

# The 'Lion's Mouth' postbox:

## A comparative review of the limitations on the use by revenue authorities of leaked and stolen information

[A working paper]

Michael Dirkis\*

### 1. Introduction

Over the last four years there has been a major focus by governments, either collectively through the G20 and the OECD, or unilaterally (in the case of the United States),<sup>1</sup> to introduce measures which impose greater tax transparency on all taxpayers. This push for transparency has a number of aspects, being:

- the disclosure to the public of individual corporate taxpayer's financial information (either by mandate<sup>2</sup> or voluntary code<sup>3</sup>);
- a greater imposition on taxpayers to disclose additional information about their affairs before lodgement of tax returns<sup>4</sup>, as part of their tax returns and post lodgement;<sup>5</sup>
- a greater imposition on taxpayers to disclose additional information about their knowledge of the affairs of third parties;<sup>6</sup> and
- a dramatic increase in the powers of revenue authorities to cooperate and exchange information (e.g. new information sharing agreements Multilateral

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\* Professor of Taxation Law, University of Sydney Law School. This paper builds on some themes originally explored in 'Having your cake and eating it too: The role of the judiciary in facilitating the effectiveness of exchange of information agreements and imposing limitations on the use of the information obtained', a paper presented at the Society of Legal Scholars (SLS) Conference, University of Oxford, 8 September 2016.

1 The Foreign Account Tax Compliance Act 2010 (US) (FATCA).

2 OECD/G20 Mandatory Disclosure Rules Action 12: 2015 *Final Report*, <<http://www.oecd-ilibrary.org/docserver/download/2315371e.pdf?expires=1461897842&id=id&accname=guest&checksum=99F3F685D9F8E02C520F8142AB7C4E52>> sets out the OECD's proposals for Mandatory Disclosure Rules which require the early disclosures of aggressive tax arrangements to provide tax authorities with timely information on such arrangements.

3 For example, the Australian Government on 3 May 2016 released and endorsed the Board of Taxation's Report (Board of Taxation, *A Tax Transparency Code: A Report to the Treasurer* (February 2016) <[http://taxboard.gov.au/files/2016/05/BoT\\_TransparencyCode\\_Final-report.pdf](http://taxboard.gov.au/files/2016/05/BoT_TransparencyCode_Final-report.pdf)>) which included a voluntary Tax transparency Code (TTC). The Australian Taxation Office (ATO) is the responsible agency for administering the TTC and for facilitating the centralised hosting of published TTC reports.

4 In many countries this is done by applications for administrative rulings, voluntary administrative arrangements which set out a framework for managing the compliance relationship between the revenue authority and a taxpayer, and Advanced Pricing Agreements (APAs). For Australia's approach see – The Board of Taxation, *A tax transparency code: Consultation paper* (December 2015) <<http://taxboard.gov.au/consultation/voluntary-tax-transparency-code/>>, 9-11.

5 By Exchange of Information (EOI) under bi-lateral tax treaties (DTAs), Taxation Information Exchange Agreements (TIEAs) and questionnaires sent by the revenue authorities.

6 For example the FATCA reporting requirements. For information on Australian domestic requirements see Michael Dirkis, 'Recent developments in tax transparency', presented to the Tax Institute's 31st National Convention, Melbourne, 4 March 2016, 9-11.

Convention on Mutual Administrative Assistance in Tax Matters (MCMAA),<sup>7</sup> a new OECD Common Reporting Standard (CRS) (spontaneous exchange of financial information)<sup>8</sup> and the OECD's Multilateral Competent Authority Agreement on the Exchange of Country-by-Country (CbC) Reports).<sup>9</sup>

As well as these more recently expanded global measures, revenue authorities continue to receive volunteered information (often anonymously) from 'concerned' citizens. This source of tax evasion information has a long history. For example, prior to Venice surrendering to Napoleon in 1797, such anonymous disclosures were encouraged by the placement of a 'Lion's Mouth' post box at the Doge's Palace. Its aim was to facilitate the lodgment of 'denunciations' of such persons who '... collude to hide the true revenue'.<sup>10</sup>

Most jurisdictions continue to encourage citizens to provide this sort of information. Many jurisdictions even have the capacity and/or strategies in place to make inducement payments for such information.<sup>11</sup> However, such volunteered information is often problematic for revenue authorities as it can be 'illegally sourced' (i.e., stolen and/or leaked) by disaffected employees or family members. The question that arises is whether the illegality of the source of the information undermines the possible unfettered use of such information by revenue authorities.

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7 A copy of the amended Protocol can be found at < <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>>.

8 The 'Common Standard on Reporting and Due Diligence for Financial Account Information' (the CRS) is contained in Part II.B of the OECD, *Standard for Automatic Exchange of Financial Information in Tax Matters* (21 July 2014) <<http://www.oecd.org/tax/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-information-in-tax-matters.htm>> and is supported by OECD, 'Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information' <<http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf>>.

9 OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, released 5 October 2015 <<http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm>> (Final Report). This Final Report is supported by a Guidance on Implementation document (OECD (2015), *Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting*, <<http://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf>>) and an Implementation Package resource (OECD (2015), *Action 13: Country-by-Country Reporting Implementation Package*, <<http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf>>). For a discussion on these measures and their adoption in Australia see Dirkis (2016) supra n 6 at 21-27.

10 The full wording of the inscribed below the 'lion's mouth' was: 'Secret denunciations against anyone who will conceal favours and services or will collude to hide the true revenue from them'.

11 Ann-Sofi Johansson, 'Finland' in International Fiscal Association, 98b *Cahiers de Droit Fiscal International – Exchange of information and cross-border cooperation between tax authorities* (Sdu, 2013) 289 at 299, citing an OECD comparative report on the use of rewards for tax relevant information and related issues (CTPA/CFA(2013)31/FINAL), noted that in response to a question in that survey asking whether countries could pay for third party information, 14 countries of the 36 countries surveyed indicated they could pay for such information. The 14 countries were Denmark, Germany, Greece, India, Ireland, Israel (for criminal cases only), Japan, Korea, the Netherlands, Portugal, South Africa, Turkey, the United Kingdom and the USA and that a number indicated payment would be made even when the information was obtained in violation of domestic or foreign laws. For a description of the schemes operative in Australia, France, Netherlands, Poland, Spain and the United states see Giuseppe Marino 'General Report' presented at the 'New exchange of information versus tax solutions of equivalent effect' European Association of Tax Law Professors (EATIP) Congress 2014, Istanbul, 30 May 2014.

This issue has received some prominence over the last decade due to a number of highly publicised cases where large volumes of client information of banks and advisory firms, located in jurisdictions with strict bank secrecy rules, has been stolen and either sold or given to tax authorities or journalists. Unlike the lion's mouth post box disclosures, these recent disclosures have potential impacts on a large number of taxpayers resident in many jurisdictions. Due to the global reach of the information, jurisdictions are still evolving their approaches to such data as revenue authorities start to undertake compliance action (including the issuing of assessments) against taxpayers named in these information releases.

The approach to the use of illegally sourced information adopted by countries is being determined as the resultant compliance outcomes are considered by the courts. The resultant judgments that have emerged highlight the differences between jurisdictions in respect of the use of this information. In response, revenue authorities in other jurisdictions, aware of the likely limitations on the use of such illegally sourced information, have adopted their compliance strategies that ensure that the information obtained is not directly used in compliance activities.

The focus of this paper is to examine the limitations (actual or presumed) in a number of jurisdictions on the use of 'tainted' (i.e., where the information gathering process was defective) and illegally sourced information in criminal or civil proceedings.<sup>12</sup> This examination will focus on the jurisdictions where the issues have been litigated (in particular France, Germany, Italy, and Australia) as well as dealing with those where litigation has not yet arisen (in particular the United Kingdom and the United States).

The paper also explores recent litigation on the use of information where the acquisition of the information:

- requires the supplier to potentially breach the laws of another jurisdiction; or
- has been acquired by a competent authority of a requesting state due to a mistake by the competent authority of the requested state.

However, as there has been very little litigation on these issues in most jurisdictions, the discussion of these issues will be focused principally on the approach adopted by the Australian courts.

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12 The broader issue of exclusion of tainted evidence has been explored in academic writing for over 50 years. An example of a historic view in respect of Canada, England, France, Germany, Israel, Japan and Norway see G. Arthur Martin, 'The Exclusionary Rule Under Foreign Law', 52 *J. Crim. L. Criminology & Police Sci.* 271 (1961).  
<<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5036&context=jclc>>.

## 2. Comparing the limitations on the use of tainted and illegally sourced information by revenue authorities in selected jurisdictions

### 2.1 The general position of countries in respect of tainted information

As noted above, in many jurisdictions the issue of use of illegally sourced information has not been considered by their courts or expressly addressed by legislation. In some jurisdiction experts merely comment that the situation remains unclear.<sup>13</sup> In light of this lack of specific legal precedent the following sets out the general approach that may be adopted by various jurisdictions where these matters are yet to be litigated.<sup>14</sup> These jurisdictions can be split into three broad categories: those jurisdictions with no limitation on the use of such information, those jurisdictions that limit the use of the information and those jurisdictions where such information cannot be used in any circumstance.

#### 2.1.1 No limitation on the use of illegally sourced information

Jurisdictions that have no limitations on the use of illegally sourced information include Denmark, Finland, Israel<sup>15</sup>, and Japan.

The Danish Minister of Taxation indicated that the Danish tax authorities are not legally restricted from using materials obtained illegally from others in the context of questions of whether the information that had been stolen by a bank officer in Liechtenstein and made available inter alia the Danish tax authorities were subject to legal limitations.<sup>16</sup>

Similarly, in the absence of any litigation in Finland, Ann-Sofi Johansson of the Finnish Tax Administration in 2013 indicated that ‘under an international agreement there is no obligation to investigate how the information was obtained by the other country.’<sup>17</sup> A similar view is held in Japan.<sup>18</sup>

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13 For example see Jennifer Roeveland and Craig West, ‘South Africa’, in *Cahiers 98b* supra n 11, 687 at 702 and Ulrika Gustafsson Myslinski, ‘Sweden’, in *Cahiers 98b* supra n 11, 719 at 736.

14 These views are based upon those of experts in the respective jurisdictions. For example Denham Martin, ‘New Zealand’, in *Cahiers 98b* ibid, 567 at 579 merely asserts that the illegally sourced information would not be used directly, but rather as the basis for commencing an inquiry leading to an assessment. Similarly, in acknowledging that although the Law on General Administrative Procedure provides a rebuttable presumption of the veracity of a foreign document and the Law on Criminal Procedure does allow a challenge the probative value of if it is acquired against the domestic of the requested state, Dejan Dabetic et al, ‘Serbia’, in *Cahiers 98b* ibid, 667 at 684 still suggest that such documents may not be able to be used due to the ‘fruit of the poisonous tree doctrine’.

15 Shosh Shacham, ‘Israel’, in *Cahiers 98b*, ibid, 359 at 372.

16 The Minister of Taxation – reply to question No 245 of 15 February 2010 from the Parliamentary Tax Commission cited in Preben Buchholtz Hasen and Lasse Esbjerg Christensen, ‘Denmark’, in *Cahiers 98b* ibid, 249 at 261-2.

17 Ann-Sofi Johansson, ‘Finland’ in *Cahiers 98b* ibid, 289 at 299. Johansson also noted that Finland as at 2013 had not been offered such information.

18 Kuniyasu Inami, ‘Japan’ in *Cahiers 98b* ibid, 399 at 423.

## 2.1.2 Partial limitations on the use of illegally sourced information

Jurisdictions that place partial limitations on the use of illegally sourced information do so in two ways. The first way is to limit the types of matters when tainted information can be used (e.g., the United States). The second way the use of illegally sourced information is partial limited is by making its use subject to other applicable restrictions such as legal professional privilege (e.g., Canada, Norway, and the United Kingdom).

In the United States a 'poisoned fruit' doctrine exists in respect of the use of unlawfully obtained evidence.<sup>19</sup> It is a judicially created exclusionary rule to safeguard American citizens right under the Fourth Amendment of the Constitution of the United States<sup>20</sup> aimed at deterring unlawful police conduct.<sup>21</sup> However, following the United States Supreme Court in *United States v Calandra*,<sup>22</sup> which laid out a cost-benefit rule for determining when the exclusionary rule would apply outside the context of criminal prosecution (i.e. where the substantial costs to society of excluding concededly relevant evidence outweighs the deterrence benefits achieved through application of the exclusionary rule), Kaminski notes that 'the Supreme Court has refused, in a number of cases, to extend the exclusionary rule beyond the criminal trial context'.<sup>23</sup> In *United States v Janis*, (1976)<sup>24</sup> the Supreme Court also declined to extend the exclusionary rule to civil tax proceedings. Justice Blackmun, in delivering the opinion of the Court, noted:

In the present case we are asked to create judicially a deterrent sanction by holding that evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective shall be inadmissible in a federal civil tax proceeding. Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable. [18](#) [448]

In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred. In this case it is the state officer who is the primary object of the sanction. It is his conduct that is to be controlled. Two factors suggest that a sanction in addition to those that presently exist is unnecessary. First, the local law enforcement official is already "punished" by the exclusion of the evidence in the state criminal trial. [19](#) That, necessarily, is of substantial concern to him. Second, the evidence is also excludable in the federal criminal trial, *Elkins v.*

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19 I would like thank Brett Bondfield, Senior Lecturer in Business Law, The University of Sydney Business School for his assistance on this issue.

20 The Fourth Amendment of the U.S. Constitution provides, '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

21 Daniel W. Kaminski, 'Conclude to Exclude: The Exclusionary Rule's Role in Civil Forfeiture Proceedings', (2010) 6 *Seventh Circuit Rev.* 268, 276.

22 *United States v Calandra*, 414 U.S. 338, 347 (1974).

23 Kaminski, supra n 24 at 276.

24 *United States v Janis*, 428 U.S. 433, 460 (1976) <<http://caselaw.findlaw.com/us-supreme-court/428/433.html>>.

United States, *supra*, so that the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated. [20](#)...

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. [29](#) [455]

...with the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trials with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest. The extension of the exclusionary rule, in our view, would be an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers. [35](#) See *Rizzo v. Goode*, 423 U.S. 362 (1976). [459]

In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. ... In the situation before us, we do not find sufficient justification for the drastic measure of an exclusionary rule. There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case. We therefore hold that the judicially [460] created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.

Thus, in other criminal tax proceedings, the use of illegally obtained information by the Inland Revenue Service is not subject to the judicially created exclusionary rule.<sup>25</sup> One possible reason for the lack of litigation in this area in the United States is that often the information is obtained through plea bargains.<sup>26</sup>

However, unlike the United States' approach complete exclusion of illegally sourced information in criminal hearings a breach of a general restriction is not always a total bar to use of such information. In Norway, Marius Meisdalen Sagen notes that there is no bar to producing illegally sourced information as evidence but the court will seek to weigh up its importance of the evidence and the character of the infringement. The Court may exclude it where the production will be a repeat or continuation of the illegal action.<sup>27</sup>

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25 In *United States v Payner*, 447 U.S. 727 (1980) the Supreme court held that information obtained illegally by the Federal Government from a third party could be used.

26 The 2007-08 so called 'UBS scandal' in the United States did not involve the use of tainted information as the Internal Revenue Service obtained the information by a UBS banking executive turning state' evidence under a plea bargain - see <<https://www.theguardian.com/business/2008/jun/29/ubs.banking>>.

27 Marius Meisdalen Sagen, 'Norway' in *Cahiers 98b* *ibid*, 155 at 589.

Similarly, where the use of an illegally sourced document, which was subject to legal professional privilege, is sought to be used there is not a total bar to the use of that information. In common law jurisdictions such as Canada<sup>28</sup> and the United Kingdom where a document has come into the possession of a third person, outside the lawyer/client relationship, in the absence of a confidential arrangement, that document may no longer be privileged<sup>29</sup> and the tax authorities can make use of that information.<sup>30</sup>

Thus, although the courts in the United Kingdom may exclude illegally sourced privileged information<sup>31</sup> generally such information can be admissible in civil litigation. Privy Council in *Kuruma v The Queen* where Lord Goddard LCJ noted:<sup>32</sup>

The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle. ... There can be no difference in principle for this purpose between a civil and a criminal case.

That said, the issue has not been tested in the tax context as Her Majesties Revenue and Customs (HMRC) has pursued a tax amnesty approach (so called 'disclosure facilities') supported by Memorandum of Understanding and tax treaty exchange of information agreements rather than a litigation.<sup>33</sup> These arrangements include the Dependency Disclosure Facilities (with Isle of Man, Guernsey, Jersey and Overseas Territories of Anguilla, Cayman Islands, Bermuda, Montserrat, Turks and Caicos, Gibraltar and the British Virgin Islands); the Liechtenstein Disclosure Facility; the Co-operation Agreement with Switzerland; and the European Savings Directive (EUSD) approach.<sup>34</sup>

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28 Nik Diksic and Jeffrey Shafer, 'Canada' in *Cahiers 98b* ibid, 155 at 173 state it 'can be used subject to other applicable restrictions.'

29 This argument is based upon the decisions in *Calcraft v Guest* [1898] 1 QB 759 and *R v Tompkins* [1898] 1 QB 759 where secondary evidence of privileged communications was admissible, as the communications had ceased to be confidential in the hands of the third person.

30 See generally Suzanne McNicol, *Law of privilege*, (Law Book Company Limited, 1992), 24-29. In Australia, the courts have determined that an assessment, which was based upon privileged documents supplied by a disgruntled former law clerk employed by the taxpayer's solicitors, was valid in *Commissioner of Taxation v Donoghue* [2015] FCAFC 183. The taxpayer's remedy lies against their solicitor. For further discussion see Michael Dirkis, Having your cake and eating it too: The role of the judiciary in facilitating the effectiveness of exchange of information agreements and imposing limitations on the use of the information obtained', a paper presented at the Society of Legal Scholars (SLS) Conference, University of Oxford, 8 September 2016.

31 Nigel Cooper Q.C., 'The fruit of the poisoned tree – The admissibility of evidence in civil cases' (2014) <<http://www.bgja.org.uk/wp-content/uploads/2014/02/NigelCooper.pdf>>.

32 *Kuruma v The Queen* [1955] AC 197; [1955] 2 WLR 223, 226-227.

33 It was suggested by Professor Judith Freeman in discussions at the Society of Legal Scholars (SLS) Conference, University of Oxford, 8 September 2016 that this may have been due to concerns about legal professional privilege and confidentiality.

34 See Mark Bowler-Smith and Huigenia Ostik 'UK National Report' prepared for the 'New exchange of information versus tax solutions of equivalent effect' European Association of Tax Law Professors (EATIP) Congress 2014, Istanbul, 30 May 2014.

### 2.1.3 A prohibition on the use of illegally sourced information

Jurisdictions that have a prohibition on the use of illegally sourced information include the Czech Republic, Liechtenstein,<sup>35</sup> Peru, Poland, Portugal and Switzerland.<sup>36</sup> The prohibition is due to bank information being classified as personal information and subject to domestic secrecy and confidentiality laws,<sup>37</sup> the tax laws,<sup>38</sup> or may be an offence under the criminal law.<sup>39</sup>

## 2.2 *The position of countries where litigation has occurred in respect of tainted information*

This examination of the approaches actually adopted in selected jurisdictions where litigation has occurred will be undertaken in the context of two of the four major information releases (i.e., the 'Kieber' (Liechtenstein) papers<sup>40</sup> and the 'Falciani' (HSBC) papers).

### 2.2.1 *Limitations on the use of the 'Kieber' (Liechtenstein) papers*

The first high profile case involving illegally sourced information began in November 2002 when Mr Kieber, a computer technician employed by the LGT Bank in Liechtenstein AG (LGT Bank) unlawfully took three compact discs containing a large number of records of a subsidiary of that bank, LGT Treuhand AG (LGT Treuhand). In 2006 he sold the information (the so called 'Kieber' or 'Liechtenstein' papers) for €4.2 million to the German Federal Intelligence Service (*Bundesnachrichtendienst* (BND)), which provided the material to the German tax office. The information was subsequently exchanged with other jurisdictions.<sup>41</sup>

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35 Matthias Langer, 'Liechtenstein', in *Cahiers 98b*, supra n 11, 449 at 469.

36 Xavier Oberson, 'General report', in *Cahiers 98b*, *ibid*, 19 at 52.

37 Lukas Moravec and Danuse Nerudova, 'Czech Republic' in *Cahiers 98b*, *ibid*, 223 at 246 note that illegally obtained information has never been allowed 'as evidence in any tax administration proceedings or criminal procedure. This attitude is based on the principles defined by Act No 40/2009 Coll. Criminal Code.' Similarly, Patricia Valdez Ladron de Guevara, 'Peru', in *Cahiers 98b*, *ibid*, 597 at 614 notes that the Peruvian Constitutional Court treated illegally obtained confidential documentation as having no legal effect (Case File No. 04224-2009PA/TC, 19 July 2011) as the documents were protected by tax confidentiality laws.

38 Hanna Filipczyk et.al, 'Poland' in *Cahiers 98b*, *ibid*, 617 at 633 note that illegally obtained information cannot be used in tax proceedings under Article 180(1) of the General Tax Law Act of 29 August 1997 (Poland) but the case is not clear where there are criminal proceedings.

39 Joao Sergio Riberio, 'Portugal' in *Cahiers 98b*, *ibid*, 639 at 651 notes that illegally obtained information may constitute a criminal offence and would be disregarded under article 126(3) of the Portuguese Criminal Code.

40 This list is also referred to as the Vaduz list as it was stolen from the LGT Bank diVaduz.

41 Actions in 2008 by tax authorities in a number of countries brought the existence of the deal to light - see Lynnley Browning, 'Banking scandal unfolds like a thriller', *The New York Times*, 14 August 2008 <[http://www.nytimes.com/2008/08/15/business/worldbusiness/15kieber.html?\\_r=0](http://www.nytimes.com/2008/08/15/business/worldbusiness/15kieber.html?_r=0)> and Liz Jackson, transcript of 'Tax Me If You Can', *Four Corners*, Australian Broadcasting Corporation, 6 October 2008 <<http://www.abc.net.au/4corners/content/2008/s2383439.htm>>. The Australian Full Federal Court decision in *Denlay v Commissioner of Taxation* [2011] FCAFC 63, [11] to [15] contains a more detailed explanation of the events that unfolded. The AAT decision in *Murray and FCT (No 3)* [2012] AATA 557 is another example of the use of the information in Australia.



In Germany, following the public revelations of the payment of €4.2 million to the former employee of LGT Bank, there was debate about both the ethical and legal issues associated with both the German Chancellery and Ministry of Finance approving the payment of a 'bribe' for stolen information. There was also a debate about whether the BND, by buying the information, had acted beyond the agency's national security role and whether the process for obtaining the information and subsequent use was unconstitutional.

In 2010 the Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)) considered an appeal on whether the Kieber information could be used to justify a decision to commence a prosecution. The Court steered away from considering the issue of the constitutionality of the process for obtaining the information. It focused upon the subject matter of the appeal, that is:

- the court at first instance did not act in an arbitrary manner when deciding on whether the law enforcement agency seriously infringed the procedural law nor acted in an arbitrary manner when obtaining the information; and
- as that information was business information it did not impact upon the individuals' personal/private rights.<sup>42</sup>

In doing so it did not determine whether obtaining the information was legal or illegal. The Federal Constitutional Court noted:

[With] regards to the constitution, there is no rule of law which says that, in the case of legally defective evidence procurement, the use of evidence obtained in this manner would always be inadmissible ... [t]he evaluation of the question, what consequences a possible breach of criminal procedure has on process regulations and whether this includes, in particular, a prohibition for use of evidence is primarily a matter for the expert courts.<sup>43</sup>

In the lower courts in Germany, the objections to the use of such information had been over-ruled.<sup>44</sup>

The approach in Australia to the use of the Kieber information was similar. Justice Logan in the Federal Court decision *Kevin Denlay v Commissioner of Taxation*<sup>45</sup> noted that in Australian law there exists a discretion to permit the use of unlawfully

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42 - 2 BvR 2101/09, JZ 2011, 249 (cine mit Anm. Wohlers) <[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/11/rk20101109\\_2bvr210109.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/11/rk20101109_2bvr210109.html)> (in German). The English citation is *Juristenzeitung*, Vol. 66, Issue 15, (2011), pp. 249-254. This report contains comments on the decision of the BVerfG by Wolfgang Wohlers. Much of the academic debate following the decision has focused upon determining at what point of the prosecution the tainted evidence will have to be excluded. I would like thank Dr Caroline Heber, Senior Research Fellow, Max Planck Institute for Tax Law and Public Finance, Munich for her assistance on this issue.

43 Ibid at [43] – cited in *Denlay v Commissioner of Taxation* [2011] FCAFC 63, [50].

44 LG Bochum [Bochum District Court], 2 Qs 10/08, 22 April 2008; and LG Bochum [Bochum District Court], 2 Qs 2/09, 7 August 2009 - cited in *Denlay* ibid.

45 *Kevin Denlay v Commissioner of Taxation* [2010] FCA 1434, [104]. The case was held concurrently with *Mirja Denlay v Commissioner of Taxation* [2010] FCA 1435 with the reasons for both decisions set out in the Kevin Denlay decision.

obtained evidence in criminal proceedings<sup>46</sup> and a like discretion as to the use of such evidence in civil cases.<sup>47</sup> He also noted that there is no bar to the subsequent use in an assessment of information unlawfully obtained by a third party.<sup>48</sup> These observations were not questioned by the Full Federal Court on appeal.<sup>49</sup> However, the Commissioner may be prevented from tendering or relying on such information by the rules of evidence (in particular hearsay) or on equitable<sup>50</sup> or public policy grounds.<sup>51</sup> The scope of these discretions in the tax context has been the subject of significant litigation in recent times. The challenges have ranged from taxpayers arguing that the tainted information is the proceeds of crime to arguing that the information is hearsay and inadmissible.

One illustration of these innovative arguments is the Full Federal Court decision *Denlay v Commissioner of Taxation* (the Denlays' appeal).<sup>52</sup> The taxpayers argued that the information supplied on discs to the Australian Taxation Office was the proceeds of crime and that tax officers' actions in obtaining information and then using it as part of an assessment amounted to 'conscious maladministration'.<sup>53</sup> The Full Federal Court, consisting of Keane CJ, Dowsett and Reeves JJ), found in respect of the proceeds of crime argument that:

[68] A reasonable suspicion may be attributed to the Commissioner's officers that Mr Kieber had obtained information from LGT by unlawful means; but the question is whether receiving information reasonably suspected of having been obtained unlawfully is proscribed by s 400.9 of the *Criminal Code*. In this regard, the evidence did not establish the receipt or importation by officers of the Commissioner of "money or other property" which could reasonably be suspected as being the proceeds of crime. ...

[74] It may be accepted that the disks which Mr Kieber gave to the Commissioner's officers contained stolen data. But, as we have observed, the disks themselves were not property reasonably suspected of being the proceeds of crime, there being nothing in the evidence to warrant a reasonable suspicion that those disks were not Mr Kieber's property...

In dismissing the conscious maladministration argument the Full Federal Court sought to clarify that, as explained in *Futuris*, that conscious maladministration '...

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46 *Bunning v Cross* [1978] HCA 22.

47 *Pearce v Button* (1985) 8 FCR 388, 402-403.

48 *Kevin Denlay v Commissioner of Taxation* [2010] FCA 1434, [103]. In *Awad v Commissioner of Taxation* [2000] FCA 1288, 'the third party had, without the involvement of the Commissioner, failed to comply with the requirements of an Australian state law in obtaining the information which later came into the Commissioner's possession and was used by him for the purposes of taxation legislation, including assessment. The court found that there was no basis raised upon which the assessment should be quashed.'

49 *Denlay v Commissioner of Taxation* [2011] FCAFC 63.

50 *Lord Ashburton v Pape* [1913] 2 Ch 469.

51 *Bunning v Cross* [1978] HCA 22.

52 *Denlay v Commissioner of Taxation* [2011] FCAFC 63.

53 *Ibid* at [51]-[56].

involves actual bad faith on the part of the Commissioner or his officers'.<sup>54</sup> The Full Federal Court concluded that:

[79] Conscious maladministration as explained in *Futuris* relates to the integrity of the assessment. Even if the circumstances in which the information in question became available to the Commissioner's officers involved unlawful conduct on their part, that would not necessarily deny the integrity of the assessment. What matters for that purpose is the accuracy of the information and the competence and honesty of those officers involved in making the assessment. ...

[81] ... It would be a remarkable state of affairs if the Commissioner were entitled, and indeed obliged, to refrain from doing what is expressed to be his duty by the terms of s 166 of the ITAA 1936 by reason of a suspicion on his part, even a reasonable suspicion, that some illegality on the part of his officers may have occurred in the course of gathering the information ... The expense and inconvenience of casting such a burden on the Commissioner, and the difficulty of defining precisely the kinds of unlawful conduct which might preclude the Commissioner from doing the duty cast on him by the unqualified language of s 166, are further reasons why the interpretation propounded by the taxpayers should be rejected.

[82] ... It is an entirely different thing to say that the interest of the Australian community in the making of taxation assessments based on the most accurate information available, an interest embodied in s 166 of the ITAA 1936, should be defeated by a default on the part of the Commissioner's officers which has no bearing on the accuracy of the assessment. Thus, the desirability of encouraging officers of the executive government to abide by the law of the land affords no reason to confine the operation of s 166 of the ITAA 1936 by subjecting it to the limitations urged by the taxpayers.

The Denlays had one more attempt at seeking to exclude Mr Kieber's evidence in *Denlay v Commissioner of Taxation (No 2)*<sup>55</sup> arguing that the evidence could not be admitted as it did not satisfy the exceptions to the hearsay rule in the Evidence Act 1995 (Cth). However, the Federal Court found that the documents met the requirements for the exceptions, and therefore were admissible. Justice Logan noted that 'I reach that conclusion because the desirability of admitting that evidence outweighs the undesirability of admitting evidence that was obtained in the way in which it was by Mr Kieber.'<sup>56</sup>

Although other countries did receive the Kieber information and it was used in compliance work, those cases have not given rise to consideration by the courts due to the issue not being litigated (e.g. Norway<sup>57</sup> and the United Kingdom<sup>58</sup>).

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54 Ibid at [78].

55 *Denlay v Commissioner of Taxation (No 2)* [2011] FCA 1093.

56 Ibid at [24].

57 Marius Meisdalen Sagen, 'Norway' in *Cahiers 98b*, supra n 11, 155 at 590 noted that the receipt of the Liechtenstein information by the Directorate of Taxes was supported by the Finance Minister in an address to the Norwegian Parliament on 7 March 2008 and subsequently the Directorate of Taxation opened

## 2.2.2 The 'Falciani' (HSBC) papers

The second high profile 'stolen documents' case occurred in 2006 and 2007. Hervé Falciani, a systems engineer employed HSBC bank's Geneva branch, allegedly stole information relating to more than 130,000 customers in a number of European Union countries. In 2008 he attempted to sell that information (the so called "Falciani" or 'HSBC' papers) to various governments. The French police, in January 2009, raided the home of Falciani and seized the data. The French government then passed the information on to selected European governments.<sup>59</sup> The impact of this information appears to have been limited to the European Union.

Unlike like the views adopted by the courts in Germany and Australia in respect of the Kieber papers, the approach in France and Italy in respect of the Falciani (HSBC) papers by the courts has not been as clear cut.

One of the French Supreme Courts (the *Cour de cassation*) ruled that bank account information illegally obtained abroad (the Falciani (HSBC) papers) cannot support a lawful administrative activity.<sup>60</sup> What was crucial in the decision was that the tFrench Tax Authorities were aware about illegal source of the information. However different approaches were adopted by the criminal chamber of the *Cour de cassation* in the *Bettencourt* case<sup>61</sup> and the other Supreme Court (*Conseil d'Etat*)<sup>62</sup> In the *Bettencourt*

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approximately 50 cases. However, in the first successful prosecution (Gulating Appeal Court, ref. 11-170076AST-GULA/AVD2, 23 February 2012) as the taxpayer confessed to holding undeclared assets offshore the issued of admissibility of the illegally source information did not arise.

58 Diane Hay and Kay Kimkana, 'United Kingdom', in *Cahiers 98b*, supra n 11, 757 at 777-778 not the In the Her Majesties Revenue and Customs (HMRC) has used illegally sourced data to enquire into potential tax evasion which was obtained in return for a payment of 100,000 pounds made to obtain the stolen data on certain off shore bank accounts held in Liechtenstein.

59 In November 2012, two and a half years after the information was passed on by the then French Finance Minister Christine Lagarde to both Greece and United Kingdom authorities (so called 'Lagarde's list'), the existence of the information became known and the media in both countries criticised their respective Government for their inaction (e.g., Ann Ashworth, 'Lagarde list' tax evaders, *The Times*, Week in money, 3 November 2012 <<http://www.thetimes.co.uk/tto/money/article3588435.ece>> and Andy Dabilis, 'Lagarde list leaked: Greek Politicians, big names', *Greek Reporter* 27 October 2012 <<http://greece.greekreporter.com/2012/10/27/lagarde-list-leaked-greek-politicians-big-names/>>.

60 See Cour d'Appel de Paris, Pôle 5 – Chambre 7, Ordonnance du 8 Février 2011 annulled the ordinances issued by the lower court that authorised the inspections on two ground. First the information used was stolen (i.e. obtained by the commission of a criminal offense); and second the transmission of such data by the Providing the Republic of Nice DNEF under Article L 101 of the LPF was irregular since this article is the communication by the judicial authority in the financial administration of any indication that it can gather such as to assume a fraud in tax matters' (see Pietro Mastellone "First decisions on the Liechtenstein case: exchange of information, burden of proof and taxpayer's rights protection" (2011) *Rivista Di Diritto Tributario Internazionale* 499-519, 518). This decision was subsequently confirmed by Cour de Cassation, Chambre Commerciale, Financière et Économique, 31 January 2012, No. 141 (recourse No. P 11-13.097), cited in Agostino Ennio La Scala and Pietro Mastellone 'New exchange of information versus tax solutions of equivalent effect' European Association of Tax Law Professors (EATIP) 2014 Istanbul (Turkey), 29-31 May 2014, 15 <<http://www.eatip.org/uploads/public/2014/National%20report%20Italy.pdf>>.

61 See Cass, n° 11-85.464, 31 January 2012 cited in Alexandre Maitrot de la Motte "National Report – France" prepared for the 'New exchange of information versus tax solutions of equivalent effect' European Association of Tax Law Professors (EATIP) Congress 2014, Istanbul, 30 May 2014, para 8.

62 Conseil d'Etat, 6 October 1999, n° 126827, *Mr. Perrini*. – Conseil d'Etat, 6 December 1995, n° 90914, *Navon* and n° 126826, *SA Samep*. – Comp. Conseil d'Etat, 3 December 1990, n° 103101, *SA Antipolia* cited in Maitrot de la Motte (Ibid).

case the illegal information was admissible as the illegality was not the result of an investigator and in the *Conseil d'Etat* case law the 'document was validly acquired by the tax authorities even if the original source was illegal or irregular' due to the document being 'obtained through a judicial or administrative procedure' which was subsequently nullified.<sup>63</sup>

The French government responded to the exclusion of the Falciani (HSBC) papers with a legislative change: The *Law on the fight against tax fraud and the great economic and financial delinquency* enacted on 6 December 2013.<sup>64</sup> Under Article 37 documents obtain legally can no longer be 'excluded "solely because of their origin" even if they have been stolen by someone before being communicated to the Tax Administration.'<sup>65</sup>

In Italy, where the Italian tax authorities had issued a large number of tax assessment notices to taxpayers based, almost exclusively, on bank account information illegally obtained and under exchange of information,<sup>66</sup> the lower courts were initially split with some courts finding that tax assessments issued upon reliance on illegally obtained information were void<sup>67</sup> whilst another court held that documents received from the competent authority of another state can be used regardless of how the other state obtained the information.<sup>68</sup> The higher Courts have adopted the approach that the use of information obtained illegally renders an assessment based only on that information void.<sup>69</sup>

[The Italian position requires further development]

Again, although other countries did receive the Falciani (HSBC) papers, those revenue authorities either continued their strategies of not prosecuting taxpayers (e.g. the United Kingdom<sup>70</sup>) or took no action (e.g. Greece<sup>71</sup>).

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63 Ibid Maitrot de la Motte.

64 *Loi n° 2013-1117 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*, 6 December 2013 : *Journal Officiel de la République Française*, 7 December 2013, text n° 4 cited in Maitrot de la Motte (Ibid).

65 Ibid Maitrot de la Motte.

66 Ibid 14.

67 See Tax Court of First Instance (*Commissione Tributaria Provinciale*) of Milan, Section XL, Decision No. 367 of 15 October 2009 and Tax Court of First Instance of Mantua, Section I, Decision No. 137 of 13 May 2010, No. 137 which both held invalid the tax assessments based on information on alleged undeclared income related to Liechtenstein bank accounts (cited in Mastellone supra n 57); and Tax Court of First Instance of Como, Decision No 188/01711 of 15 November 2011 and Tax Court of First Instance of Milan, Decision No 263/05/12 of 4 October 2011 (both cited Xavier Oberson, 'General report', in *Cahiers 98b*, supra n 11 at 53).

68 See Tax Court of First Instance of Genoa, Decision No 193 of 5 June 2012, cited in Oberson, *ibid*.

69 See the Italian Supreme Court in *Corte di cassazione*, Third Criminal Section, Decision 4 October 2011, No 38753, cited in Oberson, *ibid*.

70 The United Kingdom list contained 4,388 people holding £699 million in offshore current accounts. The HMRC identified from this list 3,600 potentially non-compliant UK taxpayers. As noted by The Treasury Minister David Gauke the HMRC continued with its policy of settlement a head of prosecutions. He noted that 'it was normal HMRC practice – stretching back to before 2010 – not to publish the names of individuals found to have been evading tax, but instead to focus on recovering the lost revenue' - see Patrick Wintour, 'HSBC files: minister defends government over pursuing tax avoiders', *The Guardian*, 9 February 2015, <<https://www.theguardian.com/business/2015/feb/13/france-says-it-did-not-restrict-uk-from->

### 2.2.3 Summary

In summary, there has emerged a clear divergence between jurisdictions in their approaches in dealing with illegally sourced information. On one hand there is little restriction on its use, as in Germany and Australia, compared with a prohibition on the use of such information in Italy.

## 3 Limitations on the use of information tainted in the gathering process

As mentioned in the introduction, the second focus of this paper was to explore the developing area of on the use of information where the acquisition of the information:

- requires the supplier to potentially breach the laws of another jurisdiction; or
- has been acquired by a competent authority of a requesting state due to a mistake by the competent authority of the requested state.

These issues are addressed in the context of Australia as they appear not to have been litigated elsewhere.

### 3.1 Causing illegality

The issue of whether a taxpayer can be required to supply information where it amounts to a commission of a crime has not been litigated elsewhere except in Australia. In *Australia and New Zealand Banking Group Limited v Konza*<sup>72</sup> the Full Federal Court partially upheld the appeal on the validity of two notices to supply information.<sup>73</sup> The Court held that one of the two notices was valid, despite the taxpayer's arguments that disclosure would be a breach of the law of Vanuatu. A crucial factor in the case was the database upon which the requested documents were held in this case was physically located in Australia.

In *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)*<sup>74</sup> the Bank sought to appeal the decision of the Federal Court concerning the primary judge's refusal to set aside portions of a notice to produce in circumstances where compliance with the notice would require the Bank and its staff to breach the criminal law of Samoa (i.e.

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[using-hsbc-files-to-pursue-bank-and-criminals](#)>. However, The House of Commons, Public Accounts Committee, after an inquiry into tax avoidance and evasion in respect of HSBC (with oral evidence provided on 23 and 24 March 2015), concluded in its Eighteenth Report that HMRC's action in this area 'continues to be unacceptably slow, putting tax revenues at risk'

<<https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2010/tax-avoidance-evasion-hsbc/>>..

71 On the Greek side, things were more chaotic in respect of their list of 1,991 names. Various political figures claimed they had handed it on to Greece's Financial and Economic Crime Unit (SDOE), the CD was then reported missing and finally an USB containing a copy of the information was found in the drawer of a secretary.- see < [https://en.wikipedia.org/wiki/Lagarde\\_list](https://en.wikipedia.org/wiki/Lagarde_list)>.

72 *Australia and New Zealand Banking Group Limited v Konza* [2012] FCAFC 127.

73 The appeal against Lander J decision in *Australia and New Zealand Banking Group Limited v Konza* [2012] FCA 119.

74 *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28 (concerning appeals from *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)* [\[2012\] FCA 938](#)).

an offence under the *International Banking Act 2005* (Samoa)).<sup>75</sup> This case is one of a series of procedural cases arising from the assessment of five key taxpayers on 12 August 2010 in respect of the profits on the acquisition and sale of securities in entities listed on the Australian Stock Exchange (ASX).<sup>76</sup> The bank argued that the Court at first instance should have relieved the bank from complying with the notice under the *Federal Court Rules 2011* (Cth) as the potential for contravention of a foreign law amounted to exceptional circumstances. In determining that this reason did not amount to exceptional circumstances, as required under r 1.34 of the *Federal Court Rules 2011* (Cth), Logan, Jagot and Robertson JJ noted:

26. ... In the present case the notice to produce was to the Bank, a party who is present in and, indeed, commenced proceedings in the jurisdiction. As the appeal statement discloses, the conduct which caused the Bank to commence the proceeding involves the disallowance of the Bank's objection to the Commissioner's notices of assessment of taxation payable on gains from dealing in shares listed on the Australian Stock Exchange. While the documents of the Bank may well be located outside this jurisdiction and in Samoa by reason of the requirements of the International Banking Act (ss 11(1) and 26(1) in particular), it cannot be said that the facts are comparable to those in *Mackinnon* [1986] Ch 482, *Arhill* (1990) 23 NSWLR 545, *Stemcor* [2004] FCA 391, *Suzlon Energy Ltd* [2011] FCA 1152; (2011) 198 FCR 1 or *Gao* [2002] VSC 64. The facts do not involve a requirement for production by a foreigner or a person who disputes the jurisdiction of the court in respect of conduct outside the jurisdiction. The Bank is a person who has invoked the court's jurisdiction and at least the foundational conduct to which the proceeding relates was within the jurisdiction. Because the essential issue is the control of the Bank in order to determine the issue of

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- 75 *Hua Wang Bank Berhad v Commissioner of Taxation* (No 2) [2012] FCA 938. In this decision, the Federal Court dismissed the taxpayers' application for judicial review of the Commissioner's decision to issue a formal request to Her Majesty's Revenue and Customs (HMRC) in the United Kingdom for certain information. The taxpayers have subsequently challenged the HMRC's decision to issue notices for disclosure of information in response to Australia's request - *Derrin Brothers Properties Ltd & Ors, R (on the application of) v A Judge of the First Tier Tribunal (Tax Chamber) & Ors* [2016] EWCA Civ 15 (15 January 2016) <<http://www.bailii.org/ew/cases/EWCA/Civ/2016/15.html>>. The Administrative Court at first instance found that the powers of HMRC pursuant to schedule 36 were sufficient to support a third party being required to provide information and documents for checking the tax position of a resident or overseas taxpayer by way of assistance to another country. The Court of Appeal unanimously dismissed the appeal, confirming that the HMRC notices were valid. They noted that they contained sufficient detail and did not have to specify the documents sought.
- 76 The cases include: *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* [2010] FCA 1014 (leave to appeal refused in *Hua Wang Bank Berhad v Deputy Commissioner of Taxation* [2010] FCAFC 140), *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* (No 2) [2010] FCA 1296, *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28 (concerning appeals from *Hua Wang Bank Berhad v Commissioner of Taxation* (No 2) [2012] FCA 938), *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* (No 4) [2012] FCA 1482, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 7) [2013] FCA 1020, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 8) [2013] FCA 1021, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 9) [2013] FCA 1022, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 10) [2013] FCA 1024, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 11) [2013] FCA 1055, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 12) [2013] FCA 1091, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 13) [2013] FCA 1095, *Hua Wang Bank Berhad v Commissioner of Taxation* (No 14) [2013] FCA 1096, *Bywater Investments Limited & Ors v Commissioner of Taxation* [2015] FCAFC 176 (concerning appeals from *Hua Wang Bank Berhad v Commissioner of Taxation* [2014] FCA 1392) and *Hua Wang Bank Berhad & Ors v Commissioner of Taxation* (No 19) [2015] FCA 454 (note: on 13 May 2016 the High Court granted the taxpayers special leave to appeal against the Full Federal Court decision).

residency, conduct outside the jurisdiction is also relevant, as the primary judge found at [62].

27. For these reasons the principle of “exceptional circumstances” (assuming there is such a principle in terms) is not engaged on the facts of the present case...

The Full Federal Court also found that the judge at first instance had taken due regard of the potential breach of a foreign law. Justices Logan, Jagot and Robertson noted:

28. The principle which is engaged is the need for caution where there is an intrusion upon the sovereignty of a foreign state, it being no light matter to enforce Australian laws in circumstances which infringe the legislative policies of other countries, ... These circumstances dictated that the primary judge proceed with caution. Assuming, for this purpose, that it is open to the Bank to appeal on the basis that the primary judge failed to proceed with caution (such a ground not being apparent from the draft notice of appeal), it cannot be said the primary judge’s reasons lend any support to that view.

29. The primary judge was aware that the Bank’s application was not to set aside the whole of the notice to produce but, rather, to produce more limited documents with customer details masked. The primary judge was sensitive to the issue of customer confidentiality which most likely attends banking records (at [64]). His Honour also expressly recognised that caution was required, posing the issue for resolution in these terms at [71]:

The requirement that a party before this court should be required, on pain of being held in contempt, to do an act which would constitute a criminal offence under the laws of another country necessarily requires one to pause.

30. In the balancing exercise then carried out the primary judge also posed and answered a series of questions as follows at [75]:

What matters are relevant? First, there is the matter of comity: “It is no light matter to enforce Australian laws in circumstances which infringe the legislative policies of other countries” (*Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* [1996] FCA 1789; (1996) 69 FCR 531 at 552 per Lehane J (Lockhart and Foster JJ agreeing)); secondly, there is the nature and significance of the proceedings which are before this court. Are the documents located in Australia or the country whose criminal laws prevent production? Do the proceedings have an element of public interest about them? How serious are they? (cf *Bank of Valetta* at [49] per Hely J). Thirdly, what is the nature of the foreign law in question? Does it have any application in the country in question or does it, in terms, only apply to foreigners? (See *Australia and New Zealand Banking Group Ltd v Konza* (2012) 289 ALR 286; [2012] FCA 196 at [80]–[100] per Lander J.) Fourthly, it is relevant to consider whether production of the material would carry with it a risk of undermining significant interests of the State involved.



31. In the face of these reasons it cannot be said that the primary judge failed to apply the principled approach of caution required when it is sought to enforce Australian laws in circumstances which infringe the legislative policies of other countries. We reject proposed ground of appeal 1 as providing a basis for leave to appeal.

### 3.2 Mistake in information exchange

Finally, the issue of whether there are any limitations on the Commissioner's use of information exchanged by a treaty partner, where it is subsequently found that the information was supplied in error, has also been litigated.

In *Hua Wang Bank Berhad v Commissioner of Taxation (No 7)*<sup>77</sup> the Commissioner was given these documents by the Cayman Islands Tax Information Authority (CITIA) on 5 May 2011 and 20 September 2011. The CITIA consented to the use of the documents in these proceedings on 17 February 2012. On 13 September 2013, the day before the trial of this matter was to begin, the Grand Court of the Cayman Islands ('the Grand Court') set aside the decision by the CITIA to consent to the use of the documents.<sup>78</sup> Justice Quin J ordered CITIA to write to the Commissioner seeking his undertaking not to divulge the documents in Court proceedings in Australia and demanding the immediate destruction or return of the documents to CITIA. A letter to that effect has been received by the Commissioner. The Commissioner has not given the suggested undertaking, does not propose to return the documents and, to the contrary, now seeks to tender them.<sup>79</sup>

The parties to the action argued that:

- by consenting to their use '... in these proceedings would be a criminal offence under laws of the Cayman Islands having extraterritorial effect in Australia. On this view of affairs the Court would not lightly permit conduct which infringed the law of the Cayman Islands. Judicial comity' is required;<sup>80</sup>
- 'the documents obtained from CITIA (including those exhibits) had been improperly obtained in breach of the law of the Cayman Islands...' and in light of the decisions by the Grand Court the illegality was said to arise;<sup>81</sup>
- the evidence was obtained 'improperly' under the Evidence Act 1995 (Cth) and as 'the documents had been obtained through a breach of the *Agreement between the Government of Australia and the Government of the Cayman Islands on the Exchange of Information with respect to Taxes*, signed 30 March 2010, [\[2011\] ATS 14](#) (entered into force 14 February 2011);<sup>82</sup>

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77 *Hua Wang Bank Berhad v Commissioner of Taxation (No 7)* [\[2013\] FCA 1020](#).

78 *JAI and MHI: MH Investments v Cayman Islands Tax Information Authority* (13 September 2013), Cause No 391/2012, Grand Court of the Cayman Islands.

79 *Hua Wang Bank Berhad v Commissioner of Taxation (No 7)* [\[2013\] FCA 1020](#), [3].

80 *Ibid* [15].

81 *Ibid* [16].

82 *Ibid* [17].

- the use of the documents had the potential to prejudice international relations between the Commonwealth and the Cayman Islands and ‘this mattered because s 130 of the Evidence Act confers a discretionary power to exclude evidence relating to a ‘matters of state’ when the public interest in admitting the evidence is outweighed by the public interest in preserving its confidentiality’;<sup>83</sup> and
- ‘...it would be a contempt of this Court for the Commissioner to use such extra-curial powers of collection to gather evidence for the purposes of these proceedings, as opposed to its use for investigative purposes.’<sup>84</sup>

Justice Perram rejected all the arguments finding that that Australia is acting in breach of the Treaty noting:

83. Under the terms of the Treaty the ATO did not require the permission of CITIA to use Exhibits 8 or 9. After the conference held in February 2012 the ATO in fact sought such permission but this was not required under the Treaty. Neither the fact that it received such a consent on 17 February 2012 nor the fact that that consent was set aside on 13 September 2013 is legally relevant.

84. In those circumstances I do not accept that the ATO came into possession of the documents in Exhibits 8 and 9 in any way which involved a breach of the Treaty. So far as it is said that the ATO obtained Exhibits 8 and 9 improperly within the meaning of s 138 of the *Evidence Act* because it did so in circumstances involving a breach of the Treaty, I reject the argument.

### 3.3 In summary

Although the issue of potential limitations on a request for exchange of information arising where it requires the supplier to potentially breach the laws of another jurisdiction or has been acquired by a competent authority of a requesting state due to a mistake have not been considered broadly, the cases discussed above will provide an indication the likely outcome of a possible challenge in both jurisdictions with minimal limitations on the use of tainted information, like Australia, and those jurisdictions that prohibit reliance on illegally sourced information, like France and Italy.

## 4. Conclusions

It is clear that the positions of many jurisdictions in respect of the limitations on illegal sourced information will continue to develop, particularly as the release of large volumes of financial information appears to be occurring on a more regular basis. In 2016 there were two major releases of financial data. The first, and largest disclosure of stolen data to date (the so called ‘Panama papers’). The leak was first reported worldwide on 3 April 2016. More than 11.5 million documents belonging to the Panamanian law firm Mossack Fonseca, detailing financial and attorney–client

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83 Ibid [18].

84 Ibid [19].

information were leaked to German journalist Bastian Obermayer from the newspaper *Süddeutsche Zeitung*.<sup>85</sup> The most recent release of protected information occurred on 21 September 2016 when the Bahamas corporate registry data, consisting of 1.3 million files, were also leaked to *Süddeutsche Zeitung*<sup>86</sup> and shared with the International Consortium of Investigative Journalists (ICIJ).<sup>87</sup>

The impact of those information releases is yet to be seen. However, a more coordinated response by revenue authorities is emerging. In response to the release of the Panama papers the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) held a special project meeting on 13 April 2016 to consider how to effectively use the information released (i.e., 'to explore possibilities of co-operation and information-sharing, identify tax compliance risks and agree on collaborative action, in light of the "Panama Papers" revelations').<sup>88</sup>

What is clear from the above discussion is that a divergence in approaches has already occurred. In Australia and Germany the courts have authorised (sometimes reluctantly) the use of tainted information in civil proceedings associated with revenue collection and in the assessment process, whilst the position in Italy is the reverse. Also what is clear from the above discussion is that revenue authorities who cannot obtain use such information directly will be altering their compliance strategies to ensure they can still benefit from the exchange of such tainted information.

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85 Due to the sheer volume of the information *Süddeutsche Zeitung* had sought the assistance of the International Consortium of Investigative Journalists (ICIJ). Under the auspices of the ICIJ the data was analysed by journalists from 107 media organizations in 80 countries, Examples of how the story was reported in Australian are Neil Chenoweth, 'Panama papers: ATO targets 800 Australians', *The Australian Financial Review*, 4 April 2016, 1 and Jacob Saulwick, 'Panama papers explainer: what you need to know', *Sydney Morning Herald*, Business Day, 4 April 2016 <<http://www.smh.com.au/business/banking-and-finance/panama-papers-explainer-what-you-need-to-know-20160403-gnxxg2e.html>>.

86 Juliette Garside, 'Bahamas files leaks expose politicians' offshore links' *The Guardian*, 21 September 2016 <<https://www.theguardian.com/business/2016/sep/21/leaked-bahamas-files-expose-politicians-offshore-links>>.

87 Will Fitzgibbon, 'ICIJ publishes leaked Bahamas info to offshore database', ICIJ website, 21 September 2016 <<https://www.icij.org/blog/2016/09/icij-publishes-leaked-bahamas-info-offshore-database>>.

88 OECD, 'Tax administrations ready to act on "Panama Papers"', Media Release 8 April 2016 <<https://www.oecd.org/tax/tax-administrations-ready-to-act-on-panama-papers.htm>>.