WHO'SWHOLEGAL

Discussion: Private Client 2013

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The International Who's Who of Private Client Lawyers has brought together **Daniel Paserman** of Gornitzky & Co and **Martin Rochwerg** of Miller Thomson to discuss levels of activity, increased disclosure between governments regarding the tax affairs of high net worth individuals and regulatory changes that impact this area.

Participants

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Who's Who Legal: *Which jurisdictions have been particularly active sources of work for you over the past year? Are there any jurisdictions which have emerged as attractive alternatives to the established markets for private wealth?*

Martin Rochwerg: Canada, the United States, the United Kingdom and other European jurisdictions have been active sources of work over the past year. We have also been engaged in work involving several jurisdictions in the Caribbean as well as in the Channel Islands. We are increasingly seeing clients interested and investing in emerging markets, including Latin America, China and elsewhere in Asia. However, established and well-known markets for private wealth have been the focus of our clients and our practice in 2012–2013.

Daniel Paserman: We have been active in multiple jurisdictions across the globe, including, inter alia, in Europe – Switzerland, Lichtenstein, Luxembourg, Cyprus, Belgium, Germany, the UK, Italy, France, Guernsey, Jersey and Ukraine; in North America – Canada, USA and Barbados; in Central/South America – Brazil, Venezuela, Mexico; Australia; in Asia – Israel, Turkey, Singapore, South Korea, China, Thailand, Russia and Kazakhstan; and in Africa - South Africa and Mauritius.

Historically, high net worth (HNW) individuals were typically tied to Switzerland and, to a certain extent, the UK and offshore jurisdictions such as Lichtenstein and Panama. However, with the recent global compliance issues and changing circumstances, whereby there has been greater global transparency and undeclared wealth is being tracked down, many HNW individuals and families have elected to voluntarily disclose their assets in their home countries and bring back their previously undisclosed funds. As a consequence, HNW individuals have also been exploring new jurisdictions such as Singapore, Hong Kong and UAE. Some argue that these jurisdictions may still offer certain banking secrecy advantages, at least regarding certain jurisdictions.

Who's Who Legal: *A major theme over the past year has been greater transparency and exchange of information between governments in relation to the tax affairs of high net worth individuals and families. Do you think that increased disclosure on an international scale will be an enduring trend, and do you think this will change the way clients approach wealth management?*

Martin Rochwerg: Recently, Canadian tax authorities have been pursuing a "Related Party Initiative" in relation to high net worth individuals, their families and their corporate and trust structures. As part of this initiative, tax authorities are issuing questionnaires to high net worth individuals and families in an effort to better understand their holdings, planning and structures, and to gauge and enforce tax compliance, as required. There has been little to no increase in corporate tax rates across Canadian jurisdictions in the past year and only some minor increases in personal tax rates. Canadian tax authorities are consequently relying on audit, enforcement and collections measures to ensure that tax revenue is received or remitted. Increased disclosure on an international scale and exchange of information agreements among governments therefore appear to be a lasting trend to assist tax authorities with present and future initiatives.

Daniel Paserman: I believe that the increased disclosure shall be an enduring trend and I expect that within a year a substantial portion of the world's undeclared fortune shall be declared. Furthermore, the leading banks in the world, including the Swiss banks, have adopted white money policies, which further limit the ability to maintain undeclared wealth. Once clients

comply and declare their funds, they may wish to conduct their banking affairs in their home jurisdictions, rather than in Switzerland and other previously attractive jurisdictions, which offered banking secrecy.

From the banks' perspective, this will require them, to a certain extent, to reinvent the advantages their services offer and provide clients with alternative advantages, such as high expertise, efficiency, strong infrastructure and IT services. I presume that this will also result in a decrease in the fees that banks will be able to charge clients, whereas at the same time, the costs entailed in such compliance shall increase.

Who's Who Legal: *Several practitioners have pointed to a rise in trusts and probate litigation, as challenges to the structure and validity of trusts occur with greater regularity. Is this something you have noticed in the jurisdictions in which you are active, and has it led to a more cautious approach from clients?*

Martin Rochwerg: The trust concept is treated quite differently under the common law than it is in jurisdictions which give more primacy to codification, contract or agency law. As a result, with globalisation, multi-jurisdictional families are encountering circumstances where there are conflicting expectations as to the obligations of trustees and the rights of beneficiaries. In this climate, it is only natural that parties to trusts, as well as adjudicators, have difficulty determining if trusts are being administered in compliance with the relevant law of trusts.

Recently, Canadian tax authorities have also pursued a trust audit initiative aimed at ensuring that domestic inter vivos trusts are properly constituted and compliant with income tax laws and regulations. An increased focus by tax authorities on reviewing trusts for compliance has led practitioners to impart a more cautious approach on their clients.

After much debate and consideration, new non-resident trust provisions were also enacted in June 2013. In general, these provisions deem a trust to be resident in Canada for tax purposes in cases involving residents of Canada who loan or transfer property to offshore trusts with resident Canadian beneficiaries. Last year, in *Fundy Settlement v Canada*, 2012 SCC 14, the Supreme Court of Canada also held that the corporate central place of management test applies in determining the jurisdiction of residence of offshore trusts. Canadian beneficiaries of otherwise offshore trusts must therefore be cautious of their level of involvement in trust decision-making to avoid the possibility of deemed residency.

Daniel Paserman: This is an interesting point. I think that, in the past, these structures were not frequently challenged. However, in recent years, due to the turmoil following the global financial crisis, the increase in disclosure and the lessening of banking secrecy, we are encountering more and more cases where these structures are being challenged. The challenges have been initiated by authorities around the world, but we have noticed that in certain cases the challenge comes from within the family. This of course has made clients much more cautious and they now exhibit a higher level of respect and adherence to the "guidelines" of such structures. We are also finding that people are making use of trusts less due to tax considerations and more due to reasons relating to succession and wealth transfer.

Who's Who Legal: *Governments worldwide have recently demonstrated a more stringent stance on tax collection and avoidance. Has this been reflected in legislative or regulatory changes in your jurisdiction and how have clients responded to such changes?*

Martin Rochwerg: In addition to the enactment of the non-resident trust rules discussed above, the Canadian government's 2013 Budget included measures aimed specifically at dealing with international tax evasion and compliance with Canadian tax laws as part of a more stringent stance on tax collection and avoidance. New measures include a requirement for certain financial intermediaries to report to tax authorities on electronic fund transfers of C$10,000 or more. A new and more comprehensive form T1135 has also been released, which requires Canadian taxpayers to provide more detailed information to Canadian tax authorities regarding their interests in foreign corporations, certain offshore trusts and foreign bank accounts if the total value of their specified foreign property in a given taxation year exceeds C$100,000. The new form T1135 reporting requirements more closely resemble US FBAR reporting obligations and are indicative of the Canadian government's stricter efforts to curb tax evasion and avoidance involving offshore jurisdictions.

Daniel Paserman: This has definitely been reflected in regulatory changes in Israel. In light of Israel's growing deficit and as part of the approval of Israel's 2013–2014 budget, on 30 July 2013, the Israeli government approved the Reform of Change in National Priorities (2013-2014 Legislative Amendments to Achieve Budgetary Goals) 5773-2013. This reform is intended to strengthen the enforcement of tax laws, minimise tax evasion, improve and optimise tax collection, improve information gathering and reporting, and fight against "black capital".

This new legislation has introduced a whole set of regulations in various areas of tax law which attempt to close various loopholes in the tax legislation and, at the same time, impose substantial disclosure requirements on taxpayers. The new legislation has also strengthened the sanctions against aggressive tax schemes. In anticipation and following the new legislation, clients are, on the one hand, making changes to existing structures in order to adapt to the new regulations and, on the other hand, they are more cautious in their tax planning and reporting positions.

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