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Panama Papers accelerate the process of voluntary disclosures

Editorial

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Dear Reader,

We are very pleased to present our 2017 guide "Panama Papers accelerate the process of voluntary disclosures under the new regime of the Automatic Exchange of Information starting 2017/2018".

The limited time left until the automatic exchange of information under the **Global Standard of OECD (AEOI)** has become a reality and in a large number of countries there will, in many instances, be a last window of opportunity for non-compliant taxpayers to voluntarily disclose assets held in and income derived from offshore accounts. Depending on each countries statutes, the possibilities vary from possible impunity in case of a voluntary disclosure with financial surcharge in most countries to no actual legal possibility for amnesty or impunity at the moment.

This AEOI requires financial institutions to report information on accounts held by non-resident individuals and entities (including trusts and foundations) together with their beneficial owners to the account holders' or beneficial owners' tax administration on an annual basis.

The status of commitments concerning the AEOI in May 2017 can be summarized as follows: The number of the participating countries has risen quickly and it has become evident, as most major countries take part that the chances of tax authorities detecting tax evasion of non-compliant taxpayers have increased. In total 100 countries have committed to the AEOI, 50 countries will be undertaking first exchanges by 2017 and another 50 by 2018. Hereof, the most important countries situated in or close to the EU, joining in 2017, are Cyprus, Liechtenstein, Luxembourg, Malta, San Marino, and joining in 2018, are Andorra, Monaco, Russia and Switzerland. And even 111 jurisdictions currently agreed participating in the Convention on Mutual Administrative Assistance in Tax Matters. Even long time reluctant countries like Bahrain and Panama have already committed, at least via verbal agreement. The reason for Panama could be the so-called **"Panama Papers"** which increased the pressure and led to the announcement of Panamas' Foreign Minister Isabel Saint Malo to join the Automatic Exchange of Information "completely and immediately". Nevertheless, Panama has not signed the AEOI so far. The question now is if the signing is just a matter of time or if it might be possible that Panama will not sign at all. But one thing is clear: The pressure on Panama will be rising to avoid being on the OECD black list.

In the meantime, the **EU Commission** itself is as well determined to introduce the highest possible level of transparency and cooperation between tax authorities in the EU, but also towards Third Member States/Offshore-states, which are often no OECD members. In the EU, the scope for the mandatory automatic exchange of certain information between Member States, has now been extended via the Savings Directive. The new rules are fully in line with the AEOI and the strengthened transparency requirements. Furthermore, the EU negotiates equal tax transparency agreements with Third Member States, meaning the participating States will automatically exchange information on the financial accounts of one another's residents and receive the names, addresses, tax identification numbers and dates of birth of their residents with accounts, as well as certain other financial information, including account balances. Actually, the EU has signed agreements in 2015 with **Switzerland** (IP/15/5043), **San Marino** (IP/15/6275), **Liechtenstein** (IP/15/5929) and in 2016 with **Andorra** (IP/16/288) and the Principality of **Monaco** (IP/16/2456). The agreement starts from 2017 in case of San Marino and Liechtenstein, and in 2018 in case of Switzerland, Monaco and Andorra. But information will already be collected one year before the reporting, **leading to need for action in 2016 respectively at the latest in 2017.**

The automatic exchange has to be separated from other already existing exchange possibilities in individual cases in form of legal and administrative cooperation. Taxpayers can already be affected this year, as the example of **Austria** and its decreasing bank secrecy shows. At the end of the year 2016, Austria may register and report certain bank accounts. And also the **Swiss Tax Administration** has already published personal customer data online due to a legal and administrative cooperation, leading to more uncertainty for non-compliant taxpayers. In the meantime, the member states themselves continue to track down tax evaders in any possible way, e.g. purchasing data via CDs or USB-Sticks or exercising house searches. In **Germany** about 30 proceedings against Swiss banks took place, being accused of abetting tax evasion via employees, leading to fines for the companies (e.g. EUR 782 million since 2010).

Despite the tightening of the provisions and because of the proceedings of the tax departments, there is high demand for legal and tax advice, especially as a voluntary disclosure with impunity is still possible in most countries.

This guide will put the spotlight on voluntary disclosure regimes in many countries under the new regime of the Automatic Exchange of Information in foreign countries and how the "Panama Papers" might accelerate this process.

We hope that you find our Guide useful and we thank our authors for their valuable contributions. Please feel free to reach out to us or any of our local-country authors.

Panama Papers accelerate the process of voluntary disclosures

Consequences in case of discovery of undeclared investment income through domestic tax authorities

If domestic tax authorities discover that a taxpayer has undeclared investment income and no voluntary disclosure has been submitted, criminal tax proceedings are initiated with punishments including fines and up to imprisonment. Tax fraud of more than EUR 500,000.00 may lead to imprisonment for up to ten years.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

A successful voluntary disclosure guarantees full immunity from prosecution for tax evasion. In order to be successful, the domestic taxpayer has to declare all undeclared taxable income for the last ten years. He also has to pay the evaded taxes together with interest on arrears. If the voluntary disclosure is submitted on the occasion of a secondary review or a tax audit a penalty surcharge of 5% to 30% applies, depending on the amount of tax evaded.

It must be mentioned that, at present, there is no inheritance or gift tax in Austria. However, gifts and donations of more than EUR 15,000.00 (EUR 50,000.00 between close relatives) have to be notified (this includes cash, capital claims, shares in corporations and partnerships, establishments and operational units that generate operating income, movable physical assets, etc.). The reporting obligations apply to both donor and recipient, if one of the parties, either donor or recipient, has their primary residence or habitual residence in Austria at the time of donation. The obligation also applies to individuals with an established secondary residence in Austria. If a report was wilfully not filed, this breach of financial regulations is punishable by a fine of up to 10% of the donation's fair value.

Conditions for a successful voluntary disclosure

A voluntary disclosure leads to an exemption from punishment if all of the following requirements are met:

- Disclosure of the offence.
- Submission of the voluntary disclosure to the competent tax or duty office.
- The offence has not been discovered at the time of committing the tax offence.
- Disclosure of the circumstances relevant for establishing evasion or underpayment of taxes if the misconduct was connected with an underpayment.
- Payment of the tax evaded in accordance with applicable tax regulations.
- Timeliness, i.e. no acts of prosecution have been carried out yet, the offence has not yet been discovered or at least the offender does not know of any such discovery, etc. The requirement of timeliness is not fulfilled if [an incomplete] voluntary disclosure to the tax authorities has already been made concerning the same tax offence.
- The person on whose behalf the voluntary report is made is clearly identified.

Will the Panama Papers accelerate the process of voluntary disclosure?

The publication of the Panama papers resulted in a 2% increase in voluntary tax disclosures in Austria in 2016 compared to the year before. According to the OECD, Panama is the 105th jurisdiction to participate in the Exchange of Information Convention. The Convention provides for all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. The first exchange of information with Panama is scheduled to begin in 2018 for data filed after January 1st, 2017. In Panama's case, the identities of the beneficial owners of offshore companies will be part of the data set to be exchanged between participating countries. In order to reach full immunity from prosecution for tax evasion, an Austrian shareholder/beneficial owner of a profitable Panamanian offshore company must submit a voluntary disclosure since, when assessing taxes due, Austrian tax authorities "look through" such companies as though they did not exist.

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Consequences in case of discovery of undeclared investment income through domestic tax authorities

In case Brazilian tax authorities discover undeclared investments abroad held by individuals residing or that have resided in Brazil in the past or held by Brazilian legal entities, the taxes considered due on the income and capital gains arising from such investments for the last 5 years, plus fine of 150% and interest, shall be charged at the following rates:

- A 15% income tax rate applies to capital gains accrued by individuals up to 31 December 2016 and progressive rates of 15% to 22.5% apply as of 1 January 2017;
- Progressive rates ranging from 0% to 27.5% apply to other income obtained by individuals; and
- A combined Corporate Income Tax and Social Contribution on Net Profit rate of up to 34% applies for Brazilian legal entities.

In addition, individuals who have taken part or contributed to the actions, including by means of a legal entity, may face criminal prosecution. Payment of the tax before the initiation of criminal action avoids liability for certain crimes.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

According to a special regularization regime (RERCT) in place during 2016 and reinstated in 2017, an individual or legal entity that, before 31 July 2017 discloses undeclared investments abroad acquired by legal means and complies with other legal conditions is subject to the payment of 15% income tax on the amount of the investment abroad on 30 June 2016, plus a fine of 135% of the tax paid (effective penalty rate of 20.25%).

Any income and capital gains arising from the investments abroad as of 1 July 2016 is subject to tax at the rates mentioned in section 1 above (15% up to 31 December 2016 and progressive rate of 15% to 22.5% as of January 2017; 0% to 27.5%; and up to 34%), plus interest (late payment fine may apply if conditions are not met within the required deadline).

Adherence to RERCT avoids criminal liability for the crimes listed in the law.

Although voluntary disclosure of investment abroad is possible outside of RERCT, taxpayers that choose to do so must pay the taxes due on the income and capital gains arising from such investments for the last 5 years, plus late payment fine of 20% (arguable) and interest.
Criminal liability for certain crimes is avoided by payment of the tax.

Conditions for a successful voluntary disclosure

Under RERCT, taxpayers must comply with the following conditions, among others, up to 31 July 2017:

- File a Regularization Return identifying the undeclared investments abroad acquired by legal means;
- Pay the 15% income tax and 20.25% fine on the amount of the undeclared investments abroad on 30 June 2016;
- Report the undeclared investments abroad in the: (i) rectification of the 2016 Individual Income Tax Return; (ii) rectification of the 2016 Brazilian Capital Abroad Statement (DCBE) (if applicable); and (iii) Brazilian legal entities' accounts; and
- Request and authorize the financial institution abroad to send, via SWIFT, the balance of the financial assets abroad on 30 June 2016 exceeding one hundred thousand US Dollars.

Will the Panama Papers accelerate the process of voluntary disclosure?

Following the example of other countries and boosted by the government's increasing need for funds, the creation of RERCT in 2016 allowing for the regularization of undeclared investments abroad with more beneficial conditions than the usual voluntary disclosure procedure has significantly increased the process of voluntary disclosures by Brazilian taxpayers.

It is expected that the reinstatement of RERCT in 2017, in addition to the increasing exchange of information between countries, will further intensify the process of voluntary disclosures.

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Panama Papers accelerate the process of voluntary disclosures

Consequences in case of discovery of undeclared investment income by domestic tax authorities

Discovery by the French tax authorities that a French tax resident has undeclared investment may lead to financial and criminal penalties. Financial penalties, applicable in addition to the payment of the avoided tax, are a fiscal fine of 40% or 80%, as penalty for deliberate tax evasion, and a 4.80% per annum late payment interest. In addition, a penalty of EUR 1,500 or 10,000 for accounts located in non-cooperative States, per year and undeclared investment is due for failure to report foreign bank accounts to the French tax authorities. Regarding criminal proceedings, the taxpayer may also be faced with a fine up to EUR 500,000 and a prison sentence up to 5 years. These criminal penalties may be increased up to EUR 2,000,000 and 7 years in case of organized fraud.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

Taxpayers who fail to mention their foreign investments (bank accounts, life-insurance contracts, shares in companies, etc.) in their initial returns may make a voluntary disclosure. This will allow French taxpayers wishing to reveal their undeclared foreign funds to avoid criminal prosecution, and reduce the amount of penalties. The 40% surcharge may be decreased to either 25% for "passive fraud", (undeclared income from legacy, gift etc.) or 35% for all other situations called "active fraud". However, the 4.80% late-payment interest is still payable.

Conditions for a successful voluntary disclosure

To be eligible for the favourable regularization scheme, the disclosure of the foreign investments must be voluntary. If the authorities have already begun a tax or a custom audit, or if a judicial procedure is pending, the taxpayer will not be entitled to reduced penalties. Furthermore, in order for the voluntary disclosure to be accepted, the money involved must not come from covert activities. Furthermore, the disclosure file must include a sworn statement explaining the origin of the funds, the original and amended tax returns as well as a complete information about all the foreign investments made for the past ten years. Once the entire file is transmitted, the French tax authorities analyse provided data and, if the approval is granted, send to the taxpayer the finalized transaction and corrective tax notices.

Will the Panama Papers accelerate the process of voluntary disclosure?

Following publication of the Panama Papers, the French Budget Ministry announced that over 560 taxpayers had been audited and that Panama has been reinstated on the list of non-cooperative States, which will lead to heavier penalties for taxpayers who have undeclared investment. In the meantime, the launch of the automatic exchange of information with other countries, currently underway, encourages voluntary disclosures before being convicted by the French tax authorities, in spite of the progressive strengthening of the sanctions applied to voluntary disclosure. Indeed, in 2016, the penalties grew from 15% to 25%, for cases of passive fraud, and from 30% to 35%, for cases of active fraud. Finally, the French ministry of budget has announced a probable closing, in 2018, of the voluntary disclosure service set up in 2013. These elements, which reduce the possibility of benefiting from the favourable procedure, lead French taxpayers to think that this is the last opportunity to regularize their tax affairs.

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Consequences in case of discovery of undeclared investment income through domestic tax authorities

If domestic tax authorities detect that a tax payer has undeclared investment income but no voluntary disclosure was submitted, it initiates criminal tax proceedings leading to a punishable offence from a fine up to imprisonment of ten years. Tax evasions of more than EUR 1,000,000 normally lead to prison sentence.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

The legal consequence of a successful voluntary disclosure is full immunity from prosecution in relation to tax evasion. In order to be successful the domestic tax payer has to declare all so far non-declared taxable income of the last ten years. Apart from that declaration he will only reach full immunity from prosecution if he pays the evaded taxes together with interest on arrears (6%), and in case certain limits are exceeded a penal surcharge between 10% for an evasion volume over EUR 25,000 per calendar up to 20% for an evasion volume over EUR 1,000,000, all within a specified and reasonable period stipulated by domestic tax authorities. Note that the limitation period for criminal prosecution is usually five years whereas the limitation period to change the tax returns is ten years.

Domestic taxpayers have to be aware of the fact that most of the foreign investments that were received as gift or inheritance may not yet be statute-barred and therefore might have to be included in voluntary disclosure as well. In case of gifts the ten year limitation period has often not even started yet, because the statutory period starts when either the donor dies or the tax department becomes aware of the gift.

Conditions for a successful voluntary disclosure

Apart from sufficient liquidity for taxes, interest and surcharges, tax evasion has to be undiscovered at the moment of the filing of the voluntary disclosure. Typical blocking reasons for full immunity from prosecution are a prior announcement of a tax audit order and the prior initiation of criminal proceedings. But also in case of discovery, a voluntary disclosure declaration will always be grounds for mitigating the penalty and is therefore the best way to return to legality.

The most foreseeable change will be the inclusion of off-shore companies. The draft law has still to be ratified by Federal Council, but will enter into force at the latest by year-end. Tax evasion via an off-shore company will then be seen as severe case of tax evasion. Voluntary disclosures for off-shore companies will then only be possible with payment of the penal surcharge of 10% to 20% and the statute of limitation period for undeclared off-shore income will principally start ten years after the year-end in which the tax has been due, i.e. in case of long-term tax evasion a doubling of the period and therefore the taxes. Moreover banking secrecy diminishes.

Will the Panama Papers accelerate the process of voluntary disclosure?

Panama has so far not signed the OECD standard. Nevertheless the risk of data of German beneficial owners of Panamanian off-shore companies being sent automatically to the German tax authorities will become likely and might just be a matter of time. Germany and Panama will carry on negotiations about the inclusion of automatic exchange of information in a Double Taxation Treaty in June 2017. Due to the upcoming draft law changes, we recommend the prompt filing of a voluntary disclosure especially for off-shore earnings by advisors before detection to reach full immunity from tax evasion. Especially as bank account information is passed anonymously and for free, e.g. in April 2017, tax administration received information about 60.000 foreign firms and persons on Malta (so-called "Malta Leaks"), which will be shared with EU Member States. Therefore, German tax authorities anticipate a new wave of voluntary disclosures.

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Consequences in case of discovery of undeclared investment income through domestic tax authorities

In case of tax evasion being detected during a tax inspection by the Hungarian tax authority, criminal tax procedure may be initiated in certain cases, leading to a punishment from payment of a fine to imprisonment for up to 10 years. Penalties which may be imposed for these offences depend on the amounts of fraud and the manner of committing the fraud, are all set out in the Hungarian Criminal Code. Nevertheless, if criminal circumstances are not identified, most of the tax inspections cases end with a maximum of 200% tax penalty based on the tax shortfall plus late payment interest (up to a three year period) as set out in the Hungarian Act on the Rules of Taxation.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

A self-revision is possible in Hungary within the statute of limitation, which allows private persons and companies to correct any tax bases filed incorrectly or any tax liability, so as to avoid these issues being detected by the tax authority during a potential tax inspection. The self-revision interest equals 50% of the late payment interest calculated by using the central bank's prime rate of interest, while in the case of repeated, i.e. second and any further self-revisions, it is 75% of the late payment interest.

As a new rule taking effect on 1 January 2017, certain undeclared and mainly foreign sourced income earned before 30 June 2016 and shareholdings in offshore destinations can be declared through specific bank accounts until 30 June 2017. In such cases, an individual has to pay 10 percent of the non-declared income as personal income tax as well as the self-revision interest. This 10% rate is lower than the Hungarian general 15% flat personal income tax rate. The tax payable is calculated, withheld and declared by the bank. There is no option to take advantage of tax allowances. Last but not least, the most interesting part of this voluntary disclosure is that the bank will not reveal any data on the private person. However, the bank will issue a certificate that tax liabilities in connection with the income have been fulfilled.

Conditions for a successful voluntary disclosure

Apart from paying 10% tax, self-revision interest and other general bank charges, there are no further fees levied by the tax authority or the bank. Nevertheless, only certain types of incomes are allowed to be declared e.g. interest received or dividends, etc. Income from domestic employment cannot be declared through this procedure and the procedure can only be carried out by certain banks assigned by the tax authority. Opening this special bank account at the assigned bank requires a written statement including personal data, and also the amount and the currency of the undeclared income.

Will the Panama Papers accelerate the process of voluntary disclosure?

It is expected that more information will also be available to the Hungarian tax authority on offshore and foreign source income, and the steps introduced in 2017 show that the final "generous" offer to pay taxes on such income has been made by the Hungarian authorities. As another new procedure in Hungary, the tax authority offers a new way of being taxpayer-friendly through what is now called the cooperative procedure. A great advantage of this procedure is that, before any inspection is launched, it is still possible for taxpayers to correct any errors or shortcomings through a self-revision, paying a self-revision charge that is much lower than the tax penalty or default charge that may be levied as a result of an inspection. Nevertheless, if the risk assessment of the Hungarian tax authority shows that fraudulent behaviour may be detected, they will initiate a tax inspection instead of "warning" the taxpayer.

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Consequences in the event of discovery of undeclared investment income by the domestic tax authorities

The last two years have seen a significant strengthening of the legal framework relating to undeclared investments. A special law (i.e. Black Money Act (Undisclosed Foreign Income and Assets) and Imposition of Tax Act) was enacted in 2015 in respect of undisclosed income and assets held overseas. This Act provides for a 30% tax and a penalty of three times the amount of tax. Imprisonment for various offences, including attempting to evade tax or failing to file returns or disclose foreign assets is also provided, with the period of imprisonment ranging from 3 months to 10 years. An important feature of this law is that it does not provide for a period of limitation. The tax can be levied in the year in which the undisclosed overseas asset or income is brought to the attention of the tax authorities.

Provisions under the Income-tax Act, 1961, relating to undisclosed income and investments have also been strengthened in 2016, by doubling the rate of tax from 30% to 60% and levying a penalty of 10% of the tax. The amount of penalty increases up to 60% in cases where the undisclosed income is discovered in search proceedings.

Consequences in the event that a voluntary disclosure is submitted to the domestic tax authorities

The Black Money Act of 2015 provided for a one-time opportunity for making a voluntary disclosure in respect of undisclosed overseas assets / income. This envisaged making a declaration and paying tax at the rate of 30% and a penalty equal to the amount of tax. Once such a declaration was made and accepted, the assets / income would not be liable to tax again under the Income Tax and Wealth Tax laws. A limited immunity from prosecution under Income Tax, Wealth Tax and Foreign Exchange laws was also provided to persons making such declarations.

However, the scheme did not receive a very enthusiastic response, with only 644 declarations (aggregating to INR 243 million in tax collections) being made.

This one-time compliance window was open only from 1 July 2015 to 30 September 2015, and is therefore no longer open.

A similar amnesty scheme was introduced by the Indian Government in 2016-17 in respect of undisclosed domestic assets, but this did not extend to undisclosed overseas income and assets.

Conditions of a successful voluntary disclosure

As mentioned above, there is no voluntary disclosure scheme currently in place in respect of overseas assets / income. As a result, consequences will be determined under the applicable legal provisions, involving levy of tax, penalty and potentially prosecution. However, once the proceedings are initiated, a taxpayer may, in some cases, consider approaching the Settlement Commission. The taxpayer will have to make a full and honest disclosure of the overseas assets / income, upon which the Settlement Commission at its discretion may waive the penalty and prosecution.

Will the Panama Papers accelerate the process of voluntary disclosures?

The Panama Papers were released after the closure of the one-time window for making voluntary disclosures under the Black Money Act, 2015. Since then, there has been no process for making voluntary disclosures.

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Panama Papers accelerate the process of voluntary disclosures

Consequences in case of discovery of undeclared investment income through domestic tax authorities

In general, in case of undeclared income or unpaid tax penalty is levied as a percentage of the tax due. More precisely, penalty is applied in the following ranges: (i) from 120% to 240%, for failure to file any income tax return at all; (ii) from 90% to 180% for untrue tax return; (iii) 30% for failure to pay tax in a timely manner. In case of foreign source income, penalties are increased by one third. Lower penalty apply if no taxes are due. In case of omitted filing of the foreign assets monitoring return, penalty is levied as a percentage (from 3% and 15%) of the value of the non-disclosed assets or properties.

Criminal penalties (in the form of imprisonment from 1 to 3 years) may be applied if certain thresholds (i.e. the tax unpaid or to the value of fictitious items indicated in the income tax return) are exceeded.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

If a voluntary disclosure programme is elected, the taxpayer has to pay all the taxes due – inclusive of accrued interest and penalties (which are reduced up to 50%). In order to further reduce the penalty (and achieve the maximum advantage offered by the procedure) the taxpayer can opt for the autonomous computation of penalties.

The taxpayer is also granted a partial protection from criminal penalties. Indeed, criminal penalties are applied only if – during the regularization – the taxpayer submits untrue or incomplete documents or information. Furthermore, specific criminal penalties apply if the taxpayer tries to regularize undisclosed income, assets or properties deriving from fraudulent conducts for which the programme does not grant any protection.

The fiscal years covered by the programme are those for which a tax assessment can still be performed by the Italian Tax Authorities. The statutory period of limitation for tax assessment is five years, dating from the end of the calendar year (31 December) when the filing of the tax return was due. The term is increased to seven years if no tax return was filed. For tax crime that involves a duty to report to the Public Minister by the Tax Authorities, the term for tax assessment is doubled.

The voluntary disclosure programme does not apply to gift or inheritance tax, which remain subject to the ordinary penalty regime.

Conditions for a successful voluntary disclosure

A voluntary disclosure can be considered successfully completed if the taxpayer pays all the taxes, interests and penalties resulting from the regularization procedure (with the possibility of paying the amount due in three monthly instalments).

Furthermore, the information and the documents provided to the Italian Tax Authorities have to be complete and fair.

Election of the regime is not possible if the taxpayer is aware of the commencement of a tax assessment or of a criminal proceeding.

Will the Panama Papers accelerate the process of voluntary disclosure?

The Italian Government has clarified – during a Parliamentary hearing – that information disclosed by the so called "Panama Papers" will be used by the Italian Tax Authorities. First of all, the Tax Authorities will verify if the individuals listed have opted for the voluntary disclosure programme. In such case, information provided during this procedure will be compared with that given in the Panama Papers. In case of incomplete or untrue information/documents provided to the Italian Tax Authorities, the taxpayer will be subject to criminal penalties and will lose the partial penalty protection provided by the voluntary disclosure programme.

In the light of the above, it is likely that this circumstance will encourage taxpayers to opt for the voluntary disclosure programme.

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Consequences in case of discovery of undeclared investment income through domestic tax authorities

The net is closing on tax payers who have hidden their wealth abroad. Not only through the automatic exchange of information, but also via stolen or embezzled information obtained by the Dutch tax authorities from foreign authorities. Should the Dutch tax authorities discover undeclared wealth or income for an individual tax payer, this could potentially lead to imprisonment of up to six years, or to a criminal penalty of up to € 82.000. Penalties could be higher, up to 300% of the tax due, in case of non-declared deemed income from savings and investments ("box 3 income"), or up to 100% of the tax due in other cases.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

Currently, no penalties are imposed in case of a timely voluntary disclosure regarding the past two years. In case the self-disclosure covers more years, a minimum penalty is imposed on those other years of 120% of the tax due in case of hidden box 3 income and 60% of the tax due in other cases.

Generally, taxation of hidden assets or income is statute-barred after five years, but after 12 years if the assets or income have been hidden outside the Netherlands. However, in case of inheritance tax, the Dutch tax claim is no longer time barred when the testator's death was registered after 1 January 2000. The limitation period in case of gift tax starts after the gift tax return has been filed, or if no gift tax return has been filed, the term starts when the donor or beneficiary dies.

Conditions for a successful voluntary disclosure

A voluntary self-disclosure is no longer possible when the individual tax payer knows or should reasonably suspect that the inspector is aware or will be aware of the (partially) unpaid tax. If the tax inspector is not aware or will not be aware of the unpaid tax, the voluntary self-disclosure can only be successful if a tax payer expressly makes clear to the inspector what amount has not (partially) been paid and the tax inspector is able to make a correct assessment on the basis of the information provided, without further investigation. As soon as an investigation or tax audit has been announced by the tax authorities, voluntary disclosure is no longer possible.

Will the Panama Papers accelerate the process of voluntary disclosure?

The Panama Papers have provided the political environment to speed up and increase governmental measures against tax evasion and tax fraud. For instance, it is not unlikely that the new government (elections were in March 2017) will implement an announced change of the previous government, due to which voluntary disclosure will no longer be possible without penalties. The increased risk of getting caught through the automatic exchange of information calls for a more stringent approach, according to the Ministry of Finance. The above mentioned minimum penalties for voluntary disclosure would apply for all years if the new government adopts the plans.

Not being able to (partially) disclose without penalties in the near future should in principle accelerate the process of voluntary disclosure. Also the attention of the press to the Panama Papers, to the announced changes in legislation and to the successes of the government in the hunt of dirty money contributes to the acceleration of voluntary disclosure. However, as the difference in penalties in case of self-disclosure and in case of being caught becomes smaller, one may question whether this will not reduce the amounts of self-disclosure cases in the future. This will probably depend on the success of the authorities in discovering the tax fraud.

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Panama Papers accelerate the process of voluntary disclosures

Consequences in case of discovery of undeclared investment income through domestic tax authorities

The automatic exchange of information starts in 2018 for Russia, and discovery of undeclared income will lead to a fine of 20% of the unpaid tax amount and charges. If the taxes are not paid on time, it may lead to a criminal investigation.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

The timely submission of foreign income will protect taxpayers from tax, administrative and criminal liabilities.

Taxpayers should submit a notification of participation in a foreign company / a notification on set-up of a foreign structure, notification on controlled foreign company / structure and tax return (if applicable) to the tax authorities.

Conditions for a successful voluntary disclosure

Notification of controlled foreign companies must be submitted no later than 20 March of the year following the year in which a Russian individual-tax resident or Russian legal entity (controlling persons – an individual or legal entity whose share in the company is more than 25% or an individual or legal entity whose share in the company is more than 10% if the share of participation of all Russian tax residents in this organization is more than 50%) recognizes income obtained from profits of a controlled foreign company. The notification of participation should be submitted no later than three months from the start of participation, if the total share of such participation is more than 10%.

Russian individuals-tax residents also have an obligation to file a notification of setting up a foreign structure without creation of a legal entity (i.e. trust, fund) within three months of the structure being set up. The notification of controlled foreign structure should be filed by the Russian tax resident if he/she exercises control over the distribution of the structure's profit.

A controlled foreign company's income is included in the tax base for income tax purposes for both tax-resident individuals and Russian legal entities. Companies are obliged to submit a tax return and pay a 20% income tax by 28 March of the year following the tax period. Individuals must submit a tax return by 30 April of the year following the tax period and pay 13% income tax by 15 July. Income must be included in the tax return if the controlled foreign company's profit is greater than 50m RUB (for year 2015), greater than 30m RUB (for year 2016) or greater than 10m RUB (for years 2017 and later). In case of submission of incorrect information, taxpayers have a legal right to submit an amended tax return.

Will the Panama Papers accelerate the process of voluntary disclosure?

There is a court precedent referring to the Panama Papers as an information source, which means that although it is not used as an official source, the courts can still consider it when making decisions on tax matters (Ruling of Commercial Court of North-Western Region No. A56-59760/2014 from 31 May 2016).

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Panama Papers accelerate the process of voluntary disclosures

Spain
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After the Spanish tax amnesty that took place in 2012, voluntary disclosure of undeclared assets overseas has become a burdensome procedure due to "Form 720", an information return, compelling Spanish tax residents to report their bank accounts, securities and real properties abroad to tax authorities on a yearly basis. Failure to report such information opens up a significant system of penalties, and to the treatment of the market value of those undeclared assets as an unjustified capital gain for the last fiscal year open to tax audit, unless taxpayers in this situation are able to demonstrate that undeclared assets were acquired with declared cash or while they were non-resident in Spain, in which case the capital gain will be the difference between the market value of the assets and their acquisition cost.

At this point, it is important to highlight that unjustified capital gains are levied at a general scale of charge ranging from 12% up to 48%, and that capital gain derived from undeclared assets on "Form 720" are not subject to any statute of limitations.

Consequences in case of discovery of undeclared investment income through domestic tax authorities

If domestic tax authorities discover that a taxpayer has undeclared assets on Form 720 but has not previously made a voluntary disclosure of them, this will trigger the following consequences:

- A penalty of €25,000 per bank account not disclosed and of €10,000 per security and/or real estate not disclosed.
- When tax due derived from the assets located abroad does not exceed €120,000, a penalty of 1.5 times the abovementioned tax due will be charged in addition.
- When tax due resulting from assets overseas is equal to, or above €120,000 but below €600,000, then it may lead to a punishable offence of a fine amounting to six times the tax due and to imprisonment for up to five years.
- If the tax due resulting from assets overseas exceeds €600,000, the taxpayer's actions may lead to a punishable offence of a fine amounting to twelve times the tax due and to imprisonment for up to six years.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

The effect of voluntary disclosure is full immunity from prosecution in relation to tax evasion. For successful disclosure, the taxpayer must determine the unjustified capital gain resulting from his undeclared assets as at the last year open to tax audit. The aforementioned capital gain must be declared on the taxpayer's last income tax period open to tax audit, and the tax due paid at that time. For late filing, a 20% surcharge and interests on arrears will be levied by tax authorities.

Additionally, the taxpayer must include all incomes related to undisclosed assets for the fiscal years within the statute of limitations (four years). Surcharges ranging from 5% up to 20% and interests on arrears will be charged on tax due on those fiscal years.

Finally, taxpayer must file all "Forms 720" within the statute of limitation period and pay the penalties for the late filing of each information return which are (per year): €500 per bank account, €200 per security and €200 per real estate asset, with a minimum amount of €1,500 per each of the abovementioned categories of assets.

Conditions for a successful voluntary disclosure

- No tax audit proceedings must have been initiated against the taxpayer for any period within the statute of limitations and,
- Cash must be available to make payments resulting from voluntary disclosure.

Will the Panama Papers accelerate the process of voluntary disclosure?

The automatic exchange of information starting 2017, combined with "Form 720", constitutes a powerful tool in the hands of tax authorities for detection of undeclared assets. In that regard, the Spanish Finance Ministry believes there could be approximately 2 million foreign nationals living in Spain with assets overseas who have not yet submitted "Form 720".

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Panama Papers accelerate the process of voluntary disclosures

Consequences in case of discovery of undeclared investment income through domestic tax authorities

If domestic tax authorities obtain information that a taxpayer has undeclared income or assets and no voluntary disclosure was submitted beforehand, the Swiss direct federal tax law provides for a punishment in the form of a fine which usually equals the evaded taxes, but which may be increased to up to three times the amount of evaded taxes in cases of severe fault. There is a period of limitation for the application of retroactive tax fines of 10 years from the end of the respective tax period. This means that the retroactive taxes can be applied at most for the last 10 tax years. Taxes evaded in previous tax periods cannot be recovered. Apart from the taxpayer, possible accomplices that have deliberately helped with the tax evasion may also face fines of up to CHF 10,000 (up to CHF 50,000 in severe cases or in case of recurrence), independent of any punishment for the taxpayer.

Consequences when a voluntary disclosure has previously been submitted to domestic tax authorities

In general, a successful voluntary disclosure will lead to a fine of 20% of the evaded taxes. However, the first time a voluntary disclosure is made by the taxpayer, the tax authorities will refrain from prosecuting the tax evasion. In order for the voluntary disclosure to be admitted, certain conditions have to be met.

Additionally to the previously mentioned general voluntary disclosure, there is a special and simplified regime for voluntary disclosure regarding inherited assets. The conditions for this special disclosure are similar to those of the general one. However, the retroactive tax is only calculated upon the last three tax years before the death of the deceased.

Conditions for a successful voluntary disclosure

In order for the tax authorities to refrain from prosecuting the tax evasion and grant full immunity, there are certain conditions that have to be met apart from the fact that it has to be a first-time voluntary disclosure. Firstly, the tax evasion must not already be known to the tax authorities, but has to be disclosed by the taxpayer. Secondly, the taxpayer has to fully support the tax authorities with assessing supplementary taxes – everything must be disclosed - and thirdly, the taxpayer has to make a genuine effort to settle the outstanding supplementary taxes.

Will the Panama Papers accelerate the process of voluntary disclosures?

There is no unusual acceleration in the process of voluntary disclosures to be expected in direct connection with the Panama Papers. An increase in voluntary disclosures has been observed in the last few years. However, the reason therefore is rather to be seen in the newly implemented law on automatic exchange of information.

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