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Exchange of Information under International Tax Conventions

I. Introduction

In the age of increasingly closer international cooperation or collaboration in every conceivable field, whether business, arts, recreation, sports, technology exchange, etc., it is small wonder that governments also collaborate in keeping the fiscal-life-supporting stream of internal revenue flowing even when the flow of revenue is across international borders of sovereign states, because without such revenue, the state would not be able to function. To ascertain that tax evasion or tax avoidance does not reduce that flow to a trickle, nations have concluded tax treaties relating to income, estate, inheritance, or gift taxes which provide for reciprocal exchanges of information and, in a more limited form, for technical assistance in the enforcement of municipal tax laws. This type of collaboration may take the form of routine exchange of information, of spontaneous disclosure by one jurisdiction to another, of specific requests of assistance, and also of simultaneous examination of a taxpayer by the respective authorities of two or more countries.

Some taxpayers believed that secrecy provisions in various jurisdictions—whether relating to the taxing authorities, or to banks and other financial institutions—would prevent a disclosure of their financial affairs. Whether the taxpayers' conduct is innocent and law-abiding, or stimulated by the purpose of evading taxes by fraud, they should be aware that at least among the major developed nations there is a considerable amount of mutual exchange of information which might either be potentially embarrassing or even lead to prosecution in one or the other jurisdiction, if not both.

Before the age of tax treaties, it was the usual procedure not to recognize foreign tax laws in one's own jurisdiction, at least in common-law countries,

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nor to enforce tax-related judgments of foreign courts. As long ago as 1775, Lord Mansfield approved the enforcement of a contract in England which had been concluded in France, a contract which violated French tax laws and would therefore have been unenforceable in France.¹ As recently as 1963, the Canadian Supreme Court denied a tax claim of the United States government on the basis of the string of precedent begun in 1775.² Even within the United States, sister states would not enforce each others' tax claims until 1935 when the Supreme Court applied the full-faith-and-credit clause of the United States Constitution to tax judgments.³ Only the advent of tax treaties made extraterritorial enforcement of a nation's tax laws possible without infringing upon the sovereignty of the other nation.⁴

The purpose of tax treaties is to avoid double taxation. This is not only a fair concept but also one required by differing applicable rules in various jurisdictions. Since some countries, such as the United States, the Netherlands, or West Germany tax their citizens and residents on worldwide income, but other jurisdictions levy solely on the basis of source of income, a given item of income might be taxed out of existence if both jurisdictions could tax it. Bilateral treaties thus prevented economic disaster for certain taxpayers by agreeing on rule whereby one of the conflicting jurisdictions ceded its legal right to tax. Reciprocity being the very foundation of the tax treaty concept, both Contracting States benefit by not suppressing desirable economic activity the decrease of which would lead to a decrease in collectible revenue.

Most citizens of civilized nations know that taxation is a necessary evil required to maintain the political and economic existence of a nation. But some of them evade taxes anyhow, and others make use of loopholes in the laws to avoid paying as much as they might otherwise have to pay. Tax evasion is a criminal offense in the United States and must be dealt with as such, yet it is regrettable that United States tax authorities as well as scholarly authors use the term "tax avoidance" in the same breath—as if it were,

¹Holman v. Johnson, 98 Eng. Rep. 11220 (1775).

²United States v. Harden, 12 A.F.T.R. 2d 5737 (1963).

³Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935).

⁴There might, of course, be a problem with the question of whether the taxes levied by one country and sought to be enforced in the other country meet the latter country's standards of elemental fairness. Where there are treaties, one must presume that both taxing jurisdictions have a fair system of taxation, and then there should be no issue of fairness. Courts have no jurisdiction to pass upon the provisions for the public order of another state. So held Judge Learned Hand in *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929), a case which found an Indiana tax not enforceable in New York courts. This view should be identical, if not even more pronounced, in cases where the sovereignty of a foreign country is involved, rather than that of a state of the United States. Further problems could potentially arise where one treaty partner changes its tax laws and introduces discriminatory or otherwise unfair taxes. Most tax treaties, however, contain a provision that enforcement of a claim is not required contrary to the public policy of the enforcing state. This is a safeguard provision, even though the application in an appropriate case might be awkward from a foreign-relations viewpoint; see also Johnson, Nirenstein, Wells, *Reciprocal Enforcement of Tax Claims through Tax Treaties*, 33 TAX LAW. 469, 471-2 (1980).

if not illegal, then at least morally reprehensible.⁵ Tax avoidance, in contrast to criminal tax evasion, is one of the rights of a free citizen and has had the sanction of the United States Supreme Court ever since 1873, when *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873), held: "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." The same sentiment was reiterated in the famous statement by Judge Learned Hand in *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934):

[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose the pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

It should, therefore, be a question of closing loopholes in municipal codes and international treaties to reduce the otherwise totally legitimate process of tax avoidance. This is occasionally being done in revisions of the Internal Revenue Code, as recently by means of adding section 897(i) to the Foreign Investment in Real Property Tax Act of 1980,⁶ or revision of article 14(4) of the estate, inheritance, and gift tax treaty with West Germany.⁷

It is therefore inappropriate to speak of tax avoidance if the letter of the law is adhered to. If a nation claims to be one of laws, then Judge Learned Hand's statement makes more sense that the pronouncements of those who complain that the spirit of the law was not followed.⁸

II. Tax Treaties and Enforcement Provisions

Tax treaties, once ratified by the United States Senate, which manifest an intention that they shall become effective as domestic law at the time they become binding are considered self-executing, do not require further action on the part of Congress. They supersede inconsistent prior statutes, whether state or federal.⁹ This is in keeping with general international-law

⁵"[W]hether anti-evasion and anti-avoidance measures serve the same purpose of reasonable and sound taxation," Van Hoorn, Jr., *Problems, Possibilities, and Limitations with Respect to Measures Against Tax Avoidance and Evasion*, 8 GA. J. INT'L & COMP. L., 763, 769 (1978); "[P]revent fraud, or administer statutory provisions against fiscal evasion or tax avoidance," Shockey, *Exchange of Information Provisions in United States Tax Treaties*, TAX MGMT.—INT'L J., No. 8, 8 (1978). Similarly, the Internal Revenue Manual—Audit, CCH (1981) [hereinafter cited as IRM], at 42G-407(3).01, speaks of exchanges of information where "significant avoidance or evasion scheme" is indicated. IRM-A 42G-408(3).01 goes even further by not even mentioning evasion, only avoidance, in choosing cases for examination where the exchange of information "is beneficial in discovering tax avoidance."

⁶Economic Recovery Tax Act of Aug. 13, 1981, Pub. L. No. 97-34, § 831(d) (1981); or the Technical Explanation to art. 14, ¶ 4, of the Convention Between the United States of America and the Federal Republic of Germany For the Avoidance of Double Taxation with Respect to Taxes on Estates, Inheritances, and Gifts, signed at Bonn on Dec. 3, 1980, (CCH) ¶ 3067R (1981).

⁷See *supra* n.6.

⁸Van Hoorn, *supra* n.5, at 769.

⁹RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S., § 141(1) (1965).

doctrine, and is applicable to all treaty partners even if their specific municipal laws may phrase it differently.

Practically all treaties contain a provision regulating mutual assistance in the collection of taxes. These provisions come generally in two types.

The "general enforcement provision" such as in the Swedish¹⁰ or the Netherlands¹¹ treaties promises to collect taxes imposed by the other Contracting State—but there are various restrictions that bring the provision close to a "limited enforcement provision"¹² because collection cannot be made against nationals of the Contracting State with domicile in that state whose assistance has been requested; the Swedish treaty limits enforcement to nationals of the taxing (and requesting) country.

The "limited enforcement provision" such as in article XVI of the income tax treaty with Germany calls for an exchange of information that is available under the respective tax codes of the Contracting States. This information is to be treated as secret. The Contracting States also promise assistance in ensuring that exemptions and reduced tax rates provided by the treaties are not enjoyed by unintended beneficiaries.¹³

The "limited enforcement provision" in the Swiss treaty is different from any of the other conventions insofar as it is limited even further: it applies only to ensuring that reductions or exemptions in taxes on dividends, interest, royalties, and pensions are enjoyed by no one else but the intended beneficiaries.¹⁴

III. Exchange of Information Provisions

In order to carry out the enforcement provisions, to prevent fraud, or to administer statutory mandates against fiscal evasion and tax avoidance,¹⁵ four kinds of exchanges of information are envisioned:

1. information furnished on a routine basis;¹⁶
 2. spontaneous exchanges without a specific request;¹⁷
 3. furnishing specific information at the request of the treaty partner;¹⁸
- and

¹⁰Swedish Income Tax Convention, art. XVII, of Nov. 14, 1939, 54 Stat. 1759, 1770-71, T.S. No. 958, 1940-2 C.B. 43.

¹¹Netherlands Income Tax Convention, art. XXII, of Dec. 1, 1948, 62 Stat. 1757, T.I.A.S. No. 1855, 1950-1 C.B. 93 (also applicable by Protocol of 1955, T.I.A.S. No. 3366, 1956-2 C.B. 1116, and by Protocol of 1963, T.I.A.S. No. 5665, 1965-1 C.B. 624, to the Netherlands Antilles).

¹²See *infra* p. 5.

¹³Art. XVI(2), German Income Tax Convention of December 1954, T.I.A.S. No. 3133, 1955-1 C.B. 365, as amended by Protocol of Sept. 16, 1965, T.I.A.S. No. 5920, 1966-1 C.B. 360, see also P-H Tax Treaties, ¶ 39, 116 (1966).

¹⁴Art. XVI(2), Swiss Income Tax Convention of Sept. 27, 1951, 2 U.S.T. 1751, 1760-61, T.I.A.S. No. 2316, 1955-2 C.B. 815.

¹⁵Shockey, *supra* note 5, at 8.

¹⁶IRM, *supra* note 5, at (25)30(1); 42(10)(10).3(1)(a).

¹⁷IRM, *supra* note 5, at 42(10)(10).1(a)(1).

¹⁸IRM, *supra* note 5, at 42(10)(10).1(a)(1)(d).

4. mutual notification of competent authorities as to changes in their respective tax laws.¹⁹

The first three provisions are of special interest, the fourth one being of a nature which does not directly affect an individual taxpayer.

1. *Information Furnished on a Routine Basis*

In cases where a treaty provides for mutual exchange of information, Treasury Regulation section 1.1461-2(d)²⁰ specifies that the Internal Revenue Service shall, as soon as practicable after the close of the calendar year, transmit to the treaty country authority forms 1001 and 1042S "showing a payee with an address in that country"²¹ unless the I.R.S. ascertains that that country does not require the forms.²² This type of exchange is substantial, as it affects about \$3.4 billion of income flowing annually out of the United States.²³ Generally, the subject matter of such routine exchanges is investment income with a source in the reporting country which has been received by a natural or juridical person resident or citizen of the other country.²⁴ Such an exchange is not limitless, however. Certain strictures are put on it by agreement:

a) The information must be "available under the respective taxation laws of the Contracting States,"²⁵ a common provision interpreted to mean information that would be available in the other country as "if the tax of the requesting country were its own tax."²⁶

b) The information must be necessary for carrying out the provision or for the prevention of fraud.²⁷

c) The information must be treated as a secret and must not disclose any trade secret or trade process.²⁸

2. *Spontaneous Exchanges Without Request*

A spontaneous exchange of information without request is

the furnishing to the treaty partner, without a specific request, information which the I.R.S. discovers during a tax examination or investigation which suggests or establishes noncompliance with the tax law of a treaty partner²⁹ . . . [which] can include not only information pertaining to non-resident aliens and foreign

¹⁹IRM, *supra* note 5, at 42(10)(10).1(a)(1)(a).

²⁰26 C.F.R. § 1.146-2(d) (1981).

²¹*Id.*

²²*Id.*

²³Balkin, *Tax Treaty Highlights from the International Fiscal Association, U.S.A. Branch, 1979 Annual Meeting, Washington, D.C.*, TAX MGMT—INT'L J., No. 5, 16, 18 (1979).

²⁴BISCHELL, *INCOME TAX TREATIES*, 502 (1978).

²⁵*See, e.g.*, in the Luxembourg Convention of Dec. 18, 1962, art. XVIII, 15 U.S.T. 2355, T.I.A.S. No. 5726, 1965-1 C.B. 615.

²⁶SEN. EXEC. REP. No. 10, 88th Cong., 2d Sess. 38 (1964), *reprinted in* 1 *TAX TREATIES*, (CCH) ¶ 5348, at 5356 (July 27, 1964).

²⁷Art. XVI(1), German Convention, *supra* note 13.

²⁸Shockey, *supra* note 5, at 10; *see also* IRM, *supra* note 5, at 42(10)(10).2(2)(c)(2).

²⁹IRM, *supra* note 5, (Supp.) § 42G-407.01.

corporations, but also U.S. citizens and domestic corporations.³⁰

Such spontaneous-exchange articles are contained in the treaties with France (article 26), Germany (article XVI(1)), and the United Kingdom (article 26). They require reciprocity which means "that the treaty partners maintain an atmosphere of freely exchanging information."³¹

For spontaneous exchange to become activated, the I.R.S. has to develop during a routine audit or investigation information "which indicates a significant avoidance [*sic*] or evasion scheme apparently resulting in a loss of potential tax revenue to a treaty partner."³²

3. *Furnishing Information at the Specific Request of the Treaty Partner*

When a request of this nature is received by the I.R.S., it is not automatically granted but is evaluated by the "U.S. Competent Authority"³³ on a case-by-case basis to ascertain that the request concerns a taxpayer subject to the treaty partner's tax laws, and that the information is required in good faith by the treaty partner.³⁴ Fishing expeditions are not welcome.

This type of information exchange is much rarer than furnishing of information on a routine basis. In the past few years, the United States has received over one hundred requests, and has sought such information in approximately the same number. Thus the United States seems to have received no more than two-score requests per year, a very small number considering the large mass of international transaction. In addition to the requirements listed in the I.R.S. *Operations Manual*,³⁵ the United States usually must be convinced that its treaty partner has exhausted its own resources in trying to obtain the desired information at home.³⁶

This treaty provision is not an absolute guarantee that the information will be forthcoming upon request even after all the above-listed requirements have been met. Escape hatches provide that neither Contracting State has to carry out administrative measures different from those in general use, or that nothing needs to be done which might affect adversely the requested state's sovereignty, security, or public policy.³⁷

³⁰*Id.*, at § 42G-407.03(1).

³¹*Id.*, at § 42G-407(5).01-.02.

³²*Id.*, at § 42G-407(3).01.

³³The United States "Competent Authority" is the Assistant Commissioner of Internal Revenue (Compliance), assisted in administering the provisions of tax treaties by the Office of International Operations of the Internal Revenue Service. *see* IRM-Admin., § 25(10)(4); IRM-Audit, § 42(10)(10).2(1). Part of this authority is redelegated to the Director, Examinations Division of the IRS, which administers the Simultaneous Examinations Program, the spontaneous exchanges of information, and the industry wide exchanges of informations programs, and to the Director of International Operations for Administering the Programs for Routine and Specific Exchanges of Information and for Mutual Assistance in Collection Programs, *see* IRM-Audit, § 42(10)(10).2(2)(a,b).

³⁴IRM, *supra* note 5, § 42(10)(10).3(b)(2).

³⁵*See* notes 17-19, *supra*.

³⁶Balkin, *supra* note 23, at 18.

³⁷Shockey, *supra* note 5, at 10.

IV. Examination Provisions in Tax Treaties

One form of specific request for information is the simultaneous examination program which is provided for in the Canadian, British, German, French, and Norwegian treaties,³⁸ and can be either bilateral or multilateral. This program is meant to coordinate the tax treatment of business firms with activities in more than one country.³⁹ In bilateral simultaneous examinations, as for instance in the treaty with the United Kingdom, the objectives are the following:

- a) each country will identify independently specific tax payers for examination⁴⁰ in order to
- b) determine correctly taxpayer's tax liability, especially where costs are shared or charged, and profits are allocated between taxpayers resident or operating in different taxing jurisdictions,⁴¹ and to
- c) exchange new or apparent patterns or techniques of tax avoidance that significantly affect the tax administration of each country.⁴²

It seems that only large, probably multinational corporations, have to anticipate the possibility of such simultaneous examinations, particularly where examinees may be "multinational enterprises having intragroup transactions which may include arrangements involving tax haven countries."⁴³

The criteria for selecting cases are rather standard in the existing treaties. The German treaty provides that taxpayers with substantial operations in both countries might be chosen on the basis of factors such as

- a) the scale of taxpayer's worldwide operations,
- b) the extent of intragroup transactions; and
- c) whether the tax years are compatible.⁴⁴

Other factors, not specifically named, may also play a role. Identical factors apply in the French treaty,⁴⁵ as well as the British one.⁴⁶ It thus seems unlikely, that anyone not in the select group of large multinational corporations need to expect such examination unless specific questions arise concerning possible tax fraud or other evasion maneuvers of similar gravity.

Multilateral simultaneous examinations are also envisioned, again obviously aimed at the multinational corporation. They are defined as examinations "where more than two treaty partners pursuing similar interests concerning possible tax avoidance or evasion by a multinational enterprise agree to exchange information."⁴⁷ The selection procedure and criteria are

³⁸IRM, *supra* note 5, § 42(10)(10).7(3)(a-e).

³⁹*Id.*, at § 42(10)(10).7(1).

⁴⁰*Id.*, at § 42(10)0-15(2).02.

⁴¹*Id.*, at § 42(10)0-15(2).03(1).

⁴²*Id.*, at § 42(10)0-15(2).03(3).

⁴³*Id.*, at § 42(10)0-15(2).03(2).

⁴⁴*Id.*, at § 42(10)0-16(3).01(1-3).

⁴⁵*Id.*, at § 42(10)0-17(3).02(1-3).

⁴⁶*Id.*, at § 42(10)0-15(3).02(1-3).

⁴⁷*Id.*, (Supp.) § 42G-408(1).03.

the same mentioned above for bilateral examinations. The actual exchange of information is then done on a quasi-bilateral basis: assuming that United States, Canada, and Great Britain decide to examine a company, the information developed is exchanged between Canada and the U.S., Canada and the U.K., and between the U.S. and the U.K. Because of the confidentiality provisions of all treaties, the United States will not forward information to one treaty partner which it has received from another.⁴⁸ The secrecy provisions of section 6103 I.R.C. do not permit such third-party disclosures but cover only bilateral situations.

V. Disclosure of Information Gathered under the Treaties

According to section 6103(a), tax returns and return information shall, as a general rule, be confidential, and no officer or employee of the United States or of one of the States shall disclose such information "except as authorized by this title."⁴⁹ Therein lies the problem, as general rules usually have more exceptions than adherence to the basic rule; at least in the case of tax treaties, disclosure is probably more the rule than the exception. While such disclosure usually happens only upon request by the Contracting State, all the routine exchanges⁵⁰ (which amount to disclosure to a foreign government) that happen on a regular basis are made without request. Since the volume of such routine disclosures is, in the case of Germany, for instance, staggering in quantity,⁵¹ very little is done about scrutinizing each individual return. The authority derives from section 6103(k)(4) which provides that

[a] return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention or other convention relating to the exchange of tax information, with the United States.

Tax treaty information may only be disclosed for assessment, collection, enforcement, or prosecution with respect to the taxes which are the subject of the respective treaties. Thus, tax treaty information may not be disclosed to state tax authorities as per section 7103(d) I.R.C., nor to any federal agencies under section 6103(i) I.R.C. *et al.*⁵² This concerns information gathered by the United States Internal Revenue Service. What about disclosure of information received from abroad?

Such information is on hand subject to the secrecy provisions of the respective tax treaty. Such clauses usually provide that the IRS cannot dis-

⁴⁸*Id.*, at § 42(10)(10).7(4)(c).

⁴⁹Section 6103(b) defines in broad, encompassing manner what constitutes a return or return information.

⁵⁰IRM, *supra* note 5, at § 25(30)(1).

⁵¹Private communication from a German lawyer who stated that the "stuff" came in by the laundry basket full every day, was dutifully fed into the computer, and then forgotten except for the rare case where someone either analyzed the tape or a red flag went up, or when the authorities were looking for a specific return.

⁵²IRM, *supra* note 5, at § 25(20)(4).

close such information to anyone but those concerned with assessment, collection, enforcement, or prosecution—which includes the courts. If a case should come into court, then any confidentiality is gone, as court records are public information. The additional safeguard of section 6103(b)(2) I.R.C. relating to return information that may not be disclosed except for the same purposes is of little help to the taxpayer.

The taxpayer who is under investigation may have a hard time finding out what information the IRS has on him. According to section 6103(e)(7) I.R.C., the taxpayer who is under investigation may have access to the information unless

the IRS or the foreign tax authority providing the information objects to disclosure or if the IRS for other reasons deems that disclosure would seriously impair Federal tax administration.⁵³

This seems to smack of a lack of due process, but in absence of any case law for this point, it is uncertain how the courts would interpret this provision in the *Internal Revenue Manual*. It is repeated in the audit part of the manual.⁵⁴

Under these same provision, the United States provides tax return information to our treaty partners either in a routine fashion or by special request.⁵⁵ But even a non-treaty country may under the same section of the Internal Revenue Code receive “limited disclosures to foreign countries or individuals of foreign countries . . . for investigative purposes . . . which is not otherwise reasonably available in connection with the administration of the internal revenue laws.”⁵⁶ Neither of the *Internal Revenue Manual’s* administration nor audit parts make any mention of reciprocity in such cases, but it is hoped that the United States insists on it as it does in treaty cases.

VI. Foreign Regulations as to Exchange of Information and Disclosure

Germany, which does not have a bank secrecy law as Switzerland does, and which insists on the taxpayer furnishing as much detailed information as does the United States, cooperates with treaty countries in the reciprocal enforcement of each others tax claims vigorously. The German Fiscal Code (*Abgabenordnung*) of 1977 [AO] provides for exchange of information if

- 1) reciprocity is guaranteed;
- 2) the information will only be used for purposes of administration and enforcement of taxation;
- 3) that its sovereignty, security, public policy or other vital interests are not harmed, and that no unreasonable damage is caused to the Ger-

⁵³*Id.*, at § 25(20)(6).

⁵⁴*Id.*, at § 43(10)(10).2(7)(d).

⁵⁵See note 50, *supra*.

⁵⁶IRM, *supra* note 5, at § 25(40)(1).

man citizen involved which exceeds the purposes of the tax laws, and that trade secrets and processes be safeguarded.⁵⁷

This code also forces the participation of persons in its jurisdiction,⁵⁸ and it even includes, contrary to United States usage, the customs service in this mutual assistance.⁵⁹ Even if events are under investigation of which a person in the jurisdiction of Germany has knowledge, such person is obligated to disclose the facts and to make available all documents necessary to prove the facts.⁶⁰ German case law has established, moreover, that a taxpayer must cooperate to a greater extent in disclosing information than he would be required to do in a purely domestic investigation.⁶¹ The Foreign Tax Law (*Aussensteuergesetz*) of 1972 [AStG] contains a similar provision, and the regulations accompanying the AStG, *Steuerrichtlinien* [StRL] article 725(1), section 17 goes into considerable detail, including the interrogation of third parties who may have information germane to the investigation.⁶² According to the German Fiscal Code,⁶³ the burden of proof is generally on the tax authorities rather than the taxpayer provided he has complied with the recordkeeping rules laid down.⁶⁴ But on the basis of the much harsher rules concerning reporting obligations in international matters, the burden of proof often seems to shift to the taxpayer.⁶⁵ The same code sections apply whether the exchange of information is spontaneous, based on request, or concerns a bilateral simultaneous examination.

Banks in Germany must disclose information concerning its clients where such information has been requested by a foreign government. A lower tax court, the Hamburg *Finanzgericht*, had held that such disclosure would violate the tax secrecy rules,⁶⁶ but the German Supreme Tax Court, the *Bundesfinanzgericht*, forced disclosure on the basis that the German taxing authorities had virtually limitless powers in any investigation of tax-relevant facts, and that such powers applied not only in respect of the taxpayer concerned but also in respect of any third party of whom such infor-

⁵⁷Art. 117 *Abgabenordnung* [hereinafter cited as *AO*] [Fiscal Code] of Mar. 16, 1977, *Bundesgesetzblatt* [hereinafter cited as *BGBI*] I S. 613, ber. [corrected] 1977 *BGBI* I S. 269, as amended 1979 *BGBI* III 610-1-3.

⁵⁸*AO*, *supra* note 57, art. 90(2).

⁵⁹*Id.*, art. 117(5).

⁶⁰*Id.*, art. 90(2).

⁶¹Note, *Increased Reporting Requirements Under Germany's Foreign Tax Law and the Simultaneous Examination Procedure with the U.S.*, TAX MGMT.—INT'L J., No. 8, 33 (1980). This article is out of date concerning the simultaneous examination program which it claims is not planned between the U.S. and Germany. IRM, *supra* note 5, at § 42(1)0-16(1) *et seq.* of December 1981 explains the exact agreed-upon procedure.

⁶²Schreiben betr. Grundsätze zur Anwendung des Aussensteuergesetzes [Memorandum regarding Principles of Application of the Statute on Foreign Taxation of July 11, 1974, *Bundessteuerblatt* [hereinafter cited as *BStBl*] I S. 442, in *Steuerrichtlinien* [Treasury Regulation] art. 725, § 17.1.3.

⁶³*AO*, *supra* note 57, art. 158.

⁶⁴*Id.*, arts. 140-48.

⁶⁵See note 61 *supra*, at 34.

⁶⁶*Finanzgericht* Hamburg, II 160/75, 1978 *Entscheidungen der Finanzgerichte* [Reports of Tax Court Decisions] 257.

mation was requested. The court also ruled that where German tax authorities are requested to assist a foreign government, the tax administration of that government enjoyed all the rights accorded to the German tax authorities.⁶⁷

Switzerland, on the other hand, is not quite as obliging. In that country, the bank secrecy laws are still relatively strong, even though a breach has been made. While Switzerland will assist in exchange of information where it feels it can, Swiss legal tradition has made effective assistance often rather useless. It must be noted that tax evasion or tax fraud in Switzerland is not considered a criminal matter but a minor form of a misdemeanor over which the Swiss federal government disclaims any jurisdiction, leaving that to the Cantonal authorities. Thus tax fraud does not qualify under other treaties such as the ones on Legal Assistance in Criminal Matters.⁶⁸ Moreover, foreign law is irrelevant even if it did consider tax evasion a criminal offense. Tax evasion, being even less serious in the Swiss view, does not merit international enforcement action either. A Swiss Federal Supreme Court decision in 1970 held that tax fraud could be raised only if the purported act qualified as tax fraud under Swiss law; tax evasion or tax avoidance did not merit invocation of the exchange-of-information provision of the tax treaty.⁶⁹ The Court did make a concession insofar as it ruled that in cases where fraud was properly alleged, Swiss bank secrecy would not be upheld. Only if the organized-crime provision of the Treaty on Legal Assistance is invoked, will bank secrecy be lifted regardless of what violation has been claimed.⁷⁰

In 1975, the Swiss Federal Supreme Court made things even more difficult when it held that Swiss tax authorities had complied with a request from the I.R.S. concerning bank transactions between a Swiss bank and an American citizen by furnishing the I.R.S. a summary of its findings after investigating the transactions, but without furnishing any documentation. The United States complained that the report was not usable in an American court, and that documents and answers to interrogatories from persons knowledgeable about the documents were needed. The Swiss Court held that Switzerland's obligation was merely to exchange information, but not to give comprehensive legal assistance.⁷¹ This situation, quite different from that encountered in Germany, may be remedied somewhat by a recent Ninth Circuit case⁷² which enforced an I.R.S. summons for records of an American corporation and its Swiss subsidiary.⁷³ The Ninth Circuit held that the procedures for exchange of information in the Swiss tax treaty is not intended to be the sole remedy, and that thus the records have to be

⁶⁷Judgment of February 20, 1979, VII R 16/79.

⁶⁸Hoen, *Steuerrecht*, 348 (2d ed. 1975).

⁶⁹X v. The [Swiss] Confederate Tax Administration, 28 A.F.T.R. 2d 71-5510 (1970).

⁷⁰*Id.*

⁷¹X & Y v. The [Swiss] Confederate Tax Administration, 37 A.F.T.R. 2d 76-1282 (1975).

⁷²United States v. Vetco Inc., 644 F.2d 1324 (1981).

⁷³644 F.2d., at 1333.

furnished. Swiss authorities had waived any interest in confidentiality and had refused to honor letters rogatory on the basis that tax investigations were a fiscal, rather than a criminal matter. The Court further pointed out that any hardship to Vetco, Inc., was of its own making because section 964(c) I.R.C. requires an American corporation to keep records pertaining to its controlled foreign corporation sufficient to enable a determination as to whether subpart F tax is due. Had Vetco kept a set of records in the U.S., the problem would not have arisen.⁷⁴

VII. Conclusion

The disclosure rules in the United States seem indeed rather detailed and thorough, as do the rules on exchange of information in its various forms. But the efficacy of these rules depends to a large degree on the respective contracting partner, as can be seen in the juxtaposition between Germany and Switzerland. German rules, applicable to its nationals and residents, seem to be even stricter than American provisions. Realistically speaking, there seems nevertheless little likelihood for a fair-sized corporation that is not a multinational to be examined bi- or multilaterally as long as at least the appearance of compliance with the respective tax codes and other rules (such as customs laws in Germany) is kept.

Another form of inter-treaty information exchange, not specially dealt with above, is the information of industry-wide data for, at the moment, purely statistical purposes. Once this information base is large enough, it may become important because the validity of pricing at arm's length may be called to question more often in international trade. German tax law has similar requirements as does the I.R.C., and it will be interesting to see what develops in that direction.

Corporations with tax-haven subsidiaries have to be particularly careful, not only because of the *Aiken* decision,⁷⁵ but also because tax havens can come in many different forms and are not necessarily just the Netherlands Antilles, the British Virgin Islands, or the like. The Internal Revenue Manual in its various parts and sections points particularly to those corporations as likely candidates for simultaneous examinations.

In every case where the likelihood of inter-treaty country problems might arise, it is vital to be informed about the local codes and jurisprudence of the treaty partner, so that one can anticipate the wide gap between the handling of requests for information, etc., in such otherwise related jurisdictions as Germany and Switzerland. The conflict-of-laws situation makes such an exercise even more interesting.

⁷⁴644 F.2d., at 1332.

⁷⁵*Aiken Industries, Inc., v. CIR*, 56 T.C. 925 (1971), *acq.*, 1972-2 C.B.1.