US tax crackdown

After moving successfully against Switzerland, is Singapore now in focus?

By Seth Cohen and Joanna Yap

EIGHT years ago, the US government began focusing on the pursuit of its citizens, green card holders and certain visa holders who evaded tax by not reporting their offshore assets and accounts. Up to now, US investigations have concentrated on taxpayers and their advisers who utilised the Swiss banking system. With the majority of those investigations concluded, there are now strong indications that the US is focusing on its taxpayers in Singapore.

This comes as no surprise as the US is following the money, much of which has landed in Asia. Caroline Ciraolo, principal deputy assistant attorney general of the US Department of Justice, Tax Division – which is the US government's authority charged with investigating and prosecuting tax evaders – stated in a Bloomberg article last year: "The money is moving out of Switzerland to a variety of jurisdictions… and we're following leads and following the money, wherever that leads us… Certainly, Singapore would be one of the jurisdictions that we're looking at."

These developments are especially troubling in light of both an increase in US aggression in investigations overseas, and the staggering volume of information the US now has and continues to acquire, from voluntary disclosures, whistleblowers, prosecutions, and new intergovernmental agreements that provide for greater transparency and increased co-operation.

The best example of increasing US aggression may be found in a recent attempt to pierce Singapore's bank secrecy law, *United States v UBS AG (S.D.Fla.) (UBS AG)*. Briefly, the facts of this case were that the US was investigating a Chinese national, purportedly a naturalised US citizen, who returned to China and opened an account at UBS Singapore.

The US faced a problem in obtaining the individual's account information as it could not serve a party with a summons outside of its borders, in the absence of an agreement with the nation where the party is located, and no such agreement existed in this case. However, the US served a Bank of Nova Scotia summons on a UBS office in Florida, compelling the bank to produce records held in Singapore.

The UBS AG case is significant because although the US has been vigorously pursuing offshore investigations for the past eight years, it had not previously used a Bank of Nova Scotia summons despite it being available since the 1980s. The Bank of Nova Scotia summons is an interesting and dangerous tool because it permits the US to use its courts to compel the production of documents in an attempt to either avoid the application of another country's bank secrecy laws or necessitate changing the bank secrecy laws of said country.

Should a bank resist the summons, criminal charges may follow, which is a very strong impetus for compliance. Although the UBS AG case ended without a verdict due to the individual agreeing to produce the information, the US' willingness to utilise the summons should not be ignored when determining the inherent risk of the exposure of damaging information.

Swiss Bank Programme

The Swiss investigations began with a major fraud investigation of UBS where, at its end, the bank paid fines totalling approximately US$770 million, entered into a deferred prosecution agreement, and in compliance with that agreement, turned over its records relating to thousands of US taxpayers. In the wake of this success, the US announced the "Swiss Bank Programme" in 2013 where Swiss banks that were not already being investigated could obtain similar results by voluntarily coming forward. Approximately 80 to 100 Swiss banks participated in varying degrees.

The Swiss Bank Programme has ended, but the disclosures yielded an incredible volume of information about US account holders, including recently closed accounts (the movement of which is attributed to increased fear of the loss of anonymity) and the jurisdiction to which the funds were wired upon closing. Many of those wires were sent to Asia with a significant number going to Singapore.

Whistleblowers

Swiss banker Bradley Birkenfeld's disclosure of information about UBS account holders started the whistleblower ball rolling. As a result of a change in US law increasing monetary awards and making them more certain, Mr Birkenfeld received over US$100 million in exchange for the information. The US continues to reward its informants well and it seems that many others will follow suit. There have also been numerous other disclosures, such as the recent high profile International Consortium of Investigative Journalists' (ICIJ) Panama Papers which the US is naturally utilising.

Offshore Voluntary Disclosure Programme (OVDP)

The US places tremendous importance on its taxpayers voluntarily admitting all non-compliance and has recently eased the process such that many non-compliant US taxpayers now face minimal penalties.

Approximately 54,000 US taxpayers have voluntarily admitted to their non-compliance with US tax and bank secrecy law to-date. The OVDP requires the participant to file tax returns for the past eight years (including income from all sources), paying all taxes, interest and a small penalty plus 27.5 per cent (or 50 per cent in some cases) of the highest value of their previously unreported assets. This penalty is in lieu of potential criminal and civil monetary penalties that could far exceed the voluntary payment.

However, it should be noted that the US has made a drastic shift in drawing a distinction between those with and without "bad" motive, and decreased the administrative burden and penalty for those deemed less culpable than others. In other words, US taxpayers who acted without the intent to evade tax may end up paying little or no penalties.

Importantly, the OVDP also requires the full cooperation of the participant. Co-operation includes providing all requested information, such as bank statements, account and entity formation documents, and testimony as to banks and bankers who assisted them. Based on the statistics, and the authors' experiences, there are many participants (whether living in or outside Asia) with accounts in Asia. As a result, information relating to the banks, bankers and others who assisted them is now in US possession.

Playing defence

The ability to voluntarily come forward ends upon being discovered, and has never been more painless for those who unintentionally violated US tax law. The difference in penalties and professional fees incurred between coming forward voluntarily and being discovered is staggering. As stated by Ms Ciraolo in a conference in March this year: "A taxpayer's claims of ignorance or lack of willfulness in failing to comply with disclosure and reporting obligations are, quite simply, neither credible nor well-received. Those who continue to fail to come forward and disclose their conduct run the very serious risk of ending up as the next criminal defendant or at the receiving end of a substantial assessment of civil penalties."

Intergovernmental agreements

As the US shifts its focus to Asia, we see a number of advancements in intergovernmental agreements (IGA). On Aug 2, 2016, the US and Singapore announced ongoing discussions on a tax information exchange agreement (TIEA), which would permit the two countries to exchange relevant tax information to enforce respective tax laws, and an IGA that provides for reciprocal automatic exchange of information with respect to certain financial accounts under the Foreign Account Tax Compliance Act (FATCA). Both countries are committed to complete negotiations and sign the TIEA and the reciprocal FATCA IGA as soon as possible with the aim of doing so by the end of 2017.

Singapore tightens its reins

In a bid to safeguard the integrity and reputation of Singapore as a financial centre, the government had taken several significant steps. These include, among others, the adoption of internationally agreed standards for Automatic Exchange of Information (AEOI), joining the inclusive framework for global implementation of the OECD's (Organisation for Economic Co-operation and Development) Base Erosion and Profit Shifting (BEPS), designating tax crimes as money laundering predicate offences and setting up a dedicated unit within the Monetary Authority of Singapore to combat money laundering and strengthen enforcement. These steps clearly show Singapore would not tolerate or provide a safe harbour for tax evaders.

While it remains to be seen how the US shift in focus could spell trouble for US taxpayers in Asia, what is clear is that it does not pay to take short cuts. For US taxpayers residing outside of the US, the best strategy is to voluntarily disclose tax while the option to do so still remains. W

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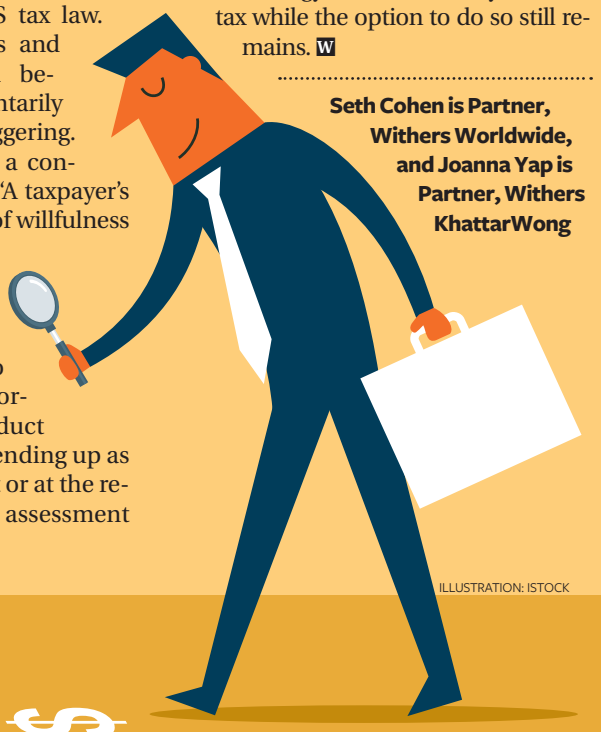

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