The OECD/G20 onslaught – Singapore capitulates?

By Dr Terry Dwyer,
Dwyer Lawyers,
Canberra, Australia

The fall of Singapore on 15 February 1942 was the most traumatic event in the history of the Crown Colony, the Queen of the Straits Settlements. The Crown Colony found itself no longer protected, or so it seemed, by the Mother Country, Great Britain, herself fighting a global war on two fronts with the continent of Europe 20 miles away under the Nazi jackboot.

It is generally known that the fall of Singapore was the greatest military defeat in the history of the British Empire. What is not generally known about the capitulation of Singapore is that General Percival, the British commander who later retired to Australia after the war, had wanted to fight on for another 24 or 48 hours even though water supplies had been cut off. We now know that his Japanese opponent, General Yamashita, the Tiger of Malaya, was equally insistent on a quick surrender because the Japanese themselves were almost out of supplies. General Percival's corps commanders, including the Australian, Gordon Bennett, all urged Percival to surrender against his protest that no British Army had ever surrendered in such circumstances.

We now know that Percival was right. A successful defence was possible even in those extremities. Capitulation and defeat were not inevitable.

Flash forward

Just as the Axis powers foreshadowed their assault through the 1930s with one successful demand after another, the OECD has waged a remarkably successful propaganda war against tax havens or offshore financial centres. It is therefore not entirely surprising that Singapore has agreed to capitulate to all of the OECD/G20 demands which have been endorsed by the St Petersburg G20 declaration and its tax annex.

Singapore has (apparently willingly) agreed to automatic information exchange for tax purposes without any judicial supervision and has agreed to sign up to the multilateral treaty on tax assistance, which may later extend to the enforcement of foreign taxes by pre-emptive seizures of assets in Singapore. Singapore has also agreed to enter into an intergovernmental agreement (IGA) with the United States to enforce the US Foreign Account Tax Compliance Act (FATCA).

It is easy to understand why Singapore has so agreed. The G20 is a forum of leaders supposedly representing 86% of the world's GDP. As an international financial centre, Singapore has much to lose if it were locked out of dealing with 86% of the world's economy. Singapore has many investments in Australia and elsewhere, while the Singapore stock exchange has attempted a merger with the Australian stock exchange. With its sovereign wealth funds invested in many parts of the globe, one can see that a small island economy would not wish to see retaliation from its trading or investment partners.

In addition, Singapore has strategic and defence alliances to consider. It has had a close defence intelligence relationship with Australia for many years, some of which has become more public following Mr Snowden's revelations

that Singapore was serving as the centre for Australia, as a "Five Eyes" partner, spying on Asian telecommunications.

The official view

The official view on Singapore's agreement (to use a neutral term) to comply with the latest OECD/G20 demands fundamentally comes down to an official acceptance that the norms laid down by the G20 and OECD are the new international "standard" to which good international citizens should now subscribe.

The Ministry of Finance therefore issued a Press Release on 14 May 2013 stating that:

1. Singapore is significantly strengthening its framework for international cooperation to combat cross-border tax offences.

2. This follows a comprehensive review of the current Exchange of Information (EOI) framework, and represents a further, major step to enhance cooperation following the changes made in 2009. Singapore had then endorsed the internationally agreed Standard for EOI for tax purposes (hereafter referred to as the "Standard"). Since then, we had amended our laws to implement the Standard and started renegotiating our tax agreements to incorporate the Standard. The Global Forum on Transparency and Exchange of Information for Tax Purposes ("the Global Forum") has recently affirmed that Singapore's practice of EOI has been in line with the Standard.

3. Singapore will take four key steps that will further strengthen its EOI framework:

a) Extend EOI assistance in accordance with the Standard to all our existing tax agreement partners, without having to update individually our bilateral tax agreements with them. The current approach of updating individual agreements is no longer necessary, as most countries have adopted the Standard and have similar EOI requirements. This extension of EOI assistance will be subject to reciprocity.

b) Sign the Convention on Mutual Administrative Assistance in Tax Matters. This was first developed as an OECD-Council of Europe agreement, and has recently been promoted as an international agreement for bilateral tax cooperation among the Convention's signatories. There are currently 45 signatories to the Convention. Based on these current signatories, the Convention will expand Singapore's network of EOI partners by 11 jurisdictions, including Brazil and the United States.

Taken together, the above two changes will more than double the number of jurisdictions - from 41 to 83 - that Singapore will be able to exchange information with under the Standard.

c) Allow IRAS to obtain bank and trust information from financial institutions without having to seek a Court Order. While Singapore has been able to respond promptly to most requests for information from its foreign partners, removing the requirement for a Court Order will further streamline the administration of EOI under the Standard. It will not undermine the basic safeguards to taxpayers. IRAS will continue to assess whether the requests are in line with the Standard, and taxpayers will continue to have the right of appeal.

d) Conclude with the United States an Inter-Governmental Agreement (IGA) that will facilitate financial institutions in Singapore to comply with the Foreign Account Tax Compliance Act (FATCA). FATCA is a US law which requires all financial institutions outside of the US to pass information about financial accounts held by US persons to the US Internal Revenue Service (US IRS) on a regular basis. The IGA will be in the form of Model 1, under which information is exchanged between Singapore and US agencies [1]. The Model 1 IGA will help ease the compliance burden of financial institutions in Singapore with FATCA.

4. The above changes are part of the progressive steps Singapore is taking to enhance our EOI framework, since endorsing the Standard in 2009. The changes also come after measures introduced by the Monetary Authority of Singapore since 2011 to ensure that Singapore's financial system is not used to harbour illegitimate funds or as a conduit for the flow of undeclared assets. From 1 July 2013, Singapore will criminalise the laundering of proceeds from serious tax offences.

5. Singapore is fully committed to working with our international partners to combat cross-border tax offences. This includes assistance in connection with the recent disclosure that the tax authorities of Australia, UK and US are investigating complex offshore structures that may be involved in wrongdoing. Our current laws and tax agreements already allow for assistance, in connection with such wrongdoings if any.

Accordingly on 29 May 2013 Singapore signed the Mutual Administrative Assistance in Tax Matters.

On 1 December 2013 it was announced that Singapore would be invited to attend the next G20 Summit in Brisbane and it was noted that "Singapore and Australia enjoy a warm and longstanding partnership."

No official pronouncement from Singapore that I know of has referred to explicit or implicit threats of sanctions by OECD or G20 trading partners as a consideration in Singapore's making these decisions. Given diplomatic sensitivities, one would be very surprised to find any such reference to explicit or implicit threats.

What is the potential cost to Singapore in signing up?

Any decision of the Singaporean authorities is one for them to make but it is worth taking stock to analyse critically and precisely what Singapore has given away in legal and economic terms and to ask if other jurisdictions should, or need to, follow its example.

First, Singapore has abandoned fundamental principles of international law on which it ought to have been able to rely as a bulwark. These principles include the principle that no country enforces another country's tax laws (the revenue rule) and that no country enforces another country's criminal laws unless the offence is criminal in both countries (the dual criminality rule). While the OECD has been attempting to undermine these rules since the 1990s (with much greater success than the OECD deserves and probably with even more surprise to itself), it remains international law that no sovereign country is under any obligation to capitulate to OECD demands.

Second, Singapore appears to have abandoned its previously expressed desire to become the Switzerland of Asia (just as Switzerland is no longer the Switzerland of Europe). In effect, by agreeing to waive client confidentiality and comply pretty much, more or less, with demands for information from foreign tax or other authorities, Singapore has ruled itself out of any truly private client

business. Switzerland and, now, Singapore, have created a job vacancy for smaller jurisdictions to fill. Both countries were once poor and became rich by looking after other people's money in privacy. The need for such a service is greater than ever, so their vacating the field is creating a market opportunity for other jurisdictions.

Third, the Singapore announcements raise policy and legal questions, some of which were put to the Ministry by the current author and to which they have graciously responded.

The questions put were as follows:

Economic policy

Why should a source territorial-taxing country help a residence country raise taxes on income arising within the source country (or outside both) and which belongs to an entity created in the source country? For example, why should Singapore help Australia tax the income of a Singapore company or Singapore trust owned or set up by an Australian when in fact the income has a Singapore source and Singapore is exempting the income for its own development reasons? To do so negates your own incentives and waives the primacy of your sovereign right not to tax. (that was a reason Switzerland originally objected to CFC legislation as fundamentally undermining the basis of tax treaty assignment of taxing rights).

Legal policy

The OECD does not seem to realise that creating a worldwide information surrender mechanism does not sit easily with a territorial basis of legal jurisdiction. There are actually good reasons for the "rule against enforcing foreign taxes" and the "dual criminality" rule. Once these are given away, legal issues such as the following are thrown up –

1. What protections does Singapore get from its treaty partners for its Ministers, public officials, citizens and residents if something goes legally wrong owing to an exchange of information; for example: If information leads to a criminal or civil action in the partner country (e.g. a US or UK extraterritorial conspiracy charge or a breach of trust action or an action for damages for loss of potential patent) are such Singapore persons promised immunity from arrest or suit in the other country? (the "immunity outside Singapore" issue).

If losses are caused to third parties by release of information and these losses are sued for in the partner country or in third countries, are such Singapore persons promised an indemnity by the receiving treaty partner for any damages orders made against them in a third country? (the "indemnity outside Singapore" issue).

What protections do affected persons have against release of sensitive information? The Court order requirement seemed natural and reasonable given private rights are being set aside and one might have thought there was a presumption in favour of privacy. Given the Court order requirement is being removed, how can a potentially affected person (including a third party) protect its legitimate commercial interests? For example, a transfer pricing dispute on the sub-licensing of confidential information may adversely affect the intellectual property position of the head licensor (who may be a stranger to the tax dispute).

What procedural checks are required to assure people that requests for information are genuine? Are requests required to be supported by sworn depositions made subject to penalty of perjury under a Singapore Court? Does the treaty partner have to undertake to produce the foreign official for questioning under oath or punishment for contempt in Singapore if an affected party contends that the request is tainted by fraud or abuse of power? (This is not fanciful. Australia got information from Switzerland under a mutual legal assistance request where a false statement was made in the Australian request concerning a payment being deducted by a taxpayer when in fact it had not been so deducted.)

As for mutual administrative assistance, will Mareva injunctions or asset freezing be undertaken before the substantive tax dispute is settled in the requesting country? If so, what protection does the affected Singapore entity have? You will be aware that in Australia, as in several other countries, tax assessment can be enforced in bankruptcy even though the matter is still under dispute. In the Brayson Motors case, a company was bankrupted and its business destroyed but the High Court later held the tax assessments were wrong and the company was right – but it was too late to undo the damage. You can see that such a situation occurring outside the home country could give rise to extensive litigation.

Is there a prima facie rule as to who bears costs in any legal proceedings? Given the presumption of innocence, one might have thought the requesting foreign party should be made to bear the costs of all parties in legal proceedings (both of the Singapore government and affected parties in or out of Singapore) until and unless fraud is established beyond reasonable doubt.

As for FATCA and any IGA, will Singapore be seeking a cost contribution from the US Treasury for its banks' compliance costs? Will Singapore seek an exclusion for "accidental US citizens" (e.g. Singapore citizens resident in Singapore but born in the USA)?

The response from the Ministry of Finance was as follows:

"Singapore has always been committed to tax cooperation based on international standards. Singapore endorsed and implemented the internationally agreed Standard for EOI for tax purposes ("Standard") in 2009.

"After a comprehensive review of our EOI framework, we took a further step to enhance tax cooperation. On 14 May 2013, we announced four key changes:

- Extend EOI assistance in accordance with the Standard to all our existing tax agreement partners, without having to update individually our bilateral tax agreements with them.
- Sign the Convention on Mutual Administrative Assistance in Tax Matters that would expand Singapore's network of EOI partners.
- Allow IRAS to obtain bank and trust information from financial institutions without having to seek a Court Order.
- Conclude with the United States an Inter-Governmental Agreement (IGA) that will facilitate financial institutions in Singapore to comply with the Foreign Account Tax Compliance Act (FATCA).

"The above enhancements signify our commitment towards international tax cooperation. They are made in line with the global trend of countries strengthening their EOI regimes.

"You have asked some questions regarding our court process. The court process was introduced in 2009 because Singapore was still new to the EOI Standard. Our tax authority, IRAS, has since had more than four years of experience in implementing the international EOI Standard and is now well-placed to evaluate and assist

on requests in line with the Standard. The removal of court process will streamline the administration of EOI and does not change the existing safeguards against misuse of taxpayers' information or fishing expeditions.

"As with the current practice, IRAS will continue to assess the validity of the EOI requests with respect to the EOI Standard, and render assistance only for requests that are clear, specific, relevant and consistent with the EOI Standard. The Standard includes the requirement on jurisdictions to maintain information confidentiality and for their requests to meet the "foreseeable relevance" standard. Spurious or frivolous requests, including requests for professional secrets e.g. trade secrets, are prohibited. The use of information is limited to the purpose for which it was requested for. The international standard contains safeguards to ensure proper use of information. We expect all our EOI partners to be able to meet the above requirements, and use the information in a legitimate manner.

"International tax cooperation is not inconsistent with the fact that each country has sovereign right to enact its own tax laws and define the boundaries of its tax net, which may include the overseas income of its residents. Singapore, for example, taxes income sourced in a foreign country upon remittance. Where taxing rights overlap for cross-border economic activities, double taxation is minimised via avoidance of double taxation agreements.

"Our underlying philosophy on EOI is that international EOI frameworks can only work if (a) there is a level playing field where the standard is implemented globally; (b) EOI is limited to jurisdictions that have a robust framework of law to ensure that the information is kept confidential and used properly; and (c) the partners are able and willing to reciprocate.

"With regard to specific questions: On the question to whom bears the cost of legal proceedings, that will be determined on a case-by-case basis. Singapore does not render assistance through freezing of assets in relation to tax offences.

"On FATCA, we have agreed to negotiate an IGA to help banks mitigate their compliance burden. Banks would in fact face FATCA compliance costs regardless of whether Singapore enters into an IGA. There are no "accidental US citizens" as described because Singapore does not permit Singapore citizens to have dual citizenships."

Obviously the Ministry cannot be expected to engage in public debates about policy and I am grateful for their kind elucidation of Singapore's position. What follows is this author's speculative discussion as an outside commentator and has in no way been discussed with the Ministry and does not, or may not, represent Singaporean views.

As regards private client business, it seems inevitable that private clients with interests in Singapore will be advised by their lawyers that countries such as Australia have obtained information from treaty partners on the basis of false statements as to the basis for the information request (there is a Swiss case in point), have demanded information on overseas bank accounts in defiance of local law (Vanuatu accounts processed in Melbourne), have ignored tax information exchange treaty restrictions and foreign Court orders (information obtained by Australia from the Cayman Islands in breach of the TIEA) and have seized documents in advance of international litigation (Timor-Leste versus Australia on the Timor Gap oil treaty).

A lawyer from Australia, to note one Singapore treaty partner, would therefore not be able to give his own country a clean bill of health when it comes to respecting international obligations or due process – and it is not much of a comfort to private clients from other countries to be told Australia is not the worst offender when it comes to observing due process.

While Singapore may be thinking that it is now so well established as an international financial centre with so much international corporate regional headquarters business that it does not have to worry about attracting or retaining private clients, one has to wonder whether that will prove correct. Many corporate enterprises are dominated by family patriarchs. Especially in Asia, corporate and private business can go together. For example, many Asian high-net-worth families have family members or investments in Australia: they may be rather wary of using Singapore as a base if doing so (rightly or wrongly) potentially exposes family members to claims from Australia.

What is not generally appreciated by authorities onshore and offshore is that private clients want privacy, peace and quiet above all. Most (I suspect a great majority) do not want to break any laws and do try to comply with their own local laws but they do not wish to be put through the third degree just to prove that they are innocent.

Further, as regards multinational corporate enterprises currently using Singapore as part of their international corporate arrangements, the obvious cloud on the horizon for Singapore is that corporate business will soon be under attack in the same way the private client business has been. The (rather silly) controversies in the US and UK over the international tax planning of Apple, Google and Starbucks, resulting in the OECD work on base erosion profit shifting and the digital economy, make it perfectly clear that ridding yourself of messy private client business does not guarantee you a clear run in attracting top tier corporate business from the big G20 economies. To take a brutal example, if OECD countries can deem the income of Singapore trusts and companies to be the income of their OECD residents what is stop them deeming banking business written in Singapore to be written in New York, London, Paris or Berlin?

Singapore may find that it has not only lost potentially lucrative private client business, but will start losing international banking and regional corporate headquarters business.

It is therefore notable that Singapore, like every other offshore centre subscribing to the OECD agenda, seems to be saying that it has an "out" if not everyone joins. It is therefore very much in Singapore's commercial interests to see that there are non-joiners left out there to keep Singapore's future options open.

The OECD, like the eye of Sauron, keeps scanning the world to seek out, destroy or intimidate resistance but it is still hard to see that every country from China to Russia to the Gulf States to Latin America will not see the danger to themselves or their rulers from uncontrolled access by other countries to private economic or tax information held within their borders. Singapore may yet be relieved of its self-imposed obligations. The victory of the OECD in the Far East is neither permanent nor inevitable.

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