

Global Exchange of Information

*WIRC Seminar on International
Taxation for Beginners*

14th May, 2016

CA Ganesh Rajgopalan

Overview

- Headlines
- FIU framework (1995)
- Article 26 of OECD Model (1963)
- Tax Information Exchange Agreements
- FATCA Intergovernmental Agreements (IGA)
- Automatic EOI & Common Reporting Standards of OECD
- Latest developments

Liechtenstein list

y: 18 Indians on Liechtenstein

New Delhi, Thu Jun 09 2011, 15:35 hrs

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The list of Indians with accounts in LGT Bank, in European tax haven Liechtenstein, that is now with the government shows that 18 individuals collectively put away

HSBC Jersey List

HSBC Investigation: clients of Britain's biggest bank exposed


Britain's biggest bank is at the centre of a major HM Revenue and Customs investigation after it opened offshore accounts in Jersey for serious criminals living in this country, The Telegraph can disclose.



By **Holly Watt, Robert Winnett and Claire Newell**

7:00AM GMT 15 Nov 2012

The tax authorities have obtained details of every British client of HSBC in Jersey after a whistleblower secretly provided a detailed list of names, addresses and account balances earlier this week.

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Source: telegraph.co.uk accessed on 14 May 2016

Panama Papers

**How to
hide
a billion
dollars**



The Panama Papers: how to hide a billion dollars – video explainer

The Panama Papers are an unprecedented leak of 11.5m files from the database of the world's fourth biggest offshore law firm, Mossack Fonseca. The records were obtained from an anonymous source by the German newspaper *Süddeutsche Zeitung*, which shared them with the International Consortium of Investigative

Source: The guardian.com accessed on 14 May 2016

IRS reward for whistleblowers

The impact on the offshore world of the IRS paying USD100+ million for information

By Howard S. Fisher, Esq., The Law Offices of Howard S. Fisher, Beverly Hills, California, Geoffrey V. Morson, Esq. Cambridge, UK and Alexander J. Fisher, Esq., Beverly Hills, California<1>

Go Directly To Jail. Do Not Pass Go. Do Not Collect USD200" - Instead, Collect USD104 Million - The Bradley Birkenfeld - UBS Saga

Prelude

A traditional cornerstone of offshore financial centres is the confidentiality of transactions. With as much as USD32 trillion being held 'offshore' the US, and other countries, are paying enormous rewards for information leading to the recovery of so-called ill gotten gains. This has led to the death of such secrecy and confidentiality, which will have a major impact on the offshore world - not just low/no tax jurisdictions.

The IRS website provides:

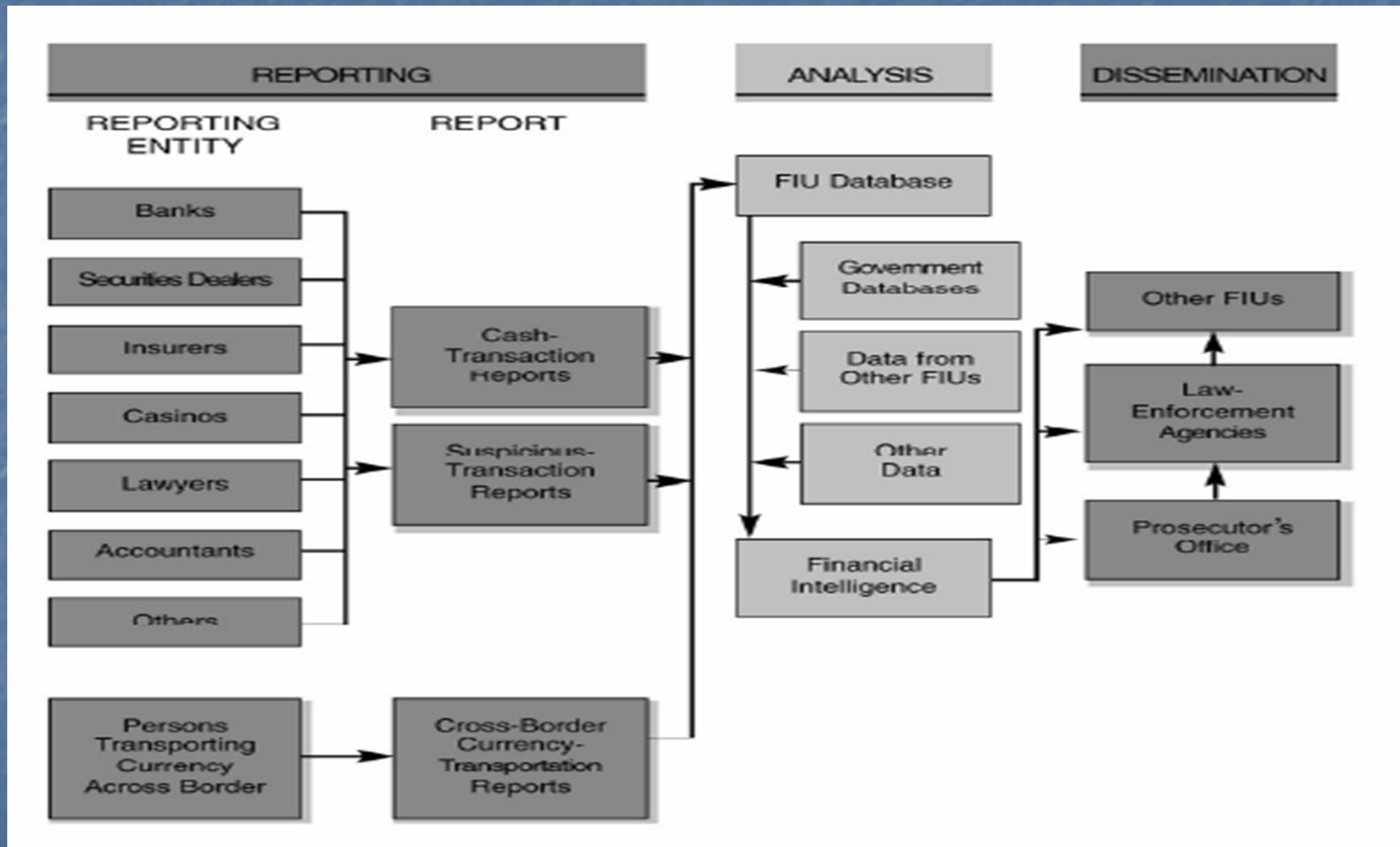
The IRS Whistleblower Office pays money to people who blow the whistle on persons who fail to pay the tax that they owe. If the IRS uses information provided by the whistleblower, it can award the whistleblower up to 30% of the additional tax, penalty and other amounts it collects.

Source: www.offshoreinvestment.com accessed on 14 May 2016

Financial intelligence Units (FIU)

- FATF 2004 recommendation to combat money laundering and financial terrorism to establish FIUs
- Information to be reported by banks /FI
 - Suspicious transaction reports
 - Report of transactions above threshold
 - Report of cross-border transportation of currency/bearer negotiable instruments
- Exchange of financial information from other FIUs
 - On request
 - spontaneously
- Rules relating to reporting entities
 - Customer information confidentiality
 - Rules against tipping off
 - Immunity for reports made in good faith

FIU Framework*



*Source: Financial Intelligence Units – An overview (IMF, July 2004)

EOI in DTAA

- Art. 26 of OECD Model 1963
- Extended to third-country persons to whom Treaty does not apply [*OECD 1977 Model*]
- Information '**foreseeably relevant**'
 - Relevant at the time it is requested; immaterial whether information once supplied proves to be relevant.
 - Should not be a 'Fishing expedition'
 - Speculative requests for information that have no apparent nexus to an open inquiry or investigation
 - Request could relate to a single taxpayer or group of taxpayers
 - Easier to establish foreseeable relevance in single taxpayer requests
- Information relating to taxes of every kind imposed by the Contracting States [*OECD Model 2000 Update*]

Information

- For application of the Convention [*Minor information clause*]
 - Resident State asks other State amount of royalty paid to its resident by payer who is resident of the other state
 - State of payer asks other State whether recipient is resident of that State and the beneficial owner of royalties
 - Information needed to determine proper allocation of profits between AEs in different states or to determine appropriate profits attributable to a PE in one State
- For implementation of domestic laws [*Major information clause*]
 - A company in State A supplies goods to a company in State B. State A requests State B to provide information on what price the company in State B paid for the goods for correct application of its domestic laws
 - During tax investigation of Mr. X by State A, there are indications that he holds one or more undeclared bank accounts with Bank B in State B. To avoid detection, a beneficial owner often holds assets in names of relatives. State A requests State B for information of all accounts with Bank B of which Mr. X is a beneficial owner and all accounts held in name of his wife and children.

'Foreseeable relevance'

- Request to mention more than mere possibility of non-compliance by non-residents in requested state
 - State A requests State B for information of all accounts with Bank B of residents of State A. The request states that Bank B is known to have large no. of foreign account holders. It's a fishing expedition [*OECD MC Comm. Art 26 Para 8.1*].
 - Clear connection between persons being investigated and third party holding the requested information needed. Otherwise any information regarding any party in requested state would be obtainable if merely identified by name in the request [*Luxembourg - Case 36016C, 21 May 2015 Tax Treaty Case Law IBFD*].
 - While investigating a Ponzi-like scheme, State A requests State B to provide details from banks in State B in which remittances from State A were deposited in order to trace and identify ultimate recipients and identifying any additional persons involved in the Ponzi scheme. The information requested is foreseeably relevant [*Singapore [Summons No 184 of 2013] SGHC 173, Tax Treaty Case Law IBFD*].

Secrecy

- Information received
 - Shall be treated as secret in the same manner as domestically obtained information
 - Sec. 138 and 280 of the ITA
 - Can be disclosed only to tax authorities or appellate authorities or in public court proceedings or judicial decisions
 - No disclosure to third countries
- Can information obtained from another State be made public [*Ram Jethmalani v UOI 12 Taxman.com 27 (SC)*]
 - Information not covered by Art 26 Indo-German DTAA;
 - there is no bar on disclosure especially in public court proceedings
 - Right to information to be balanced with right to privacy both rights guaranteed by the Constitution
 - No requirement to disclose where no evidence of wrongdoing

Use of information

- Information may be used for other purposes only where -
 - Domestic law of both states permit *and* Supplying State authorises such use
- Illegally obtained/stolen information
 - Receiving state could ground its tax assessments on such information [Italy SC- Case 8605/2015, 28 April 2015 Tax Treaty Case Law IBFD]
 - Such information did not violate defendant's right against illegal search and can be used as evidence [Payner's case, 447 US 727 (1980)]
 - Country practices
 - No restriction - Australia, Israel, Denmark and the USA
 - Restricted – Switzerland, Norway, Portugal
 - Taxpayer not barred from challenging its accuracy

Other issues

- Requested state not obliged
 - to carry out administrative measures at variance with its laws and practice
 - To supply information not obtainable in the normal course of administration
 - To supply information that would disclose trade, business secret or disclosure contrary to public policy
- Domestic tax interest
 - Cannot refuse to provide the information on the ground that the requested state itself has no use for it
 - refusal justified if information not relevant for tax purposes of requesting state
- Timing of Information request/supply
 - Can be exchanged for periods before the treaty came into force
 - A terminated treaty cannot be basis for an EOI even for the period treaty was in force.

Rubik Agreements

- Pursued by countries with banking secrecy laws
- Aimed at retaining status quo regarding current structure
- Ensuring tax collections though maintaining banking secrecy and confidentiality
- Based on EU Savings Directive provisions
- Options to the non-resident
 - to pay a special withholding tax and make a one-off lump-sum
 - Opt for voluntary disclosure to resident state
 - Close the accounts
- Declaration to not actively seek to acquire stolen data
- Criticism
 - Flat tax and not progressive tax (based on ability to pay)
 - Perpetuates ill-gotten wealth, legitimizes illegitimate practice
 - Lack of transparency
 - Institutionalises privilege for the wealthy

TIEA

- Work of OECD's Global Forum Working Group on Effective EOI for tax purposes (Global Forum) established in 2000
- Model Agreement on TIEA in 2002
 - Both bilateral and multilateral models
 - Primary focus on mutual facilitation of sharing information for tax purposes
 - Information request in civil and criminal tax matters
 - Only EOI on request ; no spontaneous or automatic exchange
 - 'Foreseeable relevance' apply
 - Lack of 'domestic interest' of requested state no bar
 - Tax examination abroad also covered in some agreements
- Exponential growth in TIEAs in last decade
- Usually entered into by low tax jurisdictions (tax havens) which do not have a double tax treaty network
- More detailed than Art. 26 of DTC with rules and procedures

FATCA

- Sec. 1471-1474 of the IRC -Foreign Account Tax Compliance Title V of Hiring Incentives to Restore Employment Act 2010
- Direct reporting to IRS by FFI financial accounts of US persons
- Non-compliance by FFI attract a WHT on payments from US sources and proceeds from sale of US investments
- Criticism
 - Unilateralism
 - FFI required to overcome their own laws and bypass their own authorities
 - Often contrary to constitutional provisions, privacy laws and banking secrecy laws in the home country of reporting FI

FATCA

- Compromise between US and G-5 in 2012 resulting in Inter-governmental Model agreements
 - Reporting by FFI to tax authorities in own jurisdiction, reciprocity
 - Based on EU Savings Directive
 - Model 1 IGA
 - FFI to report to their own governments, reciprocal or non-reciprocal
 - Model 2 IGA
 - FFI to register with IRS
 - E.g. Austria, Switzerland, Taiwan, Bermuda, Chile, Hong Kong, Japan, Moldova
 - Administrative burden on source state avoided
 - strong privacy and bank secrecy laws, high tax compliance among residents
- Inspired OECD standard on AEOI (2014)

Automatic Exchange of Information

- Global standard of automatic exchange of information, developed by the OECD and endorsed by the G20
- Common Reporting Standard and Model Competent Authority Agreement provide international legal framework for automatic EOI
 - FI to report information relating to financial accounts held by individuals and entities to own tax administration
 - Tax administration then securely transmits information to account holders' countries annually without receiving specific request
 - Reporting entities
 - Deposit-taking banks, custodial institutions, certain investment entities and insurance companies
 - Type of account information
 - Account balances, interest, dividends and sale/redemption proceeds of financial assets

AEOI

- Confidentiality, data safeguards requirements to be met by participating countries set.
- Automatic EOI to begin in 2017, with respect to data collected as from 31 December 2015.
- Complementary to EOI on request
- “Foreseeable relevance” standard not required to be met

Enabling provisions in ITA

- Multilateral Convention on Mutual Administrative Assistance on Tax Matters notified u/s 90 in 2012
- Sec. 285BA substituted vide FA 2014
- Rules 114F, 114G & 114H introduced wef Aug 2015

Information to be maintained and reported [Rule 114G]

- Name, address, TIN, date and place of birth of account holder and controlling person who are reportable persons
- Account number
- Account balance or value at year-end or on closure
- For custodial accounts, gross amount of interest, dividends and other income including sale proceeds with respect to asset in account during calendar year
- For depository account , gross amount of interest during calendar year
- For any other account, gross amount paid/credited to the account holder including sale / redemption proceeds
- Reporting for US reportable accounts from June 2014/2015 and for others from 2016.

Due diligence requirement [rule 114H]

- Objective to identify tax residence of account holders for reporting
- Detailed instructions, for instance
 - Pre-existing individual accounts
 - Thresholds prescribed for determining low & high value accounts
 - In high value accounts (over USD 1 m) as on 31st December
 - Account holder's residence status,
 - Account holder's residence address, mailing address and telephone numbers
 - Any standing instruction to transfer funds to another account
 - Any POA or signature authority forms
 - New individual accounts
 - FI to obtain verifiable self-certification to determine tax residence of account holders
 - Pre-existing & new entity accounts

Exchange of CbC reports

- CbC Reporting
 - to improve access to tax authorities regarding global allocation of income, taxes paid, and location of economic activity among jurisdictions in which an MNE Group operates
- Multilateral Competent authority Agreement on exchange of CbC Reports (2016)
 - 39 signatories (including India)
 - Standardised electronic format for CbC reporting to facilitate exchange of reports
 - Exchange of reports on bilateral basis
 - Exchange with States where constituent entities of the MNE Group is resident or a PE

Thank You