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**Swiss Tax Refuge Vanishes**
Date: December 22, 2010
*Vern Krishna*

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As Canada and the United States ramp up their efforts to reduce tax avoidance and collect more taxes, our foreign aid to corrupt regimes finds its way into Swiss bank accounts. In 2007, Ahmed Zia Massoud, the Afghan Vice-President, is reported to have carried out US$52-million in cash in a suitcase.

Canada's war against tax avoidance is accelerating, domestically and on international fronts. Radical new legislative proposals will, if enacted, require lawyers to breach their solicitor-client privilege and report avoidance transactions to the Canada Revenue Agency. Internationally, Canada is on a binge of signing Exchange of Information treaties with tax and banking havens. The most recent one with Switzerland uses obscure language.

Unlike many havens, Switzerland is actually a full-tax jurisdiction and is diligent in enforcing its tax laws. There are stringent penalties for those who do not comply with their domestic laws. An immigrant, for example, cannot even become a Swiss national unless he or she proves tax compliance.

It is a different story, however, when it comes to helping other countries enforce their laws. Swiss banking secrecy is legendary. It is the "go to" place to hide dirty money. Hence, Switzerland has always been the country of choice for organized crime, arms dealers, corrupt politicians, Nazis, African, Asian and South American dictators, and Russian oligarchs.

Traditionally, Switzerland would not divulge income tax related information to foreign governments because it does not consider tax evasion to be fraud.

However, following pressure from the U.S. government on the Union Bank of Switzerland, the Swiss changed their laws to reveal the names and identities of persons connected with tax fraud. The amended laws reveal the names of some 4,500 account holders suspected of income tax evasion in the United States.

Canada and Switzerland have also agreed to expand provisions for the exchange of income tax information. New treaty provisions provide for the tax authorities of the two countries to exchange such information as is "foreseeably relevant" for

 

the administration and enforcement of the domestic tax laws for each country.

Now, neither country can refuse to supply information to the other country solely because the information is held by a bank or other financial institution or by any other person acting in a fiduciary capacity.

The treaty gives the tax authorities the power to force compliance of taxpayers and to compel disclosure of information requested.

“Foreseeability” has long been the lifeblood of the tort bar. It is a complex test developed over nearly 80 years. It has never been used in tax laws, as it is too uncertain a concept for fiscal purposes.

The Canada-Switzerland Protocol has an Interpretative Protocol to guide officials (and the judiciary) to decipher the meaning of “foreseeably relevant.” The protocol says that the exchange of tax information between the two countries should be to the widest possible extent, but that Canada and Switzerland cannot engage in “fishing expeditions” or request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

Thus, the first legal hurdle is to determine whether the requested information is likely foreseeably relevant to the taxpayer’s affairs. The Canada Revenue Agency must show the relevance of the information and establish that it is not on a “fishing expedition,” but that it has specific concerns with particular taxpayers.

Hence, for example, the CRA cannot simply ask their Swiss counterparts to provide the names and account numbers (and other information) for all Canadian residents who have an account in a particular bank. Instead, it would have to identify specific taxpayers and establish the relevance of their particular tax status to the requested information. The taxpayer does not have any legal right of input into the request for information.

As we have seen recently, bank employees sometimes steal confidential information and sell the information to the tax authorities of various countries. In such cases, even though the CRA may have difficulty using the illegally obtained evidence in a Canadian court, it may nevertheless use the information to establish relevance with a specific and focused request to the Swiss tax authorities.

Reduction of improper tax avoidance is laudable if our laws protect solicitor-client privilege, which has been part of the common law for centuries. Of course, Canadian taxpayers also have a legitimate right to ask if our dollars are being spent to support corrupt foreign regimes.

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