The OECD/G20 tax agenda
It can't work, it won't work and it shouldn't work

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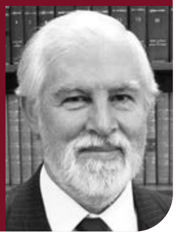

The recent St Petersburg G20 declaration endorsed (obviously without much thought by jetlagged and overburdened heads of government with too little time to think about things), a Tax Annex prepared by the Organisation for Economic Co-operation and Development (OECD) in conjunction with various tax agencies and foreign ministries across the world. Perhaps because the G20 government leaders could not agree about things like Syria (and their involvement in promoting and financing the civil war that is costing thousands of lives and has made 2 million or more people homeless), they were more willing to agree on motherhood statements about tax, thinking that they were subscribing to nothing more than the nostrum that "we ought to do something about tax dodgers".

Whatever the reason, it needs to be pointed out that the World's Emperors are parading their ignorance (more fairly, the ignorance of their officials) as much as their nakedness. The OECD tax agenda for automatic information exchange is designed to create a worldwide system where every one of nearly two hundred sovereign states collects information on the financial affairs of every person resident in or having assets or bank accounts in each of their jurisdictions. All jurisdictions will then volunteer this information to every other jurisdiction, so that the jurisdictions of residence of what is described as the "ultimate beneficial owner" will be in a position to assess that "owner" (who may not be the legal owner) to tax on his (supposed) worldwide income (including the income of foreign entities which he "owns").

It can't work

That may sound simple in principle (even if the logistics are horrendous and will cost billions which probably could be much better spent on things like hospitals not full of drug-resistant bacteria). But, like all simple-minded things, it won't work.

The OECD (and the resulting G20 Tax Annex) assumes that there is always such a thing as an "ultimate beneficial owner". This is simply not true.

Law students who study trusts and equity sometimes have to have it banged into their heads that trusts can be for purposes as well as for persons and that even trusts for persons may not have any person absolutely entitled as against the trustee for many decades.

Take, for example, a private discretionary trust with a mix of charitable objects and natural persons as beneficiaries. The trust deed may have as its default object "the promotion of rational research into efficient tax policies" (surely a charitable and educational purpose in view of the obvious ignorance of over-paid OECD bureaucrats). But it may also have as discretionary objects a class, such as "all the lineal descendants of the late John Smith of Middlesex, who died on 4 July 1921".

Who here is the ultimate beneficial owner?

The bureaucrats may think they have thought of that. They may then ask for the name of the trustee or of the person who can appoint or remove trustees. But that does not mean those persons are "ultimate beneficial owners", nor is it even necessarily relevant for taxation purposes.

Fundamentally, income can only be taxed in the hands of the person who gets to enjoy the income. One cannot rationally impose an income tax upon persons who may control income but do not enjoy it. Otherwise, President Obama and/or the United States Congress would be liable to tax personally on the budget of the United States government or Prime Minister David Cameron might find himself taxed on the budget of the UK government. And what if the control is joint? Does one apportion the tax liability of a company like Microsoft among its directors equally?

To ask such questions is to convince oneself that the only rational basis for levying an income tax is to tax income as and when received and in the hands of the recipient.

The idea of an "ultimate beneficial owner" being assessed to income tax before it is even known whether he is in reality the ultimate beneficial owner is a fantasy. The proof of the pudding is in receipt - which is why Lord MacNaughton famously remarked that "Income tax, if I may be pardoned for saying so, is a tax on income. It is not a tax on anything else." and why Rowlatt J said in *Leigh v The Commissioners of Inland Revenue* (1927) 11 TC 590, at 595 that "receivability without receipt for the purpose of Income Tax is nothing at all."

The hunt for the "ultimate beneficial owner" in legal systems where the ultimate owner of income may not be known for decades is therefore fundamentally an exercise in futility in legal terms.

At vast expense, the tax authorities of the world may burden themselves and countless others with the costs of gathering information and invading the privacy of millions upon millions for the sake of information which is fundamentally useless for tax purposes.

It won't work

The OECD/G20 tax information exchange agenda rests upon the idea that the leaders and governments of sovereign states can (and will) agree to exchange information about their subjects and those under their protection without any legal limits.

That cannot be done or will not be done due to legal constraints or sensible political or economic self-interest. Some countries have constitutional protections and bills of rights which protect their citizens of subjects in their rights to privacy, including their private papers.

Some countries are federal systems, where the legal systems and protections are basically matters of State or Provincial law. Federal law may have no power to override State privacy, trust or tort laws.

Even if a country is willing to force its citizens or subjects to hand over information to foreign powers willy-nilly, it may find it cannot do so without extreme danger, to its ministers and officials or private sector interests.

Suppose for example that the government of country A hands over information to the government of country B and that information is stolen, published in open court or otherwise disclosed. Suppose the disclosed information reveals trade secrets of company X in country C. Suppose that costs company X USD5 billion in lost profits. Whom (and where) does company X sue? Country A and country B may (perhaps) be able to legislate to protect their ministers, officials and private sector suppliers of information from lawsuits in their own countries (though that may be difficult or impossible in Federal countries) but there is no way they can legislate to strip a subject of country C of its rights to sue in the courts of country C. If the wrongdoers in country A or B have assets in country C (take, for example, a multinational bank or a government), company X may not only secure a judgment in its favour in the courts of country C but be in a position to enforce that judgment. Country C's courts may not look kindly on claims of sovereign or other immunity or "the wrong legal forum" when it is country C's subjects who are being injured. (In this regard, one would not be surprised to find 15 years from now that US courts sweep aside such claims when US firms are suing in US courts. As with the Foreign Account Tax Compliance Act (FATCA), the US may be demanding of other countries what it will not, or cannot guarantee to do, for them.)

It would be a foolish government which entered into information exchange agreements without insisting upon complete immunities from the receiving government in respect of civil or criminal actions which may arise as a consequence against its Head of State, Ministers, officials, citizens or residents for anything lawfully done within its borders. Further, a prudent government would also demand indemnities from the receiving country for its Head of State, Ministers, officials, citizens or residents for any suits or judgments arising in third countries as a direct or indirect result of the disclosure of information.

Before such possibilities are seen as fanciful, it should be pointed out that the United States of America is a common-law country where the common-law is the law of 50 states and the Federal government has no power to destroy or abrogate the common-law of the 50 states.

It should then further be remembered that the United States has inherited English trust law with its notion that persons who are involved in a breach of trust may be sued for losses arising out of a breach of trust by the trustee. If information exchange leads to everyone along a chain knowing who the ultimate beneficial owner is, then everyone along that chain is being put on notice of trust.

Likewise, in tort, the more you know about the situation of a third party, the easier it is for a court to find that you have a duty of care to that third party when you are doing something which may foreseeably cause him damage. (By the way, don't forget that US judges may be elected by the people who may be suing you.)

Thus the price of making everyone become "stickybeaks" in other people's business is that everyone along the chain may become liable if something goes wrong with other people's business and they know about it and deliberately or carelessly do something (however innocently) which helps it go wrong.

That is precisely why it has always been the policy of land registries and company share registries to avoid knowing about trusts, precisely because governments and companies do not wish to be put on notice of trusts.

Neither governments nor companies (especially banks) want to put themselves in a position where they may become liable to the beneficiaries of a trust for a breach of trust by an apparent registered owner who breaches his fiduciary obligations.

Even if a jurisdiction such as the UK were to try to exclude liability for complicity in a breach of trust of a person on notice of the trust - that does not solve the problem - and it may create other problems. Such legislation would not bind other countries or limit suits in other countries. Worse, it may undermine the security of commercial transactions in its own domestic jurisdiction. Many commercial transactions in the UK and other common-law countries depend upon the legal obligations of trusts being respected. To weaken the law of trusts by excusing inter-meddlers or those facilitating breaches of trust would be taking an axe to the foundations of commercial morality and the security of property in ways the consequences of which can barely be foreseen.

Another reason why the OECD/G20 tax agenda will not work is that many countries and their rulers have powerful reasons for not wanting it to work.

Middle Eastern countries are well aware of the attempts of the United States to freeze Iranian or Iraqi assets around the world from time to time. If you were a ruler (or possible ex-ruler) or businessman of Middle Eastern or Chinese origin or citizenship would you really want all Western countries to know all of "your" asset holdings (direct and indirect) so that the USA or UK could freeze or seize "your" assets across the world if ever there was a blow-up between your country of origin and the West? You may not even much like – or want, or support - the new revolutionary government of your home country, but do you really want "your" assets to be lost in some superpower game?

Further, why on earth should you, as the ruler of the little country of Oceania, do anything to assist country X in levying tax on the income of an Oceania company or trust earning income in Oceania or other places just because a resident of country X is a shareholder or contributor to, or beneficiary of, that Oceania company or trust? Wouldn't you say to country X - "Hang on here: you say you want to tax this income because you are the country of residence of your taxpayer but what about us? We are the country of source. This is the income of an Oceania company or trust. We are the territorial sovereign. You can wait to tax your resident when he/she actually gets the money from our Oceania company or trust, but so long as it is here, and until and unless your fellow actually gets any income from here, it is a matter for us to tax (or not tax) that Oceania company or trust's income as we please, thank you very much. Wait your turn. Don't be a queue-jumper. It ain't your fellow's income yet. Mind you, we might consider collecting your supposed or deemed taxes for you in this country when you start paying our people your health and social security benefits and sharing your tax revenues with us, but we don't think you are offering that."

It shouldn't work

So far, I have adverted to the practical and prudential reasons why the OECD/G20 agenda for information exchange can't work and won't work – reasons which ought to compel rational governments to think twice – or thrice.

More importantly, from the point of view of the liberties and rights of those governed, it should not work - and should not be allowed to work.

The fundamental duty of every sovereign is to protect his subjects. Loyalty is a two way street. As oaths of fealty and allegiance recognise, the subject or the citizen gives his allegiance to his sovereign or country in return for protection – the right to be secure in his property, and his privacy. For a sovereign to sell his own people down the river for his own interests (as opposed to theirs) is to destroy the fundamental legitimacy of his own right to govern.

The theory behind Western liberal democratic government as enunciated by John Locke is that the people are the ultimate masters: governments are not their ultimate beneficial owners but ultimately the people's servants (news, no doubt, to the various interlocking national and international bureaucratic elites which have collaborated to steer their unwitting political masters into this agenda).

Accountability and transparency should be from government to the people – NOT the other way round (as the OECD and its media claques seem to think). Public affairs should be public; private affairs should be private.

The people do not expect, or like, their governments to spy against them en masse or without reasonable cause. The people do not expect to be exposed to penalties or suits in other countries for things done lawfully within their home country. The people expect that their rights to privacy will be protected, rather than abrogated by their governments. In short, the people crave the most basic liberty of all from government - which is simply to be left alone.

For Western governments to engage in the OECD/G20 tax agenda they must fundamentally rip up the constitutional history of the United States and of every Western state since the revolution of 1688 in the United Kingdom. They must turn their fundamental constitutional principles upside down and declare to the world that in the post-modern era of "wars on terror", they have now moved to the "war on taxpayers".

Adam Smith once remarked that to be a taxpayer was not to be a slave because to pay tax marked you as a contributor to the common interest. In the post-OECD/G20 tax agenda world, this will be no longer true. The taxpayer no longer has rights of privacy or anything else. He does not contribute to a common enterprise or common wealth as a member of civil society. The taxpayer is to be reduced downwards to a servile and contemptible creature whose liberties are only such as his Imperial master may deign to leave to him as the crumbs left over from the devoured loaf of ancient common law liberties – in this new world order, as Edmund Burke remarked "The State is all in all." The Divine Right of Kings is to be re-born as the Divine Right of totalitarian democratic, fascist, corporate, welfare states to know all – there is no private sphere left.

Whoever thought the end of the Cold War would mark, not the "end of history", as Francis Fukuyama so complacently proclaimed, but the end of the liberal bourgeois democratic rights of individuals in the allegedly victorious "free" capitalist societies?

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