisclosed.

### 1 ORIGIN AND CONTEXT OF THE REVISION

Historically Switzerland has introduced only three tax amnesties (1940, 1945, and 1969) and since 1992, a number of proposals submitted to Parliament for a general tax amnesty and similar measures, have been unsuccessful.

In the Summer of 2003 another proposal by the Federal Department of Finance on the simplification of additional tax assessments in succession matters and on the introduction of a voluntary disclosure program in exchange for a waiver of penalties (ie fines) was submitted for consultation.

Since the majority of cantons rejected the idea of a general amnesty (considered to be contrary to the Constitution). The Federal Council published on October 18, 2006 a recommendation providing for additional tax assessments limited to three years for heirs and for the introduction of non-punishable voluntary disclosures. This recommendation was followed on March 20, 2008 by the adoption of the New Act. The Federal Council has set an effective date of January 1, 2010 for the New Act and the cantons must therefore adapt their legislation in accordance with the principles of harmonisation.

The waiver of penalties in exchange for a voluntary disclosure is a type of individual tax amnesty in the sense that it allows a taxpayer to choose the time of its application. However, since a taxpayer can qualify only once in a lifetime, it is not a “general amnesty”, requiring a taxpayer to act within the deadlines set by the amnesty law, as was the case with the 1969 amnesty. For both the simplified additional tax assessments in succession cases and the voluntary declarations, there will be no criminal prosecution and hence no imposition of a fine. However, additional tax assessments and default interest will remain due, although for different periods.

## 2 SCOPE OF THE AMNESTY LAW

For both the simplified additional tax assessments in succession cases and the voluntary declarations, there will be no criminal prosecution and hence no imposition of a fine. However, additional tax assessments and default interest will remain due, although for different periods. Simplified additional tax assessments are available to individuals and legal entities and will apply to the direct federal tax and cantonal taxes. Other taxes and charges not paid by a taxpayer (e.g. VAT, withholding tax or contributions to the old age and invalidity insurances) are due in full with default interest. The same applies to any unlawfully obtained gain on the basis of incorrect taxation, which must be refunded.

## 3 CONDITIONS FOR THE APPLICATION OF SIMPLIFIED ADDITIONAL TAX ASSESSMENTS

To benefit from the New Act, the following three conditions must be fulfilled: the simplified additional tax assessments in succession cases (Article 153a LIFD new) and/or the non-punishable voluntary disclosure (Article 175 para. 3 LIFD new) available to individuals and legal entities:

- > no tax authority is aware of tax evasion at the time of declaration,
- > the heirs or the taxpayer must fully cooperate with the tax authorities to identify all undisclosed taxable items (collaboration); and
- > the heirs or the taxpayer must endeavour to satisfy the additional tax assessments (payment).

## 4 SIMPLIFIED ADDITIONAL TAX ASSESSMENTS IN SUCCESSION CASES

### 4.1 IN GENERAL

In this instance heirs, as individuals, assume the place of the taxpayer. Therefore, if the deceased was the sole shareholder of a corporation and, through its activities, the company did not disclose certain income or wealth, the heirs are not responsible for the corporate tax evasion.

Currently Article 175 para. 3 LIFD governs voluntary disclosures and additional tax assessments and related default interest can be assessed for up to 10 years prior to the death of the taxpayer, although as a practical matter it is often difficult for heirs to establish the amount of the tax evasion for such a long period of time.

Regarding penalties, in order to conform to European human rights law, the Swiss Federal Act of October 8, 2004 abolished liability of heirs for the deceased's tax penalties. Therefore, voluntary disclosures in succession cases are no longer subject to penalties.

For estates opening on or after January 1, 2010, additional tax assessments in succession cases will be limited to the three tax years preceding the year of the death of the taxpayer and default interest will be calculated for the same period. By reducing the scope of possible additional tax assessments from ten years to three years, the objective is to encourage the heirs to list the full inventory of the estate.

### 4.2 STANDING

Under the new Act heirs, administrators and executors have a right to request simplified additional tax assessments, even if contrary to the wishes of the other heirs.

### 4.3 DISTINCTIONS

The 3 year rule will apply only to those taxable items unknown to the tax authorities and the requirement of full cooperation will require a willingness to pay the taxes.

However, heirs who are apprised of the undisclosed amounts only when the estate inventory is listed may still renounce the succession or request a court liquidation and additional tax assessments will be calculated for the standard 10-year period.

## 5 VOLUNTARY DISCLOSURE

### 5.1 IN GENERAL

Under the current law, a taxpayer who voluntarily declares prior tax evasion which is unknown to the tax authorities, is subject to a fine of one-fifth of the tax amount due (Article 175 para. 3 LIFD). However, under the New Act, there will be no penalty if the conditions (see above, *supra*) are satisfied. The taxpayer, however, will still remain liable for the amount of evaded tax and for default interest.

This procedure can be elected only once during a taxpayer's lifetime. Subsequent voluntary disclosures will not be exempt from penalty.

### 5.2 INDIVIDUALS

Pursuant to the new provisions, in addition to the taxpayer, participants in tax evasion (eg, instigators, accessories), who currently do not benefit from any penalty exemption, will also have the option of filing a non-punishable voluntary disclosure (Article 177 para. 3 LIFD new). If the conditions are met, they will also be relieved of their joint liability for evaded taxes and no prosecution will be initiated for criminal offenses directly related to the tax evasion.

It should be noted however, that if a participant files a voluntary declaration, any subsequent voluntary declaration by the participant for personal tax evasion will be ineffective and the inverse is also true for a participant where the taxpayer first files a voluntary disclosure. Thus, assuming all other conditions are met, only a coordinated approach of the taxpayer and the participants will allow them all to benefit from the exemption from punishment.

In the same vein, a voluntary declaration by a participant, such as a tax consultant, covering participation in several offenses will allow an exemption from punishment only for the first offense.

Should the first non-punishable tax evasion also constitute another offense, such as forgery, whilst this offence will not be prosecuted any and all unlawfully obtained gains must be refunded.

### 5.3 LEGAL ENTITIES

Identification of the taxpayer, essential in determining whether a declaration is a "first" voluntary disclosure, will be more difficult for corporations than for individuals, particularly in cases of corporate restructuring or

transfers of registered office to Switzerland. According to the recommendation of the Federal Council, the question of whether an entity is a new or existing legal entity must be determined according to the continuous existence of the legal entity, an objective criterion which provides legal certainty.

Thus, a company name change or a transfer of its registered office to Switzerland will have no influence on the tax obligations of the entity. The same applies for a change of legal form of a company within the meaning of the Federal Merger Act (LFus), provided that the entity, its property and liability to taxation remain unchanged (Articles 53 to 68 LFus; Article 53 para. 2 LFus).

Similarly, in cases of a merger by takeover or a split-off (or spin-off), the surviving company in a merger or the spun-off company will still be liable for taxes and therefore eligible to qualify for a penalty exemption as a consequence of a voluntary disclosure of tax evasion that took place prior to the merger or spin-off provided all conditions are met.

On the other hand, for a company that is absorbed in a merger or which disappears in a spin-off transaction, the non-punishable voluntary disclosure will not be available.

Finally, a company that is no longer liable to taxation in Switzerland will be precluded from filing a voluntary disclosure (Article 181a para. 6 LIFD new).

### 5.4 AUTHORIZED REPRESENTATIVES

Former corporate bodies of the legal entity (e.g., directors and statutory auditors) may also file a voluntary disclosure. Consequently, there will be no criminal prosecution of the company and of current or former members and representatives and their joint liability will be eliminated (Article 181a para. 4 LIFD new).

### 5.5 TAX AT SOURCE

When tax evasion covers tax at source due by the taxpayer, the voluntary disclosure should also cover the related offense of the embezzlement of the tax at source tax (Articles 187 LIFD and 59 para. 2 LHID) and in this case the exemption from penalty will apply to both offenses.

## 6 QUESTIONS RELATED TO THE IMPLEMENTATION OF THE NEW PROVISIONS

### 6.1 IN GENERAL

The new federal law on the simplification and limitation of additional tax assessments in succession matters and the non-punishable voluntary disclosures raises a number of issues. For example, those persons involved in a tax evasion and wishing to disclose it to the tax authorities without criminal consequences should coordinate their efforts. Additionally, some taxpayers will fall under several legal categories and legal scholars have already highlighted the following pitfalls that may arise:

### 6.2 THE POSITION OF THE SPOUSE

Legally the spouse of the principal author of the tax evasion may be both a "taxpayer" and a "heir". However, the new provisions on additional tax assessments in succession matters offer the benefit of simplified and limited additional tax assessments only to "heirs". Thus, whether the rules on simplified and limited additional tax assessments (recovering taxes for 3 years) will be applied rather than the standard additional tax assessment (recovering taxes for 10 years) is still unclear.

Moreover, should elements of wealth of the surviving spouse be disclosed to tax authorities in connection with the inventory, the rules of standard additional tax assessments, covering a period of 10 years, will likely apply. Two parallel proceedings for the two spouses would then occur and difficulties in determining the amounts involved for the respective spouses would certainly arise.

As regards the spontaneous declaration, we recommend that both spouses sign the spontaneous declaration if they both want to benefit from the penalty exemption. However, if they are separated or divorced and only one of them files a spontaneous declaration, the other spouse can no longer benefit from the exemption.

### 6.3 AUTHORIZED REPRESENTATIVES OF LEGAL ENTITIES

If a voluntary disclosure submitted by a corporate body (e.g., director or statutory auditor) of a legal entity relates only to the assets of the entity, the corporate body will benefit from the penalty exemption. However, should one of the corporate bodies have received a benefit in kind from the company, the voluntary disclosure should no longer refer to the entity alone, but also to the corporate bodies in his or its personal capacity. Thus one should analyse the tax consequences for the beneficiary (e.g., the

direct taxes due by the corporate body), whilst considering the possibility that the corporate body may benefit from an individual amnesty and also considering possible other taxes involved (withholding tax, VAT, etc.).

Moreover, in situations of tax evasion or tax fraud by a legal entity, those instigators and/or accomplices who are not formal corporate authorized representative of the legal entity will also be able to enjoy the benefit of the penalty exemption and relief from joint liability provided they file a joint declaration with the relevant corporate bodies.

### 6.4 ONE CHANCE, FULL COLLABORATION AND PAYMENT: THE CONDITIONS

Whether the tax authorities must accept the veracity of a disclosure upon the assertion of the taxpayer or whether they must verify the truth and check whether the taxpayer has previously filed a spontaneous declaration, is not addressed in the new law.

A question which arises is whether a taxpayer who has previously filed a voluntary disclosure prior to the entry into force of the new provisions in 2010, may benefit from the penalty exemption by filing an additional voluntary disclosure after January 2010, despite the fact that under normal circumstances a taxpayer has only one chance during his lifetime? The answer should be yes because the new provisions are not retroactive.

On a procedural level, it is doubtful whether the mere mention in the tax return of items of income and wealth not previously disclosed to the tax authorities, without further specific indication, can be considered a voluntary disclosure. Therefore, the form to be used for such declarations will be of paramount importance. The condition requiring the full cooperation of the heir(s) and/or of the taxpayer and for payment of additional tax assessments and default interest, are subjective notions to the extent they will be left to the discretion of the tax authorities. Thus, the manner in which they are interpreted and applied could indeed affect the scope of the proposed amnesty. In particular, the scope of the tax authorities authority to determine whether a taxpayer has or has not made a sufficient effort to pay an additional tax assessment and consequently whether they are entitled to benefit from the non-punishable nature of the voluntary disclosure, should be determined on the basis of a clear assessment criteria that ensures equal treatment while simultaneously encouraging taxpayers to make voluntary disclosures.

## 6.5 BENEFITS OBTAINED ON THE BASIS OF AN INCORRECT TAXATION

Under the proposed provisions, any gains or benefits obtained as a result of an incorrect taxation assessment must also be reimbursed thus opening the way for additional possible procedures with other governmental units. Thus, since only the benefits achieved unlawfully must be repaid, together with default interest, the necessary distinctions must be made in each case. At all times, however, prosecution and penalties for tax evasion and/or other related unlawful acts are excluded under the Act.

## 7 CONCLUSION

The simplifications and limitations introduced by the new law should encourage more taxpayers to regularise their position vis-à-vis the tax authorities and to this extent it is clearly an improvement over the current situation.

However, as note supra, the non-punishable voluntary disclosure is not an absolute and unconditional general amnesty. Depending upon the circumstances and the duration of the tax evasion, some taxpayers may be required to pay significant amounts of additional tax assessments plus default interest.

Moreover, the difference in treatment between the simplified additional tax assessments in succession cases (recovery of the 3 years prior to death) and the voluntary disclosure (recovery of the 10 years prior to declaration), may deter some taxpayers, particularly the elderly, from regularizing their tax situation, leaving their heirs with the task of doing so.

## CONTACTS

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, your usual contact at Schellenberg Wittmer or one of the following lawyers will gladly respond to your questions:

### In Zurich:



**Michael Nordin, LL.M.**

Partner  
Certified Tax Expert  
michael.nordin@swlegal.ch

### In Geneva:



**Pietro Sansonetti**

Partner  
Certified Tax Expert  
pietro.sansonetti@swlegal.ch



**Prof. Madeleine Simonek**

Of Counsel  
Certified Tax Expert  
madeleine.simonek@swlegal.ch

Schellenberg Wittmer  
Attorneys at Law

### ZURICH

Löwenstrasse 19/P.O. Box 1876  
8021 Zurich/Switzerland  
T +41 44 215 5252  
F +41 44 215 5200  
zurich@swlegal.ch

### GENEVA

15bis, rue des Alpes/P.O. Box 2088  
1211 Geneva 1/Switzerland  
T +41 22 707 8000  
F +41 22 707 8001  
geneva@swlegal.ch