

Article

Tax and the British Virgin Islands: Separating Myth From Reality

Authors: Nicholas Kuria, Counsel

In this article, Nicholas Kuria discusses some of the most glaringly misguided notions relating to the use of offshore jurisdictions, with a focus on the British Virgin Islands.

We will begin with an overview of the tax position. The British Virgin Islands has no corporate tax, capital gains tax, wealth tax, or any other tax applicable to a British Virgin Islands company. These companies are exempted from income taxes and stamp duties regarding all instruments or deeds relating to company business, including the transfer of all property to or by the company and its securities transactions.

What should be made clear is that being a tax-neutral jurisdiction is quite different from being a jurisdiction wantonly used by individuals and companies to conceal income and assets from tax authorities in other jurisdictions. The British Virgin Islands has implemented measures to comply with global standards in the sharing of tax information. Its International Tax Authority was established by the International Tax Authority Act 2018. The functions of the tax authority include monitoring British Virgin Islands compliance with international obligations in cross-border tax matters and administering and monitoring the compliance with mutual legal assistance legislation.

On 30 June 2014, the British Virgin Islands and the United States signed an agreement to improve international tax compliance and implement the Foreign Account Tax Compliance Act (FATCA), introduced by the United States in 2010 as part of the Hiring Incentives to Restore Employment Act (U.S. IGA), based on the Model 1B (nonreciprocal) intergovernmental agreement. FATCA is a federal law of the United States, but it does have extraterritorial effect that extends to the British Virgin Islands.

To comply with FATCA, a British Virgin Islands foreign financial institution is required to report information on U.S. taxpayers' accounts to the IRS. The U.S. IGA facilitates FATCA reporting for the British Virgin Islands by allowing reporting to be made directly to the International Tax Authority, which then passes the information to the IRS.

On 28 November 2013, the British Virgin Islands and the United Kingdom signed an agreement to improve international tax compliance (U.K. IGA) that facilitates similar reporting to the United Kingdom. The shared objective of the U.K. IGA and the U.S. IGA is the automatic exchange of information between the British Virgin Islands and the United Kingdom and United States, respectively.

The British Virgin Islands was one of the first countries to adopt the common reporting standard (CRS), developed by the OECD and approved by the G-20 as the global standard for the automatic exchange of information. Under the CRS, jurisdictions are required to obtain financial account information from their financial institutions and automatically exchange this information annually with partner jurisdictions. The British Virgin Islands has implemented the CRS within local legislation through the Mutual Legal Assistance (Tax Matters) Act 2003 (as amended, the CRS Act), enforced by the International Tax Authority.

The Mutual Administrative Assistance in Tax Matters Convention was extended to the British Virgin Islands on 4 September 2013, and became effective 1 March 2014. All British Virgin Islands financial institutions are required to identify account holders' tax residencies and other financial information and submit reports to the International Tax Authority via the British Virgin Islands Financial Account Reporting System. This information is exchanged automatically by the International Tax Authority with relevant tax authorities in CRS jurisdictions. As evidence that the International Tax Authority is enforcing CRS Act compliance, the International Tax Authority in May 2020 issued notices to financial institutions, requiring them to produce copies of their CRS compliance policies and procedures for inspection.

Transparency in tax matters is part of the British Virgin Islands' international financial centre model. The jurisdiction is party to various tax information exchange agreements. TIEAs are bilateral agreements negotiated and signed between two jurisdictions to establish a formal regime for the exchange of information relating to civil and criminal tax matters. For example, on 29 October 2008, the British Virgin Islands and the United Kingdom entered into a TIEA that authorizes the automatic exchange of information for tax purposes. The

British Virgin Islands has over 100 TIEAs in place with other jurisdictions, with over 1,000 information requests (and counting) having been filled.

The British Virgin Islands has implemented country-by-country (CbC) reporting as part of action 13 of the OECD's base erosion and profit-shifting project. CbC reporting was adopted under the Mutual Legal Assistance (Tax Matters) (Amendment) Act 2018, which amended the Mutual Legal Assistance (Tax Matters) Act 2003. The 2003 Act, as amended, imposes reporting and registration requirements on multinational enterprise groups with consolidated group revenues of at least €750 million in the preceding fiscal year. Any business unit or permanent establishment of an MNE group that is tax resident in the British Virgin Islands will be subject to reporting and registration requirements.

In particular, British Virgin Islands constituents must file a CbC report to the International Tax Authority by no later than 12 months after the last day of the MNE group's reporting fiscal year. The CbC report must contain a breakdown of revenue, profits, taxes, and other indicators of economic activity for each tax jurisdiction in which the MNE group does business. The International Tax Authority will automatically exchange CbC reports with tax authorities of TIEA partners.

Contrary to popular belief, British Virgin Islands entities are not used for tax avoidance through tax treaties, and company and individual tax liabilities to onshore tax authorities are not unlawfully reduced. This is because, unlike some other jurisdictions, the British Virgin Islands is not a party to any tax treaties. The shareholders of a British Virgin Islands company are liable for the appropriate taxes in the relevant jurisdictions in which such persons are tax residents. No additional tax is levied by British Virgin Islands tax authorities.

Lax or Nonexistent Regulation

In jurisdictions in which regulatory oversight is nonexistent, individuals are free to register entities and transfer funds and assets into and out of the jurisdiction without regard to regulatory restrictions. This is a concern regarding money laundering and terrorist financing. But that is not the case in the British Virgin Islands.

The reality is that the British Virgin Islands has a robust anti-money-laundering and anti-terrorist-financing regime through the enactment of the Proceeds of Criminal Conduct Act 1997 (PCCA); the Anti-Money Laundering Regulations 2008 (AML regulations); and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008.

The PCCA defines five primary money laundering offenses:

- acquiring, possessing, or using proceeds of criminal conduct;
- assisting another to retain the benefit of criminal conduct;
- concealing or transferring proceeds of criminal conduct;
- tipping off; and
- failing to disclose a suspicion that another person is engaged in money laundering.

In relation to enforcement measures, the PCCA also provides for investigations into allegations of money laundering activities and the seizure or confiscation of proceeds of criminal conduct. The PCCA requires the reporting of suspicious transactions to the British Virgin Islands Financial Investigation Agency.

The AML regulations require "relevant persons" to maintain client identification procedures, including internal controls and communication procedures appropriate for forestalling and preventing money laundering. They are also required to put in place internal reporting procedures for suspicious transactions and staff training.

Banks and registered agents fall within the definition of relevant persons under AML regulations. As a matter of British Virgin Islands company law, only a licensed registered agent may incorporate a British Virgin Islands company, and each company is required to have a registered agent at all times. All registered agents are subject to AML regulations, including the obligation to apply anti-money-laundering measures. Failure to comply with AML regulations or any directive relating to money laundering is an offense and liable to criminal penalty and significant fines.

Transparent Ownership

Is it as impossible to establish the beneficial owners of a British Virgin Islands company as the media would have you believe? In short, not quite.

In 2017 the British Virgin Islands introduced the beneficial ownership secure search (BOSS) system under the Beneficial Ownership Secure Search System Act 2017 (BOSS Act). The BOSS Act established the BOSS system to facilitate the effective and efficient storage and retrieval of beneficial owner information for all corporate and legal entities using the system.

The registered agent of each British Virgin Islands business must establish a registered agent's database (RA database) and enter prescribed information about each of the business's beneficial owners. Under the BOSS Act, registered agents are required to take reasonable steps to identify all beneficial owners, unless an exemption under the BOSS Act applies. The RA databases are all connected to the BOSS system. Under the BOSS Act, only one or more designated persons may simultaneously search all RA databases connected to the BOSS system by either the name of an individual or the name of a corporate or legal entity.

The results of a BOSS system search requested under the BOSS Act must be made available within 15 days of the submission of a request for information, unless the request is labeled urgent, in which case the information will be provided within one hour or a time period agreed upon by the requesting law enforcement or other authority specified in the BOSS Act and the designated person in accordance with the individual circumstances of the request. A request for a search of the BOSS system can be submitted to a designated person by specified British Virgin Islands authorities, including the Financial Investigation Agency and the Attorney General's Chambers.

The request itself must be certified as being either:

- based on a proper and lawful exercise of the requesting British Virgin Island authority's powers; or
- in response to a request from the Financial Intelligence Unit of the United Kingdom National Crime Agency under the exchange of notes agreement between the British Virgin Islands and the United Kingdom, entered into in April 2016.

Since the BOSS system's introduction in 2017, the British Virgin Islands Financial Investigation Agency has responded to hundreds of requests for beneficial ownership information from U.K. law enforcement authorities. The BOSS system has been publicly praised by U.K. law enforcement authorities for its role in intelligence-gathering and facilitating the investigation of illicit financing.

The BOSS system and the RA databases are not available for inspection by the general public. Only the designated person may search the BOSS system and RA databases. Discussions between the United Kingdom and the British Virgin Islands about enactment of public registers of beneficial ownership in the British Virgin Islands are ongoing. The British Virgin Islands, in line with the other British Overseas Territories, has committed to working in collaboration with the United Kingdom toward a publicly accessible register of beneficial ownership for companies in line with international standards and best practices and, at least, as implemented by the EU member states, by 2023 (but not before), further to the EU's fifth anti-money-laundering directive (Directive 2018/843/EU). As things stand, information on British Virgin Islands company beneficial owners is accessible, just not to the general public or the media.

Why Use a British Virgin Islands Company?

There are two well- founded reasons for using British Virgin Islands entities.

The first is neutrality. British Virgin Islands companies are often used in joint ventures between parties based in different jurisdictions. From a commercial perspective, the British Virgin Islands offers a third jurisdiction, in which none of the joint venture parties will hold particular influence. There is also tax neutrality to consider. It is common for the British Virgin Islands entity to operate as a holding company that owns the operating company or companies. In the tax-neutral jurisdiction, the parties do not need to address any local tax planning issues. In the case of a single shareholder structure, a British Virgin Islands company allows revenues generated globally to be consolidated in a single entity tax neutrally.

The second reason is rule of law. This is likely a lesser concern for a joint venture or other multi-shareholder structure established in a sophisticated jurisdiction. However, for a joint venture in which one or more of the parties may have reservations about whether the law will be disinterestedly and consistently enforced, the British Virgin Islands provides a neutral and secure legal environment. The British Virgin Islands' system of law is founded on the English legal system, although there is a body of British Virgin Islands statutes and case law that has been developed separately. The jurisdiction has its own court system and is part of the Eastern Caribbean Supreme Court. The Judicial Committee of the Privy Council in the United Kingdom is the highest court for any review from the British Virgin Islands.

Conclusion

The British Virgin Islands complies with global standards on the exchange of information between competent tax authorities for residents' income and assets, both on a periodic reporting basis and in response to specific requests from foreign tax authorities. There is also a highly effective system for sharing information with foreign law enforcement to combat illegal financing. This is in parallel with a robust regulatory framework of anti-money-laundering and anti-terrorist financing measures.

It is difficult to reconcile the misperceptions of the British Virgin Islands with the realities of how the jurisdiction functions as an international financial center in practice. Indeed, this article may make disappointing reading for anyone considering the British Virgin Islands for reasons founded on myths about offshore jurisdictions. We make no apologies if that is the case.

For further information, please contact your usual Conyers contact or one of the contacts listed below.

Author:

Nicholas Kuria
Counsel
nicholas.kuria@conyers.com
+1 284 852 1129

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