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Gold imports into Switzerland

Does tax secrecy stand in the way of transparency ?

Par Célian Hirsch le 1 May 2022

Switzerland's four largest gold importers can rest assured : tax secrecy should (again) prevail over transparency, according to Federal Administrative Court ruling A-741/2019 of March 16, 2022.

At the root of this case is the Society for Threatened Peoples. In 2018, this association submitted a request to the Federal Office of Customs and Border Protection (FOCB) based on the Transparency Act (LTrans). It wished to obtain complete statistics on gold imports by the four largest importers, including quantities, broken down by exporter, and the name of the Swiss importer to whom the gold was delivered, for the period from January 1, 2014 to December 31, 2017.

The FDFO consulted gold importers, who unsurprisingly opposed the request for transparency. In particular, they invoked tax secrecy, business secrecy and the protection of privacy.

Convinced by these arguments, the FDFO rejected the association's request. In accordance with Art. 13 of the Swiss Federal Data Protection and Information Act, the association referred the matter to the Federal Data Protection and Information Commissioner. After an unsuccessful mediation session, the Commissioner recommended that the FDFO transmit the information requested by the association.

According to the Commissioner, tax secrecy would not apply, since the information did not concern import tax. Furthermore, the public interest would take precedence over the protection of importers' personal data due to the media and political attention generated by the gold trade and mining, as well as the inherent ecological and social risks.

Following the advice of the Commissioner, the FDFO modified its position and issued a decision granting the association's request for access. In essence, the authority adopted the Preposé's reasoning. The four gold importers challenged this decision before the Federal Administrative Court (TAF).

Firstly, the FAT examines whether tax secrecy prevails over the principle of transparency.

The adoption of the LTrans in 2006 brought about a paradigm shift by establishing the primacy of transparency over administrative secrecy (principle of transparency, cf. art. 6 LTrans).

However, there are exceptions to this principle. In particular, art. 4 let. a LTrans provides that the special provisions of other federal laws that declare certain information secret are reserved. The judge must then determine on a case-by-case basis whether a secret guaranteed by another special federal law applies.

The Federal Administrative Court (TAF) therefore examined the question of tax secrecy under art. 74 of the Value Added Tax Act (LTVA).

Tax secrecy is justified by taxpayers' obligation to disclose their financial situation to the tax authorities. This obligation constitutes a restriction on the protection of privacy. In return, tax secrecy protects taxpayers by safeguarding their privacy from third parties. It also serves a public interest, namely trust between the taxpayer and the tax authorities. This secrecy enables the facts to be established, so that the authorities can obtain a complete declaration.

The paradigm shift in favor of transparency provided for in the LTrans has reduced the scope of administrative secrecy. However, the TAF considers that this change does not apply when a secret is justified by a private interest. In addition, the Value Added Tax Act was amended in 2008, i.e. after the Transalter Act came into force (in 2006). However, tax secrecy was not amended at that time. The TAF deduces from this silence on the part of the legislator that tax secrecy takes precedence over the principle of transparency.

Secondly, it examined whether the information requested by the association was protected by tax secrecy.

It notes that this information was collected when the goods were declared to customs, in particular as part of the OFDF's official function as the authority responsible for import VAT taxation.

The fact that this information may subsequently be used to draw up reports and statistics in no way diminishes its status as information protected by tax secrecy.

Even if the data collection can therefore be described as "mixed", in the sense that it was carried out for several purposes, the TAF considers that "tax secrecy constitutes absolute protection of the information in question, irrespective of the other purposes for which the data might be collected".

Consequently, the primacy of tax secrecy over the principle of transparency applies in this case (art. 4 let. a LTrans). The TAF therefore accepted the appeal lodged by the gold importers and rejected the association's request.

The Society for Threatened Peoples has not announced that it intends to appeal against this decision to the Federal Tribunal.

For its part, the Swiss Federal Supreme Court has very recently issued a ruling on art. 4 let. a of LTrans, intended for publication. Contrary to the tax secrecy invoked in the above-mentioned ruling, it held that the obligation to maintain secrecy laid down in art. 86 BVG does not conflict with the principle of transparency (1C_336/2021*, summary in LawInside.ch/1169/).

For its part, the Geneva Court of Justice also recently considered tax secrecy as an obstacle to

an application based on transparency. Like the TAF, the Court held that tax secrecy was an obstacle to transparency, after examining the question from the angle of art. 10 ECHR (ATA/1358/2021 of December 14, 2021).

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