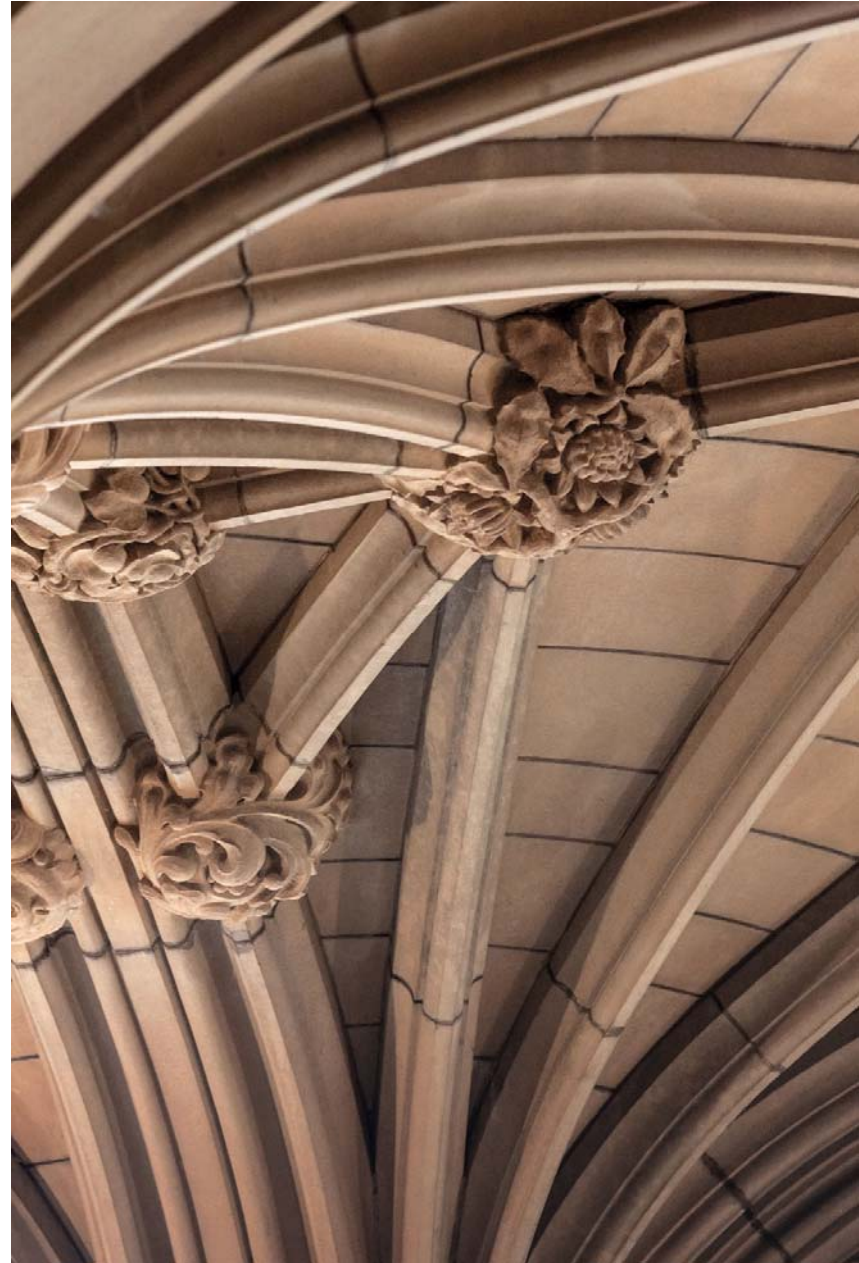


**Parsons/Max Planck Tax  
Research Conference  
2016**

**The 'Lion's Mouth'  
post box**

**Presented by**

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# 1. Introduction

- ❑ A major focus by governments, over the last four years, has been, either collectively through the G20 and the OECD, or unilaterally, to introduce measures which impose greater tax transparency on all taxpayers
- ❑ As well as these more recently expanded global measures, over the last decade revenue authorities have continued to obtain large amounts of financial data obtained illegally from 'concerned' citizens



DENONTIE SECRETE  
CONTRO CHI OCCULTERA  
GRATIE ET OFFICII.  
O COLVDERA PER  
NASCONDER LA VERA  
RENDITA D'ESSI

# 1. Introduction

- ❑ 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

# 1. Introduction

- ❑ This paper examines the limitations (actual or presumed) in a number of jurisdictions on the use of such illegally sourced information in criminal or civil proceedings in the revenue context
- ❑ After dealing briefly with a number of jurisdictions where the issue has not been litigated in the context of large data releases (eg the United Kingdom and the United States), the paper focuses on the jurisdictions where the issues have been litigated, in particular France, Italy, Germany, and Australia

# 1. Introduction: Outline of session

- 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
  - was acquired by a competent authority of a requesting state due to a mistake by the competent authority of the requested state

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

- In light of the lack of specific legal precedents in many jurisdictions the paper first sets out the general approach that may be adopted by various jurisdictions. These jurisdictions can be split into three broad categories:
  - those with no limitation on the use of such information
  - those that limit the use of the information
  - those where such information cannot be used in any circumstance

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

**2.1.1:** No limitations on the use of illegally sourced information: includes Denmark, Finland, Israel, & Japan

**2.1.2:** Partial limitations on the use of illegally sourced information via:

- limiting the types of matters when tainted information can be used (eg the United States)
- making its use subject to other applicable restrictions such as legal professional privilege (eg Canada, Norway, and the United Kingdom)



## 2.1.2 Approach in the United States

- Fourth Amendment of the United States Constitution
- Supreme Court: *United States v Calandra*: created exclusionary rule
- *United States v Janis* (1976): ‘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 ... hold that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding’
- A possible reason for the lack of litigation in the United States is that often the information is obtained through plea bargains (eg 2007-08 so called ‘UBS scandal’)

## 2.1.2 Approaches to the use of tainted information: United Kingdom

- Common law jurisdictions such as Canada & 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 and the tax authorities can make use of that information
- In *Kuruma v The Queen* [1955] AC 197 Lord Goddard LCJ noted:

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. ... There can be no difference in principle for this purpose between a civil and a criminal case

## 2.1.2 Approaches to the use of tainted information: United Kingdom

- ❑ The issue has not been tested in the data release context as 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 litigation
- ❑ These arrangements include:
  - Dependency Disclosure Facilities
  - Liechtenstein Disclosure Facility
  - Co-operation Agreement with Switzerland
  - European Savings Directive (EUSD) approach

## 2.1.3 Prohibits the use of illegally sourced information

- ❑ Czech Republic, Liechtenstein, Peru, Poland, Portugal and Switzerland
- ❑ The prohibition is due to:
  - bank information being classified as personal information and subject to domestic secrecy and confidentiality laws
  - express prohibitions on the use of illegally obtained information under the tax laws
  - the use of illegally obtained information being treated as an offence under the criminal law

## 2.2 Position of countries where litigation has occurred in respect of tainted information

- **2006:** Mr Kieber a computer technician employed by the LGT Bank sold information to German Federal Intelligence Service
- **2008:** Hervé Falciani, a systems engineer employed HSBC bank's Geneva branch, attempted to sell information relating to more than 130,000 customers

## 2.2.1 Limitations on the use of the ‘Kieber’ (Liechtenstein) papers: Germany

- Federal Constitutional Court in considering an appeal on whether the Kieber information could be used to justify a decision to commence a prosecution 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 ... The evaluation of the question ... is primarily a matter for the expert courts
- The lower courts had allowed use of the information

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

- *Kevin Denlay v Commissioner of Taxation*  
Logan J noted that in Australian law there exists a discretion to permit the use of unlawfully obtained evidence in criminal proceedings and a like discretion as to the use of such evidence in civil cases
- He also noted that there is no bar to the subsequent use in an assessment of information unlawfully obtained by a third party

## 2.2.2 Limitations on the use of the 'Kieber' (Liechtenstein) papers: Australia

- The Full Federal Court in the *Kevin Denlay* appeal heard arguments that the information supplied on discs to the Australian Taxation Office was the proceeds of crime and tax officers' actions in obtaining information and then using it as part of an assessment amounted to 'conscious maladministration'. The Court noted:  
... 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 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 ...



## 2.2.2 Limitations on the use of the 'Falciani' (HSBC) papers: France

- ❑ *Cour de cassation*: bank account information illegally obtained abroad cannot support a lawful administrative activity
- ❑ Bettencourt (Criminal chamber - Cour de cassation): admissible where investigator did not act illegally
- ❑ Conseil d'Etat case: document was validly acquired even if the original source was illegal or irregular (ie judicial or administrative procedure used was subsequently nullified)
- ❑ **6.12.13**: *The Law on the fight against tax fraud and the great economic and financial delinquency* enacted: Article 37 - can no longer be excluded 'solely because of their origin' even if they have been stolen

## 2.2.2 Limitations on the use of the 'Falciani' (HSBC) papers: Italy

- ❑ Italian tax authorities issued a large number of tax assessment notices to taxpayers based, almost exclusively, on bank account information illegally obtained under exchange of information
- ❑ Lower courts were initially split: some courts found tax assessments void where issued in reliance on illegally obtained information whilst others held that documents received from the competent authority of another state can be used regardless of how the other state obtained the information
- ❑ Higher Courts: use of illegally information renders an assessment based only on that information void

## 3.1 Causing illegality

- *Australia and New Zealand Banking Group Limited v Konza*: the Full Federal 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
- *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)*: the Full Federal Court dismissed the banks appeal against 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
- *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)

## 3.2 Mistake in information exchange [1]

*Hua Wang Bank Berhad v Commissioner of Taxation (No 7)*

- Commissioner was given documents by the Cayman Islands Tax Information Authority (CITIA) and it consented to the use of the documents in proceedings
- The day before the trial of this matter the Grand Court of the Cayman Islands set aside the decision by the CITIA to consent to the use of the documents and ordered CITIA to seek an undertaking from ATO to not divulge the documents & to demand the immediate destruction or return of the documents
- The Commissioner did not give any undertaking, did not return the documents and sought to tender them

## 3.2 Mistake in information exchange [2]

Justice Perram on breach of Treaty issue noted:

83. Under the terms of the Treaty the ATO did not require the permission of CITIA to use Exhibits 8 or 9 ... Neither the fact that it received such a consent ... nor the fact that that consent was set aside ... is legally relevant.

84. ... 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

## 4. Conclusion/Questions/Comments

- **3.4.16:** More than 11.5m leaked documents belonging to the Panamanian law firm Mossack Fonseca, detailing financial & attorney–client information, were released
- **21.9.16:** Bahamas corporate registry data, consisting of 1.3 million files, were also leaked
- It is apparent that revenue authorities can obtain tainted information and, subject to some limitations, use that tainted information