



100 *years*  
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EXPERIENCE FOR TOMORROW



## The Aftermath of FATCA/CRS – Lessons From Switzerland

# Cross-Border Tax Enforcement Before UBS

- Before the UBS scandal in 2008, tax enforcement essentially stopped at international borders
- Few criminal prosecutions of taxpayers for offshore activities, much less banks or bankers
- Collection of evidence from abroad was slow and unreliable.
  - Letters rogatory: cumbersome
  - MLAT's: unavailable for purely tax-related crimes
  - Tax treaties: information exchange trumped by local bank secrecy laws
  - Tax haven countries unwilling to enter into agreements on exchange of tax information
- Few knew what a Report of Foreign Bank or Financial Account ("FBAR") was. Accounting software even defaulted to "no" in response to question about foreign bank accounts.
- There is nothing wrong with having a foreign account; it just must be reported.

# Cross-Border Tax Enforcement After UBS

- Prosecution of banks
- Prosecution of bankers, lawyers, and financial advisors
- Prosecution of taxpayers
- Offshore Voluntary Disclosure Program
- Tax treaties with information exchange provisions that expressly defeat bank secrecy laws
- Tax Information Exchange Agreements (“TIEA”)
- Revised Convention on Mutual Administrative Assistance in Tax Matters
- Tax haven countries agreeing to exchange tax information
- John Doe summonses
- Foreign Account Tax Compliance Act of 2010 (“FATCA”)
- OECD’s Standard for Automatic Exchange of Financial Account Information, typically referred to as the Common Reporting Standard

# Prosecution of Banks

- UBS 2009 \$780 million
- Wegelin 2012 \$74 million
- Credit Suisse 2014 \$2.6 billion
- Leumi 2014 \$400 million
- Program for Swiss Banks
  - 106 banks
  - Large fines in exchange for NPA's
  - Began in 2013 and still ongoing

# Prosecution of Bankers, Lawyers, and Financial Advisors

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- Indictments of numerous “enablers” since 2008
- Most remain fugitives
- Several became cooperators against banks and customers

# Prosecution of Taxpayers

- Numerous indictments of account holders since 2008
- Accounts at banks in Switzerland, Israel, and India
- Majority have pleaded guilty
- Many eggshell audits involve unreported foreign accounts
- Underscores need for taxpayers to come into compliance immediately

# Offshore Voluntary Disclosure Program

- Created in 2009, updated in 2011 and 2012
- 27.5% of highest account balance during 8-year look-back in exchange for protection from criminal prosecution (50% for “bad” banks)
- Streamlined option outside of OVDP for “nonwillful” account holders (0% or 5% of highest balance for 6-year look-back)
- 50,000 taxpayers have paid \$7 billion
- Participants required to give full information on banks, bankers, and other “enablers”
- Professionals should discuss options with noncompliant taxpayers

# U.S. Tax Treaties and Tax Information Exchange Agreements

- Contain robust provisions on exchange of information. Some also provide for assistance in collection of revenue.
- Tax haven partners:
  - Austria (TT 1999)
  - Bahamas (TIEA 2002)
  - Bermuda (TIEA 1988)
  - British Virgin Islands (TIEA 2002)
  - Cayman Islands (TIEA 2013)
  - Cyprus (TT 1986)
  - Gibraltar (TIEA 2009, amended 2014)
  - Guernsey (TIEA 2002, amended 2013)
  - Hong Kong (TIEA 2014)
  - Isle of Man (TIEA 2002, amended 2013)
  - Jersey (TIEA 2002, amended 2013)
  - Liechtenstein (TIEA 2009, amended 2014)
  - Luxembourg (TT 1996, amendment awaiting ratification)
  - Malta (TT 2008)
  - Mauritius (TIEA 2014)
  - Monaco (TIEA 2009)
  - Panama (TIEA 2010)
  - Switzerland (TT 1998, amendment awaiting ratification)



# Sample Tax Treaty Provisions on Information Exchange

- **Broad description of information to be exchanged**
  - The parties “shall exchange such information (including documents or certified copies of the documents) as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description.”
- **Bank secrecy not an impediment to exchange of information**
  - “In no case shall [a Contracting State be permitted] to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity.”

# Sample Tax Treaty Provisions on Collection of Revenue

- **Contrary to international law’s traditional “revenue rule,” parties must assist each other in tax collection**
  - “The Contracting States shall lend assistance to each other in the collection of revenue claims.”
- **Requested party to collect taxes of requesting party as if they were its own**
  - The claims of the requesting party shall “be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.”
- **Freezing of assets even without final tax assessment**
  - “That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.”
- **No right to contest collection in venue of requested party**
  - “Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall only be brought before the courts or administrative bodies of that State. Nothing in this Article shall be construed as creating or providing any right to such proceedings before any court or administrative body of the other Contracting State”

# Convention on Mutual Administrative Assistance in Tax Matters

- Amended by protocol in 2010 to provide for more robust information exchange.
- Tax haven parties to Convention (protocol awaiting ratification in U.S. Senate)
  - Belize 2013
  - Bermuda 2014
  - British Virgin Islands 2014
  - Cayman Islands 2014
  - Cyprus Signed July 10, 2014, but not yet ratified
  - Gibraltar 2014
  - Guernsey 2014
  - Isle of Man 2014
  - Jersey 2014
  - Liechtenstein Signed November 21, 2013, but not yet ratified
  - Luxembourg 2014
  - Netherlands 1997 (adopted protocol in 2013)
  - Singapore Signed May 29, 2013, but not yet ratified
  - Switzerland Signed October 15, 2013, but not yet ratified
  - Turks & Caicos Islands 2013

# Provisions of Convention on Mutual Administrative Assistance in Tax Matters

- Provisions nearly identical to those of more-recent tax treaties and TIEA's, as both were authored by the OECD
- Extensive exchange of information
- Requested party to recover tax claims of requesting party "as if they were its own tax claims"
- Requested party to freeze assets even without final tax assessment
- No bank secrecy
- 92 participating countries

# John Doe Summonses

- Allow IRS to seek information on an entire class of taxpayers whose identities are unknown
- Federal district judge must authorize
- Served on foreign banks' U.S. correspondent banks: Achilles heel of foreign banks

# Foreign Account Tax Compliance Act of 2010 (“FATCA”)

- Forces foreign financial institutions (“FFI”) to report their U.S. customers to the IRS, or face 30% withholding on any payments from a U.S. source
- Intergovernmental agreements (“IGA”)
  - Reduce burden on FFI’s
  - Address local privacy laws
  - 79 signed
  - 28 agreed “in substance”

# OECD's Common Reporting Standard

- Multi-lateral version of FATCA's automatic information exchange
- 93 countries committed to date
- Exchange of information to begin in 2017 or 2018, depending on the country