

Tax liabilities after tax advice given

Topic: **Miscellaneous** Case number: **2018/29**

The customer requested a tax consultation from the bank. At said consultation, the tax deductibility of early repayment penalties on income tax was discussed. On the basis of said discussion, the customer paid off two instalments of his mortgage. After the payments were made, two Federal Supreme Court decisions were issued under which early repayment penalties could no longer be deducted for income tax in this scenario. The customer then accused the bank of having advised him without due care and demanded the reimbursement by the bank of his tax liabilities of several tens of thousands of francs. The bank denied having breached its duty of care during the tax consultation and refused the compensation payment. Having assessed the arguments raised, the Ombudsman considered the enforcement of the compensation claim through mediation proceedings pointless and closed the case with a notice to the customer.

The customer had liquid funds and was considering paying off part of his mortgage with them. He arranged an appointment with the bank for a tax consultation and discussed his tax situation with the bank's tax expert with and without the envisaged repayments. During said consultation, the tax expert confirmed that, in the event of an early repayment of individual instalments of the mortgage, he would be able to deduct any early repayment penalties incurred when calculating his income tax. The costs of the generally payable tax consultation were waived for the customer. On the basis thereof, he repaid two instalments of his mortgage, which resulted in early repayment penalties being incurred.

In the year after the tax consultation, the Federal Supreme Court issued two decisions which limited the deductibility of early repayment penalties for income tax, and no longer permitted the same in the customer's situation. The deductions he had made in his tax return for the year in which the consultation took place were not accepted by the tax authorities and an appeal against the assessment decision raised with the bank's help was rejected. The customer argued that the change in practice brought about by the Federal Supreme Court decisions should have been foreseen and should have been discussed with him at the tax consultation. In so doing, he referred to proceedings before the Administrative Court of the Canton of Zurich which the consultation was already subject to and to reports from experts who had made reference to the risk of a change in practice. He asked the bank to reimburse him for the tax liabilities which amounted to several tens of thousands of francs.

The bank responded to the customer's complaint with a detailed statement of its position. It argued that a change in practice with regard to the deductibility of early repayment penalties from income tax was not foreseeable at the time of the consultation. The case at the Administrative Court of the Canton of Zurich referred to by the customer did not concern income tax but real estate capital gains tax, and also confirmed the existing practice for income tax. The case could not be raised as an indication of an imminent change in practice for income tax. The bank also informed the customer about the Federal Supreme Court decisions which came as a surprise and helped him avoid a retrospective application of the resultant change in practice in his case. Unfortunately, the appeal against the assessment decision in question was unsuccessful and a further appeal was deemed not very promising by a specialist tax lawyer. The tax consultation was therefore performed with due care according to the bank. The latter therefore refused to accept responsibility for the tax liabilities

incurred by the customer.

In this customer's case, the crucial thing for the Ombudsman was whether or not the bank had carried out the tax consultation with sufficient care, in other words with up-to-date expert knowledge and, in particular, in compliance with the authorities' current practice, the relevant court rulings and specific indications of potentially imminent changes in practice or law. In his view, the case at the Administrative Court of the Canton of Zurich cited by the customer could not actually be taken as an indication of a change in the practice of the deductibility of early repayment penalties from income tax. He considered the bank's clarifications in this respect convincing. The expert reports mentioned by the customer were from the period after the Federal Supreme Court decisions and discussed the consequences thereof. In the Ombudsman's view therefore, they could also not be taken as indications of changes in practice that were foreseeable at the time of the consultation.

On the basis of some research, the Ombudsman had to assume that both Federal Supreme Court decisions somewhat surprised the experts. To some extent, they were even deemed unacceptable in the subsequent discussions. Finally, the agreement concluded by the customer with the bank regarding the tax consultation contained a clause under which the bank offered no guarantee as to the existence and amount of any tax deductibility option. Even if there had been clear evidence that a change to the practice under discussion was foreseeable at the time of the consultation, whether or not the bank could be held legally liable for the same would therefore still be questionable. At the very least, in the case of simple negligence only, this would probably have been difficult to demonstrate.

The Ombudsman could completely understand that the customer considered the situation he found himself in unfair. He did however think that there was little point in attempting to ask the bank to accommodate the request for compensation through Ombudsman proceedings and therefore had to close the case with a relevant notice to the customer.