UPDATES & OTHER TIDBITS

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SWISS BANK PAYS SECOND LARGEST PENALTY TO ESCAPE CRIMINAL PROSECUTION

The Department of Justice ("D.O.J.") Swiss Bank Program provides a path for Swiss banks to resolve potential tax-related criminal offenses arising from the maintenance of undeclared accounts of U.S. clients. In combination with the Offshore Voluntary Disclosure Program ("O.V.D.P.") in effect since 2009, it is the principal way by which the U.S. has combated offshore tax evasion by American individuals. In 2015, the D.O.J. concluded 75 non-prosecution agreements with Swiss banks. While criminal prosecutions are avoided, non-prosecution agreements provide for civil penalties that are significant.

Under the Swiss Bank Program, banks are required to

- make a complete disclosure of their cross-border activities,
- provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest,
- cooperate in treaty requests for account information,
- provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed,
- agree to close accounts of account holders who fail to come into compliance with U.S. reporting obligations, and
- pay appropriate penalties.

Bank Lombard illustrates the lengths to which Swiss banks have gone in order to adopt regulatory-compliant policies without necessarily coming into compliance. In 2008, the bank adopted a policy ostensibly forcing U.S. clients to disclose undeclared assets to the I.R.S. Typically, that entailed the execution of I.R.S. Form W-9, *Request for Taxpayer Identification Number and Certificatio* . The failure of a U.S. account holder to submit a fully completed form resulted in a threat to freeze all funds in the account. However, a more benign policy existed for favored account holders. They were allowed to make large cash or gold withdrawals and, in some cases, were permitted to make gifts to relatives and charities without the need for submitting a Form W-9.

In 2009 alone, U.S. clients made 14 cash withdrawals that exceeded $1 million. In one instance, more than $3 million in gold was withdrawn. The bank closed at least 12 other accounts held by U.S. persons with gifts to fictitious non-U.S. holders of other accounts. Over $15.7 million was involved.

The D.O.J. concluded a non-prosecution agreement with Lombard Odler & Co. ("Lombard") shortly before the end of 2015. Lombard agreed to pay $99.8 million, which is the second largest amount paid under the Swiss Bank Program. Lombard has set aside funds to cover the settlement amount.

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JERUSALEM DOUBLES THE PROPERTY TAX ON "GHOST APARTMENTS"

Jerusalem Deputy Mayor Ofer Berkowits is trying to combat the fiscal crisis in the Israeli capital by encouraging young people to live in the city and to revitalize it. However, the housing market has made Jerusalem economically unattractive to young people. The real estate market is notoriously expensive in Jerusalem and the price of housing units continues to rise faster than average income. Mr. Berkowits sees the wealthy overseas homeowners that spend not more than one or two months each year in Jerusalem as a contributing cause of rising prices. These people own existing housing stock in the city and gobble up additional units put up for sale. According to the Jerusalem Development Authority, there are as many as 11,000 so-called ghost apartments in the capital.

Recently, the Jerusalem Municipality announced that effective January 1, 2016, the property tax will increase to 223.56 shekels on absentee owners from the previous rate of 115.50 shekels. The increase in the property tax is part of an initiative to encourage absentee homeowners to rent out property and follows measures recently enacted in the U.K.[1]

The ghost apartments are mostly located in wealthy neighborhoods, and come fully furnished. Most of the absentee owners do not see the need to rent out the apartments and can afford to pay additional property tax. Some of the owners are willing to consider the rental option, but they are looking for very specific tenants and often exclude first-time renters.

Mayor Berkowits seems to understand that doubling the property tax may not discourage wealthy property owners. Many of these wealthy absentee owners do not view themselves as the cause of the problem. These people maintain the view that the market for luxury apartments is completely separate from the normal real estate market. For them, the mayor's action is simply a tax grab directed at persons who may not vote regularly.

CANADA ISSUES FORM TO EXEMPT NONRESIDENT EMPLOYERS FROM WITHHOLDING

Under new guidelines published by the Canada Revenue Agency ("C.R.A."), "qualifying nonresident employers" can use newly released Form RC473 to avoid withholding of income taxes from salary payments made to "qualifying nonresident employees" in Canada.

Qualifying nonresident employers are employers residing in countries with which

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1 See Naomi Lawton, "The Meanderings of the Taxation of U.K. Real Estate – Where are We Going?" *Insights* 1 (2016), p. 12.

Canada has a tax treaty or partnerships in which at least 90% of the partnership income is allocated to partners that reside in a country having in effect a tax treaty with Canada. Qualifying nonresident employees are individuals who meet the following three tests:

- They are residents in a country that has an income tax treaty in effect with Canada;
- They are not liable to income tax in Canada because of a provision of the relevant income tax treaty; and
- They work in Canada for less than 45 days or are present in Canada for less than 90 days in a 12-month period.

The application must be received by the C.R.A. at least 30 days before a qualifying nonresident employee begins employment in Canada. Certified nonresident employers must maintain their certification by fulfilling several obligations including documenting the employees' pay and physical presence in Canada, filing appropriate returns, and making records available for inspection. Certification will remain valid for up to two years but may be revoked earlier if the employer does not meet its tax obligations.

CBC REPORTING DELAYS

A proposed delay in the timing of U.S. country by country ("CbC") reporting obligations could create a range of logistical, privacy, and pecuniary problems for companies.

The Boustany Bill proposes a one-year delay and seeks protections for affected corporate taxpayers, such as halting the transmission of the master files containing company information in the event of abuse.

There have been concerns that, in light of such delays and restrictions, countries that have already adopted the O.E.C.D. CbC reporting obligations could institute alternative reporting processes that would require more disclosure. For example, in France, a penalty of up to €100,000 could apply to a French subsidiary if the parent company is not required to submit a CbC report to France. France is an early adopter of CbC reporting. French subsidiaries will be required to report if the foreign parent country would be required to report in France and there is no automatic CbC information exchange with France. A subsidiary can avoid the restriction by showing that the report has been filed by another group entity in France or in a country that automatically exchanges information with France.

For sophisticated companies with global revenue in excess of $850 million, the uncertainty surrounding a U.S. delay in mandating CbC reporting for large U.S.-based groups results in unnecessary problems. These companies view themselves as good corporate citizens on a global basis and find themselves adversely affected by U.S. politics.

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