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BERCY LOCK: THE SENATE ADOPTS IN FIRST READING BILL FOR FIGHTING AGAINST FRAUD

Private Equity Wealth and Asset Management Tax Law Real Estate and Construction | 09/07/18 | Philippe Lorentz

In the previous episode [1], we presented the various proposals made in the report prepared by the parliamentary information commission on prosecution of tax offences. Restating some of these proposals, on last July 3, the Senate adopted in the first reading the bill for fighting against fraud [2], thereby taking a first step toward a possible elimination of the "Bercy lock".

According to this bill, the tax authorities would now be required to file a complaint with the public prosecutor to begin prosecution if the facts they have examined in their audit satisfy the following two cumulative criteria:

- 1 - The adjusted taxes are subject to at least an 80% penalty [3] for an amount above a threshold set by decree in the French Council of State [4];
- 2 - Or (i) the taxpayer is subject to the obligation to file a declaration due to his duties or elective offices or has already been sanctioned for identical facts subject to at least an 80% penalty for two out of the last four years, or (ii) the facts are likely to be categorized as aggravated tax fraud [5].

Therefore, the Senate repeats the recommendation of the information commission on prosecution of tax offences, for whom introducing statutory criteria allows the tax authorities to objectively build up a set of cases the public prosecutor can prosecute.

However, the senators chose to establish cumulative criteria instead of alternative criteria, as the report proposed. As a reminder, the report proposed the following alternative criteria: (1) the adjusted taxes are above a certain threshold and are subject to a penalty showing the intent to avoid paying the taxes, (2) the case is categorized as aggravated tax fraud, independently of the amount avoided, and (3) the taxpayer is a repeat tax fraud offender.

As-is, this bill therefore requires the filing of a complaint with the public prosecutor if the criteria are satisfied, and, if they are not, it gives the tax authorities the discretion to refer the matter to the commission on tax offences ("CIF").

Moreover, the Senate proposes that the tax authorities nonetheless be able to consider, on grounds related to the given facts, that the complaint should not be filed even though the criteria are satisfied. However, they must so inform the competent public prosecutor, who, having the possibility of asking the tax authorities for information about the given facts, has the right to prosecute.

More specifically, as regards the CIF's survival, the senators are not contemplating eliminating it, as the report proposed.

The current procedure for examining cases as provided in Article L. 228 of the French Book of Tax Procedures will be kept, which is a referral to the CIF after selecting cases, and the CIF would issue an opinion before the tax authorities file a complaint with the competent public prosecutor. The proposal for a joint examination between the tax authorities and the public prosecutor, therefore, has been ruled out.

In addition, the bill adopted by the Senate in the first reading modifies the criminal process for tax matters.

Hence, Article 9 of the bill proposes to extend the procedure for an arraignment with a plea bargain ("CRPC") [6] and the judicial agreement in the public interest ("CJIP") to tax fraud [7], as the report recommended.

These contributions will ensure a quicker and more effective criminal response, within the framework of the CRPC, in cases of simple tax fraud recognized by the taxpayer. As regards the CJIP, extending it to tax fraud may motivate legal entities, which are sensitive to risks to their reputation due to prosecution, to contemplate paying a fine in the public interest. These two measures, therefore, appear to be adapted to ensuring that procedures for fighting against tax fraud are more efficient.

This bill, adopted in the first reading in the Senate, was sent to the National Assembly. The MPs will debate it at the end of July and, if there is disagreement over the text adopted by the senators, a joint parliamentary committee will be in charge of reaching a compromise. To be continued.

[1] <https://www.august-debouzy.com/fr/blog/1185-lassem...>

[2] <http://www.senat.fr/dossier-legislatif/pj17-385.h...>

