

The Ombudsman's Case of the Month March 2015

The status of the American taxpayer known as a 'US Person': what are the respective obligations of the bank and the customer related to the extra-territoriality of the American tax regulations?

If you are likely to be considered as a "US Person", in other words a United States tax payer according to the current tax legislation in America, both you and your bank are subject to certain obligations. Beware, if you fail to comply, the consequences may be expensive!

The facts

Mrs B, holder of a trading account in France, mentioned that she issued a sales order for 75 American shares quoted on the NYSE¹ in September 2013 for a total gross amount, after applying the exchange rate, of €4,125.26, credited to her account. Two months later, her bank cancelled this entry by debiting the €4,125.26 from her account and recrediting it with only €2,970.19. Unable to understand the reason, Mrs B asked the bank to explain. The reply was that this was to cover American tax that had been deducted because she was considered an American tax payer ("US Person"). Mrs B stated that she had dual French-American nationality, but had always lived and paid her taxes in France. She contested the deduction of these taxes which she did not consider due and for which she had not been informed. Mrs B contacted me to be reimbursed.

The analysis

The AMF has no jurisdiction in tax issues, I am neither authorised to interpret the tax provisions, especially when they are international, nor to intervene when there is a tax complaint. I can however intervene if the establishment's error, in the dispute, is not a question of tax but has tax consequences, which appeared to be the case in this instance.



I therefore contacted the bank for clarification - not on the merits of applying the status of a "US Person" in her case, which I am not qualified to assess - but on the initial information that was provided to her with respect to this mechanism.

The bank first pointed out that Mrs B had dual nationality and until September 2013 had owned 75 American shares, further mentioning that as a result, she entered into the scope of the American tax regulations. In this sense, she therefore qualified as a "US Person".

It should be stated that in accordance with its status as "Qualified Intermediary" granted by the IRS (the US tax authority), the bank committed to identify, based on an Americanness² index, those people likely to qualify as a "US Person" and to provide their personal data (identity, accounts, income) to the US tax authority. This information is collected using the W-9³ form that the customers concerned must fill in; otherwise tax penalties will be applied to them.

In order to complete the already existing mechanism and strengthen measures against tax evasion, France, along with other countries (the United Kingdom, Germany, Italy, etc.) signed an intergovernmental agreement to automatically report tax data to the United States, under the implementation of the American Foreign Account Tax Compliance Act (FACTA), which came into effect on 1 July 2014.

¹ NYSE = New York Stock Exchange: New York stock exchange

² Including American citizenship, birth place in the USA, home address in the USA, etc.

³ Form W-9: Request for Taxpayer Identification Number and Certification

In this case, concerning the prior information provided to Mrs B, I noticed that, with respect to the documentation provided by the bank, a registered letter had been sent to her in January 2012, informing her of her obligation, as a "US Person" to fill in and return the W-9 form together with a proof of identity. This letter alerted her to the consequences of not providing these element, notably the withholding of 28% of income at source as well as from the gross amount of gains when selling American securities.

The recommendation

Mrs B's financial intermediary told me that the customer did not reply to this letter and that consequently, in compliance with the requirements of the US tax regulation, 28% of her capital gains had been deducted when she sold the shares she owned.

Given that I was provided with proof that Mrs B had been informed of the formalities to comply with as a "US Person", I considered that I did not have any evidence to be able to offer compensation for her case.

The lesson to be learned

Remember to reply to requests for information from your bank, especially in terms of taxation! While the bank is indeed required to inform you of your potential status as a "US Person" and the associated formalities, you are nevertheless required to provide the information required by the American regulation or risk having heavy penalties withheld at source.

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