Financial Law Review

No. 23 (3)/2021

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVEL JOZEF ŠAFÁRIK UNIVERSITY • UNIVERSITY OF VORONEZH
http://www.ejournals.eu/FLR

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PERMISSIBLE RESTRICTIONS OF BANK SECRECY FOR TAX CONTROL PURPOSES IN THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION

Abstract

The article deals with the relationship between bank secrecy and tax transparency. It studies the issues of confidential information (which forms bank secrecy) being presented to tax authorities, also including the principle of providing information on request and automatic data provision within the framework of the Common Reporting Standard.

The comparison of bank secrecy and tax transparency is carried out from the viewpoint of its value for the society, state, and individuals. It is noted that the expansion of bank secrecy access for tax authorities can be used not only in tax control, but also to simplify the taxpayers' payment procedure and other benefits connected with the confidential information, or bank secrecy. The given research paper analyses the problem of broad exemptions from the banking secrecy regime in tax control. The analysis is based on the axiological approach and comparative legal research method based on the analysis of bank secrecy restrictions in the legal systems of Switzerland,

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Singapore and Russia. The scientific task is to determine the conditions and the necessary degree of bank secrecy restrictions in tax control.

Key words: transparency, taxes, bank, secrecy, value, law.

JEL Classification: K34

1. Introduction – Problem statement

The development of information technologies affects many areas of public life. One of the most topical issues is the information dissemination and establishment of its various regimes.

These processes have shaped the formation of a separate direction in jurisprudence – information law. However, some issues related to information fall within the sphere of other scientific branches. For example, current issues of tax law include digital economy taxation, the use of digital technologies in tax control and taxpayers accounting, digital assets taxation, and some other issues combining information and taxation.

One of such relevant complex issues is the bank secrecy restrictions in tax control, including problematic aspects in the information, tax and banking law.

The aspects of banking and tax secrecy have been studied in details by both Russian and foreign scholars [Kolodeznaya 2011, Zhirnova 2013, Bova 2013, Guo 1986]. Nevertheless, the rapid development of information technology and the response to this process by the states, international organizations and scientists present new research findings. Thus, one of the main arguments is the thesis put forward by the Organization for Economic Cooperation and Development about the end of banking secrecy era [The Era of Bank Secrecy is Over 2011]. What are the reasons for such dramatic changes in the sphere of banking secrecy?

2. Banking secrecy as a legal value

In the beginning of the research it is vital to give a definition to the bank secrecy value and determine its place in the corresponding hierarchy.

Since the axiology offers different approaches to the understanding of value as such, to its relationship with related concepts (evaluation, significance, need, value, etc.), to the classification of values, it is important to specify the terminological tools used in this study.

Due to the purpose of this research, the value is interpreted as an objective and indirect relation of object characteristics to the person's needs [Pivoev 2021]. So, the need in this case is a prerequisite, a request of object endowment with the value property. Legal values are values "personified by law in whole or in part" [Grafskiy 1996]. In addition, the law itself is a value [Alekseev 2019].

There are many broad classifications of values. The division of values into universal and individual, material and spiritual ones is of practical importance for the given research paper. It seems that the value of bank secrecy may have both material and spiritual content. The material component of bank secrecy value is based on the subject's need to maintain the relevant information confidentiality in order to use it in commercial activities, i.e. the limited information access regime can be considered as a competitive advantage. The material component of bank secrecy needs personal security, since the information protection degree constituting bank secrecy is one of the factors affecting the possible infringements of bank customers' rights in order to seize their assets.

The spiritual component of bank secrecy value is the legal right of an individual "not to be in public". In this case, the value of bank secrecy should ensure the spiritual needs of individuals not to disclose their personal information. Such a need may be explained by individual spiritual and mental traits, for example, person's modesty.

Positive law recognizes the bank secrecy value and provides certain legal instruments for its protection. The Russian legislation defines the content of bank secrecy information, the rights and obligations of persons who have access to this information, and the liability for bank secrecy violation [Federal law of 2 December 1990, On Banks and Banking Activity, Art. 26; Civil Code of the Russian Federation, Art. 857; Criminal Code of the Russian Federation, Art. 183; Administrative Code of the Russian Federation, Art. 13.14].

3. Tax transparency. Why are there exemptions of bank secrecy from general confidential aspect?

The diversity of individual and public needs precludes absolute bank secrecy. Russian and foreign literature raises the question of tax transparency value quite clearly. For example, Elena Klinarova includes the expansion of international cooperation and tax transparency into tax law reformative aspect. The scientist notes that "automatic exchange of information is very important for tax administration as it gives additional opportunities to detect illegal behavior" [Klinarova 2020]. Vladimir Babčák believes that "the requirement for taxation fairness is very closely linked with the requirement for taxation transparency"

[Babčák 2019]. So, the exemptions of bank secrecy from general confidential aspect are provided for the purposes of combating corruption, tax evasion, money laundering, terrorism financing and determining the fairness of taxation.

These goals are not values per se, but the desire to achieve these goals is aimed at state's ensuring the individual need for fundamental rights and freedoms protection. In general, it can be concluded that both bank secrecy and tax transparency exemptions from it are aimed at ensuring the same needs, meaning they have equal value.

4. What is meant by the end of banking secrecy era?

The 10th anniversary report of Global Forum on Transparency and Exchange of Information for Tax Purposes provides a brief overview of banking secrecy information in individual states and at the international level. Back in 2009, members of the Global Forum declared that the era of banking secrecy was over. Restriction of bank secrecy for tax purposes is necessary to combat money laundering and tax evasion. At the same time, the confidentiality of taxpayer's information must be secured; strict requirements and purposes of such information access are to be established. The report also states that the issue of milder bank secrecy rules for tax purposes was raised as early as 1985 by the OECD Financial Affairs Committee. The next significant step was the study outlined in the OECD report on unfair tax competition in 1998, specifying that in order to combat unfair tax competition changes should be made to the regulation of banking information provision for tax purposes.

In 2000, the report "Development of Access to Bank Secrecy" stated that the development of interbank cross-country reports presupposes new challenges, namely: the closed bank secrecy access in one jurisdiction makes the efforts of other states ineffective. Therefore, the 2000 Report concluded that virtually all member states should allow tax authorities to have direct or indirect access to banking information for all tax purposes, so that tax authorities can fully meet their revenue collection responsibilities and participate in the effective information exchange.

Subsequent reports tracked and reported the progress in this sphere, covering OECD member states and observers, as well as other relevant jurisdictions. However, it was only in 2009 that the latter jurisdictions agreed to abolish bank secrecy for the purpose of sharing information.

In 2009, 70 out of 125 jurisdictions included restrictions of banking secrecy disclosure; in 2019 there were only three jurisdictions of that kind. However, the provision of bank secrecy information was carried out only upon the request. In 2018, about 100 jurisdictions decided to apply an automatic information exchange procedure.

It should be noted that the difficulties in achieving tax transparency were not due to national regulation differences but to political ones. Yoni Guo, Ph.D., Doctor of Philosophy at the National University of Singapore analyzed the changes in national and international bank secrecy regulations and established a link between political goals and ongoing changes. The scholar says that developed countries can pursue their policies directly or through their transfer agents, primarily international organizations. Yvonne Guo analyzed the transformation of bank secrecy regulation in Switzerland and Singapore.

4.1. Singapore

Banking secrecy in Singapore is established by Section 47, Chapter 19 of the Singapore Banking Act (hereinafter referred to as the Act). As long as there is no client consent, the Bank established under the laws of Singapore is not entitled to disclose information about the client's accounts or transactions unless there is a court request, public obligation or necessity to protect the interests of the bank itself. The third annex to the Act provides that bank secrecy information can be provided at the request of a police officer or a court.

The 2001 Act amendments significantly expanded the list of exceptions to bank secrecy. In April 2009, Singapore was included into the “grey list” of States that did not implement the OECD disclosure information standards on request. However, by November 2009, after the revision of 14 international agreements, Singapore was put into the “white list”. In addition, changes have been made in the national legislation, giving tax authorities the right to obtain bank secrecy information.

On May 9, 2013, the Australian Taxation Office, HM Revenue and Customs and the US External Revenue Service announced certain plans on how to share tax information. After the data leak from the International Association of Journalists, Singapore received the jurisdiction status facilitating tax evasion.

On May 14, 2013, the Ministry of Finance and Monetary Policy Office together with the Internal Revenue Service of Singapore issued a joint statement on strengthening efforts to combat international tax evasion. The Singapore authorities have declared the following 4 steps:

- dissemination of information disclosure rule upon request to all partner states under international agreements, without making additions to existing agreements;

- signing of the International Convention on Mutual Administrative Assistance in Tax Matters;

- adoption of an automatic procedure of information exchange obliging financial institutions to provide information without a special court order;

- signing of an agreement with the United States to facilitate the implementation of the FATCA rules in Singapore.

The state has doubled the number of international agreements and checked all high-risk bank accounts. In July 2013, tax crimes cases were equated to money laundering and financial institutions were required to conduct client review by June 2014. The changes served as a signal that Singapore has ceased to be a tax haven. In December 2014, Singapore and the United States signed an agreement to implement the FATCA rules in Singapore. Singapore also adopted the CRS and ratified the Convention on Mutual Administrative Assistance in Tax Matters in January 2016. The national legislation has undergone the corresponding changes.

4.2. Switzerland

Article 47 of the Swiss Federal Law criminalizes the disclosure of confidential information. Unlike Singapore, Swiss law equally covers both national and external foreign aspects of bank secrecy protection. It is the taxpayer and not the bank that is obliged to provide tax information. Only serious tax crimes can be the ground for bank secrecy access.

In April 2009, Switzerland was added to the “grey list”. From April to September 2009, 12 international agreements providing assistance in tax matters were signed. Unlike Singapore, Switzerland made minor concessions on bank secrecy disclosure.

In 2010, the Swiss Government made a strong statement against the automatic information exchange. At the same time, the General Secretariat for Financial Affairs proposed an alternative system: the regulation of undeclared assets sale by withholding tax from the source (Rubik's model). The adoption of this model, however, did not save Switzerland from isolation and this model was abandoned in favor of automatic information exchange.

4.3. Russia

In the Russian Federation, the legal basis for ensuring bank secrecy is laid down in Article 857 of the Civil Code of the Russian Federation and Article 26 of the Federal Law "On Banks and Banking Activities" of December 02, 1990. In accordance with the provisions of these articles, the tax authorities have the right to receive information about the transactions and accounts of organizations and individuals in certain cases and in the manner provided for by the legislation on taxes and fees. Article 183 of the Criminal Code of the Russian Federation provides for criminal liability for the information disclosure constituting bank secrecy.

The Tax Code of the Russian Federation provides for broad powers of tax authorities to obtain information that constitutes bank secrecy. Article 86 of the Tax Code of the Russian Federation obliges banks to inform a tax authority about the opening of accounts by organizations and individuals, about cash balances and account transactions.

Due to the fact that Russia has joined the Multilateral Agreement of the Competent Authorities on the Automatic Exchange of Financial Information on October 29, 2014, banks, as well as other financial market organizations, are required to provide information about customers for tax control purposes according to the standards of automatic exchange.

In the case of both Singapore and Switzerland, it seems possible to conclude that the bank secrecy disclosure for tax purposes was the result of political pressure from other states and, above all, through the OECD. For the Russian Federation, the Multilateral Agreement of the Competent Authorities on the Automatic Exchange of Financial Information of 29 October 2014 did not lead to significant changes in tax authority access to bank secrecy. The changes mainly affected the order of information collection.

The report and the analysis of national legislation changes in Singapore, Switzerland and Russia prove the end of banking secrecy era in internal and external directions.

The internal sphere obliges banks and other financial market organizations to form a reliable and complete "package" of information about their customers and provide this information to the tax authorities. If earlier bank activity was rather passive including collection of customers' information and providing it to the tax authorities at their request, today the law requires banks to be more active, collect customers' data, verify it and send it to the tax authorities not only on request, but also on a mandatory basis, in particular when identifying non-residents' accounts.

The external sphere provides for the tax-relevant information exchange between states on an automatic basis.

5. Conclusion – on the admissibility to reduce the legal value of bank secrecy

It seems that the problem of tax evasion arose simultaneously with taxes. However, prior to the active international interaction described in the Report, a significant number of states did not address the issue of the relationship between bank secrecy and tax evasion.

Obviously, modern technologies have erased the material state borders to some extent, simplified settlement relations and contributed to the rapid development of international economic relations. But at its core, the needs associated with natural human rights and freedoms have altered a little. The interest of an individual or organization in maintaining bank secrecy remained unchanged.

It is a fair viewpoint that technological development in general and information technology in particular, are not sufficient reasons for introducing additional restrictions on rights and freedoms, including the right to privacy. Thus, the thesis of the end in banking secrecy era is presented as a loss of positive law value, and, consequently, the suppression and infringement of the natural right to privacy. It seems that the effectiveness of legal regulation should not be achieved by belittling some values in favor of others.

The question of bank secrecy correlation with other values has already been considered by the Constitutional Court of the Russian Federation. For example, the Ruling of the Constitutional Court of the Russian Federation of December 14, 2004 N 453-O "On refusal to accept the complaint of the open joint stock company "Joint Stock Commercial Bank "Energobank" for consideration on violation of constitutional rights and freedoms by sub-paragraph 1 of paragraph 3, Article 7 of the Russian Federation Law "On Tax Authorities of the Russian Federation", paragraph 2 of Article 86 and paragraph 1 of Article 135.1 of the Tax Code of the Russian Federation" contains the following legal positions:

- the provision of derogations from bank secrecy in the law cannot be arbitrary and balance of human and civil rights and freedoms, freedom of economic activity and free enterprise must be ensured;

- deviations from bank secrecy must meet the requirements of justice, be adequate, proportionate and necessary to protect constitutionally significant values;

- a bank can refuse to provide the requested information to the tax authority if it considers that the request is not related to the implementation of tax control.

Thus, the legal system of the Russian Federation does not allow arbitrary restriction of bank secrecy. Values that are mediated by the Institute of Banking Secrecy and the Institute of Tax Control have equal legal protection. Similar approaches exist in other states. For example, Allison Christians states that Canada's tax regime attempts to strike a balance between protecting taxpayer rights to privacy and confidentiality, and ensuring that the government has sufficient information about taxpayers in order to enforce its own laws, as well as to cooperate with efforts by other countries to enforce their tax laws in respect of their residents who invest in Canada [Allison 2012].

Expanding the bank secrecy access for tax purposes requires the confidential information protection through other institutions, in particular tax and official secrecy institutions. The development of international standards of bank secrecy access is directly related to the rules of tax protection and official secret.

In addition, bank secrecy standards can be used to automate other tax relationships. For example, in accordance with subparagraph 2 of § 1, Article 219.1 of the Tax Code of the Russian Federation, taxpayers of personal income tax have the right to reduce the tax base by the amount of money deposited to an individual investment account. The information about the individual investment account, if there is a preliminary taxpayers' application, can be automatically sent to the tax authorities enabling the taxpayer to exercise the investment tax deduction right.

The conducted research allows us to draw a conclusion that it is unacceptable to detract from one legal value, in this case, bank secrecy, in favor of other values, in particular those that are provided at the expense of public tax revenues.

The access expansion of bank secrecy information should be accompanied by appropriate changes in tax and official secrecy institutions. It also seems necessary to take a more comprehensive approach of information usage obtained by the state through the banking secrets disclosure, which provides not only for the protection of public interests, but also for the simplification of tax benefits.

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