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Tax Havens in the Age of Global Standards:
a Comparative Analysis between Germany and Italy
(University of Hamburg, 4th March 2011)**

***Towards Global Standards in Transparency and Exchange of
Information: Do Tax Havens Still Exist?***

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Do Tax Haven Still Exist?

Summary:

1. Premises;
2. Developing tax cooperation within EU and OECD Member States;
3. Widening the OECD Model Tax Convention network to counteract tax havens by improving transparency and exchange of information (recent trends)
4. The nondiscrimination clause of the OECD Model Tax Convention
5. Assessments of international tax frauds
6. Conclusion



Do Tax Haven Still Exist?

PREMISES



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Premises

“Can we still find find a single tax haven in the whole world today?”

Is this a real question or it is only a provocation?

TH have been interested by a slow but continuous process of erosion (namely of demolition).

Fundamental steps of this process:

1. OECD Recommendation “Harmful Tax Competition. An Emerging Global Issue” (1998);
2. “Agreement on Exchange of Information on Tax Matters” (2002);
3. G-7, G-8, G-20 commitment on Global Standards (especially as from 2008).



Premises

Definition of "Tax haven"

- The Italian translation of the expression "tax haven" is "paradiso fiscale"
- It is the wrong translation of the word "haven", turned into "heaven"
- The main feature of this kind of jurisdictions is better described by the word "haven"
- Lower or reduced tax rates are not the priority (even more)
- The taxpayers' most relevant interest is related to:
 - a) bank secrecy
 - b) anonymity of shares' property



Premises

Definition of "Tax haven"

The lack of transparency gives the opportunity to carry out **artificial arrangements** having only (or mainly) the aim at reducing the global tax burden.

The States of residence's **only way to obtain evidence** on the existence and the dimension of incomes produced abroad is to **ask information to the same resident taxpayer**.

National tax legislations provide rules that lay an **heavy burden of proof** on the taxpayer, even through its **reversal**.

Premises

Definition of "Tax haven"

This kind of rules has been interested in the last decade by an **intensive activity of the legislators** of the OECD Member States, aimed at **increasing the standard of protection of the fiscal interest** against the improper use of tax havens.

To overcome the gap in gathering information from Tax havens, States implemented **rules based on presumptions**.

Criticisms arise in respect to :

- a) EU Principles (proportionality);
- b) Domestic Principles (ability to pay).

Only **rebuttable presumptions** can be compliant to these principles.

Premises

Reasons for reduction of “Tax haven”

As a starting point of this seminar, it could be useful to spend few words to focus into the following **three issues**:

- a) Tax cooperation within European and OECD Member States in tackling tax havens has increased, both on the qualitative and the quantitative viewpoint;
- b) Several jurisdictions classified as tax havens have changed their policies aiming at modifying their status by signing OECD Model Tax Conventions;
- c) Assessment of international tax frauds has become more intensive and efficient by means of new forms of joint cooperation in administrative and criminal matters.



Do Tax Haven Still Exist?

INCREASED TAX COOPERATION WITHIN EUROPEAN AND OECD MEMBER STATES

- a) Joint actions
- b) European Union Policy
- c) OECD recent developments



Increased tax cooperation – Joint actions

Multilateral Convention on Mutual Administrative Assistance in Tax Matters

It is a really complete and binding instrument

A new Protocol was opened at signature on 27-28 May 2010 to all
Countries

It has been strongly criticized by some European States (Switzerland,
Austria, and Germany, as well), because:

- a) its rules laid down a very intensive regime of cooperation (from that perspective too intensive);
- b) no adequate protection of the taxpayer's rights (especially privacy rights);

Few States signed the Convention (only 21) – No Tax Havens signed



Increased tax cooperation – EU Policy

The “Monti Package” (1997)

Code of Conduct for business taxation was aimed at counteracting **harmful tax competition measures** existing in the Member States. Tax havens have been not considered directly, but **with respect to their links with the domestic tax regimes** of the single Member States. The Primarolo Group evaluated as harmful measures that allow **income from tax havens and other harmful regimes to be received tax free** in the Member State.

In cases where participation exemptions are **not combined with an appropriate controlled foreign company legislation**, the measures must be considered harmful.

Increased tax cooperation – EU Policy

The Exchange of Information in the EU

According to the EU Commission position (2009):

- a) the existing Directive on mutual assistance is **not efficient enough** to ensure an appropriate administrative cooperation;
- b) a **reinforced instrument** for administrative cooperation in the taxation sector:
 - b-1) would ensure and maintain **full national sovereignty** over the types and level of taxes;
 - b-2) is the only way of **assessing taxes correctly** and thus preventing and combating tax fraud and tax evasion (due to the lack of harmonization in this field).



Increased tax cooperation – EU Policy

The Exchange of Information in the EU

On these premises, on February, 2, 2009, EU Commission released a Directive Proposal (COM/2009/29) providing for a more detailed common set of rules .

Within the new rules are included:

a) **First**, Member States shall be obliged to provide an as wide cooperation **as they have accepted in relation to a third country** (Most Favoured Nation Clause)

b) **Second**, assistance cannot be refused **because information is held by a financial institution** when such information relates to a taxpayer resident in the Member State that ask for such assistance in order to avoid that such restrictions can favour tax evasion in EU.



Increased tax cooperation – EU Policy

The Exchange of Information in the EU

Justifications given by the Commission for the more strict rules:

- a) bank secrecy has never been intended to serve as a means to **encourage tax fraud and evasion;**
- b) it must be rather understood just to be a **protection against excessive rights for the tax administration of the home country;**
- c) this should not prevent information being provided where the **taxing rights of other Member States are concerned;**
- d) EU Member States **cannot ask more to non EU tax havens** if they do not improve administrative cooperation between them.

New Directive no. 2011/16/EU compliant to the Commission's proposal has been **approved on 15 February 2011** and It will entry into force starting from January 1st, 2013.



Increased tax cooperation – EU Policy

The Exchange of Information in the EU

As a matter of fact, cooperation between EU Member States is already carried out in an environment of maximum transparency and confidence (at least in the majority of Member States)

“**Vaduz list**” was “bought” by German tax administration and circulated in the other MS through the **spontaneous exchange of information**

Critical issue: can a “dirty” information come out from the State of origin and become “clean” when it arrives to the tax administration of the State of destination? How must we face this “**information laundering**” phenomenon? Differences could raise between evidence in a criminal trial and those in tax assessment.

Increased tax cooperation – EU Policy

The EUROFISC Network

It is provided for MS to enhance their administrative cooperation in **combating organized frauds**, launched in November 2010 (Council Regulation No. 904/2010).

EUROFISC is especially oriented at assessments of VAT carousel frauds but it can cover also extra-EU matters, for instance sharing information about **incomes related to tax havens**.



Increased tax cooperation – OECD Policy

The OECD notion of Tax Haven

Black list – Grey list – White list: the path towards transparency
States considered tax havens can change their position if they subscribe
at least twelve conventions based on the OECD Model Tax
Convention

Some OECD States (particularly Italy) argued that this provision can
easily be avoided, and really it was in many cases.

OECD has changed its standards, now requiring that conventions must
be signed with “all relevant partners”



Do Tax Haven Still Exist?

WIDENING OECD MODEL NETWORK FOR MUTUAL ASSISTANCE

- a) The OECD Model provisions**
- b) The commitment of (past) Tax Havens**
- c) The Non-discrimination clause of the OECD Model**



Widening OECD Model Network

The OECD Model provisions on mutual assistance

Article 26 of OECD Model has been updated and joined with a new article 27 providing for mutual assistance in tax recovery.

Starting from 2008 , an important progress toward a full and effective exchange of information has been made.

The international organizations' priority became the implementation of global standards to counteract money laundering and tax frauds through promoting transparency and exchange of information for tax matters.

This implementation should be carried out by means of the signature of OECD Model . As the UN also endorsed the new version of Article 26, it can now be considered as the internationally agreed standard.



Widening OECD Model Network

The commitment of the (past?) Tax Havens

New standards approved in 2009 have been universally endorsed as:

- Austria, Belgium, Luxembourg and Switzerland) lifted their reservation to Article 26 of the OECD Model;
- Andorra, Liechtenstein and Monaco (the last non-cooperative tax havens) endorsed the standard in March 2009;
- Costa Rica, Malaysia, Philippines and Uruguay, the four Global Forum jurisdictions which had not committed to implement the standard on 2 April did so soon after this date ;
- all the non-OECD countries which expressed a reservation to Article 26 withdrew their reservation, including Brazil, Chile and Thailand.



Widening OECD Model Network

Non-discrimination clause of the OECD Model Convention

National rules providing limitations to deductions of costs related to tax havens could be considered in contrast with article 24 of the OECD Model Convention

Tax Authorities cannot tax a resident parent company on profits made by its wholly owned subsidiary resident in a Tax Haven who signed a tax treaty (French Conseil d'Etat, no. 221020, dated 8 March 2002, Schneider)

CFC regime s are irreconcilable with the Treaty rules - Article 7 (1) if a derogation is not provided in a specific Treaty provision (the so-called “saving clause”) that expressly states the priority of the domestic anti avoidance rules.



Conclusion

The answer to our question should be:

“Yes of course, but”.

Indeed, the area of tax havens has been reduced, but ...

the (very little number of) States still included in this list seem to be strongly committed in protecting their prerogatives as they can.



Thanks for your attention!!!



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