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U.S. vs. Swiss Tax Cheats: A Whistleblower Ignored

By Ken Stier

At a critical point in the intense U.S.-Swiss negotiations that took place this past summer to get the names of U.S. taxpayers who were part of a massive tax evasion program, things suddenly took a nasty turn.

The U.S. Justice Department, frustrated for decades by Swiss efforts to foil any tampering with its bank secrecy traditions, was pressing its advantage: a giant tax evasion program run by Swiss bank behemoth UBS was exposed in great detail by a company whistleblower, and Uncle Sam was demanding to know the names of all 52,000 U.S. account holders involved.

The Justice Department subpoenaed bank documents, and could have threatened to have a U.S. court slap a contempt citation and a scorching daily fine on UBS until it turned the documents over. ([See the worst business deals of 2009.](#))

That's when the Swiss Government drew a bright red line: It announced that it would seize UBS documents so that the bank would not be able to hand them over to the U.S..

After intense high-level negotiations the two governments agreed that UBS would provide the names of 4,450 Americans with the largest undisclosed Swiss bank accounts. But no sooner was the ink dry on that deal than the Swiss courts ruled that no such disclosures could be made under Swiss law.

There is no clear solution to the impasse, and the first U.S. Government response, from the Internal Revenue Service, suggests that Washington is not even interested in discussing the issue. "The United States has an agreement with the Swiss government to produce information on U.S. account holders at UBS," said a terse IRS statement. "We expect the Swiss government to continue to honor the terms of the agreement."

But assertions made in a new legal filing suggest that this impasse could have been avoided if U.S. investigators had taken up an offer by the UBS whistleblower, Bradley Birkenfeld, to help roll up the entire secretive UBS operation, by providing the cell phone numbers of fellow bankers and even offering to wear a wire to gather incriminating evidence in Switzerland.

That is the assertion of lawyers representing Birkenfeld, in a complaint filed in late January to an ethics unit of the Department of Justice known as the Office of Professional Responsibility. According to Birkenfeld's attorneys, the Department of Justice "willfully/negligently failed to conduct an investigation that would have permitted the U.S. government to obtain the identities of U.S. clients who maintained illegal offshore accounts with UBS." ([See the top 10 bankruptcies.](#))

The offer to wear a wire is an unusual one but not without precedent. According the *Wall Street Journal*, former hedge fund manager David Slaine agreed to wear a wire as part of a plea agreement related to insider trading charges. He reportedly wore the wire for more than one year, acting on the instruction of the U.S. Attorney's office, and produced evidence that is now part of U.S. charges against 21 individuals, including hedge fund Galleon Group founder, Raj Rajaratnam, who has pleaded not guilty.

But Birkenfeld's offer went nowhere, according to a complaint filed by Stephen Kohn and Dean Zorbe, two experienced whistleblower lawyers who now represent Birkenfeld in a civil case to win a reward under an IRS whistleblower program begun in 2006. "That's Hollywood; you watch too many movies," he was allegedly told.

Former U.S. prosecutors say there could be many reasons for prosecutors to have passed on Birkenfeld's offer. Wearing a wire in Switzerland, for instance, would legally have required the U.S. to get permission of the Swiss authorities — an unlikely prospect — although one experienced former U.S. attorney who asked to remain anonymous noted that he and others he knew had done that in other countries without seeking permission.

"These guys are not cowboys," says a former U.S. prosecutor who worked most of his career in state field offices, where prosecutors are known to typically be more aggressive than those working at the Justice's main D.C. office. "Birkenfeld would have been better off walking in to a U.S. Attorney General field office or even a local IRS office."

The more likely reason this may have occurred, some sources said, is the same reason the DOJ balked at granting Birkenfeld immunity in exchange for his cooperation: he apparently violated the cardinal rule of not being completely truthful with investigators about his own role in the tax evasion scheme.

More specifically, Justice officials have said he was not forthcoming about his role servicing Igor Olenicoff, the Russian-born, California-based real estate billionaire whom Birkenfeld brought to UBS from Barclays, where Birkenfeld worked before — a charge his lawyers deny. (In 2008, Olenicoff pleaded guilty, paid \$52 million in taxes and interest and was sentenced to two years probation and 120 hours of community service. In 2009, Birkenfeld pleaded guilty to one conspiracy count related to tax evasion and in January 2010 began serving a 40-month sentence.)

But why Justice officials did not make use of Birkenfeld's information, to tap other UBS bankers cell phones in order to identify their key U.S. clients, is more murky.

Just as Birkenfeld's cooperation was absolutely vital to the Government's case against UBS, his lawyers believe his assistance could have led to all the

names the U.S. Government is still waiting for almost three years later. As in the earlier dispute, the U.S. still has options — including reigniting its now-suspended litigation. Washington also has trumps cards, including the nuclear option of having the Federal Reserve yank UBS' license to operate in the U.S.

But that would be economic war. The U.S. market represents 40% of UBS' business, and UBS accounts for about 20% of the economy of Switzerland, which is a de facto ally of the U.S., helpful in numerous places around the globe.

At the end of the day, none of the options facing the U.S. in its bid to bring tax cheats to justice appear promising. Which makes that lost opportunity with Birkenfeld, if true, something of a black eye for the U.S. Justice Department.

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