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Tax Evasion - Nowhere Left to Hide

By Andre Jumabhoy, Mark A. Rush and J. Stephen Barge

Global tax evasion remains a major problem for governments around the world. At a time when virtually all of the governments from the world's major economies seek additional revenue, the attractiveness to taxpayers of illegally evading taxes remains strong. In 2011, global tax evasion was estimated to cost governments worldwide an estimated $3.1 trillion in annual revenue or the equivalent of 5.1 percent of the global gross domestic product.[1] The U.S. Senate has estimated that tax evasion costs the Internal Revenue Services at least $100 billion annually,[2] while Indonesia puts its loss of revenue at the costs of US$16 billion.[3] Against this backdrop, the enforcement spotlight grows brighter in search of this alleged under-reporting. That light is brightest on financial institutions believed to be involved in facilitating tax evasion.

Foreign assets have reportedly been flowing into U.S. banks largely because the United States is not yet a party to the recent enforcement efforts and information sharing promoted by the Organization for Economic Co-operation and Development ("OECD") in the form of the Common Reporting Standard ("CRS"). However, like many other jurisdictions around the world, the United States has taken unilateral action to compel tax compliance. Thus, financial institutions and their customers who may be relying on a lack of international coordination among taxing authorities should be aware that they may not be on solid ground much longer.

Enforcement Efforts

In 2000, the United States initiated an Offshore Credit Card Program to compel credit card companies to disclose U.S. persons who held offshore credit cards issued by banks overseas. A federal judge in Miami issued John Doe summonses on American Express and Mastercard to disclose U.S. participants who held credit cards issued by banks in the Caribbean. This program was extended to Visa in 2002. In 2013, the U.S. Department of Justice ("DOJ") initiated its Swiss Bank Program, which sought to compel Swiss banks to disclose U.S. account holders' information despite the notoriously stringent Swiss bank secrecy laws. By the time the program was wound down at the beginning of this year, the DOJ had concluded 80 non-prosecution agreements with a total of 80 Swiss banks, including UBS and Credit Swiss Group, and collected a total of $1.3 billion in penalties for the banks' role in facilitating U.S. taxpayers to evade their federal income tax obligations. Alleged tax evaders were also prosecuted around the country.

The U.S. DOJ's pursuit of tax evaders has not stopped. Many U.S.-connected Swiss bank accounts were closed following the United States' vigorous attempts to obtain information. Reportedly, a significant percentage of such "leaver" accounts were migrated to Singapore, another bank secrecy jurisdiction. As a result, the U.S. DOJ resorted to the use of so-called Nova Scotia summons against the U.S. branches of foreign banks that hold U.S. taxpayers' accounts overseas. Recently, such a summons was issued to the Miami branch of UBS demanding the U.S. branch obtain information related to a Singaporean bank account without regard to Singaporean banking laws. The

[1] Reported in the New York Times on 28 November 2011, quoting a report by the Tax Justice Network

[2] https://www.justice.gov/tax/offshore-compliance-initiative citing a U.S. Senate 2008 report

[3] https://www.actionaid.org.uk/sites/default/files/doc_lib/accounting_for_poverty.pdf

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DOJ's philosophy was summed up by Caroline D. Ciraolo, Principal Deputy Assistant Attorney General, who said, "tax evasion knows no geographical bounds and … the Justice Department will pursue these cases wherever the money travels. Not only will those individuals involved be held responsible, but also the entities that support and facilitate their conduct. The Justice Department remains committed to holding foreign financial institutions, corporate service providers, legal and financial professional firms, insurance companies and other entities accountable for their role in assisting U.S. taxpayers in concealing accounts and evading U.S. tax obligations".[4]

The United States is not alone in these efforts. The UK Government has recently published a consultation on "Tackling Offshore Tax Evasion",[5] and Indonesia, in an attempt to recover and repatriate over US$300 billion held in Singapore, has recently passed into law a tax amnesty which encourages its taxpayers to repatriate their undeclared wealth by paying a penalty as low as 2 percent. Indonesian taxpayers who don't participate in this program may face penalties of up to 200 percent of the tax owed.[6]

If all this was not enough, a tax evader's actions are at increased risk of exposure from an illegal hack of bank records as seen in the recent "Panama Papers" saga.

FATCA and the OECD - Cooperation and Transparency

U.S. taxpayers have, for a long period, been required to report foreign bank accounts. Since 1970, with the passage of the Currency and Foreign Transaction Act of 1970,[7] U.S. taxpayers have been required to disclose foreign bank accounts under the Foreign Bank Accounting Reporting ("FBAR"). FBAR is still in effect, accordingly, U.S. taxpayers are required to disclose all foreign bank accounts that exceed $10,000 at any time during the calendar year. FBAR requirements are imposed on the individual taxpayer who, in the event of non-disclosure, may be subject to financial penalties.

The Foreign Account Tax Compliance Act ("FATCA") was enacted in 2014 and the U.S. Government has entered into inter-government agreements with 113 jurisdictions across the globe, including Singapore, Hong Kong, Indonesia and Malaysia, to enforce it. FATCA is aimed, however, at accounts that have a U.S. nexus. Foreign Financial Institutions ("FFIs"), which include banks, insurance companies, investment funds and custodian institutions outside of the U.S., must provide "reportable information" on U.S. citizens and tax residents including account names, account numbers, account balances, interests on income, dividend income and withdrawals. This requirement extends to not only individuals but also to privately owned U.S. corporations, U.S. trusts, U.S. estates and U.S. partnerships. In this respect, FATCA, by imposing requirements on FFIs, may be viewed as complimentary to FBAR. FATCA, however, only really assists the U.S. Government in its attempts to find U.S. taxpayers with overseas assets. FATCA does very little, if anything, to assist other countries with their attempts to police tax evasion.

FATCA was the impetus for an OECD effort that led to CRS, which compels jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. To date, 103 countries have agreed to CRS, including Singapore, Hong Kong, Indonesia and Malaysia, and first reporting is scheduled for September 2017 by a total of 54 countries; another 47

[4] At a speech on 17 August 2016 to the Panama Bankers Association Anti-money Laundering Conference

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483367/A_new_corporate_criminal_offence_of_failure_to_prevent_the_facilitation_of_tax_evasion_-_summary_of_responses__7011_.pdf

[6] The Indonesia Tax Office has confirmed that 393 trillion rupiah (SGD$41 billion) of assets have been declared as of 13 September 2016, of which at least 30 trillion rupiah is held in Singapore

[7] Commonly referred to as the Bank Secrecy Act

countries will begin sharing information from September 2018. As noted above, however, the United States is not a party to CRS and the U.S. banking system is not subject to its information exchange requirements. As a result, it is reported that significant amounts of foreign-based assets are being deposited in or are held by U.S. banks.

Despite the overlap between FATCA and CRS, there remain important differences between the two regimes and financial institutions will need to have in place adequate procedures to deal with them. In particular,

- there are different thresholds for reporting under FATCA and CRS;[8]
- FATCA bases reporting on "citizenship" and "residency"; under CRS reporting is based on "tax residency";
- FATCA and CRS follow different approaches to reportability by "controlling persons" of Passive Non-Financial Entities [definition?];
- FATCA and CRS require different due diligence procedures in different jurisdictions.

The net result is that different reporting regimes may apply depending on (1) the location of the asset, (2) the citizenship or residency of the account holder and (3) the location of the financial institution.

While unilateral action by governments around the world has undoubtedly led to success, there remains the potential for greater international cooperation. Those seeking to hide their illicit funds from the authorities will likely find it harder to keep one step ahead by moving their funds from one jurisdiction to another. The recent unilateral efforts by the United States, as well as those coordinated efforts by countries that are part of the OECD under the FATCA and the CRS, may result in a more fluid exchange of information between jurisdictions. The move promises to be a game-changer in the authorities' pursuit of undisclosed assets and revenue. This will be all the more important if the United States ever agrees to be a party to CRS. The Obama Administration has indicated that it would be in favour of joining the CRS system, but there are significant obstacles to overcome in the short term. Once the U.S. elections are completed in November and a new administration takes over in January, the prospects of the United States joining CRS may become clearer.

Monetary Authority of Singapore

In addition to the exchange of such information, many countries have enacted money laundering laws that criminalize tax evasion. Hong Kong's Organised and Serious Crimes Ordinance is one such example. More recently, and in keeping with its commitments to implement the recommendations of the UN Financial Action Task Force ("FATF"), Singapore amended its main legislation against money laundering, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A), to designate tax crimes as money laundering predicate offences, and thereby requiring financial institutions to report such funds by filing a Suspicious Transaction Report ("STR").

The advice from the Monetary Authority of Singapore ("MAS"), Singapore's central bank, is for banks to tell their clients to get their tax affairs in order. In a statement on 15 September 2016, MAS confirmed that banks are required to file an STR when dealing with tax amnesty cases. However, the statement went on to confirm that, "[p]articipation in a tax amnesty programme, in and of itself, would not attract criminal investigation in

[8] Under FATCA , pre-existing accounts under $50,000 are excluded; no such *de minimis* amount applies to CRS

Singapore. The expectation for an STR to be filed on account of a client participating in a tax amnesty programme should therefore not discourage clients from participation".[9]

Conclusion

Whether under money laundering laws, FATCA or CRS, the reality is that those engaged in tax evasion have nowhere left to hide. With financial institutions under one obligation or another to report the identity of their account holders, it appears that sooner rather than later, the authorities are going to find out about assets to ensure taxes are properly levied. Under the circumstances, those with secreted assets should seek advice. With the automatic exchange of information between jurisdictions your secret is unlikely to remain secret for very much longer.

Authors:

Andre Jumabhoy
andre.jumabhoy@klgates.com
+65.6507.8189

Mark A. Rush
mark.rush@klgates.com
+1.412.355.8333

J. Stephen Barge
steve.barge@klgates.com
+1.412.355.8330

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[9] As reported by the Singapore Straits Times on 16 September 2016