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Transparency and Information Exchange





Panel



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Agenda



- The wider context
- Overview of FATCA and CRS
- Case studies
- Corporates (BEPS/EU/JITSIC)
- Closing remarks



The Wider Context





The Wider Context



Tax Transparency - Individuals

- FATCA and CRS are the centre of practitioners' attention today
- These initiatives affect primarily individuals and will expose individuals' offshore assets and income to scrutiny and perhaps challenge by tax authorities



The Wider Context



Putting Tax Transparency In A Wider Context

- EoI is also a feature of the corporate tax world, under the OECD's anti-BEPS initiatives
- This will make tax planning for cross-border corporate business activities more transparent and therefore more liable to scrutiny and challenge



The Wider Context



Tax Transparency – Corporations

- Under BEPS, corporate tax information to be exchanged includes
 - Country by country reporting
 - Tax rulings
 - Advance pricing agreements (transfer pricing)
 - Aggressive tax positions
- Subject to peer (mutual) reviews to ensure compliance



The Wider Context



Other Information Exchanges - AML

- FATF – anti-money laundering disclosures
- Foreign tax evasion is a reportable (predicate) offence for AML purposes
- Reporting entities go far beyond traditional financial institutions
- Currently, suspicious transaction reports are not being routinely exchanged cross-border



The Wider Context



Other Information Exchanges

- Tax treaties / TIEAs
- Mutual Legal Assistance Agreements
- Whistle-blowers – Panama and Singapore papers, LuxLeaks, bank records, etc



The Wider Context



What Info Will Be Exchanged Next?

- Registers of ultimate beneficial ownership
 - Companies
 - Trusts
 - Real estate ownership
- We can probably expect this information will be exchanged



The Wider Context



And Even Further Down The Line ...

- What about reporting non-financial assets
 - Real estate – even if not held for rental
 - Bullion, diamonds, cars, etc
- Tax assessments, for mutual collection assistance
- Real-time monitoring of transactions, eg, by requiring banks to report credit card transactions (eg, for VAT enforcement)



Overview of FATCA and CRS



FATCA and AEOI



- Concerns in USA on Offshore tax evasion (\$100 billion tax revenue loss) led to enactment of FATCA
 - 30% withholding tax on US Source Payments unless FIs enter into agreement with US IRS to provide information about accounts held by US persons or entities controlled by US persons
 - Reporting of foreign accounts and assets in new Form 8938 by US persons
- Transmission of client confidential information not permitted under domestic laws of concerned countries
- Inter Governmental Agreements
 - Most jurisdictions have signed
 - IGA Model 1 vs. Model 2
 - Not fully reciprocal – Law to carry out due diligence to identify beneficial owner not passed by US Congress



FATCA and AEOI



- Leveraging on FATCA - CRS on AEOI developed
 - FIs of “source” jurisdiction to collect information about tax resident of other countries - to be transmitted through Competent Authority for the purposes of DTAA/Multilateral Convention
 - Due diligence requirements to identify the real owners
 - Three dimensions
 - Wide scope of information reporting – all types of investment income, account balance, sales proceeds from financial assets
 - Reporting by all financial institutions including brokers, collective investment vehicles and insurance companies
 - All accounts including accounts held by individuals and entities (shell companies, trusts, foundations) also to report individuals that ultimately control these entities



FATCA and AEOI



- Global implementation by 2017/2018
 - At a general level, information received under AEOI will be matched with information collected from the taxpayers and non-compliance will be addressed.
- Due diligence procedures under MCAA – to identify the resident country and tax identification number of account holders
- Existing account – review the electronic and document record
 - New account – collect the self-certification form



FATCA and AEOI



Exchange of Information on Request (EOIR) vs. Automatic Exchange of Information (AEOI)

- 139 member jurisdictions have committed to implementing the international standards on EOIR.
- [100 countries and jurisdictions](#) have committed to implementing the new standard on AEOI.
- Peer reviews – 253 peer reviews completed. 22 jurisdictions are rated “Compliant”, 77 are rated “Largely Compliant”, 12 are rated “Partially Compliant” and 5 jurisdictions “Non-Compliant”.



FATCA and AEOI



U.S. Filing Obligation – Form 8938 vs. FBAR

- FATCA requires certain U.S. taxpayers who hold foreign financial assets to report information about those assets on **Form 8938**, Statement of Specified Foreign Financial Assets.
 - In addition, U.S. taxpayers are required to submit **FinCEN Form 114**, Report of Foreign Bank and Financial Accounts (**FBAR**).



FATCA and AEOI



- Comparison of Form 8938 and FBAR Requirements for U.S. Taxpayers

	Form 8938, Statement of Specified Foreign Financial Assets	FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR)
Reporting Threshold (Total Value of Assets)	Aggregate value exceeds \$50,000, but higher for individuals married filing jointly (\$100,000) and living in a foreign country (\$200,000)	Aggregate value of financial accounts exceeds \$10,000 at any time during the calendar year.
When Due?	Form is attached to annual return and due on the date of that return, including any applicable extensions	Received by April 15 (6-month automatic extension to Oct 15)
Penalties	Up to \$10,000 for failure to disclose and an additional \$10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of \$60,000; criminal penalties may also apply	Civil monetary penalties are adjusted annually for inflation. For civil penalty assessment prior to Aug 1, 2016, if non-willful, up to \$10,000; if willful, up to the greater of \$100,000 or 50 percent of account balances; criminal penalties may also apply



FATCA and AEOI



- **Streamlined Procedures to Get Current with the U.S. Filing Obligation**
 - Non-resident U.S. taxpayer may be eligible for special IRS procedures.
 - On June 26, 2012, the IRS announced new streamlined filing compliance procedures for non-resident U.S. taxpayers.
 - Applicable to U.S. taxpayers who are living abroad have failed to timely file U.S. federal income tax returns or FBARs, but have recently become aware of their filing obligations and now seek to come into compliance with the law.
 - For non-residents including, but not limited to, dual citizens who have not filed U.S. income tax and information returns
 - Submit FBAR for past 6 years and income tax return for past 3 years



Offshore Structures



- Three stage process
 - Creation of a shell company or Trust in jurisdictions such as BVI or Seychelles
 - Opening accounts with Banks/Financial Institutions in say Switzerland which hold global assets on behalf of their clients (who are nominally in BVI/Seychelles but in reality are elsewhere) as off balance sheet item
 - Global assets could be mutual funds registered in Luxembourg or PNs invested in India
- What would be the effect of CRS on these structures?



Domestic Measures



- Schedule FA from 2012 for disclosure of
 - Details of foreign bank accounts held (including any beneficial interest)
 - Details of financial interest in any entity (including any beneficial interest)
 - Details of immovable property held (including any beneficial interest)
 - Details of any other capital asset (including any beneficial interest) held
 - Details of accounts in which the taxpayer has a signing authority
 - Details of trusts created under the laws of India of a country outside India in which the taxpayer is a trustee, beneficiary or settlor



Domestic Measures




- Compulsory return filing in above cases even if nil income (Finance Act, 2015) – only for residents (lacuna?)
- Black Money Act – failure to furnish return or failure to disclose assets penalty of Rs. 10 lakhs
- Criminal liability under Income-tax Act and Black Money Act
- Indian Tax Authority have warned that individuals that do not provide self-certification as required under FATCA reporting by 30th April, 2017 will have their non-compliant accounts blocked.



EOI – a global phenomenon



Particulars 	Count
Global Forum on EOI	133
Commitment to implement automatic EOI	101 (Panama agreed in May 2016)
THE MULTILATERAL COMPETENT AUTHORITY AGREEMENT ON AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION	<ul style="list-style-type: none">• 94 countries• 56 to start automatic information exchange by September 2017 – includes India, Korea, BVI Cayman, Cyprus• 38 by Sept 2018 – includes Switzerland, China, Hong Kong, Japan, Malaysia, Singapore, Mauritius• Switzerland has not yet signed.



Over 40 differences – CRS vs FATCA



Particulars	CRS	FATCA
Related Entity	An entity is a Related Entity of another entity if either entity controls the other entity, or the two entities are under common control. For this purpose, control includes direct or indirect ownership of more than 50 percent of the vote and value of such entity,	The control test is satisfied, if direct or indirect ownership is 50 percent of either the vote or value of such entity.
Thresholds for Preexisting Individual Accounts	Pre-existing Entity Account becomes Reportable if aggregate balance/value > USD 250,000	Pre-existing Entity Account becomes Reportable if aggregate balance/value > USD 1,000,000
Date & Place of Birth	Date and Place of Birth of each Reportable Person required	Date of birth for pre-existing accounts if TIN not available



Over 40 differences – CRS vs FATCA



Particulars	CRS	FATCA
Nexus for Reporting Financial Institutions	The Standard uses the residence of the Financial Institution as the reporting nexus	Allows a FATCA Partner to define its Reporting Financial Institutions by using either the residence or the jurisdiction under which the Financial Institution is organised (or both, in the case of some Model 1 FATA IGAs).
Reportable Jurisdiction Persons	Only residents of a Reportable Jurisdiction are considered Reportable Jurisdiction Persons, with residence generally considered to mean tax residence. Where Entities do not have a residence for tax purposes, the Standard indicates the place of effective management should be used	Since under US tax law a US citizen is also a US tax resident, the Model 1 FATCA IGA provides that both US citizens and US residents are included in the definition of US person



Swiss context



- Long journey since 2009
- Requests based on stolen data
- “Foreseeable relevance”
- Current political climate in the country (public opinion, courts, administration, parliament)
- Upcoming vote on constitutional amendment regarding banking secrecy
- Taxpayers’ rights



Swiss context



Prior notification requirements in Switzerland

- By default, the Swiss Federal Tax Administration must inform taxpayers about information requests that directly concern them. This is considered to be a general principle of Swiss law.
- The requesting state may ask that the taxpayer be informed only after the exchange if it demonstrates that the purpose of the administrative assistance and the success of its investigation would be compromised by prior notification
- Once the SFTA approves the exchange, the taxpayer has a right to challenge that decision within 30 days in court.
- Success rate of taxpayers in these procedures is marginal.



Information exchange requests to and from Switzerland

	2011	2012	2013	2014	2015	2016
Requests received	370	1'499	1'386	2'791	2'623	66'553
Requests made	1	2	6	2	39	11

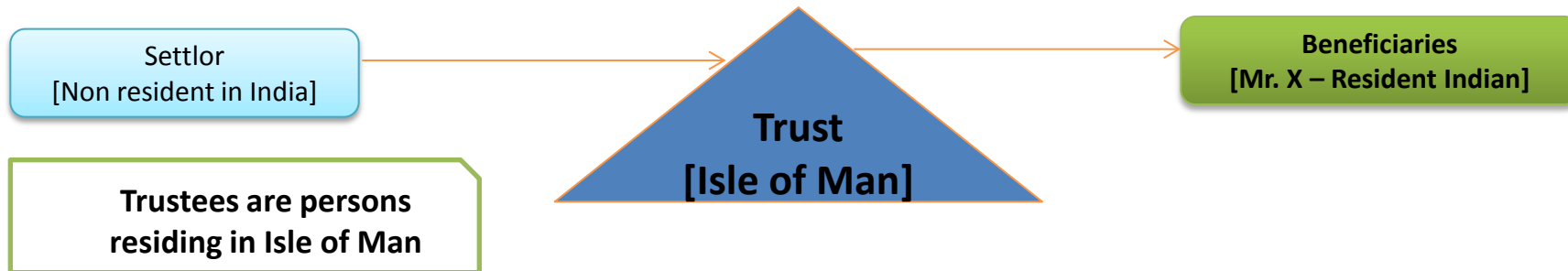
Source: Swiss Federal Tax Administration



Case Studies



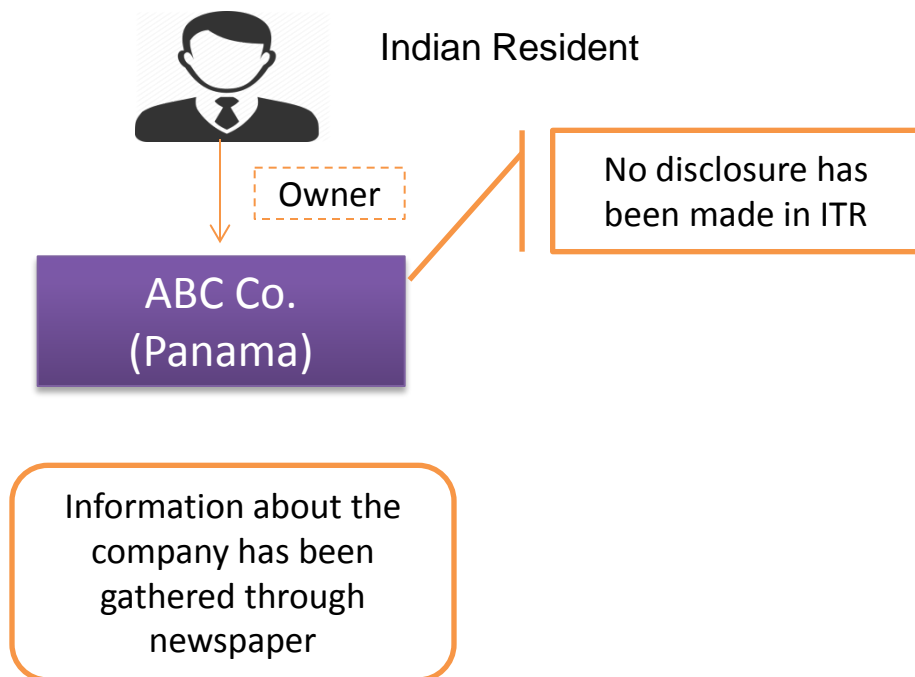
Case I



Facts of the case

- Mr. X is an Indian resident and is a beneficiary in a discretionary trust in Isle of Man
 - No benefit is received by Mr. X from the Trust since inception of the trust
 - Mr. X does not operate the bank account of the Trust
 - The Trustees of the Trust are non-residents residing in Isle of Man and are also operating the bank account of the Trust
 - No distribution/payment has been made to any one from the said trust since its inception. In other words, trust has accumulated funds
 - The corpus in the trust was deposited 20 years back by and was earned out of legitimate sources outside India but no taxes have been paid in India
- Can Indian authorities seek information of such Indian beneficiary from Competent Authority of Isle of Man?
- Since the Trust has an account, and not the Indian beneficiary, the Competent Authority of Isle of Man may refuse to give information. How will Exchange of Information be pursued?

Case II

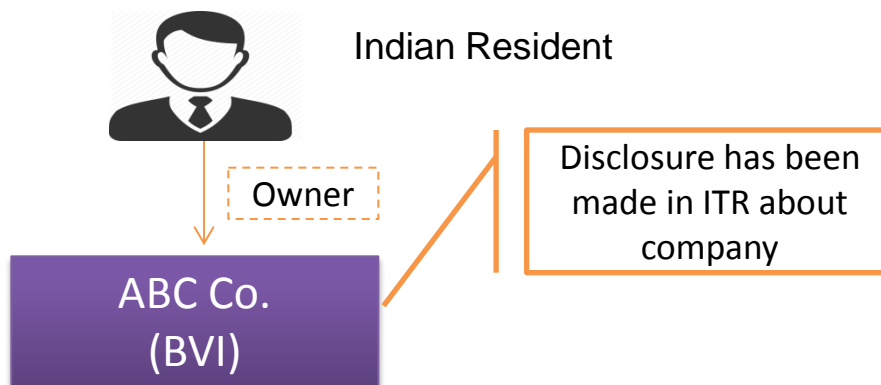


Facts:

- Mr. X, an Indian resident has set up a company, namely ABC Co. in Panama in 1990s.
- Till date, Mr. X has not made any disclosure about the said company in its return of income filed in India.
- Recently, the existence of said company has come to knowledge of the Indian tax Authorities on account of revelations made in various newspapers (called Panama leaks)
- The Indian tax Authorities seek to obtain more information about the alleged Panama company
- India does not have any DTAA or TIEA with Panama.

Under the said circumstances, how the exchange of information will take place?

Case III



Facts:

- Mr. X, an Indian resident has set up a company, namely ABC Co. in BVI in 1990s.
- Mr. X has made disclosure about the said company in its return of income filed in India.
- There is TIEA between India and BVI.
- BVI does not mandate maintenance of books of accounts or any financial information.
- ABC Co. has a bank account in Panama which has been operated by Mr. X and in this regard disclosure has not been made in his ITR.
- The Indian tax Authorities seek to obtain more information about the bank account of BVI company held in Panama
- India does not have any DTAA or TIEA with Panama.

Under the said circumstances, how the exchange of information will take place as BVI has no information about the bank account & Panama denies to provide information of bank account?



Case IV



Facts of the Case

- Mr. X, a person of Indian origin, left India for the US in 1985 for studies and taking up employment. He became a resident of the US in 1991 and obtained citizenship in 1996.
- Before leaving India Mr X had executed a General Power of Attorney in favour of Mrs Y, Mr X's mother, a resident and citizen of India.
- Under the POA, Mrs Y had full rights to operate bank accounts, manage Mr X's funds in India to make investments, donations, gifts, file legal suits on behalf of Mr X, file income-tax returns, etc. Mrs Y was also in charge of administering and managing Mr X's HUF.
- From 1991 to 2016, Mrs Y has managed Mr X's affairs in India. During this period, unknown to him, Mr X also received certain property by way of inheritance on the death of his father.
- Mr X did not directly involve himself with any investments or financial dealings in India and claims to be ignorant of all his holdings in India. As a result he did not disclose his Indian assets or incomes in his US tax returns or his US FBAR.

- Under the said circumstances, will FATCA apply?
- Can Mr X be held liable in the US for non-disclosure/ concealment of foreign income and foreign assets?
- Will the default be considered wilful?

[An HUF, or a Hindu Undivided Family, is a separate legal entity under Indian law. It comprises of an individual, his spouse and their children and their spouses, and their grand-children and their spouses and so on. The HUF contains common property. Each member of the HUF has a right or interest in all the income and property of the HUF which accrues at the time of partition, i.e. dissolution, of the HUF.]



Privacy aspects



- 200 years ago, in the wake of the French Revolution and of the Napoleonian wars, the Congress of Vienna reorganized the European continent, in order to restore the prerogatives of the monarchies.
- Since about 2010, the OECD (together with the “big stick” of the G20...) has demonstrated an admirable ability to reorganize the world of international taxation in order to work at restoring the prerogatives of the states to levy taxes:
 - in the wake of the “revolution” of globalization and of the financial crisis, and
 - In order to counter the high sophistication of tax planning and tax evasion schemes.



Privacy aspects



- Digitalization makes it all possible, but it makes the system of transparency also vulnerable.
- Is transparency unequivocally a good thing or does it lead to a “Smiling Tyranny” (French philosopher *Dominique Lecourt*)?
- How can it be avoided that tax information be used for non-tax purposes ?
- Currently there is no comprehensive concept of taxpayers’ rights protection.
- Should there be a global standard on these rights?



Privacy Aspects of EoI



Improper Use of Data

- Information should be used by the receiving government for tax purposes only
- Is this realistic to expect?



Privacy Aspects of EoI



Risk Of Data Leaks / Hacking

- How much comfort can we draw from the OECD's assessment of each country's data protection capability?
- There is a political issue in refusing to share data on security grounds



Privacy Aspects of EoI



Sale Of Data To Criminal Elements

- This is a major concern in Latin America and even some Asian jurisdictions
- Will the data be sold to criminal gangs and expose taxpayers to threats of kidnapping, extortion, etc?



Privacy Aspects of Eol



A More General Philosophical Issue

- How important is privacy today?
- How do we reconcile Eol with the policies underlying data privacy laws in most jurisdictions?
- Demands for more tax information to be made public, and the growing respectability of stolen data and even paying for stolen data
- What sort of society do we wish to become?



Privacy Aspects of EoI



What Are The Taxpayer's Rights?

- What rights should a taxpayer have? This is a very populist and one-sided debate
- Should a taxpayer -
 - Be notified when a data request is received?
 - Have the right to review and correct the data before it is sent off? What about a right to appeal?
 - Have the right to know what information has been exchanged?



Privacy Aspects of Eol



Quiver Inc & Friar Tuck Ltd v International Tax Authority, 31 March 2017, BVI

- Court held taxpayer should be given enough information to enable it to assess whether the request was lawfully issued and valid
- Notices issued for mutual Eol are subject to principles of fairness which cannot be overridden by a duty of confidentiality - this applies to all decisions made by public bodies



Privacy aspects



French Trust Registry (1/2)

- France introduced a public registry of trusts having ties with France.
- The registry was available to any taxpayer on the French tax authorities' website.
- On 21 October 2016, the French Constitutional Court (*Conseil d'État*) ruled that the public registry of trusts was infringing the right to privacy in a disproportionate manner compared to the aim of fighting against tax fraud and evasion.



Privacy aspects



French Trust Registry (2/2)

- A new registry was created in France in December 2016, with access limited to the following:
 - The French anti-money laundering agency (TRACFIN);
 - French judicial authorities;
 - Certain qualified employees of the French tax administration and the French administration of customs;
 - The French “*Autorité de contrôle prudentiel et de résolution*” (French banking and insurance oversight authority) and the French “*Autorité des marchés financiers*” (French equivalent of the Security Exchange Commission);
 - Certain professionals subject to anti money-laundering regulation in France



Privacy aspects



UK Real Estate Registry

- Beginning of April, the UK government has published its plans for a public registry of beneficial owners of UK properties held by overseas entities
- Existing foreign property owners would have one year to declare their ownership
- The register would be freely accessible to the public



Corporates





Corporates



BEPS Action 5 on “Harmful Tax Practices” – Exchanges Of Rulings

- What are the criteria for an exchange?
 - Rulings related to preferential regimes
 - Rulings giving a downward adjustment to profits
 - Unilateral APAs (transfer pricing agreements)
 - Permanent establishment rulings
 - Conduit rulings
 - And other type of ruling (to be prescribed) that could give rise to BEPS concerns



Corporates



Exchanges Of Rulings (cont.)

- Does this include past rulings?
- What is a “ruling” for this purpose? What about informal statements, dispute settlements and general practices?



Corporates



BEPS Action 13 – Country-by-Country Reports

- CbCRs give a snapshot of a multinational's profits v substance in each jurisdiction in which it operates – useful for identifying potential BEPS issues
- CbCR obligations applies to groups with turnover exceeding €700m



Corporates



Country-by-Country Reports (cont.)

- CbCRs will be filed in country of parent's residence, and automatically exchanged with other jurisdictions where the group operates
- Exchanges will be conducted under a multi-lateral (sometimes bilateral) Competent Authority agreement prepared under the Convention on Mutual Administrative Assistance in Tax Matters



Corporates



BEPS Action 12 – Mandatory Disclosure Regime

- Disclosure by taxpayers and scheme promoters to disclose aggressive tax practices
- It's contemplated that disclosures involving cross-border activities will be exchanged with other tax authorities



Corporates



How seriously will these obligations be applied in practice?

- Disclosures of harmful tax practices is one of the OECD's four "minimum prescribed standards"
- All countries who participate in the BEPS forum have committed to these 4 standards
- The 4 standards will be subjected to mutual (peer) review



EU Directive EoI

- Council Directive 2015/2376
- Amending EoI Directive of 2011
- Spontaneous EoI re advance cross-border rulings
- Advance cross-border ruling?
- Implementation as of 1 January 2017, but...



Corporates



Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC)

- 37 tax administrations
- Collaboration on tax avoidance
- Sharing experience, resources, expertise



Closing Remarks

