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TO BE OR NOT TO BE *OFFSHORE*

Mongolia is currently gripped by offshore fever, with new developments coming on a regular basis, most recently a Cabinet decision to increase the scope of jurisdictions that are covered by offshore accounts legislation. This reflects a much wider international concern around the use of offshore accounts, which this article will touch upon, and which has certainly fuelled domestic concern.

Amidst the increasing furore over government

officials' use of offshore accounts, and recent Mongolian legislation prohibiting civil servants from various offshore activities, we also had the somewhat surprising spectacle of the European Union blacklisting Mongolia as a "tax haven".

This seemed odd in light of the EU just recently opening a representative office in Ulaanbaatar, and the increased transparency and budget controls that are being implemented as part of the IMF package.

A SHORT HISTORY OF OFFSHORE OUTRAGE

The growing public concern around the use of offshore accounts has been dramatically increased by several major leaks of otherwise confidential information that have subsequently been disclosed in the public domain.

The first of these was the "Panama Papers" in 2015, a leaked database of 11.5 million documents for over 200,000 offshore entities from the Panamanian law firm, Mossack Fonseca. The leaked documents named 12 current or former national leaders, over 100 public officials and politicians and hundreds of other high-profile individuals and businessmen from over 200 countries.

The latest major leak was the so-called "Paradise Papers", leaked this year, containing over 13 million documents, primarily from the offshore law firm Appleby. The Paradise Papers included information relating to a wide range of major international corporations, including Apple, Facebook, Twitter, Disney and others, together with a number of high-profile individuals and political figures. Those named included members of the British royal family, high profile celebrities such as Madonna and Bono, philanthropists such as George Soros, and media owners of certain UK newspapers such as The Telegraph and The Times.

INTERNATIONAL REACTION

There is clearly an increasing level of media and public concern over perceived tax evasion and tax avoidance

through the use of offshore vehicles, which has been exacerbated by the number of high-profile businesses, businessmen and political figures involved in these disclosures. Undoubtedly, this has given rise to a prevailing view that the elite and wealthy in societies across the world are using offshore structures to avoid paying taxes in their own jurisdictions. It has also led to calls for greater transparency and disclosure from various political groups, including Members of the European Parliament and senior US politicians such as Barack Obama at the time of the leaks.

ARE THEY LEGAL?

There are many reasons why offshore structures are used for the purposes of making international investments. The first of these is anonymity. Most offshore jurisdictions, including classic Caribbean "havens" such as the British Virgin Islands, the Cayman Islands and Bermuda, have extremely limited publicly available information, whether in relation to beneficial owners or financial information. Accordingly, until the recent leaks, investors were generally assured of privacy.

Secondly of course, these jurisdictions have extremely low levels of tax, ensuring greater tax efficiency for investors.

There is nothing inherently illegal about this, and indeed the majority of the deals leaked in the Panama and Paradise papers would, from a strict perspective, be proper and legal transactions. However, the downside

of offshore tax havens is that due to the relative anonymity, they can be abused for the purposes of money laundering, tax evasion and other nefarious purposes.

In my experience of working in the Russian market in the 1990s, offshore investment schemes were used for some highly creative purposes. One of these, which was relatively common in those times, included the acquisition of a small percentage of shares in a Russian company owned by a BVI company (and therefore anonymously) which would then routinely disrupt and litigate against the underlying Russian company and its shareholders for business gain.

WHERE DO WE GO FROM HERE?

Clearly, it is a positive step from a transparency perspective that Mongolia has enacted legislation aimed at curbing the use of offshore tax havens for senior government officials. This is a worldwide trend that will likely only continue.

That said, it is difficult to extend these prohibitions to the private sector. By way of example, it is not currently possible for Mongolian companies to list directly on a foreign stock exchange such as Hong Kong or Singapore.

A company wishing to list its shares in Hong Kong must redomicile to a jurisdiction approved by the Hong Kong Stock Exchange, which currently includes Hong Kong itself, the PRC, Cayman (where Mongolian Mining Corporation is domiciled) and the BVI. Part of the reason for this, apart from tax efficiency, is that Cayman has relatively sophisticated restructuring and insolvency legislation, together with an efficient court system, which is important for listed companies in difficult financial situations. Indeed, close to 49% of all listed companies on the Hong Kong and Singapore stock exchanges are domiciled in the Cayman Islands.

Accordingly, there are pros and cons to offshore jurisdictions that need to be taken into account before making a definitive judgment that all entities or individuals investing through these jurisdictions are doing so for nefarious or criminal purposes. The difficulty faced by legislators worldwide is precisely this separation between dubious and legitimate offshore structures, and improvement in this likely must be

driven by the jurisdictions that themselves are regarded as offshore tax havens.

WHAT HAPPENED WITH THE EU?

Given Mongolia's recent steps to curb offshore investment, the growing public disaffection with investments in tax havens, and the IMF package aimed at improving budgetary transparency and policy stability, it was a surprise when the EU announced on 5 December, as reported by the BBC, that Mongolia was now included in a "blacklist of tax havens". More specifically, this was a decision adopted by the European Council containing a list of "non-cooperative jurisdictions for tax purposes" (link at <http://www.consilium.europa.eu/media/31945/st15429en17.pdf>).

Mongolia's inclusion in the list reflected four concerns identified by the European Council: (1) not being a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes; (2) not having signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance; (3) not applying certain criteria from the OECD Framework for tackling Base [Tax] Erosion and Profit Shifting (BEPS), and (4) not having made a commitment to address these issues by 31 December 2019.

The characterisation by the BBC of a "blacklist of tax havens" is therefore somewhat misleading in light of the detail of the European Council's paper. While the substance of the "non-compliance" is beyond the scope of this article, the issues identified in relation to Mongolia appear to be more related to process and compliance rather than fundamental underlying tax evasion issues.

The European Council paper does state that EU member states and institutions should take the list "into account" in formulating foreign policy, economic relations and development cooperation plans. At a time when Mongolia is seeking to increase levels of foreign investment, it is clearly important to keep EU member states on board, and accordingly Mongolia needs to be seen to be taking positive steps to address the EU's concerns on these points.