

Offshore and Well Off the Mark – The Facts and the Fantasy



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INSUFFICIENTLY HERALDED, THE NEW 'GOLD STANDARD' of proactive reporting and transparency introduced by the Cayman Islands – in favour of tax authorities and law enforcement – in respect of the capital and income of any legal person, trust or individual using the Cayman Islands financial services industry, is now in effect. But few would have anticipated that the most significant, unintended consequence would be that the decibel levels of the extreme left-wing high-tax campaigners would in fact increase as a result.

But perhaps on reflection it was not that surprising at all. Simply put, the disinformation, mischaracterization, character assassination (in so far as an offshore financial centre can have a character¹) and nonsense pedalled by the high-tax campaigners over the past decade, ironically, cannot survive the new transparency. The conflation of illegal tax evasion, lawful tax avoidance, money laundering and terrorist financing, which are continually used by these NGOs (and by those whom I suggest later should know better) to misdescribe the legitimate financial transactions undertaken in the Cayman

1 But practitioners in offshore financial centres do, although the Courts have not yet been asked to examine the issue of defamation by association.

Islands, will be revealed by the reporting required by FATCA and the Common Reporting Standard (CRS), and in conjunction with the transparency introduced by the Beneficial Ownership Register, to be nothing more than fake news. The NGOs know it. No doubt they need now to be noisy; their days of being taken seriously are numbered.

No one involved in implementation doubts either that the cost of compliance with FATCA, CRS and the Beneficial Ownership Register, which like the Register of People with Significant Control (PSC) in the United Kingdom requires disclosure of the ultimate 25 per cent beneficial owners through however many intermediate vehicles,² is considerable and has of itself rendered the Cayman Islands less competitive than those jurisdictions which have no intention of introducing anything similar. But as a result, the NGOs, misguided charities and the world at

2 But unlike the position in the United Kingdom and akin to the proposed position under the Fourth EU Money Laundering Directive, the Cayman Islands regime maintains a degree of respect for the legitimate right to privacy in that the register is available to tax authorities and law enforcement but not members of public, journalists or NGOs with no legitimate interest.

large (including the OECD and their EU colleagues, whose sole purpose is apparently the preparation of arbitrary and discriminatory lists) will soon be faced with an unanswerable truth. None of these transparency initiatives will move the needle on onshore tax collections from Cayman Islands entities by any discernible or statistically significant amount.

This is simply because tax avoidance is and has always been a result of dysfunctional onshore legislation (and specifically the OECD's now discredited double tax treaty model). Further, in so far as Cayman vehicles are concerned, taxes have always been paid in the onshore jurisdiction of the investment and distributions of capital, and the income made by a Cayman Islands' entity to an investor is taxable in that investor's jurisdiction of tax residence. As to that, full information has been available to onshore tax authorities for over a decade under the extensive network of Tax Information Exchange Agreements entered into by the Cayman Islands government with all relevant onshore jurisdictions.

What is troubling is that a moment's review of the available statistics by any informed researcher would have revealed the foregoing as the historic position and would also have revealed

that enquiries made under the Tax Information Exchange Agreements remain statistically insignificant. This is also true of the results of Suspicious Activity Reporting, which reveal de minimis confiscations in the order of tens of millions of dollars, largely resulting from fraudsters operating in the local economy. If we reckon (see further below) the aggregate assets under management (AUM) of all Cayman Islands vehicles to be in excess of US\$5 trillion, then the statistical evidence of any form of malfeasance is negligible. The fact that offshore tax authorities and law enforcement have historically had clear gateways to make full enquiry into all Cayman Islands entities and their accounts, entirely discredits the fanciful, if not delusional, suggestions of hidden untaxed or nefariously obtained wealth. The Cayman Islands financial services industry does not operate on the old Swiss Banking model.

Of course, we should anticipate these mischaracterizations from the extreme left-wing NGOs and one or two tenured professors in United States academic institutions whose ‘research’ we can best describe as highly selective. That is one thing. What is a good deal more distressing is the absence of any intellectual rigor on the subject in no less an institution than the House of Lords. Recent contributions to the debate in that House on the Criminal Finances Bill in April of this year display a worryingly confused understanding that deserves scrutiny.

Lord Faulks set the stage, referring to the “Undoubted need to give law enforcement agencies the necessary capabilities and powers to recover the proceeds of crime, tackle money laundering and corruption and counter terrorist terrorism”. But, of course, he is referring to the position in the United Kingdom where again, a statistical analysis reveals that a great deal is needed to be done, particularly on the subject of foreign ownership of UK real estate from questionable sources. But when the debate shifts to the question of the British Overseas Territories, including the Cayman Islands, nowhere is it stated with clarity that for over a decade, the

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Cayman Islands has had provisions requiring 10 per cent beneficial ownership to be recorded on all Cayman Islands entities. And nor does he state that information has been available to tax authorities and law enforcement in all relevant onshore jurisdictions. So, no one in the Hansard record of that debate, except possibly the admirable Lord Blencartha, made the point that the Cayman Islands standards on transparency already far exceed those of the United Kingdom, and will continue to exceed them even after the introduction in the UK of the Criminal Finances Bill. The Cayman Islands already requires a more detailed analysis of beneficial ownership to be kept by every registered service provider.

Baroness Stern then made reference to having been briefed by Christian Aid and Transparency International – and therein no doubt lies the root of the problem with what follows. So, let us examine the flaws in the argument that the Baroness presents. First, the hackneyed cliché: “The lack of transparency in offshore financial centres helps the corrupt to find the haven for the ill-gotten wealth and tax evaders to sleep easily in their beds”. Fact: Since 1976, the Cayman Islands has, in the Confidential Relationships Preservation Law, provided gateways for all law enforcement to enquire on any matter involving a Cayman Islands entity and has subsequently been a first mover in introducing all the international standards for law enforcement, which have effectively mirrored the United Kingdom anti-money laundering provisions on suspicious activity reporting, anti-terrorist financing and proceeds of crime. It follows that since HMRC and law enforcement (if it knew what it was trying to enforce)

could have obtained the contents of any file obtained in the Cayman Islands pursuant to the Cayman Islands/United Kingdom Double Tax Treaty, or other gateways, that Baroness Stern is evidently misguided with her suggestion that the Cayman Islands could be a haven for tax evasion and unlawful behaviour. If HMRC, Interpol or Scotland Yard have statistics on convictions in relation to tax evasion in the Cayman Islands or of criminal convictions, they should publish them. Otherwise, UK legislators are likely to be misled. But no one should be pretending that they did not have full access. It should be said also that Cayman Islands practitioners are not aware of anything of any significance.

Apparently, not content with the mischaracterization of tax evasion and corruption in the Cayman Islands, Baroness Stern ploughed full speed into the quicksand of the Panama Papers. Now, we know the Chancellor of the Exchequer has indicated that the Panama Papers Task Force in the UK is investigating some 22 individuals for suspected tax evasion and some 43 high-net worth individuals are under special review, and it is investigating a further 26 companies for potentially suspicious activity, but no one would suppose that in relation to the 214,000 companies whose information was revealed in the Panama Papers, that the foregoing numbers are significant. But that is not the point. What exactly is it that Baroness Stern is trying to allege? That in some way there is some similarity between Panama and the Cayman Islands? If so, the Baroness is at sea geographically, politically and, most crucially, in terms of legal infrastructure and international transparency. But it appears that that is exactly what Baroness Stern is trying to allege. What the Baroness then says is that because the enquiries being made by the Panama Papers task force in relation to Panama are ‘the files of just one legal firm and just one country, it gives an indication of the huge extent of illicit activity and illuminates the measures in

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this very welcome Bill'. That conclusion is unsound for a number of reasons.

1. A moment's research would have revealed why criminal activities, including tax evasion, centred on the jurisdiction of Panama. At the relevant time, Panama, as matter of political intent, had no transparency treaties on tax or available beneficial ownership information whatsoever with any country, and had strict confidentiality laws all of which (as was well known by the Columbian drug cartels) made it a magnet for criminal enterprise and tax evasion of the worst sort. In fact, the exact opposite of the position which pertained in the Cayman Islands and other Overseas Territories and not a fact pattern from which any safe assumption can be extrapolated.
2. Baroness Stern suggested "the Overseas Territories and Crown Dependencies should keep good and accurate information", evidently overlooking the fact that it was already kept full beneficial ownership information to a higher standard than required by the new Criminal Finances Bill of the United Kingdom and available to law enforcement and tax authorities.
3. Baroness Stern does not pause to consider the obvious. If the Panama Papers revealed that the Mossack Fonseca law firm formed 120,000 companies in the British Virgin Islands (BVI), why would it have done so if tax evasion or wrongdoing were involved when no transparency existed in Panama in relation to law enforcement or tax matters but, as an Overseas Territory and as with the Cayman Islands, full transparency existed in relation to BVI companies in relation to law enforcement and tax matters?

Baroness Stern then suggests that the Register of Beneficial Owners should be made public, as is the case in the United Kingdom. But no good reason has been suggested why this should be the case in the Cayman Islands, which respects the legitimate right to privacy in commercial affairs, and particularly not in the light of section 9 of the Cayman Islands Bill

of Rights, which provides that no person shall be subjected to the search of his or her person or property without his or her consent, save in the interests of law enforcement and similar cases.

There was then a good deal of commentary by the Lords in the debate about extending United Kingdom law to the Overseas Territories, including the Cayman Islands, by way of Order in Council only. Baroness Williams of Trafford sounds a cautionary note about seeking to extend reserved powers into the area of Cayman Islands financial services. And for good reason. The Cayman Islands Constitution constrains the exercise of such reserved powers to "laws for the peace, order and good governance of the Cayman Islands". In addition, the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, is not entirely silent on the exercise of quasi colonial powers. Article 2 of part 1 states that "all peoples may for their own ends freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic operations based on the principles of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence".

Baroness Stern seeks to justify the approach by discrediting a counterfactual. But the competitive disadvantage is not to protect the malfeasant. Experience has shown, and the statistical evidence offers no contrary proposition, that in an Overseas Territory like the Cayman Islands, where law enforcement and tax authorities already have unrestricted rights of access, that the "malfeasant" are statistically insignificant. Those clients that are leaving jurisdictions like the Cayman Islands for the totally opaque jurisdictions of the United States, notably, Delaware, Wyoming, Nevada and South Dakota, are simply those high net worth individuals who are concerned about the risks of kidnap, extortion, identity theft and other criminal activity that inappropriate disclosure of their wealth will almost necessarily introduce.

No doubt, malfeasance of that sort perpetrated by real-world criminals occurs rarely enough in the rarefied atmosphere of the House of Lords. In the real world, it is a real concern.

At the very least, those who purport to extend extra-territorial powers of legislation should first demonstrate better understanding of the relevant circumstances than that which was demonstrated in the debate in the House of Lords on 25 April 2017.

But there is a greater and overarching point. The Cayman Islands Monetary Authority statistics put hedge fund investment by Cayman Islands vehicles at US\$2.4 trillion to which we can add US\$1.4 trillion of bank deposits and inter-bank bookings. Anecdotally, we could probably add another US\$1 trillion private equity investment. These investments are made into onshore jurisdictions where they create jobs, tax revenues that in turn pay for government services. It is already, regrettably, the case, as a result of unnecessary European Union regulation, that investment by Cayman Islands hedge funds in and through the City of London has declined post crisis from US\$600 billion to US\$300 billion.

That is a subject for another day, but what should be clear is that in a post-Brexit environment, the City of London in particular, should be looking hard at highly successful, superbly regulated, offshore financial centres like the Cayman Islands as beacons of financial rectitude and probity from which, with the right legislative and regulatory framework introduced in the United Kingdom, greater investment should be encouraged. Post Brexit the City of London should be looking to fill the gap in revenues that will be left by the inevitable relocation of certain financial services to Paris, Frankfurt or Dublin.

Any reliance at all by UK legislators on the ill-informed mischaracterizations peddled by extreme left-wing NGOs about the Cayman Islands, not only does the Cayman Islands and its professionals a disservice but is likely to do the City of London a greater disservice. ■