

CASE STUDY 21

EXCHANGE AND COLLABORATION WITH TAX ADMINISTRATIONS

Sharing Evidence with Joint Prosecution Teams

Introduction

The basic requirements for effective prosecutions

Investigating and prosecuting suspected perpetrators of corruption is very time-consuming and requires collaboration, expertise and knowledge of the law. The process of detecting and proving corruption, fraud, tax evasion and other financial crimes requires many hours of work, specialized expertise and sometimes expensive software or surveillance equipment.³⁶ Inter-agency cooperation between revenue authorities, financial intelligence units (FIUs) and other law enforcement agencies can be a force multiplier, offering additional resources, expertise, and legal tools.³⁷ Effective cooperation can provide “critical cover in politically sensitive cases”, that can support law enforcement agencies to counteract any political risks.³⁸ In order to successfully meet the objective of prosecuting a suspect, Joint Investigation Teams must operate within the confines of the law, set a strong terms of reference determining the scope and role of each agency, and ensure timely action.

The successful prosecution of corruption and other financial crimes entails cooperation among agencies with varying institutional cultures and differing scopes and objectives. The level of cooperation between tax administrations and other domestic law enforcement agencies is critical in countering tax and financial crimes.³⁹ Whilst there are several limitations on the scope of cooperation, opportunities exist in the form of existing cooperation models, the use of task forces and joint centers, and in applying international best practices.⁴⁰

Tax administrations have a key role to play in addressing serious crime. They are granted access to and are highly trained in examining the financial affairs, transactions, and records of millions of individuals and entities.⁴¹ Alongside examining the affairs of taxpayers, tax authorities are enabled by law to issue demand notices requesting the payment of outstanding taxes and pursue payment through specialized tax tribunals or through mediation efforts with the taxpayer. However, tax administrators are not always aware, especially in developing countries, either of the typical indicators of possible bribery, corruption, and other financial crimes not related to tax, or of their role in referring their suspicions to the appropriate law enforcement authority or public prosecutor.⁴² For this reason, as well as the way that key data is spread across various agencies, inter-agency cooperation to share information, investigate alleged financial crimes and, ultimately, prosecute is imperative.

The different agencies need to be able to share information effectively while abiding by data protection rules. Some of the agencies involved may include the police, judiciary, public prosecutors, corruption investigation agencies, and financial intelligence units (FIUs). Each of these agencies/institutions will already have some appreciation of the links between their functions and mandates in tackling financial crime.⁴³ In the course of their activities, the different agencies will collect and hold information on individuals, corporations, and transactions, which may be directly relevant to the activities of other agencies. However, legal gateways will need to be established to enable the sharing of information.⁴⁴ This will often be defined by domestic law and limited by regulatory restrictions governing the collection and use of information (e.g. General Data Protection Rules

in the EU).⁴⁵ This requires balancing data protection rights with inter-agency sharing of information. It is important to protect the confidentiality of information and the integrity of the mandate being fulfilled by each agency.⁴⁶

Tax tribunals with less strict rules of evidence are an alternative to legal action. The decision to prosecute will generally be anchored on access to lawfully obtained information (particularly regarding the rules of evidence), which is collected and shared between agencies through a mandated process. The collection and sharing of information for purposes of prosecution can only be successful if relevant agencies utilize their technical capacities to identify a financial crime, the appropriate avenue for scrutinizing that crime and the agency entitled to initiate action. Selecting the correct agency is especially important for tax administrators since tax evasion cases may be prosecuted by tax authorities in specialized tax tribunals. From time to time, the tax authority may negotiate with the taxpayer to recover revenues, especially where the chances of a successful legal action are low. Specialized tax tribunals often have less stringent rules of evidence and may be preferred where evidence has not been handled in line with strict rules of evidence. In addition, where a legal action has little chance of success, the tax authority may, at least, recover some revenue from the income generated by that asset.

The capacity to investigate may not always translate into a capacity to prosecute. Investigation involves analyzing significant volumes of financial, banking, and accounting documents, including tax or customs records in order to identify illegal schemes, follow the money and gather financial intelligence.⁴⁷ Prosecution will require similar expertise, but will also require gathering and presenting evidence for confiscation, seeking judicial authorization for specialized investigation tools and presenting the case to the court.⁴⁸

The role of tax administration and limitations to joint prosecution

In many countries, the limitations imposed on the tax authority's ability to obtain information from other agencies pose a significant challenge to an

effective prosecution. The ability to share information for purposes of inter-agency cooperation in prosecuting a financial crime is often dependent on the enabling framework in a country. In general, for purposes of prosecution it is imperative that the agreement to cooperate is implemented in accordance with the enabling provisions of the law. Countries can and have modified their laws to enable them to get better access to information. Some of the methods of cooperation include direct access to information contained in agency records or databases; an obligation or ability to provide information spontaneously; and an obligation or ability to provide information only on request.⁴⁹

Based on a review of 51 countries, the OECD found that some countries had barriers to the ability of tax administrations to share information with the police or public prosecutors in non-tax investigations. In 15 countries, there was no legal obligation to report suspicions of serious non-tax offenses to the relevant authorities. In two countries, the tax administration was specifically prohibited from doing so.⁵⁰ Mixed abilities to share tax information with the FIU were found, together with the prohibition in two countries from sharing with the authority responsible for conducting corruption investigations.⁵¹ In contrast, customs administrations, due to their role in countering illicit trade, were mostly allowed to share information with the police or public prosecutors investigating non-tax offenses, and seven countries⁵² even permitted direct access to customs information.⁵³ Notably, in almost all countries, legal gateways permit (not obligate) the police or public prosecutor to provide information to the tax administration for purposes of administering taxes and, generally, enable sharing with the FIU.⁵⁴ Overall, while all other agencies that tend to be involved in the prosecution of a financial crime were permitted to share information with the police or public prosecutor, the limitation on tax administrations and the lack of an obligation for the police and public prosecutors to share relevant information are likely to impede an effective prosecution.

Tax administrations hold a wealth of personal and company information that is a valuable source of intelligence for other agencies tasked with identifying financial crimes.⁵⁵ Such information relates to income, assets, financial transactions and banking information, among others. Tax agencies are enabled to engage in exchange of information on request (EOIR), spontaneous exchange of information or automatic exchange of information (AEOI) for tax

purposes on the basis of either tax treaties, or Tax Information Exchange Agreements (TIEA). AEOI and EOIR provide tax authorities with a framework to request and obtain specific information relating to a taxpayer in a foreign jurisdiction; this information can be used to carry out a risk assessment and/or trigger a tax investigation.⁵⁶ This may be beneficial to other law enforcement agencies investigating a financial crime. However, there are limitations on the sharing of information. For instance, tax authorities should refrain from engaging in fishing expeditions or requesting information that is not likely to be relevant to the tax affairs of a taxpayer.⁵⁷ In addition, the information received must be treated with proper confidence and can only be shared with authorities involved in the assessment, collection, enforcement or prosecution of a tax related offense.⁵⁸ Information can be exchanged with other law enforcement agencies where money laundering, corruption and terrorism financing may be concerned, but the supplying jurisdiction must be informed and authorize this.⁵⁹

Since the proceeds or tools of corruption will often involve the use of other jurisdictions, exchange of information between tax authorities can prove advantageous to an inter-agency initiative to prosecute. Where gathering evidence will require the cooperation of foreign authorities, mutual legal assistance can be key, particularly where prosecution is concerned, in executing proceedings or extradition.⁶⁰ Mutual legal assistance can be provided via agreements between countries, the UN Convention against Corruption (UNCAC), or on the basis of reciprocity where no agreement exists. In Asia and the Pacific, some of the barriers to effective international legal assistance include the lack of legal basis for cooperation, differences in legal and procedural frameworks, language barriers, resource limitations and evidentiary issues.⁶¹ In addition, a relationship of trust combined with a strong and clear request for assistance was found to be key in enhancing mutual legal assistance.⁶² Other agencies can provide tax administrations with important information about ongoing or completed investigations that could influence the reopening of a tax assessment or initiate a tax crime investigation.⁶³

In the Brazilian Petrobras investigation, tax auditors supported the transnational corruption investigation by analyzing suspects' tax and customs data and sharing this with the police and public prosecutor as permitted by law.⁶⁴ With that information, officials were able to uncover evidence of

money laundering, tax evasion and hidden assets and the investigation has, so far, resulted in criminal fines, tax penalties and recovered assets amounting to USD15 billion and 1,400 years in prison sentences.⁶⁵ Brazil's National Strategy to Combat Corruption and Money Laundering (ENCCLA) was set up as an inter-agency organization to fight money laundering and corruption through coordination and joint policy making among public officials.⁶⁶

Criminal investigations can be affected by a country's limitation on the tax authority's sharing of information. Where criminal prosecutions are concerned, the tax administration is often able to ensure that individuals and companies are required to pay tax on all of their income. This includes income derived from criminal activities, on which the tax administration can deny a deduction for expenses.⁶⁷ However, in the event that information valuable to a criminal investigation is uncovered in a country that can limit the ability of tax administrations to share information, there is a likelihood that some elements of a financial crime may go undetected. In addition, where the tax administration may be limited from taxing the direct proceeds of a crime, cooperation with other law enforcement agencies could provide an avenue for alternative charges to be brought against a suspect.

A joint prosecution must be carried out within the confines and structures of the law, which can make prosecutions more difficult. For instance, if the law provides that information obtained from the tax administration may be used for investigative purposes but not as evidence in proceedings, this would present a barrier to successful prosecution.⁶⁸ Some laws may require that a formal criminal procedure is initiated under the authority of a public prosecutor or a court order obtained before an anti-corruption authority may receive tax information.⁶⁹ Although this ensures an important balancing with protecting personal or confidential information, it may delay and increase the costs of the process. Countries should introduce laws to streamline this process and adapt the legal framework to enable sharing of information for purposes of providing evidence in a formal case.

Globally, jurisdictions apply different frameworks for prosecution of tax and financial crimes. Some countries, such as Burkina Faso and Mexico, have a central prosecution authority that is also responsible for criminal investigations, whilst others do not involve public prosecutors in the investigations that will be

carried out by the police or specialized agencies.⁷⁰ In several countries, including New Zealand and Nigeria, law enforcement agencies, including the police, tax administrations or anti-corruption authorities, may prosecute cases directly.⁷¹ In a number of jurisdictions, for example Ghana, Rwanda, and Malaysia, public prosecutors responsible for the prosecution of a financial crime may either have the authority to delegate performance of significant elements of an investigation to a number of the agencies identified above, or they may not participate at all in the investigation process.⁷²

Tax administrations generally carry out a separate process of prosecuting tax-related cases through specialized tax courts or tribunals, which are found in most developed and developing countries.

In most jurisdictions, the enforcement of taxes and the prevention of tax crime is the tax administration's responsibility.⁷³ The process of investigation for tax purposes will involve specialized audit teams accessing the financial and other information of a person; this process and the powers to access the information of a taxpayer are provided for by law. Taxpayers are often required to exhaust the tax procedural process before the courts are approached. The coordination of this process with the overall joint prosecution is key, since a failure in the specialized tribunal or inability to prosecute may weaken an overall case, particularly with regard to money laundering. Where a taxpayer agrees to comply with the orders of the tax administration and pay the outstanding taxes, this is likely to affirm the allegation of a tax crime having been committed and efforts to determine whether money laundering occurred will be further justified. If joint teams opt to initiate prosecution in specialized tax tribunals, they will need to ensure that the tax investigation is distinct from the overall investigation. Pursuing an action in the specialized tax tribunal should be considered where a criminal prosecution might not be possible or is unlikely to succeed. This may remove at least part of the proceeds of crime from the criminals by taxing the income generated from that asset and would entail less stringent requirements for evidence. Where tax authorities are involved in a joint prosecution process, they may make strategic decisions about whether or not to combine charges for tax crimes, corruption, and other financial crimes into a single prosecution.⁷⁴

Obstacles to coordination between government agencies may arise from systemic and practical differences:

- Lack of political will and distrust amongst law

enforcement agencies;

- The agency's need to preserve autonomy and independence throughout the process to protect the integrity of its mandate;
- Organizational routines and procedures that may be difficult to synchronize and coordinate;
- Observing the rules of evidence to ensure admissibility in court;
- Differing organizational objectives between the collaborating agencies, which need to be balanced;
- Differing expectations and levels of pressure from and for each agency to deliver some element of the work; and
- Differing and incompatible technical platforms.

The importance of enabling law

The mandate of a joint prosecution effort must be clear and each agency must act within its empowering provisions. However, even where empowering provisions exist, political interests may often undermine the legitimacy of a joint investigation team. In addition, the support of policy makers to introduce an enabling legal framework will be key.

Where extensive empowering provisions are not available, a Memorandum of Understanding (MOU)⁷⁵ can affirm and evidence the objectives of inter-agency cooperation to prosecute. Under Project Wickenby, the Australian Tax Office has direct access to information collected by the Australian FIU (AUSTRAC) and an MOU with AUSTRAC.⁷⁶ Such an MOU should be compliant with the law and provide details on existing regulations, provide modalities of exchange of information, and facilitate shared objectives. It should not create legally binding obligations on the agencies, but it should foster a common understanding of objectives, procedures, and roles, and build trust between agencies.

Recognizing tax crimes as predicate offenses

The ability of tax administrations to be involved in prosecuting financial crimes is often made easier

when tax crimes are recognized as predicate offenses to money laundering. The Financial Action Task Force (FATF) recognized this in 2012, when they revised the Recommendations to include tax crimes as a predicate offense. Predicate offenses are types of criminal activity that give rise to funds or assets that can be laundered to obscure the illegal source.⁷⁷ Where a tax crime is designated as a predicate offense, it means that a person may be charged with the offense of money laundering and the predicate offense, in this case tax evasion. This is important because it gives joint prosecution teams greater scope to secure a conviction or impose greater penalties, pursue cases of tax crimes involving other jurisdictions and recover the proceeds of crime through mutual legal assistance.⁷⁸ The definition of a tax crime should be broad enough to cover the violation of all direct and indirect tax obligations. A narrow definition could limit the role of the tax administration. It also requires financial institutions and Designated Non-Financial Businesses and Professions to report suspicions of any predicate offenses relating to the proceeds of tax crimes; this will generally require some awareness of the risks and indicators amongst reporting entities and greater cooperation with tax administrations.

According to an OECD survey of 31 jurisdictions, the inclusion of tax crimes as a predicate offense had practical and positive impacts on their work.⁷⁹

The most reported impact was better inter-agency cooperation, including an increased ability to work with other agencies on particular cases and on strategic and policy matters.⁸⁰ Greater awareness amongst other law enforcement agencies, intelligence agencies and the private sector of the possibility of tax crimes occurring and better avenues for communication with other agencies were also reported.⁸¹ Notably, some jurisdictions reported an increase in prosecutions and that prosecutions were easier to undertake.⁸²

The EU 4th Anti-Money Laundering (AML) Directive introduced a requirement for member states to introduce tax crimes as a predicate offense. While no definition was specified, countries were expected to have effected this amendment by 26 June 2017, and by 1 January 2018 tax authorities were to gain access to data collected under AML laws. Ultimately, the European Commission had to open infringement procedures for non-communication of transposition measures against 20 member states. Of the 20, three countries, including Ireland, were referred to the Court of Justice.

Alongside laws defining the mandate of government agencies to cooperate, countries should introduce a wide definition of tax crimes as a predicate offense to money laundering. This could enable cooperation in investigations that involve a broad range of tax crimes. Although there is no recommended definition of a tax crime, countries seeking to introduce them as a predicate offense should amend their AML laws to define the offense and the elements that make it a serious offense.⁸³ Countries should also ensure that tax crimes committed in a foreign jurisdiction are considered tax crimes. The legal provisions should provide a broad set of tax-related offenses that constitute predicate offenses to money laundering. In particular, fiscal offenses relating to indirect and direct taxes should be included.⁸⁴ This could ultimately entail straightforward non-payment of direct and indirect taxes being considered as a predicate offense to money laundering, or, potentially, certain cases of aggressive tax avoidance. In addition, countries will need to:⁸⁵

- Establish, either through legislation or case precedent, that the predicate offense need not be proven in order to convict for money laundering, as established in the FATF recommendations;
- Prepare internal guidelines, handbooks and in-person training for investigators; and
- Introduce policies or directives that establish the mandatory requirement of opening a parallel financial investigation in every investigation of a predicate offense.

The introduction of tax crimes as a predicate offense needs to be effective. This will generally entail countries ensuring that law enforcement agencies, other agencies required to provide information in accordance with the AML requirements, and Designated Non-Financial Businesses and Professions undergo thorough training and awareness raising.

Showing regard for the right to privacy

Particular care is required to ensure that cooperation between agencies does not lead to any curtailing of the right to privacy. Enabling legislation is an important feature in framing the scope of each agency in the process of prosecuting financial crimes. However, an MOU can also provide an enabling framework for the authorities to cooperate.

The role of the tax administration can only extend as far as a tax crime may be concerned and the process will entail a simultaneous prosecution in alignment with tax procedures as mentioned above. Clearly setting out the roles of each authority throughout the prosecution process and ensuring strict adherence to the law ensures that the case cannot be dismissed based on procedural matters. Alongside respecting the rule of law, the right to privacy entitles persons to protection from arbitrary interference or intrusion from the state. Although the right is not absolute, limitations regarding banking secrecy and money laundering in general are often clear. The tax administration must evaluate whether sharing of information is in line with the requirements of the Constitution or Bill of Rights of their jurisdiction. Any limitations to the right to privacy should be balanced by some determination of whether it would be reasonably necessary for the attainment of the objectives underlying the joint investigation.

In making this assessment, the obligation of sharing taxpayer information with other agencies for purposes of investigating a financial crime must be balanced against the potential impact on the integrity of the tax system.⁸⁶ A tax administration's information sharing to address serious crime is acceptable as long as it is fit for purpose. In addition, balancing the right to privacy and the benefits to society must be evaluated based on the following:⁸⁷

- The nature of the serious crime in question and the scope of the information required;
- The authority to access the information and the ability of the tax administration to provide it;
- The intended and potential use of the information; and
- The risk of misuse.

Investigating agencies will need to determine to what extent the information is available and will be shared. The 4th AML Directive provides that the processing of personal data should be limited to what is necessary for the purposes of complying with the requirements of the Directive. Financial investigations are, by nature, intrusive and will result in obtaining the private information of an individual.⁸⁸ Law enforcement agencies must remain aware of their country's human rights legislation, which protects the right to privacy and associated considerations. They should therefore be able to justify such investigations as proportionate, non-discriminatory, legitimate, accountable, and

necessary to the investigation to be undertaken.⁸⁹

Joint teams should set the criteria for information sharing. These should be based on the indicators of suspicious features that fall within the prevention of tax abuses and money laundering initiatives to ensure that the process of prosecution does not infringe upon the right to privacy. The criteria should include:

- Transactions with no real business purpose (substance over form);
- The use of offshore accounts, trusts or companies which do not support any economic substance;
- Tax schemes that involve high-risk jurisdictions (particularly jurisdictions with high levels of secrecy and low or no taxes);
- Highly complex tax structures;
- Unexplained wealth;⁹⁰
- Short-term businesses involved in importing or exporting; and
- Use of cash transactions instead of appropriate financial instruments.

Conclusion

The obstacles to effective prosecutions go beyond the limitations imposed by legislation. The attention drawn to legal challenges is warranted by the potential consequences of a failure to operate within the confines of the law. These failures include the inadmissibility of evidence, the consequence of which will result in rendering the entire process redundant. Joint teams may be limited by distrust amongst the enforcement agencies, differing expectations on the delivery of outcomes, and a lack of harmonized institutional procedures particularly regarding the use of technology to collect, hold, and share data.

Joint prosecution teams must have a clear mandate based on the law, clearly defining the role of each agency and determining clear procedures for cooperation. They must remain aware of their limitations as any breach may result in a failed process, and be prepared to receive any additional support to ensure they meet the procedural requirements. Tax administrations will need to operate within the specialized courts and ensure that sharing of any

information is enabled by the legal framework or any reasonable exceptions. In order to do so, countries should consider introducing tax crimes as a predicate offense in order to facilitate:

- Increased sharing of information and awareness about the nature of tax crimes.
- Mutual legal assistance.
- Prosecution of money laundering based on tax crimes involving foreign jurisdictions.
- Expanding the tools, skills, and resources available, including for asset recovery.
- Extending the statute of limitations through linking to money laundering.

Example: South Africa (Tannenbaum case)⁹¹

Brief facts of the case

The following South African agencies cooperated in a four-year investigation of Barry Tannenbaum that led to prosecution in 2009:

- South African Reserve Bank (SARB);
- South African Revenue Services (SARS): responsible for the collection of revenue and enforcement of compliance with tax and customs legislation (semi-autonomous);
- South African Police Service (SAPS) Serious Economic Offences Unit: tasked with preventing, combating and investigating economic crime;
- The Financial Intelligence Centre (FIC): assists in the identification of the proceeds of unlawful activities and combating of money laundering activities, amongst others; and
- National Prosecuting Authority (NPA).

Tannenbaum was accused of setting up a Ponzi scheme that involved at least 800 investors in South Africa, Germany, US, and Australia. The scheme promised investors returns of 200% per year in investments related to fraudulent pharmaceutical imports. On 30 July 2009, the North Gauteng High Court granted the Asset Forfeiture Unit in the NPA a preservation order in

line with the Prevention of Organized Crime Act.⁹² The order froze an estimated R44 million held in two bank accounts belonging to Tannenbaum and his associate.

Cooperation and legal mandate of SARS

SARS's five-year priority initiative proposed to adopt a whole-of-government approach in managing the customs border environment. This included continuing to strengthen risk management capabilities as well as international agreements and links with other jurisdictions. Further, SARS's strategic plan emphasized a whole-of-government approach through collaboration with other government agencies to improve the government's overall value chain.

SARS is mandated to conduct criminal investigations into all criminal offenses created under the Tax Administration Act. This applies to all tax acts whether indirect or direct taxes, excluding offenses under the Customs and Excise Act.⁹³ SARS is also the only authority assigned the legal mandate to officially lay a criminal complaint with SAPS in respect of a Serious Tax Offense.⁹⁴ In general, South Africa recognizes tax crimes as a predicate offense to money laundering.

- Section 73 of the AML/CFT Act provides that any investigation instituted in line with the Act, including those on the property, financial activities, affairs or business of any person, must be reported to the Commissioner of SARS or any officials with a view to mutual cooperation and sharing of information.
- Section 70(3) (c) of the Tax Administration Act 2011, provides for the disclosure of information to the FIC where such information is required for the purpose of carrying out their duties and functions.

In general, South Africa's system provides an enabling environment for SARS to cooperate in a joint prosecution and review information obtained by other agencies with regard to the alleged tax crime.

Process of cooperation

The five agencies coordinated their efforts, ensuring that clear terms of reference identified each agency's scope and mandate. The joint team determined a plan of action for the high-level investigation into serious allegations of fraud, money laundering, tax evasion and

foreign exchange control violations. The responsibilities were set out as follows:

- NPA: freezing or forfeiture of assets of the main suspect and associates and determining whether to prosecute any of the persons or entities involved in the scheme;
- SARS: raising tax assessments and generating attachment orders;
- SAPS: supporting with seizure and arrest where possible;
- FIC: tracing the movement of finances; and
- SARB: accessing banking information, which revealed the use of Tannenbaum's personal accounts to channel money out of the country.

SARS reviewed Tannenbaum's tax filings in the period 2004–2009 and alleged that he had under-declared his income, resulting in tax, penalties and interest.⁹⁵ Through investigations into Tannenbaum's accounts, they discovered that he received about USD415 million and about USD324 million was paid to investors and agents in the scheme.⁹⁶

The issuance of arrest warrants could not be enforced since Tannenbaum had fled to Australia and one of his associates was based in Switzerland. Although extradition proceedings were pursued, the process has taken many years and prosecutors were not optimistic that Australia would agree to the extradition request.⁹⁷ Tannenbaum has also managed to evade authorities in Australia. The prosecution of Tannenbaum and his associates tied up state resources for several years with little progress made. In addition, investors and overall victims of the scheme have pursued litigation in efforts to recover their assets. Several of the businesses registered as part of the scheme are attached to different associates, whilst others are insolvent. This has had implications for recovery of assets by SARS.

Recommendations

For purposes of joint prosecution efforts, inter-agency teams should evaluate the following and encourage governments to strengthen any areas of weakness:

- Introduce enabling laws, including a broader legal

mandate that permits the sharing of information between agencies where reasonable and the recognition of tax crimes as a predicate offense;

- Ensure cost effectiveness;
- The possibility of extradition where suspects may be based in foreign jurisdictions may arise and teams must remain aware of the potential implications for the case and the need for a speedy process;
- Determine clearly whether illegal schemes are taxable;
- Ensure clear frameworks for any information sharing with foreign institutions;
- Consider the role of victims or investors not only as witnesses, but also in pressing charges; and
- Information management—ensure that a member of the directorate of public prosecution is part of the team to enable the quick turnaround of ex parte applications.

With regard to asset tracing and recovery:

- Evaluate the appropriate time to implement preventative measures, including the freezing of assets; this should be done in the interest of ensuring that the person of interest is not alerted too early or too late;
- Understand the constraints existing in the requested country;
- Since cooperation with foreign jurisdictions will be imperative to the tracing and identification of assets for recovery and taxation purposes, ensure that there is a legal basis for assistance, no barriers will prevent cooperation and the appropriate legal instrument is chosen;
- Freezing of assets at the domestic level: determine how fast the judiciary can respond, what kind of coordination will be required, the asset management framework available and the costs associated with holding certain assets whilst proceedings are taking place; and
- Freezing of assets in foreign jurisdictions: since this will require mutual legal assistance, with foreign authorities and comply with the differing rules of procedure.

Whilst the ultimate outcome may not have been a successful prosecution of the alleged offenders, the South African joint team was able to effectively coordinate efforts and engage in a process that should lead to more effective future investigations of financial crimes. The outcome does not take away from the commendable efforts made by the prosecution team and the recommendations made above represent the main lessons drawn by the involved agencies for future joint efforts.

Example 2: Brazil

Some additional lessons may be drawn from Brazil's experience with Operation Car Wash, which involved 44 other countries where investigations were being carried out. This required the negotiation of new agreements with several states, including the United States and Switzerland.⁹⁸ Using information obtained by the tax authority on the purchase of a luxury car by the daughter of a former director of Petrobras, the invoice revealed a connection with an operator of the corruption scheme whom the director had denied knowing.⁹⁹ Further analysis of the director found that he was the beneficial owner of an offshore company owning a luxurious apartment where the operator once lived.¹⁰⁰ Although the investigation is still ongoing, the authorities were able to engage in international legal cooperation that proved essential to obtaining relevant evidence of major crimes and in recovering illicit assets in foreign jurisdictions.¹⁰¹ Brazil had an array of regulations dealing with cooperation, including international treaties and agreements, direct assistance, extradition, and enforcement of foreign court decisions. To facilitate successful prosecution, enabling legislation must go beyond obligations for domestic institutions and establish cooperation across jurisdictions.

Notes

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