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How Will They Catch Me? Let Me Count the Ways (Part Two)

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The first part¹ of this two-part article summarized the information sources from which the Internal Revenue Service may identify non-compliant U.S. citizens living abroad and their foreign accounts and assets. This part reviews the collection alternatives available to the United States government to recover delinquent taxes, interest, and penalties from its non-resident citizens.

Treasury Enforcement Communications System

The Department of Homeland Security's Treasury Enforcement Communications System ("TECS") allows border officers to screen persons entering the United States. IRS revenue officers can request information about taxpayers who have delinquent balances be entered into TECS. Those taxpayers are placed on a "DHS lookout indicators list" thereby enabling DHS to advise the IRS when those taxpayers travel into the United States.² Revenue officers may request through TECS available information on past travel of delinquent taxpayers to and from the United States and are encouraged to use the DHS lookout indicators list to "facilitate contact with these [non-resident] taxpayers or discovery of asset information which, in turn, may facilitate collection of their delinquent liabilities."³ TECS also allows the IRS to access currency transaction reports (Form 4789), reports of for-

foreign bank and financial accounts (FinCEN Form 114), currency transaction reports by casinos (Form 8362), and suspicious activity reports (Form TD F 90-22.47).⁴

Any taxpayer living outside the United States or who is about to depart to reside in a foreign country can be entered into the TECS lookout indicator list if

- the taxpayer has failed to fully pay a tax liability or enter into an installment agreement for payment of the tax liability,
- a notice of federal tax lien has been filed for the tax due, and
- the taxpayer owes more than \$50,000.⁵

Inclusion of a taxpayer on the lookout indicator list allows DHS to notify the IRS of the delinquent taxpayer's arrival in the United States and provide the taxpayer's address while in the United States, the nature of the taxpayer's visit, the transportation of any currency over \$10,000, and "any other available travel and/or asset information."⁶ This information clearly facilitates service of a summons or subpoena on the taxpayer, including for suits to repatriate property and repatriation orders discussed below.

Writ 'Ne Exeat Republica'

As with the Hotel California, once delinquent taxpayers enter the United States, leaving may be problematic. District courts of the United States have the authority to issue writs *ne exeat republica* ("let him not go out of the republic").⁷ The writ can be requested and issued to temporarily detain taxpayers en-

⁴ IRM 9.4.2.4.2 (08-09-2004).

⁵ IRM 5.1.18.14.7.1 (03-27-2012).

⁶ IRM 5.1.18.14.6 (06-10-2015).

⁷ I.R.C. §7402(a); 28 U.S.C. §1651. Hereinafter, all section references are to the U.S. Internal Revenue Code, as amended (I.R.C. / 26 U.S.C.) or the Treasury regulations thereunder (26 C.F.R.), unless otherwise indicated.

¹ Ward, *How Will They Catch Me? Let Me Count the Ways (Part One)*, 46 Tax Mgmt. Int'l J. 275 (May 12, 2017).

² IRM 5.1.18.13.14(2.1) (06-10-2015).

³ IRM 5.1.18.14.1(1) (06-10-2015).

tering or leaving the United States if it is believed the taxpayer is unlikely to return to the United States or the taxpayer concealed or conveyed cash or other property for transfer out of the United States prior to departure.⁸ The writ *ne exeat republica* is usually filed in conjunction with another civil enforcement action against the taxpayer and requires evidence the taxpayer is likely to return to the United States at a specific time and place so as to establish jurisdiction of the appropriate district court.⁹ The writ is not appropriate if the taxpayer is returning to the United States permanently.¹⁰ The government has the burden of proof in order to obtain the writ. The writ *ne exeat republica* is described as a form of injunctive relief and requires that the government meet the burden of proof associated with a preliminary injunction.¹¹

Passport Denial or Revocation

Section 7345 allows the Secretary of the Treasury — on certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt — to transmit that certification to the Secretary of State to revoke or limit an existing passport of a U.S. citizen or deny issuance or renewal of a passport.¹² A seriously delinquent tax debt for purposes of §7345 is an assessment of more than \$50,000 with respect to which either (a) a notice of tax lien has been filed pursuant to §6323 and the taxpayer's rights to a collection due process hearing under §6320 have either been exhausted or lapsed or (b) the IRS has already levied the taxpayer under §6331. The taxpayer is entitled to notice of the certification by the Commissioner to the Secretary of the Treasury and limited judicial review in U.S. district court.¹³

Treaty-Based Collection Methods

Of the more than 60 bilateral income tax treaties to which the United States is a signatory, 24 have some form of limited collection assistance provision.¹⁴ The assistance provided by a foreign government to the United States to collect the tax obligation of a U.S. citizen will be the same as that utilized by the foreign government to collect tax liabilities under its own laws. Five tax treaties have collection assistance provisions in the mutual assistance article of the treaty that establish a mutual collection assistance program:

⁸ IRM 5.21.3.3.3(1) (01-07-2016).

⁹ IRM 5.21.3.3(5) (01-07-2016).

¹⁰ *Id.*

¹¹ See *United States v. Mathewson*, 71 A.F.T.R.2d 93-1453, 93-1 USTC ¶50,152 (S.D. Fla. 1993).

¹² See §7345(a).

¹³ See §7345(e).

¹⁴ Harrt, McManus, Diruzzo, Kethcham, *Civil and Criminal Enforcement Tools Used Against Offshore Assets*, ABA Section of Tax'n Fall Mtg. 2016. See generally IRM 5.1.12.25 (08-05-2014).

Canada, France, Denmark, Sweden, and The Netherlands. Four of these are tax-specific (for example, income, estate, or gift tax). However, the Canada treaty provides for assistance with collection of all U.S. taxes.¹⁵ Despite treaty provisions, the tax treaties with Canada and Denmark both contain provisions which bar the foreign government from assisting in the collection of a U.S. tax liability if the taxpayer was a citizen of that country at the time the tax liability arose.¹⁶ In contrast, the tax treaties with France, The Netherlands, and Sweden prohibit assistance in collection of U.S. taxes if the taxpayer was a citizen of the applicable country at the time of the U.S. collection request.¹⁷

Mutual Legal Assistance Treaties

The United States has Mutual Legal Assistance Treaties (“MLATs”) with every government of the European Union as well as approximately 50 other countries worldwide.¹⁸ MLATs can be used for both grand jury and administrative investigations to obtain testimony and tangible evidence from treaty partners.¹⁹ Judicial and executive authorities in the treaty partner may be requested to supply official records, locate persons, provide service of process, execute search and seizures of property, arrange for the appearance of witnesses or experts before local judicial authorities, secure extraditions, transfer accused persons to the United States, and “exchange relevant information relating to the laws, regulations, and international practices in criminal matters of the contracting state.”²⁰

Levy on a Domestic Branch of a Foreign Financial Institution

The United States does not have to rely on the assistance of a foreign government to collect tax debts of U.S. citizens. Any person who fails to pay a tax within 10 days after notice and demand is subject to

¹⁵ Canada-U.S. Tax Treaty, art. XXVI(9). The January 24, 2013 Protocol to Convention Between the United States and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, also contains a collection assistance provision which will become effective once the Protocol is ratified. IRM 5.21.3.7 (01-07-2016).

¹⁶ Canada-U.S. Tax Treaty, art. XXVI(8); Denmark-U.S. Tax Treaty, art. XXVII(8). See also *Att’y Gen. of Canada v. R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001).

¹⁷ IRM 5.21.7.4.7(2) (11-13-2015), 5.1.12.25(6) (08-05-2014).

¹⁸ Bureau of International Narcotics and Law Enforcement Affairs 2012 International Narcotics Control Strategy Report (INCSR), www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm (03-07-2012).

¹⁹ IRM 9.4.2.6.2(2) (03-09-2012).

²⁰ IRM 9.4.2.6.2(3) (03-09-2012).

a levy on the property of the delinquent taxpayer.²¹ Generally, the IRS's levy authority ends at the border. However, both the Treasury Regulations and Internal Revenue Manual authorize a District Director of the Internal Revenue Service to levy on the foreign accounts of a delinquent taxpayer when the foreign financial institution is engaged in the banking business in the United States.²² Levy is available on the domestic branch of a foreign financial institution when the foreign financial accounts consist of funds transferred from the United States "in order to hinder or delay collection of the tax imposed by the Code."²³ Revenue officers seeking to levy on the foreign financial accounts of a taxpayer residing outside the United States are also directed to initiate a request for collection assistance in the case of taxpayers residing in treaty partner countries with mutual collection assistance provisions.²⁴

Repatriation Orders

Under §7402(a), U.S. district courts have the authority to issue a variety of orders including repatriation orders directed at taxpayers to bring foreign assets to the United States. Generally, issuance of such an order would require some degree of due process, often including a hearing subject to the rules of the district court. Repatriation orders are subject to enforcement by contempt proceedings. Repatriation orders require showing:

- the taxpayer has an unpaid tax liability,
- there is a reasonable basis to believe the taxpayer has non-U.S. assets,
- U.S. assets are insufficient to fully pay the tax, and
- the United States is able to get personal jurisdiction over the taxpayer.²⁵

Prior to requesting a repatriation order, the IRS will first attempt enforcement against the taxpayer's domestic property.²⁶ In cases in which the domestic assets are inadequate to fully pay the tax liability, the IRS will attempt to determine the nature and the ex-

tent of the taxpayer's foreign assets.²⁷ Information regarding the taxpayer's foreign assets may be obtained through an exchange-of-information request to the country in which the assets are located pursuant to a U.S. tax treaty or TIEA through the office of the U.S. Competent Authority.²⁸ IRS personnel are also instructed to levy on the domestic bank branch of a foreign financial institution at which the delinquent taxpayer has funds on deposit.²⁹

Appointment of a Receiver

Section 7402(a) also allows U.S. district courts to order the appointment of a receiver to collect delinquent taxes. District courts are often requested to appoint a receiver to take control of the delinquent taxpayer's assets in conjunction with other collection actions described above such as a repatriation order or a writ *ne exeat republica*.³⁰ In order for the IRS to move for appointment of a receiver, the taxpayer's assets in the United States must be insufficient to fully satisfy the tax liability and evidence must exist to confirm the existence of substantial assets outside the United States.³¹

Foreign Discovery

The Federal Rules of Civil Procedure allow for depositions of witnesses located in foreign countries.³² However, the foreign jurisdiction's "blocking statutes" may limit the type of deposition permitted, the nature of oaths to which foreign witnesses are subject, and penalties available for violations of foreign discovery laws. The alternative is to use the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("The Hague Convention"). The Hague Convention can be used to obtain discovery only in "civil or commercial matters."³³ Evidence can be obtained under the Hague Convention through letters of request or diplomatic or consular officers. A letter of request ("letters rogatory") is issued by a U.S. court to an authority in the foreign country in which the evidence is located. The foreign authority executes the letter of request in reliance upon its own law. The letter of request may specify certain procedures to be used by the foreign authority if those procedures are not incompatible with the laws to which

²¹ §6331(a); Reg. §301.6331-1(a)(1).

²² See Reg. §301.6332-1(a)(2); IRM 5.21.3.2 (01-07-2016).

²³ Reg. §301.6332-1(a)(2)(ii); IRM 5.21.3.2(3) (01-07-2016). See also Reg. §301.7401-1(b)(2).

²⁴ IRM 5.21.3.2(5) (01-07-2016).

²⁵ IRM 5.21.3.6(2) (01-07-2016). The taxpayer is either present in the United States or a U.S. territory or "returning to, or passing through, the United States." *Id.*

²⁶ IRM 5.21.3.6(3.1) (01-07-2016).

²⁷ IRM 5.21.3.6(3.2) (01-07-2016).

²⁸ IRM 5.21.3.6(3.3) (01-07-2016).

²⁹ See IRM 5.21.3.6(3.5) (01-07-2016).

³⁰ Accord IRM 5.21.3.5(3) (01-07-2016).

³¹ See IRM 5.21.3.5(4) (01-07-2016).

³² See FRCP Rule 45(b)(3); 28 U.S.C. §1783.

³³ Hague Convention, arts. 1, 15, 17. IRM 5.21.2.4 (12-17-2013). It has been determined that the Convention does not apply in criminal proceedings. See *United Kingdom v. United States*, 238 F.3d 1312, 1318 (11th Cir. 2001).

the foreign authority is subject.³⁴ Generally, letters of request are available only at post-complaint or post-indictment stages of an investigation. However, evidentiary rules in Hong Kong and the United Kingdom allow courts in those jurisdictions to release evidence at earlier stages of a criminal investigation.³⁵ Although the Hague Convention allows diplomatic officers or consular agents to obtain evidence in foreign countries, the authorization is limited to deposition testimony. Diplomatic officers and consular agents are not able to obtain documents or compel the production of evidence under the provisions of the Hague Convention.

Concluding Observations

So with obvious and varied means at its disposal to gather information regarding recalcitrant U.S. taxpayers and pursue collection, the obvious question is “Why has the United States been so reticent to pursue its tax-delinquent citizens who reside abroad?” When the author has posed this question to Treasury and

Justice Department personnel, the response has been a recitation of the many things the United States government has done to encourage foreign compliance. However, while there have been a few high-profile prosecutions of U.S. resident taxpayers who had failed to disclose foreign assets and accounts, there has yet to be a prosecution of a U.S. citizen living abroad solely for failure to file U.S. income tax and information returns. Possibly this is due to limited resources. Perhaps those prosecutions will be forthcoming as information received in response to FATCA³⁶ compliance is processed. It may also be that Treasury is attempting to negotiate arrangements with foreign authorities for the collection of U.S. taxes in countries in which large numbers of U.S. citizens reside. However, the fact remains that enforcement to date has been lax if not non-existent. Accordingly, the question at the beginning of this article should perhaps be rephrased “What, me worry?”³⁷ Of course, just because something has not yet happened, does not mean it won't.

³⁴ Hague Convention, arts. 9 and 10.

³⁵ IRM 9.4.2.6.4(2) (03-15-2007).

³⁶ Foreign Account Tax Compliance Act.

³⁷ Alfred E. Neuman of “Mad” Magazine fame.