



**PRACTICAL PROTECTION OF TAXPAYERS IN THE  
EXCHANGE OF INFORMATION PROCESS**

SEMINAR D

1 SEPTEMBER 2015



# THE PANEL

- **Chair**

- Jennifer Roeleveld (South Africa)

- **General Reporter (Subject 2)**

- Philip Baker QC

- **The Secretary**

- Craig West (South Africa)

- **Intervention from**

- Alan Granwell (United States)

- **The Panel**

- Monica Bhatia (OECD Global Forum)
- Ernst Czakert (Germany)
- Addy Mazz (Uruguay)
- Xavier Oberson (Switzerland)

# Agenda

## Part A

1. Introduction
2. An initial erosion of taxpayer rights or simply good administrative practice? – The Sabou case
3. The steady (but rapid) erosion of taxpayer rights
4. The passive-aggressive push-back by States
5. Justifiable push-back by States or simply obstructive behaviour?
6. Concluding remarks on Part A

## Part B

1. Introduction to issues concerning automatic exchange of information
2. Intervention on US FATCA related experiences
3. New trends – The German Protocols
4. Other practical issues

## Part C

1. Quick-fire round
2. The immediate future – the impact of multilateral instruments

## Conclusion and thanks

## **+ A1. Introduction**

Section 9 – General Report Subject 2



## GR: Subject 2 – Cross border procedures Eol

- Recall: The focus of the General Report is on
  - a) best practice in practical protection of taxpayers' rights; and
  - b) minimum standards (derived from state practice)
- Recall: additional material on confidentiality (part 3) and on audits (part 4) – provide background to Eol



## GR: Subject 2 – Cross border procedures EoI

- In general, less attention to cross-border EoI than to domestic issues BUT some examples of good practice
- Considerations of taxpayer protection may differ
  - for requested and requesting State
  - for EoIR (notifying taxpayer; scope of exchange) and for AEoI (data protection)
  - Where data a) already held; b) has to be sought from taxpayer; c) has to be sought from third party



## GR: Subject 2 – Cross border procedures EoI

- EoIR: Right to be informed on gathering data and to challenge the EoIR
  - Right to be informed - 7/41; 9/41 if 3<sup>rd</sup> parties
  - Who should inform – requesting and/or requested state
  - Should be two-way tool – benefits taxpayer
  - Obstructive behavior vs proportionate measures
    - Can be dealt with by legislative changes
  - Approach based on stage of investigation – administrative investigation vs litigation stage (see below)



## GR: Subject 2 – Cross border procedures EoI

- Disturbing development: Removal of right to be informed under peer pressure from OECD Forum on Transparency – Austria, Liechtenstein, the Netherlands, Portugal and Switzerland
- Reflects very badly on OECD





## GR: Subject 2 – Cross border procedures EoI

- Additional safeguards noted in some states:
  - Provisions in DTCs – e.g. Germany;
  - Requests based on illegally obtained information
  - Guarantees from recipient state – Finland
- Minimum standard:
  - “minimum standard that a state should not receive information under EoIR if that state is unable to provide independent, verifiable evidence that it observes high standards of data protection. That, as we suggest elsewhere, needs to be independently audited.”

## **+ A2. An initial erosion of taxpayer rights of good administrative practice?**

The Sabou case

CZ: ECJ, 22 Oct. 2013, Case C-276/12, Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu, ECJ Case Law IBFD



## The *Sabou* case: C-276/12: Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu

### *Facts of the case*

- Taxpayer was footballer – for 2004 sought to deduct various payments in connection with possible transfers
- Czech tax authorities sought information under Directive 77/799 from Spain, France, the UK
- Czech tax authorities sought information about invoices from Hungary



## C-276/12: Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu

### *Abbreviated legal issues (relevant here)*

1. Did EU Law (via Directive) or domestic law confer right to be informed and to take part in formulating request (NB Prior to Charter of Fundamental Rights)
2. Are Member States required to inform taxpayer before witnesses are to be examined and can taxpayer take part in examination (could under domestic law)
3. May information received by requested State be questioned or challenged by the taxpayer? Must requested state provide minimum details of how information was obtained?



## C-276/12: Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu

### *Response of the CJEU*

1. Directive facilitated exchange – did not impose obligations on Member States. Nor did right of defence as process took place at **investigation stage**. No right under EU law to be informed or take part in formulating questions
2. Directive does not govern the taxpayer's challenge to information or impose obligations of minimum content of response



## The Sabou Case – An acceptable decision

- Decision is acceptable
- Member State must protect the taxpayers' rights
- EoI is fact finding
- Advocate General Kokott supported:
  - EU law does not give a taxpayer the right to be notified in advance of or formulate the request.
  - National law can provide such rights
  - No restriction on questioning correctness of the information supplied



## The *Sabou* case: A missed opportunity

- This case raised an issue from the perspective of the requesting country
- Claim: request for information did not comply with the right to be informed in terms of Czech law
- Court decision: No infringement of Directive, since the Directive gives no rights to taxpayers, but only allows tax authorities to exchange information on a mutual basis



## The *Sabou* case: A missed opportunity

- What was the opportunity?
  - Request for a test of compatibility of EU Law with protection of fundamental rights.
- Outcome:
  - Missed opportunity: Czech national court only asked on the compatibility of the Directive and not the protection of fundamental rights
- Questions remaining:
  - How is defence possible if taxpayer has neither access to nor ability to obtain the same information as the revenue authorities?
  - Principle of Equality for fair trial in question?



## The *Sabou* Case – A criticism

1. Information exchange:
  - Fact gathering OR
  - Independent administrative procedure
2. CJEU – Fact gathering until decision taken at end of process?
3. CJEU – EU Law does not exclude domestic participation rights
4. Comment: Rights should be granted DURING the process to enhance substantive analysis by requested State

## **+ A3. The steady (but rapid?) erosion of taxpayer rights**

External pressures!



## Erosion of rights – Uruguayan example

- Constitution ensures the right to fair trial in tax matters
- Provides a timely and effective protection for taxpayers
- Right includes:
  - prior notification for information to be exchanged with other States;
  - opportunity to present the taxpayers' view;
  - opportunity to appeal against the administrative act (decision).
- Administrative Court (TCA) obliged to quash all administrative acts not notified to addressees



## The developments in Uruguay between 2011 and 2013

2011: Taxpayers provided participation rights in EoI

2013: Erosion of rights (post Global Forum peer review)

- Taxpayer access to info limited to five days before the information transmitted
- Taxpayer objections limited to clear violations of Constitutional and certain internal principles including the due process of law.
- Taxpayer only keeps right of appeal, but only an *ex post* protection for damages
- Infringement of general administrative rules and Constitution?

## + The search for best practices: some issues

**Accepted:** Global tax transparency requires effective EoI

**BUT**

- Is the “global standard” a global development?
- Who provides the legitimacy to impose such standards and have them reviewed by tax authorities of other countries?
- What is the quality of a standard that requires compromise of the effective protection of its fundamental rights?
- Who checks whether such standards violate the basic rights of taxpayers?
- It is not just about transparency, but also about protection of basic rights of taxpayers, which are human rights!
- Standard should preserve a basic *ex ante* dialogue with the taxpayers

## + Protection of taxpayer's rights

- The international standard of the Global Forum recognises the protection of taxpayer's rights (under element B.2 “Notification requirements and rights and safeguards”)
- However, rights and safeguards are not absolute, the standard specifies that rights and safeguards should be compatible with effective exchange of information:
- It should not unduly prevent or delay effective exchange of information; and
- It should permit exceptions from prior notification (*e.g.* in cases in which the information request is of very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).

## **+ A4. The (passive-aggressive) push-back by States ?**



## German Treaty Policy – Data Protection Rules

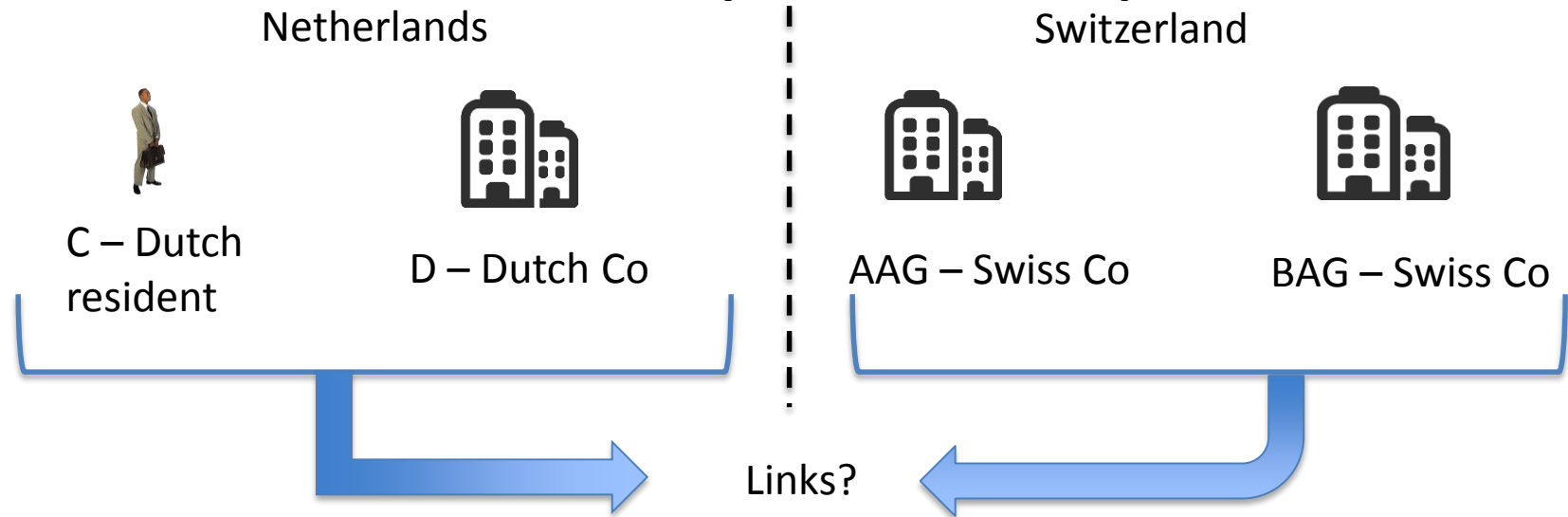
- Additional text added to German treaties for EoI article – restricts data use
- Protocol affirms purpose and provides a number of protections
  - Ordre public
  - Rights of the taxpayer





# I. Swiss Federal Administrative Court (FAC).

## Case of October 7, 2014 (A-1606/2014)



The BD has sent a request of information, as of March 1, 2010, as to:

- who is shareholder of AAG and BAG;
- whether C or D are (or were) direct or indirect owners of AAG or BAG, or are (or were) in any other way linked with these two entities;
- whether cash payments through C and or D were made to BAG;
- whether C, D, AAG, or BAG, as holder of accounts, beneficial owner or under a power of attorney, have rights of disposal on banks accounts by Bank K in L (Switzerland), or Bank O.



# I. Swiss Federal Administrative Court (FAC).

## Case of October 7, 2014 (A-1606/2014)

### 2. Reasoning of the Court

- The standard of foreseeable relevance excludes “fishing expeditions”
- For “foreseeable relevance”:
  - (i) the *requesting* State should comply in the request;
  - (ii) the *requested* State should exclude information not foreseeably relevant.
- Requested State is bound by the request in terms of “good faith” unless there are some obvious mistakes or contradictions or loopholes.
- The information provider should only give information for directly held accounts i.e. where the contractual relationship exists.



# I. Swiss Federal Administrative Court (FAC). Case of October 7, 2014 (A-1606/2014)

## 3. Comments

- Accepted: No information should be provided on A and B as Swiss residents.
- Court position on beneficial ownership does not convince.
- Last sentence of art. 26 par. 5 DTT, includes information which “*relates to ownership interest in a person*” – override by court?



## II. Swiss Federal Administrative Court (FAC).

### Case of December 8, 2014 (A-3294/2014)

#### 1. Facts

French tax authorities requested bank account info for Swiss residents (direct and indirect i.e. beneficial ownership)

#### 2. Reasoning of the Court

- French tax authorities to demonstrate French residence for foreseeable relevance.
- Information about bank accounts not demonstrated as relevant. The request for information should therefore be rejected.
- Considered bank secrecy prohibition in treaty
- Indirect holdings not in scope of bank secrecy as the beneficial owner does not have any contractual relationship with the bank (as with previous case).

#### 3. Comments

Questionable: banking secrecy prohibition refers to ownership interest.

## **+ A5. Justifiable push-back for taxpayers or simply obstructive behaviour?**

An illustration from the Aloe Vera case

Aloe Vera of America, Inc., et. al. v United States of America 99 AFTR 2d 2007-895



# Aloe Vera of America, Inc., et. al. v United States of America

## Decision history

Aloe Vera of America v. United States (US District Court for District of Arizona, decision of 10<sup>th</sup> February 2015)

- Multiple earlier litigation – taxpayer warned of exchange of information with Japan
- Information from exchange appeared in the press
- Taxpayer claimed damages from US for supplying information knowing it to be inaccurate
- Taxpayer claimed US\$52m in damages – awarded US\$1,000

## **+ A6. Initial concluding remarks**



## The need for practical protection of taxpayer rights

1. Effective defence requires sufficient information to exercise such right
2. Requested country should ensure an *ex ante* effective protection of the fundamental rights of taxpayers (*audita altera partem* principle)
3. Domestic protection of taxpayers' rights should also be secured in the requesting country
4. Global tax transparency does not justify removal of all basic rights of taxpayers

### **BUT**

Effective protection should not cause excessive delays to mutual assistance



## **+** The use of stolen data

A request of information based on stolen data is a controversial issue.

- Principle of legality but for domestic laws
- Compliance with the VCLT “good faith” principle
- Potential conflict with “public order” requirements of EoI provision?

**BUT**

Global Forum allows such use?



# General Report evaluation of EoIR

## Minimum Standards

- The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation.
- If information is sought from third parties, judicial authorisation should be necessary.
- A state should not be entitled to receive information if it is unable to provide independent, verifiable evidence that it observes high standards of data protection.

# General Report evaluation

## Best Practice

- The taxpayer should be informed that a cross-border request for information is to be made.
- Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer.
- Provisions should be included in tax treaties setting specific conditions for exchange of information.
- The taxpayer should be given access to information received by the requesting state.
- Information should not be supplied in response to a request where the originating cause was the acquisition of stolen or illegally obtained information.
- A requesting state should provide confirmation of confidentiality to the requested state.

## **+ B1. Introduction**

Special attention to Automatic Exchange of Information



## GR: Subject 2 – Cross border procedures AEol

- Focus is on different protections for AEol than Eol by request
  - protection of massive data exchanges
- EU: Data Protection Directive 95/46/EC
  - Restrictions on use and retention of data
  - Restrictions on transmission of data to third states
- Art 29 Working Group
- EU: Council Directive 2014/107/EU of 9 December 2014, amending Directive 2011/16/EU as regards mandatory AEol in the field of taxation, Art. 1(5)(b)



## GR: Subject 2 – Cross border procedures AEoI

- Block submission of data for AEoI
- Additional “Best Practice” should be that the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights



## Protection of taxpayer's rights – the CRS

- The Common Reporting Standard (CRS) ensures the respect of confidentiality and data protection (Section 5 and the representations in the fourth clause of the preamble of the MCAA)
- Section 7 of the MCAA also specifies that non-compliance in relation to confidentiality and data safeguards can lead to the suspension of the exchange of information
- The CRS (including the confidentiality and data safeguards elements) is based on FATCA



## Protection of taxpayer's rights - the CRS

- Considering the importance of confidentiality in the AEOI process, a preliminary assessment of confidentiality measures of all 95 jurisdictions that have committed to AEOI is a priority for the Global Forum
- The confidentiality assessments are to be done by an expert panel of 12 experts in collaboration with the Global Forum Secretariat
- Will build on assessments done for the purposes of FATCA, rely on peer inputs and outcomes will be available for Global Forum members. Ongoing monitoring also built in.





## Protection of taxpayer's rights - the CRS

- The confidentiality assessments of jurisdictions that have committed for first exchange in 2017 have started and are expected to be finalised by the end of 2015
- The remaining jurisdiction will be assessed on their confidentiality measures in the first half of 2016

----- On-going monitoring of confidentiality -----

## **+ B2. Intervention on US FATCA related experiences**



## How is US Coping with FATCA and IGA?

- Overwhelming Amount of Guidance
  - US Treasury Regulations
  - IGAs
  - Local Country Guidance
- Conflicting Definitions
  - US Treasury Regulations
  - IGAs
- Confusion in filling out IRS Forms or Substitute Forms

## IGAs in Effect (as of 17 June 2015)

- Model 1:
  - Signed: 65
  - In substance as of 30 June 2014: 26
  - In substance as of 30 November 2014: 7
  
- Model 2:
  - Signed: 7
  - In substance as of 30 June 2014: 6
  - In substance as of 30 November 2014: 1



## Reciprocity of Exchange of Information

- In General: No
- IGA partners give more than they receive from US
- US has current limitations on amount of information they can provide currently
- There are legislative proposals to expand scope of information that US can provide to make exchange reciprocal
- Note, not all Model 1 IGAs are reciprocal
- Model 2 IGAs are not reciprocal

## **+ B3. New trends – The German Protocols**



# German implementation of the AEOI

- Multiple aspects to consider
  - Convention on Mutual Administrative Assistance in Tax Matters
  - Multilateral Competent Authority Agreement
  - National Implementation Rules
- German declaration and data protection rules
  - General declaration with reference to *ordre public*
  - Practical rules

## + B4. Other practical issues



## **+ AEOI – Data Protection – Transmission, storage and retention**

Safeguards critical for large quantities of personal data:

- the processing of those data,
- transmission to other countries
- retention limitations.

Little evidence that any significant attention has been paid to these data protection issues.

### ***Questions:***

- Will a taxpayer be entitled to have access to any information provided by way of AEOI in order to correct any inaccuracies?
- Will there be time limits for which the recipient state may retain the data supplied?
- Will there be controls on the use that may be made of data?

## + C1. Quick-fire round

Q&A to Panelists



## Quick-fire Q&A

1. Do any of your bilateral treaties permit information exchanged to be transmitted to a third State?
2. If so / if not, how does the State authorise / prevent on-transmission to a third State?
3. If applicable, how do revenue authorities manage the information if some bilateral treaties permit third State transmission and others don't?
4. If information transmitted by receiving State to third State in error, what recourse or damages are applicable for the original supplying State?

## + C2. The immediate future

Multilateralism



## The impending impact of multilateral instruments

- Impact of the multilateral instrument on the overall EOI environment
- Not yet clear if multilateral instrument will contain measures on EOI – could provide for additional safeguards
- Potential clash between EU protection of data processing and US FATCA / OECD CRS

## + C3. Conclusion and Thanks



## THE PANEL

- **Jennifer Roeleveld** (Professor, University of Cape Town, South Africa)
- **Philip Baker QC** (Field Court Tax Chambers, United Kingdom)
- **Monica Bhatia** (Head of Division, OECD Global Forum Secretariat)
- **Ernst Czakert** (Federal Ministry of Finance, Germany)
- **Alan Granwell** (Sharp Partners PA, United States)
- **Addy Mazz** (Professor, Universidad de la Republica, Uruguay)
- **Xavier Oberson** (Professor, University of Geneva and Partner, Oberson Avocats)
- **Craig West** (Associate Professor, University of Cape Town, South Africa)