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Ameliora – The cooperation partner for US Clients in the investment business

Shortly before Christmas, First Advisory Group reached an agreement with GN Treuhand Anstalt, of Vaduz, regarding a substantial participating interest in the independent Swiss investment adviser Ameliora Wealth Management Ltd. Incorporated in February 2012, Ameliora has its registered office at Gutenbergstrasse 10 in Zurich, and has been regulated by the United States Securities and Exchange Commission (SEC) since mid-June 2012. The SEC was set up in response to the 1929 Wall Street Crash and is the state regulator of securities trading in the United States of America. Ameliora's business model is focused exclusively on providing wealth management and advisory services to natural persons who are US citizens as well as legal persons and trusts whose beneficial owners and beneficiaries are US citizens.

Managing Director of Ameliora is Rainer Nigg, while Jürg Häusler currently serves as Chairman of the Board of Directors.

The two other directors are Markus Stalder and Max Riederer von Paar, a qualified attorney-at-law who also acts as the company's Chief Compliance Officer.

This strategic investment has enabled the First Advisory Group to meet the needs of US clients for professional, tax-compliant management of their assets.

The investment process begins with a precise analysis of the client's circumstances, investment preferences and goals, as well as the expected returns. Other important elements in this analysis are the client's risk tolerance and future liquidity requirements.

Ameliora pursues a «long only» approach, focusing mainly on steady returns from long-term investment.



Ameliora offers its wealth management clients a choice of six different strategies for the investment of their assets. Depending on the preferred risk/return profile, the following options are available:

- Fixed Income
- Income
- Yield
- Balanced
- Growth
- Equities

The investment strategies start with the low-risk Fixed Income, which invests exclusively in money market instruments and bonds. At the other end of the spectrum is Equities, in which the asset allocation consists almost exclusively of stocks and shares.

The Ameliora portfolio is structured as a classic combination of top-down and bottom-up. The macroeconomic environment,

the countries, industrial sectors and asset classes are analysed from the top down. On the other hand, the fundamentals used for the targeted picking of individual investments are analysed from the bottom up. In this process, Ameliora bases its own analyses on research reports by independent third parties (secondary research).

Portfolios are permanently monitored. This ensures that the investments conform to the client's requirements (e.g. restrictions placed on certain investments as part of the strategy) or to the client's chosen strategy itself.

In addition to wealth management, Ameliora offers an investment advisory service. With this service, it is always the client who makes the final choice of investment. This differs from discretionary portfolio management, where Ameliora invests under an asset management contract.

Focus on Liechtenstein

State Court rules on «fishing expeditions»

Overview

The Principality of Liechtenstein's State Court (Staatsgerichtshof – StGH) ruled in its judgment of 3 September 2012 (StGH 2012/106) that administrative assistance to German tax authorities in the case before the court involved an improper exploratory investigation (a «fishing expedition»). The decision was grounded in the finding that knowledge of the name of a specific foundation and that of its deceased German founder did not suffice to justify access to information on other, as of that time unknown, beneficiaries who may possibly be subject to taxation in Germany.

Facts

In March 2011, one of several secondary beneficiaries reported a disbursement received from a Liechtenstein foundation as a «bequest» from its deceased German founder and primary beneficiary for the purposes of declaration of inheritance tax in Germany. The corresponding tax return was accompanied by copies of the articles of association and the beneficiary rules of the foundation. However, except for the name of the second beneficiary, all names and references to other beneficiaries were anonymised or blacked out in these documents.

In August 2011, the Federal Central Tax Office (Bundeszentralamt für Steuern) in Bonn submitted a request for administrative assistance to the Liechtenstein tax authorities concerning the deceased founder. With the consent of the foundation, the Liechtenstein tax authorities then initially forwarded various documents concerning the foundation (e.g., articles of association, lists of assets) that were required for the purposes of determining the tax base of the deceased founder for income tax for 2010 and inheritance tax to the authority that had submitted the request. However, all names, except for that of the founder, were again blacked out in the beneficiary rules.

The authority in Bonn that had originally submitted the request for administrative assistance reacted to this response to its original request with a complementary request in December 2011. The German authority formulated its request for information as follows:

«If the persons whose names were blacked out in your reply reside in Germany, please provide information as to who (name and known address) the other beneficiaries/heirs and/or remaindermen of the foundation are since this would be of importance for their taxation in Germany. The domestic tax authority would prefer that the requested information be made available in the form of the complete (not anonymised) rules of the foundation.»

Central legal issue

On the basis of the facts described above, the central legal issue involved here is whether the complementary request made by the Federal Central Office in Bonn was sufficiently specific as regards the identity of the group of persons concerned by the query as to comply with the provisions of the German/Liechtenstein Tax Information Exchange Agreement (hereinafter referred to as «TIEA-DE») applicable in this case or whether this could perhaps constitute a prohibited exploratory investigation (a «fishing expedition») within the meaning of the Liechtenstein Law on Administrative Assistance in Tax Matters (Steueramtshilfegesetz – SteAHG).

Decisions of the ordinary courts

The Liechtenstein tax authorities and the Supreme Administrative Court (Verwaltungsgerichtshof) on appeal ruled that disclosure of the information to the German authorities was legitimate and did not involve a «fishing expedition».

Content of the appeal to the State Court

In its appeal to the State Court, the foundation alleged as complainant that several of its basic rights that are protected by the constitution and the European Convention on Human Rights (ECHR) were violated. Among other things, the complainant submitted that its fundamental right to preservation of its sphere of privacy and secrecy had been infringed.

Based on both the provisions of the TIEA-DE and the Law on Administrative Assistance in Tax Matters, it was submitted that requests for administrative assistance from Germany must contain in particular the identity of the individual who is the subject of the investigation and that the identity of that individual must already be known to the authority making the request.¹ The explanatory memorandum to the TIEA-DE does, however, to be sure state in this regard that «mention of a name is not required to determine the identity of the taxpayer in exceptional cases if it can be determined from other information».² The complainant argued that the mere suspicion advanced in the complementary request in the case at issue by the authority requesting administrative assistance to the effect that other beneficiaries of the foundation could possibly be residents of Germany who – like the founder – have also failed to fulfil their fiscal obligations certainly did not, however, suffice. The complainant submitted further that the German complementary

request also did not therefore contain the degree of specificity required by the TIEA-DE, but involved instead an improper «fishing expedition» within the meaning of the Law on Administrative Assistance in Tax Matters, which is also applicable to the case at hand.

Decision of the State Court

The State Court allowed the foundation's appeal and found – in contrast to the legal position of the lower courts – that the German complementary request for administrative assistance did indeed qualify as an improper exploratory investigation. In the grounds for its decision, the State Court first of all stated that such «fishing expeditions» represent in any case disproportionate and unjustified infringement of the constitutionally protected sphere of privacy and secrecy and that a request for administrative assistance in a tax matter will regularly be considered to constitute a «fishing expedition» if it contains neither mention of names of specific individuals nor information that would permit identification of the parties concerned.

According to the State Court, knowledge of the name of a foundation is, despite the legal opinion held previously by the Supreme Administrative Court, not the same as knowledge of a bank account number, which is considered sufficient for the purposes of identification of specific persons; although it is always possible to identify one or more clearly identifiable holders with a traceable account number in the case of a bank account, the beneficiary of a foundation can take any conceivable form, both in terms of person and content (entitled, prospective beneficiary, discretionary beneficiary, etc.). The court went on to explain that mere suspicion that persons that reside in and are subject to taxation in the state submitting a request for administrative assistance could be beneficiaries of a foundation known to that state therefore – unlike knowledge of a bank account number – constitutes neither knowledge of a personal identifying characteristic nor other evidence that would suffice to identify persons who are unknown by name within the meaning of the TIEA-DE or the OECD Model Tax Convention³.

According to the legal opinion of the State Court, a request for administrative assistance also presupposes that proceedings are already pending in the state making the request or that an investigation is at least being conducted, but that is not the case. The court pointed out that the German tax authority is in fact attempting in the present case to obtain further information on persons who are not sufficiently identified on the basis of its knowledge of the name of a foundation and that of its deceased

¹ See Art. 5(5)(a) of the TIEA-DE and Art. 7(2)(a) of the SteAHG

² See section 2 of the explanatory memorandum to the TIEA-DE

³ See update to Art. 26 of the OECD Model Tax Convention and its commentary of 17 July 2012 in section II, paragraph 5.1

founder for the very purposes of initiating such proceedings or such an investigation in the first place.

Conclusions

By providing a narrower construction of the previously unclear term «fishing expedition», the State Court has with its present decision made an important contribution to legal clarity in the case of proceedings involving administrative assistance in tax matters in connection with legally independent special-purpose funds (foundations, etc.), which are of such great importance for Liechtenstein. In this context, the State Court has also taken into account the unique fact that such funds have no owner by presenting the legal differences that exist between funds and bank accounts. The decision also provides a clear indication of a desire to prevent further evisceration of the sphere of secrecy and privacy that enjoys protection at the constitutional level in Liechtenstein.

It remains to be hoped that the unique nature of the structure of Liechtenstein's legal entities will be treated with equal respect in the context of the discussion currently taking place in Liechtenstein with respect to «group requests» in the area of administrative assistance proceedings concerning taxation so that protection of at least the core of the respective sphere of secrecy and privacy will be preserved.

Information on Switzerland

Group requests and the limits to exploratory investigation as well as the question as to retroactive implications will most likely also be addressed by the Swiss courts. The decision is to be welcomed from the Swiss perspective since the additional protocols to each of the double-taxation treaties contain a remark to the effect that the purpose of referral of information that is likely to be significant is to ensure the greatest possible exchange of information in tax matters without allowing the contracting state to undertake «fishing expeditions» or request information that is unlikely to be of relevance as regards the tax affairs of a taxpayer. Professor Cavelti correctly concludes that information is to be exchanged if positive identification of the taxpayer involved is possible and such exchange does not lead to the receipt of data on random taxpayers through blanket requests of a general nature; the new group requests that are planned will also not result in any change in the requirement for positive identification.⁴

⁴ See Ulrich Cavelti, OECD-Gruppenanfragen wahren Rechtsschutz, in NZZ of 1 December 2012, p. 37

As regards timing, it is necessary to retain that only the version that is in effect as of the time of the conclusion of the respective double-taxation treaty can be determinative. Subsequent changes cannot be applied unless they reflect the desire of the contracting parties.⁵ The contemplated intent also cannot be significantly changed by unilateral pronouncements of the executive branch since it is the legislative branch that is responsible for the conclusion or, as the case may be, approval of double-taxation treaties. Furthermore, the legislature expressed a clear-cut opinion on group requests when it adopted the Law on Administrative Assistance in Tax Matters and therefore also advocated the validity of group requests once the law goes into effect.

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⁵ See Thomas Koblenzer, Auslegung von Art. 27 DTA-Schweiz im Lichte des geänderten OECD-Musterkommentars zu Art. 26 OECD-MA, in iStR 22/1012, p. 872