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OFFSHORE

Tax haven invasion

Tightening laws and a more no-nonsense approach are making it increasingly difficult to hide savings in offshore tax havens

Earlier this year, it was reported that the German tax authorities had purchased the bank records of a large number of individuals holding bank accounts at LGT Bank in Liechtenstein from one of its ex-employees.

This was not the first time it had obtained information relating to Liechtenstein bank accounts. Previously, when the information had been obtained from a whistleblower, Germany had offered to share the information with about a dozen other countries. All were reported to have turned down the offer. The position is very different this time, with countries as far afield as the US and Australia having shown an interest in reviewing the stolen information.

Investigations into LGT have focused on at least 15,000 customers holding in excess of £100bn invested by a variety of anonymous vehicles. About 50 countries, led by Germany, consider that their citizens have undisclosed assets in LGT.

In Germany it is said that approximately 750 accounts are being investigated; the head of the German Post Office, as well as four politicians, have already been questioned.

The result is that Liechtenstein has reached a tax fraud agreement with the European Union and is considering bilateral tax treaties providing for the exchange of information. It is also revising its banking laws, as well as the law governing foundations.

It has been reported that HM Revenue and Customs (HMRC) paid £100,000 for information in relation to accounts held by UK citizens in Liechtenstein. Apparently, it is investigating approximately 100 accounts of UK nationals and is hoping to recover approximately £100m of unpaid taxes. If found guilty, individuals in the UK face jail sentences of up to seven years and a fine up to the amount of tax that should have been paid.

In addition, HMRC is seeking to target around 25 other foreign banks in order to uncover information about UK citizens with offshore accounts.

In the US, UBS has agreed that it will no longer allow US residents to put money into its Swiss bank accounts. It is reported to have held 19,000 accounts containing undeclared assets worth $18bn (£10.9bn). A Senate subcommittee has estimated that the US Treasury loses about $100bn (£60bn) annually from offshore tax abuses.

As for UK citizens who are faced with a tax investigation, how are the English courts likely to react to a defence that the information should not be admissible in evidence as it was bought from a former employee of LGT?

The likely answer is that the evidence will be admissible, both in civil and criminal proceedings. Under English criminal common law, it has long been held that evidence obtained by illegal means can be used in criminal cases. This was again recognised by the House of Lords in *R v Khan* [1997], where Lord Nolan stated that "as a matter of English Law, evidence which is obtained improperly or even unlawfully remains admissible".

It would also appear that any application based on the defendant's right to a fair trial under article six of the European Convention on Human Rights would fail. In *R v P* [2002], Lord Hobhouse stated that article six does not entitle a defendant "to have unlawfully obtained evidence excluded just because it was so obtained. What he is entitled to is an opportunity to challenge its use and admission upon the fairness of trial as is provided for by section 78 [of the Police and Criminal Evidence Act 1984]".

In civil proceedings, the English courts have a general discretion to exclude unlawfully obtained evidence in civil proceedings under rule 32.1 of the Civil Procedure Rules (CPR). However, the discretion is to be exercised in a fundamentally different way to that in criminal proceedings, as the overriding principle of the CPR must be taken into consideration — in particular, the requirements that the court should, so far as practicable, ensure that the parties are on an equal footing and that the case is dealt with fairly.

Therefore, the court has wide powers which it can use in considering whether it should allow illegally-obtained evidence to be used or not. In *Jones v University of Warwick* [2003] the Court of Appeal was required to decide between two conflicting public interests — achieving justice in the present case and considering the effect in general of allowing the illegally obtained evidence to be used. In this case, the defendant's insurers had hired a private investigator to gain entry to the claimant's house by posing as a market researcher, and used a hidden camera to film the claimant to see whether her injury was as serious as she claimed. The Court of Appeal held that the behaviour was not so outrageous that the evidence should be excluded.

This position was confirmed in the case of *Ian Franses (Liquidator of Arab News network) v Somar Al Assad & Others* [2007], where the court held that the gathering of evidence by illegal means has not in general led to its exclusion under the English law of evidence. The Court commented that where such evidence is of central importance, such as involving impersonation or deception, it should be used on any without notice application.

With financial institutions being attacked internationally and account holders facing greater risks, it will become increasingly difficult to hide money in offshore tax havens. ■

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