Searching for Wayward Dollars: Money Laundering or Tax Evasion—Which Dollars are We Really After?

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Searching for wayward dollars: Money laundering or tax evasion--which dollars are we really after?

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Abstract

The focus on money laundering has become the international law enforcement approach to transnational crimes and the approach to take to effectively impact other sophisticated criminal operations. This paper calls for a serious and honest appraisal of the actual objective behind some of the policies that parade as anti-money laundering strategies. Money laundering legislation is being applied to situations unrelated to any traditional notion of organized crime and in situations where illicit proceeds are deposited or otherwise used but where there is no "cleansing" involved.

Full Text

The theme of this year's conference on economic crime was hidden wealth in general - not necessarily dressed up as money laundering. Therefore the question becomes how is wealth 'hidden' rather than laundered - how can we best identify these funds - and are we politically willing to go after them and at what 'costs' to society in terms of dollars, but more importantly in terms of privacy and confidentiality considerations?

A focus on money laundering has become the international law enforcement approach to transnational crimes and 'the' approach to take to effectively impact other sophisticated criminal operations. Gold and Levi1 call money laundering 'one of the buzz phrases of crime in the 1990s'. It is now creating a roar rather than a buzz as we move into the 2000s. National and international politics and power prove to be key components in understanding this rhetoric. As George Gilligan states:

'This political dimension can be seen in the "regulatory jihad" against money laundering in recent years as part of the US-led war on drugs.'2
Hence we have the enthusiastic adoption of antimoney laundering policies, investigations and sanctions, as expressed by spokespersons such as Raymond Kelly, Commissioner of US Customs Service, which become part of the rhetoric of the `war on drugs':

`We will not win the war on drugs by following the tons of cocaine and heroin and marijuana that move through our streets. We will win it by following the billions of drug dollars that move through our financial system.'

This is nonsensical rhetoric devoid of any substantiating evidence - but very politically attractive. Rhetoric around money laundering has motivated significant international cooperation. Internationally, seemingly the entire Western world is determined to 'fight' the money laundering war. How much of the fight is mere symbolic words and how much of the concern is even actually `money laundering’ ought to be more strenuously debated.

This paper calls for a serious and honest appraisal of the actual objective behind some of the policies that parade as anti-money laundering strategies. Money laundering legislation is being applied to situations unrelated to any traditional notion of organised crime and in situations where illicit proceeds are deposited or otherwise used but where there is no 'cleansing' involved. The evidence that the criminal acts seldom involve `money laundering' per se leads one to suspect that the term money laundering is being used, by even some of the most ardent anti--laundering advocates, as a 'selling' concept in order to advance new legislation and policies that relate to capital flight and tax evasion and not what has been traditionally defined as money laundering. With global corporations, a mobile workforce and other major financial transitions such as the move to Eurodollars, countries must be concerned about maintaining an adequate tax base.

In the USA and elsewhere, an industry is becoming increasingly sophisticated and 'focused' on advising on the planning for, and facilitating the construction of, business transactions that slide between tax avoidance and tax evasion - legal evasion. A 'new' contingency fee market has developed in the USA whereby forensic accountant firms - comprised of bankers, lawyers and
accountants (known now as `financial engineers') - devise schemes to save the large corporations taxes and charge a percentage of the savings. The US Treasury Department has identified corporate tax evasion as the nation's biggest tax enforcement problem - and these 'shelters' are seen to be the core of the problem. Charging a fee based on a percentage of the taxes avoided is supposedly prohibited by ethics rules of the accounting industry. Hence, `value pricing' becomes the substituted terminology. All of the `Big 5' accounting firms charge corporations based on savings from the tax shelters: ie PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche, KPMG and Arthur Andersen. Alas, while systems are in place to catch the 'suspicious' depositor, an entire industry has grown up around assisting corporations to move money around.4

The term money laundering is attractive because it has become exchangeable with transnational crime/ organised crime and drug trafficking - criminality pure and simple and surely worthy of a concerted control regime. In contrast, tax policies are burdened with confidentiality and voluntary compliance rhetoric. No such sentiment protects the drug trafficking 'money launderer'. Ironically, one might argue that actual laundering is being neglected or at worst protected by the sectors which are the most vocally involved in the control efforts. While the Clinton pardons were widely criticised for various reasons, it is of note that two of those persons pardoned were convicted international money launderers in addition to whatever other offences they may have committed.

Banks and Revenue department information becomes critically important in both tax evasion and money laundering. The first sector (ie the banks) has been targeted by the international community and the second is just about to be. The international community through the efforts of a vast array of players - led in part by the FATF - has been attempting to bring the financial institutions on board as partners in the money laundering 'war'.

BANKING INFORMATION

Banking is seen as a convergent point for illicit proceeds. Banking systems that deliberately attract illicit proceeds by facilitating money laundering provide a niche-market service to criminals. Typically
we think of offshore brass-plate banking services as being the laundering centres - however, the recent focus on banks and laundering activities reveals that some of the most prestigious banks in the world (Switzerland, Monaco, USA, Britain . . .) are vulnerable, or make themselves vulnerable.

A study at the Nathanson Centre on the `voluntary' compliance of the financial institutions in Canada to the suspicious transaction protocols that were developed by the `Big 5' banks has just been completed. The results were dismal - and expectedly so for several totally rational reasons. All suspicious reporting - whether voluntary or mandatory - arguably rests on two essential principles: the `know your customer' policies, and the belief in an ability to profile 'suspicious' transactions. The notion is that while there are millions of transactions that pass through financial institutions, a certain percentage are irregular in some aspect and warrant greater - and more timely - scrutiny. A number of key assumptions are made.

- There is the assumption that front-line tellers, or business persons, untrained in wider law enforcement techniques, will be able to learn how to identify these 'suspicious' transactions.

- Further, there is the assumption that they will be motivated to do so carefully in a manner that does not ignore 'suspicious' cases nor over-identifies cases that are unlikely to prove to be worthy of police investigations.

- This of course is build on a third assumption that these suspicious transactions can be 'profiled' and that it is possible to teach employees what characteristics ought to alert the employee to a potential criminal operation that can then be passed immediately to law enforcement.5

Driven by the work of the Financial Action Task Force (FATF),6 the 'required' uniform standard now requires mandatory reporting of suspicious transactions and reporting of large transactions. Whether the system works to any significant extent becomes immaterial.

The question arises as to 'who' gets to be deemed to be 'suspicious'. This form of detection could be targeting the most unsophisticated cases, where 'suspicious' literally takes the form of a hesitation to
answer questions or an unease in appearance behavioural characteristics that will be absent from the truly professional launderer.

One of the most pervasive complaints about transaction reporting schemes internationally is that they have generally failed to lead to the conviction of sophisticated money launderers. The clumsy novice is most often the criminal that is caught in what is seen by some critics to be a very expensive and intrusive web. Some research also indicates that there may be a class and/or racial aspect as a certain appearance, presentation of self, and/or specific countries involved in financial transfers are seen to be more 'suspicious' than other characteristics or jurisdictions.

`Know your customer’ is one of the few policy links that go from the regulatory bodies to the financial institutions that they attempt to oversee. In Canada the Office of the Superintendent of Financial Institutions (OSFI) issues `best practices’ documents confirming, among other anti-laundering strategies, the importance of the `know your customer’ policy. Once the `regulated' institutions put these policies into operation, there is an expectation that a key defence against money laundering is at play. This, however, takes for granted that the policy is actually being enforced by the financial institutions, and second that the financial institution sees it to their advantage (ethically or in terms of the risks that can occur) to comply.

While it is acknowledged that some of the individual banks in the USA may have had some forms of `know your customer’ policies in place stemming from the Bank Secrecy Act, GAO (General Accounting Office) reports and reviews by the Federal Reserve were extremely critical of the anti-laundering efforts of the banks. Private banking in particular was found to be nearly wide open to laundering, tax evasion and capital flight (and looting) by corrupt government officials.7 The argument is made that a culture of secrecy combines with a culture of lax anti-money laundering controls due quite understandably to competing agendas:
`It is the private banker who is charged with researching the background of perspective clients, and it is the private banker who is asked in the first instance to monitor existing accounts for suspicious activity. But it is also the job of the private banker to open accounts and expand client deposits.'

Much publicity surrounded the various reports on the private banking industry in the USA and internationally where similar scandals had occurred. Result -- high-profile adverse media; followed incredibly by refusal to 'allow' the regulators to impose their 'know your customer' plan that had been proposed by the Federal Reserve; and now those banks most criticised (ie Citigroup) sign on to the 'voluntary' series of Wolfsberg Principles.

It is alarming enough that the banking 'regulators' can be forced to withdraw their anti-laundering plan by those institutions that they are meant to be regulating. This of course speaks to the power of the banks. A further concern is that while it is assumed that other banks will `sign on' to the Wolfsberg Principles, the result will remain for a long time a patchwork quilt. While the Wolfsberg Principles are quite innocuous in their limited focus on 'know your customer' requirements, this lack of uniformity will mean that to the extent that the principles are followed, the banks who serve the private banking sector will not be operating under the same rules.

It is recognised that there is intense competition with each other, and yet it is to be hoped that at least some will give a degree of concern for who their customers are and where their dollars have come from. However, a number of factors render one suspicious of the motivations. Further highprofile cases may reveal that aside from a nice symbolic aspect, the principles were easily accommodated/renegotiated/ignored!

While we could say that the Wolfsberg Principles are important in that they are at least trying to bring some of the banks up to minimum standards of antimoney laundering accountability, the recent debate between the EU governments and the European Parliament appears to be moving in the opposite direction. The efforts of the EU to 'tighten' up laws against money laundering have been challenged by the European Parliament. Specifically, the Parliament wants to reduce the burden on
lawyers, accountants and tax consultants to report suspicious transactions. These of course are the very professions that are so critical to sophisticated money laundering. The amendments preferred by the Parliament would remove these 'professionals' from the regime that applies to the banks and credit institutions. It is acknowledged that the Parliament has been heavily lobbied by the legal profession.9 The concern is that these new amendments, introduced by the European Parliament, could mean that the EU Directive is dropped and has to be drawn up again. In November 2000, their agreement was reached after two years of discussion and debate with difficult negotiations over the issue of whether or not to include lawyers.

Again, without a conspiratorial mind-set, it is hard to imagine how any organisation serious about largescale, sophisticated ‘money laundering’ does not appreciate that it needs to be serious about the roles played by lawyers. The evidence from money laundering cases is clear - lawyers are critical to many sophisticated long-term laundering schemes.

The search for 'alternative' law enforcement strategies forces a re-examination of the relationships that currently exist between the agencies that share varying enforcement responsibilities. The banks with varying degrees of success have been brought under the anti-money laundering regimes. Overcoming the debates and commitments to confidentiality were in some cases hard fought and changes have been made (again, whether this amounts to the detection and capture of money launderers is questionable).

One can trace the route from 'consensual' FATF peer evaluations to blacklisting of countries pertaining mainly to banking and legislative aspects of money laundering control. The move now appears to be to look at the 'confidential' income tax returns of citizens or to alter the rhetoric and eliminate the desirability of 'confidentiality' in the name of international cooperation.

REVENUE INFORMATION
Just as bank transactions have become fodder for law enforcement, we can predict a similarly aggressive demand for countries to make tax information available to their own law enforcement agencies and, through the financial intelligence unit (FIU) network, to foreign jurisdictions. The pressure has begun - appropriate or inappropriate - and the main concern is that it is being packaged as something else (again), and that something else is the noncontroversial objective of fighting the drug war or taking the profits from drug traffickers.

Canada

Canada has always separated tax information from criminal code information and has traditionally treated the two very differently. There may be merit in examining some of the taken-for-granted unique, if not actually peculiar, arrangements that are in place. The legislative and interpretative barriers to the sharing of information between Revenue Canada and the RCMP (or other policing agencies) are one such prime example. Police investigators describe sitting on different sides of a table during large-scale cases that involve both Revenue and the police and having to keep their information separate, with much more of an allowable slide of information from the police to Revenue, with little information allowed to pass ‘formally’ in the other direction. (It is worth keeping that image in mind. It seems that in other jurisdictions there is an acknowledged ‘informal’ exchange of information - how likely is it that this informal exchange does not presently occur in Canada?)

Given the fact that a financial intelligence unit is currently being set up to receive, analyse and appropriately disseminate financial information and intelligence, this paper focuses at some length on this question. While the intent is to focus on the current situation, it is necessary to provide some historical background since the ‘explanation’ of the current situation appears to be based on a significantly re-written history! Over time, however, the degree of confidentiality that is applied to the Revenue-- related information has varied, and what is accepted today to be near sacred was not always so.
The working partnerships between the police and Revenue Canada is seen to be a critical one and is 'formalised' in various joint-force operations where the Special Investigations Unit of Revenue Canada work on a regular and ongoing basis with the RCMP. Likewise, via MLAT arrangements, Revenue Canada and the US Treasury may exchange information. In each of these cases, however, there are significant imbalances in the flow of information. It might be argued that any exchange that favours one side over the other not only hampers law enforcement but also hampers the working relationships among the agencies.

Simple stated, Canada placed restrictions on the type of information and the conditions under which tax-department-held information can be shared with other government agencies. The most often provided explanation for this is that stated in Tyler v Canada,11 that tax information is 'compelled' information. An official from Revenue Canada stated that the whole self-assessment scheme behind the collection of tax information from the public would falter without the confidentiality provisions, the argument being that the right against being compelled to bring self-incriminating information against oneself would be a viable defence to not filing tax returns.

A historical picture does not support this argument - nor does it mean that there is not a legislative or regulatory response to this argument if one were needed. It may speak instead to the way in which Canada has traditionally viewed financial crimes and tax violations as being distinct from 'real' crimes - property crimes, personal violence or drug violations. However, what we see today is that the large sophisticated 'organised' and transnational crimes are often financial frauds - or include financial frauds. Every one of these cases will involve a history of tax violations, manipulations and evasions.

A look at the legislation and case law on the disclosure of tax information during three periods (1917-1966; 1966-1993; 1993-2000) reveals a graduate tightening up on the confidentiality of tax information. During the first period, one can find judgments such as in R v Snider.12 The Attorney General of British Columbia attempted to use personal tax return information to further the
prosecution of a group of individuals on bookmaking charges. In response to the claim that disclosure would be contrary to public policy, the argument was made and held that:

`The disclosure of a person's return of income for taxation purposes is no more a matter of confidence or secrecy than that, say, of his real property which for generations have [sic] been publicly disclosed in assessment rolls. It is in the same category as any other fact of his life and the production in court of its details obtained from his books or any other course is an every-day occurrence. The ban against departmental disclosure is merely a concession to the inbred tendency to keep one's affairs to one's self.'13

A similar passage is found in Ship v R:14

`It would be a curious position to take that when the Crown obtains knowledge through returns of the commission of some crime not connected with the Act, it should be prohibited from using that information against the perpetrator of that crime. I am of the opinion that when evidence contained in the tax return is pertinent on any criminal charge, the magistrate before whom that charge is being tried is a person legally entitled to the information.'

While it must be noted that in both of these cases the activities involved criminal investigations and criminal charges, they are indicative of the `one-- state' view - ie information provided to any one branch of government is therefore the property of the government as a whole. This position shifted considerably during the second period - the 1966-1993 years.

Legislative amendments in 1966 and 1967(15) transformed s. 133 into the format characteristic of the current confidentiality requirement. A prohibition against disclosing taxpayer information was imposed that was limited by very specific administrative exemptions. This confidentiality requirement was further enhanced by the addition of a definition as to who was a person authorised to receive the information. There was also a restriction on the compellability of officials and authorised persons
to testify in legal proceedings - with an exemption from this limitation in respect of criminal proceedings and proceedings relating to the administration and enforcement of the Income Tax Act.

Following these and other changes to the Tax Act during this period, the courts began to explore the relationship between the Minister as agent for the taxpayer and the party interested in disclosure with a view to the competing `legal interests' and the `public interests' at stake. A quote from Lord Reid illustrates these competing concerns in Conway v Rimmer:16

`It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm should not be done to the nation or the public service by the disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.'17

Until 1993 s. 241 was worded in such a manner as to retain the term `authorised person' within the description of persons authorised to have access to information obtained under the Tax Act, ie `an official or authorised person may . . . in the course of his duties in connection with the administration or enforcement of this act . . . communicate [tax return information] . . . to an official or authorised person . . . '. During the 1960s and 1970s a memorandum of understanding between the RCMP and Revenue Canada formed the basis of the arrangements by which the RCMP received information from Revenue. It was argued by the departments that since the RCMP was mandated to enforce all Federal statutes, of which the Tax Act is one, and since most of their enquiries would have some taxrelated aspect, then the requirements of s. 241 were satisfied.

Over time this practice of sharing information became more 'relaxed' to the point that there was less of a concern that the matter being exchanged from Revenue to the RCMP related to the Tax Act. This sharing of information was strongly criticised by the McDonald Commission, 1978.18 Perhaps most damaging was the presence of a memo dated 19th January, 1968 sent by an inspector to a chief superintendent acknowledging that the provision of information to the Security and Intelligence
Directorate by a source in the Department of National Revenue was a violation of the Income Tax Act and therefore they must not seek an opinion from the Department of Justice since:

`that opinion could only be that there was a contravention of the Act and receipt of such an opinion would place the Security and Intelligence Directorate in the position that if it continued with the practice, it would be "in contravention of a recent and explicit ruling from the legal officer of the Crown".'19

Gradually since the 1970s there has been an increasing significance placed on confidentiality by the courts.20 By 1980 s. 241 was assigned priority importance. MacKinnon ACJO of the Ontario Court of Appeal in Glover v Glover et al. (No. 1)21 stated:

'Section 241, in my view, is a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the Income Tax Act.'

Currently, there are exemptions to the confidentiality of the tax information once legal proceedings are under way and in certain other situations where disclosure of information from Revenue to a law enforcement agency may occur. However, there are few opportunities for the police to use taxpayer information for the purposes of detecting or investigating crimes.

Of particular interest is s. 462.48 which allows for the submission by the Attorney General of an application for a search warrant to a judge for the release of a taxpayer’s return information in circumstances where an investigation is under way and prior to the laying of an information or the preferring of an indictment in respect of specific criminal offences:

- a designated substance offence
- possession of property obtained by crime (offence against 354)
- laundering proceeds of crime (offence against 462.31)
- participation in criminal organisations (offence against 467.1).

(Note: there may be additional offences included as part of the new omnibus OC Bill currently working its way through the legislative process.)

These are the only types of criminal investigations that allow the police to apply for and obtain a warrant for the release of tax information for the purposes of investigating a crime. What then happens in the 'partnership' joint-force operations that involve Revenue Canada Special Investigations Unit (SI) officials and police officers?

According to Mr Ron Moore, Director of Special Investigations for Revenue Canada,22 the relationship between the SI and the RCMP is virtually 100 per cent one way. According to Mr Moore, the confidentiality requirements as set out in s. 241 are strictly adhered to. 'What's mine is mine and what's yours is mine' was how he described it. To emphasise, he explained that the interaction between the SI (Revenue) and the RCMP was directed solely towards the investigation of the Tax Act or other Acts as specified in s. 241. Any information that a police officer obtains as a result of the officer's involvement with the Revenue that leads the officer to suspect the existence for grounds for investigation or arrest for other criminal offences cannot be made use of by the RCMP either to serve as the basis for an investigation or in support of a charge.

Even when the police have a legislative right to request access to the tax information it may be denied. In Tyler v Canada (MNR)23 the RCMP requested information from the Revenue in accordance with s. 231.2(1)(a). The request was made while narcotics charges were outstanding against the accused. The request was denied. Speaking for the court, Judge Stone declared:

`As I see it, the communication of such compelled information to the police while the charges are outstanding, would deny to the appellant his right to silence contrary to the principles of fundamental justice.'
In addition to these restrictions, cases indicate that in no circumstances will taxpayer information be made available to civil proceedings. In a case in which a mother was trying to locate a taxpayer who had left the jurisdiction with the children from their marriage, the Supreme Court of Canada in Glover v Glover stated:

'Sympathetic though one is inclined to be ... the statutory provisions above-mentioned for nondisclosure, in connection with any legal proceedings Of a civil character, do not give any power to a court to qualify them nor do the exemptions set out in s. 241(4)[c] assist the appellant.' 24

INTERNATIONAL COMPARISONS

Peggy Mullens, Special Attache to Canada, US Treasury Bureau, Investigations and Enforcement, `US Consulate, Ottawa' 25 outlined some of the differences between Canada and the USA in terms of these confidentiality questions. For example, US Treasury officers, with knowledge of tax information, work hand in hand with other agencies in conducting their investigations. While the member of the non-tax agency may not have access to the tax document directly, they take part in the interviews and other aspects of the investigation and thereby share in the information learnt from all of the sources. The person under suspicion may be at the end charged simultaneously by the DEA for narcotics and other criminal offences as well as by the Treasury Department. The tax information comes forward to the trial where it can substantiate all of the diverse allegations against the accused. An alternative method by which the tax information becomes 'open' in the USA is through the Grand Jury process. Once a Grand Jury process is initiated all agencies that are involved may freely share their respective resources and information - in pursuit of the goal set out by the Grand Jury.

Of some contention is the perceived imbalance in the sharing of tax information between Canada and the USA. Under the MLAT agreement, Revenue Canada is entitled to access to tax information held by the US Treasury on a basis equal to that of a US law enforcement agency. In contrast, the US Treasury is not permitted access equal to that of the RCMP (the US Treasury does not appear to
be able to obtain a warrant for information concerning those criminal offences set out within s. 462.48).

According to the people who will be running the Canadian Financial Transactions and Reports Analysis Centre (FINTRAC), the existence of this centralised data collection and dissemination centre will not alter the confidentiality of the Revenue income tax information. The `basic fire-wall' will remain. However, following discussions and a study of the legislation, there are several outstanding questions about this legislation and its likely impact.

- FINTRAC can share with other foreign FIUs if their units have access to Revenue data on foreign citizens or Canadians abroad, will that information come to Canada?

- The legislation makes mention of sharing arrangements, access to `federal data bases', and triggering mechanisms that can broaden the scope of the `share-able' information. One might imagine that this legislation could lay the foundation for future legislative changes.

Australia

Australia provides another example where information collected for tax purposes is seen as fodder for wider criminal investigations. In a process resembling a tribunal rather than a court of inquiry, a panel of representatives from the tax department, police and other government branches consider the requests for disclosure of tax information and make a determination. Again, on examining the AUSTRAL (financial intelligence system), it is hard to imagine the flow of information working rationally with rigid barriers between the various recipients.

UK

It is of interest that the debate regarding the protection (or erosion) of income tax information is spreading. While the author thought this might be a situation unique to Canada, it appears that the issues of type and degree of confidentiality of the income tax records are occurring in many
jurisdictions. In the UK the current 2001 debates over the original draft of the Criminal Justice and Police Act raised many concerns that drive the Canadian sharing policies. Articles by the Chartered Institute of Taxation (CIOT) outline their concerns with sections of the omnibus-style legislation that were later removed prior to the Act receiving Royal Assent on 11th May, 2001.

The arguments presented by the CIOT regarding the need to maintain the privacy of tax information are similar to the Canadian position: that frank and full disclosure of revenue would be threatened if tax advisers could not assure their clients that the UK tax authorities would not pass the information along to other agencies within the UK or in other states. The response by Revenue was in part to say that the critics ought to ‘trust us to be fair’. The trust is seemingly not there!

The NCIS is the UK FIU unit and interviews with a couple of their spokespeople indicated that personal tax records could not be obtained without judicial authority and likewise bank statements from financial institutions could not be obtained. However, Customs and Excise and the Inland Revenue do have ‘legal gateways to exchange information’ for the protection of fraud and the ‘informal’ sharing of information is not impossible to imagine.

Colombia

In Colombia, one sees a similar semblance of confidentiality that fades somewhat upon closer inspection. While the National Directorate of Taxes and Customs (DIAN) cannot provide tax returns to the district attorney for use by the police, they can however disclose the information that is contained in the tax return. It was acknowledged in interviews that a large amount of information is ‘informally’ exchanged between the district attorney and the DIAN.

THE FUTURE

A longer list of countries would be likely to reveal a rhetoric of confidentiality with mechanisms formal and informal - to penetrate that secrecy. Articles such as FIUs in Action: 100 Cases from the Egmont Group are reminiscent of the early days with a minimum of the FATF. The challenge is therefore
to protect the privacy of individuals with a minimum of disadvantages to wider law enforcement considerations. Large-scale transnational financial crimes may be the most significant form of ‘organised crime’. While to these may or may not involve tax offences, the files may reveal evidence essential to an investigation. There may be more appropriate criteria for information sharing that still serves to disallow ‘fishing expeditions’. What is currently irrational is:

- the ‘principle’ that says that only certain categories of crimes override the need for confidentiality while other equally serious crimes can not be used to trigger the exemption

- a system the functions due in large part to informal information exchanges that ‘guide’ if not of direct use

- the confusion over the real objective of the current focus on tax records - local or international money laundering investigations would not garner this degree of international attention. The potential for massive tax evasion and capital flight would.

This historical look at confidentiality has indicated that there has not always been the same degree of ‘protection’ assigned to the information contained in our tax returns. The current protection may be also indicative of a view that tax offences - while worthy of investigation by Revenue - are not in the same category as ‘real’ criminal offences and hence the two streams of access and disclosure are justified. As more transnational crimes include tax evasion, manipulation and fraud the two streams must be seen to flow together.

As Brooks argues:

‘... there is a trump card that can be played in putting tax evasion on the same moral plane with theft of privately owned property. Those who attach greater moral significance to the theft of property than to tax evasion presumably assume that the rules that govern the market place or the private sphere are somewhat natural, or at least uncontentious and perhaps even inevitable, while those that govern the public sphere, including the tax system, are the result of political choices that are
imposed on those who disagree with them. This effort to categorise the background rules governing market place transactions differently from the rules imposed by legislative or regulatory bodies is incoherent. What economists often refer to as the self regulating, neutral and free marketplace is in fact comprised of legal rights and commercial exchanges that are created and regulated by a seamless web of rules, standards, distinctions and judgments that collectively constitute the rules of property, contract and tort law. None of these rules was ordained by God.
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Sidebar
New money laundering directive approved by European Parliament

Sidebar
The proposal to widen the scope of the EU’s proposed money laundering directive has been approved by the European Parliament, and the directive will be adopted as soon as agreement is forthcoming from the council.

Sidebar
The new directive will extend the current directive on money laundering by requiring member states to combat laundering of the proceeds of all serious crime (including fraud against the EU budget). Obligations under the current legislation apply only to the proceeds of drug offences. The current directive is limited to the financial sector, but will be extended to a series of non-financial activities and professions that are vulnerable to misuse by money launderers. Requirements relating to client identification, record keeping and the reporting of suspicious transactions will be extended to external accountants and auditors, real estate agents, notaries, lawyers, dealers in high value goods (such as precious stones and metals or works of art), auctioneers, and casinos.

Member states will have to implement the new directive within 18 months of its final adoption. The text of the approved directive by parliament on 13th November, 2001 was agreed in a conciliation procedure between the Parliament and the EU’s council of ministers.
References


(6) The Financial Action Task Force (FATF) is a body created in 1989 by the Group of 7 (G7) to address money laundering. Each year an annual report is produced. The 40 Recommendations made by the FATF serve as guidelines for the appropriate response to money laundering. This `consensus'orientated body has turned to `name and shame' techniques to encourage countries to adhere to their recommendations.

(7) `The Vulnerability of Private Banking to Money Laundering Activities', Testimony of Richard A. Small, the Federal Reserve Board, 10th November, 1999.


(10) Prepared with assistance from Professor Neil Brooks, Osgoode Hall Law School and a graduate assistant, Robert G. Johnston.


(13) Ibid. CTC 255, at 260 (SCC).

(14) Ship v R [1949], 8 CR 26, 95 CCC 143 (Que. CA).

(15) SC 1966-67, c. 47, s. 17 and SC 1966-67, c. 91, s. 22.

(17) Ibid. at p. 940.


(20) In 1982 the introduction of the Privacy Act and the Access to Information Act provided a statutory scheme of confidentiality to protect an individual's personal information in situations that, unlike the Tax Act, did not already contain provisions for confidentiality and disclosure.

(21) Glover v Glover et al. (No. 1) [1980] Ont. CA 29 OR (2d) 392, 113.

(22) Phone interview with Robert Johnston, 1999.


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