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DEVELOPMENTS IN THE SHARING OF TAX INFORMATION AND ANTI-MONEY LAUNDERING LAWS

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Introduction

One of the recent key developments with regards to International Civil and Commercial Relations has to do with the sharing of tax information on cross-border or multi-jurisdictional investigations or intelligence gathering. One of the key aims with regards to the sharing of tax information between States is to crack down on the ability of entities to reduce or negate its tax liabilities to the State. This prevailing culture of tax savvy entities reducing or eliminating its tax liabilities results in Governments collecting less revenue, consequently, Governments cannot spend as much as it would wish to and it is argued that the net effect of this is that there are Government restrictions on spending where funds are most needed, for example, in the health or education budget. Tax reduction or elimination measures also foster discontent and scorn amongst the proletariat, who feels resentful of the fact that they pay their taxes yet others, and generally those of considerably better means, do not pay the taxes that they should. Accordingly, the international community has sought to pressurize or influence countries to adopt measures that combat against these tax reduction or elimination measures.

In my presentation today, I will talk about one of the key instruments used by the international community to combat tax reduction or elimination measures, in particular I will talk about the framework of the multilateral co-operation agreement on the sharing of tax information; specifically I will briefly look at Convention on the Mutual Administrative Assistance in Tax Matters. I will also look into the developments and effects of anti-money laundering measures that jurisdictions have and are adopting. Finally, I will look into how this legal regime affects investors and consequently international relations. But first, let us look at the current regime on tax avoidance mechanisms or "wealth management", as some people in the industry prefers to call it.

Tax Avoidance or Wealth Management: How It Works

Tax avoidance mechanisms have existed for many hundreds of years, the Trust, a device created by the English Courts of Chancery, with their equitable jurisdiction, allowed for the legal ownership of a right to be held by one person, hitherto referred to as a trustee, on behalf of and for the ultimate benefit of another, hitherto called the beneficiary, whose identity is often not present in any formal or official legal document. This structure was often used by those knowledgeable in tax laws to devise a manner of ways to completely avoid paying tax. For example, upon the death of an individual, certain taxes had to be paid by that individual's heirs in conveying any immovable properties to themselves. However, these taxes could be entirely avoided if the properties were held by a company on trust for the individual and then on trust to the heirs upon the death of the individual. Now, because it is the company that is the legal owner of the land and remains so, no death taxes are paid when the beneficial interest on the land is transferred.

The above is but an overly simplified example of how the Trust device coupled with the use of a corporate entity can be used to completely avoid the payment of tax. Of course, changes in the British laws have sought to combat this manner of tax avoidance, and the specifics of that are beyond the scope of my presentation. But as you may have no doubt discerned, laws can be put in place to combat tax avoidance measures. And therein lies the dilemma, because at the end of the day, it is because of the existing tax laws, and in particular the deficiencies of these tax laws, deficiencies that are usually only discernable to those who wish to avoid the payment of the tax, that loopholes, as some call it, are taken advantage of, resulting in successful tax avoidance.

Tax Havens

Today, the business of tax avoidance or wealth management is a big one. The offshore industry, offshore financial services or tax havens are some of the terms used to describe jurisdictions which have laws that allow for the creation of Trusts, corporate entities and other legal personalities that do not have to prepare audited accounts and whose owners are not recorded in any public registry. These entities are the vehicles of wealth management and some of the cleverest people in the world trawl through tax laws looking for loopholes so that their clients need not pay any or much taxes. Now, before I go on, I must also point out the alternate view to tax avoidance. There are many individuals who feel that their Governments are wasteful of tax revenue or whose Governments have individuals who plunder the Government coffers, accordingly, many of these individuals behind tax avoidance schemes believe that they are justified in not paying taxes to their Governments, they believe that they can contribute to their communities in other manners, such as charitable projects under their direction or under the control of people or organizations that they trust. But I am not here to talk about the merits or lack thereof, of tax avoidance schemes.

The OECD Global Forum

In 2001, the member countries of the Organization for Economic Co-Operation and Development, often referred to simply as the OECD, established the Global Forum, whose purpose was to develop international standards of transparency and exchange of information for tax purposes. In 2009, in response to the G20 leaders' call for jurisdictions to adopt high standards transparency and exchange of information in tax matters, the Global Forum agreed to promote and implement such standards through the peer review of all of its members. The Global Forum now includes over 116 member jurisdictions and the European Union, it is therefore the largest tax grouping in the world. Eventually, the impetus led to amendments being made to the Convention on Mutual Administrative Assistance in Tax Matters ("**the Convention**") , which came into effect on the 1st of June 2011.

The Convention

In the preamble to the Convention, signatories applaud efforts to combat tax avoidance and evasion on an international level, whether multilaterally or bilaterally. Here, the distinction between tax avoidance and tax evasion does not appear to be addressed, although tax avoidance - the act of planning one's affairs to minimize one's tax liability, is lawful and tax evasion – that of hiding one's taxable income from the revenue authorities, is unlawful. The signatories to the Convention have agreed that they will assist one another in the exchange of tax information, the recovery of taxes and on the service of documents. Presently, there are only 42 states that are signatories to the Convention, of which only 3 are African, these are Ghana, South Africa and Tunisia. But with the increasing pressure from the international community, the numbers of signatories are expected to rise, indeed, in the past year and a half, the Convention welcomed 15 new signatories. Now, for businesses and this includes investors, who ensure that they comply with local laws on accounting standards and practices and ensure that they pay their taxes in line with the law, there should be no problems. But care must be taken to ensure that tax advice is taken from legitimate accounting and/or legal professionals. In many jurisdictions, judges are adopting purposive views on tax legislation, and mechanisms that appear artificial and whose sole aim is defeat tax laws may not find favour with the judges. This means that circumstances may arise whereby a party may believe that their dealings are above board and in line with the law but then the courts may rule otherwise.

The Convention further allows a member state to request that another member state take measures to recover tax due to be paid by an entity in the requesting State. So that if an investor is adjudged to be owing taxes say in the United Kingdom, the United Kingdom authorities may request that another member state pursue that investors' assets in that other member state to recover the investor's tax liability to the United Kingdom. This is therefore a powerful incentive for an investor to ensure that any tax planning mechanisms that he or she enters into is lawful in the jurisdictions that it may be liable to pay taxes in.

Tax Information Exchange Agreements ("TIEAs")
Although I have placed much emphasis on the Convention, it is by no means the only instrument that binds jurisdictions into sharing tax information with other nations. Many arrangements are done on a bilateral basis; there are a great very many TIEAs. For example, although Seychelles is not a signatory to the Convention, it has TIEAs with 6 European countries. The People's Republic of China has TIEAs with Argentina, Bahamas and Bermuda, the latter two being well known as tax havens. Our hosts, Mauritius, have 7 TIEAs.

The Rise of Anti-Money Laundering Measures
An investor must also be wary of the manner in which he or she funds his or her business projects. Strict regulatory controls are being implemented throughout the world and Africa is no exception. Proof of the source of funds is a minimum requirement to deposit funds into a bank account and greater suspicion is cast by the banks on large cash deposits or incoming transfers from institutions or organizations which show no identification information on the remitter of the funds. Proofs of the identity of the ultimate beneficiaries behind corporate entities are also now becoming the norm.

The Financial Action Task Force ("FATF")
FATF is an inter-governmental body established in 1989 by the Ministers of its member states. Its mandate is to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system. In order to combat money laundering and terrorist financing FATF has come up with 40 recommendations and an additional 9 special recommendations that it expects members and associate members to implement. There are 36 member states, which includes People's Republic of China and only one state from Africa, which is South Africa. The associate members comprise of regional blocks of which many other countries are grouped into, most relevant to Africa are the Eastern and Southern Africa Anti-Money Laudering Group ("**ESAAMLG**"), of which Mauritius and Seychelles are members, amongst a dozen states, then there is the Inter Governmental Action Group against Money Laundering in West Africa ("**GIABA**") and then the Middle East and North Africa Financial Action Task Force ("**MENAFATF**").

The FATF 40 + 9 Recommendations

It is beyond the scope of this presentation for me to go through the 40 + 9 recommendation of the FATF. But key examples of some of their recommendation are that countries adopt laws to criminalize money laundering, which in is defined as concealing the source of one's funds at its simplest, but depending on the definitions adopted by individual jurisdictions can be very widely defined to include any proceeds or any of material or economic benefit that one may obtain that is derived from or suspected to be derived from criminal activity. Criminal activity must also be defined by each individual jurisdiction and this can also be defined very widely. For example, it can include tax liabilities concealed from the tax authorities, so that tax evasion also triggers the crime of money laundering. Other measures that countries are expected to adopt are the creation of a national Financial Intelligence Unit to gather information and combat money laundering activities. Countries are also expected to adopt mechanisms whereby the State may confiscate funds believed to be the proceeds of crime, even though no one has been convicted of any criminal offence, but where such persons or entities cannot provide proof of that their source of funds are legitimate. There are also increasing measures requiring more information from corporate entities as to the individuals behind them. And failing to comply with any of these regulations can result in stiff penalties in the form of fines or custodial sentences. Some of the recommendations also make it a legal obligation for certain parties, deemed as reporting entities, to report suspicious behavior to the Financial Intelligence Unit, the failure of reporting entities to do so can result in severe sanctions against the reporting entities. And in most if not all cases, banks, corporate service providers, accountants and lawyers are reporting entities under the law, so that one's own bank, accountant or lawyer is legally obliged to report their own client's to the authorities if they suspect any wrongdoing, even if the client may not believe that they are doing anything wrong.

Concluding Remarks

An investor must ensure that he acts adroitly and in accordance with a country's anti-money laundering laws. Sources of funds to undertake a business project must be clearly established as legitimate. The outward transfer of funds may is also monitored by the local laws so that an investor must ensure that his outflows go into legitimate beneficiaries or holding companies, as the case may be. Falling foul of a country's anti-money laundering laws can not only result in time consuming litigation before the courts, which can stall investment projects, but the mere fact that an investor is being taken to court by a State or the State's Financial Intelligence Unit, can damage the reputation of the investor and bring the entire enterprise to a grinding halt.

In order for an investor to guarantee that he does not act in a manner that contrary to the laws of a country, an investor must ensure that he is informed about a country's legal framework. The best way that this should be done is to always engage local lawyers to undertake due diligence before embarking into investments and also during the investment process. Lawyers' fees may be costly, but as I have noted above, it would be far more costly to break a country's laws even if it is done unwittingly or unknowingly. If legal proceedings were to be commenced against an investor, it is no doubt that this may cause strain and tension between the nationals of the host state and the investor, and possibly other interested jurisdictions.

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