PRAGER DREIFUSS

ADMINISTRATIVE ASSISTANCE IN TAX MATTERS – FOCUS ON UBS

PRAGER DREIFUSS AG is a leading, over 30-lawyer strong, business law firm with an international focus that has offices in Zurich, Berne and Brussels.

Dr Urs Feller, a partner at the firm, specializes in dispute resolution and is co-head of the firm's litigation and arbitration group. He and his team act for international and domestic clients in a variety of disputes before courts and administrative authorities in Switzerland as well as before international arbitration tribunals. He is a member of the executive committee of the International Bar Association's litigation section and co-editor of the International Litigation News. As a member of STEP (Society of Trust and Estate Practitioners) he advises entrepreneurs and private clients in the area of estate and succession planning as well as philanthropic topics.

Here Dr Urs Feller explains exactly how the UBS case was handled in Switzerland and provides an update on recent related case law.

HOW CAN THE PROCEDURE REGARDING THE DISCLOSURE OF ACCOUNT INFORMATION IN THE UBS MATTER BE DESCRIBED?

Based on a treaty between Switzerland and the US for the Avoidance of Double Taxation in 1996 and a further agreement reached in 2009, the IRS submitted a request for administrative assistance to the Swiss Federal Tax Administration (SFTA) in August 2009. Following this request the SFTA ordered UBS to submit all information about accounts as defined in the annex to the 2009 agreement to the SFTA. Although the criteria were described as detailed as possible, UBS had to assess each account on a case-by-case basis. Following the identification of an account, UBS was obliged to inform the account holder and also the beneficial owner of the account. Some account holders were informed before the data was transferred to the SFTA, others many weeks after the transfer. Account holders affected by the procedure were given the option to submit their arguments to the SFTA before its decision about the disclosure. Following receipt of the SFTA's order, account holders and beneficial owners had 30 days to lodge an appeal with the Swiss Federal Administrative Court, the highest authority in Switzerland for matters of administrative assistance. In these cases the Swiss Federal Administrative Court's judgment can only be reviewed by the European Court of Human Rights. The latter is, however, not competent to prohibit Switzerland from disclosing information to the US authorities. Switzerland can nevertheless be reprimanded for its behavior.

BASED ON WHAT CRITERIA DID UBS IDENTIFY THE ACCOUNTS THAT WOULD HAVE TO BE DISCLOSED TO SWISS FEDERAL TAX ADMINISTRATION?

The request did not include any names of account holders and/or beneficial owners but rather set forth typical patterns and account set-ups that were being investigated. Therefore, UBS had to check its files as to whether the required pattern was fulfilled.

According to the requirements set out in the agreement of 2009 the SFTA requested UBS to disclose the details of such bank accounts that either belonged directly to US persons or were held by an offshore structure that in turn was beneficially owned by a US person. Furthermore, the agreement required that a reasonable suspicion for the commission of a tax offence by the US person was established. Finally, the assets and the revenue in the case in question had to exceed a certain limit (assets of CHF 250 000 upward in case of fraud and yearly revenues of at least CHF 100 000 for at least three years in case of continued serious tax offenses) as defined by the agreement between Switzerland and the US.

WHO WAS REGARDED AS A US-PERSON?

US-domiciled clients of UBS were included irrespective of their citizenship. In addition, the term US person also included US citizens or green card holders without regard for their place of residence.

HOW WAS THE IDENTIFICATION OF US PERSONS PROCESSED BY UBS?

The bank relied on written information in the files and avoided contacting the responsible client relationship manager. The crucial data (US residency or US

Dr Urs Feller at Prager Dreifuss in Zurich

citizenship) was mainly based on information contained in the so-called Form A. This form was, however, originally established to prevent money laundering. In a number of cases the addresses of the account holder and/or the beneficial owner on the Form A had not been updated although some customers had left the US many years previously. This led to many inclusions of clients that did not fall into the category of US persons. These customers had to undertake serious efforts to prove their new place of residence where they settled, in some cases, 10 or more years ago. Such account holders were therefore wrongly identified as being US persons.

DID IT MATTER WHETHER THE ACCOUNT WAS HELD DIRECTLY OR BY A FOUNDATION, A TRUST OR AN UNDERLYING COMPANY?

As the Form A requires the identification of the beneficial owner(s) of the funds held in a Swiss bank account, the names of these individuals are on file with the respective banks. It therefore did not matter whether the account was held by the US person or by a structure.

HOW HAS THE TERM 'BENEFICIALLY OWNED' BEEN INTERPRETED BY THE SWISS FEDERAL TAX ADMINISTRATION AND THE SWISS FEDERAL ADMINISTRATIVE COURT?

In a number of cases the term 'beneficially owned' has been the most controversial of the criteria.

The Swiss Federal Administrative Court explained that an account could only be regarded as being beneficially owned by a US person when the US person retained the decision making competence on how the assets were managed and how the income/assets were distributed. The court underlined that the decision is made on a case-by-case basis, whereby a number of elements would be considered.

For example, in case of a (Liechtenstein) foundation if:

- a mandate agreement is in place between the US person and the board members;
- the US person is entitled to change the statutes of the foundation at anytime;
- the US person is identified in the regulations as being the sole beneficiary during his/her lifetime with arrangements taking effect after death;
- the US person is identified in the statutes as default beneficiary;
- the US person and the board of the foundation and the sole beneficiary were identical;
- the US person holds signatory rights on the account of the foundation.

A single element of the above could be sufficient for the conclusion that the US person beneficially owned the accounts.

US-domiciled clients of UBS were included irrespective of their citizenship. In addition, the term US person also included US citizens or green card holders without regard for their place of residence.

In another case, the Swiss Federal Administrative Court rendered a judgment concerning an irrevocable and discretionary trust. The underlying company held a bank account with UBS. According to the SFTA the beneficiaries of the trust were (for anti-money laundering purposes) regarded as the beneficial owners of the aforementioned company's bank account. The trust's beneficiaries, however, argued that the account could not be attributed to them, neither legally nor beneficially. In addition, in line with the structure, the members of the class of beneficiaries did not have any rights of administration of the trust's assets and also had no signatory rights on the accounts. By applying the principle 'substance over form', the court followed the beneficiaries' line of argument and rejected the exchange of information. In the view of the court, the beneficiaries of a discretionary and irrevocable trust were not entitled to any assets since all the powers to manage and distribute assets are vested with the trustee. Such a trust's beneficiaries therefore have only equitable ownership of the trust's assets as they are not entitled to but are, nevertheless, among the persons who can receive a distribution. Consequently, the accounts were not considered to be beneficially owned by the appellants in the sense of the applicable agreement. In such cases Form A is to be replaced by Form T, as form T is used for assets or patrimonies without specific beneficial owners. ■

Prager Dreifuss AG
Mühlebachstrasse 6
CH-8008 Zurich
Switzerland
Tel +41 44 254 55 55
Fax +41 44 254 55 99

www.prager-dreifuss.com