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FEATURED PERSPECTIVES

Germany's Fruit From Liechtenstein's Poisonous Tree

by Wolfgang Kessler and Rolf Eicke

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Not all fruits are healthy; some fruits are poisonous. German prosecutors must wonder which of their collected ''fruits'' they can use against the hundreds of individuals that could be indicted for failing to declare savings in Liechtenstein. What could turn out to be the biggest tax evasion case in German history started with a simple DVD. A Liechtensteiner offered and sold a DVD with stolen bank data to the German Intelligence Service (Bundesnachrichtendienst, or BND) for €4.2 million. The identity of the Liechtenstein citizen has not yet been officially released, but according to *The Wall Street Journal*, his name is Heinrich Kieber, a former employee of LGT Bank, which is owned by the Principality of Liechtenstein. Meanwhile, the BND said that Kieber is *not* the source of the information. Ironically, Liechtenstein, having refused to offer any tax cooperation or legal assistance in even simple tax evasion cases in the past, asked Germany for legal assistance to find the person who stole and sold the data to the BND.

The story unfolded to the public on the morning of February 14, 2008, when tax investigators raided the home and office of Deutsche Post CEO Klaus Zumwinkel. Zumwinkel resigned and managed to stay out of jail after paying a considerable amount of his tax liabilities. Many raids have been conducted since then, and more are about to be. The prosecutors are following the so-called five phases strategy. The first phase was the raid of the house and office of Zumwinkel to gain public attention. In phase two, tax exiles were publicly advised to file a self-accusation of tax evasion. Phase three encompasses raiding more private houses and offices of other suspects. In phase four, prosecutors question suspects and attempt to achieve a settlement. In phase five, prosecutors and tax investigators take on the banks and Liechtensteiner trustees (*Treuhänder*) that supported the tax evasion.

There has been much speculation in the German media on why a small fraction of wealthy Germans evade taxes. The potential reasons range from the person's self-perception of being able to stand above and beyond the law, to greediness, to the need to take risks. These explanations try to grasp the phenomenon that the economic theory of the declining marginal utility of money does not apply to a few wealthy individuals. Politically, this conduct of the few helps left-wing politicians appeal to the masses and present their policies. Even worse, it erodes the acceptability of the entire tax system.

Three Questions

The Liechtenstein case involves three major issues that go far beyond German international criminal tax law. First, to what extent does the United States' ''fruit of the poisonous tree'' doctrine apply in this case? Second, did the conduct of uncooperative tax havens like Liechtenstein spark the actions of German tax investigators? And finally, which counteractions can the United States, Germany, and other so-called high-tax countries take to fight the kind of conduct performed by Liechtenstein?

Fruit of the Poisonous Tree

Many Germans could not believe it when they learned that the BND was involved in a tax evasion case, a playing field on which the Intelligence Service has neither the authority nor the power to act. The BND justified its participation by saying that it was providing only administrative assistance for the Ministry of Finance. The purchase of stolen data was only a by-catch in the crusade against international terrorism and other major crimes.

The crucial question for the upcoming proceedings will be whether the data can be used against the suspects. One problem is that it was stolen from the LGT Bank in Liechtenstein; another problem is that the conduct of the BND could be considered as receiving stolen property, as Zumwinkel's attorneys argue. Some commentators maintain that there is no receipt of stolen property because the German authorities will send the DVD back to Liechtenstein after analysis. However, this legal opinion is highly contestable.

> **Until recently Liechtenstein was perceived as a picture-postcard tax haven.**

The issue of whether evidence is admissible in tax proceedings if it was obtained illegally will be the focus of upcoming legal discussions. The answer will not only serve as the cornerstone for legal policy, but will also tip the scales for the outcome of those cases that are based on stolen bank data. This is known metaphorically in the United States as the fruit of the poisonous tree doctrine, which is an offshoot of the exclusionary rule. The exclusionary rule states that if the source of evidence (the tree) is tainted, anything gained from it (the fruit) cannot be used as evidence, except in three restrictive situations. The purpose of the doctrine is to deter law enforcement from violating the Fourth Amendment protections against unreasonable searches and seizures.

However, the fruit of the poisonous tree doctrine cannot be adopted at large in German criminal tax law, because the roles of the parties participating in the criminal proceedings are different from those in the United States. In Germany, major crimes can justify the use of information derived from an illegally obtained source. Moreover, the question is whether it is justified to use stolen data in the courtroom in light of the fact that Liechtenstein has not shown much will for cooperation in the past. The only concession Liechtenstein has made is to help in cases of money laundering or terrorist affairs. Tax evasion is not a crime in Liechtenstein. German tax investigators claim that buying bank data is the only measure to effectively fight tax evasion. Is this the only resort left for high-tax countries to fight tax evasion? Is there a justification called ''state of tax emergency'' against an offense that deprives countries and communities from obtaining the funds they are legally entitled to claim? If so, such a notion could constitute the bursting of a dam, provoking the question of how illegal the supply of information must be to be inadmissible in criminal tax proceedings. Moreover, would admitting the information into evidence before or in the course of the proceedings mean that the legal system supports and rewards offenses and crimes? Or was this measure mandatory to promote equal taxation?

The query must be posed: What would have happened if the BND had refused to purchase the DVD, with the consequence that many millions of euros in revenue could not have been gained for the citizens that pay their taxes in compliance with the law? However, embracing this argument would entail fostering the commercialization of criminal tax law, because it would officially open up a market for the trade of information. The result could be that cases depend on whether the tax haven bank or the foreign tax jurisdiction offers more money for the sensitive data.

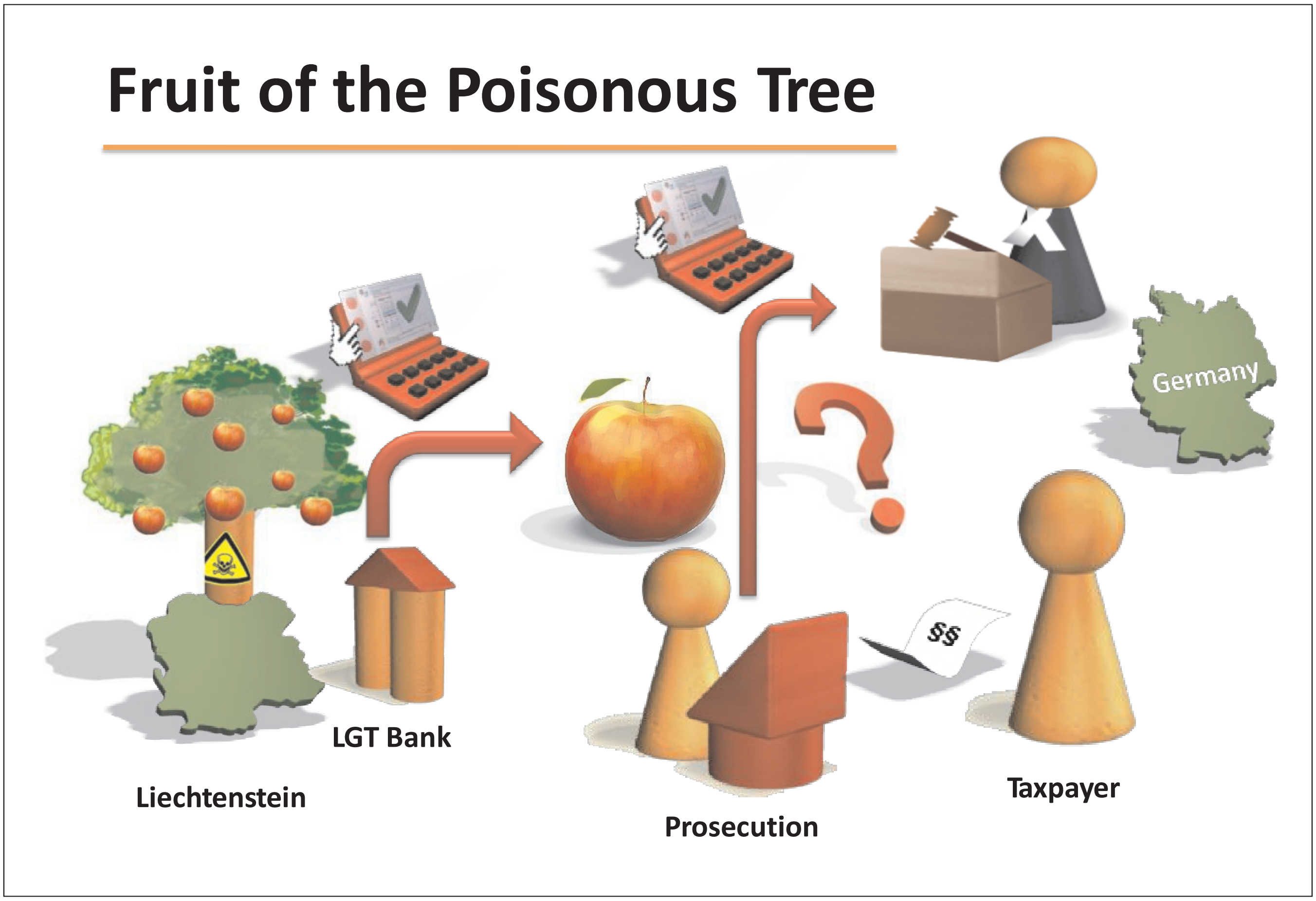
Discussions of the fruit of the poisonous tree doctrine in German literature are highly controversial, and are rarely applied in practice. The Liechtenstein case might serve as a starting point for looking at the more practical relevance of this doctrine.

Conduct of Liechtenstein

Until recently Liechtenstein was perceived as an (almost) picture-postcard tax haven. Unlike some members of other royal or noble families who have to (or want to) read the stories of their lives in the newspapers, the members of the nobility of Liechtenstein have managed to appear in sophisticated business magazines, promoting and advertising the attractive features of Liechtenstein as an investment location. Because of the latest tax affair, Liechtenstein may struggle to survive as a major financial center if it does not make any concessions to the EU, the OECD, or the United States.

Liechtenstein, located between Austria and Switzerland, has a long tradition of attracting foreign capital as an offshore center. Liechtenstein's trust regime (since 1926) and the creation of the *Anstalt* are as well known as its bank secrecy. Even though the country is not a member state of the EU, it is a member state of the European Economic Area.

However, the EU and the OECD have been targeting Liechtenstein's tax system and tax policy. Liechtenstein is one of the few countries left on the OECD blacklist of uncooperative tax havens, sharing this fate only with Andorra and Monaco. Efforts have been undertaken to improve Liechtenstein's reputation. Liechtenstein is working on a tax road map both to enhance



its attractiveness as an investment location and to comply with EC law and international standards.

Liechtenstein is a sovereign country with fiscal sovereignty. The citizens of Liechtenstein embrace the saying, ''Tax oases can only exist where there are deserts.'' However, this attitude and self-promotion invites criticism. Recently, the leader of the German Social Democratic Party, Kurt Beck, accused Liechtenstein of committing ''tax robbery,'' and Minister of Finance Peer Steinbrück cited from an internal paper of the Ministry of Finance that Liechtenstein's business model is the assistance of tax evasion. At the core of their concern is the fact that the 75,000 trusts (*Stiftungen*) in Liechtenstein are anonymous, making it almost impossible for foreign tax authorities to link Liechtenstein income to their taxpayers. Despite the enormous pressure on Liechtenstein because of the recent affair, the principality is poised to maintain its anonymous trust regime. Instead, Liechtenstein's policy is to blame the other tax systems as being too complex and too excessive. On February 22 Prime Minister Otmar Hasler of Liechtenstein announced in an interview with the German newspaper *Frankfurter Allgemeine Zeitung* that Liechtenstein considers it a tradition not to prosecute tax evasion. Moreover, he said that it depends on the ''skills'' of the foreign tax authorities to find tax exiles.

Yet it is doubtful whether Liechtenstein will be able to maintain its widely uncooperative position. If there was unanimous will, the EU could quickly dry up Liechtenstein's tax oasis. Moreover, because of recent measures of the EU and its member states, Liechtenstein's business model is already endangered. The word is that some German individuals are preparing to give up Liechtenstein accounts and transfer money to the Cayman Islands, Hong Kong, or Singapore. Thus, Liechtenstein's noncooperation strategy could soon lead to a demise of one of the world's major financial centers. Transparency and cooperation should be the measures of the hour, because fiscal sovereignty does not provide for a charter to deprive other sovereign countries of their revenue. Since Liechtenstein alleges not to deprive other countries, transparency and mutual assistance are the only means to counteract this perception. Moreover, the German government offered to give the bank data free to countries interested in obtaining it. Germany is also addressing this issue on the international level (with ECOFIN) and will push for measures against Liechtenstein's conduct.

Counteractions

In the wake of the LGT Bank tax evasion case, other countries such as the United States and the United Kingdom will redefine their policy toward Liechtenstein. Germany and the United States are beginning the process now. U.S. Sen. Carl Levin, D-Mich., plans to investigate money transfers between U.S. citizens and LGT Bank. Because of severe pressure by the U.S. IRS to sign ''qualified intermediary agreements,'' LGT Bank and other Liechtensteiner banks must disclose to the IRS information on interest and dividend payments made to U.S. citizens, including the identities of those recipients. Currently, the German government plans to impose withholding taxes on payments between German citizens and Liechtenstein.

Conclusion

The Liechtenstein case has sent shock waves far beyond Germany. It reveals to the public in an unprecedented manner the conduct of a few individuals and of the Principality of Liechtenstein. According to the German tax authorities, the purchase of stolen bank data was the last resort to fight tax evasion effectively. For those individuals connected to the data on the DVD, the fruit of the poisonous tree doctrine might be their last resort to avoid conviction. ◆