



FROM THE CHAIR

No Place to Hide? FATCA and Beyond

By Michael Hirschfeld*

While the income tax is celebrating its 100th anniversary in 2013, efforts to evade paying tax trace themselves back to the foundation of America. If there was no discontent on the part of several Massachusetts residents with a tax on tea, the Boston Tea party may not have occurred, and we may be carrying British passports today. That discontent with taxation has made a voluntary income tax system difficult to insure collection of all taxes due, which has led to creation of complex withholding and reporting rules that affect many of our clients. John Doe summonses served on certain foreign financial institutions have also garnered the names of non-compliant taxpayers.

Despite these efforts, investing money offshore is still perceived by some as a way to avoid paying their taxes. That abuse led to enactment of the Foreign Account Tax Compliance Act (FATCA) in 2010. Starting on July 1, 2014, FATCA will impose new withholding taxes on many foreign financial institutions (FFIs) that fail to agree to disclose to the IRS the identity of their U.S. customers. The concept of cross-border tax disclosure mandated by FATCA is even being adopted by other nations, such as the UK, and being considered by OECD member states. Given the global economy that affects nearly all our clients, this area of international tax is one we all need to understand, which is why I felt compelled to make it the subject of my column.

FATCA's main focus is FFIs, which encompass foreign banks, investment funds, custodians, and insurance companies issuing non-term life policies. With exceptions for certain pre-existing obligations, effective July 1, 2014, these

FFIs will be subject to a 30% withholding tax on interest, dividends, and other types of passive income having a U.S. source paid by U.S. persons to non-U.S. persons, unless (i) the FFI enters into a FFI Agreement to agree to be a participating FFI subject to FATCA; (ii) the FFI is a resident of a country that has signed an Inter-Governmental Agreement with the U.S. (IGA) that will mandate compliance with FATCA by local FFIs but only as to their offices in that country; or (iii) an exception can be found that does exist but is limited in scope. Starting in 2017, FFIs also face withholding on gross proceeds from the sale of U.S. stocks and securities unless they comply with FATCA.

A participating FFI agrees to (i) conduct due diligence to discover if they have any U.S. persons or U.S. owned foreign entities owning disclosable accounts (such as bank accounts or interests in a hedge or private equity fund); (ii) report the identity of those persons to the IRS along with other related information; and (iii) impose withholding tax on certain payments it may make to investors who are either (a) recalcitrant holders, who repeatedly refuse to supply information requested by the FFI so as to determine their tax status or (b) other FFIs who refuse to become a participating IGA and are not a resident of an IGA country. If the FFI is a resident of a country that has an IGA, then these local FFIs will be mandated by local law to participate in the FATCA program and do these tasks. The IGA eliminates concerns that local laws restricting account disclosure may impede compliance with FATCA while liberalizing some of the rules that may

otherwise apply. IGAs are not limited to countries that have an income tax, but are an option for any nation; nations as diverse as the UK and the Cayman Islands are signatories.

Many FFIs will likely need to register on an IRS electronic portal to obtain a FATCA identification number, called a global intermediary information number (GIIN) and then furnish that to U.S. withholding agents to prevent FATCA withholding. Those agents face a difficult time in determining when they can safely not withhold under FATCA when they pay any non-U.S. person, and even if they obtain the GIIN on new Form W-8s that are being finalized, they will need to confirm the accuracy of those GIINs on a separate IRS webpage. While FATCA withholding will not start until July 1, 2014, action is needed before then to make sure the GIIN can be timely provided and corroborated in order to insure no withholding will occur. FFIs in so-called Model 1 IGAs are given an added six-month breather to get a GIIN, but caution may dictate getting that as soon as they can. While no one can register on the portal until next year, getting on the portal this year is a good move since registration will take time and you can save your input until you next sign in.

On November 15, the Tax Section will host its 2nd Annual International Tax Enforcement Conference in Washington, D.C. Attendance may help lift the confusion that many are feeling now about this brave new world of global tax cooperation and enforcement. I hope to see you there. ■

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