

Taxpayer Rights in International Exchange of Information

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“ *Little else is requisite to carry a State to the highest degree of opulence from the lowest barbarism but peace, easy taxes, and a tolerable administration of justice: all the rest being brought about by the natural course of things* ”

- Adam Smith

“

Offshore tax evasion is a global issue requiring global solutions – otherwise the issue is simply relocated, rather than resolved

”

– OECD Report for the G8 Summit,
June 2013

Tax Avoidance and Tax Evasion

- ▶ Data leaks – shell companies transfer funds – legitimate and illegitimate reasons
- ▶ Panama Papers
- ▶ Paradise Papers

Tax Avoidance and Tax Evasion

- ▶ Measures to curb Tax avoidance and tax evasion
 - ▶ Co-operation between Tax administration and Tax payers
 - ▶ Tax Information Exchange Agreements (TIEAs)
 - ▶ Common Reporting Standard (CRS)
 - ▶ Exchange of Information on Request (EOIR)
 - ▶ Automatic Exchange of Information (AEOI)
 - ▶ Foreign Exchange and Tax Compliance Act (FATCA)
 - ▶ Global Forum on Exchange of Information and Transparency for Tax Purposes

Tax Information Exchange Agreements (TIEA)

- ▶ Purpose of TIEA
 - ▶ International co-operation through Exchange of Information
 - ▶ OECD – standards on transparency and exchange of information
 - ▶ Every country - minimum 12 TIEAs to be regarded as co-operative jurisdiction
- ▶ Most TIEA based on OECD Model

Common Reporting Standard (CRS)

- ▶ OECD introduced the CRS at the February 2014 meeting of G20 Finance Ministers
- ▶ Standard for the automatic exchange of taxpayer data
- ▶ Global Forum 2016 annual report - 101 jurisdictions committed to CRS
- ▶ India amongst the first 49 countries to implement the CRS standard for AEOI

Exchange of Information (EOI)



EOI: Global Forum for global change



127 members
= the largest tax group in the world

Exchange of Information (EOI)

- ▶ Cross-border sharing of taxpayer information by tax administrations
- ▶ EOIR - tax administrations asking for specific information on a particular case from another jurisdiction
- ▶ AEOI – voluntary sharing of information by a jurisdiction it believes to be of interest to another tax authority

Automatic Exchange of Information



AEOI the basics: what, how and why?

What?

- Systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country.
- A core form of tax cooperation as provided for by DTAs/the MAC.

How?

- Information on various potential categories obtained by a tax authority (e.g. dividends, interest, royalties, salaries, pensions, changes in residence, value added tax refunds etc.).
- Exchanged with tax authorities of treaty partners.

Why?

- The taxpayer’s country of residence can check its tax records to verify offshore income/assets have been accurately reported.
- Deterrence impact and voluntary compliance.

Differences between EOIR and AEOI

| Basis | EOIR | AEOI |
|---------------------|---|--|
| Type of information | Specific investigation about a particular taxpayer | Automatic flow of general taxpayer information between tax authorities |
| | Involves a range of information required as part of the investigation | Involves huge amounts of financial data relating to taxpayers |
| | Less common and more focused at obtaining specific information; only in cases where the information is critical to an investigation | More common and focused on obtaining general information about the taxpayers |

Differences between EOIR and AEOI

| Basis | EOIR | AEOI |
|--|---|---|
| Issues relating to taxpayer protection | Obligation to notify the taxpayer concerned before information is exchanged | Security of the data |
| Protection of the taxpayer in the requesting state | The rights of the taxpayer engaged when seeking information and protection of such rights | Protect the rights of taxpayers with respect to the data received |

Differences between EOIR and AEOI

| Basis | EOIR | AEOI |
|---|--|---|
| Protection of the taxpayer in the requested state | Rights of taxpayers if the State needs to use its powers to obtain information | Rights of taxpayers impacted by the process of gathering and processing the data |
| | Guarantees offered by the requesting state for the taxpayer in respect of information supplied to it | Safeguards necessary for the transmission of the data and safeguards offered by the recipient state |

Foreign Account Tax Compliance Act (FATCA)

- ▶ Reporting obligations on US taxpayers and certain foreign financial entities.
- ▶ Inter-Governmental Agreements
 - ▶ India-USA
 - ▶ Section 28BA: The Statement of Reportable Account.
 - ▶ Rule 114F: Definitions.
 - ▶ Rule 114G: Information to be maintained and reported.
 - ▶ Rule 114H: Due diligence requirement.

Demonstrating “Foreseeable Relevance”

- ▶ The requesting State states how information requested would be relevant for investigation, assessment or collection of taxes
- ▶ Information sought needs to be relevant at the time when the request is made
- ▶ Immaterial whether the information actually proves to be relevant or not
- ▶ Information requested “foreseeably relevant” for
 - ▶ DTAA or
 - ▶ Administration and enforcement of domestic laws

Demonstrating “Foreseeable Relevance”

- ▶ In some of the DTAAAs, “foreseeably relevant” and “necessary” are interchangeably used
- ▶ Help foreign tax authorities provide the information requested, prevent legal challenges in accessing information
- ▶ All TIEA entered into by India require the presence of “foreseeable relevance” at the time of making requests except the TIEA with Bermuda

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*It is the first responsibility of every
citizen to question authority*

”

– Benjamin Franklin

Tax Payer Rights

- ▶ Evolution made in tax transparency and information sharing
- ▶ International agreements need to help protect taxpayer privacy rights while simultaneously encourage a more effective sharing of taxpayer information across borders and ensure effective collection of taxes
- ▶ TIE should be accompanied by assurance to Governments that the rights of their citizens will be respected

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At their core, taxpayer rights are human rights

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– Nina E. Olson,
US national taxpayer advocate

Fundamental Principles supporting Taxpayer Rights

▶ Principle of Proportionality

- ▶ Disadvantages suffered must be in proportion to the object.

▶ Ne bis in idem

- ▶ No legal action can be instituted twice for the same cause of action.

Fundamental Principles supporting Taxpayer Rights

- ▶ **Audi alteram partem**
 - ▶ No person should be judged without a fair hearing.
- ▶ **Nemo tenetur se detegere**
 - ▶ The right against self-incrimination, i.e. the right to remain silent.

“ We realize that some of the objectives are in conflict, in the sense that movement toward one goal means that others might be achieved less adequately. Simultaneous realization of all the goals in some degree will constitute success if, as we hope, our choices as to the appropriate compromises adequately reflect the [informed] consensus...”

- Carter Commission

Standard Taxpayer Rights

- ▶ Right to privacy.
- ▶ Right to a fair trial.
- ▶ Freedom from discriminatory tax laws.
- ▶ Freedom from self-incrimination.
- ▶ Respect for the rule of law.

Protection against Fishing Expedition

- ▶ A State does not have the liberty to engage in a fishing expedition.
- ▶ The request must be targeted at specific persons – The State must identify the ‘person under examination’.
- ▶ A State receiving request is under no obligation to provide information in case of a fishing expedition.

Right to confidentiality

- ▶ Protection of personal information.
- ▶ Article 26(2) of the OECD Model DTAA:
 - ▶ Information shall be treated as secret in the same manner as information obtained under domestic laws of the receiving state.
- ▶ Information cannot be disclosed under domestic information disclosure laws.

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... stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights.

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– P. Pistone

Thank you