

U.S. ANTI-TAX HAVEN POLICY

WILL PRESIDENT OBAMA BLACKLIST LUXEMBOURG?

President Obama and the new Congress will be under increased pressure to raise U.S. tax revenue given the potential severity of the current financial crisis (per Bloomberg, the Federal Bailout risks to go as high as USD 9.7 trillion). A growing consensus in Washington is that shutting down offshore tax abuses by U.S. taxpayers would be an efficient as well as politically acceptable source of new revenue.

Back in 2007 during the 110th Congress, then Senator Obama co-sponsored a bi-partisan bill that blacklisted Luxembourg along with 33 other countries as “offshore secrecy jurisdictions” in order to shut down these perceived offshore abuses. The bill, entitled “The Stop Tax Haven Abuse Act,” was not voted on and did not progress to Congressional committee hearings.

However, now most Washington insiders expect action on this subject in the months to come, most likely in the form of new tax legislation similar to the 2007 bill which targets these “offshore secrecy jurisdictions.” Luxembourg may be in danger as being among the countries targeted.

THE RISING ANTI-TAX HAVEN AGENDA IN WASHINGTON

Since 2007, a consensus has formed among U.S. politicians on the so-called “tax gap” of undeclared income hidden in offshore tax havens by U.S. tax cheats - as much as USD 345 billion per one IRS estimate. The belief is that the U.S. should implement a policy of forcing the blacklisted tax havens to allow the U.S. sufficient information exchange and other enforcement tools to enable audits and investigations of U.S. taxpayers in such countries, or alternatively simply dissuading U.S. taxpayers from using these jurisdictions via such mechanisms as burdensome reporting requirements and higher penalties.

In February 2007, Senator Obama co-sponsored the “Stop Tax Haven Abuse Act” bill (S. 681) which created a “blacklist” of 34 “offshore secrecy jurisdictions” including Luxembourg. The ramifications of being on the blacklist are severe and would be a disincentive for U.S. businesses and citizens from doing business or investing in such blacklisted countries. In particular, the bill would authorize financial sanctions on blacklisted countries and provide a rebuttable presumption in certain conditions that any amount received from a company or bank account in a blacklisted jurisdiction is previously “unreported income” to the benefiting U.S. tax payer. The proposed blacklist mainly is comprised of classic tax havens such as Panama, the Cayman Islands, and the British Virgin Islands. Further, Luxembourg, as well as other European countries such as Cyprus, Malta, and Switzerland are blacklisted. However, most EU Member States, even those with tax advantages, such as the Netherlands, Belgium, and Austria are not blacklisted.

President Obama has remained focused on his anti-tax haven objectives ever since the introduction of his co-sponsored bill back in 2007. During his Presidential campaign, he promised to “crack down on international tax havens” and in his “Blueprint for Change,” he pledged to “penalize companies that abuse the tax code and stop the use of tax havens.” Further, his new Treasury Secretary Geithner recently affirmed that he shared “the President-Elect’s commitment to aggressively address the problem of offshore tax abuses.”

Senator Hillary Clinton in June 2008 introduced a bill (S. 3139) which prohibits the U.S. government from awarding any contracts to a company or individual located in an “offshore secrecy jurisdiction” – Luxembourg is also included on her proposed blacklist.

The publicity keeps mounting. Notably, the U.S. Government Accountability Office (the “GAO”) published in December a list of the 100 largest U.S. corporations with subsidiaries in “tax havens or financial privacy jurisdictions.” Luxembourg is of course listed throughout the detailed report as one of these jurisdictions given its relative success in attracting corporate structures.

CAN LUXEMBOURG AVOID THE BLACKLIST?

Presumably, for Luxembourg to avoid being on these anti-tax haven blacklists, it will be critical that the U.S. government is enabled with sufficient information exchange powers regarding U.S. tax payers despite local bank secrecy rules. Particular emphasis will likely be on the exchange of information mechanisms in the current U.S.-Luxembourg Tax Treaty and Mutual Legal Assistance Treaty and whether these will need to be revisited so that the U.S. government has sufficient tools to verify U.S. tax payers are not abusing Luxembourg’s bank secrecy rules.

On a positive note, if Luxembourg can successfully avoid being targeted or blacklisted in future U.S. anti-tax haven legislation - as opposed to so many so-called “offshore secrecy jurisdictions,” then Luxembourg could find itself on a short list of non-black listed jurisdictions which provide for a favorable tax regime but nonetheless remain on good terms with the U.S. government as far as U.S. tax payer information exchange is concerned. Such a result could prove very beneficial to Luxembourg’s role as a location of choice for U.S. businesses and investments.

The American Chamber of Commerce Tax Committee has committed to the objective of making its best efforts to save Luxembourg from any U.S. anti-tax haven legislation and is currently making optimal use of its network of professionals and government contacts, both in Luxembourg and Washington, to achieve this goal.



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