

Through the Lens of CARICOM: The Case for Exemption:

There Are Limits to the Cross-Border Enforcement of FATCA

- Tax and Accounting Practitioners prepare FFIs for compliance rather than exemption.
- The US/IRS require compliance.
- US Treasury Department encourages inter-governmental agreements:
 - To ease the burden on FFIs.

Compliance as the Option



- June 2012: Jamaica's Minister of Finance basically said compliance is an imperative

 even though he accepts that it is a law aimed at eliminating tax havens.
- September 2012: BOJ General Counsel said avenue open for IGA in principle
- October 1, 2012 Caribbean Bankers'
 Associations are calling on CARICOM to fight
 FATCA Established a Nine Member Task Force
 - (they are to meet in November here in Jamaica):....

The RESPONSE WITHIN CARICOM



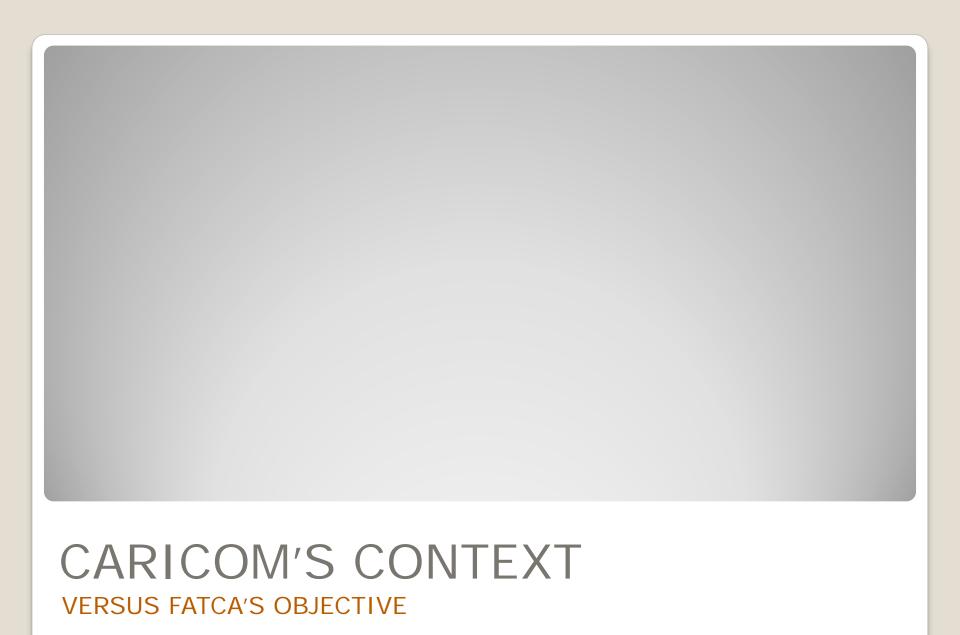
Europe

- No Complaint about sovereignty or overreaching of foreign laws.
- Burdened European Taxpayers wanted scalps!
- First proposed model agreement (July 26,2012 – G-5*

*Chancellor of the Exchequer Osborne

 We need to be as tough on tax evasion abroad as we are at home. The Model Agreement constitutes an important step in tackling international tax evasion...

Compliance Is Contextual





 "Foreign tax havens like Switzerland, Liechtenstein and some Caribbean countries thrive by keeping their clients' money under wraps and safe from tax authorities' reach."

DEATH OF A LOOPHOLE!



• "It's important that <u>no group of</u> <u>people have immunity from</u> <u>U.S. laws</u>, and <u>this</u> will go a long way to reaching these <u>offshore accounts</u> where <u>U.S.</u> <u>citizens</u> hide their earnings."

THE LONGARM OF US LAW

- CARICOM Members states are in the category of "some" Caribbean Countries:
 - Generally they do not fit within the category of off-shore jurisdictions or "Tax Havens"
 - CARICOM'S tax policies are inconsistent with the with the objectives of FATCA:
 - CARICOM since December 22, 2010 enacted its own reciprocal fiscal arrangement among some member states to prevent tax evasion.
 - Jamaica's Finance Minister accepts that the purpose of FATCA is to fight eliminate tax havens

Exemption Based on Context

 "Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion..."

December 22, 2010

The Caricom Tax Agreement

- FATCA is a Voluntary agreement
 - The exceptions under s. 44 of the FIA and the Banking Act are in relation to matters within the jurisdiction of the Court.
 - Consent must be "voluntarily and freely given".
 - Mackinnon v. Donaldson Lufkin & Jenrette Securities Corp [1986] 1 All ER 653
 - Attorney General v. BNS, BNS Trust (Cayman)
 Limted (1985) CILR 418

Conflicts with Local Law

- A state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.
 - The most frequent insistence by her Majesty's Government has been as a result of its violation by the courts and government agencies of the United States....

McKinnon v. Lufkin

Confidential Relationships (Preservation)
 Law:

A "consent directive" from a US court was held to be given under compulsion with the threat of contempt proceedings and fines and/or imprisonment in the event of refusal. CONSENT in those circumstances is not valid because consent must not be submission to force and must be voluntarily given.

AG v. BNS & BNS Trust (Cayman)

- CARICOM's position is not unreasonable
- There is no question of reciprocity.
 - Dual Citizen Problem is US going to recognise and share that information?
- Is FATCA compliance truly voluntary?
- Is consent to release Banking information to IRS truly Voluntary?
- Data Protection Legislation

Questions?