VIEWPOINTS

Switzerland and the U.S.: What We Have Here Is a Failure to Communicate

by H. David Rosenbloom

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A recent essay in Bloomberg View by University of Bern Law School professor Peter Viktor Kunz articulates the Swiss position — or at least *a* Swiss position — on international banking and bank secrecy.[1]

Professor Kunz acknowledges growing Swiss recognition of ''genuine reputational issues abroad.'' He laments that ''all anyone wants to talk about is our alleged facilitation of tax fraud and evasion.'' The Swiss, he reports, ''don't see banking secrecy as something to be ashamed of.'' This form of ''protection'' is like ''nondisclosure of one's religious beliefs, sexual orientation or health status,'' which anyone coming to Switzerland should enjoy regardless of what his government may demand. ''It is our strong belief that what you do with your legally gained money should be nobody's business but your own.''

Professor Kunz views the behavior of the U.S. Department of Justice in 2009, ''threatening Zurich-based UBS AG with criminal prosecution for alleged facilitation of tax evasion (which is not a crime in Switzerland),'' as ''no better than extortion.'' He claims the United States disdained use of the 1996 income tax treaty as a means of seeking information about offshore accounts maintained by U.S. persons, opting instead for ''the intimidation available to a superpower.''

Finally, professor Kunz sniffs hypocrisy in the perceived U.S. attitude toward Switzerland, given the ''U.S. shell company factory epitomized by Delaware, which offers foreign-owned companies anonymity and a virtually tax-free home for profits booked abroad.''

From my many communications with Swiss friends, colleagues, and clients, it appears that these are representative Swiss views of recent developments regarding banking secrecy and the U.S. effort to obtain information on offshore accounts held by U.S. persons. What were those developments?

It was in 2007 that the penny dropped on the offshore accounts. Whether it was the revelations that a Swiss bank was actively engaged in assisting U.S. persons to avoid their U.S. tax obligations, or a purloined list of account holders in Liechtenstein, or some other catalyst does not seem particularly important from the vantage point of five years and counting.

The intervening period has seen three voluntary disclosure programs initiated by U.S. tax authorities; scores of criminal indictments and guilty pleas; tense negotiations regarding the fate of Swiss banks, bankers, and advisers; a new protocol to the Switzerland-U.S. tax treaty and an extension of the protocol's new information exchange provisions to cover ''behavioral pattern'' requests; and, most recently, the Foreign Account Tax Compliance Act, a statute of unprecedented reach, cost, and complexity aimed at ferreting out accounts maintained abroad by U.S. persons.

This essay is written in the context of all that, but it is directed at something slightly different — namely, the apparently unyielding level of misunderstanding between the United States and Switzerland about the objectives and motivations of each country.

I think I am well placed to dive into that subject. As a representative of the U.S. Treasury, I was involved in early negotiations that eventually led to the 1996 treaty. I have given many presentations over the past 30 years to the Swiss-American Chamber of Commerce in Zurich, and I have taught a full course in the Master of Laws program at the University of Neuchatel. Each

[1]Peter Viktor Kunz, ''Roger Federer, Swiss Banking Will Both Come Back,'' Bloomberg, Apr. 30, 2012, *available at* http://mobile.bloomberg.com/news/2012-04-30/roger-federer-swiss-banking-will-both-come-back.

year I host a unit on taxation at New York University School of Law for the St. Gallen University Masters program on European and Business Law. I am regularly interviewed on Swiss radio and television for the ''U.S. viewpoint.'' Together with colleagues at my law firm, I have been involved in hundreds of cases involving Swiss accounts held by Americans. My wife was brought up through high school in Geneva. I bear no animus toward Switzerland.

Most importantly, I have had a ringside seat for the tangled skein of events that has played out since 2007, and I think I see where both Switzerland and the United States are coming from. Each has clung steadfastly to beliefs regarding the other that strike me as misplaced. My reply to professor Kunz is really just an attempt to explain the U.S. position.

Switzerland's position is pretty clear — or, to be fair, the position of a substantial portion of the Swiss population is pretty clear. On this view, the United States takes a moralistic view of taxation and sees Switzerland as a facilitator of tax fraud and evasion. The United States fails to appreciate the deeply felt Swiss respect for privacy.

Further, Switzerland sees the United States as a bully and a law-breaker. Given the existence of the treaty, Switzerland cannot understand how or why the United States could bring criminal proceedings against UBS or resort to a summons enforcement action in U.S. district court, legal procedures wholly independent of the treaty's exchange of information provisions.

With the U.S. failure to compel Delaware, a U.S. state, to cease offering anonymity to foreign owners of companies organized there, Switzerland wonders how the United States can point a finger at other countries.

Let us all take a deep breath now.

The Swiss view of their country as a haven for those persecuted elsewhere goes back centuries and is admirable. Perhaps not everyone in the United States holds that view, but I certainly do. Thinking of Switzerland as merely a facilitator of fraud on the U.S. fisc is simplistic, ahistorical, and foolish.

On the other hand, there is much more to the U.S. concern about offshore accounts, and about the behavior of Swiss banks, than moralism. Yes, the United States can be self-righteous about certain matters (as can the Swiss), but there are pragmatic considerations at play here. The United States is not a country of 11 million. Its population numbers about 312 million, and it has *big* governmental expenses. The U.S. tax system must produce revenue. When some U.S. taxpayers fail to report their income, through the use of offshore accounts or otherwise, there is a potential for havoc. Nothing threatens a voluntary compliance system like that of the United States so much as a spreading perception that similarly situated taxpayers are receiving disparate treatment because some are successfully avoiding their obligations.

UBS did not play a merely passive role in the events that surfaced in 2007. It sent representatives to the United States, often in surreptitious circumstances, to school U.S. persons on how to circumvent U.S. rules designed to identify offshore accounts. This was a criminal act — a conspiracy — and it occurred on U.S. soil. There should be no surprise that U.S. authorities reacted as they did.

The proposition that the treaty represents the only means for the United States to seek names of U.S. owners of Swiss accounts is legally frivolous. UBS and Credit Suisse have enormous physical presences in the United States. Having chosen to develop those presences, they are fully subject to U.S. domestic laws. There is nothing about a tax treaty that excuses Swiss people in the United States from stopping at red lights.

Nor is it appropriate to compare nondisclosure of bank information to religious belief, sexual orientation, or health status. The privacy of Swiss bank information has been relied upon by U.S. persons to commit crimes. Switzerland may think that failure to report income should not be a crime, but the United States takes a different view, for reasons I have explained. And it would be the height of naïveté to deny that Swiss privacy laws dovetailed nicely with widespread violations of U.S. law.

It may be true that the use of a person's legally gained money is nobody else's business. But a fair amount of the money in question here was *not* legally gained, and the earnings produced by that money, if unreported, were not legally gained either. U.S. law treats all of a U.S. person's earnings worldwide, legal or illegal, including earnings in Swiss accounts, as reportable and fully taxable. Indeed, the 2011 reports are due in the United States in just a few weeks.

Finally, Delaware and other states of the United States may offer anonymity to owners of U.S. corporations. They do not offer tax exemption. Every U.S. corporation — yes, even those incorporated in Delaware — must file U.S. tax returns and pay tax on worldwide income. The Delaware ''hypocrisy'' is something of a canard.

The United States would be well advised to try to understand Swiss sensitivities on the issue of privacy. There is a U.S. tendency to stake claim to the moral high ground and express explicit or implicit criticism of countries that come from a different place. My point is that, in the case of Switzerland, the reverse is also true. The situation would be much improved if each country tried a little harder to understand the other's position. ◆