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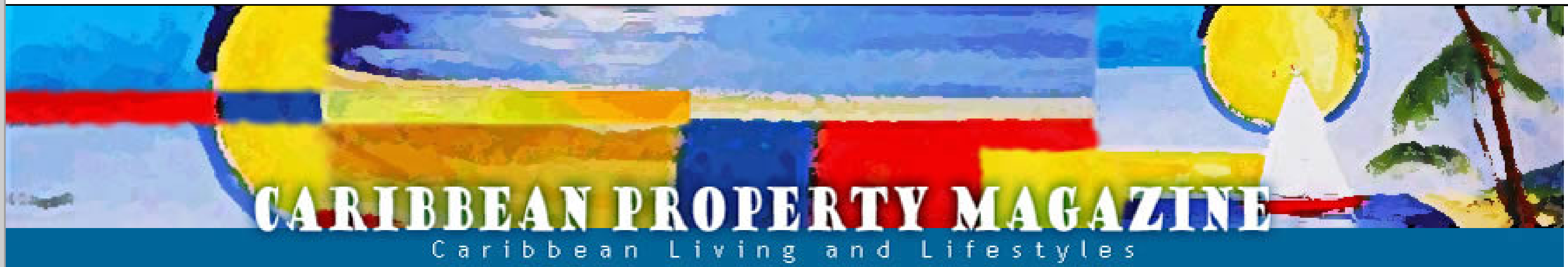

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SPECIAL FEATURES

THE CARIBBEAN, THE OECD AND THE EMPTY BLACK LIST
By Dr. Ulrich Eder

After all the hype about tax havens and offshore banking secrecy, the black list is no more. Gone forever or just the calm before the Caribbean storm?

The infamous black list of un-cooperative tax havens, maintained by the Organisation for Economic Co-operation and Development (OECD) and dominated by Caribbean jurisdictions is empty now. In an increasingly borderless world there seems to be no rogue tax regime any more. But this is just a temporary silence and definitely not forever.

Therefore, it is interesting to know which Caribbean countries will find themselves on this list shortly and which affect it has if you live and invest in a blacklisted country. Practical aspects of the past, the present and the future are discussed in the following.

A Short History of the Black List

Founded in the post-second world war area, it took the OECD more than 50 years before it listed 15 jurisdictions as tax havens according to criteria it had established by itself. This first list, dated from the year 2000, covered countries from Bermudas over to the Cayman Islands, and on to Saint Vincent and the Grenadines. OECD said it had investigated 31 countries, before drawing up the list.

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In 2000 a OECD report named and shamed 47 "preferential tax regimes" and 35 tax havens. These listed countries have been threatened by the OECD with "defensive measures" if they fail to "eliminate harmful features of their regimes." In the following years most of the listed company did make commitments to transparency and exchange of information. Among these are Barbados and the US Virgin Islands.

Seven jurisdictions (Andorra, Liechtenstein, Liberia, Monaco, Marshall Islands, Nauru and Vanuatu) resisted all requests and threads - this does not include any Caribbean jurisdiction. In April 2002, these Seven Samurai were formally identified by the OECD as uncooperative and, as a result, the list of seven went black.

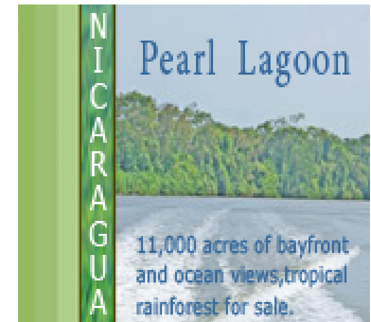
This was called the high-water mark of the anti-offshore initiative. However, things were going to get worse before they got better, if they even get better at all.

All of these jurisdictions subsequently have been involved in negotiations to make some or full commitments. Costa Rica has been one of the last jurisdictions that escaped the list. Based on these statements the OECD decided in May 2009 to remove all seven from the black list.

THE BLACKLIST OF UNCOOPERATIVE TAX HAVENS IS CURRENTLY EMPTY. YOU MAY CALL IT THE WORLD'S SHORTEST BLACK LIST NOW.

As a result, the black list of uncooperative tax havens is currently empty. You may call it the world's shortest black list now. All 84 jurisdictions on the radar screen of the OECD agreed to implement the standard.

A grey list (countries that supposedly lack fiscal transparency but have committed to change) includes Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Montserrat, Netherland Antilles, St. Kitts and Nevis St. Lucia, Saint Vincent and the



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Grenadines, as well as the Turks and Caicos Islands.

Not officially disclosed by the OECD, there is even a white list. Territories as Delaware and Hong Kong, with an overpowering empire in the background, can disregard the OECD principles without the threat of being added to the black list. The OECD will not quarrel with the big boys. Any Caribbean location, even the Cayman Isles, will not benefit from this privilege.

Who Will Qualify for the Black List

Low tax or no tax countries will qualify as uncooperative from the OECD point of view, if they do not meet specific standards of transparency and effective exchange of information.

The OECD regularly updates which tax havens and other jurisdictions implemented the standards and which are in delay, although they agreed to the standards. The later ones will be good candidates for a new black list.

Therefore, it is of great interest, how these so-called "internationally agreed tax standards" are defined. Based on the publications of the OECD a very broad and aggressive definition is used. It is the "full exchange of information on request in all tax matters without regard to a domestic tax interest requirement or bank secrecy for tax purposes."

The interpretation of this definition will definitely leave a gray area. As a rule of thumb the OECD expects each country to sign at least twelve information exchange agreements with non-tax-havens and its willingness to sign even more in the future.

Tax information exchange is in many cases implemented in the double tax treaties (e.g., "the competent authorities of the contracting states shall exchange such information as is necessary for carrying out the provisions of this treaty or of the domestic laws of the contracting states.") However, they can be agreed separately or in a multilateral contract as well.

The exchange of information as requested by the OECD standards will not cover only individuals but also companies and trusts. As a result its shareholders and beneficial owners will have to be disclosed as well.

Everything anticipated to be relevant has to be disclosed. Although the OECD stresses its respect for taxpayers'rights, this concept is weakly implemented. There will be no effective protection and defense against fishing expeditions of high-tax jurisdictions abroad in the Caribbean.

What the Future Will Bring

The OECD published in April 2002 a model agreement on exchange of information on tax matters. 116 clauses - included in 16 articles - cover, above all, the exchange of information upon request, the possibility of declining a request, confidentiality and costs, as well as procedural questions. A number of bilateral agreements have been based on this draft.

Jurisdictions that accept the numbers game of at least twelve signed tax information exchange agreements might have a good start to sign bilateral agreements with seven Nordic economies - Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden - on exchange of information for tax purposes. Seven of twelve is half the battle.

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Living Your Life in a Blacklisted Country

There is no doubt that the OECD will not rest or settle before getting the full commitments of the gray listed jurisdictions. Instead they will monitor to achieve a rapid and effective implementation of the standard. This will include requests for legislative changes and the negotiation of specific bilateral agreements.

The Bahamas, the Cayman Islands, St. Kitts and Nevis, and some Pacific islands like Samoa, may be the hottest candidates for a new black list. They are already in the public focus of the European Union and may be impeached first for not meeting their pledge to fight tax evasion. On the other side, Aruba, Bermuda and Netherlands Antilles are praised for making progress in negotiating exchange of information agreements.

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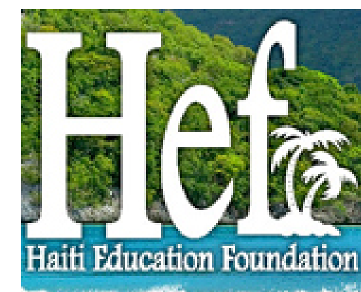

Very recently Bermuda and the Netherlands signed a bilateral agreement for the exchange of information for tax purposes, bringing to 12 the number of such agreements that Bermuda has entered into and thereby crossing the threshold for being considered to have substantially implemented the internationally agreed standard in this area.

Anyway, it is clearly foreseeable that there will be a shift from the gray list back to the black list soon. Is this a list of shame or a list of honor? The jury is still out. But what is the disadvantage for future blacklisted countries, its residents and investors?

THE OECD ITSELF HAS NO POWER TO IMPLEMENT SANCTIONS AGAINST ANY BLACKLISTED COUNTRY.

The OECD itself has no power to implement sanctions against any blacklisted country. However, its member states have already opened and shown their toolbox of countermeasures. Basically three types of measures can be expected, and had already been discussed by the OECD in 1998:

The First: the tax environment for blacklisted countries will be downgraded by changes in the domestic tax laws of OECD member states. Any cross-border-payments to blacklisted countries may be subject to a withholding tax. Exemptions, deductions and allowances might not be accepted tax wise. Any investments may be taxed in the shareholders' country as so-called controlled foreign companies. Even punitive tax rates are possible to discriminate and discipline blacklisted countries.

The Second: the toolbox of countermeasures contains a review, repeal and/or refusal of bilateral tax treaties. Existing favorable tax treaties without efficient tax information exchange clauses may be terminated. This will result in an effective double taxation of profits.

The Third: this category covers aggressive tax audits and non-tax measures like an embargo, the cancellation of free trade agreements or punitive tariffs and customs. In addition, a new legislation might discourage international financial institutions from having funds in these jurisdictions. Although, as of today, financial institutions in some jurisdictions need to apply enhanced scrutiny to transactions involving blacklisted countries.

Still a Positive Outlook?

Statements like "After all the hype about tax havens and offshore banking secrecy, the black list is no more" are more than optimistic. They are wrong. The black list mechanisms are still in place, the black list empty only on a temporary basis.

The OECD, describes itself as an "organization helping governments tackle the economic, social and governance challenges of a globalized economy." It has 30 member countries and active relationships with 70 other countries. But it is in essence a "talk shop" - a forum to discuss economic policy issues as well as environmental agricultural and energy concerns. It has no supranational power at all.

There are still voices clearly challenging the statement of the Paris-based bureaucracy. They mention that it is unfair for low-tax countries to attract jobs, capital and entrepreneurial talent away from high-tax countries.

"Tax competition is a liberalizing force in the world economy, something that should be celebrated rather than persecuted," is the message of well-known economics around the world. There are good reasons that the tax cartel anxiously awaited by the OECD will eventually go the way of the dinosaur. In the meantime, there are approved ways and means to restrict and circumvent an unfair attempt to destroy a level playing field in competitive markets.

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