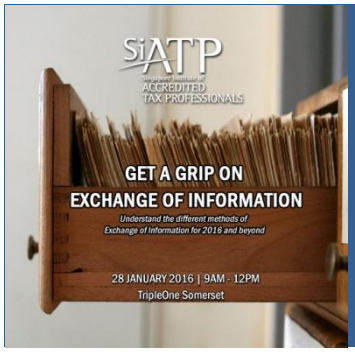

TED: Get a Grip on Exchange of Information

Know essentials and the latest

28 January 2016, Thursday

Facilitated by:
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Confidential information has been provided by the Inland Revenue Authority of Singapore (IRAS) to foreign tax authorities, as part of Singapore's application of the 2005 international standard for Exchange of Information (EOI) for tax purposes set by the Organisation for Economic Co-operation and Development (OECD) in Article 26 of the OECD Model Tax Convention.

EOI is carried out under bilateral tax agreements, through the article on exchange of information in Agreements for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion (DTAs) that Singapore has concluded with many other tax jurisdictions. Besides DTAs, EOI may also be implemented under an Exchange of Information Agreement (EOIA), which Singapore has with Bermuda.

Exchange of Information

The basic requirement for EOI is that information sought must be foreseeably relevant for carrying out the provisions of the DTA, or for the administration or enforcement of domestic tax laws of the requesting state. Elaborating on this was Accredited Tax Advisor (Income Tax and GST) S. Sharma, Consultant at A C Fergusson Law Corporation, at a recent *Tax Excellence Decoded* session by the Singapore Institute of Accredited Tax Professionals.

Updating the participants, Mr Sharma highlighted that requests made by foreign tax authorities under a DTA were previously limited to information on residents of the two Contracting States. With amendments made in 2010 to the Income Tax Act (ITA) through new Parts XXA and XXB and a new Eighth Schedule, and changes to DTAs, a foreign tax authority may seek and obtain from IRAS, information on a person who is neither resident in Singapore nor in the other country. Requests by the foreign tax authority may also be made for taxes not covered in the DTA, and information obtained may be used for purposes not limited to taxes under the DTA. Singapore is obliged to obtain the information requested even if it does not need the information for the administration of its own taxes.

Under further amendments, Part XXB of the ITA was replaced in November 2013. Hence, IRAS can disclose secret banking and trust company information to a foreign tax authority without first obtaining an Order of the High Court to authorise such disclosure. The new Part XXB was introduced in 2013 to improve international tax co-operation under international tax compliance agreements like Foreign Account Tax Compliance Act (FATCA). Since November 2014, requests for information on a group of taxpayers are possible. Under Singapore's EOI regime, information may be provided on a request basis (EOIR) or on an automatic basis (AEOI).

Exchange of Information by Request

Under EOIR, Singapore's treaty partner makes the request for specific information to the Comptroller of Income Tax (CIT) at IRAS. The request is made under s105D of the ITA and must comply with all the requirements of the Eighth Schedule. The request is dealt with in accordance with the EOI article in the relevant DTA.

The requesting state is obliged to treat the information supplied as confidential and to prevent unauthorised use of the information after it is disclosed by IRAS.

Legal Protection in EOI

If a taxpayer feels aggrieved by IRAS' actions, the affected person may initiate an application to the court for a judicial review. To protect taxpayers, various other legal protections are in place, including provisions under the article on exchange of information under the relevant DTA.

Complex EOI principles were dissected in the Tax Excellence Decoded session.

Singapore, as the requested state, is not obliged to carry out administrative measures that are different from its own laws or administrative practices or those of the requesting state. It is also not obliged to supply information which is not obtainable under its laws or those of the requesting state, or not obtainable in the normal course of its or the requesting state's administration.

Additionally, Singapore is not obliged to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Neither is Singapore obliged to supply information where disclosure would be contrary to public policy.

Automatic Exchange of Information

Under the AEOI regime, bulk taxpayer information is transmitted in a systematic and periodic fashion from the source country (where the income is earned) to the residence country (where the person receiving the income is normally based). Such information may include dividends, interest, royalties and salaries – aspects of income normally collected on a routine basis through the reporting process in the source country. Other types of information that may fall under the ambit of AEOI include the change of residence, the purchase or disposal of immovable property and GST refunds.

In November 2013, changes in the ITA extended IRAS' ability to provide EOI assistance in accordance with the internationally agreed standard to all existing treaty partners without having to update these DTAs bilaterally.

In November 2014, further changes such as the expansion of scope of EOI arrangements to cover multilateral treaties, confidentiality requirements for judicial reviews and anti-avoidance provisions were implemented.

In 2015, there were two Supreme Court cases on EOI.

ABU v COMPTROLLER OF INCOME TAX [2015] SGCA 4

In November 2012, in a Letter of Request (LoR), the National Tax Agency of Japan (JNTA) requested various bank statements from 2006 to 2011 of specific bank accounts of a Japanese national, his child and related companies. The request was made in the course of a tax examination into the Japanese national residing in Japan.

As required by the ITA as it then stood, CIT applied for a High Court order in April 2013 for the bank information, with the bank as the defendant. However, the application was for all bank statements of any bank account of the Japanese taxpayer, his child and a number of corporate entities (local and foreign) – far more than what the JNTA had requested. The High Court granted an order in terms[1] of CIT's court application. Although the taxpayer was granted leave to intervene in the proceedings, the LoR was available only to CIT and the High Court.

The taxpayer subsequently appealed to the Court of Appeal (CA) that CIT had acted beyond the terms of the Request, citing JNTA's LoR which had been denied to him. The issue before CA was whether the High Court's order for all bank statements was proper (given that the LoR only sought bank statements of specified bank accounts). Based on s105J of the ITA (which states that CIT could only apply for High Court order to comply with a request for information), CA ruled that any application from CIT cannot go beyond the ambit of the request.

This case also highlighted that as long as the request for information complied with the Eighth Schedule of the ITA on the face of the request, it is not for the Courts to question the requests made by the requesting authority. If there are doubts concerning the veracity of the request, it would fall on the CIT to resolve them through diplomatic channels.

Accredited Tax Advisor (Income Tax and GST) S. Sharma, Consultant at A C Fergusson Law Corporation, explained the essentials of Exchange of Information and updated the audience on the latest Supreme Court cases on the topic.

AXY v COMPTROLLER OF INCOME TAX [2015] SGHC 291

In September 2013, the National Tax Service of the Republic of Korea (NTS) issued a request for the provision of information on the banking activities of Korean taxpayers in Singapore. This request was issued after tax investigations had commenced in Korea against the Korean nationals.

Following the request, CIT issued notices to various banks in Singapore for information on all banking activities in the accounts of the taxpayers and their companies from 2003 to the date of the LoR. The taxpayers subsequently applied for leave to commence judicial review of CIT's decision to issue the notices to the banks. The taxpayers obtained some of the information and documents requested, including the LOR.

This case highlights that taxpayers have access to the judicial process through judicial review, as a safeguard to prevent CIT from acting arbitrarily or incorrectly. It is also highlighted that in determining the scope of discovery for a judicial review application, the court should consider the overriding principle that the gathering of information in a foreign state for tax investigation purposes must not be prejudiced by court proceedings in Singapore.

[1] Comptroller of Income Tax v BLM [2014] 1 SLR 123

In summary, the two cases established that CIT's actions in applying EOI provisions in the ITA and relevant DTA, including issuing of notices, is subject to the court's scrutiny. CIT's duty is to act rationally, legally and procedurally properly in evaluating the request (which should be relevant, specific and comply fully with the Eighth Schedule). "Fishing expeditions" by foreign tax authorities are not allowed. Singapore courts will not examine issues of foreign tax law.

Separately, under IRAS' practice, taxpayers may make representations to highlight any issues with specific requests. Singapore's EOI regime is still evolving. An Exchange of Information Order was gazetted on 25 January 2016, signifying Singapore's adoption of the Convention on Mutual Administrative Assistance in Tax Matters including Singapore's reservations. Further amendments have been proposed under the Income Tax (Amendment) Bill due for second reading in Parliament on 29 February 2016.

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