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International exchange of data in tax matters: a revolution is just around the corner

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In the near future, international data exchange in tax matters will revolutionize taxation procedures in Germany and other countries. Due to the taxation of worldwide income in many countries, one observes the revenue authorities' deficits with regard to foreign situations, because the ability to investigate on a national level general ends at the national borders. In light of increased mobility of persons, goods and capital, it is obvious that the national tax authorities are limited in determining the authoritative tax-related circumstances. The taxpayers' obligations to cooperate and inform that have been established in the meantime with regard to foreign situations (inter alia Secs. 90, subsections 2 and 3, 138 para. 2 German Fiscal Code (AO), Secs. 16, 17 German Foreign Transaction Tax Act (AStG), Sec. 30 para. 3, sentence 1 clause 2 German Inheritance and Gift Tax Act (ErbStG)) have not led to the desired elimination of the informational disadvantages on the part of the tax authorities. The direct exchange of tax data between the tax authorities of individual countries is supposed to remedy this state of affairs.

Overview

The international exchange of data in tax matters can be classified into the following instruments:

- exchange of information upon request,
- automatic exchange of information,
- spontaneous exchange of information.

The sources of the law on the international exchange of data are very different; to some extent they overlap and in part they are independent and parallel. In addition to bilateral treaties with disclosure clauses (e.g., double taxation treaties), there are many multilateral treaties on data exchange and administrative cooperation with regard to tax matters. With the EU Mutual Assistance Directive, there are also EU standard provisions for the exchange of tax data, which in part clearly transcend the regulations of the existing multilateral treaties. In Germany, the instruments for tax data exchange were primarily implemented by way of the Financial Accounts Information Exchange Act (FKAustG) of 21 December 2015 and the EU Mutual Assistance Act (EUAHiG) of 26 June 2013.

Information Exchange upon Request

Older double taxation treaties only provide for information exchange upon request for the purpose of implementing the treaty ("minor disclosure clause"). In contrast, current double taxation treaties, as well as recently concluded Tax Information Exchange Agreements with many "tax havens", contain a "major disclosure clause", according to which the contracting states exchange all data necessary for the implementation of both the treaty and domestic tax law. This "major" disclosure standard also applies between EU states with no double taxation treaty in force, because EU law obligates all EU members to supply information reciprocally upon request (Secs. 4-6 EUAHiG).

INTERNATIONAL EXCHANGE OF TAX DATA WILL DRAMATICALLY CHANGE TAXATION IN CROSS-BORDER SITUATIONS

Automatic Exchange of Information

The OECD's Common Reporting Standard (CRS) of 21 July 2014 launched the creation of an international regime for Automatic Exchange of Information for financial accounts. Germany acceded to the CRS on 21 December 2015 and implemented it in the Financial Accounts Information Exchange Act (FKAustG). The contractual parties are, inter alia, all EU states, as well as the U.S., Russia, China and Japan, and also include Switzerland, Liechtenstein, Monaco, Guernsey and Jersey, Singapore and the Cayman Islands. Within the scope of the CRS, all financial institutions domiciled in a contracting state collect data on the accounts kept by obligees residing in another contracting state. The collected data include personal information, tax and account numbers, annual balances of the respective accounts and all earnings credited to these accounts each year. These data are transferred once a year from the financial in-

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stitution to a central revenue authority in the respective country, which automatically transfers the data to a central body in the country in which the obligee resides. In Germany, the Federal Central Tax Office is the authority responsible for transmitting the account data collected domestically to the foreign tax authorities, as well as for the receipt of account data from other countries and its distribution to the German revenue offices (Sec. 5 FKAustG). A group of countries, inter alia Germany, Great Britain and Lichtenstein, has already implemented the CRS as of 1 January 2016 and will first transfer the data collected for 2016 in September 2017 ("early adopters"). Thereafter, the data for the previous year will always be transferred in September.

The fact that the CRS does not exonerate them from the obligation to submit a complete tax return is relevant to taxpayers. The CRS gives the fiscal authorities a monitoring instrument without the taxpayer being made aware of the account data that is thereby exchanged. Many taxpayers will receive mail from their revenue office after September 2017, if the account data that was automatically exchanged for 2016 differs from the information provided on the 2016 tax return.

Automatic Information Exchange in Other Cases

Outside of the scope of foreign financial accounts, EU law provides for automatic exchange of data between the EU member states for salary, board member fees, certain life insurance policies, pension and rental income from real estate (Sec. 7 EUAHiG). These obligations to report apply since 1 January 2014 and are each implemented as of 30 June of the following year, for the first time in 2015. In practice, we have seen the first cases in which fiscal authorities initiated audits on the basis of salary data that was automatically transmitted from abroad.

Spontaneous Exchange of Information

All data relevant for tax matters can be the object of spontaneous exchange of information, which dates from the Convention on Mutual Administrative Assistance in Tax Matters of 27 May 2010. The EU Mutual Assistance Directive and German law have implemented spontaneous exchange of information (Secs. 8, 9 EUAHiG). In addition to the EU members and OECD members, the contracting states include Singapore since 1 May 2016 and Lichtenstein since 1 December 2016. All information can be the object of spontaneous exchange of information, which could be considered useful to the German fiscal authorities according to the discretion of a foreign tax authority. Foreign authorities have an obligation to inform for individual case groups, in particular upon presumption of tax evasion and presumption of "fake" transfers of profits within corporate groups.

Conclusion

International exchange of tax data will dramatically change taxation in cross-border situations. The fact that the fiscal authorities can thereby fulfill their obligation of equal taxation (Article 3 German Federal Constitution, GG) is positive. However, from a constitutional perspective, one must criticize the fact that the taxpayer is not informed of the information about him that is exchanged and is not granted the opportunity for effective legal redress (Article 19 para. 4 GG), e.g., to halt the transfer of false information to a foreign country. Finally, one worries that the legislators could use the fiscal authorities' future advantage with regard to information to increase taxes at will and thereby begin an international race to the top. However, it should be noted that international information exchange will not be without loopholes in the foreseeable future: In territorial respects, there will continue to be countries (in particular in Africa, the Near East and Pacific regions) that will not participate in the exchange of tax data. As a matter of fact, different national standards of enforcement and national tax authorities' ignorance of the tax regulations of other countries could lead to exploitation of the information potential of tax data exchange in a manner that is incomplete and irregular from country to country – in this respect, tax data exchange is no guarantee for comprehensive uniformity of taxation.

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