VIEWPOINTS

FATCA and the Shaping of a New International Tax Order

by Jeff N. Mukadi

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Following the enactment of the Foreign Account Tax Compliance Act[1] through section 501 of the Hiring Incentives to Restore Employment (HIRE) Act[2] by Congress on March 18, 2010, and the many notices[3] issued by the Internal Revenue Service thereafter, the long-awaited proposed Treasury regulations regarding information reporting by foreign financial institutions[4] (FFIs) for U.S. accounts and withholding on certain payments to FFIs and other foreign entities were finally released by the Treasury Department and the IRS on February 8, 2012.

While comments on these proposed regulations were expected by Treasury and the IRS before April 30, 2012, many articles had been written and published, commenting on the appropriateness of such a bold move by the United States. These articles mostly analyze several provisions of the act itself and point out the foreseeable difficulties for its implementation while at the same time examining the necessary logistics to be put in place by FFIs before July 2013, when FATCA is supposed to become effective, or simply criticize it altogether with the newly released proposed regulations issued under Notice 2012-15 on February 8, 2012.

Rather than following the same path, this article goes beyond the discussion of FATCA's provisions, an analysis of its applicability, and the necessary logistics to be put in place by FFIs in order to prevent clashes with the IRS or mitigate the bumps and bruises in complying with FATCA. It hypothesizes an implementation and enforcement of multiple FATCA-like legislations as a consequence of the domino effect of the U.S. FATCA or as retaliatory measures to the latter or the implementation of a multilateral FATCA as a logical outcome of a concerted intergovernmental approach such as the one initiated through the six-nation ''joint statement on improving international tax compliance and implementing FATCA,''[5] issued on the same day the proposed Treasury regulations under FATCA were released. It goes on to conclude that if the United States, to whom five OECD countries have already joined in intention, is serious about bringing into play

[1]FATCA was originally introduced in Congress through H.R. 3933 on October 27, 2009, and was enacted in P.L. 111-147.

[2]Section 501 of the HIRE Act amends the 1986 IRC by inserting a new Chapter 4, ''Taxes to Enforce Reporting on Certain Foreign Accounts,'' which comprises new sections 1471 through 1474.

[3]*See* Notice 2010-60, 2010-37 IRB 329, Notice 2011-34, 2011-19 IRB 765, and Notice 2011-53, 2011-32 IRB 124 (collectively, the FATCA notices), containing, among others, the definition of foreign financial institutions (FFIs), some exemptions provided for under FATCA, and the requirements for account documentation and reporting; guidance on some issues such as ''priority concerns'' and passthrough payments; and providing for additional time for participating FFIs to enter into an agreement with the IRS for the implementation of FATCA.

[4]An FFI is defined as a financial institution that (a) accepts deposits in the ordinary course of a banking or similar business; (b) holds financial assets on behalf of others as a substantial portion of its business; and (c) engages primarily in the business of investing, reinvesting, or trading securities, partnership interests, commodities, or any interest in such securities, partnership interests, and commodities. IRC section 1471(d)(5). *See also* Douglas Stransky and Martha Coultrap, ''Analysis of FATCA Proposed Regulations,'' *Practical International Tax Strategies*, Vol. 16, No. 6 (Mar. 2012), p. 7.

[5]Joint Statement from the United States, France, Germany, Italy, Spain, and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and implementing FATCA. Through this statement these six countries have announced their agreement to explore an intergovernmental approach to FATCA implementation through domestic reporting and reciprocal automatic exchange and based on existing bilateral tax treaties.

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such a bold, aggressive, and unprecedented measure intended to encourage compliance and prevent international tax evasion, it will end up putting in place a framework that will require policy harmonization between countries and a deep level of integration and collaboration between national tax administrations that in fact will substantially constitute a virtual international tax coordination body.

Indeed, the enactment of FATCA demonstrates that tax information exchange mechanisms and assistance in tax collection through ordinary tax treaties or tax information exchange agreements have proved to be inefficient. This article proposes that instead of wasting time by seeing whether a unilateral FATCA or multiple independent FATCA-like legislations will work, the U.S. and the other five OECD countries should take advantage of their expressed intent and commitment to start conceiving the mechanism and structuring of an international tax coordination body.

I. Brief Overview of FATCA

The Foreign Account Tax Compliance Act, originally introduced in Congress through bill H.R. 3933 in 2009, was enacted March 18, 2010, as a way of increasing transparency and disclosure of U.S. accounts held outside the United States, promoting compliance, and preventing tax evasion on an international level. In order to achieve this purpose, the act delegates considerable power to Treasury and the IRS and provides the latter with unprecedented tools to strengthen information collection and reporting mechanisms regarding U.S. persons who have invested money overseas. FATCA is not a reform like many others we are used to. It is an unprecedented measure that poses the problem of extraterritorial applicability and enforcement of U.S. domestic law. Indeed, even though, as noted above, some countries have already expressed their intention to cooperate and facilitate FATCA implementation and enforcement, FATCA was conceived with the objective of constraining foreign persons, not necessarily U.S. taxpayers, to abide by U.S. law and act as IRS auxiliaries in collecting information and taxes on behalf of the IRS or face harsh penalties from the United States.

In a nutshell, this is how FATCA is intended to work: Both U.S. and foreign financial institutions are required to classify all account holders first as either U.S. or non-U.S., then as individuals or entities, and finally as financial or nonfinancial. Through an agreement that they are required to sign with the IRS, FFIs will commit to identify U.S. accounts, collect some information — including name, address, account number, balance in the account, taxpayer identification number, gross receipts and gross payment from the account, and so forth[6] — and report them to the IRS and eventually collect taxes on those accounts and remit the revenue to the IRS.[7] They will do this on an annual basis. FFIs can have two statuses under FATCA. They can be withholding agents (when they are payers of withholdable payments) and they can be recipients (when they are beneficiaries of withholdable payments). Both U.S. financial institutions and FFIs will also commit to collect some information about substantial U.S. ownership of nonfinancial foreign entities (NFFEs) and report it to the IRS. In some cases, however, no reporting is required for U.S. accounts held at a U.S. branch of an FFI[8] or at an FFI that is a U.S. taxpayer.[9]

As a penalty for not cooperating, nonparticipating FFIs, recalcitrant account holders, and NFFEs that refuse to disclose their substantial U.S. owners are subject to 30 percent withholding tax.[10] This withholding tax applies on all U.S.-source payments[11] and the gross proceeds from the sale of a property generating U.S.-source income for which they are beneficiaries. If a withholding agent, U.S. financial institution, or FFI fails to withhold the 30 percent or any other tax due, they become liable for it, plus interest and eventual penalties.

FATCA is a U.S. domestic law that intends and sets up mechanisms to compel foreign persons to subject themselves to the authority of the IRS without acting through the tax administration of the country of residence or nationality of the concerned foreign persons. FATCA also departs from generally established and accepted international tax principles that require either voluntary compliance or collaboration between tax administrations under a tax treaty. Unfortunately, because

[6]IRC section 1471(b)(1)(C) and (E); *see also* Stransky and Coultrap, *supra* note 4, at 8.

[7]FFIs that enter into an agreement with the IRS for this purpose are said to be ''participating FFIs'' in opposition to ''nonparticipating FFIs'' or those who refuse to sign this agreement. A customer that refuses to have its information disclosed to the IRS is called a ''recalcitrant account holder.''

[8]Prop. Treas. reg. section 1.1471-4(d)(2)(iii)(B). The same exception also applies to the withholding requirement as provided for in prop. reg. section 1.1471-4(b)(5). *See also* Ira B. Mirsky et al., ''New Financial Asset Reporting Requirement with Deadline of April 17, 2012,'' *Practical International Tax Strategies*, Vol. 16, No. 6 (Mar. 2012), p. 5.

[9]Prop. Treas. reg. section 1.1471-4(d)(2)(iii)(A).

[10]IRC section 1471(a) and section 1472(a).

[11]These include U.S. dividends and interests (including OID), rents, royalties, and other fixed determinable annual or periodic income as well as payments of gross proceeds on stocks, securities, and debt instruments that produce U.S.-source interest or dividends. *See also* Robert Frastai et al., ''Proposed FATCA regulations released,'' *Thomson Reuter News & Insight*, Apr. 2, 2012, *available at* http://newsandinsight.thomsonreuters.com/Securities/Insight/2012/04_-_April/Proposed_FATCA_regulations_released/.

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of the unique position of the United States as a leading financial center, the stakes are simply too high for any FFI to not enter into an agreement with the IRS to implement and enforce FATCA, but is it fair for the U.S. to take advantage of its strong position to override all generally accepted international law and tax law principles?

II. Current State of International Tax Order

In today's world, regardless of the tax system in place — worldwide income taxation or territorial income taxation — international taxation is enforced through two principal legal mechanisms. One is national or domestic to every country, the domestic international tax law; the other tax is treaty law, which is international, based on a treaty relationship, and could be bilateral or multilateral.

International taxation per se concerns two types of transactions or taxable activities performed by two different categories of taxpayers. On one hand, we have outbound transactions performed by citizens or residents and domestic corporations, that is, investment and business activities of citizens or residents and domestic corporations of a country outside the boundaries of that country. On the other hand, we have inbound transactions performed by nonresidents and foreign corporations of a country, that is, investment and business activities carried on by nonresidents and foreign corporations of a country within the boundaries of that country. Before demonstrating how FATCA departs from the currently established international tax order, let us first explain how this tax order applies to these two sets of transactions and categories of taxpayers.

A. Domestic International Tax Law

1. Outbound Activities of Residents

Most outbound investments and business activities of residents or citizens and domestic corporations generate foreign-source income, either as business income or passive investment income, such as dividends and interest. According to every country's tax law, except where treaty-based attribution or allocation rules[12] apply,[13] domestic-source income is primarily subject to the taxation of the country where it is created regardless of whether it belongs to residents or nonresidents, individuals, or corporations. Usually, when it belongs to resident taxpayers, the tax collection is done through voluntary declaration of taxable income and self-assessment of related taxes subject, of course, to verification by the tax administration. However, when it belongs to nonresident taxpayers, the source country will make sure that before the taxable income is remitted to their beneficiaries, the payer of such income has withheld the corresponding tax at the required rate, and remitted the collected tax revenue to the tax administration. By law, the payer of such income is liable to the tax administration for the collection of the taxes due.

If the income tax system is worldwide income based, after the source country has applied its primary tax jurisdiction on such foreign-source income, nonresident taxpayers and residents who are citizens of a country applying tax jurisdiction based on citizenship (like the U.S.) will have to declare the same foreign-source income already taxed overseas to their resident or citizenship country's tax administration for a secondary income taxation. Naturally, a foreign tax credit related to the foreign tax liability will apply against the secondary tax liability. Compliance and remittance of this kind of secondary or residual tax liability is voluntary, with no withholding mechanism available to this date. After they have been subject to the primary-source taxation, nonresidents and citizens decide if and when they want to declare their foreign-source income to their country of residence or citizenship. If their country of residence or citizenship applies a territorial income taxation, such foreign-source income usually does not fall under the tax jurisdiction of such a country.

2. Inbound Activities of Nonresidents

The situation of the taxation of inbound activities of nonresidents and foreign corporations is the opposite of the one in the preceding paragraph. Let's say, here, there is generation of domestic-source income that will be subject to domestic taxation — here also with the exception of treaty-based attribution or allocation principles — enforced mainly through withholding mechanisms, due to the fact that nonresidents and foreign corporations do not always have any physical attachment for eventual proceedings in case of noncompliance. Again in this case, the payer acts as an auxiliary to the tax administration in collecting through withholding and remitting tax revenue to the administration.

As we can see from these two situations of enforcing domestic international tax law, the withholding mechanism of enforcing taxation is reserved only for the country applying the taxation at source. The tax administration of the resident or citizenship country does not have a direct way of constraining its residents or citizens deriving foreign income to comply with its

[12]Although under statutory tax laws, domestic-source income is always subject to withholding source taxation, many tax treaties either reduce the rate of the withholding at source or completely eliminate the withholding taxation, substantially allocating the tax jurisdiction to the resident country only. Also, some tax treaties re-attribute tax jurisdiction on some category of income, such as royalties, to the country of residence only and not at all in the country of source.

[13]Including the exception related to the taxability of foreign corporations' business income only if and where the domestic-source income is derived through and is attributed to a permanent establishment.

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international tax provisions if their foreign-source income does not have any connection with their domestic activities, especially when the income is not even repatriated[14] or the citizen is a foreign resident. Moreover, the resident tax administration does not have any means of enforcing its domestic international tax law in a foreign territory without cooperation of the source country, which is what the tax treaty law has tried to bring into international tax law.

B. Tax Treaty Law

Domestic international tax law alone, as a way of enforcing international taxation, can be both limited and conflicting. It is limited because its enforcement depends on voluntary compliance by the taxpayer, while the taxing jurisdiction does not have enough coercive measure to force recalcitrant taxpayers to comply. It can be conflicting when the residence country and the source country apply incompatible source principles, the result of which is obvious international double taxation and, in some cases, international double nontaxation.

In order to increase enforcement through a better gathering of relevant information related to foreign activities of one country's taxpayers and to mitigate, eliminate, or prevent international double taxation, most countries have thought it necessary to negotiate tax treaties with each other or at least with their main trading partners. It is therefore appropriate to say that the main purpose of tax treaty law is to increase enforcement of international taxation and manage the conflicts generated by unilateral application of domestic international tax laws.

By means of tax treaties, signatory countries can re-attribute tax jurisdiction on some categories of income differently from ordinary source rules, as in the case of royalties that are taxable only in the country of residence of the beneficiary as represented in article 12 of the OECD model treaty; they can apportion the taxable base between the source and residence country for interest, dividends, and capital gains; and most important regarding compliance and enforcement of international taxation, national tax administrations can collaborate in exchanging information and assisting each other in the collection of tax revenues. There is a good example of a multilateral instrument in the EU-OECD ''Convention on Mutual Assistance in Tax Matters''[15] signed by 14 countries, including the United States. This convention ''provides for exchange of information relevant to the enforcement of domestic tax laws and assistance in the collection of taxes.''[16] In addition to this multilateral treaty, there are many bilateral TIEAs. Taking only the example of the United States, between 2006 and 2008 it has concluded five TIEAs with the British Virgin Islands, the Cayman Islands, Jersey, Brazil, and the Netherlands Antilles. Many more similar bilateral agreements have been concluded between other OECD member countries and several so-called tax haven or tax secrecy countries.[17]

In addition to exchange of information and assistance in the collection of taxes, tax treaties provide for mutual agreement procedures in which competent authorities of involved countries endeavor to resolve an international tax issue regardless of the remedies provided for in the domestic laws of such countries.[18]

International taxation is basically enforceable only through voluntary compliance by the taxpayer or through mutual assistance between tax administrations. These principles and mechanisms, which are considered to be the pillars of the international tax order as it has been known for generations, are about to be shaken, as FATCA is soon to be implemented by the U.S. Treasury and IRS. Let us demonstrate why FATCA, if implemented as intended, will reshape the international tax order.

III. Implementation and Enforcement

As noted above, FATCA is a U.S. statutory provision intended to apply directly to foreign financial assets of U.S. persons, including corporations, and U.S. residents in foreign jurisdictions by requiring FFIs to act as auxiliaries of the IRS in gathering information and withholding taxes. There are three possible ways of implementing and enforcing FATCA:

- a unilateral implementation and enforcement of a single FATCA by the U.S. (or as ''the action of a lone sheriff in town'');
- unilateral implementation and enforcement of multiple FATCA-like legislations by several countries (''the domino and boomerang effects''); and
- a mutual implementation and enforcement of a multilateral FATCA (''the new international tax order'').

A. The Action of a Lone Sheriff in Town

Thanks to the position of the United States in the world and the role it plays in global finance and trade,

[14]Even when some countries have put in place measures of taxing domestic corporations on their foreign income while it remains parked overseas, if the foreign income has not been declared to the resident tax administration in the first place, these measures cannot be enforced appropriately.

[15]*See* OECD, Convention on Mutual Assistance in Tax Matters, Jan. 25, 1988.

[16]William P. Streng, ''U.S. Income Tax Treaties Trends, Issues & Policies: Recent Developments — Future Prospects'' (2009), p. 24. Presented at Houston International Tax Forum April 2, 2009; *available at* http://www.law.uh.edu/faculty/wstreng. *See also* articles 26 and 27 of the 2010 OECD model treaty.

[17]*Id.* at 33-35.

[18]*See* article 25 of the 2010 OECD model treaty.

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"it is expected that most FFIs will enter into an agreement with the IRS"[19] for the implementation and enforcement of FATCA in order to avoid the stiff penalty for being labeled as a nonparticipating FFI. Because this agreement involves foreign persons or foreign residents (FFIs) normally not subject to U.S. jurisdiction and is entered into directly with the IRS, subjecting therefore those foreign persons or foreign residents to the orders of a U.S. law enforcement agency without involvement of the tax administration in the country of the FFI residence, for the purpose of applying FATCA, a U.S. statutory law, it creates an unprecedented case of extraterritorial application or applicability of a domestic law to foreign persons or residents. This is a blatant violation by the U.S. of the sovereignty of any country for which participating FFIs are nationals or residents.[20] Naturally, one would expect any country whose sovereignty is being violated to object and take appropriate measures to affirm or defend its sovereignty, but the question here is why the United States has gone that far just for the sake of "increasing transparency and disclosure of U.S. accounts being held outside of the United States."[21] The answer is simple: It is the action of a lone sheriff in town with absolute power.

Now, assume that all countries whose participating FFIs are nationals or residents that decide to object to FATCA (this seems to be the direction we are heading in), and look closely at issues that extraterritorial enforcement of FATCA might raise:

- First, knowing that in most cases the income that FATCA is targeting is from sources that are domestic to countries of FFIs residence, payable predominantly to nonresident taxpayers — U.S. residents or citizens and U.S. corporations — we should infer that the same participating FFIs have legal obligations to act as withholding agents of their domestic tax administration. In this case, who do they serve first: the sheriff or the deputy? Or perhaps should they serve both at the same time, meaning double or even triple withholding, leaving to the sheriff the responsibility of applying the foreign tax credit and subsequent tax refunds.
- Second, when there is a claim of non-U.S. status that is contested by the IRS, does the taxpayer have any appeal against the IRS notice? And, if so, what tribunal or court would have jurisdiction over such a proceeding?
- Third, what if after December 31, 2015, domestic privacy and banking laws have not been harmonized with FATCA and the information required by the IRS is protected and prohibited from being transmitted? The proposed regulations say if the account holder does not give a waiver, the FFI should close the account.[22] In this case, should taxpayers grant permission just because they fear account closure and a withholding penalty, which in this case would be illegal since it is imposed according to a foreign law and not the law of the land, especially when the taxpayers are not U.S. residents?
- Fourth, a unilateral implementation and enforcement of FATCA by the United States brings about another U.S. demon just when the world has started to look the other way — the issue of tax treaty override by the United States.[23] As

[19]Desmond Teo and Duncan Edwards, "Tackling America's Tax Tentacles: Non-US Financial Institutions need to Get their Act Together to Comply with FATCA — Sooner than Later," *The Business Times*, Feb. 22, 2012, p. 19.

[20]The U.S. Treasury and IRS acknowledge this fact as we can read in paragraph 2 of the Joint Statement with France, Germany, Italy, Spain, and the U.K.: "FATCA, however has raised a number of issues, including that FFIs established in these countries may not be able to comply with the reporting, withholding and accounts closure requirements because of legal restrictions." If this is true for these five countries, it is true for any other country. The proposed Treas. regs extend the transitional period for "limited branches" and "limited FFI affiliates" — these are FFI branches and FFIs located in jurisdictions where domestic laws prevent them from complying with the requirements under FATCA — to December 31, 2015. After this date, they will be subject to the 30 percent withholding regardless of the laws in their jurisdiction. *See* prop. Treas. reg. sections 1.1471-4(e)(2)(iii), 1.1471-4(e)(2)(vi), 1.1471-4(e)(3)(ii), and 1.1471-4(e)(3)(v).

[21]Frastai et al., *supra* note 11.

[22]Prop. Treas. reg. section 1.1471-4(a)(5).

[23]It is a well-established and generally accepted premise in international law that once a treaty is formally ratified by a country it takes precedence over a domestic law, but this premise was never true for the United States, especially and particularly regarding tax law. Due to the supremacy clause of the U.S. Constitution, provided in Article VI Clause 2 and stipulating in part "this Constitution and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or, which shall be made, under the authority of the United States, shall be the supreme Law of the Land," the U.S. Supreme Court has ruled for over a century now that domestic statutes and treaties hold equal status; the consequence of which is that the later in date supersedes the prior. Among others, we can cite *The Cherokee Tobacco,* 78 U.S. 616, 612 (1871); *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *The Head Money Cases*, 112 U.S. 580, 599 (1884); and *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889). Even though the U.S. Constitution is also enumerated in the same supremacy clause, no one ever contended that it is on equal footing with a statute. To make things clear, the U.S. codified the principle of equal footing between a treaty and a statute in section 7852(d) of the 1988 Internal Revenue Code. Some examples of tax treaty override by the United States are: the Revenue Act of 1962 where Congress expressly provided that it took precedence over all prior treaties; the 1980 Foreign Investment in Real Property Act (FIRPTA), which among others, authorized the U.S. to tax nonresidents on their income from sale of U.S. real property contrary to treaty provisions based on the 1963 and 1977 OECD models; the 1986 Tax Reform Act introducing the U.S. branch profit tax; the 1988 Technical and Miscellaneous Revenue Act (TAMRA), which introduced the earning stripping provision; and the Revenue Reconciliation Act of 1989 whereby Congress

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pointed out above, it is at least clear that FATCA is an insult to the principle of territorial sovereignty, but specifically regarding tax treaty law, we see many principles like the ones embodied in provisions similar to the OECD model treaty's articles 10 through 15 being seriously challenged for potential double withholding at source, and articles 24 through 27 that a unilateral enforcement of FATCA might render completely irrelevant or seriously compromise, if there is not an intergovernmental approach like the one intended with France, Germany, Italy, Spain, and the U.K.

- Fifth, complying with FATCA necessitates additional investment for FFIs.[24] What financial compensation do they get from the U.S. Treasury for taking on the IRS's administrative tasks? More questions could be raised and many more problems could arise regarding a unilateral implementation and enforcement of FATCA by the United States, the most important being the issue raised next.
- Sixth, although it sets the tone, the United States is not the only country that would love to increase tax revenues by fighting tax evasion; this means that like a domino effect, many more countries will follow in trying to implement measures similar to FATCA,[25] which will lead to a chaotic situation for FFIs, as explained in the next section.

B. The Domino and Boomerang Effects

Certainly not based on the reciprocity principle of international law — you scratch my back and I'll scratch yours — because FATCA is not an international instrument, but as a ''copy cut'' effect as Christine Pratt,[26] a senior analyst with the Aite Group, once mentioned, if it turns out to be a success story for the United States, I bet that like a domino effect, every other country (starting with OECD members) is going to do the same thing. But it does not even need to be a success for other countries to do the same, because they can just be in a retaliatory mood against the U.S. (the boomerang effect) and implement their own version of FATCA to test the seriousness of the U.S. regarding FATCA. And if this had to occur without any coordination or harmonization between all countries and any oversight by an international body, one could not imagine what financial institutions worldwide will be facing in attempting to comply with the laws of every country and serve every foreign tax administration.

One might say this would not be different from the situation a multinational company is in when it must comply with the tax laws of every country it operates in, but it is indeed different because FATCA-like measures may and will come from any country that is serious about fighting international tax evasion. A financial institution that has a customer who is a taxpayer of another country should be willing to enforce that other country's FATCA-like measure.

I can see many developing countries — at least the ones that are serious about fighting tax evasion — jumping on such an opportunity to find out the whereabouts of the billions invested or hidden overseas by their corrupt officials and citizens. The only thing they might not have is the stick to inflict any penalty to nonparticipating FFIs, like the United States would. But at least as a boomerang, the U.S. will get in return what it is trying to do to other countries, unless as this article foresees, all countries willing to implement FATCA-like legislations decide to work together in harmonizing their policies in order to implement a unique but multilateral FATCA based on a concerted and coordinated mechanism.

C. New International Tax Order

It all gets to the point where it should normally have started: negotiating with treaty or trading partners regarding ways of strengthening the fight against international tax evasion and putting in place multilateral treaty mechanisms to achieve such a goal. To prevent the chaos that is likely to occur with the implementation and independent attempt to enforce multiple FATCA-like laws, all interested countries need to agree on a level of harmony, integration, and collaboration among the tax administrations.[27] A deeper level of harmonization of policies, a real integration, and a stronger collaboration between countries' tax administrations (like the six nations that have already agreed on an intergovernmental approach to improving tax compliance and implementing FATCA by enacting all legislative changes necessary for the implementation of the common approach) will lay the ground for the creation of an international tax coordination framework.

For instance, absent an agreement like the one with France, Germany, Italy, Spain, and the U.K., when a U.S. FATCA and country B's FATCA-like withholdings

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enacted section 163(j) to deny interest deduction to any corporation paying interest to U.S. tax-exempt lenders. *See also* Richard L. Doenberg, ''The Problem of Tax Treaty Overrides in the United States,'' Proceedings of International Symposium on Shaping an International Tax Order, Kansai University Institute of Legal Studies, Japan (1996), pp. 23-70.

[24] *See also* Daniel Wolfe, ''Banks Face the Facts on FATCA,'' *America Banker — The Financial Service Daily*, Dec. 28, 2011.

[25] *Id.*

[26] *Id.*

[27] *See also* Ernst & Young, ''Proposed FATCA regulations: focus on asset management'': ''The precise ramifications of domestic legislations intended to be enacted pursuant to the joint statement between the six countries is likely to create inconsistencies of mechanisms by different countries.'' Online Report, Feb. 14, 2012, p. 3, *available at* http://www.ey.com/Publication/vwLUAssets/FATCA_regulations_impact_on_asset_management/$FILE/FATCA%20EMEIA%20Asset%20Management%20alert.pdf.

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are warranted in country C because the beneficiary taxpayer is a U.S. citizen residing in country B, there is no reason that the withholding C country's financial institution proceed to a triple withholding at maximum rates of country C, the U.S., and country B; and remit the fund to country C's tax administration to be transferred to the IRS and country B's tax administration for eventual FTC application and related tax refunds. When there is an agreement, there is no guarantee that all competing tax jurisdictions will be part of the same agreement. Let us say, based on the above example, that country B is the U.K., while country C is Canada or Japan; the mechanism based on the U.K.-U.S. agreement will not apply to such third-party countries. Instead, if there is a coordinated mechanism, based on a notice of assessment from the international tax coordination body, country C's financial institution could withhold once, at the top rate among the three competing jurisdictions and have the international tax coordination body apportion the tax revenue among the three countries based on agreed formula apportionment. This is the only way to make it easier and manageable for participating FFIs, fairer for the taxpayer, and equitable for all involved jurisdictions.

Such an international tax agency will coordinate the taxation of any international income[28] on behalf of competing tax jurisdictions. In this era of globalization where harmonization of national financial policies is being sought for a well-balanced global financial environment, harmonization of international tax policies is not only inescapable but also a logical outcome of a well-conceived and efficiently managed intergovernmental framework for a harmonious implementation and effective enforcement of a FATCA-like multilateral instrument. This will start a new era in international taxation, but it is the only way possible for the survival of the currently existing treaty-based international tax order, since unilateral enforcement of domestic international tax laws will convert the global market into a case where the fastest and the strongest will be the only winners.

Using the OECD as a starting point for such an international tax coordination body will save time, since the OECD has an instrument that could be leveraged and modified by including FATCA principles, and it includes many countries with major financial centers with an extensive treaty network that could also be leveraged to harmonize international tax principles and mechanisms. Once the original framework is functional, no other country receiving and probably depending on payments from financial centers located in OECD countries will be capable of staying out of the system, and a full functioning body of international tax coordination will become a reality.

While this could seem far away to many readers, everything depends on the six-nation group of countries' political will and the seriousness of the United States to enforce FATCA. I strongly believe that FATCA will trigger the end of the international tax order as we have known it and at the same time open the way to the new one, the one that will see the birth of an international tax coordination body. ◆

[28] *See* Ngoy J. Mukadi, '''International Income' — The Last Remaining Tax Issue Triggered by International Business,'' *Tax Notes Int'l*, Apr. 2, 2001, p. 1713, *Doc 2001-9456*, or *2001 WTD 63-12*.

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