

UBS: A lesson in extraterritorial enforcement of US law

The breadth of US laws applicable to foreign persons and entities or others with only minor connections to the US is staggering. More concerning are the lengths to which the US will go to enforce these laws, even when directly in conflict with the laws of the foreign jurisdiction, according to **Virginia La Torre Jeker, J.D.** and attorneys at Miller & Chevalier Chartered.

It has long been recognised that the US has a robust view of its ability to project force, whether military, diplomatic or legal, outside of its borders and into the affairs of other countries and their citizenry. A crucial issue in considering the effectiveness of this force in the legal context is whether the US can enforce its demands despite opposing local laws in foreign jurisdictions. After all, without the ability to effectively enforce various US laws extraterritorially, their practical breadth would be seriously limited.

Nowhere in recent memory has there been a more direct conflict between one country's enforcement efforts and another country's local laws than in the recent attempts by the US to obtain the bank account information of US citizens from the biggest Swiss bank, UBS. It is this conflict that forms the basis for the brief case study presented in this article. This study is followed by a discussion of other US laws that are projected in an equally robust manner by the US and that can form the basis for very similar concerns in the eyes of foreign individuals, businesses and governments.

The long arm of US tax law

In 2008, largely prompted by information obtained from whistleblowers, the US' Internal Revenue Service (IRS) began an investigation into the activities of UBS in aiding US citizens in evading US tax and banking laws. This investigation ultimately led the parent corporation, UBS AG (a Swiss entity without direct business ties to the US) to enter into a deferred prosecution agreement in which it paid a massive fine and agreed to help the IRS access the names and account information of certain US-based clients. This deal also settled the enforcement issues raised by the IRS/Department of Justice

issuance of a summons (again, issued in the US but to the foreign entity UBS) demanding bank account information for UBS accounts held by US citizens. This summons directly implicated the stringent Swiss bank-secrecy laws, and compliance by UBS would have violated Swiss law.

As part of the deal, the Swiss and US governments attempted to work out an arrangement under which UBS could disclose the information sought by the US. Switzerland consented to process the US disclosure requests under the US-Swiss tax treaty. But there was a problem. The tax treaty included restrictions on disclosure based on Swiss bank secrecy that could only be overcome if the persons subject to the request were found to have engaged in Swiss-defined "tax fraud or the like". The parties attempted to circumvent these restrictions by deeming them to be satisfied where a certain income threshold or other criteria associated with each account were reached. Both the US and Switzerland apparently believed that by using this methodology, the Swiss would be able to disclose to the US account information for those US-domiciled account holders who had been concealing their Swiss accounts from US tax authorities.

Things did not go as planned. Several account holders, in apparent violation of US statutes that criminalise anonymous challenges to US information requests overseas, brought suit in Swiss court, litigating the question of whether this deemed "tax fraud or the like" methodology satisfied the restrictions in the tax treaty. The court determined that, in the absence of any other misrepresentations or wrongdoing, the mere failure by a US-domiciled UBS client to report the existence

of a Swiss account to US tax authorities was not "tax fraud or the like" under current Swiss law and that the parties could not escape this simply by deeming it to be so.¹ Therefore, the court concluded that the Swiss/US agreement was an invalid interpretation of that term and that Swiss bank secrecy laws prevented disclosure under such circumstances.



While US enforcement lost this battle, they appear likely to win the war. In the aftermath of the Swiss court ruling, the US and Swiss governments have negotiated a protocol that would address the issues raised in the court opinion by changing the definition of "tax fraud or the like" to include merely failure to report. The countries expect to sign that protocol soon. The Swiss government will then seek parliamentary approval for the agreement, which would elevate the agreement to the same legal status as a treaty. Thus, even in the face of the strongest bank secrecy laws in the world, it appears that the US will be able to effectively enforce its tax laws extraterritorially.

That the US has been so effective getting Swiss bank account information demonstrates the reach of US law and IRS/ Department of Justice enforcement power. The US pulled out all the stops in going after UBS. They threatened prosecution of the entity and its executives (some of whom were actually detained on warrants that allow the US to hold individuals without trial). They threatened to shut down all US operations of UBS subsidiaries and affiliates. And they employed the State and Treasury Departments effectively to coerce the Swiss government to itself pressure UBS to concede.

After UBS, there can be no question that the US will aggressively pursue US law violators outside of its borders using all means at its disposal and regardless of foreign law. This includes not only US citizens (regardless of where they reside) and US permanent residents, but even



those who own interests in US businesses or investments, whether directly, through corporations or through trusts. The staggering reach of US law coupled with the very aggressive enforcement policies illustrated by UBS should be a wake-up call to anyone with unresolved US issues.

US non-tax enforcement power

In addition to tax law, several other US laws bear noting for their extreme breadth and robust enforcement practices. The Foreign Corrupt Practices Act (FCPA) prohibits a broad swath of individuals

and companies from paying bribes to government officials to obtain or retain business or a commercial advantage. The definition of “government official” is very broad and extends to employees of state-owned entities, as well as family members of an official. Depending on the parties involved, a violation of the FCPA can occur even if the prohibited activity takes place entirely outside of the US and does not involve the use of any instrument of US interstate commerce (mail, email, wire transfer or phone). Although there are statutory restrictions that should restrict the application of the FCPA in the context of a solely foreign person where no such activities occurs within the US, the Department of Justice is aggressively expanding the reach of the provisions through its enforcement efforts. The FCPA’s interaction with the tax laws also results in effective tax law sanctions applying to any entity in which US persons own a majority of interests. All of these rules apply regardless of local law.

The Office of Foreign Asset Control (OFAC) enforces rules that prohibit a wide variety of export and sanctions-based activities. The OFAC exercises some jurisdiction over US persons, including lawful permanent residents (citizenship jurisdiction), some jurisdiction over US-origin items and foreign-made items containing more than de minimis amounts of US-origin items (basically quasi in rem or list-based jurisdiction), and some jurisdiction over acts by anyone in the territory of the US (territorial jurisdiction). The complexity is compounded by different types of prohibitions, including US persons facilitating or approving trade between third countries and Iran (among others). As an example, prosecutors have charged non-US parties with “causing” (or aiding and abetting) a US export that would otherwise be lawful but for the fact the non-US firm is re-exporting to Iran. In sum, OFAC jurisdiction is very far-reaching, captures a great deal of conduct by parties outside of the US and is often inconsistent with local law of third countries.

In addition, there are a variety of collateral criminal provisions in US law that can be

used by a creative prosecutor to “touch” non-US persons involved in conduct with some relation to the US. These include provisions regarding mail and wire fraud, false statements, conspiracy and a provision that bars travel associated with various underlying illegal acts. Similarly, under relatively recent Supreme Court precedent, US prosecutors can succeed in bringing a criminal action in the US based on fraudulent use of US mail, email, wire transfer or phone lines predicated solely upon the violation of a local country’s law, including local country tax law. This amounts to the application of US enforcement authority and aggressiveness to local country laws in the hands of a motivated US prosecutor.

Finally, any individual with concerns regarding US enforcement should focus on the ability of the US to extradite them from their home country. Traditional extradition treaties often excluded tax crimes either out of a concern that the requirements defining the crime were not similar enough in each jurisdiction (a lack of so-called dual-criminality) or based on a general policy not to extradite with respect to historically “white-collar” crimes. This is changing. With increased globalisation, strong revenue pressures being felt worldwide due to the current economic downturn and encouragement of global cooperation by such international organisations as the OECD and the Commonwealth Secretariat, the present trend is to include tax and other white-collar offenses (such as bribery and export controls violations) in extradition treaties. As a result, the likelihood of successful US extradition is ever increasing. HW

¹ The authors are reminded of the famous Abraham Lincoln quip that asks the question: “How many legs does a dog have if you call a tail a leg?” The answer: “Four. Calling a tail a leg doesn’t make it one.”

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The authors of this paper will be conducting a day-long, invitation-only seminar with respect to these and related issues in Dubai on April 12, 2010. Those with an interest should contact Shannon Stewart of Miller & Chevalier (sstewart@milchev.com) for more details. Opinions expressed in this article are those of the author and do not necessarily represent those of the MONEYworks group of magazines. This article should not be misconstrued as financial advice. Don't forget that investments can go down as well as up and you may not get back the amount originally invested.