

Fate of ex-UBS client cases uncertain, lawyers say

By Lynnley Browning – April 23, 2012



Tax lawyers are divided over the legal consequences of the bruising defeat in court of a billionaire former client of UBS AG who sued the Swiss bank for allegedly giving him incorrect tax advice.

On April 10, Judge Andrew Guilford of U.S. District Court in Santa Ana, Calif., dismissed a case brought by Igor Olenicoff, a Russia-born property developer. Olenicoff had accused the bank of improperly telling him he didn't have to disclose certain Swiss-held assets on his U.S. tax returns.

In ruling for UBS, the judge said that because Olenicoff had been convicted in 2007 of tax evasion and of lying on his tax returns about having offshore accounts, he did not have a solid claim of fraud and breach of fiduciary duty against UBS. Judge Guilford wrote that because Olenicoff had admitted to tax evasion, he had placed “nearly every room of his legal house of cards into jeopardy.”

The judge wrote that UBS had run afoul of U.S. authorities over its offshore private bank, but added that “UBS’s admission of guilt does not give Olenicoff the right to sue UBS for fraudulent tax advice.”

In 2009, UBS averted indictment, admitted to criminal wrongdoing with tax-evasion services sold to 19,000 Americans through its private bank and signed a \$780 million deferred-prosecution agreement with the U.S. Justice Department.

Barbara Kaplan, a tax lawyer at Greenberg Traurig in New York who represents clients of foreign banks, said that “the significance of the Olenicoff ruling is that a person is not going to be allowed to shift responsibility for his own acknowledged wrongdoing to another party, even if that party might be viewed in an unfavorable light.”

TAXPAYER RESPONSIBILITY

Gerard Levins, a tax lawyer and former Internal Revenue Service agent based in Hopkinton, Mass., said that regardless of what a bank says, or fails to say, about tax-reporting requirements, the client is responsible for telling the IRS about offshore accounts.

“Just because the bank says you don't have to report it or doesn't tell you that you have to report doesn't absolve the U.S. taxpayer of the duty to report it,” said Levins, who represents bank clients who have come forward voluntarily to the IRS.

Levins said that because American taxpayers are required under IRS rules to disclose offshore accounts on their returns, and because they sign their tax returns under penalty of perjury, nondisclosure means “the client has lied to the IRS.” He added that clients who did not question their private banks on the U.S. tax question should have known better and turned to a U.S. lawyer or accountant.

But David Deary, a lawyer for two former UBS clients who are suing UBS on similar grounds in a Chicago federal court, said the Olenicoff decision was not applicable to his case.

He said that because his clients had not been convicted of tax evasion, “there will be no facts established that our clients knowingly filed false or fraudulent tax returns or that they knew they were required to report the income on their returns.” Deary, who is based in Dallas, said that his clients did not know they were violating tax laws because UBS failed to issue required disclosure forms, called W9s, for them to sign. The forms trigger withholding of any applicable taxes by UBS, which then sends withheld money to the IRS.

SECOND UBS CASE

The Chicago case, filed by Matthew Thomas of California and Himanshu Patel of Arizona last June, seeks class-action status on behalf of scores of former UBS clients. It accuses the bank of fraud and breach of fiduciary duty through its offshore private bank over 2002 through 2008. Deary said he represented around 90 former UBS clients he said planned to join the lawsuit if it gains class-action status.

UBS has filed motions to dismiss the case, saying in part that the plaintiffs did not properly argue that UBS owed them any fiduciary duty regarding advice on U.S. tax-reporting obligations. UBS has said that it does not offer tax advice.

A UBS spokeswoman in New York did not return calls requesting comment on lawsuits by former clients.

Like Olenicoff, around three dozen other U.S. taxpayers with offshore accounts have pleaded guilty to charges of failing to report and pay taxes on their offshore bank accounts. Some 30,000 other U.S. taxpayers have avoided indictment and instead come forward voluntarily to the IRS to declare their offshore accounts at various foreign banks and pay their taxes, interest and fines.

Those within that latter group of 30,000 could have stronger cases against their banks, according to William Sharp, a tax lawyer in Tampa, Florida, who represents many American clients of Swiss banks.

“For those claimants who completed an IRS voluntary disclosure and thus did not plead guilty to any wrongdoing, the Olenicoff decision may not be a show stopper, particularly if those claimants focus on alleged misconduct separate and apart from bank secrecy issues,” Sharp said.

Scott Michel, a tax lawyer at Caplin & Drysdale in Washington, D.C. who has represented foreign banks and wealthy individuals, said the focus of the Chicago case would likely shift to assertions that UBS gave improper tax advice to clients who had no prior tax-related convictions.

Olenicoff, an American citizen, pleaded guilty in 2007 to tax evasion and to filing false returns that hid his offshore accounts. He averted jail time but paid \$52 million in back taxes; in his admission, he said he knew he was violating U.S. tax laws.

Thomas Newmeyer, a lawyer for Olenicoff, declined to comment on whether he would appeal the ruling.