8th SGATAR Joint Training Program
For SGATAR Members

International Tax Cooperation Agreement
On Exchange of Information

Country Report

Prepared by

China

International Tax Cooperation Agreement on Exchange of Information

1. Introduction

Under the circumstance of economic globalization proceeding fastly, China participates international transactions or other business activities more actively and frequently. It's really a serious issue for Chinese tax authorities to think over how to prevent taxpayers making use of loopholes in tax laws and regulations, or concealing their true transactions to carry out tax avoidance and evasion. For many years, tax authorities all over the world and international organizations such as OECD have been committing themselves to bi-lateral or multi-lateral tax cooperation and assistance to help better defend jurisdictions' national rights and interests. The practices by many countries have proved that cross-border exchange of information (EoI) is very effective in striking international tax evasion and avoidance. The international network of EoI has become a high wall for tax evaders to stride over. But at the same time, due to the tax sources becoming more international and transactions more complicated, there arise

much more difficulties and challenges for tax authorities to gather valid and timely information to find tax abuse clues.

1.1 Bilateral agreements signed by China

It's generally considered that a treaty in force is binding on the parties and must be performed by them in good faith. Exchange of tax information is an obligation for China acting as the contracting state of tax treaties, and also an important way to conduct tax collaboration with countries and regions.

1.1.1 Double Taxation Conventions （DTCs）

Since 1985, up till now, China has signed DTCs (or arrangements) with 95 countries (or regions). Articles of EoI are non-exceptionally included in these conventions (or arrangements). Among these 95 conventions (or arrangements), 92 of them had come into effect, and the other 3 signed with Czech Republic, Ethiopia, and Nepal haven't taking effect yet. Taxes covered in these DTCs include Corporate Income Tax, Individual Income Tax, Business Tax, Consumption Tax, etc. China has a growing interest in the reciprocal reception and supply of information based on these DTCs.

1.1.2 Tax Information Exchange Agreements (TIEAs)

In order to solve the problem of tax information asymmetry, and to prevent and hit tax evasion by using tax havens, the State Administration of Taxation (SAT)

has contact with some well-known tax havens at the time the international situations is favorable for China. In September 2009, after several rounds of hard negotiations, SAT signed TIEAs with Bahamas and British Virgin Islands, which laid a legal basis for EoI between China and tax havens.

1.1.3 TIEAs in progress

China has approached 3 jurisdictions for TIEAs and is being approached by 5 jurisdictions.

Now China have completed the negotiation of TIEAs with Guernsey, Jersey, Isle of Man, Bermuda and Argentina, and these agreements are expected officially be signed at the end of 2010. TIEAs with tax paradises may produce strong deterrent upon tax abusers, and knock-down the psychological anticipation of tax evasion through tax shelters.

1.1.4 upgrating EoI article in DTCs

According to the 2005 and 2008 OECD Model, China has upgraded EoI articles in bilateral convention or arrangement with Singapore and Hongkong to internationally accepted standards.

1.2 Multilateral Agreements

China has no multilateral agreements with jurisdictions.

1.3 Domestic Laws and Regulations

China has established the following laws and regulations involving EoI:

--For the purpose of information collection, inquiry and investigation, there is Law of Tax Collection and Administration and other substantive laws such as Corporate Income Tax Law, Individual Income Tax Law, etc.

--EoI article generally will nail-down obligations of keeping secrecy by tax authorities that may send out, receive and use information. There are some special requirements in domestic rules touched upon the scope and target of information reveal. The Law of the People's Republic of China on Guarding State Secrets and confidential clauses in some related laws regulate the gathering, transmission, use, preservation of tax-related information.

--Though the contents of EoI is usually treated as tax information, it's very possible to involve information which is limited for exchange by other laws, e.g., Company Law, Patent Law, Law of Commercial Banks, Criminal Law. These laws may limit the provision of assistance.

--The Administrative Regulation of EoI for Tax Matters (hereinafter referred to as the Regulation). SAT issued the Regulation in 2001, and it was revised in 2006. Since the Regulation was made out by absorbing advanced experiences from other jurisdictions and new ideas of OECD, it now served as the administrative guidelines for China tax authorities to conduct information exchange operation. However, it is only a departmental regulation, not a law yet.

2. Overview of China’s EoI Achievements

2.1 Participation in international events

EoI is attached great attention by international society. China is very active in recent years by taking part in the Global Forum on Transparent and Effective EoI (hereinafter referred as Global Forum), jointly committing itself to the establishment of principles and rules of EoI, to express China’s stance and suggestions on cooperation through EoI, which is helpful to protect China’s national interests as well. In September 2009, SAT officials attended the founding meeting of Global Forum in Mexico, and in December, SAT sent officials to address the Guide Group Meeting and Parallel Review Meeting, providing opinions towards regulations and working procedures of the Global Forum. Now China has become vice chairmanship of the Global Forum.

Besides that, China has been dispatching tax officials to Vienna, Australia, to take the training courses held by international organizations such as OECD. These training programs are very helpful for China tax officials to learn advanced ideas, knowledge or experiences of other states, and can build up a good image in international taxation fields. On other hand, they give chances to foreign counterparts be more familiar with and know more about China.

China has established a system to exchange EOI certificates among Leeds Castle Group, e.g., to exchange certificates with Japan and U.S.A to honor tax officials or authorities that have made big contributions to EoI.

China has become JITSIC observer in 2008 and will be a formal member soon, which may bring some substantial influence on EoI.

In terms of administration collaboration with sovereign countries, the amount of information changed between China and Japan tops the list. SAT has been making effort in keeping a good relationship with U.S.A, Japan, South Korea, Canada, Australia and Netherlands.

2.2 EoI achievements in 2009

In 2009, SAT received 258 pieces of specific information request from 41 jurisdictions, and sent out 68 pieces of specific information request to 20 jurisdictions. Under the EoI framework between China and Netherlands, SAT provided 11 pieces of spontaneous information to the Netherlands tax department and received favorable comments.

The amount of automatic and spontaneous information received and investigated went beyond 4000 pieces, and the amount of automatic information SAT sent out to U.S.A, Japan, South Korea, Canada and Australia was about 10,000 pieces.

By making use of the above information received and requested, tax authorities all over China have investigated and collected tax revenue about 480,000,000 Yuan which includes late payment and penalty. Compared with 2008, there was an increase of 50%.

2.3 Operational problems

2.3.1 The legal basis is still weak. China tax laws have no requirement for information sources or facts that tax authorities could take as evidences to hit tax evasion and avoidance. The Administrative Regulation of EoI for Tax Matters has clauses permitting tax authorities to enforce collection or penalty according to information exchanged with other jurisdictions. But since the Regulation is only a departmental rule, it cannot substitute substantive laws, and this brings big risks for tax authorities. It's suggested that when the Tax Administration and Collection Law is revised, SAT should put in the law some articles about the effectiveness of information exchanged to be used as tax administration enforcement evidences.

2.3.2 The grant of rights to tax authorities to collect and verify information is obviously blank in some fields too. The typical example is with banks. The request of information examination often dealt with bank accounts opened by taxpayers which may be entities or individuals, residents or non-residents. Chinese tax laws only permit to check bank deposit accounts of criminal or civil suspects and the accused. If a foreign taxpayer does not constitute a Chinese resident and was not inviting suspicion, the tax authority has no right to collect his/her bank information. This limitation is a huge barrier for China to fulfill its EoI obligations.

2.3.3 To promote the EoI awareness is urgent. Conception and awareness is the precondition in improving the personal ability to find, collect, select and provide

information. Due the poor support and awareness of the directors of tax offices, the number of staff in charge of EoI is few at different administrative levels in China. Though education and training of an excellent EoI staff take time, we often face the problem of brain drain. Some well-trained and experienced staff may be transferred to other departments without any proper reasons, which is a disadvantage to develop EoI in depth.

2.3.4 The coordination between internal departments plays an import role in gathering timely and usable information. Due to the complex procedure of EoI and the organization structure of tax offices, it's very hard to get the information replied or provided as quickly as we expect. If the timeliness of information cannot be guaranteed, it will lose meaningless of EoI. And that's explain the reason why departments like tax investigation bureaus have no strong interest in making good use of EoI to help tax inspections. Since the provision of information is not compulsory, departments in charge of daily tax administration will look at EoI as a burden and are not perfectly happy to gather and supply information.

2.3.5 Development of technologies supporting EoI is comparatively slow. SAT is encouraging provinces or municipalities to have a trial development of EoI software or technological platforms. Beijing, Guangdong province now have some breakthrough in collecting and producing automatic information. But there also exists the problems of data obtaining. China Taxation Administration Information System (CTAIS) contains rich data resources, however, the quality of tax data is poor and incomplete. Another reason is that there lacks systematic training for EoI staff to inquire, draw out, classify and have assessment on the data. Some tax authorities have strict limitations for the access to draw data from CTAIS.

2.3.6 One of the obstacles for Chinese officials to gather information is concerned with language. From the view of the obligation of taxpayers, they would prefer providing information in Chinese to in English. In many conditions, tax authorities have to ask taxpayers to provide additional English translations of information such as name or address, etc. If tax officials cannot read contracts written in English, it's possible for them to get crucial and valuable information.

3. Future of Development

3.1 Further expand EoI net.

It's a tendency that more and more jurisdictions are asking to accurately state or describe EoI articles in the DTCs of TIEAs according to the OECD Model article of EoI. And there are common needs and wishes of jurisdictions to seek the signing of TIEAs in line with their tax treaties or arrangements. All reflects the great attention to EoI paid by tax authorities all over the world.

Since the circumstance is favorable, SAT will grasp every opportunity to expand EoI net mainly through investing manpower and material resources. The tasks for EoI development focus on the following:

--to upgrade EoI article in effective bilateral tax conventions or arrangements to a high standard;

--to negotiate and sign TIEAs with lower-tax jurisdictions;

--to execute EoI procedures regulated by conventions already coming into effect.

--to study and have adoption of the newest OECD Model article which is the important reference for China's EoI work.

3.2 Promote the perfecting of legal framework.

Since there are no specific and detailed rules in DTCs and TIEAs about the examination methods adopted, the definition of the nature of information, the conditions for information being used as criminal evidence, etc, the domestic law should make it clear.

To adapt to the new trends of EoI, SAT is setting about the revising of the Regulation especially in respect of using EoI by compulsion in international tax administration.

3.3 Suiting EoI to overall tax administration.

Resources of specific information are always a headache for China. Statistics shows that SAT received much more verification request than the request it sent out. The use of EoI has not being brought into full play in China tax administration.

SAT has given some guidelines in terms of specific information collecting:

--to check the ID authenticity of non-residents;

--to verify the real beneficiary owner of dividends or interests, esp. for large amount remitted to lower-tax jurisdictions;

--to verify headquarters' registration information and business activities when its China representative office asking for the enjoy of tax treaty treatment;

--to verify the transaction substance of outbound stock transferring related with Chinese entities;

--to verify the evidences provided for judging a Permanent Establishment.

3.3 Improve IT standard

For tax officials in charge of automatic and spontaneous information provision, there should be more technological convenience. China's automatic information mainly comes from foreign currency exchange control, non-residents tax administration and enjoyment of tax treaties. Tax authorities rely so much on foreign exchange control information. There must be some worries about information resource if China's foreign currency system is reformed and further opened to the world market.

To solve the problem of information resource, SAT should optimize CTAIS which is the biggest tax database system in China. Taxpayers information should be fully collected, and classified thoroughly and accurately, and it's

should be easy and convenient for query processing and data extraction and integration.

3.4 Introduce foreign talents into EoI

International taxation department of some developed countries would employ international talents to take part in the administration. For Asia countries, foreign employee's language ability should be taken into account for better gathering and verifying information. It's a creative idea to introduce some foreign employees with good command of Chinese and English or other languages to take part in some important cases. Besides language, the negotiation ability and a good understanding of China's tax laws plus tax treaties are also key factors in determining the employment or assistance providing.

3.5 Introduce risk management conception

Risk assessment includes the assessment of taxpayers' business type, their tax compliance degree and status, which may lay the basis for EoI.

Tax authorities should discover and recognize the risk areas in international investment, trade and service providing, and to classify risks to different grades, and recognize the ability, efficiency and procedure risks of EoI cooperating counterparts.

Tax authorities may give full scope to EoI if they can realize the administration

risks and know well the ways and channels with which taxpayers would use for tax evasion or avoidance purposes. In this sense, China's EoI is at the primary stage. It's a tendency for every jurisdiction to bear some risk assessment conception in order to improve the administration efficiency and lower the taxation cost.

8th SGATAR
JOINT TRAINING PROGRAM
FOR SGATAR MEMBERS

International Tax Cooperation Agreements on Exchange of Information

Prepared By:

The Hong Kong Special Administrative Region
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CONTENTS

International Tax Cooperation Agreements on Exchange of Information

I Addressing international evasion and avoidance through exchange of information (EoI)

1. Background

1.1. The taxation system of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China is one of the most business-friendly systems in the world. It is simple with low rates. Taxes are levied only on three types of income, namely profits, salaries and property rental. There is no tax on general consumption or capital gains. Dividends and, to a large extent, interest are not taxed. Basically, only income derived from sources in HKSAR is taxable.

1.2. The Inland Revenue Department (IRD) is an executive arm of the Government of the HKSAR, operating under the policy management of the Financial Services and the Treasury Bureau, which is equivalent to the Ministry of Finance in other jurisdictions. IRD's primary function is to raise revenue through administrating the Inland Revenue Ordinance (IRO), Stamp Duty Ordinance, Betting Duty Ordinance and Business

Registration Ordinance.

2. Necessity of EoI

2.1. The drastic change in global economic landscape in the past 20 to 30 years has posted challenges to tax administrations.

2.2. The lowering of trade and investment barriers, advancement of information technology, enhanced efficiency in transportation and logistics management, all facilitated the movement of goods, services and capital among different economies. The economic globalization has enabled businesses to get closer to their markets and to rationalize production and international supply chain management. This resulted in the emergence and success of many multinational enterprises (MNEs). These MNEs are at the same time exposed to the risk of double taxation, which arises when the same income or profits is subject to tax in more than one jurisdiction. It is an established view that double taxation will impede trade, investment and the flow of talent among economies.

2.3. The internationalization of business on the other hand also creates opportunities for tax planning and enables corporations or individuals to move income or hide it in low tax jurisdictions. Integrated operations that span several geographical borders make it difficult for tax administrations to ensure that they are getting a fair share of the

assessable profits of MNEs.

2.4. Therefore, it has long been internationally recognised that it is desirable to have international tax cooperation for the elimination of double taxation as well as the prevention of tax evasion. One of the important and essential keys to international tax cooperation is effective EoI.

3. Mode of International Cooperation

3.1. Bilateral Agreement for the Avoidance of Double Taxation (DTA) is the most commonly adopted form of international cooperation among the world economies. By defining the taxing rights between the two contracting jurisdictions, a DTA will bring about tax savings and certainty to tax liabilities in connection with cross-border activities. Furthermore, it would provide a basis for the EoI between the two contracting jurisdictions.

3.2. There are good grounds for including EoI provisions in a DTA to facilitate the tax administrations of the contracting jurisdictions to combat tax evasion. The EoI provisions lay down a proper basis for the implementation of the domestic tax laws of the contracting jurisdictions and for the application of specific provisions of a DTA.

3.3. Apart from DTA, there is an increasing trend among resident based tax

jurisdictions to enter into standalone Tax Information Exchange Agreement (TIEA). For Hong Kong, we operate a territorial based system and TIEAs are of limited benefits. Our law and policy require that any exchange of tax information have to be done under the framework of a DTA. Hence, Hong Kong adopts the policy of negotiating and concluding further DTAs with other jurisdictions and pursuing effective EoI within the ambit of a DTA only.

4. Hong Kong Regime

4.1 As a business facilitation initiative, the HKSAR Government has been seeking to sign DTAs with our major trading partners since 1998. Our efforts in extending Hong Kong's DTA network can be divided into two stages. The dividing line is the entry into force of our domestic legislative amendments in March 2010, which enabled Hong Kong to adopt the latest international standard, i.e. the Organisation for Economic Co-operation and Development ("OECD") 2004 version of the EoI article.

4.2 Old Regime

4.2.1. Prior to March 2010, the EoI article adopted in Hong Kong's DTAs was based on the OECD 1995 version of the EoI article. According to this version, Hong Kong could refuse to collect and supply the information requested by our DTA partner if

Hong Kong did not need it for domestic tax purposes.

4.2.2. Hong Kong concluded DTAs with Belgium in 2003, with Thailand in 2005, with the Mainland of China in 2006, with Luxembourg in 2007 and with Vietnam in 2008. All these 5 DTAs adopted the OECD 1995 version of EoI article.

4.2.3. However, most economies have adopted the OECD 2004 version of the EoI article, which categorically states that the lack of domestic tax interest does not constitute a valid reason for refusing to collect and supply the information requested by the DTA partner.

4.2.4. Hong Kong cannot adopt 2004 version because under our domestic taw law, the IRD's information gathering power is restricted by domestic tax interest.

4.2.5. This legal constraint has been a major obstacle to our DTA negotiations because most economies have adopted the OECD 2004 version. This constraint has reduced the number of Hong Kong's potential DTA partners and restricted the progress of our negotiations.

4.2.6. Despite our legal constraints, Hong Kong has been very supportive of efforts by the international community to

promote transparency in tax administration. As early as in 2005, we openly endorsed OECD's Principles of Transparency and Effective Exchange of Information at the OECD Global Forum on Taxation held in Melbourne.

4.2.7. On the domestic front, we consulted the business and professional sectors on the liberalization of EoI under DTAs in 2005 and 2008. While views were divided in the 2005 consultative exercise, we received majority support in 2008. In view of this consultation outcome, the Hong Kong Government put forward legislative proposals in mid 2009 to align our EoI arrangements with the international standard.

4.3. New Regime

4.3.1. The Amendment Ordinance to enable Hong Kong to adopt the OECD 2004 version of the EoI article in our DTAs came into operation in March 2010. With the entry into force of the Amendment Ordinance, Hong Kong is moving a big step forward to align with the international standard on EoI.

4.3.2. We then signed DTAs with Brunei, the Netherlands and Indonesia in March 2010, with Hungary, Kuwait, and Austria in May 2010, with the United Kingdom and Ireland in June 2010, and with Liechtenstein in August 2010. All these 9

DTAs adopted the OECD 2004 version of the EoI article. Hong Kong has also upgraded the EoI article in our DTA with the Mainland to the new standard.

4.3.3. Hong Kong has also concluded and initialed six DTAs with other jurisdictions that contain the new EoI standard. We are in the process of negotiating DTAs with 10 other economies.

II Operational aspects involved in EoI

1. OECD Standards of Transparency and Effective EoI

1.1. As an international financial centre and a fast developing economy, Hong Kong will seek to abide by the OECD's Principles of Transparency and Effective EoI. The standards of which require, in essence -

1.1.1. existence of mechanisms for EoI upon request;

1.1.2. EoI for purposes of domestic tax law in both criminal and civil matters;

1.1.3. no restriction of information exchange caused by application of dual criminality principle or domestic tax interest

requirements;

1.1.4. respect for safeguard and limitations;

1.1.5. strict confidentiality rules for information exchanged; and

1.1.6. availability of reliable information (in particular bank, ownership, identity and accounting information) and powers to obtain such information in response to a specific request.

1.2. Hong Kong does not have bank secrecy law. We fully respect taxpayers' rights and have laws for protecting the confidentiality of information exchanged and received. We have no restrictions on information exchange caused by application of dual criminality principle. With the enactment of the law amendments on EoI, our domestic tax requirement as a condition for invoking the information seeking power of the IRD has been removed.

2. Safeguards provided under DTAs

2.1. The OECD EoI Article stipulates stringent safeguards to protect an individual's right to privacy and the confidentiality of information exchanged, which are adopted by Hong Kong save for some modifications as permitted by the OECD Standards to reflect our own formulation in the light of our EoI policy and to provide additional

safeguards on privacy and confidentiality to personal data.

2.2. The safeguards adopted by Hong Kong include –

2.2.1. Hong Kong's policy on the EoI is restricted to exchange on request. We will not agree to engage in automatic or spontaneous exchanges and will only supply information, including bank information, upon specific and bona-fide requests received from the competent authority of a treaty partner in justifiable cases.

2.2.2. Under the main rule concerning the EoI, the competent authorities of the contracting states shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the DTA or of the domestic laws of the contracting parties concerning taxes as agreed between the parties. A requesting party should provide information to demonstrate that the requested information is "forseeably relevant" and is not allowed to engage in "fishing expeditions", i.e. speculative requests for information that have apparent nexus to an open inquiry or investigation or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

2.2.3. Hong Kong only authorises the exchange of information and

the use of information exchanged in relation to the administration and enforcement of taxes covered by the DTA.

2.2.4. Hong Kong fully adopts the OECD standard on tax secrecy and privacy for personal data and requires that information be kept confidential, and that information should be treated "as secret in the same manner as information obtained under domestic law that ensures that information relating to a taxpayer and his affairs remains confidential and is protected from unauthorised disclosure.

2.2.5. Hong Kong provides in the DTA that information received under a disclosure request by a requesting party shall be disclosed only to person or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to the EoI Article. Such persons or authorities shall use the information only for such purposes.

2.2.6. Apart from the tax secrecy and the restriction on the use of information exchanged, any information received by a Contracting Party under the DTAs shall be treated as confidential and may be disclosed only to persons or tax authorities of the requesting jurisdictions, but not any other person or entity or authority of any other jurisdiction. The

confidentiality provisions of the DTAs create obligations under international law. These provisions take precedence over any domestic rules that permit disclosures to persons not referred to in the confidentiality provision.

2.2.7. While the OCED Model EoI Article permits disclosure of information exchanged to the oversight authority of the requesting party, Hong Kong's policy is more restrictive in this respect and does not permit disclosure to oversight authorities unless there are legitimate reasons given by the requesting party. Oversight authorities are authorities that supervise the tax administration and enforcement authorities as part of the general administration of the government of the contracting parties.

2.2.8. All provisions under a DTA, including the EoI Article, shall have effect only after the agreement enters into force. Any EoI will only be possible after the relevant provisions have effect, i.e. the effective date. Hong Kong's policy, as reflected by law, is that we would not disclose any information relating to any tax period prior to the effective date.

3. Organization and Management

3.1. EoI as specified in the DTA shall be conducted by the competent

authorities of the Contracting Parties. In the case of Hong Kong, the competent authority is the Commissioner of Inland Revenue (CIR) or his authorised representative.

3.2. A disclosure request must be made in writing and made by the competent authority of the requesting party as set out in the relevant DTA under which the request is made. Unless otherwise agreed between the parties, the request must be in the English language.

3.3. Unless exceptional circumstances exist, the CIR must, prior to the disclosure of any information in response to a disclosure request, notify the person to whom the information requested is related in writing about the disclosure. The person may request the CIR to amend the information to be exchanged if the information does not relate to him or the information or part thereof is incorrect.

3.4. Hong Kong will try to comply with the OECD standard response time of 90 days after receipt of a disclosure request. If we are unable to provide the information within the 90-day period, we would inform the requesting competent authority with reasons upon expiration of that period.

3.5. IRD has a special team, known as the Tax Treaty (TT) Section, responsible for the negotiation, administration and implementation of DTAs. Apart from 4 full time members, the TT Section also engaged

technical and clerical support from other officers of the Department. The TT Section works under the direct supervision of a Deputy Commissioner who is in charge of the international tax affairs.

4. Monitoring and Reporting

4.1. Not only all information requests received or issued by IRD have to be scrutinised by the CIR or his authorised representative, any reply to the requesting party has to be approved by either one of them.

4.2. IRD has to report regularly to the policy bureau, the Financial Services and the Treasury Bureau, on the progress and development of information exchange with Hong Kong's DTA partners.

III Future of international cooperation

1. Effectiveness of International Agreements

Hong Kong has a very short history in the implementation of DTA and EoI. So far we have formally signed 14 DTAs and only 5 out of them have actually entered into force. Our first DTA came into force in 2004. The number of specific requests for information received by Hong Kong from its treaty partners was not too many at this moment. We are still at the infant stage, hence, are not in a position to assess

the effectiveness of the DTAs in curbing international fiscal evasion and avoidance.

2. Problems and Emerging Concerns

Nevertheless, Hong Kong came across administrative problems in the course of implementing the EoI provisions under the DTAs. They include language problem, insufficient details of the target persons provided in the request, short time frame for reply etc.

3. Possible Solutions

3.1. We find it helpful to have working meetings between the competent authorities after the DTA came into force, so that the two sides can work out the implementation details together.

3.2. IRD has the privilege of conducting working meetings with the State Administration of Taxation of the Mainland of China and also the General Department of Taxation of Vietnam. During these working meetings, the two sides have a chance to exchange views and experience on the interpretation and implementation of the provisions of the DTAs, in particular, the procedures and standard expected in the EoI. Alternatively, the two sides can exchange notes or memorandum of understanding in this regard.

3.3. Other possible solutions include greater use of foreign tax identification numbers, standardization of requests to fulfill documentary requirements in order to overcome issues such as translation or insufficient details on target entities, as well as the use of information technology for registering and monitoring EoI functions.

4. Expectations and Looking Forward

4.1. The international community generally recognises that double taxation hinders the exchange of goods and services, movements of capital, technology and human resources, and poses an obstacle to the development of economic relations between economies. On the other hand, the internationalization of business also creates opportunities for tax planning and enables corporations or individuals to move income or hide it in low tax jurisdictions.

4.2. The key elements in facilitating effective EoI are cooperation, reciprocity and the exercise of good faith. With the commitment of all jurisdictions to the latest OECE standard for EoI and having an effective EoI mechanism in place, potential non-compliant taxpayers will be deterred from tax evasion.

4.3. From a global view, effective EoI will provide mutual benefits to tax administrations in eliminating double taxation and at the same time preventing fiscal evasion, so that each can get its fair share of the tax

revenue. The world economy could also move closer to building a level playing field.

END

8th SGATAR JOINT TRAINING PROGRAM

International Tax Cooperation Agreements on Exchange of Information

Country Report

Prepared by

Indonesia

International Tax Cooperation Agreements on Exchange of Information

1. Addressing International Evasion and Avoidance through Exchange of Information (EOI)

All countries face challenges posed by international evasion and avoidance and many of them have undertaken robust actions at the national level to improve taxpayer compliance. At the international level, cooperation between tax administrations has become an important instrument in dealing with the issue.

Effective tax cooperation helps to ensure that taxpayers who have access to cross border transactions do not have greater access to tax evasion and avoidance compared with taxpayers who operate in domestic market only. Cooperation in tax matters also reflects the basic principle that participation in the global economy carries both benefits and responsibilities.

International tax evasion and avoidance affects all countries and information sharing network could be applied to deal with it. Tax administrations could intensify cooperation on exchange of information and the effectiveness of this cooperation may be improved by better level of coordination of strategies between treaty partners.

1.1. Double Taxation Conventions (DTCs) Through EOI Article

Tax administrations need to demonstrate their determination to impede any aggressive and unethical commercial practices. Leaders of G20 countries, on their meeting of April 2009 in London, have agreed that the implementation on information transparency standard in financial sector concerning EOI and other financial information would be in accordance with OECD model standard on

EOI. This agreement results in two consequences. First, the countries should review and update the existing EOI provision in their DTCs to meet the standard. Second, they have to make initiation in signing Tax Information Exchange Agreement (TIEA) with low income tax jurisdictions.

Indonesia currently has DTCs with 59 countries/jurisdictions. Of the 59 DTCs, 57 provide for EOI article i.e. DTCs with the followings:

1. Algeria
2. Australia
3. Austria
4. Bangladesh
5. Belgium
6. Brunei Darussalam
7. Bulgaria
8. Canada
9. Czech
10. China
11. Denmark
12. Egypt
13. Finland
14. France
15. Germany
16. Hungary
17. India
18. Italy
19. Japan
20. Jordan
21. Korea, Republic of
22. Korea, Democratic People's Republic of
23. Kuwait
24. Luxembourg
25. Malaysia

26. Mexico
27. Mongolia
28. Netherlands
29. New Zealand
30. Norway
31. Pakistan
32. Philippines
33. Poland
34. Portugal
35. Qatar
36. Romania
37. Russia
38. Seychelles
39. Singapore
40. Slovak
41. South Africa
42. Spain
43. Sri Lanka
44. Sudan
45. Sweden
46. Syria
47. Taipei
48. Thailand
49. Tunisia
50. Turkey
51. U.A.E
52. Ukraine
53. United Kingdom
54. United States
55. Uzbekistan
56. Venezuela
57. Vietnam

According to OECD on its press release on transparency of 3 June 2010, based on information provided, Indonesia has 53 bilateral tax treaties that provide for exchange of information in tax matters that meet the internationally agreed standard.

EOI provision, which uses to be on Article 26 of DTCs, has two purposes. First is to ascertain the facts in relation to which the rules of DTC are to be applied. Second is to assist Directorate General of Taxes (DGT) in administering or enforcing its domestic law.

Information that can be exchanged is as follows:

- Information related income tax;
- Information related documentation on individual and corporate tax;
- In some treaties, indirect taxes such as goods and service tax;
- Information related tax investigation.

Scope of EOI

EOI provision in DTCs envisages information exchange to “the widest possible extent”. On the other hand, it does not allow “fishing expeditions” i.e. speculative request for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of “foreseeable relevance”.

Persons Covered

EOI is not limited to information related to the transaction between residents of Indonesia and treaty partner. Sometimes, Indonesia has an interest in receiving information on activities carried on in treaty partner country by a particular person who is resident of a third country because the tax liability of that person as a non-resident taxpayer is at issue.

Taxes Covered

EOI applies to the administration and enforcement of the taxes covered by the Agreement and also to taxes not otherwise covered.

1.2. Tax Information Exchange Agreement (TIEA)

Many countries are concerned about offshore non-compliance with their residence and source based taxation rules and increasingly recognized the need to identify the beneficial owner of offshore accounts for tax purposes. To a better offshore compliance, signing new TIEAs is a first step. G20 countries have agreed on initiating TIEAs with low income tax jurisdictions.

The benefits of having TIEAs are:

- Getting access to obtain tax information from low income tax jurisdictions which are centers of the world financial activities;
- Information obtained can be used for resident taxpayers' intensification;
- Possibility on conducting tax examination abroad;
- Tax administration can fulfill OECD's assessment.

Up to now, Indonesia has conducted negotiation on TIEA with 5 jurisdictions:

1. Jersey
2. Guernsey
3. Isle of Man
4. Bermuda
5. San Marino

In a short time, Indonesia is also going to have negotiation with these jurisdictions:

1. Cayman Islands
2. Bahamas
3. Costa Rica
4. British Virgin Islands

TIEA is the key in dealing with offshore non-compliance to encourage non-cooperative actors to comply with international standard of transparency, tax cooperation and keep up the pressure on various stakeholders.

1.3. Domestic Law

Domestic legal instruments on the basis of which exchange of information for tax purpose may take place are:

1. Law on General Provisions and Procedures (Law No. 28/2007);
2. Law on Income Tax (Law No. 36/2008);
3. Regulation of Directorate General of Taxes No. PER-67/PJ/2009.

General

Regulation of Directorate General of Taxes No. PER-67/PJ/2009 stipulates:

- Article 1 point 2, tax information is information that can be obtained under the laws or in the normal course of the administration of the Contracting States and is not intended to disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.
- Article 2 paragraph (2), every unit in DGT can request for exchange of information in case:
  - It is conducting verification, audit, investigation, and examination regarding international transactions;
  - There is suspicion that the transaction is being used for tax avoidance or treaty shopping.

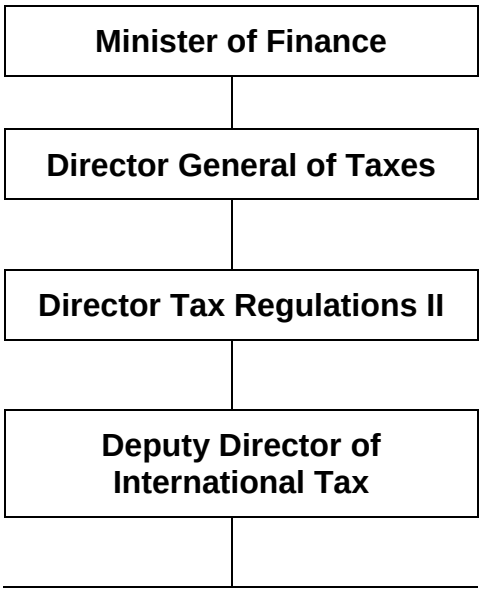
Competent Authority

In Indonesia, relations with other countries fall within the competence of the Ministry of Foreign Affairs. In principle, therefore, official contacts with foreign

countries have to be made through diplomatic channels. In the case of information exchange in tax matters, this may, allow the contracting parties to designate one or more “Competent Authorities” to deal directly with Treaty Partner. The Competent Authorities in Indonesia is Minister of Finance and Minister of Finance under Minister Finance Decree No. 100/2008 delegates the functions of Competent Authority to Director General of Taxes and Director of Tax Regulations II.

The function performed by the Competent Authority is generally centralized within the Director General of Taxes to ensure cooperation and the necessary consistency with respect to the exchange of information policy. There are, however, situations in which certain responsibilities of the Competent Authority may be delegated to Director of Tax Regulations II, for instance, in cases of exchange of information and bilateral tax cooperation, also sometimes Competent Tax Authority delegates some the exchange of information function to Director of Tax Intelligence and investigation to the appropriate investigative.

International Tax Division under Directorate Tax Regulations II has responsibility for EOI and tax cooperation. Director Tax regulations II has responsibility to report to the Director General of Taxes.



Section of International Tax Cooperation

Gathering Information

DGT has the right to full and free access to all buildings, places, books, documents and other papers for the purposes of both the General Provisions and Procedures (Law No. 28/2007) and Income Tax Law (Law No. 36/2008). This enables DGT to obtain tax-related information from the offices of solicitors and accountants whose clients are being investigated for tax avoidance. Information requested under the Exchange of Information in DTA can be accessed by the DGT through the regulations referred to above.

When collecting information for the Treaty Partner, DGT is obliged only to obtain and provide such information that Treaty Partner could itself obtain under its own laws in similar circumstances. Hence, Indonesia is not obliged to supply information that the requesting country itself could not obtain in the normal course of administration.

Information Disclosure

Law on General Provisions and Procedures prohibits the disclosure of taxpayer information to unauthorized parties. The information can only be disclosed to certain persons or authorities. Article 34 of this law stipulates as follows.

- Paragraph (1), every official shall be prohibited to give an unauthorized party any information known or provided to that official by a Taxpayer in the course of his position or duties to implement taxation rules.
- Paragraph (3), for the interest of the state, the Minister of Finance has the authority to issue a written permission to an official as referred to in paragraph (1) and to an expert as referred to in paragraph (2) to provide information and present written evidence from or concerning a Taxpayer to a designated parties.

As for banks and similar financial institutions, they are required to protect the confidentiality of their clients' financial affairs. Consequently, the obligation on bank secrecy not only protects the information from being disclosed to third parties but also affects the access of such information by governmental authorities including tax authorities. Bank secrecy, however, cannot be the ground for declining a request for information. Where parties have duty to withhold confidential information, such duty shall be negated for the purpose of tax audit, tax collection, or tax crime investigation, except for a bank for which the duty to maintain confidentiality shall be waived based on a written request from the Minister of Finance.

Utilizing Information Provided Automatically and Spontaneously

Any information received by DGT should be treated as confidential. DGT will not use the information that has been exchanged for purposes other than those for which it has been exchanged (non-tax purposes). The information received may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection and enforcement of the taxes covered (including the prosecution or the determination of appeals) and the information may be used only for such purposes. Information may not be disclosed to any other person or third jurisdiction without the express written consent of Treaty Partner.

Article 43A of Law on General Provisions and Procedures stipulates that based on information, data, reports, and complaints, the Director General of Taxes is authorized to conduct Preliminary Investigation before an investigation on the tax crime is conducted. Based on elucidation of this article, information, data, reports, and complaints submitted to Directorate General of Taxes shall be analyzed by intelligence activity or observation in which the result may be preceded by an audit, Preliminary Investigation, or not being proceeded.

2. Operational Aspects Involved in Exchange of Information

2.1. Common Procedures

Exchange of information provision in DTCs provides for broad information exchange and does not limit the forms or manner in which information exchange can take place. However, the main form of information exchange in Indonesia recently only applies to the exchange of information on request, in-bound automatic, and spontaneous.

2.1.1. Preparing and Sending a Request

Before sending a request, DGT should use all means available in Indonesia to obtain the information except where those would give rise to disproportionate difficulties. The efforts by DGT should also include attempts to obtain information in the other contracting party before making a request, for example by use of the internet, and where practical, commercial databases or engaging diplomatic staff located in Treaty Partner to obtain publicly available information.

Drafting the request in a complete and comprehensive manner is very important. DGT will put himself in the position of the recipient of the request and include the information in the request. The request should be as detailed as possible and contain all the relevant facts, so that the Treaty Partner that receives the request is well aware of the needs of the DGT and can deal with the request in the most efficient manner. An incomplete request will increase delays since Treaty Partner may have to ask for more details to answer the request properly.

Common procedure in requesting particular information from a treaty partner:

1. Requesting unit in DGT makes a request in writing to Director of Tax Regulations II as the Indonesian Competent Authority.
2. Director of Tax Regulation II studies the request and makes sure that the following checklist has been included in the request:
   - The identity of the person under examination or investigation: name, date of birth (for individuals), marital status (if relevant), TIN and address (including email or internet addresses, if known);
   - The identity of any foreign taxpayer or entity relevant to the examination or investigation and, to the extent known, their relationship to the person under examination or investigation: name, marital status (if relevant), TIN (if known), addresses (including email or internet addresses if known), registration number in the case of a legal entity (if known), charts, diagrams or other documents illustrating the relationships between the persons involved;
   - If the information requested involves a payment or transaction via an intermediary, the name, addresses and TIN (if known) of the intermediary, including, if known, the name and address of the bank branch as well as the bank account number when bank information is requested;
   - Relevant background information including the tax purpose for which the information is sought, the origin of the enquiry, the reasons for the request and the grounds for believing that the information requested is held in the territory of the Treaty Partner or is in the possession or control of a person within the jurisdiction of the Treaty Partner;
   - The information requested and why it is needed, and also the information that may be pertinent (e.g. invoices, contracts);
   - The taxes concerned, the tax periods under examination (day, month, year they begin and end), and the tax periods for which information is requested (if they differ from the years examined give the reasons why);
   - The urgency of the reply, the reasons for the urgency and, if applicable, the date after which the information may no longer be useful;

3. Director of Tax Regulations II sends the request to treaty partner.
4. In case the requested treaty partner replies to the request, Director of Tax Regulations II will forward the response to requesting unit and acknowledges receipt of the response.
5. Requesting unit shall provide feedback regarding the usefulness of the information supplied
6. Director of Tax Regulations II sends the feedback to the requested treaty partner.

2.1.2. Replying To A Request

Procedure in preparing the reply to the information request:

1. Director of Tax Regulations II verifies the validity and completeness of the request from the treaty partner by confirming that:
   a. it fulfills the conditions set forth in the applicable exchange of information provision;
   b. it has been signed by the competent authority and includes all the necessary information to process the request;
   c. the information requested is of a nature which can be provided having regard to the legal instrument on which it is based and the relevant laws of the requested party;
   d. sufficient information is provided to identify the taxpayer;
   e. sufficient information is given to understand the request.
2. If the information/data received is not valid or incomplete, Director of Tax Regulations II should notify the applicant party of any deficiencies in the request as soon as possible.
3. If the information is valid and complete, Director of Tax Regulations II verifies the information requested in the tax files and if it is not available the Director of Tax Regulations II will then forward it to the appropriate unit:
   a. Directorate of Intelligence and Investigation in case the requested information concerns Taxpayer who has Tax Identification Number (TIN) and needs to be audited and/or investigated;

b. Directorate of Tax Information Technology in case the requested information concerns Taxpayer's general data and information;
c. District Tax Office and Regional Tax Office in case the requested data concerns Taxpayer's data and information which is available in or connected with those offices.

4. If units other than Directorate of Tax Regulations II receive the information request directly from treaty partners, those units shall forward the request to Director of Tax Regulations II.
5. Information gathered by Directorate of Intelligence and Investigation or Directorate of Tax Information Technology or District Tax Office or Regional Tax Office shall be sent to Director of Tax Regulations II.
6. Director of Tax Regulations II studies the information and makes sure that the following checklist has been included:
   a. The reference to the legal basis pursuant to which the information is provided.
   b. A reference to the request in response to which the information is provided.
   c. The information requested, including copies of documents (e.g. records, contracts, invoices) as well as any information not specifically requested but likely to be useful based on the information provided in connection with the request. Where reference is made to domestic laws, an explanation should be added as the Treaty partner will not be familiar with these rules.
   d. Explanation why certain information could not be provided or could not be provided in the form requested.
   e. For money amounts, indicate currency, whether a tax has been withheld and if so the rate and amount of tax.
   f. The type of action taken to gather the information.
   g. The tax periods for which the information is provided.
   h. Mention whether the taxpayer or a third person has been notified about the exchange.

i. Mention whether there are any objections to notifying the taxpayer of the receipt of the information.
j. Mention whether there are any objections to disclosing all or certain parts of the information provided to the taxpayer.
k. Mention whether feedback is requested on the usefulness of the information.
l. A reminder that the use of the information provided is subject to the applicable confidentiality rules by stamping a reference to the applicable confidentiality rule on the information provided.
m. The name, phone, fax number and e-mail address of the tax official who may be contacted if needed.

7. If the checklist has already been included and the information is in accordance with the request, Director of Tax Regulations II will then prepare the response to the requesting treaty partner.
8. Requesting treaty partner makes the use of information and sends the feedback to Director of Tax Regulations II who then forwards it to unit that prepared the information.

2.1.3. Sending Spontaneous Exchange of Information

Information is exchanged spontaneously when DGT having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes passes on this information without the latter having asked for it. The effectiveness of this form of exchange of information largely depends on the ability of tax inspectors to identify, in the course of an investigation, information that may be relevant for a foreign tax administration.

Procedure on sending spontaneous EOI to treaty partner:

1. District Tax office or other unit in DGT, who obtains information during audit and/or investigation which concern foreign Taxpayer from and may

be useful to treaty partner, sends the proposal on sending spontaneous EOI to Director of Tax Regulations II.

2. Director of Tax Regulations II studies the information and the list below provides examples of where a spontaneous exchange of information should be considered:
   a. Grounds for suspecting that there may be a significant loss of tax in Treaty Partner country;
   b. Payments made to residents of Treaty Partner country where there is suspicion that they have not been reported;
   c. A person liable to tax obtains a reduction in or an exemption from tax in Indonesia which could give rise to an increase in tax liability to tax in Treaty Partner country;
   d. Business dealings between a person liable to tax in Indonesia and a person liable to tax in Treaty Partner country are conducted through one or more countries in such a way that a saving in tax may result in Indonesia and Treaty Partner country or in both;
   e. A country has grounds for suspecting that a saving of tax may result from artificial transfers of profits within groups of enterprises; and
   f. Where there is likelihood of a particular tax avoidance or evasion scheme being used by other taxpayers.
3. Director of Tax Regulations II makes sure the following checklist has been included in the information:
   a. The identity of the person to whom information relates: name, TIN, addresses (including email or internet addresses if known);
   b. The identity of the person from whom the information was obtained: name, TIN (if known), addresses (including email or internet addresses if known), registration number in the case of a legal entity (if known), charts, diagrams or other documents illustrating the relationships between the persons involved;
   c. If the information involves a payment or transaction via an intermediary mention the name, addresses and TIN (if known) of the intermediary;

d. If there is bank information, the name and address of the bank as well as the bank account number;
e. The information which was gathered and an explanation why the information is thought to be of interest to treaty partner;
f. For money amounts, indicate the currency and whether a tax has been withheld and if so the rate and amount;
g. Mention how the information was obtained and identify the source of the information provided, e.g. tax return, third party information, etc.
h. Mention whether the taxpayer or a third person has been notified about exchange and if it has been whether there is any objection to disclosing all or certain parts of the information provided;
i. Mention whether feedback is requested on the usefulness of the information.

4. Director of Tax Regulations II sends spontaneous EOI to treaty partner.
5. Treaty partner makes the use of information and sends the feedback to Director of Tax Regulations II.
6. Director of Tax Regulations II forwards the feedback to information sender.

2.1.4. Receiving Information Provided Spontaneously

Procedure in receiving and utilizing information provided spontaneously:

1. Director of Tax Regulations II receives information or data provided spontaneously by treaty partner.
2. Director of Tax Regulations II studies the information and pass it on to related unit if it is considered useful.
3. Related units which can make use of the information are:
   a. Directorate of Intelligence and Investigation for information received concerning taxpayer who has Tax Identification Number and needs to be audited and/or investigated;
   b. District Tax Office or Regional Tax Office for information received concerning data and information of taxpayer who is registered in that office or resides in the working area of that office.

4. Receiving unit conducts verification, audit and/or investigation on information or data received.
5. Receiving unit makes a report on usefulness of information and sends it to Director of Tax Regulations II.
6. Director of Tax Regulations II sends the feedback to treaty partner that provided the information.

2.2. Technology Required

DGT still has no technology required to use OECD Standard Magnetic Format for automatic exchange and Indonesia has never entered into working agreement or memorandum of understanding on automatic EOI for tax purposes. Therefore, DGT has never sent automatic EOI to treaty partners.

There is a need, however, of greater use of IT technologies in the registering, monitoring and reporting EOI functions.

2.3. Assistance

Foreign auditors may visit to explain complicated EOI cases especially on the use of international tax avoidance scheme. However, they may not assist in preparing response to a request since the EOI provision in Indonesian DTCs with all countries/jurisdictions has not included joint audit or tax examination abroad. Domestic law does not permit foreign auditors assistance in gathering taxpayer information in Indonesia.

As for TIEA, tax examination abroad is included. At the moment, DGT is preparing domestic rule on conducting tax examination abroad to implement the provision in TIEA.

3. Future of International Tax Cooperation

Non-compliant taxpayers will be deterred from tax evasion by having an effective EOI program in place.

3.1 Effectiveness of International Agreements

Exchange of information between tax authorities has increasingly become the most important and effective means in combating international tax evasion which has become more prevalent as a result of unprecedented liberalization and globalization of national economies. It is an effective way for countries to maintain sovereignty over their own tax bases and to ensure the correct allocation of taxing rights between tax treaty partners.

Effective exchange of tax information between tax authorities in different countries is a critical part of enforcement of taxpayer obligations. Unavailability of information exchange has long been recognized as a particularly important factor permitting the sheltering offshore of, especially, financial income, and the resulting growth in the use of tax havens.

Unprecedented progress has been made on this issue, especially in the past year, in the wake of international incidents involving tax secrecy linked to taxpayer evasion and fraud in various jurisdictions. Steps now being undertaken through the expanded G 20 inspired Global Forum mechanism will have major implications for tax administration not only in OECD, emerging market and tax haven jurisdictions, but importantly in developing countries as well.

3.2 Problems and Emerging Concerns

Exchange of information has been hampered both by a lack of transparency and strict secrecy rules applicable in some jurisdictions, on the one hand, and by a lack of capacity to produce required information in usable forms on the part of many countries, on the other.

Task and function of exchange of information in Indonesia is not optimal because of internal and external obstacles. An internal problem is the situation such as, incomplete and unsynchronized exchange information domestic regulation and a limited professional in exchange information officer. On the other hand, an external problem constitutes a weak coordination with other institutions and a poor exchange of information management.

DGT in developing the exchange of information system has the challenges and impediments in efficiency and effectiveness, timeliness, resources, awareness, information technology support, and also regional disparity.

In Indonesia, domestic tax legislation prohibits the disclosure of taxpayer information to unauthorized parties. The information can only legally be disclosed to certain persons or authorities. Also under domestic law, banks and similar financial institutions are required to protect the confidentiality of the financial affairs of their clients. Consequently, DGT need to have the authority to access, either directly or indirectly, through a judicial or administrative process, information held by banks or other financial institutions and to provide such information to the other contracting party if requested.

3.3 Possible Solutions

The effectiveness of exchange of information may be improved by a better level of coordination. This coordination may have three dimensions: coordinated timing, conditions, and information sharing.

If exchange of information is run at different times or with different conditions, taxpayer may move their investments either to remove them from the net or to enable them to participate in a scheme with favorable terms. Coordination between countries would therefore be advantageous.

The effectiveness also depends on the motivation and the initiative of the DGT officials; therefore it is important that local tax officials have the reflex to pass on to Director Tax Regulations II information which would potentially be of use to a tax treaty partner. DGT will consider developing strategies that aim to encourage and promote the use of exchange of information. Such strategies might include carrying out comprehensive, regular and properly targeted awareness training to local tax officials.

To handle the challenges, DGT is speeding up the process of set up the rules and coordination with other constitutions:

- developing the domestic legal bases for the exchange of information;
- developing the procedures and standards for exchange of information;
- developing the confidentiality of information system;
- developing the organization and management of Exchange of Information
- access to bank information for tax purposes;
- developing the record keeping (database) and access power for exchange of information;
- coordination with other unit, such as: the Immigration Department;
- continuing work on the design of voluntary compliance programs to minimize the extent of tax evasion and avoidance

The 8th SGATAR Joint Training Program

Promoting the Effective Exchange of Information

COUNTRY REPORT

Prepared by:

Japan

Promoting the Effective Exchange of Information

1 Introduction

Currently, tax administrations around the world are focusing on two main areas to promote tax compliance: strengthening tax enforcement to confront offshore non-compliance, and establishing better relationships with taxpayers to create a cooperative approach to tax compliance.

Multilateral and bilateral efforts towards liberalizing the international trade of goods and services and removing or limiting foreign investment and foreign exchange controls have continuously been made over the last few decades, and this has brought about unprecedented globalization in national economies around the world. As a part of this, however, globalization has also brought the opportunity for taxpayers to deliberately create cross-border transactions and to open offshore accounts for hiding or avoiding their tax obligations.

The Exchange of Information (EOI) based on Double Taxation Conventions (DTCs) or Tax Information Exchange Agreements (TIEAs) is a key measure to counter cross-border and offshore non-compliance through cooperation between tax authorities. In particular, implementing of EOI consistent with international standards by, namely, including information held by banks or fiduciaries, can be a most effective tool in elucidating the realities of cross-border transactions and

offshore accounts.

The recent global financial and economic crisis has brought into sharper focus the use of tax havens and offshore non-compliance. As a result, many countries have seen a greater need to develop the international standards for transparency and information exchange developed by the OECD and endorsed by the United Nations. By the end of September 2010, almost five hundred TIEs and DTCs consistent with international standards were signed by jurisdiction which the OECD had identified as not substantially implementing the standards, in its progress report published on 2 April in conjunction of the 2nd G20 Summit on Financial Markets and the World Economy, in which the end of the era of bank secrecy was declared and the need for all countries to adopt international standards concerning the exchange of information was affirmed.

"Promoting the Effective Exchange of Information" is also a top-priority theme at Japan's National Tax Agency (the NTA) with regard to strengthening tax enforcement. This July, NTA Commissioner Chikara Kawakita said at the press conference upon taking office, "Against the backdrop of the current globalization of national economies, it has become increasingly difficult to ensure tax compliance by using the conventional and unilateral approach." "With regard to international tax avoidance, our strategy is to promote and enhance the implementation of Information Exchange between all possible foreign authorities."

According to this prioritization, the International Operations Division of the NTA,

the director of which is in charge of EOI, is implementing several practices in the organization, participating in international forums such as the Global Forum on Transparency and Exchange of Information for Tax Purposes, and supporting accelerated treaty negotiations by the Ministry of Finance with the expected treaty partners.

Japan also believes that bilateral cooperation between treaty partners at the working level is becoming crucial to make EOI more effective against tax non-compliance. From this view point, in the coming 40th SGATAR Fukuoka Meeting where the heads of tax authorities will gather on November 8-11, Japan would like to propose the promotion of cooperative relationships between each other, including the implementation of EOI, as one important area. Japan would very much appreciate other members' support for this proposal. Under these circumstances, it is extremely appropriate that the 8th SGATAR Joint Training Program has chosen "International Tax Cooperation Agreements on the Exchange of Information" as the theme of this event.

2 Legal Framework of EOI

2. 1 Bilateral Tax Treaties

As of the end of September 2010, Japan had concluded 48 tax treaties (double taxation conventions/tax agreements) with 59 countries. With the exception of the treaty with Switzerland, the remaining 47 of treaties contain EOI provisions.

For Switzerland as well, a revised tax treaty including EOI provision was signed in May 2010, and is expected to be approved in the Diet by the end of this year.

Since the 2nd G20 Summit on Financial Markets and the World Economy held on April 2009, 8 tax treaties between Japan and other countries/territories have come into force, been approved, or are slated for approval in the Diet for the purpose of implementing exchange of information consistent with international standards. In addition, it has become possible for Japan to unilaterally request tax information from the Cayman Islands, in accordance with the domestic laws in force in the Caymans.

Among SGATAR members, Japan has concluded tax treaties with 10 countries – Australia, China, Indonesia, Malaysia, New Zealand, the Philippines, Singapore, South Korea, Thailand, and Vietnam.

2. 2 Tax Information covered by EOI

In terms of tax items and information covered, EOI provisions under tax treaties concluded by Japan fall into the following three types:

1) **Information related to the administration or enforcement of domestic laws of the contracting parties concerning taxes of every kind**
2) **Information related to the administration or enforcement of the taxes covered by the treaties**

3) Information necessary for implementing the treaties, such as information regarding resident/nonresident status and confirmation of taxes withheld at the source.

Japan's policy in treaty negotiations is to provide the first type of EOI provisions, namely, those which cover tax information of every kind, and this policy conforms to *Article 26 of the OECD Model Tax Convention* (revised in 2000). Most of the treaties that Japan has concluded so far, however, provide for the second type of EOI, which only covers Information related to the taxes specifically covered by the treaties. Among Japan's treaties with SGATAR members, those with Australia, Singapore, and Vietnam have EOI provisions which cover tax information of every kind. The treaty with Malaysia was also revised to cover tax information of every kind and will come into force in the year 2011.

2. 3 Exchange of Information held by Banks and Fiduciaries

Article 26, Paragraph 5 of the *OECD Model Tax Convention* stipulates that contracting parties cannot "decline to supply requested information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity." This Article denies bank secrecy as grounds against EOI, and its principle is the core of the international standards developed by the OECD and strongly endorsed by the 2nd G20 Summit Declaration.

To carry out EOI in accordance with these international standards, contracting parties must have adequate authority to access, either directly or indirectly through administrative or judicial process, the requested information held by banks, financial institutions, and fiduciaries.

In Japan, the NTA can obtain information held by the banks through normal administrative procedures. In other words, the responsible tax officials can obtain bank-holding information by exercising the “authority for inquiry and inspection” stipulated in Article 9 of the *Special Act on the Implementation of Tax Treaties.* Considering the sensitivity of bank secrecy, however, administrative guidelines also require tax officials inquiring or inspecting banks to have special certificates of authorization for the examination from the district director of the tax office in charge of the area in which the bank is located.

Between Japan and most of its treaty partners, information held by banks or fiduciaries are generally exchanged in the same way as other information, although only a few treaties that Japan has concluded provide explicit stipulations on information held by banks or fiduciaries. Among Japan’s treaties with SGATAR members, those with Australia and Singapore have explicit provisions, and the treaty with Malaysia was also revised to add these explicit provisions and will be in force in year 2011.

2. 4 Domestic Tax Interest (DTI)

The international standards of EOI also require, as is stipulated in Article 26, Paragraph 4 of the *OECD Model Tax Convention*, that a contracting party is to use its information gathering measures to obtain the information it has been requested to obtain, regardless whether the party that received the request has any domestic tax interest (DTI) in the information.

In 2003, Japan amended the *Special Act on the Implementation of Tax Treaties* to clarify Japan's full commitment to these international standards, by adding Article 9, which deals with the authority to make inquiries and conduct inspections for supplying information requested by a contracting party. More specifically, according to the administrative guidelines, the responsible tax officials must notify a taxpayer or third party subject to such an inquiry in advance that an inquiry will be conducted in response to a request from a contracting party, unless the contracting party explicitly asks not to notify or unless the tax officials themselves are concerned that notifying the person could result in evasion, obstruction, or destruction/concealment of books and other related documents.

Between Japan and the majority of its treaty partners, requested information is exchanged regardless whether it is related with DTI, while only a few treaties concluded by Japan have explicit provisions about the treatment of DTI. Among the SGATAR members, Japan's treaties with Australia and Singapore have the explicit provisions. The treaty with Malaysia was also revised to add this explicit provision and will come into force in the year 2011.

2. 5 Requirements for the implementation of EOI

According to Paragraph 5 of the *Commentary on Article 26* (referred to as "the Commentary" below), Article 26 of the *OECD Model Tax Convention* is intended to provide for EOI to "the widest possible extent," while clarifying several requirements for the implementation of EOI. Japan creates similar stipulations on the requirements and the restrictions for the implementation of EOI in treaties it concludes and in the *Special Act on the Implementation of Tax Treaties.*

2.5.1 Reciprocity

Japan cannot furnish requested information if the applicant party is considered to be unable to take measures to collect information in order to provide information to Japan pursuant to the tax treaty *(*Article 8-2, Clause 1, *Special Act on the Implementation of Tax Treaties).*

However, as mentioned in Paragraph 15 of the Commentary, Japan also recognizes that excessively rigorous application of the standard of reciprocity could undermine effective EOI, and that reciprocity needs to be interpreted in broad and practical terms. Based on this understanding, in cases, for example, where there is no "automatic EOI" (defined in 3.1) from a treaty partner due to technical problems, Japan will supply such information to this partner while offering and providing technical assistance to resolve such problems.

2.5.2 Taking Internal Measures for Information Gathering

Japan cannot furnish requested information if it finds that the applicant party did not carry out its information gathering measures according to the normal course of administration for obtaining requested information (Article 8-2, Clause 5, *Special Act on the Implementation of Tax Treaties*). These provisions are also intended to prevent a contracting party from engaging “fishing expeditions,” for collecting uncovering evidences.

2.5.3 Confidentiality

Japan cannot provide information when requesting or replying to EOI if it does not find that the contracting party will treat such information as secret in the same manner as information obtained under the domestic law of the contracting party and that the contracting party will disclose such information only for tax purposes. (Article 8-2, Clause 2 and 3, *Special Act on the Implementation of Tax Treaties*)

Under Japan’s self-assessment system, maintaining people’s trust in our compliance with the confidentiality rule is critically important to assuring voluntary tax compliance and to preserving the cooperative relationship we have with the taxpayer, and as such, the penalties imposed on tax officials for violations of the confidentiality rule are set much tougher than those imposed on other governmental officials. Accordingly, all tax treaties concluded by Japan, provide regulations on confidentiality in the implementation of EOI, as well as the *Special Act on the Implementation of Tax Treaties*.

2.5.4 Protection of Trade, Business, and other Types of Secrets

Most of the treaties concluded by Japan also restrict exchanging information revealing trade, business, industrial, commercial, or professional secrets or transaction processes, or information for which disclosure would result in conditions undermining public order, in the same spirit as Article 26 Paragraph 3, Clause c of the *OECD Model Tax Convention*.

3 Implementation of EOI

3.1 Types and Trends of EOI

The Commentary provides the following three categories as the major and traditional types of EOI:

1) **Exchange of Information on Request:** A contracting party requests particular information related with specific cases from the other contracting party, and the other contracting party furnishes such information upon request.

2) **Spontaneous Exchange of Information:** A contracting party furnishes information which is obtained in the normal course of its administration and is deemed to be of interest to the other contracting party, without a request from the other contracting party.

3) **Automatic Exchange of Information:** A contracting party regularly provides

standardized information about various categories of income (interest, dividends, royalties, pensions, etc.) related to multiple residents of the other contracting party. Information provided is usually sourced from information returns stipulated in the domestic law of the first mentioned party.

Japan implements all three types of EOI with its treaty partners. The number of information exchanges has continuously increased, reaching 500,000 in FY 2009. While the majority of these 500,000 cases consist of automatic EOI, EOI on Request and Spontaneous EOI are also increasing rapidly.

3.2 Organization and Management of EOI

EOI based on treaties is conducted by the competent authorities of the contracting parties. In Japan, the competent authorities are the Minister of Finance and the Director of the International Operations Division of the National Tax Agency, whom the Minister authorizes as his representative. Under the Director's control, the EOI Section at the headquarters of the NTA is in charge of the practical implementation. In addition, officials responsible for EOI are also appointed at regional taxation bureaus and tax offices.

To ensure that EOI is implemented in a prompt, accurate, and appropriate manner, the Commissioner of the NTA has issued "Administrative Guidelines on Procedures for the Exchange of Information under Tax Treaties" which reiterates the requirements and the basic procedures of EOI stipulated in the treaties and

the *Special Act on the Implementation of Tax Treaties*. The International Operations Division also issues and annually revises a *Manual on the Exchange of Information* which explains each treaty concluded by Japan in greater detail, and contains examples of requesting letters and other practical information.

3.3 Practices Implemented for Effective EOI

3.3.1 Timely EOI on Request

EOI on Request is usually the most powerful tool to clarify the nature and the reality of cross-border transactions and offshore accounts held by taxpayers. At the same time, these requests can be a burden on the requested party, especially when the requested party does not have adequate information and has to conduct information gathering measures. Therefore, the Commentary holds in Paragraph 9 that "it [is] understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State." Module 1 of the *OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* (referred to as "the OECD Manual" below) also recommends that a requesting letter express, that "(your) tax administration has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties."

At the same time, because EOI on request can take a considerable length of time, received information has sometimes been rendered useless due to the

statute of limitations or the movement of assets from the requested party's jurisdiction to another jurisdiction. Therefore, it is also important to use such requests at the earliest stage possible, though all such requests must be grounded enough not to be considered "fishing expeditions."

In this aspect, tax officials at the NTA had usually interpreted the meaning of "has pursued all means available …to obtain the information" as "has commenced field audits and still has been incapable of obtaining information." In November 2009, the NTA issued an administrative memorandum to make it clear that EOI on request can be used even before the commencement of field audits if tax officials reasonably believe and can explain based on the grounds of taxpayers' past non-cooperation, etc. that they cannot expect to obtain the necessary information by inquiring or inspecting at coming field audits.

3.3.2 Holding Face-to-Face Meetings for EOI on Request

3.3.2.1 Overview of Face-to-Face Meetings for EOI on Request

As stated above, EOI on request takes considerable length of time. In addition, when a case contains complex schemes or transactions, the conventional method of EOI, that is, by written letter, is possibly inadequate for conveying the details of the request and for providing the appropriate explanation in response to the request.

In order to compensate for these shortcomings of EOI by letter and to enable information gathering to be carried out in a prompt and precise manner, Japan's

competent authorities and their representatives have visited multiple contracting parties including some SGATAR members and held face-to-face meetings for EOI with the contracting parties' competent authorities.

Visiting to a contracting party and having a face-to-face meeting for EOI between the competent authorities is grounded in the EOI provisions of the treaty, and is conducted with the advance consent of the other contracting party. At a meeting, our tax officials in charge of the relevant case, accompanied by our competent authorities, explain the whole picture of the case, the details of the transactions in question, and the information that we really need. Depending on the discretional decisions by the other contracting party, we sometimes can provide such explanations directly to the tax officials of the other contracting party who are in charge of gathering the information requested. We also usually receive a certain level of information that the other contracting party already possesses, or that was collected before the meeting.

3.3.2.2 Cases that Face-to-Face Meetings for EOI on Request are Particularly Effective

Face-to-Face Meetings for EOI on Request are particularly expected to be effective in the following cases:

1) Cases containing complex schemes or transactions (as stated above)

2) Cases that need to be processed with exceptional urgency

For example, cases close to the statute of limitations, cases with a risk that taxation and collection will become difficult due to assets being removed to

a third-party State, etc.

3) Cases expected to yield spillover effects

Namely, cases containing broadly used aggressive tax schemes, clarification of which through EOI or joint research by the competent authorities is likely to have a positive and wide-spread influence on other audits conducted by the contracting parties.

Additionally, face-to-face meetings for EOI are expected to have an educational effect on the tax officials involved in them and to strengthen mutual understanding and cooperative relationships between the competent authorities in the contracting parties. From this point of view, Japan would like to conduct face-to-face meetings for EOI more frequently with a greater number of States, especially with the SGATAR members.

3.3.3 Utilizing the Database etc. for Prompt Response to Request

Promptly replying to an EOI request is extremely important when the information contained in the reply is to be utilized in taxation by the requesting party. *The OECD Manual* states that “gathering information for another country should be given a high priority because the exchange of information is mandatory and a prompt and comprehensive reply is likely to contribute to the same type of treatment in a reverse situation.” (Paragraph 16 of Module 1) and “a competent authority should seek to provide the requested information within 90 days of receipt of a request.” (Paragraph 21 of Module 1)

In order to speed up replies to requests from its contracting parties, the NTA has

prepared a *Manual on the Exchange of Information* (as noted in 3.2) and holds various types of seminars for educating tax officials in regional taxation bureaus and tax offices. In addition, the staff members of the EOI Section at NTA headquarters search for the necessary information by themselves in response to comparatively easy requests, such as requests to confirm whether the taxpayer in question has returned to Japan, by using the internal online database.

3.3.4 Compiling Examples for Promoting Spontaneous EOI

Because of its nature, spontaneous EOI relies on active participation and cooperation by the tax officials. In particular, it depends on whether tax officials know what kinds of information constitutes the potential interests of the contracting parties, and whether tax officials have the motivation to report such information. Therefore, The NTA has compiled a collection of precedents and examples where spontaneous EOI should be considered in similar cases, and has included this information in the *Manual on the Exchange of Information*. (*See Appendix)*

3.3.5 Presenting Letters of Appreciation for Promoting EOI

Timely feedback from the applicant party is important as it enables quality improvements to be made for future EOI on request, and can improve the motivation of tax officials to provide information. Spontaneous EOI also depends on the motivation and the initiative of the officials supplying the information.

For improving both the motivation of tax officials and the quality of information exchanged, Japan exchanges letters of appreciation with several contracting

parties, for tax officials who provide significantly effective information spontaneously or in response to a request. Based on reports from regional taxation bureaus, the NTA chooses cases of EOI in which Japan requested information from the contracting parties, and received information which was particularly effective in revealing large tax deficiencies or tax fraudulence. The letters of appreciation are sent through the competent authority of the contracting party. For SGATAR members, the NTA has sent letters of appreciation to tax officials in Australia, China, South Korea, Thailand, and Vietnam.

Additionally, other tax officials who have made superior contributions in EOI are also eligible to receive an award from the Commissioner or the Directors of the Regional Taxation Bureaus.

3.3.6 Using the SMF Format for Sending Automatic EOI

In Japan, information returns are submitted by both through paper documents and electronic media. The EOI Section at NTA headquarters converts all these materials into the OECD Standard Magnetic Format (SMF) and sends them to the contracting parties in order to enable their effective use.

4. Practices for More Effective EOI

4.1 Holding Regular Meetings for EOI

As stated in 3.3.2, face-to-face meetings for EOI can be one of the most effective and prompt means of EOI. However, it also takes some time to be conducted, especially in confirming whether the requested party gives its consent for each visit. To minimize the amount of time this takes, regularizing the meetings for EOI is another choice. Particularly, if the contracting parties frequently request or respond to EOI, they could hold meetings quarterly or semiannually (for example) in alternating jurisdictions under a general agreement made in advance. Regular meetings for EOI also help to further strengthen the mutual understanding and the cooperative relationships between the competent authorities of the contracting parties.

4.2 Providing Technical Assistance for Automatic EOI

Automatic information received from the contracting parties (namely, information about interest, dividends, and other periodical payments sourced in the contracting parties' jurisdictions and paid to Japanese residents or companies) has an important role in Japan in the processes of reviewing returns and selecting cases to be audited. While some SGATAR members are already significant contributors to our enforcement efforts, most of the SGATAR members have not as yet provided automatic information. We hope to provide technical assistance to resolve the problems that such SGATAR members are facing in processing automatic EOI, and to promote EOI among SGATAR members in this field.

4.3 Incorporating EOI into Performance Assessment

While EOI on request is the most effective tool for clarifying overseas transactions or assets, it requires a certain volume of administrative work to e done when the request is received. Further, due to its nature, spontaneous EOI depends entirely on the voluntary participation and cooperation of tax officials. Based on this understanding, the NTA has tried to provide some incentives for EOI by presenting letters of appreciation and giving awards. Beyond this, however, we should actively evaluate participation in EOI and incorporate this evaluation into the regular process of tax officials' performance assessments.

4.4 Reinforcement of Staff Resources for EOI

To assure the quantitative and qualitative improvements of the implementation of the exchange of information between the competent authorities, the contracting parties should consider strengthening their capabilities to address EOI cases by increasing the number of staffs in charge of EOI, providing further trainings to their tax officials, and taking all other possible measures.

Appendix

[Spontaneous EOI Precedents and Examples]

○ Wire transfers in large amounts were being sent from the party X in the other state to a resident of Japan. Upon tracing the flow of the funds, it was found that a portion of them had been wire-transferred back to a savings account based in the other state, bearing the name of the resident of Japan in question. Said account was being managed by a representative of the party X (the husband of the resident of Japan), supporting the view that some form of fraudulent calculations were taking place.

○ The party X in the other state had sales rebates remitted from a supplier based in State A to the personal account of a representative in Japan. According to an interview with the bank, these sales rebates were then wire-transferred to State B in installments equal to or under 2,000,000 JPY. It is believed that income was excluded by the party X in the other state.

○ The person being audited had been paid a sales fee, but could not prove that services had been provided, and therefore, this was repudiated in the audit. It is believed that income was excluded by the payment recipient.

○ Upon the request of the party X in the other state, another party in Japan signed a fictitious export report, an account was opened to accept wire transfers

from the party X, and the remitted funds were withdrawn and handed over to the party X. It is believed that the party X posted a fictitious inventory purchase in the other state.

○ Information was provided, as it was discovered that the transfer of the shares actually in the possession of a resident of another state had not been reported.

○ Due to a delay in the requested development of a product, a claim was filed and the contract amount was altered. Due to the nature of the singular transaction and the fact that it involved a claim, the exclusion of income is suspected.

○ Information was provided in regard to fees for a singular transaction in the form of a database purchase.

○ Compensation paid to a non-resident officer of the audited corporation was allocated to the purchase of a local condominium for this officer. It was discovered that up until the point of purchase, said compensation had been pooled in a local bank account in the form of savings, supporting the view that there was no report of associated interest income in the other state.

○ Upon using automatic EOI regarding the receipt of interest in the audit, it was discovered that the recipient in question had lent his name to a sibling residing in the other state. It is believed that the intention was to help his sibling avoid taxation on interest as a resident of the other state.

○ Purchasing prices were overvalued, with the difference wire-transferred to a savings account based in a third country. It is believed that income was excluded by the seller in the other state.

○ The person being audited, an exporter of mechanical devices, carried out a price discount for reasons based on delays in shipping. While it was requested that the invoice (original) based on initial prices be returned, only a copy was provided, lending support to the view that the company to which sales were conducted posted a fictitious purchase of inventory.

○ The person being audited had wire-transferred a portion of a sales fee to savings accounts held by the representative of the payment recipient and by another corporation, lending support to the view that income was being excluded by the seller in the other state.

○ The person being audited had wire-transferred a portion of external order fees to savings accounts belonging to the representative and employees of the other party, lending support to the view that income was being excluded by the other party in the other state.

○ The person being audited had paid sales fees with cash in hand, lending support to the view that income was being excluded by the seller in the other state.

○ The person in question is the representative of the audited corporation and the representative director of a corporation based in State A. This person had been receiving large salaries from both corporations, lending support to the view that income exclusion was taking place.

○ The wire transfer of application monies that were accepted within Japan were wire-transferred to the party X which had conducted in the other state the sales off lottery tickets through direct mail. It is believed that income was excluded by the party X in the other state.

NATIONAL TAX SERVICE

EXCHANGE OF INFORMATION

National Tax Service
Republic of Korea

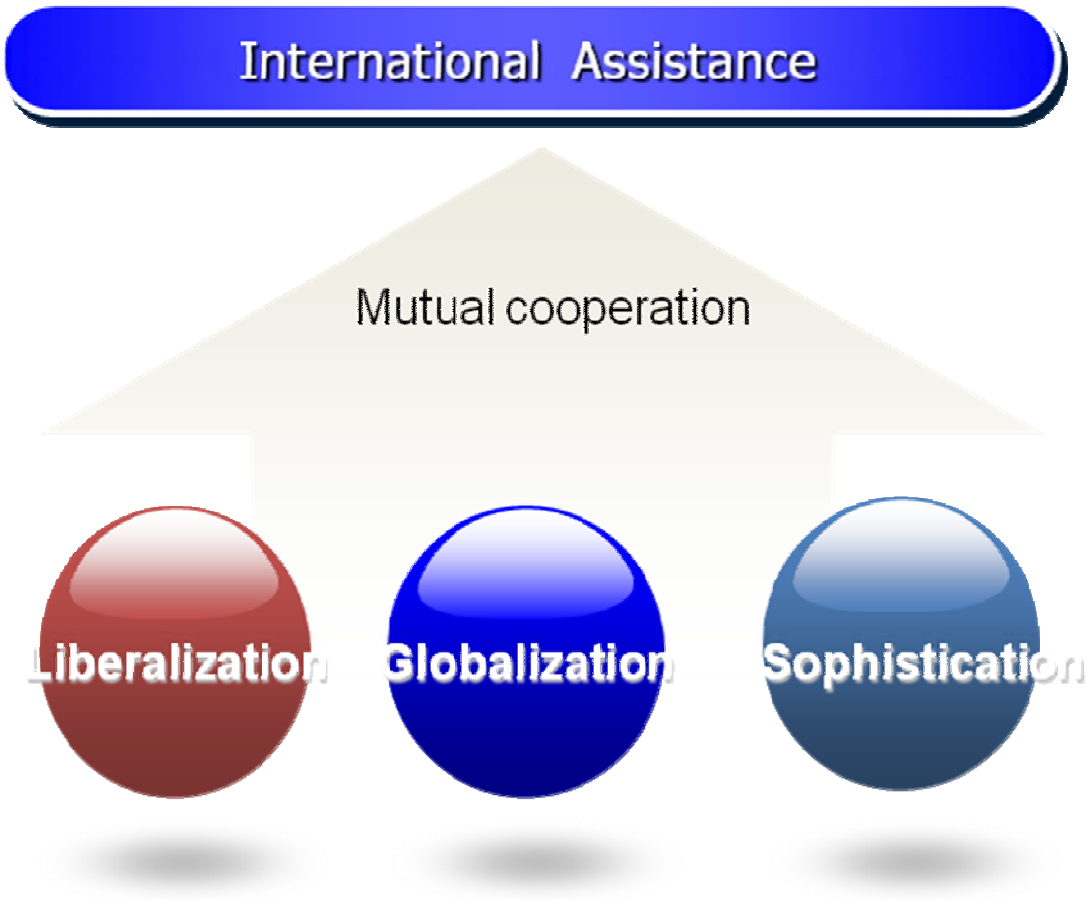
EXCHANGE OF INFORMATION

It is time to increase the International assistance between countries.

In the past decades, we have experienced an unprecedented liberalization and globalization of national economics. And also the method of tax evasion is more and more sophisticated than ever before.

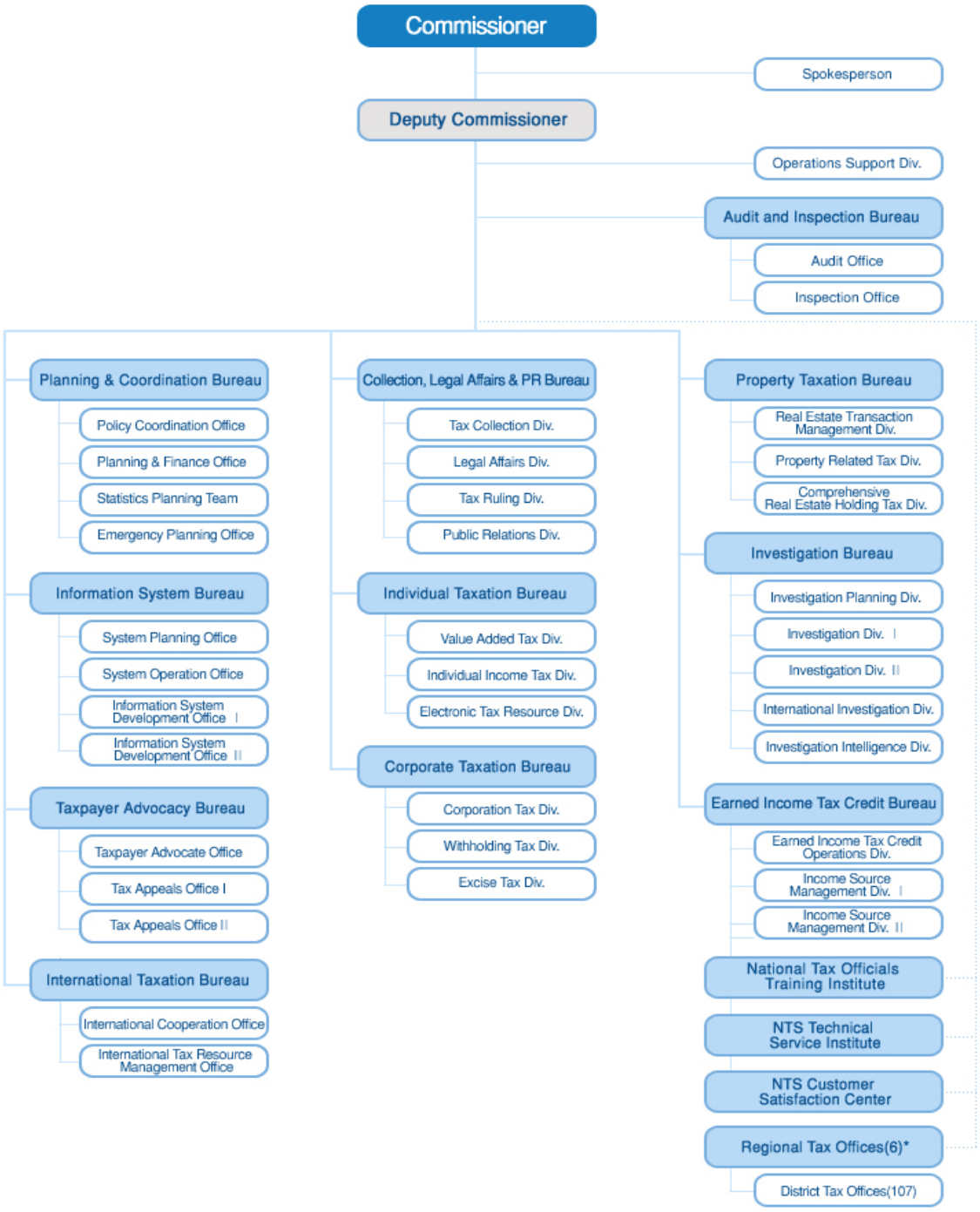
We enacted the Law for the Coordination of International Tax Affairs (LCITA), which took effect since 1997 to get into this situation but, the circumstances is likely to be little better than before.

Now or never is the time for us to increase the international assistance through the mutual cooperation such as exchange of information between countries.



CONTENTS

1.1 Organization of NTS



> Seoul, Jungbu, Daejeon, Gwangju, Daegu, Busan Regional Tax Offices

1.2 History of NTS

1960s

Mar.3,1966	Launch of the National Tax Service(NTS) (4 Bureaus, 13 Divisions, 4 Regional Tax Offices, 77 District Tax Offices, and 23 Branch Offices)
Apr.15,1967	The NTS Organization Reform (Established the National Tax Officials Training Institute, and newly added Daegu Regional Tax Office and 4 District Tax Offices)

1970s

Mar.3,1970	Concluded the Korea-Japan Tax Treaty
Jan.1,1975	Tax system reform - Abrogated the Real Estate Speculation Control Tax - Introduced the full-scale Global Income Tax System, New Capital Gains Tax and the Excess Profit Tax - Enacted the Basic Law for National Taxes
Jul.1,1977	Introduced the Value Added Tax and the Special Excise Tax

1980s

Jan.1,1982	Introduced the Education Tax Revised the Tax Exemption and Reduction Control Law
Aug.20,1987	Opened the New Public Service Center
Jun.23,1988	Announced the simplification of Tax Receipt System

1990s

Aug.12,1993	Introduced the Real-name Financial Transaction System
Jan.6,1997	Opened the Tax Integrated System
Jun.30,1997	Adopted the Charter of Taxpayer's Rights
Mar.3,1999	Opened Homepage on the Internet
Sept.1,1999	Downsized and Reformed the NTS's organization (Consolidated one regional tax office and 35 district tax offices) - Reorganized the NTS according to essential functions not by the type of taxes - Moving of the NTS

2000 ~ Present

Jan.1,2000	Introduced the Credit Card Lottery System
Mar.3,2001	Opened the National Tax General Consulting Center
Oct.5,2002	New NTS Building Completed Opened the Tax Museum
Mar.24,2003	Inauguration of Youngsup Lee as Commissioner of the NTS
Mar.15,2005	Inauguration of Goonpyo Jeon as Commissioner of the NTS
Jul.18,2006	Inauguration of Ju-Sung Lee as Commissioner of the NTS
Sep.13,2006	3rd OECD FTA Meeting was held in SEOUL

1.3 Scope of EOI

- **Tax information required for the imposition and collection of taxes, review of tax appeals, and criminal prosecution, and the tax information generalized with international practice, within such limit as not conflicting with other Acts**

- **Scope**
  - the tax status of a legal entity
  - the income and expense shown on a tax return
  - Business records (for instance to determine the amount of commissions paid to a company of other State)
  - accounting records and financial statements
  - banking records
  - copies of invoices, commercial contracts, etc.

1.4 Banking records

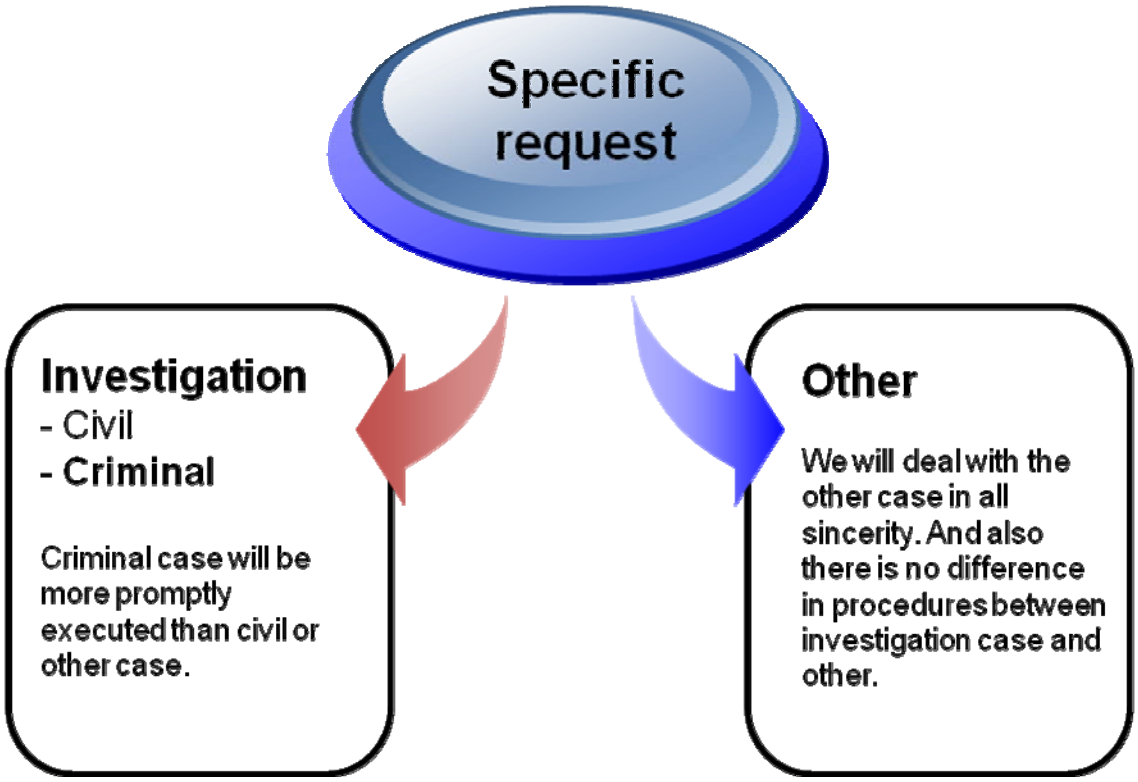
- **We may request to a SPECIFIC branch of a financial institute to offer the financial information where it is necessary for the competent authority of a Contracting State to verify any data sufficient to prove the suspicion of tax dodging.**

- **Requirements needed to request a financial information**
  - Personal information on the holder of a title deed
  - Trade period subject to a request
  - Legal ground for a request
  - Purpose of the use of information
  - Contents of transaction information requested
  - Personal information, such as the name and duties, etc., of the person in charge and the responsible person in the institution to be requested.

2.1 Classification of specific EOI

We categorize the information received from the Contracting Country into two basic types: investigation case and other.

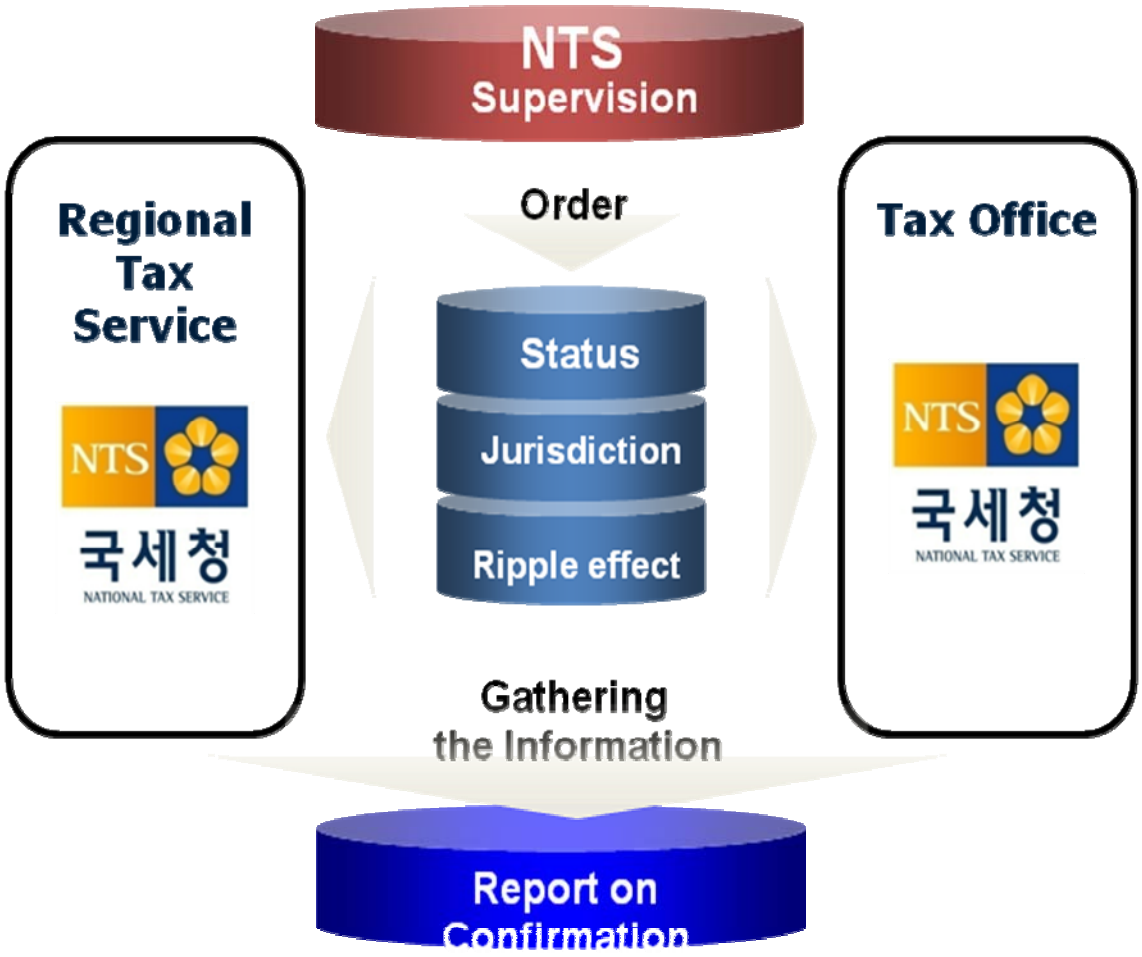
We should have been more careful when gathering the information concerning the Investigation case but, we also deal with the other case in all sincerity.



2.2 Procedures

Each cases has been treated by our Regional Tax Service or Tax Office by the order of NTS in the light of status (importance), jurisdiction and ripple effect.

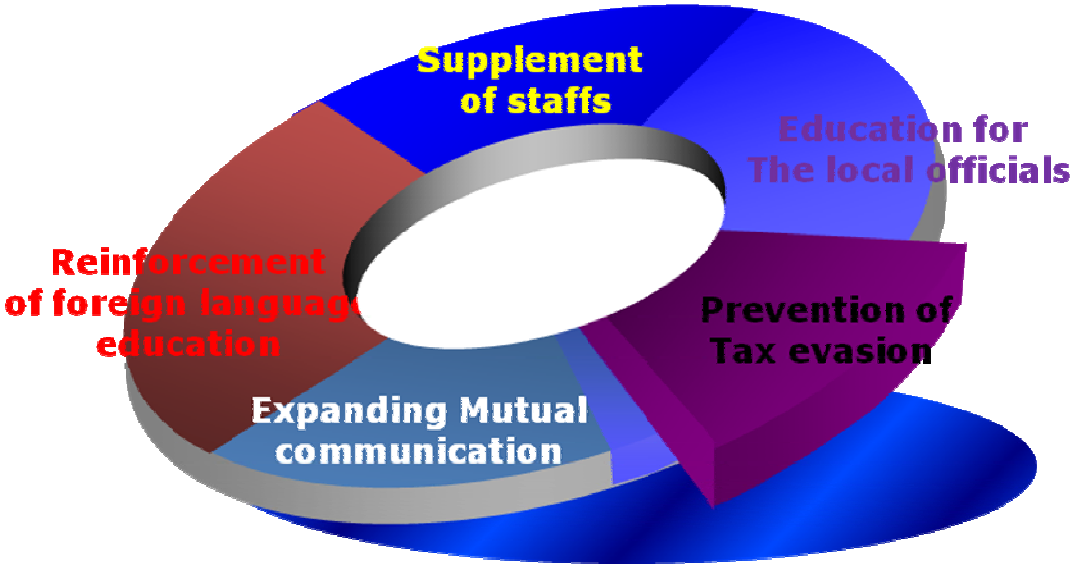
Mainly, important and difficult case to confirm is allocated to Regional Tax Service.



2.3 Vitalization

As stated above, NOW, we think, it is time to vitalize EOI for prevention of tax evasion thru international transaction.

It seems for us to be needed more education for our local tax officials, supplement of staffs, reinforcement of foreign language education and expanding mutual communication.



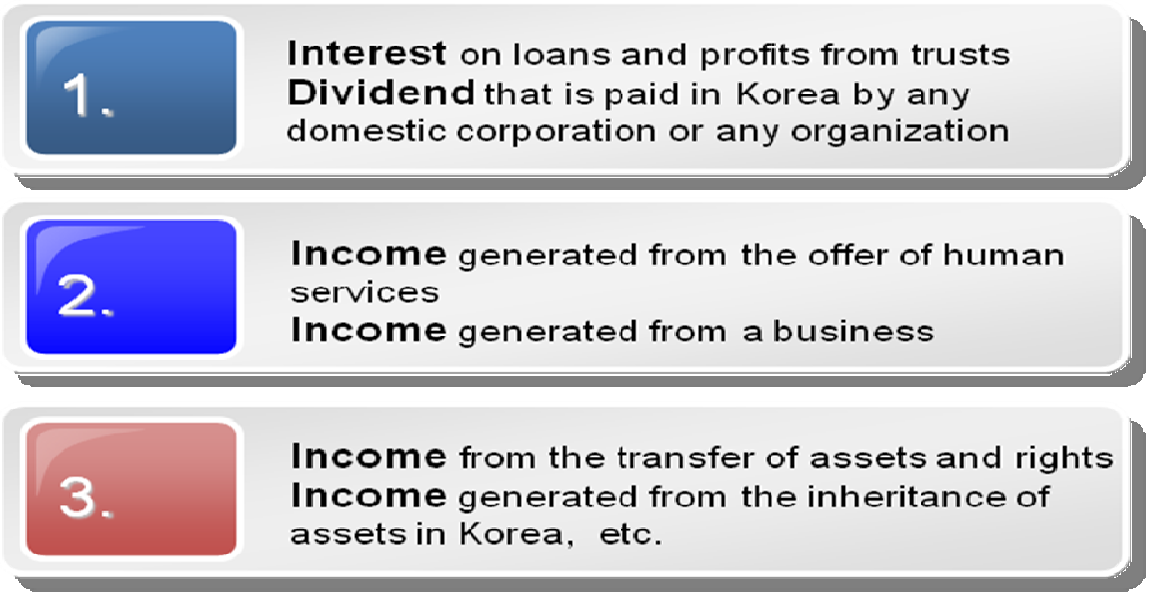
3. Encouraging and Promoting the use of Spontaneous

EOI

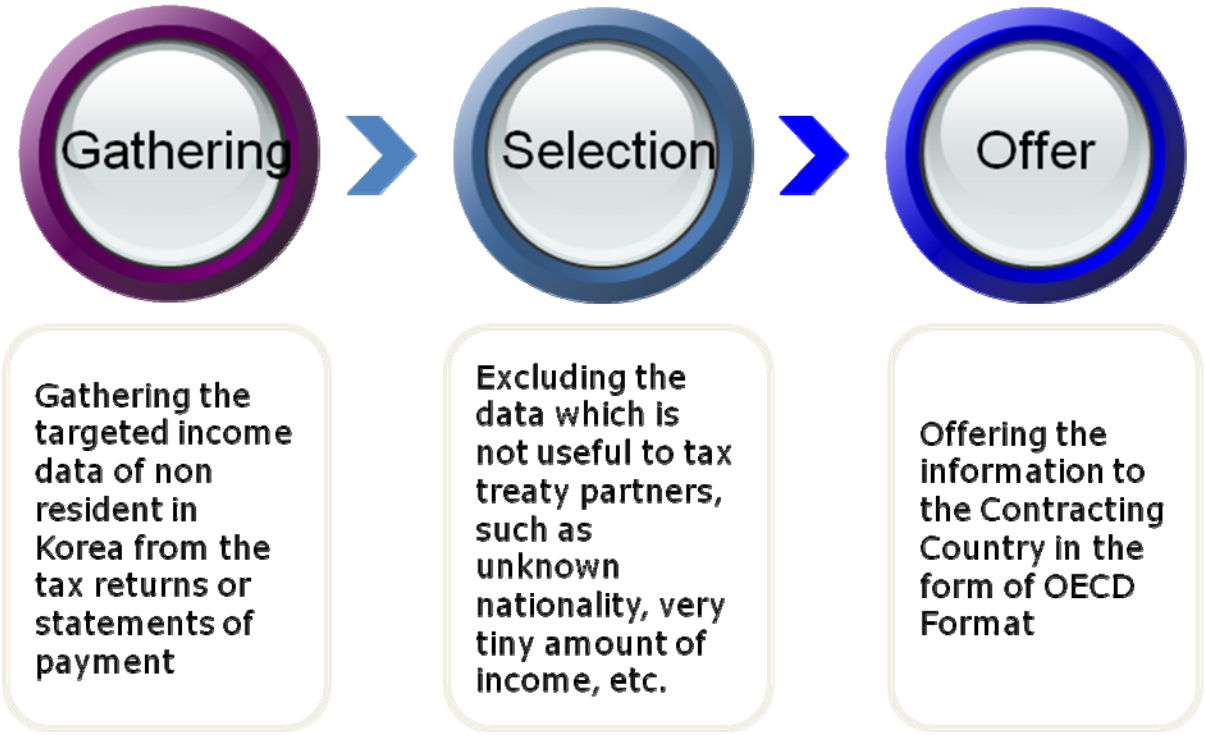
- The effectives and efficiency of spontaneous exchange very much depends on the motivation and the initiative of the officials in the supplying country.
- It is therefore important that local tax officials have the reflex to pass on to their competent authority information which would potentially be of use to a tax treaty.
- It should be borne in mind that sending useful information to another country will increase the likelihood of receiving useful information in return.

4.1 Targeted Income

- **Income generated from sources in the Republic of Korea of non resident**



4.2 Procedures



Automatic EOI requires the standardization of formats in order to be efficient.

a. SMF(the Standard Magnetic Format)
b. STF(the Standard Transmission Format)

5.1 Usefulness

- Tax examination abroad may also reduce the compliance burden for taxpayers by enabling tax administration to work together, rather than independently, on issues regarding the same taxpayer or tax group. Such cooperation ensures duplication is minimized or avoided altogether, costs are reduced and time is saved, all of which flow as advantaged to the taxpayer.

- A tax administration also authorize officials of the tax administration of another country to enter the territory of the requested country to interview individuals and examine records with the written consent of the persons concerned

5.2 Difficulties

In spite of principle usefulness, signing of agreement on Tax examination broad is not easy owing to some difficulties. We should put together our knowledge in this matter.

<Difficulties to think about>

8TH SGATAR JOINT TRAINING PROGRAM

MANILA

27 – 29 OCTOBER 2010

INTERNATIONAL TAX COOPERATION AGREEMENTS ON EXCHANGE OF INFORMATION

COUNTRY REPORT

PREPARED BY

MALAYSIA

Addressing International Evasion and Avoidance through Exchange of Information

Introduction

Exchange of Information (EoI) has indeed been a preferred topic discussed currently at various conferences around the world. It was the key topic at last year's 39th Study Group on Asian Tax Administration and Research (SGATAR) Meeting held in Bali. The information exchange subject will also be widely discussed at the 31st Commonwealth Association of Tax Administrators (CATA) Technical Conference which will be hosted by the Nigerian Tax Authority. Thus, this presentation will be discussing on the practice by Malaysia in the effort to deal with international evasion and avoidance through information exchange, the practice of EoI and the future of international cooperation.

Like many countries and jurisdictions around the world, Malaysia has its needs for EoI. The world economy has become globalised and borderless. This process and the liberalization of economic activities have resulted in an inevitable increase in cross border transactions. Clearly understood, tax authorities are confined in their own jurisdictions whereas taxpayers are freely engaging in cross border transactions. To ensure that these taxpayers pay the correct amount of tax, it is important for tax authorities to exchange information with one another. This hopefully will deter and in the end curb tax avoidance and fiscal evasion which in turn encourage tax compliance.

Through the years Malaysia has constantly been working on bridging bilateral agreements among member countries to establish better understandings on the subject of EoI. Amendments were made to the Exchange of Information article to arrive upon a common solution to increase the efficiency of the information exchange practice.

Malaysia has associated 68 Double Taxation Agreements (DTAs) or Double Taxation Conventions (DTCs) as known to some with other jurisdictions throughout. As to date

Malaysia is still focusing on issues addressing international evasion and avoidance by method of bilateral agreements through DTAs.

Generally, it can be said in that almost all the bilateral agreements widely carries the theme of combating fiscal avoidance and evasion in cross border transactions. '...to prevent evasion and avoidance of tax...' has always been one of the key objectives of Malaysia's bilateral tax agreements, to aspire a favourable climate for both inbound and outbound investments. In the aim to make Malaysia's special tax incentives fully effective for taxpayers of capital exporting countries and also to obtain a more effective relief from double taxation compared to relief gained under unilateral measures.

In a world where taxpayers' financial transactions take on an increasingly international flavour, tax administrations face more and greater challenges towards a proper enforcement of their tax laws. Recent events have underlined the pressing need for countries to cooperate more fully to ensure the proper application of their domestic tax laws. To meet these challenges, tax authorities must increasingly rely on international tax cooperation based on the international standards of transparency and effective EoIs.

Adoption of the Internationally Agreed Tax Standards with the inclusion of Para 4 and 5 to the article on Exchange of Information along with the success in concluding the required number of protocols has publicized Malaysia's stand on the subject. Domestic legality procedures have also provided Malaysia with the access to information that was once made difficult. Surely, these legislative changes coupled with domestic law have allowed Malaysia to contribute towards oppressing these international evasion and avoidance issue. Further on, we will to see Malaysia's viewpoint on addressing international evasion and avoidance through exchange of information.

A. Bilateral Agreements

At present Malaysia have 68 effective DTAs with treaty partners across the globe. Bilateral tax agreements in the form of DTA have always been Malaysia's resolution on apprehending issues pertaining to matters concerning information exchange. For the past few years vital changes have been made to the existing bilateral agreements on the article of Exchange of Information.

Looking back at the chronological events on the EoI establishment, the principles of Transparency and Exchange of Information developed by the OECD's forum and the UN Committee Experts on International Cooperation had establish the Global Forum and internationally agreed standard for EoI. It was in April 2009, when the OECD Progress Report was issued on implementation of the agreed EoI standards. Following that, in June 2009 Malaysia adopted the acclaimed standard principles into its Malaysian DTA draft model.

The stand that Malaysia took has lightened its way to cooperate with the other counterparts as to enhance information exchange across the border. Up till now, Malaysia has gone through countless effort in associating protocols with other treaty partners to review the Article 25 of Exchange of Information following its amended Malaysian Draft DTA Model.

Tax information Exchange Agreements (TIEA)

Currently there are no TIEAs between Malaysia and foreign counterparts. By definition, a TIEA is another form of agreement applicable to a country that does not have a treaty agreement or DTA with Malaysia and the focus is solely on the subject of information exchange.

It is agreed that TIEAs have its positive outcome on things, especially in assisting us to solve taxation matters which requires sufficient and reliable information from counterparts. By definition, TIEAs are more applicable to jurisdictions with lower taxes on income. Inevitably, the current scenario proves that fiscal avoidance and evasions do arise from so called countries and jurisdiction with no or low taxes on income. All over, there are still a handful of TIEAs waiting to enter into force despite the signings that took place. The Ministry of Finance of Malaysia is looking at bringing into play of TIEAs between Malaysia with other jurisdictions.

B. Multilateral Agreements

Undoubtedly, multilateral agreements provide solutions to enable jurisdictions to counter the growing needs to battle international evasion and avoidance. They have been many debates on the practicability of multilateral agreements. Despite that, numerous proposed solutions were also given in return.

A handful of reviews might provide various opinions on this area under discussion. Concerns are mainly on the domestic laws of the concerning states and requesting procedures. Negotiations too must be done with the involvements of existing tax treaties to cater the need for multilateral understandings. Positive outcomes can be materialized by mode of multilateral agreements.

Standardization of formats and articles must exist before a multilateral agreement could take off. Countries involved must be able to see the need in order to implement and reciprocate. They must be made to see the importance and not just judging it by the ‘returns’ in the form of evaded amount and what has it in return for them. Factor such as the existing systems in requested countries too are an aspect to be regarded. Requested states have many ways to protect the secrecy of a person’s related information. Legal technicalities apart from the application of domestic laws of requested countries also have a part to play in the efficiency of multilateral agreements.

Likewise, ‘information’ is another focus that has to be considered in gauging the effectiveness of a multilateral agreement. The availability of relevant information will determine the procedures to be outlined. In came other related factors such as legal requirements and also administrative measures. Information requested to must be addressed in a manner that each party would agree.

It is agreed that proposed multilateral agreements would have the advantage to address international evasion and avoidance through exchange of information. Some barriers and clear dimensions plus understandings between involving jurisdictions would provide better solutions in struggle.

There are no existing multilateral agreements between Malaysia with its treaty partners as to date.

C. Domestic Law

Below are legislative provisions currently applied by the Malaysian Domestic Law in relation to the subject of Exchange of Information.

- Introduction of Income Tax (Request For Information) Rules 2009
- Blanket Authorization for DGIR (Director General of Inland Revenue) to obtain information from banks and financial institutions

An Income Tax Rules on Exchange of Information was gazetted and came into force from 26 August 2009. This Rules stipulated amongst others, the procedures in exchanging information with our treaty partners. In addition, a blanket authorization has been obtained for DGIR to have direct access to bank information held by banks and financial institutions.

"… shall not prevent the disclosure ..." - ***Section 81, Income Tax Act 1967 – Power to Call for Information***

To obtain the information as requested by our treaty partners, the DGIR is empowered under Section 81 of ITA 1967 to call for information.

Section 132(2), Income Tax Act 1967

The Malaysian Income Tax Act (ITA) 1967, Section 132 empowers the Minister of Finance to enter into DTAs and DTAs override the Income Tax Act. Subsection 2 of Section 132 allows the disclosure of information to the government of a country which we have entered into an agreement. This subsection states explicitly that the confidentiality clause of Section 138 shall not prevent the disclosure of information to our treaty partners. This gives IRBM (Inland Revenue Board Malaysia) the right to disclose information to the tax authority of another country. Information provided to the IRBM is confidential and should not be disclosed to anyone.

The Authority to call for information for the purpose of EoI can only be carried out by Competent Authorities (CAs). For Malaysia, the CA is the Minister of Finance or his authorized representatives; Ministry of Finance: Undersecretary and Deputy, Tax Analysis Division and IRBM: CEO/DGIR, Deputy Director Generals of IRBM and the Director of Department of International Taxation.

Information exchange between counterparts is being practiced based on the outline of the article of Exchange of Information. Adaptation of the Internationally Agreed Tax Standard of Exchange of Information incorporated with the application of Malaysia's domestic law has enhanced the competence of information exchange.

Operational aspects involved in Exchange of Information

A. Best practices and common procedures

Malaysia practices three categories of information exchange as many counterparts carry out which are collectively the Specific, Automatic and Spontaneous Exchange of Information. Treatments to these information requests are based on the same principles and guidelines. Nonetheless the treatment of information gatherings for each nature of information might vary from one to another. Malaysia has always abided the agreed Exchange of Information article in its implementation of information exchange.

Information requests are being exchanged in three different classifications. The first category is based on request from a treaty partner or what is commonly known as Specific EoI. This usually happens when a tax authority requires further information on a particular taxpayer which is only available outside its own jurisdiction.

The second form of EoI is the Automatic Exchange of Information. Under this form of exchange, information is provided to a treaty partner routinely or on a yearly basis. Our treaty partners like Australia, Japan and New Zealand will routinely send a list of all Malaysian residents receiving various categories of income i.e. interest, dividends, royalties, pensions, commissions etc. from these countries. In the list, information such as names, dates of birth, addresses and income (tax year, date, type of payment, currency, gross and net amount, tax withheld, refund etc.) are provided. Other types of information exchanged automatically include changes of residence, acquisitions or dispositions of immovable properties.

The third form of information exchange is the Spontaneous Exchange of Information. For spontaneous exchange, a treaty partner provides information which is believed to be of interest to its treaty partner without the other treaty partner having to enquire for the information. As for this form of exchange, we do not face any problems provided

that the information has sufficient information on the person's identification or any possible unique features such as Income Tax Reference number or IDs that allows us to identify in an efficient and timely manner.

Requests are received via 'snail-mail' for every class of information request. We ensure that the requests come in through the appointed competent authorities. Acknowledgements are being sent to the respective competent authorities upon the receipt of these requests within a required outlined period. These requests are then being sorted out to the respective departments. As for straightforward queries and verifications, it is done at the Department of International Taxation of IRBM's level; e.g. verifying whether one is a registered taxpayer and straightforward details of the particular individuals.

For requests that needed to be progressed by other in-house departments, banks and related bodies, these requests are sorted out accordingly. Secrecy has always been a major concern in managing information request throughout. Preferably, communication via e-mails and snail-mails that could potentially divulge the secrecy of information is avoided. Upon distributing the requests, only required information is listed partially from the primary requests' source. These requests are normally broken into a manner whereby the recipients of the request will not be able to put the pieces together and gain knowledge of the full intended request.

Information in the form of Automatic Exchange received from other counterparts has a different practice as compared to the spontaneous and specific request. Encrypted CD-ROMs' in the Standard Magnetic Format (SMF) are sent to the Forensic Department of Inland Revenue Board to undergo the decrypting process. Data in CDs are paired with diskettes containing *key-files* backed by provided passwords as a form of security. The decrypted data will be returned back to the Department of International Taxation. All the relevant information are being extracted and presented in a simplified format to the Compliance Department of IRBM for further action to be taken. The information from list

of recipients is being conveyed to the individual tax files to be scrutinised by the relevant authorities at the branches' level.

Specified time period were also outlined to the recipient of the request especially on request that were distributed out of IRBM. In turn, this allows us to monitor that the request are being replied within the specified period.

How far back can information could be gathered and supplied? What is the effect of retention period of relevant entities?

For information that is in the possession of the IRBM, gathering the information would be less complicated and will not be bound by time limits. Information that is within the knowledge of IRBM with reference to the individual personal tax files could be gathered and provided within an efficient time period.

As for information that requires cooperation from respective networks outside of the ambit of IRBM, the policy and data sufficiency of these networks will influence the duration and the speed of information gathering.

Retention period of relevant entities will affect the value of information to the requesting country. Need be, gentle reminders were sent to prompt replies on requested information. If not in full, partial information of our intended request can also be utilize.

B. Technology required

Aside from staff, what is relevant technology/system is needed in exchange of information i.e. data warehouse, linkages and special software that encrypts and decrypts)

When mentioning the term ‘technology’ the focal point will always be on the subject information exchange via Automatic Exchange. Automatic information exchange is provided the form of a long list of recipients. These lists are computer generated and sent by a handful of counterparts. Though we have managed to retrieve the provided information, many ways can be devised to maximize the efficiency and the usefulness of the provided information.

When discussing information received through automatic exchange, the main concern is regarding the accuracy of the data and time constrain. Some proposed delivery methods on the format of the arrangements of data could be simplified i.e.

i. Data sent in CD-ROMs could be made viewable from a common simple program such the commonly used pdfs, Microsoft Excel, spreadsheets etc.

ii. Limit the number of ‘Fields’ in the existing format. Only produce the relevant key information. Relevant information that can be used for the purposes of identifying the individuals such as;

   - Information of Recipients: Names/Surname/Address,
   - Information of Payer: Payer Name/Payer Address,
   - Information of Payment: Payment Type/Payment Date/ Currency/Gross Amount/Withholding Tax.

Through the years, we have identified numerous setbacks that could be improvised to generate satisfying results through information received via automatic exchange i.e.

- Not all the decrypted data are relevant. Selections of relevant fields are required to eliminate the unrelated fields,
- Selected fields have to be re-arranged and transferred to spreadsheets in order to present the information in an orderly manner,
- The effectiveness of the decrypting process will rely on the efficiency of the *key-files.* Therefore if the key-files are inefficient, the processed data will be inaccessible,
- Occasionally decrypted data were not appropriately aligned.

Information could be sent in a format that does not require any decrypting process. In the current practice information sent normally will have to endure the decrypting process. This eliminates risk of error, such as alignment of data.

For security purposes, information will have to be protected by passwords in replace of key-files. Passwords could be sent to us upon reception of the acknowledgement receipt acknowledgement i.e. the Automatic/Routine Exchange from the National Tax Agency of Japan.

In addition to the existing format, other additional (unique features) of information regarding the recipients could be added in, i.e. Passport Numbers, Identification Numbers and other related unique features to assist the identification of the intended individual. This eliminates the error of mistakenly identifying other individuals that carries the similar name as the recipient.

As to date, Malaysia has not been providing any form of Automatic Exchange to its counterparts. This is due certain constraint pertaining to systems and data gatherings. Despite the constraints, Malaysia is still in the study to provide automatic Information exchange in the near future.

C. Assistance

May foreign auditors assist in gathering or verifying the information?

TIEAs for multilateral and bilateral agreements have included Article 6, Tax Examination Abroad in the OECD's Agreement on Exchange of information. Through this, it provides that the contracting party to allow a representative from the competent authority of the requesting state to enter its territory to retain the requested information as stated upon. Malaysia has all along been practicing bilateral agreements which do not constitute the rights for the requesting jurisdictions to perform any joint tax examinations or commonly known as simultaneous audits.

Future of International Tax Cooperation

A. Effective of international agreements

For Malaysia, a better and effective international cooperation in the subject of EoI has always been the aim. This would lead to a list of the expectations, here are to name a few.

Effective international agreements would be able to enhance a widely accepted legal basis for bilateral agreements or other modes of agreements. The improvement of EoI would derive to an ideal standard for access to information such as banking information to name one. Effective international tax cooperation agreements on EoI would provide less 'shelter' taken by taxpayers through strict bank secrecy laws in some jurisdiction around the world.

Each country tends to have their respective 'bank secrecy', regulations and confidentiality rules. With the acceptance of a common understanding i.e. the acceptance of the proposed standardized paragraph (4) and (5) of Article 26 of the

OECD model, international cooperation would be taken to higher level of efficiency through the ability to access to banking information.

Legislative changes in the subject of EoI would eliminate domestic tax interest requirements. With that the changes in treaty policy is not to require domestic interest, but in return counterparts are willing to provide information to counterparts without requiring any domestic tax interest under its domestic laws implemented.

Tax authorities throughout would be making changes to their domestic laws, regulations and administrative practices to cater for a better EoI process and directly enhance the effectiveness of international cooperation. Mutual benefits would derive from voluntary compliance to deter non-compliance through effective EoI in the form of declaration of income. The standardization would discourage 'treaty shopping' which relatively a common problem faced by most tax authorities.

The vast advancement in information technologies has also contributed towards a better EoI system in the future. Tax authorities will be able to gain more advantages in taxation matters especially in the subject of accessing banking information where modern technologies are being adopted globally.

No doubt, effective international agreements on EoI would lead to greater expectations of better tax governance for tax authorities worldwide in handling numerous current common issues and problems throughout. Establishing a more effective EoI would benefit in civil and crime prevention matters which have widely spread today. As for Malaysia, the cooperation between tax authorities and treaty partners worldwide would generate numerous positive outcomes through the understandings of international agreements' which in turn generates an improvised EoI systems and standard.

B. Problems and emerging concerns

Like many other countries in the developed as well as the developing world, Malaysia too cannot absolve herself from the need to facilitate her trade and investments with the outside world through international tax treaty network with other countries. The increased pace of industrialisation coupled with increased foreign direct investment in the country necessitated effective international arrangements with other countries to provide investors with certainty and guarantees in the area of taxation.

The exchange of information between international tax authorities has recently emerged as a key and controversial topic in the international tax policy discussion. It is at the heart of the recent and controversial high initiatives by both the OECD and also the European Union. The problem to which the EoI is addressing is the residence based taxes on capital income can be evaded by depositing funds in low tax jurisdictions and failing to declare the proceeds to residence authorities in contrast, allocating some of the revenue from information exchange to the source country.

Tax haven jurisdictions offer foreign investors low tax rates and other tax features designed to attract investment and thereby stimulate economic activity. The economic prosperity of tax haven countries comes at the expense of higher tax countries is unclear, though recent researches suggest that tax haven activity stimulates investment in nearby high-tax countries.

Quantifying the outcomes based on current scenario in relation to the effectiveness of international tax cooperation might be more accurate if we were to compare it with the forecasted outcome; should a form of commonly agreed Multilateral Agreement were to be consented upon. Comparative results will be able to define the outcomes to the exact.

Tax losses, avoidance and tax evasions have long existed and will prolong in the future. Through measures and effective existing DTAs, these figures have decreased. Real

results can only be achieved by measuring and quantifying it against the outcome of a common international tax agreement model should it take place. No doubt, existing agreements has led to a better collaboration with counterparts in the effort to fight against international evasion and avoidance. If we were to measure in terms of cost-efficiency and time, then existing bilateral international agreements so far has been very fruitful.

Though positive outcomes were shown, there are still room for the future of international agreements to generate better returns both fiscally and legislatively in the struggle to curb international evasion and avoidance.

C. Possible solutions

A common approach could be materialized among SGATAR members if we were to venture into our own Asian Model. We do not view it as something unattainable in the future; in fact such possible solution has been practice among numerous European countries. Though the subject of cost, efficiency and period are the main factors to be considered, one has to agree with the positive outcomes of the initiation.

Multilateral automatic information exchange could offer a better standardized format for the model to assist members in making this method of information exchange a more efficient mode of exchange. It must be backed by properly laid precedents such as domestic law and provisions on banking secrecies.

Information upon request, that is encouraging the sharing of information among members could facilitate in the objective of curbing international fiscal evasion and avoidance. Information considered to be useful to others can be channelled out and does not have to be ‘upon request’ as applied the current practice.

Technological advancement has contributed a great deal of assistance on information exchange. Certainly, technological advancement between countries has its variation with one being more advance than the other. On the other hand, evasion and avoidance too are being facilitated by this factor.

In a world where taxpayers' financial transactions take on an increasingly international flavour, tax administrations face more and greater challenges to the proper enforcement of their tax laws. Recent events have underlined the pressing need for countries to cooperate more fully to ensure the proper application of their domestic tax laws. To meet these challenges, tax authorities must increasingly rely on international tax cooperation based on the implementation of international standards of transparency and effective EoIs.

Conclusion

Cross border and international transactions has altered the course and needs for information exchange. Exchange of Information has been regarded as a necessity and will remain as a compulsory piece of writing in tax treaties. Regardless whichever structure treaties will appear in the future, exchange of information will always be a crucial element in addressing cross border international evasion and avoidance of tax.

Domestic law and legal frameworks on the subject of EoI must align with the objective of treaties. Improvisation on procedures and information processing methods are important to ensure sufficiency and viability of dispatched information.

Official changes in policy in its tax treaties means Malaysia can now widely apply the powers to obtain information. This means that there is no domestic interest requirement and the competent authority now has direct access to information. This is part of the continuous effort to ensure the legal framework is in accordance with the international best practices. Malaysia will continue to review its legal framework and update its domestic law to enhance international tax cooperation between its treaty partners and future counterparts.

Collaboration among members to arrive upon agreeable mode of international agreement is something within reach. Agreed upon precedents, common practices and procedures, technological and systems' advancement are the important elements to determine the success of international tax cooperation. Ultimately, continuous information sharing along with other important elements will always be the resolution to deter the international tax avoidance and evasion.

INTERNATIONAL TAX COOPERATION AGREEMENTS ON EXCHANGE OF INFORMATION

COUNTRY REPORT

PHILIPPINES

I. ADDRESSING INTERNATIONAL EVASION AND AVOIDANCE THROUGH EXCHANGE OF INFORMATION

In the ever-changing global environment, it is a recognized fact that businesses operate globally. Although this is not a new phenomenon, the speed and ease brought about by rapid advances in technology and other converging factors had presented opportunities as well as challenges for tax administrators.

Basically, although tax administrators are generally restricted in its operation within its jurisdiction, taxpayers are not. Thus, the need to secure cooperation from other tax administrations is crucial in addressing shared concerns such as international tax evasion and avoidance.

A good starting point is through exchange of information instruments.

A. Bilateral Agreements

International tax agreements can either be bilateral or multilateral. Bilateral agreements that provide for exchange of information can take place either under a Double Taxation Convention (DTC) or pursuant to a Tax Information Exchange Agreement (TIEA).

DTCs or Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income are comprehensive tax conventions/agreements which contain an exchange of information provision.[1] Presently, The Philippines has 37 bilateral DTCs, all of which save for one contains an article on exchange of information.

Among the SGATAR members, the Philippines has concluded DTCs with Australia, China, Indonesia, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand, and Vietnam.

TIEAs on the other hand are agreements which specifically focus on exchange of information on tax matters. The Philippines has not yet concluded any TIEAs but is seriously considering its merits.

B. MULTILATERAL AGREEMENTS

Multilateral agreements, as we know, cover several Contracting States. One such example of a multilateral agreement is the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. The original agreement entered

[1] Normally Article 26 of the DTC.

into forced in 1995 and was binding to 14 countries.[2] It, nevertheless, covers not just exchange of information but also other forms of assistance and co-operation, namely: performance of tax examinations abroad including assistance in recovery of tax claims to name a few. Recently, it underwent revisions to make room for significant changes, one of which is, to enable developing countries to become parties to the said agreement.

The Philippines has not yet concluded any multilateral agreement in exchange of information. However, the Philippines do recognize several advantages a multilateral agreement offers. First, in terms of speed and ease, conclusion of a multilateral agreement is more convenient compared to a bilateral agreement. Likewise, another advantage would be in terms of resources saved in the conduct of negotiations; thus, making it more practical especially for a developing country.

C. DOMESTIC LAW

Assistance to foreign jurisdictions may also be provided solely in the domestic law through unilateral mechanisms. In the absence of an international agreement, a State may provide for the procedure and conditions when it can supply information to another State.

[2] Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, The Netherlands, Norway, Poland, Sweden, UK, US and Ukraine.

In the case of the Philippines, Republic Act No. 10021 was recently passed by Congress. Its objective was to remove any impediment in the exchange of information. The basis, however, of the obligation to provide information is still the international agreement The Philippines entered into with its treaty partners.

Of the thirty-six (36) bilateral agreements which the Philippines entered into, nineteen (19) DTCs provide that they are not restricted by Article 1 of the Convention.[3] As for taxes covered, all of the articles of the DTC on exchange of information is with respect only to taxes covered by the Convention.

II. OPERATIONAL ASPECTS INVOLVED IN EXCHANGE OF INFORMATION

A. BEST PRACTICES AND COMMON PROCEDURES

Information can be exchanged in any of the following:

- *Upon request* -- referring to a request by a Contracting State to the other Contracting State regarding a particular or specific information;

- *Automatic* -- information that is provided automatically and/or on a routine basis;

[3] Article 1 Persons Covered.

- *Spontaneous* – when a Contracting State in the course of administering its own laws provide information which it believes to be of interest to the other Contracting State

Of the three methods, the Philippines is implementing the first type of exchange of information. Accordingly, requests for information should be made in writing and addressed to the Competent Authority of the Philippines, in this case—the Commissioner of Internal Revenue. As to the contents of the request, Revenue Regulations No. 10-2010 provides that the following should be clearly stated in the request:

a) The identity of the person under examination or investigation;

b) A statement of the information being sought including its nature and the form in which the said foreign tax authority prefers to receive the information from the Commissioner;

c) The tax purpose for which the information is being sought;

d) Grounds for believing that the information requested is held in the Philippines or is in the possession or control of a person within the jurisdiction of the Philippines;

e) To the extent known, the name and address of any person believed to be in possession of the requested information;

f) A statement that the request is in conformity with the law and administrative practices of the said foreign tax authority, such that if the requested information was within the jurisdiction of the said foreign tax authority then it would be able to obtain the information under its laws or in the normal course of administrative practice and that it is in conformity with an international convention or agreement on tax matters;

g) A statement that the requesting foreign tax authority is also allowed under its domestic laws to exchange or furnish the information subject of the request; and

h) A statement that the requesting foreign tax authority has exhausted all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

B. TECHNOLOGY REQUIRED

Given that exchange of information is processed upon request, the technology that is used for automatic exchange of information in the case of the Philippines is not applicable. The Philippines, however, recognize the need to utilize existing technology in gathering as well as storing tax information particularly the use of data warehouses.

Improvements in the area of infrastructure that will support linkages with other government agencies and other relevant entities that hold information are considered

vital. As for the retention period, information that may come from banks or financial institutions are governed by the policies of the relevant regulatory bodies.

C. ASSISTANCE

Foreign assistance or tax examinations abroad are being done in other jurisdictions for the purpose of gathering information. This arises when a taxpayer in a Contracting State is permitted to keep records in the other Contracting State.[4]

A Contracting State may permit the authorized representatives of the Contracting State, to the extent allowed by its domestic law. Therefore, the level of participation or assistance may differ depending on the laws and practices of the Contracting States.

In the case of the Philippines, the law is silent in so far as active[5] tax examinations involving taxpayers is concerned. The law however allows foreign tax authorities to examine income tax returns of specific taxpayers subject of a request.

Finally, it is a matter of observation that TIEAs of other jurisdictions contain a provision on tax examinations involving active participation by the requesting State. This however requires the consent of the taxpayer.

[4] OECD Commentaries on Article 26, paragraph 9.1.

[5] Conduct interview of individuals

III. FUTURE OF INTERNATIONAL TAX COOPERATION

A. EFFECTIVENESS OF INTERNATIONAL AGREEMENTS

One of the real objectives of an international tax co-operation agreement is to address and hopefully prevent international tax evasion or avoidance. The extent of international tax evasion or avoidance in a State is however largely dependent also in its own domestic laws and how it approaches the problem. Key to solving the problem of evasion is having a robust domestic law and enforcement capabilities. One way of measuring the effectiveness of these agreements is how they can improve and complement the domestic laws of both the Contracting States.

In the case of the Philippines, the move to amend its domestic law was precipitated by the need to comply with its international obligations. Instead of individually negotiating its treaties, it deemed more expedient to address the domestic constraints given that there are already existing agreements which provides a framework for the exchange of information.

Nevertheless, it is imperative to identify other areas in the domestic law that need to be enhanced, not just for the purpose of complying with the exchanging information provision but also mainly for combating tax evasion both in the international and

domestic setting. Technical assistance from the requesting State or other groups will also help mitigate the incidence of tax evasion.

B. PROBLEMS AND EMERGING CONCERNS

An international tax agreement, like tax evasion, is something that is not static. It is constantly evolving. The Philippines in concluding future DTCs will necessarily have to reflect the changes of the Model Convention specifically the additional paragraphs in Article 26. It will also take into consideration the usefulness of TIEAs and multilateral instruments in future negotiations.

It has been observed that TIEAs and existing multilateral instruments are not just limited to exchange of information *per se* as earlier mentioned. Basically, these agreements expand the scope of Article 26 as negotiated by the Contracting parties; and may well extend to other areas of co-operation. TIEAs expand the scope of taxes covered while multilateral agreements may include provisions on tax collection. One foreseeable concern is that a Contracting State may find these other areas of co-operation difficult to implement at its current stage of development.

Another pertinent issue relates to as to whether a Contracting State should immediately enter into an international agreement on exchange of information, e.g. TIEA, once it receives a proposal from another Contracting State, notwithstanding the fact that there is an existing DTC. Concerns on having multiple instruments with the

same Contracting State may therefore arise. As such, whether to amend an existing DTC or enter into a separate TIEA are two possible considerations.

C. POSSIBLE SOLUTIONS

Given the present global condition, one logical question that can be asked is whether there is a common solution to a problem like international tax evasion. International tax cooperation agreements are but a means to an end. However, the Philippines believe that it is indeed part of the solution.

Regional initiatives in so far as a common exchange of information instrument among Asian countries particularly SGATAR members have yet to be discussed. Whether there is merit in such a proposal remains to be seen. One such advantage is the expediency that it provides. However, as to whether a consensus can be reached is another matter.

In closing, an international tax agreement for it to work needs the co-operation of both the requesting and requested State. Although there is an international tax standard, the prevailing conditions in each Contracting State is altogether different. The facility in entering into these agreements as well as the capability to implement the same is affected by these factors. For Countries who have just started introducing changes in their respective systems, the challenge lies not just in its implementation but how it can address its avowed objective—that is, the problem of tax evasion and avoidance in a global setting.

INTERNATIONAL TAX COOPERATION AGREEMENTS ON EXCHANGE OF INFORMATION

SINGAPORE

INTERNATIONAL TAX COOPERATION AGREEMENTS ON EXCHANGE OF INFORMATION

– SINGAPORE

(A) Introduction

1. On 6th March 2009, Singapore endorsed the internationally agreed standard on transparency and exchange of information for tax purposes("the Standard"), also known as the Organisation for Economic Co-operation and Development ("OECD") Standard for the effective exchange of information through Avoidance of Double Taxation Agreements ("DTAs"). Consequently, Singapore has incorporated and continues to incorporate the enhanced Exchange of Information article to facilitate the exchange of information under the DTAs between Singapore and her existing and new treaty partners. Singapore has also enacted new legislative provisions under the Income Tax Act to implement the Standard in the enhanced Exchange of Information article in the DTAs.

(B) Bilateral Agreements addressing international evasion and avoidance through exchange of information

2. The main mode adopted to facilitate the exchange of information for tax purposes between the Inland Revenue Authority of Singapore ("IRAS") and the tax authorities of countries which have entered into DTAs with Singapore is through the use of the Exchange of Information article in the DTAs. Singapore has signed 17 Amending Protocols to existing DTAs (with Belgium, United Kingdom, Netherlands, Denmark, Australia, Austria, Norway, Qatar, Mexico, Bahrain, France, Brunei, Finland, Malta, Japan, South Korea and China) and 4 DTAs (with New Zealand, Geogia, Slovenia and Saudi Arabia) which have incorporated the enhanced Exchange of Information article; of

which 8 of these Amending Protocols or DTAs have been ratified (i.e. those with New Zealand, Netherlands, Austria, Norway, Brunei, Finland, Georgia and Japan). It should also be noted that the scope of the Exchange of Information article is wide enough to cover all types of taxes and all persons (including non-residents).

(a) *Enhanced Exchange of Information article*

3. Article 26 of the DTA between Singapore and Japan is an example of the enhanced Exchange of Information article and it is reproduced as follows:

> "1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their local authorities, insofar as the taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Articles 1 and 2.
>
> 2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
>
> 3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

4. If information is requested by a Contracting State in accordance with the provisions of this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other Contracting State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. However, a Contracting State may decline to supply information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under the domestic laws of the Contracting State."

4. The main differences between the previous Exchange of Information article and the enhanced Exchange of Information article which adopts the Standard in the Amending Protocols and DTAs are as follows:

- The enhanced Exchange of Information article is not restricted by Articles 1 and 2 which deal with the taxes and persons covered and therefore the scope of the enhanced Exchange of Information article is wide enough to cover all types of taxes and all persons (including non-residents).

- The Contracting State cannot decline to supply information solely because it has no domestic interest in such information and therefore the domestic interest requirement has been lifted.

- The Contracting State cannot decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person and therefore such information (e.g. information sought from a bank) can still be obtained via the enhanced Exchange of Information article even though there are provisions precluding the disclosure of such information (e.g. banking secrecy provisions) in the domestic law.

- The exchange of information is subject to legal privilege.

5. The relevant provisions of the Singapore domestic law which deal with the exchange of information are sections 105A to 105M of the Income Tax Act and Order 98 of the Rules of Court. These provisions are annexed as Appendix 1. Singapore has recently enacted the Income Tax (Amendment)(Exchange of Information) Act 2009 which came into operation on 9 February 2010 to amend the Income Tax Act by including provisions in respect of the Exchange of Information under Avoidance of Double Taxation Agreements (Part XXA: section 105A to 105H) as well as provisions in respect of Court Orders relating to Restricted Information (Part XXB: section 105I to 105M). There is also a new Eighth Schedule on the information to be included in a request for information under Part XXA. We would like to briefly highlight some of these provisions.

(b) Domestic Law Exchange of Information under Avoidance of Double Taxation Agreements

Definitions

6. The Income Tax provisions provide that:

- "competent authority" , in relation to a prescribed arrangement, means a person or an authority whom the Comptroller is satisfied is authorised under the EOI provision of the arrangement to make a request to the Comptroller for information under that provision;

- “exchange of information provision” or “EOI provision”, in relation to an avoidance of double taxation arrangement, means a provision in that arrangement which provides expressly for the exchange of information concerning the tax positions of persons;

Purpose

7. The purpose of Part XXA is to facilitate the disclosure of information to a competent authority under a DTA in accordance with the EOI provision in the DTA.

Request for information

8. The competent authority under a DTA may make a request to the Comptroller for information concerning the tax position of any person in accordance with the EOI provision of the DTA and unless the Comptroller otherwise permits, the request must set out the information prescribed in the Eighth Schedule. Every request shall also be subject to and dealt with in accordance with the terms of the DTA.

Comptroller to serve notice of request on certain persons

9. After receipt of a request for any information which, in the opinion of the Comptroller,

is information that is protected from unauthorised disclosure under section 47 of the Banking Act (Cap. 19) including any regulations made under subsection (10) of that section; or section 49 of the Trust Companies Act (Cap. 336), the Comptroller shall serve notice of the request by ordinary post on the person identified in the request as the person in relation to whom the information is sought; and the person identified in the request as the person who is believed to have possession or control of the information.

Power of Comptroller to obtain information

10. Sections 65 to 65C (provisions giving the Comptroller the power to obtain information) shall have effect for the purpose of enabling the Comptroller to obtain any information for the purpose of complying with a request for the information referred to in paragraph 8.

(c)Court Orders relating to Restricted Information

Orders relating to certain information

11. Singapore has domestic statutory banking and trust confidentiality provisions under Section 47 of the Banking Act and Section 49 of the Trust Companies Act.

12. Where the Comptroller requires information in order to comply with a request by a foreign treaty partner and the Comptroller is of the opinion that the information is protected from unauthorized disclosure under Section 47 of the Banking Act or Section 49 of the Trust Companies Act, the Comptroller may apply to the High Court for a production order.

13. There are no limitations to the obtaining of the production order save that an order obtained under Section 105J shall not confer any right to the production of, or access to,

information subject to legal privilege (consistent with Article 26 of the OECD Model Convention).

14. The text of Section 105J provides that where the Comptroller requires any information —

(i) for the administration of this Act, other than for an investigation or a prosecution of an offence alleged or suspected to have been committed under this Act; or

(ii) in order to comply with a request made under section 105D; and the Comptroller is of the opinion that the information is protected from unauthorised disclosure under section 47 of the Banking Act (Cap. 19) including any regulations made under subsection (10) of that section; or section 49 of the Trust Companies Act (Cap. 336), then the Comptroller or an authorised officer may apply to the High Court for an order that the person who appears to it to have possession or control of the information to which the application relates shall make a copy of any document containing the information and provide the copy to an authorised officer for him to take away; or give an authorised officer access to the information, within 21 days from the date of the order or such other period as the Court considers appropriate, where the making of the order is justified in the circumstances of the case; and it is not contrary to the public interest for a copy of the document to be produced or that access to the information be given.

15. Both or either of the following persons may, within 7 days from the date the order is served on the person against whom it is made, apply to the High Court to have the order discharged or varied:

(a) the person against whom the order is made;

(b) the person in relation to whom information is sought,

and the Court, on hearing such an application, may discharge the order or make such variation to it as it thinks fit.

Failure to comply with section 105J orders

16. Any person who without reasonable excuse contravenes an order under section 105J(2) or 105J(7); or in purported compliance with an order under section 105J(2), produces to an authorised officer any document which contains any information, or makes available to an authorised officer any information, known to the person to be false or misleading in a material particular without —

(i) indicating to the authorised officer that the information is false or misleading and the part that is false or misleading; or

(ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

(d)Civil procedure

Order 98 of the Rules of Court

17. An application to the High Court for an order under section 105J of the Income Tax Act must be made by way of originating summons together with a supporting affidavit and the application may be made ex parte.

18. The affidavit must —

(a) state the grounds on which the application is made;

(b) exhibit the request made under section 105D to which the application relates; and

(c) state the applicant's belief that the request sets out all the information prescribed in the Eighth Schedule to the Act and that the conditions specified in section 105J(3) are fulfilled.

19. If the Court decides that the proceedings for the application should be conducted in the presence of a person referred to in section 105J(6)(*a*) or (*b*), it must adjourn the proceedings for a period not exceeding 7 days and require the applicant to serve the summons and supporting affidavit on that person.

20. An application before a Judge in Chambers for the discharge or variation of an order under section 105J must be made by summons and supported by an affidavit. The application and supporting affidavit must be filed and served on the following persons at least 7 clear days before the date fixed for the hearing of the application:

(a) the Comptroller; and

(b) any person entitled to make the application under section 105J(4) other than the applicant himself.

(C) Operational aspects involved in exchange of information

21. Singapore recently assisted a tax authority of a treaty partner to obtain a Court Order for the production of certain bank documents as requested by the treaty partner. This was the first case since the new legislative provisions came into operation. For this particular request, the Comptroller of Income Tax was able to obtain the Court Order within a period of about 1 month from the time the request was received. Annexed as Appendix 2 is a flow chart setting out the steps involved from the time a request is received from a treaty partner to the time the information requested is obtained and furnished to the treaty partner.

22. The Exchange of Information article (Article 26) also provides that in no case shall the Article be construed so as to impose on a Contracting State the obligation to supply information which is not obtainable under the laws or in the normal course of the

administration of that or of the other Contracting State. It should be noted that section 67 of the Income Tax Act provides that a person's (e.g. bank's) obligation of record-keeping shall be for a period of 5 years from the year of assessment to which any income relates to enable the person's income and allowable deductions to be readily ascertained by the Comptroller. It would therefore appear that since there is no obligation for the bank to keep records beyond the 5-year period, it is arguable there should also not be an obligation on a Contracting State to supply information which goes beyond the 5-year period.

23. There also does not appear to be a need for special technology or systems to facilitate the exchange of information.

24. Singapore also has a policy of providing assistance in respect of exchange of information only upon specific requests from her treaty partners. Singapore would not as a matter of practice provide automatic or spontaneous assistance in respect of exchange of information. It may also be possible for foreign auditors to assist in the gathering of or verifying of information.

(D) Future of international tax cooperation

25. We believe that the DTAs and the recent legislative amendments to the Singapore domestic law will serve its purpose of curbing international tax evasion and avoidance. However, as Singapore has only recently started to respond to the requests from her treaty partners for the exchange of information pursuant to the signing of Amending Protocols and DTAs with the enhanced Exchange of Information article, it remains to be seen how effective the adoption of the Standard in the enhanced Exchange of Information article will be in curbing international tax evasion and avoidance.

26. However, we have successfully obtained the grant of a Court Order for the production of bank documents pursuant to a recent request from a treaty partner for the exchange of information. It would therefore appear that the exchange of information

process can be relatively smooth even in respect of restricted or protected information for which a Court Order is required to obtain the information. This could also have been because the information requested was in respect of a bank account which had already been closed.

27. Going forward, if the bank or trust company from whom we seek the information is represented by counsel, they may seek to challenge the validity of the Court application at the first instance. In addition, there may also be instances where the bank or trust company may apply to vary or discharge the Court Order for the production of the information. In these circumstances, some preparation to contest such applications would be required.

(E) Conclusion

28. With the enactment of the new legislative amendments and the ratification of 8 Amending Protocols or DTAs incorporating the enhanced Exchange of Information article, the process of the exchange of tax information between Singapore and her treaty partners would be greatly facilitated and we believe this will foster greater international cooperation on the exchange of tax information between the Inland Revenue of Singapore and other tax authorities around the globe.

Order 98 of the Rules of Court

1. Interpretation and application (O. 98, r. 01)

(1) In this Order, "Act" means the Income Tax Act (Chapter 134), and any reference to a section shall be construed as a reference to a section in the Act.

(2) Expressions used in this Order which are used in the Act have the same meanings in this Order as in the Act.

(3) Subject to rule 3(1), an application to which this Order applies must be made —

(a) where an action is pending, by summons in the action; and

(b) in any other case, by originating summons.

2. Orders under section 105J (O. 98, r. 02)

(1) An application for an order under section 105J must be supported by an affidavit and may be made ex parte.

(2) The affidavit must —

(a) state the grounds on which the application is made;

(b) exhibit the request made under section 105D to which the application relates; and

(c) state the applicant's belief that the request sets out all the information prescribed in the Eighth Schedule to the Act and that the conditions specified in section 105J(3) are fulfilled.

(3) If the Court decides under section 105J(6) that the proceedings for the application should be conducted in the presence of a person referred to in section 105J(6)(*a*) or (*b*), it must adjourn the proceedings for a period not exceeding 7 days and require the applicant to serve the summons and supporting affidavit on that person.

(4) The supporting affidavit to be served under paragraph (3) shall exclude the request referred to in paragraph (2)(*b*).

3. Discharge or variation of orders under section 105J (O. 98, r. 3)

(1) An application under section 105J(4) for the discharge or variation of an order under section 105J must be made by summons and supported by an affidavit.

(2) The application and supporting affidavit must be filed and served on the following persons at least 7 clear days before the date fixed for the hearing of the application:

(a) the Comptroller; and

(b) any person entitled to make the application under section 105J(4) other than the applicant himself.

(3) The application shall be heard by a Judge in Chambers.

4. Leave of Court for inspection or publication (O. 98, r. 4)

(1) An application for leave of the High Court under section 105J(9) or (10) must be supported by an affidavit.

(2) The application and supporting affidavit must be filed and served on the following persons at least 7 clear days before the date fixed for the hearing of the application:

(a) the Comptroller; and

(b) each of the parties referred to in section 105J(6) unless he is the applicant.

(3) The application shall be heard by a Judge in Chambers.

(4) Order 60, Rule 4 shall not apply in relation to proceedings under section 105J.

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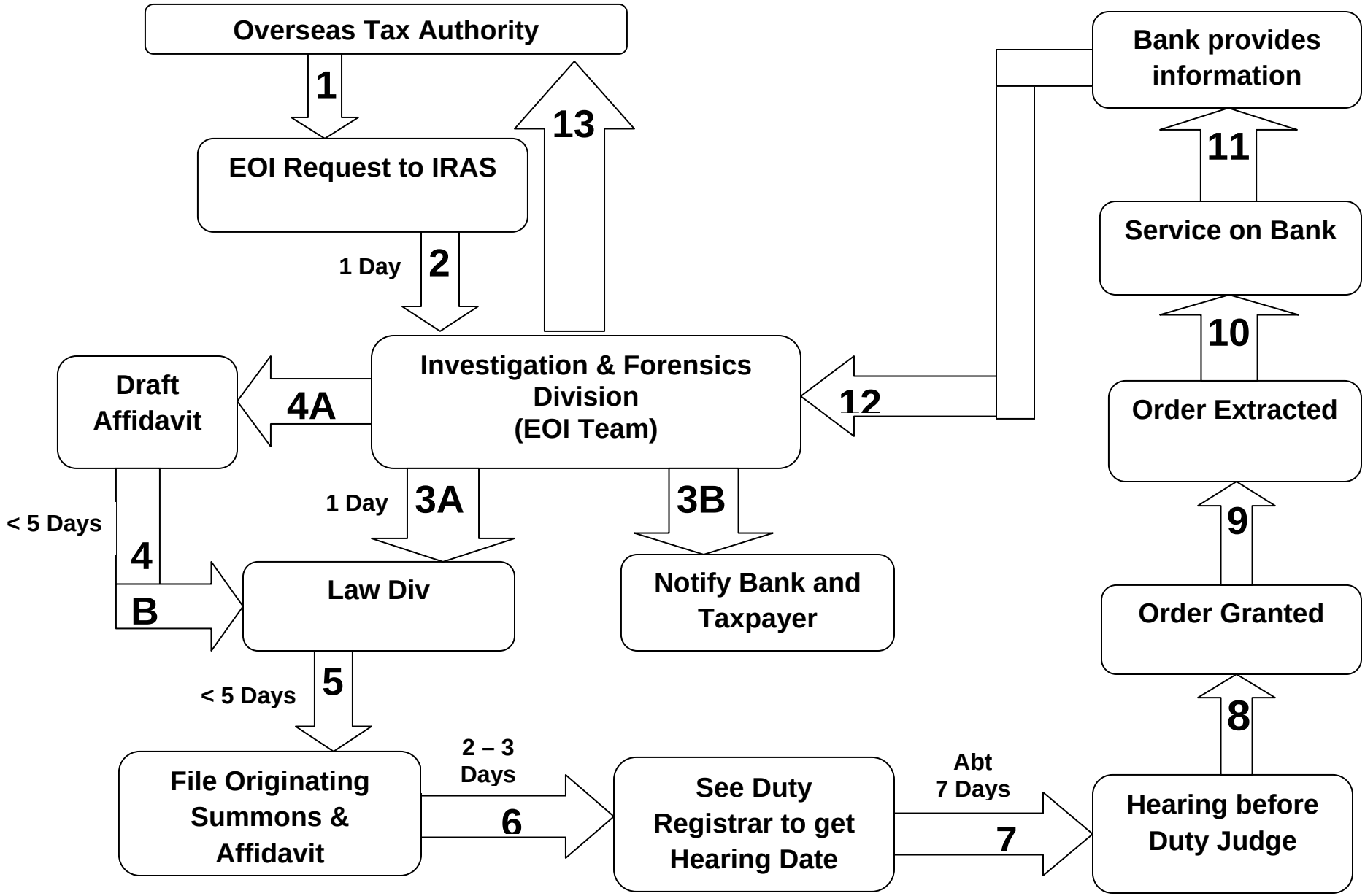

Overseas Tax Authority
1
EOI Request to IRAS
1 Day
2
13
Investigation & Forensics Division (EOI Team)
Draft Affidavit
4A
< 5 Days
4
B
1 Day
3A
3B
Law Div
Notify Bank and Taxpayer
< 5 Days
5
File Originating Summons & Affidavit
2 – 3 Days
6
See Duty Registrar to get Hearing Date
Abt 7 Days
7
Hearing before Duty Judge
8
Order Granted
9
Order Extracted
10
Service on Bank
11
Bank provides information
12

The 8th SGATAR JOINT TRAINING PROGRAM

International Tax Cooperation Agreements on Exchange of Information

Prepared by

Chinese Taipei

International Tax Cooperation Agreements on Exchange of Information

1. Addressing international evasion and avoidance through exchange of information

Due to globalization, taxpayers nowadays can easily obtain knowledge of domestic and international tax regimes of different jurisdictions. This knowledge can be utilized as part of a strategy to minimize the tax burden when taxpayers make decisions in allocating investments and in conducting business throughout the world. Therefore, in addressing international tax evasion and avoidance, the taxation information obtained from domestic sources can no longer be sufficient for the tax authorities. While taxpayers can operate globally relatively unconstrained by national borders, tax authorities must respect these borders in carrying out their functions[1]. The exchange of information with other jurisdictions is therefore an important vehicle which helps the tax authorities to expand their resources of taxation-related information, and exchange of information provisions offer a legal framework for cooperating across borders without violating the sovereignty of other jurisdictions or the rights of taxpayers.

The exchange of information may be performed based on three modes, bilateral agreements, multilateral agreements, and domestic laws.

[1] http://www.oecd.org/about/0,3347,en_2649_33767_1_1_1_1_1,00.html 2010/09/29

1.1. Bilateral Agreements

1.1.1. In Chinese Taipei, the Exchange of Information provisions in the Double Taxation Agreements (DTAs) are the main legal instruments serving as the legal basis for the exchange of information. In accordance with current legislative conditions, we are in a position to enter into comprehensive reciprocal bilateral DTAs with foreign governments, but we are not in a position to conclude Tax Information Exchange Agreements (TIEAs) with other jurisdictions.

1.1.2. As of September 2010, we have 18 DTAs which are in force. The list of our counterparties and the date of entry into force of each DTA can be found in the following table (in order of date of entry into force).

	Contracting Partners	Date of Entry into Force
1	Singapore	1 January 1982
2	Indonesia	1 January 1996
3	South Africa	12 September 1996
4	Australia	11 October 1996
5	New Zealand	5 December 1997
6	Vietnam	6 May 1998
7	Gambia	4 November 1998
8	Swaziland	9 February 1999
9	Malaysia	26 December 1999
10	Macedonia	9 June 1999
11	Netherlands	16 May 2001
12	UK	23 December 2002

13	Senegal	9 October 2004
14	Sweden	24 November 2004
15	Belgium	14 December 2005
16	Denmark	23 December 2005
17	Israel	24 December 2009
18	Paraguay	3 June 2010

1.1.3. In regard to the provisions for the Exchange of Information in each DTA, the persons and types of taxes covered by the Exchange of Information differ by DTA as demonstrated in the following table (DTA partner in alphabetical order).

EOI PROVISIONS IN DTAs & CONTRACTING PARTNERS		Persons Covered	
		Residents	Both Residents and Non-Residents
Taxes Covered	Income Tax	Australia, Gambia, Indonesia, Malaysia, Netherlands, Paraguay, Senegal, Singapore, South Africa, Vietnam	Israel, Macedonia, New Zealand, Swaziland, Sweden, UK
	Taxes of Every Kind		Belgium, Denmark

1.2. Multilateral Agreements

1.2.1. There are examples of multilateral agreements in respect of international cooperation in taxation matters that are in operation. One of the examples is the *Convention on Mutual Administrative Assistance in Tax Matters.* The Convention was developed jointly by the Council of Europe and the OECD and opened for signature by the member States of both organizations on 25 January 1988. A protocol which amends the Convention was opened for signature in May 2010. It is now also provides for the opening of the Convention to non-OECD and non-Council of Europe member States.

1.2.2. Due to reasons related to legislative matters, Chinese Taipei has not signed any multilateral agreements in tax matters.

1.3. Domestic Law

While some countries, such as Cayman Island and St. Kitts and Nevis, have enacted domestic legislation to allow for the exchange of information on a unilateral basis, Chinese Taipei can only exchange tax information with other jurisdictions according to the provisions of bilateral DTAs under our current legal framework.

2. Operational aspects involved in exchange of information

2.1. Best practices and common procedures

2.1.1. Inbound exchange of information

2.1.1.1. Automatic exchange of information

2.1.1.1.1. We report our experience in handling data in an instance where information was provided by a DTA partner under the automatic exchange of information. In this example, the information included data on income, capital gains, and income on properties derived from their country and paid to the recipients who claimed to be our residents. The data we received was encrypted in a CD ROM and we initially faced some difficulties in decrypting the data. After some communications with the information provider, the data provided under an automatic exchange of information would be decrypted with RAR software and converted into excel files by Data Processing Division staff first, and then provided to the information collectors.

2.1.1.1.2. About the use of the information, in case of a company's information, assuming that the name of the company has been provided only in roman script, the auditor will use a search engine to search for the name of the company in Chinese script. Having obtained the name of the company in Chinese script, the auditor will further search again in the tax administration's data base for a plausible Business Administration Number.

2.1.1.1.3. When auditors execute the auditing work with the exchanged data, some companies claim that they have never derived income from the countries which provided the information and that they do not possess the company for which the name is given in roman script, there was no sufficient evidence to prove that they hadn't declare the income

because of the plausible Business Administration Number. However, we have also found some cases where, based on the information exchanged, the auditor has eventually found that a certain company did not report the interest income it received from the Contracting Partner. As a result, it was requested to increase the declared amount of the interest income, pay higher amount of tax and was fined for tax evasion according to the Income Tax Law.

2.1.1.1.4. As for individuals, individuals within our tax jurisdiction were not required to declare their overseas income and pay tax on it before 2010, so we have no experience of the use of the exchange of information for individuals. However, for the tax years of and after 2010, according to the Income Basic Tax Act, individuals qualifying under certain conditions shall declare their overseas income and pay tax on it. The taxation data provided via the automatic exchange of information would be helpful to us in understanding the status of the information on overseas income of individuals in due course.

2.1.1.1.5. The next point for us to consider in the process is that we index a company's information in our tax administration database system mainly by the Business Administration Number (BAN) of the company and we index an individual's information by his or her Personal ID Number (IDN), but the information provided by our DTA partner did not include either the BAN of the corporation or any IDN of an individual. Instead, the information included only the name of an individual, the name of a company, and the address of the company, all in roman script; which led to problems with ease of identification. Therefore, it would be very useful for us if an automatic exchange of information could include a corporation's Business Administration Number and a Personal ID Number.

2.1.1.2. Exchange of information on request

2.1.1.2.1. Due to the unfamiliarity with the provisions of EOI and the language barrier, our auditors have few cases to request our DTA partners to provide data or auditing assistance.

2.1.1.2.2. In several months ago, we have an example where a domestic corporation claimed to have paid a huge amount of service fees to a foreign company in accordance with an agreement between them. Since there was not sufficient evidence to prove the execution of the services, we judged that the service fee was invented for the purpose of tax evasion, and thus rejected the company's tax declaration, citing the Income Tax Law and substantive taxation principles. At that time, we asked the DTA partner in which the recipient was residing to assist us by providing the related income accounts of the foreign company concerned for reference. And it was finally found that the foreign company had signed other back-to-back contracts with companies in other countries, which included companies in some countries labeled as tax havens.

2.1.1.2.3. In general, our procedure for the handling of a request for exchange of information can be described as follows.

- The Tax Administration poses a request for an exchange of information to the Competent Authority of the DTA, which is the Taxation Agency (TA).

- The TA determines whether the elements in the request are sufficient and whether the request complies with the provisions of the DTA.

- In that the elements are sufficient, the TA will send a letter of request to the Competent Authority of the DTA partner and wait for the information be exchanged according to the provisions of the DTA.

- After receiving the information from the Competent Authority of the DTA partner, the TA passes the information to the Tax Administration which made the request.

2.1.2. Outbound exchange of Information

2.1.2.1. Exchange of information on request

2.1.2.1.1. So far, we have not provided the exchange of tax information to our DTA partners on automatic basis. The exchange of information has only been done on request.

2.1.2.1.2. Generally speaking, the time required for collecting and providing information depends on the content of the data. Data which can be collected and provided in a short period of time includes declared information, audited information, balance sheet, the responsible person's name or shareholder's name which is stored in the tax authority's database, or information that can be accessed through a related government website such as company registration information, director and supervisor's name etc. Data which it will take longer to collect and provide includes information which is in needs of further confirmation or investigation, such as that in regard to the factuality of a transaction or of certain remittance arrangements, as such kind of

information may involve requesting documents from a company or a certified public accountant.

2.1.2.1.3. According to our domestic regulations, a corporation shall keep its accounts records for 10 years and keep the related evidence for 5 years. Currently our tax administrations retain tax information in their databases for 10 years.

2.1.2.1.4. In general, our procedures for the handling of a request from our DTA partners for exchange of information can be described as follows.

- The Taxation Agency, Minister of Finance (hereafter: TA) receives the request for an exchange of information from Competent Authority of the DTA partner.

- The TA determines whether the request complies with the provisions of the DTA. We have a checklist of “what to include in a request”, which principally follows the checklist provided in the OECD “Manual on the Implementation of Exchange of Information Provisions for Tax Purposes” approved by the OECD Committee on Fiscal Affairs on 23 January 2006.

- If the letter of request includes sufficient information according to the checklist, the TA will pass the request to Tax Administration in charge.

- The Tax Administration may provide information which is already contained in the tax databases. If the information is not available in the tax files, the Tax Administration may conduct investigations or examination to seek to obtain the information from the taxpayers or third parties.

- After gathering the requested information, the Tax Administration then passes the information to the TA.

- Then TA will send the information to the Competent Authority of the DTA partner according to the EOI provisions of the DTA.

2.2. Technology required

2.2.1. Our tax administration is very concerned about data security. To ensure data security, the tax administration can only access the database via intranet. Auditors cannot transfer tax information onto a CD ROM or install any software by themselves. Each auditor is equipped with a desk top computer, and it is prohibited to plug a USB into the computer. At present, about 8-10 people in one group share access to the internet via a computer which is segregated from the intranet, and which provides no access to the database of the tax administration.

2.2.2. Under the existing system, we provide information to be exchanged via letter or CD-ROM by post. The information in the CD-ROM is placed there by Data Processing Division staff using encryption/decryption software.

2.3. Assistance

2.3.1. Pursuant to current auditing procedures, the taxpayers will normally submit contracts or related remittances as evidence of international trade, either cost or expenses, for examination by auditors, and, if a concerned foreign tax authority can help to check details in cases where there are doubts about the factuality of a transaction, e.g., whether a foreign

company has declared the income or not or whether there is any arrangement that violates the normal business operation rules, the number of cases of international tax evasion could be much more minimized.

2.3.2. In our auditing practice of the international transactions cases, the most common details which we need to confirm are arrangements for the payment of foreign commissions. The taxpayers will normally present commission agreements and evidence of remittance for the auditor's reference. But in the case that there is no DTA in place with a provision for the exchange of information, it will be difficult for the auditors to investigate if the relevant foreign company or individual has declared their income or not, or if the foreign company is legally registered, or if the board of directors or shareholders of the foreign company are related to the tax payer in a territory.

2.3.3. Moreover, in case of the loss of the foreign default payment, we can easily confirm whether the foreign company has declared the income or not if that default payment has been settled by reconciliation through the exchange of information, which will be very helpful to ensure the collection of tax revenue.

2.3.4. To this date, we have only asked our DTA partners to provide relevant information in a very limited number of cases. In addition, the unfamiliarity with the provisions of EOI and the needs of translating the related auditing data into English increase the load on the auditors and constitute a challenge.

3. Future of international tax cooperation

3.1. Effectiveness of international agreements

3.1.1. Effective international tax cooperation will enhance the capacity of tax authorities in determining appropriate tax amounts and ensure the proper application and enforcement of domestic laws and DTAs. It will also prevent cross-border double taxation, and also help to combat tax avoidance and evasion.

3.1.2. The effectiveness of international agreements, in particular in regard to the exchange of information, can be quantified by the tax supplement amount which is paid by the taxpayers based on investigation and utilization of the information exchanged by DTA partners. Feedback from the DTA partners in regard to the utilization of the information exchanged would be helpful in measuring the effectiveness of the exchange of information.

3.2. Problems and emerging concerns

3.2.1. It is a big challenge to tax administrations to address international tax evasion and avoidance in the globalized economy in particular when the tax administration system was initially designed for local economic activities. The utilization of the exchange of information with other governments is a new vehicle for our tax authorities in dealing with cross-border tax evasion cases.

3.2.2. In 2010, we received more letters of request for the exchange of information than in any preceding years. We have noted some problems in regard to the content of certain of the letters. For example, that there may not be enough details included in a letter for us to establish why it is essential for us to conduct an investigation, or the requesting agency may not be the Competent Authority of the DTA, or even that the requesting agency may be from a jurisdiction with which we do not have a DTA.

3.2.3. There are some identification difficulties when we receive the automatic exchange of information from our DTA partners because of the language barrier.

3.3. Possible solutions

3.3.1. It is essential to have well-trained staff to operate the exchange of information in an effective manner. A training program which is designed for the enhancement of investigation skill and provides an introduction of the obligations and rights in regard to provisions on the exchange of information provisions in the DTAs is needed.

3.3.2 Currently we need to establish guidelines to set-up a standard process for the exchange of information, and we hope to learn from the experience of SGATAR members which are more advanced in this field.

3.3.3. It would be very helpful to us if an automatic exchange of information were to include the corporation’s Business Administration Number and the individual’s Personal ID Number or passport number in the data.

3.3.4. As of September 2010, we only have 18 DTAs in force. We intend to expend our DTA network to enhance the legal basis of our international cooperation for the purposes of eliminating double taxation and combating cross-border tax avoidance and evasion.

8th SGATAR
Joint Training Program

International Tax Cooperation Agreements on Exchange of Information

Working Paper

Prepared By: THAILAND

International Tax Cooperation Agreements on Exchange of Information

1. Addressing international evasion and avoidance through exchange of information

In keeping pace with the increased internationalization of business and the development of sophisticated techniques of tax avoidance, tax evasion and transfer pricing cases have forced tax administrators of different nations to strengthen its examinations of international transactions. However, it is extremely difficult to locate the data relevant to the international transactions and there is no question that Multi National Enterprises exist in foreign countries. Thus, under this circumstance, the co-operation among nations has developed a major role in the form of exchange of information under Double Taxation Agreements (DTAs). Most DTAs include provisions for the exchange of information between treaty partners. Thailand has concluded 53 DTAs, all of which contain provisions of the exchange of information.

1.1 Tax Cooperation Agreement

1.1.1 Bilateral Agreements

Thailand will exchange information only under the provisions of the DTA. In general Thailand's DTAs follow almost the same line as the UN Model Double Taxation Convention on Income and Capital (2001) (UN Model DTA) which covers the exchange of information with the aim to ensure the appropriate application of the provisions of the DTA or of the treaty partners' domestic laws with respect to taxes under the scope of the DTA even if the

information is not utilized for the application of the DTA. The present Thai Model DTA (see attached Article 26 of the Thai Model DTA), restricts the exchange of information to those concerning the persons, taxes, and use of information for tax purpose compared to the no-restriction format of the OECD Model Double Taxation Convention on Income and Capital (2008) (OECD Model Convention).

In other words, Thailand's DTAs covers the exchange of information only on residents of Thailand or of its treaty partner and the income taxes, which include the Personal Income Tax, the Corporate Income Tax, and the Petroleum Income Tax. Consequently, they do not permit the treaty partners to exchange information in relation to persons not covered by DTA and other indirect taxes such as the Value Added Tax. Nevertheless, in practice, this does not mean that information about a person or tax not covered by the DTA will not be exchanged. If we obtain such information in accordance with our tax law, it will be supplied to the treaty partner for tax purpose in order to secure the application of DTA or of the domestic laws of the treaty partner.

The basic idea for implementation of exchange of information "as is necessary" could range from limiting information exchange to that which is necessary for carrying out the provisions of DTA to the broadest definition which covers information as is necessary for the prevention of tax avoidance or the tax administration provisions. Therefore, treaty partners should endeavour to develop an understanding on what can be obtained from each other through the normal way of administration. They should bear in mind that it is crucial for them to explore the limitations of reciprocity and protected classes of information.

1.1.2 Domestic Law

There is only one provision in Thailand's domestic tax law which deals with official secrecy. Section 10 of the Revenue Code of Thailand states

that " an officer who has by virtue of his office under this Title acquired information on the business of a taxpayer or of any other person concerned shall not divulge or otherwise communicate such information to any person, unless authorized to do so by law". Therefore, this section limits the access to such information to those revenue officials who are involved in the assessment or collection of tax. Nevertheless, the information may be disclosed to courts even if it has nothing to do with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxation if it is authorized to do so by law. The information exchange significance is that it facilitates the supply of information, which was then not obtainable under previously existing laws. There is also a specific article in DTAs stipulating the conditions for Exchange of Information. However Thailand has no TIEAs been under negotiation yet.

The provision of a DTA imposes on the Contracting States the obligation to "treat any information received as secret in the same manner as information obtained under the domestic laws and to disclose the information only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Convention". Moreover, the Article on exchange of information of both UN Model convention and OECD Model convention allow the limitations so that the requested State may not provide information under the following conditions:

(a) " to carry out administrative measures at variance with the laws and administrative practice",

(b) " to supply information which is not obtainable under the laws or in the normal course of administration", and

(c) " to supply information which would disclose any

trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy".

Thus, despite the existence of the DTA the revenue authorities must still observe their own rules of secrecy which effectively can narrow down the scope for information exchange.

2. Operational aspects involved in exchange of information

2.1 Practice of Exchange of Information

Thailand practices the three kinds of Exchange of Information; 1) EoI on request, 2) spontaneous EoI, and 3) automatic EoI. The exchange of information takes place when the requesting State asks the other State to supply the information. It is obvious that the revenue authority of requesting State must use all efforts and all means of information collection available within the domestic legal framework before asking for help from its counterpart in the other Contracting State.

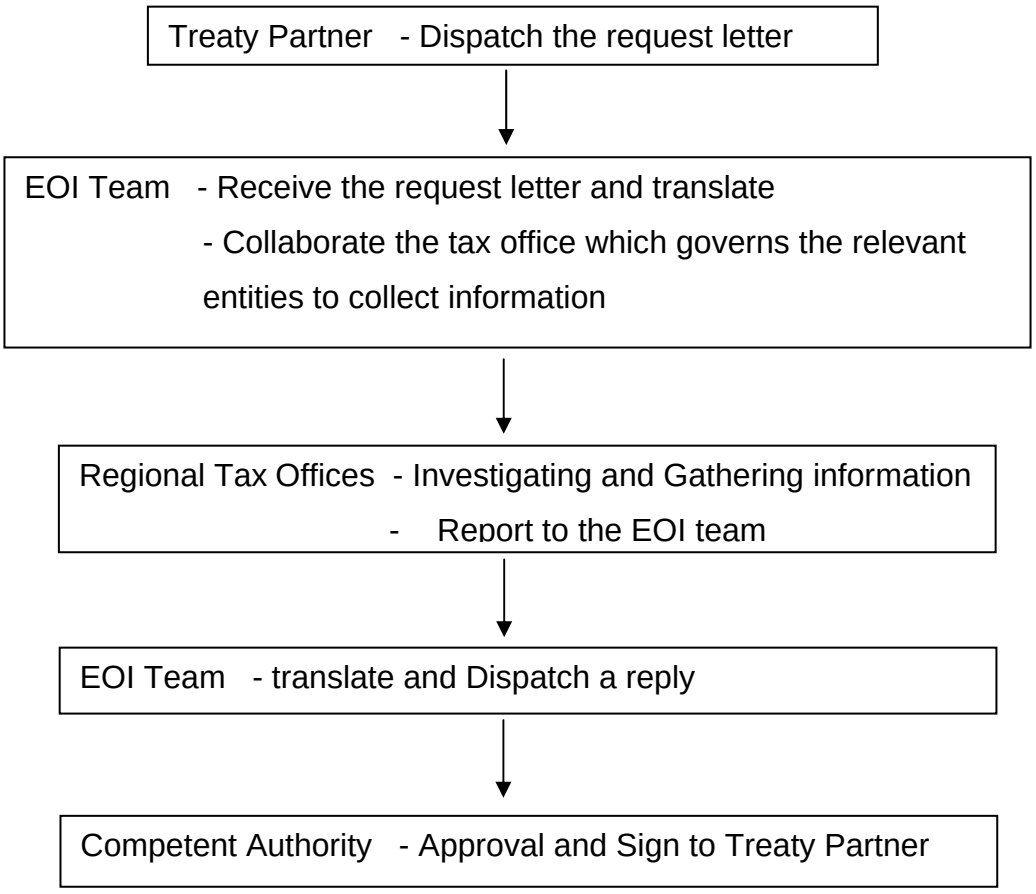
Due to the internationalization of transactions, exchange of information will be beneficial if there is a reciprocal flow of information between the two countries. However, there may be cases where the requested State has may decline to submit the information requested by the requesting State, due to the restrictive nature of its domestic laws or its unwillingness to obtain information. Therefore, it follows that information exchange will be justified only by a degree of reciprocity depending on the capabilities in supplying data collection which vary from country to country.

2.2 Procedures of Exchange of Information

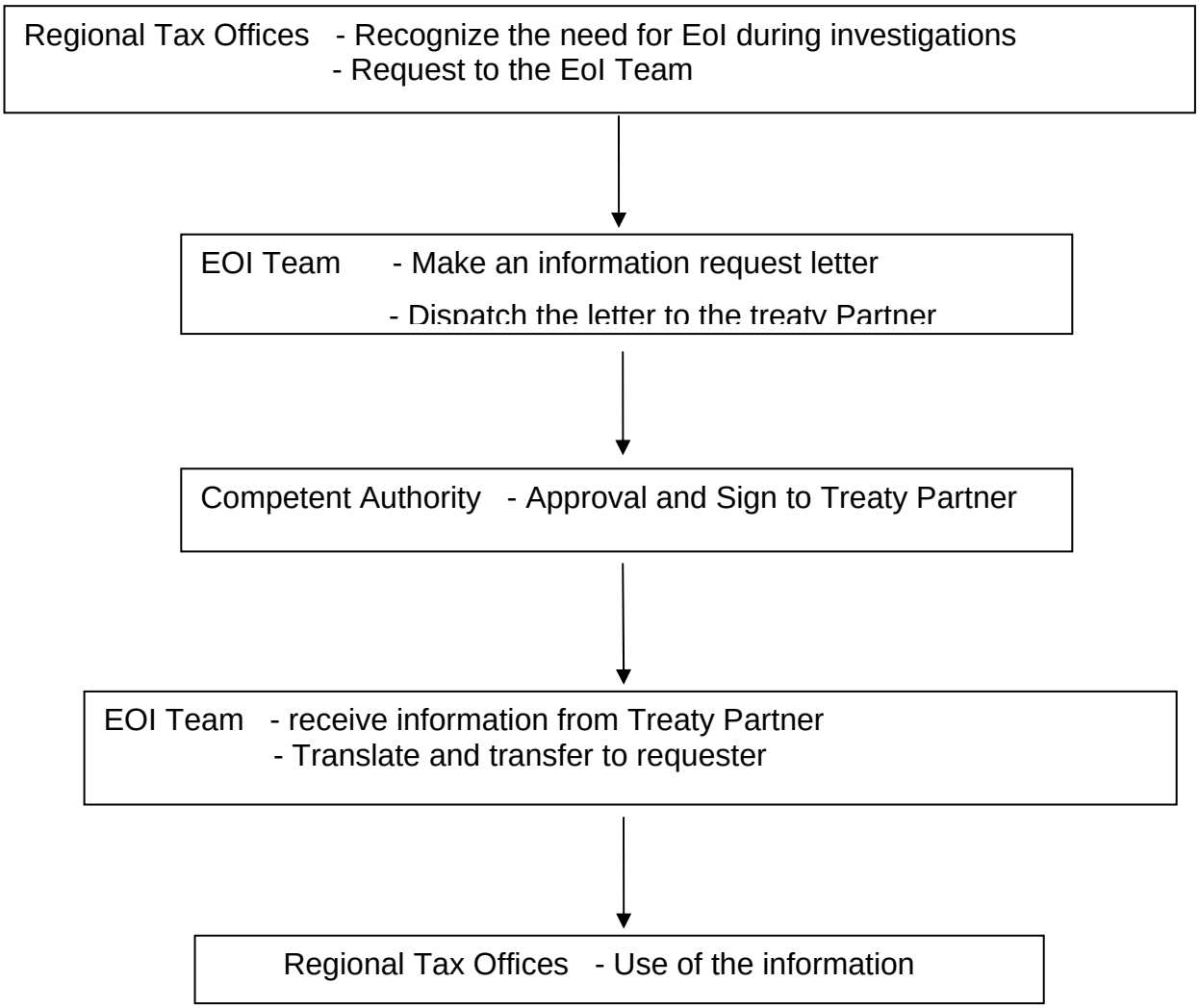
The exchange of information team of Thailand comprising five officials was established in International Section, the Bureau of Tax Policy and Planning of the Revenue Department of Thailand(RD), responsible for the negotiation, administration and implementation of DTAs. The competent authority is the Director-General of RD or his authorized representative. The Deputy Director is currently the authorized representatives for Exchange of Information.

Procedures of Exchange of Information requested by and request to the other treaty party are as follows:

a) <u>EoI requested by</u>;



b) <u>EoI request to</u>;



Procedures take four or five months on the average

2.3 Monitoring and Reporting

Every revenue authority has the obligation to maintain the confidentiality and interest of its taxpayers which is relevant to domestic laws of each country. The disclosure of certain types of information about taxpayers is

prohibited and the DTA allows for exclusion of certain types of information from the exchange.

However, such limitations should not be interpreted too broadly. Both UN Model Convention and OECD Model Convention also expressly exclude or limit the exchange of information which disclose trade, business, industrial, commercial or professional secret or trade process, or information since, the disclosure would be contrary to public policy (ordre public). These limitations in the models are open to treaty partners to interpret at their discretion even though the onus is to exhaust every possible means to obtain information requested by the treaty partner.

Therefore even though a Contracting State is not obliged to supply the information as above, it may decide to do so. A Contracting State should carefully weigh if the interests and secrets of the taxpayer really justify the request for information. Otherwise it is clear that an inappropriate interpretation may result in the exchange of information being an ineffective tool to promote bilateral tax cooperation.

3. Future of international tax cooperation

3.1 Effectiveness of International agreement

Effective Exchange of Information between tax authorities will enhance tax authorities' capacity to determine appropriate amount of tax on domestic and foreign income. The international tax cooperations can help detect taxpayers' non-compliant activities and result in deterring their attempts to

evade taxes in advance. Therefore, effective EoI will be useful to induce taxpayers' voluntary tax compliance and protect base securely.

It should be noted that information exchange is undoubtedly a valuable tool for tax administrators. Thailand believe that the purpose of the information exchange under Article 26 of DTA is to help treaty partners in order to prevent tax avoidance and evasion arising from cross-border economic activities.

3.2 Problems and emerging concerns

There are problems in connection with the speed of response and business secrecy.

3.2.1 Speed of response

The speed of response by the requested State depends largely on whether or not the revenue authority already has at hand the information sought after by its counterpart. If not, time would be needed for seeking the information desired. In the case of Thailand response can be made quickly if the requested information is contained within the tax returns and the relating documents needed for tax returns filing. However, if a special tax audit on a particular taxpayer is found to be necessary, the provision of information will be unavoidably time consuming. Information sometimes can not be obtained in the normal course of tax administration due to the unknown address of requested taxpayer in the requested state or the not up to date information supplied by the requesting State.

3.2.2 Business secret

All of Thailand's DTAs expressly exclude the exchange of such information if it is a business secret. The provision's objective is to protect of the interest of taxpayers. However, the provision would not be of much use if it is taken in too wide a sense. Thus, treaty partners are given a certain degree of discretion to refuse to supply the requested information if it is considered to be business secret.

In practice, Thailand has rarely encountered such a problem. The information that it requests and that is requested by its partners is mostly for the purpose of verifying the reported income and expenses. Furthermore, requests are made to reconfirm the physical presence of a person such as recipient or payer of income or shareholder.

3.2.3 Requesting information from treaty partners

Most of reasons behind the problems encountered by the Revenue Department of Thailand in this matter come from the lack of knowledge by the tax officials about what type of information that can be acquired to assist their work. It happens as a result of internal procedures of tax administration that rely upon with only occasional requests for information being made to other tax administrations. Moreover, shortages of tax officials and low degree of automation have forced Thai tax administration to concentrate more on improving domestic tax data collection rather than utilising information reporting from foreign tax administration. Thus, if the internal collection and use of data can be improved to a reasonable level, the Revenue Department would be in the position to look for this additional source of information from treaty partners.

3.3 Possible solutions

A country may provide different solutions for each of its treaty partners with respect to information exchange. This depends on the variance between domestic laws, limitations and position regarding the exchange of information of the two Contracting States. Treaty partners have to overcome these unavoidable obstacles before such a tool can be put into good use. Therefore, the main problem is how to smooth out these differences. To do this, revenue authorities of treaty partners must work closely together with each other in order to understand about each other's capabilities as well as limitations regarding information exchange.

It seems essential for the concerned tax authorities to begin with some guideline to work towards an ideal design of the information exchange arrangement that is acceptable to both Contracting States. The guideline, should deal with the general concepts such as reciprocity, secrecy, limitation in order to set the scope for information exchange. This would ensure that treaty partners would share the same understanding and move in the same direction in order to come up with a workable solution. From Thailand's point of view, it is realized that the information exchange arrangement between Thailand and its treaty partners will play an increasingly important role in the stream of globalization.

Thai Model DTA restricts the exchange of information to the persons, taxes, and using information for tax purpose with respect to DTA. It seems the no-restriction format of the OECD Model Convention may be too broad for the scope of information exchange as the power may not be in the hands of tax administrators. Nevertheless, in practice if we obtain that information in accordance with the proceeding of our tax law, we will definitely exchange that information to treaty partners. We also believe that we need to make the utilization of information technology as a priority to enhance the efficiency of

information facilities. Training on how to use such a potential tool effectively must be given to our officers.

In conclusion, each country should collaborate with one other to exchange and explore the domestic laws, limitations and position regarding the exchange of information. Once mutual understanding is achieved, the suitable solution on how to exchange information can take place. Otherwise such a useful tool (exchange of information) under the DTA cannot be utilized effectively.

(Attachment)

THAI MODEL DTA

Article 26
EXCHANGE OF INFORMATION

1 The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation :

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(a) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

Vietnam Paper
INTERNATIONAL TAX COOPERATION AGREEMENTS ON INFORMATION EXCHANGE

Vietnam has signed tax treaties (DTA) with more than 61 countries and territories in the world. All the agreements have articles on information exchange that follow the principles provided in the Article 26 of the OECD Model or UN Model.

I. Solutions via information exchange addressing international tax evasion and avoidance

1. General principles regarding countries' taxing rights

In international economic activities, the existence of different taxation systems among countries would lead to the consequence that, a taxpayer's income may be taxed in two different countries. This is because, most of the countries impose their taxing rights based on the following principles:

- Residents: who are identified having residence status in a country, must pay tax on all income sources received, regardless of the places where the income is generated;

- Source of income: non-resident in a country, must pay tax on the incomes generated in that country;

- Resident status or source of income is specified differently by regulations of each country and in many cases, a country or an individual can be a resident of two or more countries. Therefore, the double taxation can be occurred in the following cases:

+ Two or more countries impose tax on global income of the same taxpayer when this taxpayer is identified as resident of those countries;

+ Two or more countries together define a taxpayer's income as generated in their respective jurisdictions and together impose tax on that income;

+ A company or an individual who are resident of a country, but having income generated in another country, thus, they may have obligation to both pay tax (for global income) in the country where they are residing, and to pay tax for income generated in the country where they are not residents. .

In order to solve the double taxation for all above mentioned situations, regularly, a bilateral agreement for avoidance of double taxation prevention of fiscal evasion with respect to taxes on income and on capital, the content of which is mainly focused on the division of taxing rights of each country regarding the concerning incomes of the persons. covered.

2. The objectives of the DTAs

- To clearly specify the taxing right of the country where the income is generated with respect to some types of income of the non-resident;

- To clearly specify the entity and the types of income to be exempted;

- To limit the tax rate imposed on some types of income of non-resident in countries where the income is generated (for example, if the tax rate is higher than that specified in the agreement, according to domestic law, the tax rate stated in the agreement will be applied);

- To specify the methods for avoidance of double taxation;

- To specify the requirement on transparency of income sources, aiming at prevention of tax evasion.

- To administratively support in verifying the actual information and to mutually strengthen information exchange between the treaty partners, in order to assist the creation of the basis for enforcement of domestic tax laws in the respective countries with regard to the taxes covered by the DTA.;

II- Regulations on DTA information exchange in Vietnam

Articles on information exchange in Vietnam's DTAs are basically in compliance to OECD Model, excluding new paragraphs 4 and 5 of Articles 26. However, due to Vietnamese conditions, normally only information exchange of tax types specified in the agreement are accepted, but not all the taxes as recently required by the OECD's Model. For example, in the DTA of Vietnam with a country, it is stated that: "The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic laws of the Contracting States concerning taxes covered by the Agreement insofar as the taxation thereunder is not contrary to the Agreement." (Article 26. Information Exchange).

Vietnam is non-OECD member, thus it is not obliged to implement the automatic information exchange mechanism, but only to carry out the information exchange on request.

The processing of information exchange in accordance to the DTA in Vietnam is centralized at the General Department of Taxation (GDT). Accordingly, the GDT– with the position as the Ministry of Finance authorized representative –carries out the information exchange procedures with DTA partners. Local tax authorities are not authorized to do this directly with DTA partners.

1 Regulations on information exchange

Regulations on information exchange for DTA purposes by the GDT are organized in accordance to the form information exchange:

- Regulation on providing exchange of information on request from DTA partners;

- Regulations on requesting exchange of information from DTA partners; and

- Regulations on processing of information exchange provided automatically by partners.

Details as follows:

1.1. Regulation on providing exchange of information on request from DTA partners

- When receiving request for exchange of information from partners, Department of International Taxation of the GDT reports to the Deputy Director General in charge of international taxation on the following contents:

+ Identification of the related taxpayers in Vietnam, nature of the transaction involved, possibility of providing the requested information by GDT;

+ Draft document sending to local tax offices to request verification, examination and providing of the information which Vietnam may supply.

- Monitoring and supervising the collection of information processed by local tax offices.

- When receiving the information from local tax offices, the following steps will be carried out by Department of International Taxation at the GDT:

+ Summarize the information to be suitable and appropriate with the requests from partners;

+ Translate into English to provide the information to the partners;

+ Report to Deputy Director General in charge of international taxion for approval and send official letter in response to the partner's request.

1.2. Regulations on requesting exchange of information from DTA partners: When receiving the request from local tax offices or from other

departments of the GDT regarding information from DTA partners, Department of International Taxation of GDT will carry out the following steps:

- Report to the Deputy Director General in charge of international taxation the following details:

The reasonability of information which is requested to be provided by DTA partners (in accordance with DTA provisions);

+ Draft official letter (in English) to request information from DTA partners.

To follow-up the information to be provided by DTA partners.

- When receiving the requested information from partners, the Department of International Taxation of GDT will do the following tasks:

- Report to the Deputy Director General in charge of international taxation the following details:

+ Analyzed results from the information supplied by partners (whether it is suitable or unsuitable with the Vietnamese requests);

+ To send received information to the concerned local tax offices.

- Request local tax offices to report on the results of using the supplied information from DTA partners.

1.3. Regulations on processing of information exchange provided automatically by partners:

When receiving information which is automatically supplied by partners, Department of International Taxation at the GDT will do following tasks:

- To report to the Deputy Director General in charge of international tax the following details:

+ The nature of the supplied information
+ Identify the taxpayers relating to the supplied information (by searching the taxpayer data base of the GDT)
+ Propose solutions for using the supplied information:

. Send to the related local tax offices for handling.

. Request local tax offices to report on the results of handling the information.

2. Overview of information exchanges in recent period

Due to the fact of information exchange carrying out by requested cases only, the amount of information exchanges with DAT partners is not many. However, in 03 recent years (from 2008 – 2010), there is an increasing tendency of information exchange with DTA partners.

2.1. Regarding the request for information exchange from DTA partners :

In 2008, there is no request from Vietnam for information exchange from DTA partners, but in 2009, the first request for information exchange was issued (e.g. with Singapore). Also, in 2010, 07 partners are requested by Vietnam for information exchange. Information requested is focused on:

- To specify the income received by foreign individuals who are living in Vietnam.
- To specify the price level of products of Vietnam companies to be exported to companies, which are resident of the DTA partners.

Among the above-mentioned information to be recommended to supply, up to now, only information supplied by South Korea and Japan has been received and sent to Local tax offices for handling.

2.2. Regarding information exchange request by DTA partners:

Like the tendency of Vietnam requests for information exchange from DTA partners, in the past 3 years, the requests for information exchange by DTA partners have been increasing. In 2008, if only one request for information supply was received (from Ukraine), in 2009, there were 13 requests and in the first 10 months of 2010 there were 11 requests received by GDT. The DTA partners having more requests for information exchange are Japan (occupies

about 50%), then, next to Poland, China and some other countries located in the former Eastern Europe.

Regarding above-mentioned information exchange, in principle, it is provided fully by Vietnam, except for some cases of the information, which is incompatible to the provisions in the DTA and/or to the domestic tax laws and regulations of Vietnam. As for those cases, notice letters showing the reasons would have been sent.

2.3. Regarding the processing of information automatically supplied by DTA partners:

Although, Vietnam is non-OECD member, recently we has received information on income and tax payment of Vietnam residents generated from sources in DTA partners. They are from Australia, Finland, Denmark (previously Japan). The information is mainly related to individuals.

As receiving the above information, it was processed seriously by the GDT, not only to ensure for the confidential regulations and information application as required by the agreement, but also to utilize that information on the tax administration in an effective way by notifying and guidance to local tax offices on the examination and treatment of the related taxpayers.

III. Some issues on cooperation relating to information exchange

1. Effective implementation method

- Establishing a basic legal foundation for the cooperation, information exchange and mutual administrative supports among countries suitable to their respective capability and to be appropriate with domestic laws of each partner.

- Countries to be active in supplying necessary information relating to the breach of tax laws and in principle of complying regulations for ensurance of the confidentiality of information.

- Strengthen audit activities and measures in order to timely find out the false statement, noncompliance and tax evasions.

- Improving the cooperative relations among countries in respect of information exchange.

- Information exchanged among countries must be accurate, timely and confidential as regulated in the DTA.

- Information exchange must be stored systematically on the tax authorities database, ensuring for timely processing and supply.

- Enhance the sharing of experience in fields of information exchange among countries.

2. Application of information technology

- Information is managed in an integrated system basing on the application of modern information technology, ensuring for timely supply and processing when needed.

- Information system must be updated timely, regularly and continuously in a integrated information data system and accessible by local Tax offices.

3. Supporting measures

- To apply the modern information technology to archive the information;

- To apply the advanced, modern software programs for management and supply of information;

- Inspectors can support and assist mutually and coordinate with one another in investigating and verification of requests.

IV. Future of International Cooperation

1. Effectiveness of the agreements

- To prevent tax evasion;

- To ensure for the fairness and equality in the enforcement of tax laws and compliance of taxpayers;

- To create fair competitive business environment;

- To contribute to the completion and improvement on tax management effectiveness in each country;

- To strengthen the cooperation relationship of each country.

2. New interested issues

One of the most interested issue of many countries in international taxation presently is transfer pricing (TP):

TP can be understood to be the implementation of pricing policy for goods and services transferred among members in a corporation or related parties, but not to follow the marker price – the arm-length principles, in order to minimize the tax payable worldwide by multinational corporations. If the price can be increased or reduced in transactions carried out among members in the corporation, it is because of 03 reasons as follows:

Firstly, the business discretion by the related parties.

Secondly, the difference of transaction price carried out among related partners in the corporation can produce the same overall profitability.

Thirdly, the decision of transaction price policy among related partners can change the total of tax obligations in multinational corporations, economic groups.

The master and application of different tax rules carried out by economic entities among countries, even the tax incentives in that country to enjoy benefits seem to be completely legal, but imperceptibly, the TP has caused the inequality due to the incorrect determination of tax obligation, leading to the inequality on benefits, creating gaps in competitive edge.

3. Recommendations

- To continue improving and enhance cooperation among tax authorities via information exchange;

- To build up data and information base sufficiently and accurately, ensuring for timely supply;

- To regularly exchange and share experience in order to strengthen tax administration in each country.