ACCOUNTABILITY FOR ENABLERS OF TAX CRIMES

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I. INTRODUCTION

- **A. Precursors for Prosecuting U.S. Enablers**
- *1. Pasquantino*
- The seminal case on prosecuting U.S. persons is *Pasquantino v. U.S.*, 544 U.S. 349 (2005).
- Defendants were convicted of smuggling large quantities of liquor into Canada from the U.S. to evade Canada's heavy alcohol import tax.
- They were convicted of violating the federal wire fraud statute.

I. INTRODUCTION

- The U.S. Supreme Court heard the case because the circuits were split.
- Defendants asserted the revenue rule that no country enforces the tax laws of another in absence of a treaty.
- The majority decision held that a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute.

I. INTRODUCTION

- *2. Offshore Tax Shelters*
- In 2003-5, the DOJ and IRS responded to a wave of aggressive designing and marketing offshore tax shelters by major law and accounting firms working in conjunction with banks.
- The response was to audit the taxpayers and prosecute the professionals involved in designing and marketing the shelters.

I. INTRODUCTION

- On Oct. 17, 2005, the DOJ and IRS announced the filing of a superseding indictment n the largest criminal tax case ever filed.
- 19 individuals were charged with conspiracy to defraud the IRS, tax evasion and obstruction of tax laws arising out of illegal tax shelters that Big 4 Accounting firm KPMG and others designed, marketed and implemented.
- The shelters generated $11 bn in phony losses.

I. INTRODUCTION

- **B. Precursors for U.S. Prosecuting Foreign Enablers**
- In 1996, the U.S. Attorney, District of New Jersey (Newark) indicted John M. Mathewson, a U.S. citizen who offered his Cayman Islands bank account to U.S. taxpayers, for *inter alia*: conspiracy to commit fraud and money laundering for cable-television piracy ringleaders.

I. INTRODUCTION

- The Mathewson case can be distinguished from the prosecutions of foreign bankers for conspiracy to evade income tax since he was a U.S. citizen who moved to the Cayman and regularly conducted business with Americans and regularly communicated with them in the U.S.
- In addition, he was living in the U.S. when he was arrested for helping traffic in illegally outfitted cable television decoder boxes, estimated to cost up to $7 billion annually.
- Hence, the Mathewson case is distinguishable from the prosecutions of foreign bankers for income tax evasion because Mathewson was not charged with conspiracy to help U.S. taxpayers evade income tax, he was a U.S. person, and he had much more contact with U.S. territory before, during, and after the alleged offenses.

I. INTRODUCTION

- Except for investigations of Deutsche Bank (DB) for participating in the sale of fraudulent tax shelters (case was settled in 2010 before an indictment), the legal community was not contemplating that such provision could/would also apply to foreign/Swiss bankers in a context of U.S. clients not paying their taxes to U.S. authorities.

I. INTRODUCTION

- The DB case can be distinguished from the prosecutions of Swiss bankers after the Tax Division's Offshore Compliance Initiative because the indictment of DB's bankers David Parse and Raymond Craig Brubaker, which was instrumental in the DB settlement, did not occur until June 9, 2009 and much of the conspiracy occurred entirely in the U.S.

I. INTRODUCTION

- The co-conspirators designed the scheme, discussed it with DB, marketed it to U.S. taxpayers, all in the U.S. whereas the acts in the prosecutions involving UBS, Credit Suisse, and Wegelin mostly occurred outside the U.S.

I. INTRODUCTION

- According to the U.S. Department of Justice, the Tax Division's current offshore compliance program, which includes the prosecution of banks and bankers, began in 2008, with the investigation of UBS AG, Switzerland's largest bank.
- In May 2008, Bradley Birkenfeld, formerly employed by UBS AG was arrested, indicted, and pled guilty to conspiring with a U.S. taxpayer, Igor Olenicoff, to hide $200 million in assets in offshore accounts in Switzerland and Liechtenstein, and to evade $7.2 million in U.S. taxes.

I. INTRODUCTION

- The United States had earlier detained as a material witness in that prosecution a senior UBS private banking official from Switzerland traveling on business in Florida, allegedly seizing his computer and other evidence.
- In June 2008, the former UBS private banker, Bradley Birkenfeld, pleaded guilty to conspiracy to defraud the IRS. This appears to represent the first time that the United States has criminally prosecuted a Swiss banker for helping a U.S. taxpayer evade payment of U.S. taxes.

I. INTRODUCTION

- The U.S. also charged his alleged co-conspirator, Mario Staggl, part owner of a trust company. The U.S. also indicted the then UBS senior private banking official, Martin Liechti.
- U.S. Sen. Perman. Subcommitee on Investigations: the action against Birkenfeld appears to represent the first time that the U.S. has criminally prosecuted a Swiss banker for helping a U.S. taxpayer evade payment of U.S. taxes.

I. INTRODUCTION

- On July 1, 2008, U.S. Dist Court for the S.D. Fla. approved DOJ's request to file an IRS adminis. summons with UBS asking the bank to disclose the names of all of its U.S. clients who have opened accounts in Switzerland, but for which the bank has not filed forms with the IRS disclosing the Swiss accounts.
- This John Doe summons represents the first time that the U.S. has tried to pierce Swiss bank secrecy by compelling a Swiss bank to name its U.S. clients

I. INTRODUCTION

- Feb. 2012: Wegelin & Co. (oldest Swiss bank), Indicted/Ceased Operations
- July 2013: Liechtensteinische Landesbank (Switzerland) LTD., Non-prosecution Agreement ("NPA")
- May 2014: Credit Suisse AG – Guilty Plea
- The Swiss Bank Program, announced over 5 years ago, "provided a path for Swiss banks to resolve potential criminal liability in the United States, and to cooperate in the Department's ongoing investigation of the use of foreign bank accounts to commit tax evasion."

DOJ OVDP for Swiss Banks

- In exchange for NPA, banks were required to cooperate, including:
- Disclose cross-border activities;
- Provide detailed information on accounts owned by U.S. taxpayers;
- Disclose information as to other banks that made transfers into accounts; and
- Cooperate in any related criminal and civil proceeding during life of proceeding.
- 14 banks under investigation were ineligible to participate in Program.
- Dec. 2014: Bank Leumi Group, DPA
- Feb. 2016: Bank Julius Baer, DPA
- July 2018: NBP Neue Privat Bank, NPA
- Aug. 2018: Basler Kantonalbank, DPA
- Aug. 2018: Zürcher Kantonalbank, DPA

OVDP

- On September 28, 2018, the Offshore Voluntary Disclosure Program ("OVDP") closed.
- More than 56,000 taxpayers made disclosures and over $11.1 billion collected.
- The following options remain available for taxpayers to come into compliance:
- Streamlined Domestic and Foreign Offshore Filing Procedures
- Delinquent FBAR Filing Procedures
- Delinquent International Information Return Procedures
- Updated Voluntary Disclosure Practice and
- Amending Returns.

JURIES ACQUIT BANKERS

- All of the banks charged have settled.
- Most of the individuals charged plead guilty.
- However, in Nov. 2014, a jury in Ft. Lauderdale acquitted former UBS executive Raoul Weil of conspiring to defraud the IRS.
- The same week federal jury in LA acquitted Shokrollah Baravarian, a former senior vice president at the local branch of Israel's Mizrahi Tefahot Bank, of conspiring to help U.S. clients defraud the IRS through the opening of secret foreign bank accounts.

ASSISTANCE TO FOREIGN TAX AUTHORITIES

- April 24, 2019: A district court granted the IRS leave to serve John Doe summonses on three U.S. banks.
- The summonses, predicated on a request made under the U.S.-Finland tax treaty, sought information regarding debit and credit cards issued by the banks that had been used at ATMs or in other transactions in Finland.
- The pattern of usage of the cards led the Finnish Tax Authority to conclude that they are likely being used by Finnish taxpayers who had not properly reported income to Finland.
- *United States v. John Does*, Case No. 19-00067 (W.D.N.C. 2019).

PROSECUTION FOR VIOLATING FATCA

- Former head of Loyal Bk (offshore bank w offices in Budapest
- & Saint Vincent) pleaded guilty to conspiring to defraud the
- by failing to comply with FATCA under 18 U.S.C. § 371.
- Conviction is the result of U.S. investigation of Belize-based stockbrokers.
- An undercover FBI agent asked Defendant to open bank accounts without having his name appear on account opening documents.
- Agent specifically asked that Defendant not report his ownership of the accounts to the U.S. under FATCA.
- Defendant opened multiple offshore accounts.
- *United States v. Kyriacou*, et. al., No. 18-0102 (E.D.N.Y.)

II. CURRENT PROSECUTORS OF ENABLERS

- **A. U.S. Panama Papers, Mexican VAT et al**
- **Owens** - Defendants (Panamanian, German, and U.S. citizens) were charged in 11-count indictment for assisting U.S. taxpayer clients of Mossack Fonseca with concealing assets, investments, and income from the U.S.
- Defendants allegedly marketed, created, and maintained sham foundations and shell companies to conceal income from the IRS.
- Among other counts, indictment bootstraps tax fraud charges into more severe criminal charges.
- First, it charges wire fraud based on emails and bank wire transfers designed to support a scheme to defraud the IRS.
- Second, it charges conspiracy to commit money laundering based on cross-border transfers made to promote the "wire fraud scheme."
- Pleas, but Panamanian lawyer still at large.
- *United States v. Owens*, et. al., 18-693 (S.D.N.Y.).

MEXICAN VAT FRAUD – THE NEHMAD DECISION

- May 29, 2018 –Carlos Djemal Nehmad sentenced in the U.S. Court S.D.N.Y. to 75 months for fraudulent scheme to obtain $20 million in tax refunds.
- Nehmad created companies in Mexico and U.S. front companies purportedly doing business as importers and exporters of cellular phones to fraudulently obtain VAT refunds from Mexican tax authority.
- Once the phones reached the U.S., they were transferred to a front company and returned to Mexico to a different front company.
- To create appear of legitimate cell phone sales, each transfer of phones was accompanied by a transfer of funds to and from accounts in the name of the relevant front company.

U.S. Court Approves John Doe Summons for Panamanian Law Firm

- On July 28, 2021, U.S. District Judge in the SDNY entered a revised order authorizing the IRS to serve IRS "John Doe" summonses to several U.S. couriers and financial institutions to produce information about U.S. taxpayers who may have use the Panamanian law firm to evade federal income taxes.
- The use of John Doe summons seeking shipping and banking information about POLS is a mechanism to avoid some of the difficult issues raised when the government directly asks a lawyer for the names of clients.

Bank of Butterfield Enters into NPA for Facilitating U.S. Taxpayers Hide Assets

- On Aug 3, 2021, the US and the Bermudan Bank of N.T. Butterfield & Son Ltd concluded a NPA, whereby Butterfield agreed to pay $5.6 million to the U.S. for helping U.S. taxpayer-clients in opening and maintaining undeclared foreign bank accounts from 2001 through 2013.
- This is the first criminal settlement by a Caribbean bank arising out of a bank conspiring with U.S. taxpayers to hide income and assets.

B. Current Foreign Prosecutions of Tax Enablers

- HSBC - European tax authorities have proactively prosecuted enablers.
- Feb. 20, 2019, the Tribunal de Grande Instance in Paris convicted the Swiss MNE UBS AG and its French subsidiary UBS France & 5 officers of evasion of French taxes.
- The corp. fines and civil damages of over €4 bn. Were the largest ever imposed in France on a corporation.

B. Current Foreign Prosecutions of Tax Enablers

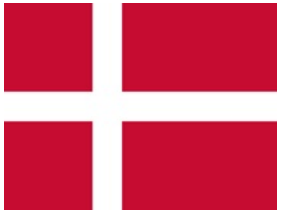
- On Aug. 6, 2019, the Swiss branch of HSBC agreed to pay €294.4 m. to end a Belgian criminal investigation into fax fraud, ML, and illegal financial services by helping Belgian taxpayers to move money from Swiss accts to companies in Panama and the BVI.
- On Aug. 7, the former HSBC head of private banking in Switzerland pleaded guilty to helping clients hide assets.

B. Current Foreign Prosecutions of Tax Enablers

- Belgian and French cases arose from theft by Herve Falciani, a former IT employee at HSBC, from the Geneva office of HSBC in 2008 and sharing them with investigators.

FOREIGN SOVEREIGNS BRINGING ACTIONS IN THE U.S.

- In general, U.S. courts will not enforce directly or indirectly a foreign sovereign's tax laws through civil litigation. *European Community v. RJR Nabisco, Inc*., 424 F.3d 175, 179-182 (2d Cir. 2005).
- In 2018, in *re SKAT Tax Refund Scheme Litigation*, Case No. 1:2018cv.04047 (S.D.N.Y.), Denmark's tax authority, SKAT, alleged that defendant U.S. pension plans defrauded SKAT by falsely representing that they owned shares in various Danish corporations that paid dividends subject to withholding tax which would have entitled them to refunds under the DTA.
- SKAT did pay refunds but then sued and avoided dismissal.
- Some defendants have settled.



PROSECUTING FOR NON-TAX CRIMES

- The most prevalent foreign offense is money laundering because it covers virtually all predicate offenses that are felonies.
- Corruption, embezzlement, graft, and crimes violating integrity are common foreign offenses often mixed with tax offenses.

FOREIGN PROSECUTIONS OF ENABLERS

- **Nigerian Government Starts Voluntary Offshore Assets London Declaration Facilities**
- On July 26, 2021, the Federal Government of Nigeria announced its Voluntary Offshore Assets Regularization Scheme of Nigeria (VOARS) London Declaration Facilities.
- The establishment of its VOARS London Declaration Facilities illustrates a trend whereby govts, including in developing countries, are establishing OVD or regularization regimes for taxpayers and intermediaries. They are also establishing facilities in various locations to enable taxpayers around the world to access the facilities.

FOREIGN PROSECUTIONS OF ENABLERS

- For intermediaries, such as private banks, law firms, asset managers and trustees, VOARS may offer a welcome relief from the inevitable risks intermediaries face as automatic exchange of information comes into play and as the Nigerian authorities obtain information from declarants regarding potential enabler activity.

FOREIGN PROSECUTIONS OF ENABLERS

- Increasingly, the U.K. and Commonwealth countries are using Unexplained Wealth Orders extraterritorially to freeze and forfeit funds.
- Increasingly the OECD is using Mandatory Disclosure Rules to penetrate CRS Avoidance Arrangements and Opaque Offshore Structures.

FOREIGN PROSECUTIONS OF ENABLERS

- The EU Directive Requires Mandatory Automatic Exchange of Information in Relation to Reportable Cross Border Arrangements.
- Administrative penal and/or criminal penalties accompany the increased reporting (e.g., UK Criminal Finances Act 2017).

Indian Tax Authority Takes Action ag Undeclared Assets in Swiss Banks

- The Indian government has filed over 107 prosecution complaints and raised about $1.1 billion from assessment orders in its efforts to uncover undisclosed foreign assets. In a July 26 press release, the Ministry of Finance said that the government filed the complaints and issued assessment orders in 166 cases under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (the Black Money Act). This stemmed from an HSBC data.

Indian Tax Authority Takes Action ag Undeclared Assets in Swiss Banks

- The Black Money Act aimed to abolish undisclosed foreign income and assets.

- Countries worldwide are taking an aggressive stance against tax evaders, enablers, and other financial fraud. The actions by the Indian government show unilateral enforcement efforts against undeclared assets abroad. Until now, the Indian government has not taken action against the foreign enablers, namely the Swiss banks.

Indian Tax Authority Takes Action ag Undeclared Assets in Swiss Banks

- The Indian tax authority revealed that the government discovered undisclosed credits of approximately INR 200 billion based on information from the Panama Papers leak, with an additional INR 2.46 billion from the Paradise Papers leak.

Spanish Court Attacks Banco de Chile for Money Laundering and Tax Crimes from Pinochet Expropriations

- On July 29, 2021, the Seventh Court of Guarantee of Santiago (El Séptimo Juzgado de Garantía de Santiago) reopened an investigation into whether the Banco de Chile helped the former dictator, Augusto Pinochet, launder money. It notified the Supreme Court of Chile of the reopening of the case and advised the bank, whose ownership is related to the Pinochet family, to set aside $103 million.

Spanish Court Attacks Banco de Chile for Money Laundering and Tax Crimes from Pinochet Expropriations

- The plaintiffs are led by the President Allende Foundation, named after the former President Salvador Allende, whom Pinochet overthrew in a coup. The Foundation represents more than 20,000 victims of the Pinochet dictatorship.
- The plaintiffs allege the funds were obtained by illegal expropriations by General Pinochet and his associates and transferred to personal offshore accounts. The complaints allege that the transfers constituted acts of tax evasion and money laundering, which the
- Banco de Chile assisted.

Spanish Court Attacks Banco de Chile for Money Laundering and Tax Crimes from Pinochet Expropriations

- This case should be watched for its efforts to hold accountable Banco de Chile, the alleged enabler, almost 23 years after the initial charges in Spain.
- In particular, the case has significance because of the period of time that has elapsed with respect to the expropriations, the current charges and the fact that, even though the Chilean courts adjudicated the case, the Spanish courts are still exercising jurisdiction.
- The case illustrates the use of extraterritorial jurisdiction when a court believes a foreign court, although exercising jurisdiction, have not properly adjudicated the case.

III. MULTILATERAL ENFORCEMENT

- **A. OECD Report on Enablers** - On Feb. 25, 2021, OECD published report entitled "Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes," focusing on tax and financial crime issues by professional enablers (such as accountants, lawyers and financial institutions) and provides guidance on combatting enablers.
- Report's goal is to counter tax and financial crime.
- Description of role of professional enablers in tax and financial crimes.
- Actions governments can take to address issue of professional enablers in selected areas.
- Governmental counter-strategies to reduce tax fraud and financial crimes.
- Prevention rather than investigation.
- Criminal sanctions and civil penalties.
- Professional body suspensions.
- Pre-emptive communication strategies of proscribed conduct.
- Voluntary disclosure programs .
- Anonymous reporting to identify professional enablers.
- Inter-govtal cooperative activities: intelligence, information sharing and joint investigations.

III. MULTILATERAL ENFORCEMENT

- **B. DAC6** - Many gaps exist between the laws and culture of the EU and U.S. insofar as DAC6, the 5th EU anti-money laundering directive, trusts, and corporate registers are concerned.
- DAC6 requires intermediaries and, in some circumstances, taxpayers — to report cross-border transactions back to June 25, 2018, to EU tax authorities.

III. MULTILATERAL ENFORCEMENT

- Transactions should be reported if they involve at least one EU member state and contain specific hallmarks that suggest potentially aggressive tax planning.
- Some hallmarks may apply, even if obtaining a tax advantage is not the main purpose or benefit, or even one of the main benefits, of the transaction.

III. MULTILATERAL ENFORCEMENT

- An arrangement under DAC6 includes either
- one “which may have the effect of undermining automatic exchange of financial account information”
- or one “involving non-transparent legal or beneficial ownership chain

III. MULTILATERAL ENFORCEMENT

- DAC6 requires EU Members to impose penalties against the violation of national rules implementing DAC6.
- In view of the DAC6 requirements, U.S. intermediaries may need to make reports or risk violating the DAC6.
- **Mexico** has its own version of DAC6, effective from January 2021, with a requirement to report some historic data.
- **Argentina**. A mandatory tax planning disclosure regime for domestic and int'l arrangements implemented since October 20, 2020.
- (General Resolution No. 4838/2020)

III. MULTILATERAL ENFORCEMENT

- A problem for U.S. promoters and service providers is that many structures in the U.S. will undermine AEOI.
- The U.S. does not fully reciprocate under FATCA IGAs.
- The U.S. has not joined the CRS.
- Many states have additional confidentiality provisions. These include: Wyoming, S. Dakota Nevada, and Delaware.

III. MULTILATERAL ENFORCEMENT

- **C. OECD Publishes New Edition of Fighting Tax Crime as More Tax Authorities Prosecute Tax Crimes**
- On June 17, 2021, the OECD published a new edition of Fighting Tax Crime – The Ten Global Principles.
- It discusses ten essential principles covering the legal, institutional, administrative, and operational aspects necessary for developing an efficient and effective system for identifying, investigating and prosecuting tax crimes, while respecting the rights of accused taxpayers.

III. MULTILATERAL ENFORCEMENT

- This second edition deals with new challenges, such as managing professionals who enable tax and white-collar crimes and promoting international co-operation in assets recovery.
- Drawing on the experiences of jurisdictions in all continents, the report also has summaries of successful cases concerning the misuse of virtual assets, complex investigations involving joint task forces, and the use of new technology tools to fight tax crimes and other financial crimes.

III. MULTILATERAL ENFORCEMENT

- The publication highlights three priority areas. First, it underscores the importance of supporting developing countries and their tax administrations in building capacity for successful tax crime investigations.
- Second, it calls attention to the need to scrutinize the effectiveness of current information-sharing practices and policies.
- Third, it notes the need for the OECD Task Force on Tax Crimes and Other Crimes (TFTC) to give impetus to deliberations on the sharing of beneficial ownership information between criminal investigations.

IV. SUMMARY AND CONCLUSION

- More cross-border activity targeting enablers.
- More joint investigations & cooperation.
- More unilateral extraterritorial imposition of reporting and enforcement against foreign governments & intermediaries.
- Lesson: invest in prevention and due diligence for clients and yourselves.

IV. SUMMARY AND CONCLUSION

- In the absence of stronger laws, self-regulated organizations can act.
- However, in the U.S. the ABA's Standing Committee on Ethics and Professional Responsibility has refused to issue black letter rules , requiring, i.e., Customer Due Diligence and other AML prevention requirements.

IV. SUMMARY AND CONCLUSION

- Instead, the ABA Committee and state bars have put their heads in the sand.
- Increasingly, governments around the world are regulating gatekeepers, including lawyers, accountants, auditors as financial institutions.
- Not so in the U.S. where there are no explicit AML regs, no audits to check on implementation.

IV. SUMMARY AND CONCLUSION

- Many of the scandals whereby corrupt leaders have moved large amounts of money (e.g., Teodoro Obiang, 1MDB, Abacha, Pinochet, Lazarenko) have involved U.S. gatekeepers.
- Hence, on Jan. 31, 2016 Global Witness with 60 Minutes conducted an undercover sting operation on 13 different New York law firms who met with an investigator posing as a German lawyer who represented a West African mining minister.

IV. SUMMARY AND CONCLUSION

- U.S. financial institutions are increasingly asking law firms that engage in wealth planning and international business transactional work for their AML due diligence plans.
- Lack of governmental and self-regulatory (i.e., bar action) will inevitably lead to more prosecution and regulatory actions against gatekeepers.

IV. SUMMARY AND CONCLUSION

- Meanwhile, investigating journalists, lead by the ICIJ, will continue to publish exposes (Panama papers, Paradise Papers, FinCEN files, Lux leaks, Luanda leaks).