

THE STOP TAX HAVEN ABUSE BILL

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On 22nd September in a speech on the stump Barack Obama said *“we lose \$100Bn every year because corporations get to set up mailboxes offshore so that they can avoid paying a dime of taxes in America. Imagine if you got to do that..... I will shut down those offshore tax havens and corporate loopholes as President, because you shouldn't have to pay higher taxes because some big corporation cut corners to avoid paying theirs”*. Anti offshore centre rhetoric is par for the course in US presidential campaigns. The difference on this occasion is that the candidate who looks set to reach the White House is publicly backing a Bill titled the ‘Stop Tax Haven Abuse Act’. The Bill may gain an unstoppable momentum under an Obama presidency. What effect will the Bill have if it becomes law?

The Bill is not only bullish in its aim, which is to prevent tax evasion, but also its prime target; “offshore secrecy jurisdictions”, defined as jurisdictions which, in the judgment of the Treasury Secretary, have ‘*corporate, business, bank, or tax secrecy rules and practices which... unreasonably restrict the ability of the United States to obtain information relevant to enforcement*’. As well as providing a statutory framework to determine what an ‘offshore secrecy jurisdiction’ is, the Bill includes a list of countries that will, upon enactment, be automatically considered as such including: Jersey, Guernsey, the Isle of Man, Cayman and Bermuda. Inclusion on the blacklist could impact the ability of these jurisdictions to operate in the global financial market.

Whilst it is not possible to detail every provision contained in the Bill here, it is important to outline some of the key measures contained within it. It creates a rebuttable presumption (for internal revenue code and securities law purposes) that a US person who either formed, transferred assets to, was beneficiary of or received money or property from an entity in an offshore secrecy jurisdiction exercised control over that entity irrespective of the corporate veil. Consequently, any amount or thing of value received from an offshore secrecy jurisdiction represents that person’s income and is thereby taxable.

Amongst the array of penal measures, The Bill also combines extensions to time limits for investigations where offshore secrecy jurisdictions are involved with heavy evidential burdens of rebutting presumptions. Such burdens include measures such as not permitting evidence from non-US persons unless the person appears to testify in proceedings and limiting legal opinion protection.

Whereas the usual rule is that any foreign account holding \$10,000 or more has to be reported to the IRS, the Bill creates a presumption that an account in an offshore secrecy jurisdiction does

contain sufficient funds to trigger the reporting requirement.

In a further move by the Treasury to extend the reach of US law, the Bill also provides that the Treasury would be able to extend sanctions currently available to it under the Patriot Act in respect of money laundering, to entities which are “impeding US tax enforcement.” Anyone who is familiar with the impact upon Banco Delta Asia of the US Treasury’s designation of it as an organisation of ‘primary money laundering concern’ will know how draconian these sanctions are. If they were to be used against offshore jurisdictions the dollar would be closed to them rendering them redundant as financial centres.

In July 2007, Guernsey sent a delegation to the US in protest at its proposed inclusion on the blacklist pointing out that it had, in fact, entered into a tax information sharing agreement with the US. Barbados has pointed out that it has a 24 year old taxation treaty with the US. Guernsey and Barbados are not alone in feeling that their inclusion is without merit.

The Coalition for Tax Competition, admittedly not an impartial observer, has pointed out that the Bill, if enacted would actually harm the US insofar as it would place its citizens at a competitive disadvantage with foreign nationals (including those operating within the US) and in any event is anti-competitive and in breach of the US’s trade obligations pursuant to the WTO.

From a UK perspective, the Bill should ring alarm bells for all those that represent entities or individuals who have dealings with the US and the blacklisted countries, either directly or through subsidiaries.

Many reputable centres particularly Jersey, Guernsey and the Isle of Man, which genuinely are not ‘banks secrecy jurisdictions’ have made big strides over the past decade to meet international standards and dispel toxic business. They have been recognised for doing so by numerous international standard setting bodies. There is nothing in the Stop Tax Haven Abuse Bill that recognises or rewards them, quite the opposite. Further, the absence of any mention within the Bill or the Senate Subcommittee report that preceded it of the startling criminal vulnerabilities of Delaware LLC’s will deepen suspicion that the Bill is not in fact motivated by a desire to stamp out the abuse of offshore financial services but by a need for the US to begin to exercise control over large pools of development capital in offshore centres at a time when the US economy has bombed.

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