Senate Finance Committee Hearing
"Offshore Tax Evasion: Stashing Cash Overseas"[1]
May 3, 2007

Statement for the Hearing Record

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1 http://www.senate.gov/~finance/sitepages/hearing050307.htm accessed 18-6-07

2 http://www.taxresearch.org.uk/Documents//RichardMurphycvJuly2006.pdf accessed 18-6-07

3 http://www.essex.ac.uk/afm/staff/sikka.shtm accessed 18-6-07

4 http://www.sussex.ac.uk/irp/profile17282.html accessed 18-6-07

5 http://www.lancs.ac.uk/fss/law/staff/picciotto.htm accessed 18-6-07

6 http://www.policyinnovations.org/innovators/people/data/07512 accessed 18-6-07

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8 http://www.taxjustice.net/cms/front_content.php?idcat=2 accessed 18-6-07

Jersey – still a tax haven

Chairman Baucus, Ranking Member Grassley, Members of the Committee, we are honoured to provide you with this written testimony on the subject of offshore tax evasion. This testimony is submitted in the light of Bills S. 396 and S. 681 and the testimonies submitted to the Committee at the hearing on the 3rd May 2007 and is made in response to the submissions made to you by Deputy Mike Torode, Chief Minister of the States of Guernsey on 17 May 2007 and in particular in response to the submission made to you by Senator Frank Walker, Chief Minister of Jersey, also on 17 May 2007.

What follows is a refutation of the claims made by those ministers with regard to the tax havens that they represent. We provide evidence, drawn from Jersey, that far from being compliant with the requirements of international taxation and other regulatory authorities to prevent the abuse of their territories for the purposes of tax evasion and other criminal activities they are in fact actively promulgating innovations that facilitate those activities.

The claims Jersey has made to your committee

In his written submission to your Committee Hearing entitled "Offshore Tax Evasion: Stashing Cash Overseas" on May 3, 2007[9] Senator Frank Walker, Chief Minister of Jersey said[11]:

> *Jersey is a long standing international finance centre providing a wide range of financial and professional services and in compliance with international standards.* ***It is no part of Jersey's policy to assist directly or indirectly the***

[9] http://www.senate.gov/~finance/sitepages/hearing050307.htm accessed 6-6-07

[11] http://www.gov.je/NR/rdonlyres/9265D0B9-7217-4C05-8052-642B5237E896/0/WrittenTestimonyoftheChiefMinister.pdf accessed 6-6-07

> ***evasion of taxes properly payable in other jurisdictions. Such business is actively discouraged.*** (Emphasis in the original).

In addition Senator Walker said that Jersey should not be considered a tax haven under the draft legislation noted above introduced into the US Senate because:

1. Jersey has obtained international recognition of its compliance with international standards, and of its cooperation in the pursuit of those engaged in financial crime, including fiscal crime.

2. Jersey is applying standards on a par and in some areas ahead of those in place in major OECD countries.

3. Jersey has entered into a tax information exchange agreement (TIEA) with the United States which is in accord with the OECD's model agreement on tax information exchange, and which agreement is being effectively implemented.

4. The Jersey authorities have developed good relationships with the US administration; not just on tax matters, but on financial crime matters generally.

5. It is important that the action taken by jurisdictions such as Jersey to comply with international standards and to engage in international cooperation should be recognised, and the good relationship that exists with the United States should not be damaged by unfair discriminatory legislation.

6. Jersey is keen to maintain and enhance the good relationship it has with the United States and will be pleased to extend that relationship to the Senate Committee if invited to do so.

The counter-claim

Our contention is that:

1. Jersey remains committed to conventional tax haven practices, with all that implies;

2. Jersey's compliance is with the form of international standards but not with the substance of the conduct that they expect;

3. Jersey's co-operation with the USA is not representative of its general approach to international issues;

4. Jersey is purposefully creating structures and procedures for use by its financial services industry that will result in information not being available for exchange under internationally agreed arrangements, so nullifying their effect;

The evidence

The evidence presented here is not meant to be comprehensive. What is offered is indicative of patterns of behaviour that support our view that Jersey and tax havens like it remain committed to the maintenance of the key elements which maintain them as tax havens, namely[12]:

1. No or nominal taxation on the relevant income.

2. Lack of effective exchange of information for tax purposes.

3. Lack of transparency of the tax or regulatory regime (e.g. excessive banking secrecy; inadequate access to beneficial ownership information, etc.) which may limit the availability of, or the access to, information when it is needed for tax examinations or investigations.

4. Lack of a requirement that activities have economic substance (e.g. the existence of shell companies).

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[12] Based on the testimony of Jeffrey Owens of the OECD on 3 May 2007 http://www.senate.gov/~finance/hearings/testimony/2007test/050307testjo.pdf accessed 6-6-07

No or nominal taxation

Traditionally Jersey charged no tax at all on companies registered or trading in that Island if those companies were considered not resident there or were not owned by Jersey resident persons. The rules used to determine residence did not comply with international norms and were biased towards treating companies as not resident even if their sole place of activity was Jersey.

This was considered an artificial 'ring fence' under the terms of the EU Code of Conduct on Business Taxation published in 1998[13] and as such the UK required Jersey to change these laws.

After several false starts, one of which was highlighted by an author of this paper[14] Jersey is now introducing new tax laws that it claims comply with the requirements of the EU. These laws do the following and have the noted consequences:

1. As from 2009 Jersey will have a notional 0% tax rate for all corporations incorporated or resident in the Island irrespective of ownership by a Jersey resident person or not, with the sole exception of a special rate of tax of 10% for specified financial services companies including banking, trust company services and some fund functionary activities[15].

   This will result in a loss of tax revenue of between £100 million and £120 million per annum[16]. This is significant. Jersey's annual budget for spending in 2007 is £516 million[17]. It has traditionally run a balanced budget. The reason for the

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[13] http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm accessed 6-6-07

[14] http://www.richard.murphy.dial.pipex.com/4180-12935-2962005.pdf#search=%22states%20of%20jersey%20shadow%20scrutiny%20committee%20richard%20murphy%22 accessed 6-6-07

[15] http://www.gov.je/NR/rdonlyres/37E79D78-637F-4C8E-A0CE-06DEF0B117B4/0/IncomeTaxAmendment28.pdf accessed 7-6-07

[16] http://www.taxresearch.org.uk/Blog/2006/10/10/jersey-gets-it-rong-again/ accessed 6-6-07

[17] http://www.statesassembly.gov.je/documents/propositions/28169-43311-25102006.htm accessed 6-6-07

loss is that almost half of Jersey's tax revenues have come from taxes on corporations, charged in large part on the financial services sector. At least half this income will be lost.

Such is Jersey's commitment to no or nominal taxation that it faces the risk of running a budget deficit of at least 22% of States' spending rather than charge tax on companies using the Island for tax haven purposes. With national reserves running at little more than £500 million this is unsustainable. At present the deficit issue appears not to have been addressed by policy makers. All the politicians responsible for this policy, including Senator Frank Walker, the Chief Minister, have indicated that they will retire at the next election at which they are due to stand for office.

2. The claim that all companies will pay tax at zero per cent in future is not true. Companies owned by Jersey residents will still be subject to a tax charge on their profits. This will be charged in one of two ways. If the company distributes at least 60% of its taxable (not accounting) profits in a year to its Jersey resident owners then the tax they pay on that income will be deemed sufficient to settle the tax liability of the company, meaning that these corporations will now enjoy an effective tax rate of 12% as opposed to the normal income tax rate in the Island of 20%. This is bound to increase the tax losses Jersey will suffer.

   If the companies Jersey resident's own do not distribute the required 60% of their taxable profits then the shareholder is required to declare the difference between the dividend they actually receive and 60% of taxable profits as a deemed distribution to them on which deemed distribution they are then taxed at 20%. If however the shareholder says they cannot pay this tax as they have not received the income to which it relates then the company can be assessed and is required to pay for the shareholder.

   These rules clearly make a distinction between companies owned by Jersey resident people, which remain taxable in Jersey and those owned by non-residents, which are not taxable. Thus the ring fence that is designed to ensure only Jersey residents pay tax on corporate profits remains in the Jersey tax system. This means that the system is not compliant with the requirements of the EU Code of Conduct on Business Taxation. Accordingly the claim made by Senator Walker to the US Senate dated 17 May that "All these changes are compliant with the EU Code of Conduct Group on Business Taxation requirements in respect of the removal of harmful tax practices" is incorrect. Indeed, this has to be the case: the EU does not give prior clearance on arrangements connected with the Code as it only considers them after they have become law. It has not had a chance to do this in respect of these changes to Jersey's taxation system because they are not yet operative.

Accordingly the claimed compliance with international standards in this area does not exist.

3. In an attempt to recover tax lost as a result of introducing a zero per cent tax on corporate profits Jersey is introducing a broad-based (GST) Goods and Services Tax at a rate of three per cent[18]. This is expected to raise approximately £40 - £45 million[19] from the local population, but will not by any means close the 'tax gap' that Jersey will suffer. The tax is so broad based that many items not usually charged to such taxes are liable in Jersey e.g. medicines.

   This tax contains a curious provision with regard to the financial services sector, to which the term 'broad base' does not seem to apply. In particular, GST will not be charged on services provided to "international services entities"[20]. This term will include the majority of companies, trusts and partnerships that form the international client base of the Island's finance industry. This will be the case even though these special purpose vehicles are unlikely to have a place of residence anywhere else in the world and would otherwise be considered to be located in Jersey for GST purposes. The administrators of these entities may pay £50 per entity pre annum to be given the status of "international services" clients[21]. This creates a 'ring fence' from GST for these entities and perpetuates the myth that these entities that only have existence in Jersey are in fact stateless and exist 'elsewhere' without question arising as to where that other place might be. Jersey law is, in this sense, a work of fiction.

[18] http://www.gov.je/NR/rdonlyres/19A91841-E843-4B5A-A2F1-E03228420499/0/JMattachment110507GoodsandServicesTaxJerseyLaw200.pdf accessed 8-6-07

[19] http://www.crownagents.co.uk/projects.asp?step=2&contentID=279&sectorID=10&serviceID=10&regionID=1 accessed 8-6-07

[20] http://www.gov.je/NR/rdonlyres/19A91841-E843-4B5A-A2F1-E03228420499/0/JMattachment110507GoodsandServicesTaxJerseyLaw200.pdf Part 12 accessed 8-6-07

[21] http://www.volaw.com/pg470.htm accessed 8-6-07

In addition it is normal for finance companies to be considered ‘exempt’ from charging GST in Europe. This does however mean that they cannot recover any of the GST charged to them. This will not be the case in Jersey. As a consultation paper issued on GST and the finance industry in Jersey says[22]:

> *Many firms conducting banking business, trust company business, investment business and fund services business primarily service international clients. In these circumstances a standard [GST] treatment would create inordinate compliance and administrative burdens and where appropriate a simplified scheme will therefore be available. Under these schemes a straightforward procedure will determine a fair and reasonable estimate of GST on expenditure that cannot be recovered.(Emphasis added)*

The implication is clear. Not only will these companies not charge GST, they will recover much of what they will be charged. In that case this is another ring fence within the GST since it creates a standard for this tax incompatible with international taxation norms. This represents a bias to no or nominal rates of tax with regard to tax haven activities, which local residents will pay increased taxation to support. In that case the issue of abuse that the EU Code of Conduct sought to address has not been removed, it has simply been moved from direct taxation that the Code addressed to an indirect one, which it did not address.

4. In January 2006 Jersey introduced a new law that effectively capped the tax paid by its tax exile residents. Section 135a of the Income Tax (Jersey) Law 1961 (as amended) provided that persons granted what is called 1(1)(k) housing consent (which basically means they can live in Jersey without having to work there provided that they buy a house worth at least £1 million and make a local tax payment) are offered special exemption from Jersey’s tax law that requires a resident person to pay tax on their world wide income.[23] This concession, about which there appears to be a conspiracy of silence on the States of Jersey web site and amongst the professional advisers on the Island, provides that a person

[22] http://www.gov.je/NR/rdonlyres/36823EE0-4D32-4079-A19E-E1E6E1585D7E/0/JM170506attachment8433gstpageswebrev2.pdf page 2 accessed 8-6-07

[23] http://www.gov.je/TreasuryResources/IncomeTax/IncomeTaxLegislation/Income+Tax+(Jersey)+Law+1961/ accessed 8-6-07

enjoying such status has a limit on their tax liability calculated by reducing the tax rate to 1% on non-Jersey income that exceeds a statutory limit. As a result all Jersey source income is taxed at 20%. The first £1 million of foreign source income is taxed at 20%. The next £500,000 of foreign source income is taxed at 10% and all foreign source income over £1.5 million is taxed at 1%[24]. Since it is easy to arrange that almost any financial income be foreign source it is unlikely that a person enjoying this concession will have much if any Jersey income (by definition they will not work in Jersey). As such this little known piece of legislation means that wealthy residents not of Jersey origin (by definition) have an effective tax cap in Jersey of little more than £250,000. Admittedly, this is not 'no taxation' but if the individual had an income of, say, £10 million in a year from non-Jersey sources then the tax due would be £335,000, an effective tax rate of just 3.35%, and that can fairly be called nominal.

In combination it is clear that, except with regard to its own resident population, Jersey has a very clear policy of charging no or nominal taxation. Its new taxes have not been internationally approved. They use means of calculation and assessment that do not correspond with international norms. They maintain the fiction that special purpose entities created by the Jersey financial services industry are not resident in the Island even though they are registered, managed and controlled and can only undertake their transactions within its domain. Ring fences, which are widely seen as a harmful tax practice, remain in its taxation legislation for companies, individuals and sales taxes.

In summary, Jersey remains committed to conventional tax haven practices with regard to taxation and any cooperation it has offered in this respect to international agencies and authorities is notional at best.

Lack of transparency of the tax or regulatory regime

This issue is considered next, although out of order according to the definition of the characteristics of a tax haven as noted above.

Jersey is not, and has never been committed to transparency in its taxation and regulatory regimes. The following examples are indication of this:

[24] http://www.gov.im/lib/docs/treasury/incometax//taxcap.pdf accessed 8-6-07

1. Jersey companies have to reveal the names of their shareholders, but these can be nominees[25].
2. Jersey companies have to disclose their registered office, but in the case of any company that is likely to be of any interest to tax authorities it will be that of a lawyer, accountant or trust company.
3. No other information need be filed on record by a Jersey company.
4. Jersey requires that the accounts of companies registered there be audited but there is no way of knowing if this requirement is complied with since the accounts are not on public record.
5. There is no register of trusts in Jersey. No one has any idea how many trusts there are.

All of this is typical of a tax haven. In effect no public information of any sort at all is available with regard to the entities registered in the Island. Secrecy remains a hallmark of Jersey's financial services industry and there appears no prospect that this will change.

Information exchange does, however, use different data. This involves the data that government and regulated parties operating in the financial services sector collect. A review of this whole sector would be lengthy and unproductive. The report of the Bureau of International Narcotics and Law Enforcement Affairs of the US State Department published March 2007[26] said:

> *Jersey's main anti-money laundering laws are the Drug Trafficking Offences (Jersey) Law of 1988, which criminalizes money laundering related to narcotics trafficking, and the Proceeds of Crime (Jersey) Law, 1999, which broadens the predicate offences for money laundering to all offences punishable by at least one year in prison. The Prevention of Terrorism (Jersey) Law 1996, which criminalizes money laundering related to terrorist activity, was replaced by the Terrorism (Jersey) Law 2002 that came into force in January 2003. The Terrorism (Jersey) Law 2002 is a response to the events of September 11, 2001, and enhances the powers of BOJ authorities to investigate terrorist offences, to*

[25] When undertaking research on the ownership of a major UK group an author of this paper discovered it was owned by two Jersey nominee companies. Upon investigation it was discovered that these two companies owned each other. There was, therefore, no apparent beneficial owner.

[26] http://www.state.gov/p/inl/rls/nrcrpt/2007/vol2/html/80887.htm accessed 8-6-07

cooperate with law enforcement agencies in other jurisdictions, and to seize assets. Jersey passed the Corruption Law 2005 in alignment with the Council of Europe Criminal Law Convention on Corruption. Although the law was registered in May 2006, by the end of 2006 it had not yet come into force.

In broad terms, the Proceeds of Crime (Jersey) Law, 1999 implemented the FATF's first 40 recommendations[27] and the Terrorism (Jersey) Law 2002 its later nine recommendations[28]. In effect, Jersey put into place the legislation required of it, although it has yet to implement the changes required by the EU's Third Money Laundering Directive or the FATF recommendations on which it is based, but is now consulting on how to do so.

This combination of arrangements gave rise to this comment from the Bureau of International Narcotics and Law Enforcement Affairs:

The International Monetary Fund (IMF) conducted an assessment of the anti-money laundering regime of Jersey in October 2003. The IMF team found Jersey's Financial Services Commission (JFSC), the financial services regulator, to be in compliance with international standards, but provided recommendations for improvement.

These concerns are reflected in this summary to their report:

The Bailiwick of Jersey has established an anti-money laundering program that in some instances exceeds international standards, and addresses its particular vulnerabilities to money laundering. However, Jersey should establish reporting requirements for the cross-border transportation of currency and monetary instruments, and set penalties for violations. Jersey should also take steps to force its obligated entities to obtain verification documents for customers preceding the 1999 requirements. The BOJ should introduce civil asset forfeiture, and implement its new corruption law. Jersey should also ensure that supervisory

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[27] http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html accessed 8-6-07

[28] http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html accessed 8-6-07

authorities exist to apply standards and regulations to its port activity and "exempt companies" that are identical to those used in the rest of the jurisdiction. Jersey should take steps toward a more proactive role in fighting terrorism financing by circulating the UNSCR 1267 list as well as other lists, instead of relying on the entities to research names through online public sources. Jersey should continue to demonstrate its commitment to fighting financial crime by enhancing its anti-money laundering/counterterrorist financing regime in these areas of vulnerability.

Jersey uses the IMF report to justify the claim that it is well regulated. There are, however serious doubts about whether that is actually the case. In addition, it would appear that Jersey is going out of its way to reduce the quality of the regulation it imposes upon the financial services sector in the Island. These issues will be dealt with in turn.

Problems with the current systems

Firstly, as the Bureau notes:

Jersey should also ensure that supervisory authorities exist to apply standards and regulations to its port activity and "exempt companies" that are identical to those used in the rest of the jurisdiction.

The implication of this is quite clear. Jersey is operating a dual standard, one part of which relates to its domestic affairs, the second part of which relates to the offshore activities that are in practice located in its domain even if they are, using the perverse logic of Jersey law considered to be located elsewhere[29]. It is, of course, the offshore issue that is of most importance in the case of Jersey. Its financial service industry exists to service this sector and not the domestic market, which most certainly could not otherwise support the 50% of GDP generated by this activity[30]. Failure to address this sector properly represents a major weakness in the Jersey system of regulation.

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[29] For a discussion of this issue see pages 11 -1 3 of http://www.richard.murphy.dial.pipex.com/4180-12935-2962005.pdf accessed 8-6-07

[30] https://www.cia.gov/library/publications/the-world-factbook/geos/je.html accessed 8-6-07

So too does the fact that the Jersey system of regulation might exist but appears not to be used. The Jersey police annual report for 2006[31] included a section on financial crime. Appendix 3 to that report [32] suggested that just 110 financial crimes had been reported in the year. Not one related to criminal money laundering. In the circumstances the claim in the report that the Jersey police have 'a reputation for high quality financial crime investigation' seems unfounded. The same report also noted:

> In 2003, independent inspectors from the International Monetary Fund stated that *'Current staff levels at the JFCU are less than adequate to effectively implement aggressive investigations into money laundering and financing of terrorism in the Island.'*

In 2007 it was reported in the *Jersey Evening Post* that[33]:

> *The last IMF inspection did challenge whether the States were putting enough investment into financial crimes investigation, but there has been no additional investment as a result. What we have been able to do is use money from some vacant posts to keep that part of the operation running, but we might not have those vacant posts in 2007. Meeting international commitments should not have to be at the expense of catching burglars. If Jersey is to pass the next IMF inspection there will have to be some evidence of investment.*

As the head of Jersey's police was quoted as saying[34]:

> *Jersey is falling behind other jurisdictions in developing its financial crime laws*

This is a different picture from that painted by Senator Walker in his report to the US Senate. This is perhaps unsurprising. It would appear that the Island does not want to recognise that financial crime might take place. As the police report notes:

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31 http://www.gov.je/HomeAffairs/Police/Annual+Report+for+States+of+Jersey+Police+2006.htm accessed 8-6-07

32 http://www.taxresearch.org.uk/Documents/StatesofJerseyPoliceAnnualReport2006.pdf accessed 8-6-07

33 Quoted at http://www.taxresearch.org.uk/Blog/2007/01/05/jersey-not-tackling-financial-crime/ accessed 8-6-07

34 ibid

JFCU received 1,034 suspicious activity reports in 2006, a figure slightly down on the 1,162 shown for 2005. In 2006 the JFCU received 663 requests for assistance, an identical number to the 2005 figure. The volume of requests from overseas jurisdictions increased by 8.6% to 427 requests, which appears to be a growing trend year on year.

This means just 603 suspicious activity reports were made locally in the year. Since these can relate to a wide range of activities, as noted in Appendix 3 to the report, noted above, and none gave rise to what was considered notification of a money laundering crime it is reasonable to assume that almost none of these suspicious activity reports related to money laundering of the type of concern here.

It could be concluded that this means that no such crimes do occur. But in a financial services industry managing more than £460 billion[35] this seems implausible. Much more plausible is the possibility that Jersey financial institutions are loath to file suspicious activity reports with regard to their concerns. Indeed, this must be the case for most of them. There are 46 banks, 1,157 collective funds, 175 insurance businesses[36] and over 80 trust companies[37] on the Island. There are also lawyers and accountants to consider. The vast majority of these must never have submitted a suspicious activity report.

The evidence is clear: whatever paperwork is in place a commitment to use it is not present either within the States itself, as indicated by its failure to resource its financial crimes unit, or by the reluctance of the industry to recognise that such crime exists and to report it.

Developing issues

There is in addition a developing agenda that must be explored. This is the deliberate policy of the States of Jersey to reduce transparency within its regulatory environment and hence to reduce the information it holds that might be exchanged with those

35 http://www.jerseyfinance.je/_support/uploadedFiles/Quarterly%20Report%20for%20Period%20ended%2031st%20December%202006%20-%20Final.pdf accessed 8-6-07

36 ibid

37 http://www.jatco.org/default.asp accessed 8-6-07

making enquiry of it. At the same time, it appears to be creating opportunities for abuse within its financial services sector. These issues are explored in turn:

a. The EU Savings Directive

Jersey has refused to follow the UK and the vast majority of European Union states in applying the provisions of the European Union Savings Directive by disclosing information on interest paid to persons not resident in Jersey to tax authorities in the EU countries in which they are resident (this arrangement does not apply outside the EU and certain dependent territories, including the Channel Islands). In making this choice Jersey opted to facilitate continuing tax evasion by large numbers of people who had placed their funds in the Island precisely because they did not want information on the existence of their bank accounts or the interest paid on them to be disclosed to their domestic tax authority.

If Jersey really meant, as Senator Walker claimed in his evidence submitted to you, that “it is no part of Jersey’s policy to assist directly or indirectly the evasion of taxes properly payable in other jurisdictions” and that “such business is actively discouraged” then the EU Savings Directive provided a perfect opportunity to demonstrate that fact. If Jersey had opted for disclosure to be made in respect of all relevant accounts maintained with Island banks there would have been no doubt that all those evading tax would have moved their funds elsewhere, straight away. The business Jersey did not want would then have gone. But that option was not chosen. The only obvious explanation is that Jersey does want this business.

Since adoption of the EU Savings Directive the UK’s HM Revenue & Customs has succeeded in securing information on bank accounts maintained by the five leading UK high street banks through their Jersey, Guernsey, Isle of Man and Irish branches on behalf of persons resident in the UK. This was not done with the cooperation of the authorities in those tax havens. It was secured because the banks in question processed the data relating to those branches in the UK and HM Revenue & Customs exploited this fact to secure the information.

The result is that more than 400,000 letters have been sent to persons who have such accounts[38]. This is not small scale activity. This is systemic use of offshore banking by

[38] http://business.timesonline.co.uk/tol/business/money/tax/article1875552.ece accessed 8-6-07

UK based people. That can only have happened if the activity was encouraged, as indeed it is by the banks in question. This has been noticed by the Director General of HM Revenue & Customs in the UK, who has suggested he may wish to question their conduct in doing so[39]. The amount of tax likely to be recovered is not yet known. HM Revenue & Customs suggest £1 billion. Some accountants suggest it may be five times that sum[40].

What all the evidence suggests is that Jersey knew it had good reason not to disclose details of the bank accounts held by UK resident persons to UK tax authorities and its action in doing so was one of purposeful non-cooperation.

b. Tax reforms

There is a curious by-product of Jersey's tax reforms with regard to companies. If a company has no tax liability it need not submit a tax return. In practice 'exempt' Jersey companies have enjoyed this facility for many years, and nor do they have to file accounts with the States of Jersey[41]. Since Jersey clearly wants its new arrangements to replicate the old as far as possible Malcolm Campbell, Comptroller of Income Tax on the island has said that under the new regime zero per cent companies will only re required to submit a simplified tax return[42]. In practice 'simplified' is thought to mean little more than filing confirmation that the company exists, does not undertake a chargeable trade and confirmation of whether or not it has Jersey resident tax payers. This will, technically, be all that is required to ensure that the Comptroller can collect the information needed to ensure Jersey resident taxpayers do declare their 'personal' tax liabilities due from the company. The company itself will no longer need to file its accounts with the Comptroller, and nor will it need to file tax return data. The data on its affairs will be submitted, if necessary, by its Jersey resident shareholders.

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39 ibid

40 http://www.accountancyage.com/accountancyage/news/2187922/hmrc-reveals-tax-amnesty accessed 8-6-07

41 http://www.offshore-formations.co.uk/offshore_company_formations/offshore_formations_jersey.htm accessed 8-6-07

42 http://www.thisisjersey.com/finance2006/showfir.pl?ArticleID=000017 accessed 8-6-07

This might seem an innocuous development. The practical consequence is, however, significant. Jersey will no longer receive any accounting or tax information from most companies incorporated in the island. This will mean that it will not have that information to exchange.

Further changes in the law will facilitate this change. First will be a change in the law that will allow a Jersey company to be more easily considered resident in a territory other than Jersey[43]. If approved this law will mean that these companies will not have to supply information to the Jersey Comptroller of Income Taxes.

Second, under changes in money laundering regulations now proposed the disclosure of the beneficial ownership of a new Jersey company to the Island's authorities (at one time the Comptroller of Income Taxes, subsequently the Jersey Financial Services Commission) before the company can be incorporated (an arrangement which received strong approval in the Edward's Report)[44] is to be scrapped. The States of Jersey will no longer require this information, relying solely on the financial services sector's assurance that they 'know their client'. This is marked retrograde step with regard to regulation of companies in the Island.

In combination these changes mean that the information available for exchange about corporations registered in the Island held by the States of Jersey will be markedly reduced in future and as such it is likely that whatever information exchange arrangements might be in place the actual information for exchange is much less likely to be available.

c. Trust reforms

Jersey trust law was substantially revised in 2006[45]. The principle change was the introduction of statutory provisions for reserved powers for trust settlors. This change means that a settlor of a Jersey trust may now reserve certain powers for themselves

[43] http://www.gov.je/NR/rdonlyres/7A8C11C5-F9F4-48AC-9BF3-FB8699D7DCD8/0/IncomeTaxAmendment27.pdf accessed 8-6-07

[44] Para 10.6.2 http://www.archive.official-documents.co.uk/document/cm41/4109/a-chap10.htm accessed 8-6-07

[45] http://www.gov.je/StatesGreffe/MinisterialDecision/EconomicDevelopment/2006/Trusts+Amendment+no+4+law.htm accessed 18-6-07

that are specified in the law, including the grant of a beneficial interest in the trust property without affecting the validity of the trust. Included amongst the powers that a settlor may reserve are:

- The power to amend or revoke the trust;
- To appoint new trustees and to remove trustees;
- To appoint or remove an investment manager or investment adviser;
- To give directions to the trustee in connection with the purchase, retention or sale of trust property;
- To give directions to the trustee for the distribution of trust property; and
- To restrict the exercise by the trustee of some of its powers or discretions.

As a Jersey trust company has said[46]:

> *In a nutshell, these provisions allow the settlor of a trust to direct the trustee in the exercise of a range of powers*

As the same firms says[47]:

> *In summary, these wide-ranging changes to the Trusts (Jersey) Law are expected to maintain Jersey's pre-eminent position as a most desirable jurisdiction in which to establish a trust.*

The importance of these changes is hard to understate. In common law (which originated in England) a trust usually requires four participants or it fails:

1. A **settlor** who irrevocably gifts the asset into trust;
2. A **trustee** who legally owns the trust property but does not have beneficial entitlement to it, although they may be paid a fee for their services;
3. At least two **beneficiaries** with differing claims on the assets held by the trust. These persons need not be named in which case the trust is considered discretionary. Only one beneficiary is needed if the asset is held for a minor.

What is also necessary is that:

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[46] http://www.volaw.com/pg605.htm accessed 8-6-7

[47] ibid

1. The trust cannot be revoked. If it can be there is no gift of the trust property, it is merely loaned;
2. The settlor cannot be the trustee. If the settlor is the trustee they have not put the asset into trust;
3. The trustee cannot benefit from the trust or the trust property was gifted to them, and not for the benefit of others;
4. The beneficiaries cannot include the settlor or the settlor has not gifted the asset as they retain the benefit of owning it.

If these conditions fail, so does the trust (minor points excepted that do not need consideration here). In Jersey all these conditions can now fail:

1. The trust can now be revoked;
2. The settlor can order the trustee what to do: as such the settlor is in effect the trustee, the latter acting as mere nominee for the settlor;
3. The settlor can order the distribution of the trust person to someone of their choosing. That could be themselves. They are, therefore always potential beneficiaries of the trust;
4. Whatever the trust deed now say application can be made to the Royal Court in Jersey to invoke these powers.

The consequences are obvious. There is now no such things as a Jersey trust. There are only sham trusts in Jersey. A sham trust has been defined by Lord Justice Diplock as:

> *"if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."*[48]

Admittedly, it has been argued[49] that:

> *An intention only on behalf of the settlor to deceive third parties, a trustee who is found to have exercised its discretion but virtually always done as the*

[48] Snook v London and West Riding Investments Limited [1967] 2 QB 786 at 802. quoted at http://www.mondaq.com/article.asp?articleid=43332 accessed 8-6-07

[49] http://www.mondaq.com/article.asp?articleid=43332 accessed 8-6-07

settlor/beneficiary asks, or a settlor who has reserved a number of powers in the trust deed for himself in the hope of controlling the trustee, will not be enough to satisfy the current sham threshold.

For a sham trust claim to succeed there must be a common intention of both the settlor and the trustees that the trust assets should be held otherwise than as set out in the trust deed which they both executed and that both the settlor and the trustee had a common intention to mislead third parties by giving a false impression of the position. A trustee will have the necessary intention if he goes along with the settlor "neither knowing or caring what he is signing (i.e. who is reckless)". The time for ascertaining such intention is at the time of the creation of the trust, or, if assets are subsequently added, at the time the assets are added. Conduct of the trustees subsequent to the creation of the trust is however admissible in evidence, from which inferences can be drawn as to intention.

This argument has been recognised in Jersey law[50].

In the USA a sham trust has been more succinctly defined by the IRS as:

Generally used by the courts to describe an abusive trust that serves no legitimate purpose and lacks economic substance. The trust is disregarded for tax purposes, and all income and expenses are assigned to the true owner of the activity.[51]

This is important in the context of the correspondence relating to the creation of Jersey's new trust laws that was sent, apparently in error, to the Observer newspaper in the UK who then supplied it to an author of this paper. The full text of that correspondence is available[52]. That correspondence was between senior ministers and civil servants in Jersey, including its Comptroller of Income Tax. One participant (who helped design the change in the trust law) said:

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50 See http://www.jerseylegalinfo.je/Publications/jerseylawreview/feb04/JLR0402_Hayton.aspx accessed 8-6-07

51 http://www.irs.gov/businesses/small/article/0,,id=106554,00.html accessed 8-6-07

52 See http://www.taxresearch.org.uk/Documents/JerseyMail0906.pdf accessed 8-6-07

The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out. Currently, it is common for assets such as shares in a family company to be placed in trust, but for the settlor to wish to retain control over how the company is operated. Or an investment portfolio may be placed in trust, but the settlor may wish to manage the investments. In such circumstances, the settlor has two choices.

The first is to use a Jersey trust and through very careful drafting, define precisely the limitations of the trustees' responsibilities. The power of the trustees to replace a director or investment advisor could be limited, for example. The problem with this is that it requires careful drafting and it is uncertain whether the trustee has an overriding duty to protect trust assets. In other words, if the company or assets start performing badly, is the trustee bound to apply to court for an Order to preserve trust assets? Also, if the discretion of the trustee is fettered, there is a risk that the trust could subsequently be attacked as a sham. For an international client, these are reasons to not use a Jersey trust.

The second alternative is to simply establish a trust in one of the many jurisdictions that allow a settlor to retain stated powers. To use your example, if a Jersey person wishes to retain significant control of his assets, he could simply place them in a Cayman or BVI law governed trust. This need not have Cayman or BVI trustees – a Guernsey trustee could easily do the job.

I imagine that a large number of wealthy people all over the world (including Jersey) do just the thing you fear in your e-mail – place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled up income tax free. If 0/10 is implemented with look-through provisions, for example, I would expect many wealthy people who might own a private Jersey investment company to simply move the assets to a company in another jurisdiction, place the shares of that company in a trust, and let the assets roll up.

So practically, the changes will not make it any easier to avoid tax. What they will do is allow Jersey to compete more effectively for international work, where wealthy families will often wish to place assets in a trust structure and yet retain certain control over the management of the trust assets. The driving reason for doing this will not usually be tax planning: a settlor may live in a jurisdiction that is politically unstable, or where there are forced heirship restrictions, or may simply wish to place his or her assets in a vehicle that would benefit his or her family in the event of any subsequent personal bankruptcy. Most often, it will be *because the settlor is self-made and thinks he can manage his assets better than any professional.*

The key issue remains, as always, that while it is easy to tax people when they spend, and fairly straightforward to tax people on what they earn, any attempt to tax people on unearned income or capital gains is likely to lead to those who can afford it seeking expert advice on how to structure their wealth in order to minimise their tax liability. The tax burden, as with inheritance tax in the UK, will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time: if you have £10million you can afford to lock £9m away for a rainy day, whereas if you have £1m you can't.

As Jersey is squarely pitching itself at the expert/sophisticated/ultra-high net worth end of the market, we need settlor reserved powers in order to offer an attractive product to international clients. However, other jurisdictions have been offering this product for years and I imagine that any wealthy Jersey resident minded to do so has been taking advantage of these products for years.

Hope that assists.

Paul

It is fascinating to note that the Comptroller of Income Tax was alarmed at this legislative change, saying in two separate parts of the correspondence:

On the Trusts Law change I would not want the AG to be blamed for this at all......he just brought it to my attention .... and on the face of it, if the settlor has a new power to instruct the trustees of a trust he has settled - rather than having a 'letter of wishes' as in the past - on the assets / property (sic) in the trust, then, is it not possible for a Jersey resident to settle assets / property in such a Jersey trust then appoint, say, Guernsey resident trustees, thereby achieving a 'no tax' situation in both jurisdictions and, after several years, he - the settlor - becomes non resident in Jersey and then instructs the Guernsey trustees as he wishes re the disposition of the assets in the trust, ie, he gets the assets and income diverted for his own use?? Or some similar structure? Or am I worrying without cause about this?

And:

Thanks.....you have confirmed my fears! ..... and I am concerned about your view in para. 4 re 0 / 10 implementation.....as it need not necessarily be wealthy *people who might do this but also the middle classes.....because if this does happen there could be significant tax leakage.*

It is very rare to get such an insight into the real thinking of those who run tax haven administrations and several points should be noted:

1. It was recognised that current practice amongst Jersey professional people did not match the requirements of the law. In practice the discretion of trustees was being fettered, and this might be seen as a sham. Rather than attack the malpractice, Jersey officials seem to have taken the view that since the abuse was commonplace they should legitimise it. In other words, they knowingly created what are in effect sham trusts.

2. They did this because they know that "a large number of wealthy people all over the world …. place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled up income tax free". In other words it seems that those writing these mails:

    a. Acknowledged that this is the intention of the parties to some trusts at the outset and that there is connivance in this respect between settlors and trustees. As the legal decisions noted above make clear, this is a necessary condition for a sham trust to exist;
    b. Knew that this action is fraudulent i.e. that the statements the 'settlor' makes are untrue and therefore constitute tax evasion because they recognise that it is always the intention of the parties to eventually unwind the trust and have the trust property returned to the settlor tax free;
    c. Knew that they were creating an arrangement to facilitate this activity none the less;
    d. Did so whilst acknowledging that this might harm the tax base of Jersey. They appeared quite indifferent to the fate of other countries in this respect;
    e. Knew that this would be exploited by the rich alone. As they say, "The tax burden …. will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time: if you have £10million you can afford to lock

£9m away for a rainy day, whereas if you have £1m you can't". This market they clearly call that for the "expert/sophisticated/ultra-high net worth end of the market".

f. Think that this market requires such services. As they say "we need settlor reserved powers in order to offer an attractive product to international clients".

That "product" is, in effect, tax evasion. As another participant in the correspondence noted:

> *Finally I am very concerned by the apparent retrospective attack – inspired it seems by the A[ttorny] G[eneral] – on a major feature of the recent trust law change on the ground that it ostensibly facilitates greater tax avoidance.*

This correspondent, unlike all others, does not see the problem to which Jersey's own Attorney General had drawn attention when using the local euphemism of tax avoidance to embrace tax evasion. But tax evasion is precisely what the law encouraged, and the Attorney General's concern was well placed, if understated. The result is that:

1. On application to the Royal Court in Jersey all Jersey trust are now revocable;
2. In that case they should in every case be identified as being the property of the settlor;
3. In that case the EU Savings Directive should be applied to all Jersey trusts as if the settlor is the owner of the property with deduction of tax being made if appropriate and information exchange being required to take place;
4. Trusts used for inheritance and estate planning purposes almost certainly now fail in to comply with the requirements of other legislatures.

It is only a lack of knowledge -- and Jersey's own cloak of secrecy that has been drawn over the consequences of these provisions -- that has prevented this legislation being reviewed in this way. It is high time, however, that it is: Jersey's trusts and those of the many other jurisdictions that allow similar arrangements are mere shams used for the purpose of the evasion of tax and other regulatory requirements and as the correspondence quoted shows, those running these administrations appear to know this is true. Those trying to tackle the tax haven problem should also be aware of this fact.

d. The International Cell Company

Protected Cell Companies (PCC) were first provided by Guernsey in 1997[53]. That territory has a specialisation in the provision of offshore re-insurance arrangements. In effect a PCC operates as if it were a group of separate companies except all are part of the same legal entity. There is, therefore a 'parent level' which provides management services for the company but in addition there are a number of further segregated parts called cells. Each cell is legally independent and separate from the others, as well as from the 'parent level' of the company.

As has been noted[54]:

> *The undertakings of one cell have no bearing on the other cells. Each cell is identified by a unique name, and the assets, liabilities and activities of each cell are ring-fenced from the others.*
>
> *If one cell becomes insolvent, creditors only have recourse to the assets of that particular cell and not to any other.*

This use in insurance terms is worrying. Anyone insuring with such an entity cannot be sure what assets might be used to cover their risk. No doubt that is the intent of those using them. More worrying though is their further possible use, of which some are now becoming aware[55]:

> *The astute offshore practitioner can employ an offshore protected cell company as an effective asset protector and privacy enhancer.*
>
> *With an offshore insurance corporation, it is market practice that provides tangible benefits; with the protected cell company, it is the structure of the entity itself -- think of a house with a locked front door, and rooms inside, each with a separate lock and key.*

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53 http://www.legalinfo-panama.com/articulos/articulos_41a.htm accessed 31-1-07

54 http://www.offshore-fox.com/offshore-corporations/offshore_corporations_030404.html accessed 31-1-07

55 ibid

Protected Cell companies have -- in concert with other entities -- been used to construct what has been called "an impenetrable wall" against creditors and prying eyes. Whilst these claims can only be tested by time, this novel use of a PCC for asset protection and financial privacy is an interesting approach and a valuable piece of intellectual property.

This is the logic of offshore: professional people use legislatures to create structures that they can sell to those wishing for secrecy, the only realistic use for which is the evasion of obligations arising under the laws of other countries.

Guernsey is no longer alone in supplying these companies. Jersey has offered them since 2005. As is typical in this market, each territory seeks to innovate and develop such a product to out- compete other tax havens in the legal structures they have to offer. Jersey's innovation has been to offer an 'incorporated cell company', the difference from a protected cell company being that each cell has its own, notional, legal identity so that recognition in countries that will have nothing to do with the 'protected cell' concept is easier to achieve.

Superficially the resulting structure looks like a group of companies. Indeed, as leading Jersey lawyers Carey Olson say[56]:

Indeed, at first glance, an ICC structure resembles a group structure, with a company at the top - the ICC or parent - and other companies below - the cells or subsidiaries. There is, however, a crucial difference between an ICC and a standard group structure: while the ICC has significant control over the cells it creates, it is unlikely to own the cells. The cells may be owned by investors, whereas the ICC might be owned by the financial institution structuring the investment product or by a charitable trust so that it is an 'orphan' ICC.

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This is actually far removed from a group structure. What it does instead provide is a new means for undertaking disguised transactions at low cost. As the same firm says of the use of a Jersey ICC:

The purpose of a cell company - whether an ICC or a PCC - is to provide a vehicle which can create cells, separate parts within which assets and liabilities can be segregated. This concept of "ring-fencing" is fundamental to cell

56 http://www.mondaq.com/article.asp?articleid=44136 accessed 18-6-07

companies. The key principle is that the assets of a cell should only be available to the creditors and shareholders of that cell.

The administrative benefits of a cell company are significant. Once a cell company structure is in place, repeat transactions can be established in a much reduced timescale. This is particularly attractive in projects such as collective investment funds and securitisations, where negotiating transaction documents can be a complex and lengthy process, and where a successful initial structure will often lead to a demand for further, similar structures using the same key participants.

A framework can be established which includes all of the participants in the structure – such as administrators, managers, investment managers and custodians – and model agreements entered into governing the contractual roles of those participants. Regulatory consents can be obtained in advance for the structure, and then, as new cells are added, the level of regulatory scrutiny that will be required is much reduced, as the fundamental structure has already been agreed.

When particular transactions are envisaged – for example, adding a fund to invest in a specific country or sector, or a new vehicle to acquire receivables in the course of a securitisation – a cell can be created specifically to act in that defined role.

As the functionary agreements and regulatory consents have already been agreed with respect to the form of the transaction, a new cell can be added at a fraction of the cost and time that would be required were the structure to be established from scratch.

This may be true, but by adopting the logic of this argument, it is equally easy to see how this structure could be used for a variety of abusive purposes. In addition, since such structures are at present virtually unknown in populous states, their role has not been taken into consideration in information exchange agreements as yet. Another barrier to securing data has been established as a result.

e. Redomiciliation

Since the Competition (Jersey) Law 2005 came into full force on 1 November 2005 it has been possible to redomicile a Jersey company. Redomiciliation allows a company registered in one place to apply to be removed from registration in that location and to be re-registered in another country or territory. The company is not dissolved in the process. What happens is that, for example XYX Limited of Malta with company number 444555 in that location becomes XYZ Limited of Jersey with company number 777888 in that new location. The company carries on trading without change, it has simply shifted the country to which it owes legal duty by way of registration. As one Jersey lawyer[57] has reported since then they have:

> *advised a number of clients in relation to moving companies from Jersey to other jurisdictions, including Delaware, Spain, Liechtenstein, Switzerland, Portugal and Malta.*

This trend is worrying. Information exchange has no doubt motivated interest in companies being able to relocate themselves. Most territories take time to reply to enquiries on information exchange. Corporate relocation often takes less time than it takes an offshore tax authority to deal with an information request. As such relocation is an obvious flight strategy in the event of enquiry talking place. Jersey's participation in this activity is not a sign that it is committed to the highest standards: it is instead a sign that it is willing to allow companies to flee in the face of challenge being made to them.

The danger is obvious. Capital flight could easily become a simple matter of corporate flight with the world populated by roving, unaccountable companies whilst the havens are held hostage to lowest common denominator practices for fear that those located there will leave. This effectively means that realistic attacks on offshore have now to be focussed on the suppliers of offshore services and the facilities that these companies use as much as on the companies themselves.

[57] http://www.mourant.com/section/132/index.html accessed 18-6-07

f. Money laundering reforms

Jersey is revising its money laundering regulations to bring them into line with latest FATF requirements which would also bring it into line with the EU's Third Money Laundering Directive[58]. However opportunity is being taken to revise the Jersey Financial services Commission's Handbook for the Prevention and Detection of Money Laundering and The Financing of Terrorism[59] at the same time.

Some aspects of this are welcome. For example, section 2.8.5 on fraud related offences says:

> *Fraud, including fiscal offences (such as tax evasion) and exchange control violations, are commonly and mistakenly regarded as distinct from other types of crime for money laundering purposes. They are not. Any fraud related offence is capable of predicating an offence of money laundering in Jersey where it satisfies the requirements of the definition of criminal conduct within the Proceeds of Crime Law.*

The clear statement that tax evasion is a money laundering offence is obviously correct, but It makes the fact that not a single Suspicious Activity Report was filed with the Jersey Police in 2006 even more surprising. This is especially so as the EU Savings Directive was in full operation for the first time during that year. At least 70% of all those asked in Jersey if they wanted interest paid on their accounts to be declared to their home government under the terms of this Directive declined the offer[60]. Any bank receiving such a request should have suspected that tax evasion was a possible explanation for this reluctance and accordingly filed a suspicious activity report with regard to that account. As is apparent, this cannot have happened. This Handbook may exist but it is obvious that it is ignored by Jersey's financial institutions when it suits them to do so.

The new handbook also contains a number of worrying developments:

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[58] http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_309/l_30920051125en00150036.pdf accessed 18-6-07

[59] See http://www.jerseyfsc.org/the_commission/general_information/press_releases/release169.asp accessed 12-6-07

[60] See http://www.gov.je/TreasuryResources/IncomeTax/Bulletin+Board/EuropeanUnionSavingsDirective/EUSDPressRelease120606.htm accessed 12-6-07

1. New clients can be assessed as being of lower, standard and higher risk.[61]

2. Once assessed as being 'lower risk' a customer of a financial services company is only required to disclose their name, residential address and date of birth[62] when opening an account. However, proof is only required of the first and one of the last two. [63] In other words, a low risk client can give a false address and this will not be detected if a single document e.g. their passport (which shows their identity and date of birth) has been offered as evidence of identity to the financial services provider;

3. One Jersey financial services provider can now rely on the customer checking procedures of another Jersey financial services provider and does not have to replicate the 'know your client checks' that the first has done.

The implications of these changes are obvious. In an environment such as Jersey's where there is little evidence of compliance with the requirements of money laundering rules, as the absence of Suspicious Activity Reports with regard to money laundering proves, there will be a tendency for financial services providers to rank their customers as having low risk, so avoiding the need for property proof of identity to be given before a bank account of other facility is opened. There may be merits in this onshore (or even for Jersey passport holders in Jersey) but in money laundering terms anyone wishing to open an account in an offshore financial services centre has to represent a risk with regard to money laundering, if only in the form of tax evasion. Accordingly the availability of this category of risk and the lax approach to client identification that it allows is a major cause of concern and is bound to facilitate offshore abuse. Abuse of the EU Savings Directive is the most obvious example: this Directive only applies to persons resident in the EU. If a false address is given outside the EU it need not be checked and the requirements of the EU Savings Directive will be fraudulently avoided. The likelihood of this happening is high and an immediate review of the standards and codes in operation in Jersey and elsewhere is needed to prevent this abuse becoming commonplace.

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[61] http://www.jerseyfsc.org/the_commission/general_information/press_releases/release169.asp Section 3.3.5

[62] ibid Section 4.3.1

[63] ibid Section 4.3.2

Lack of effective exchange of information for tax purposes

In the face of international pressure to exchange information, Jersey has signed a Tax information Exchange Agreement with the USA[64]. It also has the double taxation agreements with the UK, France and Guernsey (but no other location)[65]. However, as LowTax.Net[66] says:

> *As a matter of policy Jersey does not normally enter tax treaties. However, double taxation agreements exist with the United Kingdom and Guernsey, and a limited agreement with France exempting a resident of either country from tax in the other country on profits from shipping and air transport.*

They go on to say:

> *The UK and Guernsey treaties do not conform to the OECD standard model treaty. The agreement with the United Kingdom specifically excludes dividends and debenture interest from its provisions.*

In addition, the French agreement is:

> *limited to exempting a resident of either country from tax in the other country on profits from shipping and air transport.*

This is hardly evidence of a commitment to effective information exchange. This lack of willing on its part is obvious from its reaction to the UK imposed requirement that it participate in the European information sharing agreement that forms the basis of the EU Savings Tax Directive[67]. It agreed to this obligation only after considerable pressure from the UK had been applied. When doing so it opted for the deduction of a withholding tax from account holders by default rather than exchange information. This minimised information exchanged and provided continuing shelter for those using its banks from within the EU for the purposes of tax evasion.

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[64] http://www.gov.je/TreasuryResources/IncomeTax/TIEA/TaxationUSAJersey2006.htm accessed 18-6-07

[65] http://www.gov.je/TreasuryResources/IncomeTax/IncomeTaxLegislation/ accessed 18-6-07

[66] http://www.lowtax.net/lowtax/html/jje2tax.html accessed 8-6-07

[67] http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/index_en.htm accessed 8-6-07

Jersey only appears willing to engage in international agreements relating to financial services when they suit its purposes. As such in October 2003 Jersey signed a Memorandum of Understanding with the International Organisation of Securities Commissions designed to combat securities and derivatives violations[68]. Twenty four countries are party to this. It has similar agreements with Bahrain, Dubai, Cayman and Qatar to promote offshore finance arrangements. These do not constitute information sharing agreements.

Conclusions

This paper has sought to show that:

1. Jersey remains committed to conventional tax haven practices, with all that implies;

2. Jersey's compliance is with the form of international standards but not with the substance of the conduct that they expect;

3. Jersey's co-operation with the USA is not indicative of its general approach to international issues;

4. Jersey is purposefully creating structures and procedures for use by its financial services industry that will result in information not being available for exchange under internationally agreed arrangements, so nullifying their effect;

The evidence supports these conclusions. Jersey is offering no or nominal taxation to those using its legislation and secrecy space for tax haven purposes, whilst increasing the tax burden on its local population to pay for this.

The new laws it is introducing on corporate tax, the taxation of high net worth individuals and GST do not comply with international norms. Its new money laundering arrangements will allow abuse not possible at present. At a time when increased standards are expected internationally Jersey is finding ways to lower those it operates whilst offering apparent compliance with internationally imposed obligations. Its new

[68] http://www.lowtax.net/lowtax/html/jje2tax.html accessed 18-6-07

laws on trusts, incorporated cell companies and redomiciliation are all indication of this. At the very least each makes information exchange harder: in the worst possible case each could be of benefit to those undertaking fraudulent transactions, and in the case of the trust laws correspondence that has been seen shows that the government in Jersey knew this to be the case.

It is apparent that in the light of this extremely limited range of tax agreements into which it has entered that the cooperation that Senator Walker claimed Jersey is providing to the USA in his submission to the US Senate dated 17 May 2007 is illusory. Even if some cooperation is being offered to the USA, it is unusual for tax haven activity to exist on a pure bilateral basis. As such if a US transaction is routed to Jersey via another location it is highly unlikely that effective information exchange arrangements will be in place to track it, so nullifying many of the benefits of the US TIEA. That TIEA should be seen for what it is: a token gesture designed to curry favour that is not indicative of any serious effort on the part of Jersey to exchange information that might limit its ability to be a fully effective tax haven.

So what is happening? The best explanation appears to be the simplest one. As pressure mounts for tax havens to exchange information so they are reacting by ensuring that they either do not have that information, or by providing mechanisms that make it both harder to secure, and easier for it to flee. The result is that corruption in places like Jersey can no longer be tackled at the transaction level. Put simply, transaction data will soon be unavailable or in perpetual transit between tax haven locations. As such offshore corruption can now only be tackled at the systemic level. This requires a changed approach. The corrupt user of tax haven services is no longer the problem; the corruption of the tax havens is the problem now.

It is time to tackle the suppliers of corruption services if the integrity of the world's economy, taxation systems and democracies is to remain intact. Tax havens are at the heart of this challenge to the way we live. And tackling them systemically is the solution to this problem.