CENTRE DE DROIT
BANCAIRE ET FINANCIER

Gold imports

Tax secrecy trumps the principle of transparency

Par Célian Hirsch le 9 February 2024

The Swiss Federal Supreme Court has ruled that tax secrecy takes precedence over the principle of transparency (ruling intended for publication 1C_272/2022, delivered in open court by four votes to one).

The origin of this ruling lies in the request of the NGO Society for Threatened Peoples, based on the Transparency Act (LTrans). The NGO was asking the Federal Office of Customs and Border Protection (FOCB) for access to detailed statistics on gold imports by major Swiss importers, for the period 2014 to 2017. In the face of opposition from importers, who invoked tax secrecy in particular, the OFDF initially rejected the request.

When the matter was referred to it by the NGO, the FDPIC recommended disclosure of the information, as tax secrecy would not apply and the public interest in transparency would prevail. The FDFO followed this recommendation, prompting four importing companies to appeal against the decision.

The Federal Administrative Court upheld their appeals, considering tax secrecy to be a lex specialis in relation to the principle of transparency (cf. Hirsch, cdbf.ch/1232).

The Federal Supreme Court must now clarify the relationship between the principle of transparency and tax secrecy.

The aim of the LTrans is to reverse the principle of administrative secrecy in favor of transparency. However, art. 4 let. a of the Transparency Act reserves the right to apply the special provisions of other federal laws that declare certain information to be secret. The Federal Court must therefore determine whether art. 74 of the VAT Act, which provides for tax secrecy in VAT matters, constitutes such a lex specialis.

Tax secrecy is justified on two counts. Firstly, it protects the taxpayer’s personality and safeguards his business secrets, since he is subject to a very extensive disclosure obligation under tax law. Secondly, it favours the taxpayer’s fulfilment of his obligation to inform, since he can then count on the fact that information disclosed to the tax authorities will not be made public. As such, it serves the public interest.

According to recent case law, the absence of any consideration of coordination between the LTrans and new legislation should rather be interpreted as an indication that the legislative

authority did not intend to restrict the scope of application of the LTrans in the area in question (ATF 146 II 265, summary in : Cuendet, LawInside.ch/933). The LTVA was revised in 2008, but the relationship between tax secrecy and the LTrans was not clarified on that occasion. That said, tax secrecy enjoys more extensive protection than official secrecy, and is therefore a qualified secret. In view of the central importance of this secrecy and its public interest, the legislator did not wish to extend the principle of transparency to the tax field. This is all the more justified given that this field is not directly related to the administration's activities. Tax secrecy is therefore a lex specialis within the meaning of art. 4 let. a LTrans.

In the present case, the information referred to by the NGO was produced by the companies under an obligation to declare, in particular in order for the authority to verify whether taxes should be levied. This information is therefore covered by tax secrecy under art. 74 of the Value Added Tax Act, and is not in principle subject to the principle of transparency.

The Federal Court develops its reasoning further in two obiter dicta.

Firstly, the federal legislature recently enacted art. 964j ff CO ("Duties of care and transparency with regard to minerals and metals from conflict zones and with regard to child labor"). These provisions impose a certain level of transparency on gold importers (cf. Neri-Castracane, cdbf.ch/1182). This legislative intervention in favor of transparency demonstrates that it is up to the federal legislator, and not the Federal Court, to extend transparency requirements or make changes to the tax secrecy regime in this context.

Secondly, the principle of transparency allows any citizen to verify the functioning of the State. In this case, the request for access concerns the quantity and origin of gold imported by four companies. It therefore concerned exclusively private activities, and did not seek a right of scrutiny over the activities of the State. The Federal Court concludes that the NGO's approach is alien to the aim pursued by the LTrans. It could not therefore lead to obtaining protected information.

The result of this ruling is convincing. LTrans aims to verify the activities of the State, not those of private individuals. This law should not, therefore, allow indirect access to information that concerns only private activities, and not state affairs.

The Federal Supreme Court's reasoning, i.e. to admit a lex specialis within the meaning of art. 4 of the Swiss Federal Act on the Protection of Individuals with regard to the Processing of Personal Data (LTrans), due to the specific nature of tax secrecy and its public interest, seems to fill the gap that the legislator should have filled when revising the LTVA in 2008.

In contrast to tax secrecy, banking secrecy was expressly mentioned in the Federal Council's Message as a secret opposed to transparency (FF 2003 1833). However, as the FDPIC pointed out in a case concerning bank declarations relating to the freezing of Russian assets, "it is (…) not the bank's secrecy that is protected, but the secrecy of the bank's customers".

Finally, in support of its appeal, the NGO invoked art. 10 ECHR (freedom of expression) and related case law. In Magyar Helsinki Bizottság v. Hungary, the ECtHR recognized that art. 10 ECHR includes "a right of access to information" under certain conditions. The Swiss Federal Supreme Court did not respond to this complaint. It also points out that it considers itself bound by the tax secrecy regime by virtue of art. 190 of the Swiss Constitution. However, this provision

does not allow a federal law to stand up to the ECHR. The NGO could therefore still appeal to the ECtHR.
