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Search of bank documents under ACIA

The bank account holder is entitled to request that the documents be sealed

Par Romain Dupuis le 24 November 2023

In a ruling handed down in the context of criminal tax law proceedings, the Swiss Federal Supreme Court has upheld the appeal lodged by bank account holders who had been denied the right to request the sealing of the documentation produced (ruling 7B_99/2022 of September 28, 2023).

The background can be briefly summarized as follows.

On the authorization of the Federal Department of Finance, the Federal Tax Administration (FTA) is conducting an investigation into suspicions that two individuals and a company have committed serious tax offences. The procedure is governed by the Federal Act on Administrative Criminal Law (ACIA).

As part of its investigation, the FTA ordered six banks to produce documentation relating to accounts held, beneficially owned or signed over a four-year period by A, one of the individuals subject to the proceedings. The banks promptly provided the required documentation.

The holders of the accounts in question (A, his co-defendant B and certain companies) object to the search of the documentation produced – and consequently request that it be sealed (art. 50 para. 3 ACIA) – on the grounds that it includes documents relating to their accounts.

However, the head of the FTA investigation refused to seal the documents. This decision was upheld on complaint by the Director of the FTA, and on appeal by the Complaints Court of the Federal Criminal Court.

The Federal Court must therefore consider whether the persons claiming to be the owners of the bank accounts covered by the deposit order are entitled to request that seals be affixed.

Under art. 50 para. 3 ACIA, it is in principle the “holder of the papers” (i.e., in this case, the banks) who is entitled to object to the search and request that the documents be sealed. However, the Federal Supreme Court reiterates its jurisprudence that third parties who may have a legally protected interest in maintaining the secrecy of documents, irrespective of their actual control over them, may be legitimized. This exception applies, for example, to attorney-client or medical confidentiality, but also allows the holder of a bank account to request the sealing of documents relating to his own account.

If it is clear to the investigating authority that such a situation exists, it may be necessary to grant third parties who do not hold the documents the right to request that they be sealed. Such third parties must, however, state in their request the grounds on which they are entitled to request sealing. In the absence of such a statement, the request for sealing may be rejected.

On the other hand, if a legally protected interest in maintaining secrecy is invoked, the investigating authority is in principle obliged to comply with the request. Subject to cases where the request is manifestly unfounded or abusive, the judge must examine the merits of the grounds invoked in the unsealing procedure.

In the case in point, the Federal Court noted that the appellants had argued from the moment the banks produced the banking documentation that it concerned accounts held by them and was protected by confidentiality. The appellants also argued that certain documents did not fall within the scope of the facts under investigation, so that their search was disproportionate. A ground for objecting to the search had therefore indeed been put forward.

Moreover, as the FTA had provisionally sealed the documentation received pending a decision on the appellants' legitimacy, it was impossible to immediately invalidate the reason given by the appellants (as it had not been possible to examine the documents).

In these circumstances, the Federal Court considers, in accordance with its case law, that the appellants should have been granted the right to request that the documents be placed under seal. The Complaints Court of the Federal Criminal Court, on the other hand, should have initiated an unsealing procedure of its own motion, in order to examine the merits of the grounds put forward and to sort out the documents that might have to be discarded or redacted.

In other words, the Federal Supreme Court reiterates that the criminal authorities cannot avoid an unsealing procedure by denying legitimation to the interested parties on the sole grounds that the sealing request does not identify the documents to be excluded or redacted (cf. Andrew Garbarski / Louis Frédéric Muskens, Légitimation active pour requérir la mise sous scellés en procédure pénale administrative, in : www.verwaltungsstrafrecht.ch of November 14, 2023).

In reality, all that is required is for the request to contain a plausible reason for opposing the search (step 1). Provided this is not manifestly unfounded or abusive, it is in the unsealing procedure that the actual sorting of items must then take place (step 2).

In short, the Federal Court criticizes the FTA and the Complaints Court of the Federal Criminal Court for confusing these two stages.

The ruling serves as a reminder to prosecuting authorities, who tend to avoid lengthy (and sometimes tedious) unsealing procedures by too quickly denying interested parties the right to request unsealing on the grounds that their request is not sufficiently detailed.

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