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41.00 *OBTAINING FOREIGN EVIDENCE AND OTHER TYPES OF ASSISTANCE FOR CRIMINAL TAX CASES*

41.01 *INTRODUCTION*

This section provides a detailed analysis of the various means available to federal prosecutors for obtaining foreign evidence and other types of international assistance in criminal tax cases. The means analyzed here include mutual legal assistance treaties (MLATs) and similar processes, tax information exchange agreements (TIEAs) and tax treaties, court-sponsored procedures for taking foreign depositions, including letters rogatory, and the use of unilateral compulsory measures, such as subpoenas, for obtaining foreign evidence.

Obtaining foreign evidence and other types of international assistance under the various processes described here usually requires considerable amounts of time and can cause significant delays in an investigation or trial proceeding. Thus, a prosecutor should initiate seeking such evidence or assistance through the appropriate process as soon as possible.

It is extremely important to remember that no United States investigator or prosecutor should contact foreign authorities or witnesses, whether by telephone or other means, or undertake foreign travel,without obtaining the proper clearances or authorizations. Prosecutors under the jurisdiction of the Department of Justice are required to coordinate and clear all such contacts and travel through the Office of International Affairs ((202) 514-0000).

41.02 *OBTAINING FOREIGN EVIDENCE OR OTHER TYPES OF ASSISTANCE UNDER MUTUAL LEGAL ASSISTANCE TREATIES*

41.02[1] *Background*

Mutual Legal Assistance Treaties (MLATs) create a routine channel for obtaining a broad range of legal assistance for criminal matters generally, including, *inter alia,* taking testimony or statements of persons, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. These treaties are concluded by the United States Department of Justice (primarily the Criminal Division) in conjunction with the United States Department of State. An MLAT creates a contractual obligation between the treaty partners to render to each other assistance in criminal matters in accordance with the terms of the treaty. It is designed to facilitate the exchange of information and evidence for use in criminal investigations and prosecutions. Unfortunately, while many of the MLATs currently in force cover most U.S. tax felonies, several others have only limited coverage at best for tax offenses.

41.02[2] *MLATs Currently in Effect*

As of June 1, 1994, the United States has MLATs with 17 jurisdictions: Anguilla, Argentina, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Italy, Mexico, Montserrat, Morocco, the Netherlands (including the Netherlands Antilles and Aruba), Spain, Switzerland, Thailand, Turkey, the Turks and Caicos Islands, and Uruguay.

41.02[3] ***The Extent of Tax Coverage in MLATs***

The MLATs with Argentina, Canada, Italy, Mexico, the Netherlands (excluding the Netherlands Antilles and Aruba), Spain, Thailand, and Turkey, cover all criminal tax felonies under the Internal Revenue Code. The remaining MLATs contain a variety of restrictions regarding assistance for tax offenses. Thus, the Swiss MLAT excludes tax and similar fiscal offenses from its scope except in cases involving organized crime. However, assistance is available from the Swiss under one of their domestic mutual assistance statutes in any tax matter where a foreign tax authority can establish "tax fraud" under Swiss law. Unfortunately, the Swiss consider the conduct underlying most U.S. criminal tax felonies as civil in nature, and establishing "tax fraud" under Swiss law is a difficult task. [1] The Cayman and Bahamian MLATs generally exclude offenses relating to tax laws except for tax matters arising from unlawful activities otherwise covered by the MLATs. [1] Furthermore, each of these three treaties contains specific limitations on the use of evidence obtained for covered offenses, and, thus, such evidence is generally not available for tax purposes in civil or criminal investigations or proceedings which are subsequently conducted. [2]

41.02[4] ***Designation of a Central Authority to Administer the MLAT for Each Treaty Partner***

Every MLAT specifies central authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to generally administer the treaty relationship. Under all of the MLATs to which the United States is a party, the central authority designated for the United States is the Director, Office of International Affairs (OIA), Criminal Division, U.S. Department of Justice. [28 C.F.R § 0.64-1.] The central authority for the treaty partner is generally an entity located within the ministry of justice or its equivalent agency.

1 Cayman MLAT, Article 19; Bahamian MLAT, Art. 2.

2 Swiss MLAT, Art. 5; Cayman MLAT, Art. 7; Bahamian MLAT, Art. 8.

41.02[5] *Public Law Enforcement Purpose of MLATs*

The central authorities make requests under MLATs on behalf of law enforcement and judicial authorities in their respective countries who are legally responsible for investigating and prosecuting criminal conduct. For the United States, such authorities include federal and state prosecutors, as well as other governmental entities responsible for investigating criminal conduct or handling matters ancillary to criminal conduct such as civil forfeiture. Private parties are not permitted to make requests under MLATs.

41.02[6] *Matters for Which Assistance Is Available under MLATs*

Assistance is available under the MLAT once an investigation or prosecution has been initiated by an appropriate law enforcement or judicial authority in the requesting state. Thus, the United States may initiate a request for assistance under an MLAT when a criminal matter is at the trial stage, or is under investigation by (1) a prosecutor, (2) a grand jury, (3) an agency with criminal law enforcement responsibilities, such as the Criminal Investigation Division of the Internal Revenue Service, or (4) an agency with regulatory responsibilities, such as the Securities and Exchange Commission.

41.02[7] *Types of Assistance Available under MLATs*

Generally, MLATs provide for the following types of assistance:

a. serving documents in the requested state;

b. locating or identifying persons or items in the requested state;

c. taking testimony or statements from persons in the requested state;

d. transferring persons in custody in either state to the other for testimony or other purposes deemed necessary or useful by the requesting state;

e. providing documents, records, and articles of evidence located in the requested state;

f. executing requests for searches and seizures in the requested state;

g. immobilizing assets located in the requested state;

h. assisting in proceedings related to forfeiture and restitution; and

i. any other form of assistance not prohibited by the laws of the requested state.

MLATs are specifically designed to override local laws pertaining to bank secrecy and to ensure the admissibility of the evidence obtained. Thus, for example, MLATs typically contain provisions which, in conjunction with certain statutes, are directed at securing the admissibility of business records, or establishing chain of custody over an evidentiary item, without having to adduce the in-court testimony of a foreign witness.

41.02[8] ***Procedures for Making Requests for Assistance***

To make a request for assistance under a particular MLAT, a prosecutor or investigator should contact OIA at (202) 514-0000, request to speak to the attorney in charge of the country from which assistance will be requested, and collaborate on the preparation of the request. Once the Director of OIA signs a request, it must be translated into the official language of the requested state, unless the particular MLAT provides otherwise. The request will then be submitted in both language versions (English and the official language of the requested state) to the central authority of the requested state.

41.02[9] ***Contents of a Request***

Generally, MLATs require that a request contain the following information:

a. the name of the authority conducting the investigation, prosecution, or other proceeding to which the request relates;

b. a description of the subject matter and the nature of the investigation, prosecution, or proceeding, including the specific criminal offenses which relate to the matter;

c. a description of the evidence, information, or other assistance sought; and

d. a statement of the purpose for which the evidence, information, or other assistance is sought.

In addition, MLATs require that the following information be provided to the extent that such information is available:

e. information on the identity and location of any person from whom evidence is sought;

f. information on the identity and location of a person to be served, that person's relationship to the proceeding, and the manner in which service is to be made;

g. information on the identity and whereabouts of a person to be located;

h. a precise description of the place or person to be searched and of the items to be seized;

i. a description of the manner in which any testimony or statement is to be taken and recorded;

j. a list of questions to be asked of a witness;

k. a description of any particular procedure to be followed in executing the request;

l. information as to the allowances and expenses to which a person asked to appear in the requesting state will be entitled; and

m. any other information which may be brought to the

attention of the requested state to facilitate execution of the request.

41.02[10] ***Limitations on Use of Evidence or Information Obtained***

Generally, MLATs provide that the requested state may impose conditions on the use of information or evidence furnished under their provisions, including conditions of confidentiality. The requesting state, in using the information or evidence in the course of an investigation or prosecution, must use best efforts to comply with the conditions. Although some MLATs are more restrictive, generally, once the information or evidence, properly used in the investigation or prosecution becomes a matter of public record in the requesting state, it may be used for any purpose.

41.02[11] ***Obligation to Return the Items Provided***

Generally, MLATs provide that all original documents, records, or articles of evidence provided pursuant to an MLAT request must be returned as soon as possible to the state providing such items unless that state waives the right to have the items returned. Items are typically returned by the prosecutor through the central authority. Generally, copies of documents provided under an MLAT need not be returned unless the state which provides such copies specifically requests their return.

41.03 *MUTUAL LEGAL ASSISTANCE UNDER FOREIGN STATUTES WHERE NO FORMAL TREATY RELATIONSHIP EXISTS*

New effective approaches have been recently developed for obtaining assistance from countries with which the U.S. has no MLAT relationship. Thus, for example, with the assistance of the Office of the Assistant Legal Adviser, Law Enforcement and Intelligence, Department of State, the Director and Deputy Directors of OIA have recently been designated as competent authorities for initiating formal requests for legal assistance to Israel under the terms of the Israeli Law of Legal Assistance to Foreign States (1977).

As a result, letters rogatory issued by a court are no longer the exclusive means of securing formal legal assistance from the State of Israel. In addition to Israel, there are a number of other non-Mutual Legal Assistance Treaty (MLAT) countries with which OIA has established a practice of making and receiving formal legal assistance requests--either dealing directly with its foreign counterpart office or through the diplomatic channel.

Such requests typically follow a format similar to that employed under MLATs, and are sometimes referred to as "MLAT-Type" requests. Legal assistance in these circumstances is provided to the extent permitted by relevant domestic legislation. Countries in this category include Panama, Israel, the United Kingdom, Japan, Korea, Thailand, Australia, New Zealand, Channel Islands, Isle of Man, and Liechtenstein. Contact the appropriate OIA Team at (202) 514-0000 for further details.

41.04 *OBTAINING FOREIGN EVIDENCE UNDER TAX INFORMATION EXCHANGE AGREEMENTS AND TAX TREATIES*

41.04[1] *Background*

Tax information exchange agreements (TIEAs) and income tax treaties constitute bases for obtaining foreign-based documents and testimony, often in admissible form, for criminal and civil tax cases and investigations. These pacts are concluded by the United States Department of Treasury, with the assistance of the Internal Revenue Service and the Tax Division of the Department of Justice, and are administered by the Assistant Commissioner (International) of the IRS. For the purposes of obtaining foreign evidence, TIEAs are more specialized and effective than tax treaties.

41.04[2] ***Tax Information Exchange Agreements (TIEAs)***

TIEAs are agreements which specifically provide for mutual assistance in criminal and civil tax investigations and proceedings. This assistance comprises obtaining foreign-based documents, including bank records, and testimony in admissible form. TIEAs are statutory creatures of the Internal Revenue Code. *See* 26 U.S.C. §§ 274(h)(6)(C) and 927(e). This statutory framework initially authorized the Secretary of the Treasury Department to conclude agreements with countries in the Caribbean Basin (thereby qualifying such countries for certain benefits under the Caribbean Basin Initiative), but later expanded this authority to conclude TIEAs with any country.

41.04[3] ***TIEAs Currently in Effect***

As of June 1, 1994, the United States had TIEAs in effect with the following countries: Barbados, Bermuda, Costa Rica, Dominica, the Dominican Republic, Grenada, Guyana, Honduras, Jamaica, Mexico, Peru, St. Lucia, and Trinidad & Tobago. [2]

41.04[4] ***Information Exchange under Tax Treaties***

Virtually all U.S. income tax treaties, which are directed at the relief of double taxation on income, contain a provision for exchanging information similar in concept to TIEAs. Although these provisions are considered to be critical parts of the tax treaty process by both Treasury and the IRS, only a limited amount of time and space is allocated for their negotiation and inclusion in tax treaties, which typically contain around 30 other types of provisions. Consequently, the process for exchanging information under these mechanisms is not as thoroughly defined and detailed as similar processes embodied in TIEAs and MLATs, the entire focus of which is directed at evidence gathering for the agreement partner.

41.04[5] ***Tax Treaties Currently in Effect***

As of June 1, 1994, the United States had income tax treaties in force -- including exchange of information provisions -- with the following countries: Australia, Austria, Barbados, Belgium, Bermuda, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Korea, Luxembourg, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Romania, Russia, Slovak Republic, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, and the United Kingdom.

The Treasury Department is very active in the negotiation of new income tax treaties, as well as the renegotiation of income tax treaties currently in force. Thus, new treaty partners will be added to this list regularly.

41.04[6] ***Scope of TIEAs and Income Tax Treaties***

Under most of the TIEAs and tax treaties to which the United States is a party, requests for assistance may be made for any civil or criminal tax investigation or proceeding regarding any tax year not barred by the statute of limitations of the state seeking the information. A small number of our treaty partners, with Germany in the lead, however, recently have started to resist exchanging information for criminal cases, especially criminal matters which have reached the formal judicial process. *See* the discussion at subsection 41.04(11), *infra*, entitled *Possible Problems with Exchanging Information under TIEAs and Income Tax Treaties*.

41.04[7] ***Designation of a Competent Authority to Administer TIEAs and Tax Treaties for Each Treaty Partner***

Every TIEA and tax treaty specifies competent authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to administer generally the treaty relationship. The Assistant Commissioner (International) (ACI), Internal Revenue Service, has been designated to act as the Competent Authority for exchanging information under TIEAs and tax treaties under the authority of the Secretary of Treasury. The specific office acting under the direction of the ACI to make and receive requests for information under TIEAs and income tax treaties is the Exchange of Information Team. The competent authority for the treaty partner is generally an entity located within the ministry of finance or its equivalent agency.

41.04[8] ***Procedures for Making Requests For Information***

There are currently six Exchange Analysts on the Exchange of Information Team, each of whom has specific responsibility for certain countries. If you wish to explore making a request for evidence or information under a TIEA or tax treaty, simply call the general number for the team ((202) 874-1840) and ask to speak to the Exchange Analyst who is responsible for the country where the information is located. Usually, the investigator or prosecutor in charge of the case will draft the initial version of the request and forward this draft to the Exchange Analyst for review. Subsequently, the request is formalized and sent to the foreign Competent Authority for execution.

41.04[9] ***Contents of a Request***

A request under a TIEA or income tax treaty should contain, *inter alia*, the following:

a. The taxpayer's (defendant's) name and address, and if applicable, social security number, place and date of birth, and whether the taxpayer is a citizen of the United States;

b. The names and addresses of pertinent entities affiliated with the taxpayer and the nature of such affiliations;

c. A brief resume of the case with particular reference to the

tax issues;

d. A detailed statement of the information sought and why it is needed;

e. A statement of the efforts made to secure the desired information prior to the request and why the efforts were not successful (including comment on any relevant data supplied by the taxpayer and the reasons for considering such data inadequate);

f. If the records of a foreign affiliate of the taxpayer are to be examined, the name and address of the custodian of the records and a document authorizing the custodian to permit the examination or an explanation as to why the authorization was not obtained;

g. All pertinent names, addresses, leads, and other information that may be helpful in complying with the request; and

h. Requests for bank account information should specify the branch.

To the extent known, the following information should also be transmitted with the request:

i. Date upon which a response is required (*i.e.*, for statute of limitations purposes) or any other facts indicating the urgency of the information;

j. Information concerning the importance of the case and any other facts which make the case unusual or worthy of preferential treatment; and

k. The taxable years and approximate tax liability or additional income involved.

41.04[10] ***Confidentiality of Information Obtained***

All of our TIEAs, and virtually all of our tax treaties, currently in effect contain language requiring that information obtained under such agreements be used only for tax purposes. Obviously, such language can raise troublesome issues for a prosecutor conducting a grand jury investigation directed at both tax and non-tax crimes. Indeed, recently certain treaty partners have resisted executing requests for information made in such cases based on their view that the obligation of confidentiality forbids use by a grand jury considering non-tax crimes. To address this situation, the Treasury Department and the Justice Department jointly decided to undertake using cautionary instructions to the grand and petit juries in such cases.

Under this approach, the prosecutor would caution the grand jury, as would the trial judge the petit jury, that the evidence obtained under the tax agreement could not be utilized to draw inferences of guilt regarding the non-tax offenses. This approach would also require the trial judge to ignore the evidence for the purposes of a defendant's motion to dismiss under Fed. R. Crim. P. 29.

41.04[11] *Possible Problems with Exchanging Information under TIEAs and Income Tax Treaties*

Although exchanging information under TIEAs and tax treaties has been relatively successful, there are a variety of problems which can arise. For example, officials of some countries having civil law systems, such as Germany, balk at executing requests in criminal tax cases made under a tax treaty, especially those arising from grand jury investigations, because they believe that tax treaties, which they consider to be part of an *administrative* governmental process, should not be used for *judicial* matters. This problem can be aggravated where non-tax offenses are also under investigation, given the ever-present provision in these agreements dealing with confidentiality. Also, certain other countries will provide treaty partners only with information which currently exists in their tax files regarding a given taxpayer, and will not undertake to gather information from other sources, including third parties. Finally, some treaty partners, even if they will undertake to gather information from sources other than their tax files, will not obtain and provide financial information, such as bank records, because of bank secrecy laws.

41.05 *USING LETTERS ROGATORY AND OTHER JUDICIAL PROCEDURES TO OBTAIN EVIDENCE IN CRIMINAL TAX CASES*

41.05[1] *Background*

Before the advent of tax treaties, MLATs, TIEAs, and other types of mutual assistance agreements, law enforcement authorities (just as private litigants) primarily relied upon deposition by stipulation, deposition by notice, deposition by commission, and letters rogatory, all judicially sponsored procedures, to obtain evidence abroad in both civil and criminal cases. *See* Fed. R. Crim. P. 15. This section briefly explores the basics of these various procedures and their limitations, especially in criminal tax cases.

41.05[2] ***Deposition by Stipulation, Notice, or Commission***

There are three types of procedures under which a U.S. prosecutor can obtain foreign source testimony without the assistance of foreign authorities, assuming the witness is willing to testify voluntarily and the foreign country's laws do not prohibit the litigant's taking of that testimony.

First, the parties to the litigation may agree to take testimony abroad by stipulation. *See* Fed. R. Crim. P. 15(g). Under this procedure, the parties simply agree as to the necessary circumstances of the deposition, *i.e.*, the official before whom the testimony will be taken, the time and place of the deposition, the type of notice to be given, the manner in which the deposition is to be conducted. If the parties can so agree, the stipulation procedure is the most expeditious method of taking foreign testimony.

Second, a litigant may take a foreign deposition by notice. *See* Fed. R. Crim. P. 15(d), providing that depositions in criminal matters shall be taken and filed in the same manner as civil actions (as provided for in Fed. R. Civ. P. 28(g)). Under this procedure, the moving party may arrange a deposition "on notice before a person authorized to administer oaths in the place in which the examination is [to be] held, either by the law thereof or by the law of the United States,..." Fed. R. Civ. P. 28(b)(1). This party must make the necessary arrangements for the deposition, such as assuring the presence of the witness, scheduling the services of an appropriate foreign official, a reporter for the transcript, and, if necessary, an interpreter.

Third, a litigant may take a foreign deposition by commission. *See* Fed. R. Crim. P. 15(d), providing that depositions in criminal matters shall be taken and filed in the same manner as civil actions (as provided for in Fed. R. Civ. P. 28(g)). Under this procedure, the moving party may arrange a deposition "before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony,..." Fed R. Civ. P. 28(b)(2). This procedure is similar to the notice procedure except that the court appoints the person, *i.e.*, the commissioner, before whom the deposition is to be taken.

Each of these procedures is available to United States prosecutors handling criminal tax

cases, [3] but, as mentioned above, only where the foreign-based witness voluntarily submits to the deposition and the particular country does not object to the evidence taking within its borders. The latter condition becomes prohibitive if the state in question is a civil law country. Such jurisdictions are inclined to regard evidence taking by any person other than their own legal authorities as violative of their sovereignty. Where such circumstances bar any of these three approaches and no treaties or agreements for assistance are available, the last resort is usually to a letter rogatory to obtain evidence abroad.

41.05[3] ***Depositions by Letters Rogatory***

The traditional method used by United States litigants to enlist the assistance of foreign authorities to obtain evidence abroad, in both civil and criminal cases, is a letter rogatory, also known as a letter of request.

Basically, a letter rogatory is a formal request from a court, in which an action is pending, to a foreign court to perform some judicial act. If the foreign court honors the request, it does so based on comity rather than any sort of strict obligation. As this definition suggests, a letter rogatory can usually only be used in a proceeding which has actually commenced, such as in the post-indictment stages of a criminal case or the post-complaint stages of a civil case, but this is not an iron-clad rule. [4] The route of a letter rogatory is quite circuitous and involves many diverse entities in an uncoordinated process. Typically, a litigant initiates the process by applying to the court, before which the particular action is pending, for the issuance of a letter rogatory, supporting the application with a set of complicated and formalistic pleadings.

Upon signature by the court, the letter rogatory must be transmitted through diplomatic channels, which involves not only the U.S. State Department but also the foreign ministry of the country involved. The foreign ministry delivers the request to the country's ministry of justice, which in turn delivers it to the foreign court originally contemplated to execute the letter request. If the request is successfully executed, the evidence must retrace the path of the request.

41.05[4] ***Procedures for Obtaining Assistance by Letters Rogatory***

The procedures for utilizing the letters rogatory process, once a prosecutor has secured the court's leave to do so under Fed. R. Crim. P. 15, are not as well defined and standardized as those for obtaining assistance under MLATs, TIEAs, and tax treaties. For example, the channel for sending a "letter request" (the term often employed for a letter rogatory request, especially for the countries following the common law system of the United Kingdom) to certain countries is the State Department, as generally described above. However, for certain countries, such as the United Kingdom and Hong Kong, OIA has developed an expedited channel for transmitting letter requests, so that certain stopping points along the way of the traditional channel have been eliminated, thereby speeding up the overall process.

Also, the form of the letter request can vary according to the country of destination. Thus, the best approach for initiating a letter request is to follow the initial phase of the MLAT procedure, namely, contact OIA (202-514-0000) and request to speak to the attorney in charge of the country from which assistance is sought.

41.05[5] ***Problems with the Letters Rogatory Process Generally***

While the letter rogatory procedure is the traditional method of obtaining assistance abroad, it is certainly not without its flaws. Thus, there is no obligation that the foreign country honor the request; the foreign country's enabling legislation, if any, may not provide any exceptions to that country's bank secrecy laws; there are no mutually agreed upon procedures which ensure the obtaining of evidence in admissible form; the multiple stages of the process, involving diverse entities, generate serious time delays; and, the procedure may not be available at crucial stage of a proceeding, *e.g.*, the investigation of a criminal offense, where it may be needed most. To address these critical problems, law enforcement authorities developed new methods to gather foreign evidence, such as the MLAT.

41.05[6] ***Specific Problems with the Letters Rogatory Process When Used in Criminal Tax Cases***

In addition to the problems which afflict the letters rogatory process generally, prosecutors seeking to obtain foreign evidence through this process for tax cases may face a unique roadblock in jurisdictions following the common law tradition of the United Kingdom.[5] This possible obstacle is the international rule of comity that one nation will not directly or indirectly enforce the revenue laws of another nation.

In its most basic form, the rule is that the courts of one country will not enforce a judgment for taxes issued by the court of another country.[3] The rule seems to have originated in two opinions of Lord Mansfield in 1775 and 1779.[4] However, the modern bedrock of the rule seems to be the House of Lords' decision in ***Government of India v. Taylor***, [1955] 2 W.L.R. 303 (hereinafter ***India v. Taylor***),[5] where the tax authorities of India sued to collect moneys in the United Kingdom based on a tax judgment issued by an Indian court. While most common law jurisdictions, including the United States, seem to accept this basic form of the rule as elementary and without dispute,[6] its application beyond this realm has varied.[7] In one of its broader forms, the rule prohibits one country from granting another country's request for information or evidence for any tax-related proceeding in the requesting country, either in a civil[8] or criminal[9] matter.

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3 ***Her Majesty, Queen in Right, Etc. v. Gilbertson***, 597 F.2d 1161 (9th Cir. 1979) (hereinafter ***Gilbertson***), *aff'g* 433 F. Supp. 410 (D. Oregon 1977).

4 ***Gilbertson***, 597 F.2d at 1164.

5 For authorities relying primarily on ***India v. Taylor***, *see*, *e.g.*, ***State of Norway's Application***, [1987] 1 Q.B. 433, 445-46 (C.A.); ***R. v. Chief Metropolitan Stipendiary Magistrate***, [1988] 1 W.L.R. at 1207, 1214-15; ***United States v. First National City Bank***, 379 U.S. 378, 395-96 & n.16 (1965).
2d at 1163-66.

7 *See*, *e.g.*, ***R. v. Chief Metropolitan Stipendiary Magistrate***, [1988] 1 W.L.R. at 1207, 1214-15 (distinguishing permissible extradition of a Norwegian national for tax-related charges from impermissible assistance in the recovery of taxes for a foreign state). Also compare the dicta in ***State of Norway's Application***, [1987] 1 Q.B. at 448 (stating that simply providing evidence to another state for its civil determination of a tax liability is the enforcement, albeit indirect, of

In any event, until the decision was overturned, there had been serious fallout from the decision of the United Kingdom Court of Appeal in ***In re State of Norway's Application***, [1987] 1 Q.B. 433 (C.A.), where that Court construed the rule to operate in the broader sense. Thus, the United Kingdom and the common law countries which follow its legal precedent were rejecting the letter rogatory requests of U.S. tax authorities based on the dicta in that decision. Fortunately for U.S. prosecutors seeking foreign evidence in tax cases, the House of Lords, the highest court of the United Kingdom, reversed the Court of Appeal in ***In re State of Norway (No.1), et al.***, slip op. (H.L. Feb. 16, 1989) (consolidated appeals and cross appeals), holding that simply providing evidence to another state for that state to use to enforce its revenue laws does not constitute the direct or indirect enforcement of another state's revenue laws. This decision should dramatically enhance mutual assistance from countries following English Common Law in civil and criminal tax cases, especially between governmental authorities.

41.06 *USING COMPULSORY MEASURES TO OBTAIN FOREIGN EVIDENCE*

41.06[1] *Background*

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another state's revenue laws) with ***Re Request for International Judicial Assistance***, 102 D.L.R.3d 18, 38 (Can. 1979) (rejecting broader application of rule and stating that granting assistance to United States in criminal tax case is not tantamount to the collection of taxes for that state).

8 ***State of Norway's Application***, [1987] 1 Q.B. at 445-46.

9 ***In re the Criminal Proceedings before the U.S. District Court for the District of Kansas Concerning Marcel Samuel Lambert and Arloho Mae Pinto***, No. 962 (Bahamas Sup. Ct. 1986).

The United States tax authorities do not always have an effective mutual assistance means available to them for obtaining evidence abroad. For example, in a "pure tax" case involving evidence in the Cayman Islands or the Bahamas, United States authorities cannot use a tax treaty, [6] and the current MLATs with these countries exclude assistance for pure fiscal matters from their scope. Thus, the United States may have to resort to unilateral action, such as a subpoena, to obtain the needed evidence. The various types of unilateral compulsory process which can be directed at obtaining foreign-based evidence will now be explored.

41.06[2] ***The Use of Subpoenas or Summonses to Obtain Foreign Evidence Directly***

One form of process used by government attorneys to obtain evidence abroad is the subpoena power applied directly to a domestically-based entity having some relationship to the foreign-based entity holding the records.[7] If a Department of Justice attorney, or an Assistant United States Attorney, wants to use a grand jury or criminal trial subpoena to obtain evidence located in a foreign country, the prosecutor must obtain the concurrence of the OIA, Criminal Division, before both issuing and enforcing such subpoena.[10] In determining whether to concur in such actions, OIA considers the following factors: (1) the availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory; (2) the indispensability of the records to the success of the investigation or prosecution; and (3) the need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.[11] Once the concurrence of OIA to issue and enforce a subpoena for foreign records has been obtained, the prosecutor will then be required to plead a so-called comity analysis and the enforcement court will be required to balance the comity factors in favor of the government before the subpoena can be properly enforced.[12]

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10 Department of Justice, United States Attorneys' Manual (USAM) 9-13.525 (1989-2 Supplement).

11 USAM 9-13.525.

12 To resolve jurisdictional conflicts which may arise from an order for the production of foreign documents, U.S. courts apply the so-called comity analysis under Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987). *See* ***Societe Nationale Industrielle Aerospatiale v. United States District Court***, 482 U.S. 522, 543-44 & n. 28 (1987); ***Richmark Corp. v. Timber Falling Consultants***, 959 F.2d 1468, 1474-79 (9th Cir. 1992). Before this most recent version of the Restatement was adopted by the American Law Institute in 1987, U.S. courts applied a slightly different comity analysis under the Restatement (Second). *See*, *e.g.*, ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817, *cert. denied*, 469 U.S. 1106 (1985); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); ***Garpeg Ltd. v. United States***, 583 F. Supp. 789 (S.D.N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 584 F. Supp. 1080 (S.D.N.Y. 1984); ***United States v. First Nat. Bank***,

41.06[3] ***The Use of Subpoenas to Obtain Testimony of a Nonresident Temporarily in the United States***

Prosecutors assisting federal grand juries in their investigation can subpoena critical witnesses, such as foreign bankers, who are temporarily found in the United States. [8] United States courts have held that the principle of comity between nations does not require one state to relinquish its compulsory process on a potential witness, temporarily within that state, simply because his testimony may subject him to criminal prosecution in the other state. [13] Furthermore, such a witness must produce documentary evidence notwithstanding claims that the attorney-client relationship of the other state is broader than that of the jurisdiction issuing the subpoena. [14]

41.06[4] ***The Use of Compelled Directives to Obtain Disclosure of Financial Matters Covered by Foreign Secrecy Laws***

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699 F.2d 341 (7th Cir. 1983).

The Restatement of Law (Third) (Section 442(1)(c)) provides as follows:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; *the availability of alternative means of securing the information*; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. (Emphasis added.)

The major difference between the comity analyses under the newer and older versions of the Restatement is the introduction of the factor, "the availability of alternative means of securing the information," in the newer version of the Restatement. Accordingly, the courts will now inquire into whether mutual assistance alternatives to subpoenas exist before ordering enforcement. *See* ***Richmark Corp. v. Timber Falling Consultants***, 959 F.2d at 1475-76.

13 ***United States v. Field***, 532 F.2d at 407.

Prosecutors can seek court orders compelling an account holder to direct a foreign bank or other institution to disclose to the prosecutor matters protected by foreign financial secrecy laws. [9] The Supreme Court has ruled that an order directing an account holder to sign a hypothetically-framed disclosure directive does not violate his Fifth Amendment privilege against self-incrimination. [15]

Foreign courts have had mixed reactions to these directives. A court of the Cayman Islands, a dependency of the United Kingdom, has held that such compelled disclosure directives do not constitute voluntary and freely given consent for disclosure as required under the secrecy laws of that jurisdiction. [16] For other countries which do not have such stringent secrecy statutes and which follow the British common law, there is authority that such disclosures do constitute valid consent under the common law duty of a banker to keep the financial affairs of an account holder confidential. [17]

Prosecutors have enjoyed widespread success in using *compelled* disclosure directives to obtain financial records from most countries, and, indeed, have used *voluntary* disclosure directives to gather financial records from virtually every country. The use of disclosure directives is preferred over the use of compulsory process directly against U.S.-based branches or offices of financial institutions to obtain financial records located abroad, because using disclosure directives involves no real jurisdictional conflicts (except when seeking evidence in countries like the Cayman Islands) and lessens the inclination of most foreign countries to block production of the evidence.

41.06[5] ***The Use of Subpoenas Issued to United States Citizens or Residents Abroad***

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14 ***United States v. Bowe***, 694 F.2d at 1258.
15 ***Doe v. United States***, 487 U.S. at 206-218.
16 ***In Re ABC Ltd.***, 1984 CILR 130, 134-35 (Grand Court of the Cayman Islands, 1984).
17 ***Tournier v. National Provincial & Union Bank of England***, [1924] 1 K.B. 461 (C.A.).

Prosecutors can also use compulsory process to obtain documents or testimony from U.S. citizens or residents located in foreign countries. [10] Thus, federal law enforcement attorneys may issue court-ordered subpoenas to any such individuals in any federal proceedings, criminal or civil, under the provisions of 28 U.S.C. § 1783, and seek sanctions under 28 U.S.C. § 1784, if there is any failure to appear or produce documents.

41.06[6] ***Jurisdictional Conflicts Arising from the Use of Certain Unilateral Measures***

The use of certain of these unilateral measures, especially the subpoenas on domestic financial institutions for foreign-based records, are controversial and lead to protracted litigation which often fails to secure the intended result. Indeed, these jurisdictional controversies led the Justice Department to adopt section 9-13.525 of the United States Attorneys' Manual, described *supra*, which requires the concurrence of OIA for both the issuance and enforcement of such subpoenas in Department criminal matters. When U.S. authorities resort to the enforcement of such measures, they encounter strong opposition from many different quarters. For example, the financial institutions served with process typically resist strenuously and raise every possible issue for resolution, including the bedrock of their position, the jurisdictional conflict between the laws of the two countries involved. Even when these institutions suffer an adverse decision of the U.S. courts, they often choose to be subject to sizeable contempt sanctions rather than produce the subpoenaed or summonsed records. *See*, *e.g.*, ***In re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). Officials of foreign jurisdictions also object to the use of these measures, by instructing their foreign ministries to complain to the U.S. State Department, entering *amicus* appearances in the protracted litigation, and sometimes directing their own law enforcement authorities to take blocking measures, which may include the seizure of the foreign-based records to thwart production. [11] Needless to say, production of the evidence sought by the use of certain of these unilateral measures is not a foregone conclusion.

At all events, as mentioned above, before a ***Bank of Nova Scotia***-type subpoena can be authorized by the Criminal Division (*see* U.S.A.M., Section 13.525) or enforced by a district court, a prosecutor will need to establish that no alternative methods exist for obtaining the foreign records sought.

41.07 ***CONCLUSION***

New law enforcement treaties and agreements are being continually negotiated and concluded by the various responsible authorities. Accordingly, new means for obtaining foreign evidence may appear on the horizon following publication of this analysis. For further details regarding the matters set forth herein, or for developments following publication contact James P. Springer, Senior Counsel for International Tax Matters, Tax Division, Department of Justice, at (202) 514-2427.

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1. Indeed, the Swiss authorities and legal scholars are accustomed to referring to the term "tax evasion" as a civil matter, even if the conduct involved would constitute a felony under our law, such as filing a false federal income tax return. Thus, when the Swiss refer to fiscal crimes they use the term "tax fraud" which has a much more restricted meaning under Swiss law than under U.S. law. *See*, *e.g.*, U.S.--Swiss MLAT, Art. 1, Sec. 1(a), and Art. 2, Secs. 1 and 2; J. Knapp, ***Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy***. Case W. Res. J. Int'l L. 405-08, 418-20 (1988); J. Springer, ***An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases***, 22 Geo. Wash. J. Int'l L. & Econ. 277, 303-08 (1988); Aubert, ***The Limits of Swiss Banking Secrecy under Domestic and International Law***, 273 Int'l Tax & Bus. Law. 273, 286-288 (1984).

2. On July 21, 1993, the United States and Colombia signed a TIEA which will soon be placed into effect.

3. The Federal Rules of Criminal Procedure, *i.e.*, Fed. R. Crim. P. 15, specifically provide for these procedures, but in criminal cases, depositions, foreign or otherwise, can only be taken by order of the court, made in the exercise of discretion and on notice to all parties (Notes of the Advisory Committee on Rules), in contrast to the practice in civil cases where depositions may be taken as a matter of right by notice without permission of the court.

4. *See*, *e.g.*, United Kingdom Evidence (Proceedings in Other Jurisdictions) Act 1975, Secs. 1 and 5 (allowing for compulsory process to obtain evidence in the United Kingdom for judicial requests

of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted); Evidence Ordinance of Hong Kong, CAP. 8, Part VIII, Secs. 75 and 77B (allowing for compulsory process to obtain evidence in Hong Kong for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted or are likely to be instituted if the evidence is obtained); ***United States v. Reagan***, 453 F.2d 165, 171-74 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972) (affirming district court's issuance of a letter rogatory even though criminal case was in pre-indictment stage but noting some contrary authority).

5. The number of countries which follow British common law is quite large, since both the present and former dependencies of the United Kingdom fall into this category. For example, the Bahamas, Singapore, the Cayman Islands, and Hong Kong follow this legal precedent.

6. The United States does not have a tax treaty with either the Bahamas or the Cayman Islands.

7. *See*, *e.g.*, ***Matter of Marc Rich & Co. A.G. v. United States***, 707 F.2d 663 (2nd Cir.), *cert. denied*, 463 U.S. 1215 (1983), later proceeding, 731 F.2d 1032 (1984), later proceeding, 736 F.2d 864 (1984), later proceeding, 739 F.2d 834 (1984); ***United States v. Vetco, Inc.***, 644 F.2d 1324 (9th Cir.), *amended on rehearing*, 691 F.2d 1281, *cert. denied*, 454 U.S. 1098 (1981); ***United States v. Toyota Motor Corp.***, 561 F.Supp. 354, 355-56, 358 (C.D. Cal. 1983), later proceeding, 569 F. Supp. 1158 (1983); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817 (1984), *cert. denied*, 469 U.S. 1106 (1985); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); the so-called "Gucci" or "Garpeg" summons enforcement decisions (***Garpeg Ltd. v. United States***, 583 F. Supp. 789 (S.D. N.Y. 1984); ***Garpeg, Ltd. v. United States***, 583 F. Supp. 799 (S.D. N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 584 F. Supp. 1080 (S.D. N.Y. 1984); ***Vanguard Intern. Mfg., Inc. v. United States***, 588 F. Supp. 1229 (S.D. N.Y. 1984); ***Vanguard Intern. Mfg., Inc. v. United States***, 588 F.Supp. 1234 (S.D. N.Y. 1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1237 (1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1239 (S.D.N.Y. 1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1240 (S.D.N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 590 F.Supp. 1160 (1984)); ***In Re Grand Jury 81-2***, 550 F. Supp. 24 (W.D. Mich. 1982); ***S.E.C. v. Banca Della Svizzera Italiana***, 92 F.R.D. 111 (S.D.N.Y. 1981); *Cf.* ***In Re Sealed Case***, 825 F.2d 494 (D.C. Cir. 1987); ***United States v. First Nat. Bank***, 699 F.2d 341 (7th Cir. 1983).

8. *See*, *e.g.*, ***United States v. Bowe***, 694 F.2d 1256, 1258 (11th Cir. 1982); ***United States v. Field***, 532 F.2d 404, 409 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

9. *See*, *e.g.*, ***Doe v. United States***, 487 U.S. 201 (1988); ***United States v. Ghidoni***, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); ***United States v. Lehder-Rivas***, 822 F.2d 682 (11th Cir. 1987); ***United States v. Davis***, 767 F.2d 1025 (2d Cir. 1985); ***In Re Grand Jury***

Proceedings, Western District of Louisiana (Juan A. Cid), 767 F.2d 1131 (5th Cir. 1985); ***In Re N.D.N.Y. Grand Jury Subpoena #86-0351-S,*** 811 F.2d 114 (2d Cir. 1987). *Contra*, ***In Re Grand Jury Proceedings***, 814 F.2d 791 (1st Cir. 1987); ***In Re ABC Ltd.***, 1984 CILR 130 (Grand Court of the Cayman Islands, 1984); ***Garpeg, Ltd. v. United States***, 583 F. Supp. 789, 799 (S.D.N.Y. 1984).

10. 28 U.S.C. §§ 1783-1784.

11. *See*, *e.g.*, ***In re Marc Rich & Co., A.G. v. United States***, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).