BBD ENTERPRISES

Tax Crimes as a Predicate Offence for Money Laundering

May 2013 Issue

Background

In its 2012 recommendations, Financial Action Task Force (FATF) included serious tax crimes in the list of predicate offences to money laundering. By making serious tax crimes a predicate offence to money laundering, the FATF hopes to remove potential obstacles for international cooperation between law enforcement and tax authorities in the area of tax evasion. Member countries of FATF need to transpose these frameworks into law, and will be required to cooperate with other countries to make these laws enforceable. Here we look at the Singapore example to review how the recommendations may be adopted.

The Case

Money laundering is a serious offence that involves processes such as disguising the true ownership and control of funds, usually obtained via criminal activities, and then placed in the legitimate financial systems.

Historically, whether tax crimes are considered to be a predicate offence for money laundering depends on the jurisdiction in which such crime occurs. Some jurisdictions consider the severity of tax crime sufficient to warrant prison sentences. Others would consider tax evasion being a crime if it is both a crime in the source country and in the jurisdiction where the money is placed – the dual criminality approach.

Most serious crimes (e.g. drug trafficking, terrorism, fraud, robbery, prostitution, illegal gambling, arms trafficking, bribery and corruption) are capable of being a predicate offence to money laundering in almost all countries. By making serious tax crime equitable to the other serious crimes, tax authorities can now use money laundering investigative powers to pursue tax evaders.

The FATF adopted a complementary approach for assessing whether the recommendations objectives are achieved. First, a technical compliance assessment addresses specific requirements relevant to legal and institutional framework of a country, along with the power and related procedures within its authorities. Then, an effectiveness assessment evaluates the adequacy of the implementation of the recommendations to the extent that a country achieves the defined set of outcomes that are central to a robust AML/CTF system.

Singapore Example

On 28 March 2013, the Monetary Authority of Singapore (MAS) released its "Response to Feedback Received" from its consultation paper for designating serious tax crimes as money laundering predicate offences. Financial Institutions (FI) are responsible for assessing whether there are reasons to suspect that any client's assets are the proceeds of "fraudulent or wilful" tax evasion. If there is such suspicion, FIs should file suspicious transactions reports (STR) and apply appropriate risk mitigation and control measures.

MAS do not require FIs to determine whether their clients are fully compliant with all their global tax obligations. However, the dual criminality approach of mutual legal assistance in Singapore means that FIs need to consider whether a serious tax crime constitutes an offence in foreign jurisdiction or if such crime has occurred in Singapore, does it constitute a predicate money laundering offence in Singapore. This regime may post additional risk to FIs and DNFSP .

[1] "Fraudulent and wilful" is being used to distinguish the seriousness of the crimes; as opposed to negligence and error.
[2] "Designated Non-financial Service Providers".

STR filing obligations are protected under the provisions of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) ACT (CDSA) if they are considered serious crimes under CDSA. However, if a FI is certain that foreign tax evaded is not of a type imposed in Singapore then it is not required to file an STR. If it files an STR, it will not be legally protected under provision of CDSA as the offence is not a "serious crime". This means that FIs have to evaluate whether the tax crimes are captured under CDSA before filing, as wrongful STR filing could put the FI into potential breach of CDSA's disclosure rules.

While further guidance for the type of tax crimes captured will be given in future, MAS expects FIs to develop their own risk based approach assessments in order to understand their clients' tax-risk profiles, as well as having demonstrable complementary record keeping. For now, MAS has listed red-flags such as complex structures, negative tax-related reports of client from reliable sources, and domicile or tax haven residence that are worth reviewing.

MAS has given FIs a timetable to implement their tax-risk reviews – (i) for accounts assessed as presenting a high tax-risk, the deadline for completion is 30 June 2013, and (ii) for those not assessed as posing a high tax-risk, the completion date is 30 June 2014.

Subsequently, Singapore Private Banking Industry Group (PBIG) published additional list of red-flags that could require enhanced due diligence (EDD) of the client, along with recommended actions that could be used on clients assessed as being a high risk for "fraudulent or wilful" tax evasion. [3]

Conclusion

The Singapore regime appears to have complied with the technical compliance procedures of the FATF recommendations. However it also applies the "fraudulent or wilful" filter and the dual criminality approach. It remains to be seen how effective this can be in exposing potential tax evaders. The caveat is how each country defines what a serious tax crime is. In this regard, each client should review its situation with the legal principles in case law for further guidance.

In order to mitigate the apparent risk, FIs and DNFSP initiated many rounds of request for information from their clients. Some of their clients had started looking to other countries for safe harbour. In our global financial market when a client can easily relocate to a different jurisdiction, where its tax arrangements are not perceived as a serious crime, the effectiveness of AML/CTF system is yet to be tested.

[3] Addendum 1, "Code of Conduct – for Private Banking in Singapore", PBIG, 2013