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Alternative D: Exchange of Information

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Agenda

- International exchange of information (EOI)
- Treaty-based EOI
- Domestic information gathering and EOI rules
- EOI cases

International Exchange of Information

International EOI Mechanism

- Bilateral instruments
 - EOI provision under double taxation agreements (DTAs)
 - Tax information exchange agreement (TIEA)
- Multilateral instruments
 - Multilateral Convention on Mutual Administrative Assistance in Tax Matters
 - CRS MCAA (87 participating jurisdictions)
 - CbC MCAA (49 participating jurisdictions)
 - The Joint International Tax Shelter Information and Collaboration Network (currently 36 member jurisdictions)

Information Exchange in Different Ways



Treaty-based EOI

Amendments to EOI Provision under OECD Model Tax Convention (MTC)

Year	Key Amendments
2005	<ul style="list-style-type: none">• EOI allowed if the requested information is “foreseeably relevant” (<i>used to be “necessary”</i>) to the administration or enforcement of the tax laws of a Contracting State• No restriction of EOI based on bank secrecy rule
2012	<ul style="list-style-type: none">• Allow information used for other purposes in certain situations (<i>used to be an optional provision</i>)

Current EOI Provision under OCED MTC

Information scope

- Information **foreseeably relevant** for application of the Convention or to the administration or enforcement of the tax laws of a Contracting State
- Information not restricted to residents

Obligation of confidentiality

- Shall be treated as secret in the same manner as information obtained under the domestic laws
- Shall be disclosed only for tax-related purposes or in public court proceedings or in judicial decisions
- May be used for other purposes if allowed under both States' laws and the other competent authority authorises such use

Current EOI Provision under OCED MTC (Cont'd)

Receiving
state not
obliged to:

- to carry out administrative measures **at variance with the laws and administrative practice** of either State; or
- to supply information which is **not obtainable under the laws or in the normal course of the administration** of either State; or
- 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*).

No decline
of
information
request
solely based
on:

- the receiving State has no **domestic interest** in such information;
- the information is held by a **bank**, other financial institution, nominee or person acting in an agency or a fiduciary capacity; or
- the information relates to ownership interests in a person.

China

- EOI provision under 105 DTAs
 - Treaties signed before 2005 basically follow the pre-2005 OECD EOI Provision
 - e.g., China's treaties with US, Japan, Korea and Australia
 - Treaties signed, renewed or revised (via protocol) afterwards basically follow the new OECD EOI provision
 - e.g., Germany, Singapore, Hong Kong, UK
- TIEAs with 10 jurisdictions
 - e.g., Cayman, Bermuda, the British Virgin Islands and Bahamas

Germany

- EOI request has to be specific to conform to legitimate purpose of information gathering
 - Information has to be **foreseeably relevant** for the purpose of:
 - enforcement of the Treaty or
 - administration or application of domestic tax law of the contracting state or its constituent parts
 - "**Foreseeably relevant**" excludes fishing expeditions, i.e. speculative enquiries which do not show a clear relevance to a specific tax trans-action
 - "**Foreseeably relevant**" excludes information which the requesting state could obtain through enquiries in its own territory

Germany (Cont'd)

- EOI requests do not oblige receiving state to do any of the following:
 - Undertake administrative **measures which deviate** from the laws and administrative practice of either state
 - Provide information which **cannot be obtained** according to the laws or the administrative practice of either state
 - Provide information which would **reveal a trade, industry, operating or professional secret** or procedure or which contravenes the ordre public
 - Provide information in a situation, where the preservation of **tax secrecy with respect to this information is not secured** in the other state (Example: Sweden, where tax relevant information concerning individuals is published much like a telephone directory)

Singapore

- Income Tax Act (Cap. 134) (ITA)
 - Part XXA: Exchange of Information under Avoidance of Double Taxation Arrangements and Exchange of Information Arrangements
 - Definition of a “double taxation arrangement” references s 49 of the ITA.
 - Power of Comptroller to obtain information under s 105F references s 65 to s 65D of the ITA.
 - Under s 105D, a request for information (from a foreign authority) has to comply with the Eighth Schedule to the ITA.

Singapore (Cont'd)

– Double Taxation Agreements

**AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE AND
THE GOVERNMENT OF JAPAN
FOR THE AVOIDANCE OF DOUBLE TAXATION AND
THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME**

“Article 26

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.

Singapore (Cont'd)

EIGHTH SCHEDULE

Sections 105D(2) and 106(3)

INFORMATION TO BE INCLUDED IN A REQUEST FOR INFORMATION UNDER PART XXA

1. The purpose of the request.
2. The identity of the competent authority.
3. The identity of the person in relation to whom the information is requested.
4. A statement of the information requested for including its nature, and the form in which the competent authority wishes to receive the information from the Comptroller.
5. The grounds for believing that the information requested for is held by the Comptroller, the Comptroller of Goods and Services Tax, the Comptroller of Property Tax, the Chief Assessor or the Commissioner of Stamp Duties, or is in the possession or control of a person in Singapore.
6. To the extent known, the name and address of any person believed to have possession or control of the information requested for.
7. A statement that the request is in conformity with the law and administrative practices of the country of the competent authority, and that the competent authority is authorised to obtain the information under the laws of that country or in the normal course of administrative practice.
8. A statement that the country has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties.
9. *[Deleted by S 595/2012]*
10. Any other information required to be included with the request under the prescribed arrangement.
11. Any other information that may assist in giving effect to the request.

[24/2009; S 595/2012]

Singapore (Cont'd)

– Overview of legislative amendments

Date	Comments
2009	EOI provisions first introduced into the ITA
2011	Expansion of the EOI regime to not only include EOI provisions in DTAs, but also an “EOI arrangement”
2013	<ul style="list-style-type: none">• Repeal of Part XXB of the ITA.• s 65B was amended to apply notwithstanding any duty of secrecy under the Banking Act or Trust Companies Act
2014	<ul style="list-style-type: none">• Expansion of EOI regime to expand the scope of an “EOI arrangement” to include a multilateral treaty.• Inclusion of new s 105HA which restricts the documents subject to discovery
2016	Expansion of the definition of “EOI arrangement” to include arrangements beyond the sharing of information upon request (e.g., spontaneous exchange of information)

Korea

- Adoption of amended EOI provision in recent treaty negotiations
 - Switzerland(2012)
 - Singapore(2013)
 - Belgium (2015)
 - Italy (2015)
 - Luxembourg(2013)
 - Australia(2010 Initialing)
 - Malaysia(2011 Initialing)
 - Austria (2002)

Australia

- Extensive treaty network
- Australian treaties:
 - Older treaties use “**as necessary**” concept
 - “**Foreseeably relevant standard**” > 2005ATO takes broad view of this test

“Spontaneous EOI is seen as fostering spirit of co-operation which may result in ATO recovering information when requested”

Australia (Cont'd)

New Australia - Germany treaty

ARTICLE 26

Exchange of Information

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 and, in the case of the Federal Republic of Germany, on behalf of its States (Länder), or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

Hong Kong

- Hong Kong first endorsed the OECD standard for EOI in 2005.
- In 2010, under international pressure, the domestic tax interest requirement for EOI under DTAs was removed. This allowed Hong Kong to adopt the OECD's standard of EOI at that time.
- 31 new DTAs have been signed Since 2010. More DTAs are currently under negotiation.
- In 2013, under international pressure, Hong Kong changed the legislation to allow EOI under TIEAs. 7 TIEAs have been signed, including with the USA.
- Since 2013, subject to some restrictions, it is possible to exchange tax information relating to a period before a CDTA or TIEA has been entered.
- The Disclosure Rules (2010) provide procedural rules, rights and safeguards.

Domestic Information Gathering and EOI Rules

How Government Gather Tax Information?

Asking you for it

Asking someone else for it

Taking it from you or from someone else

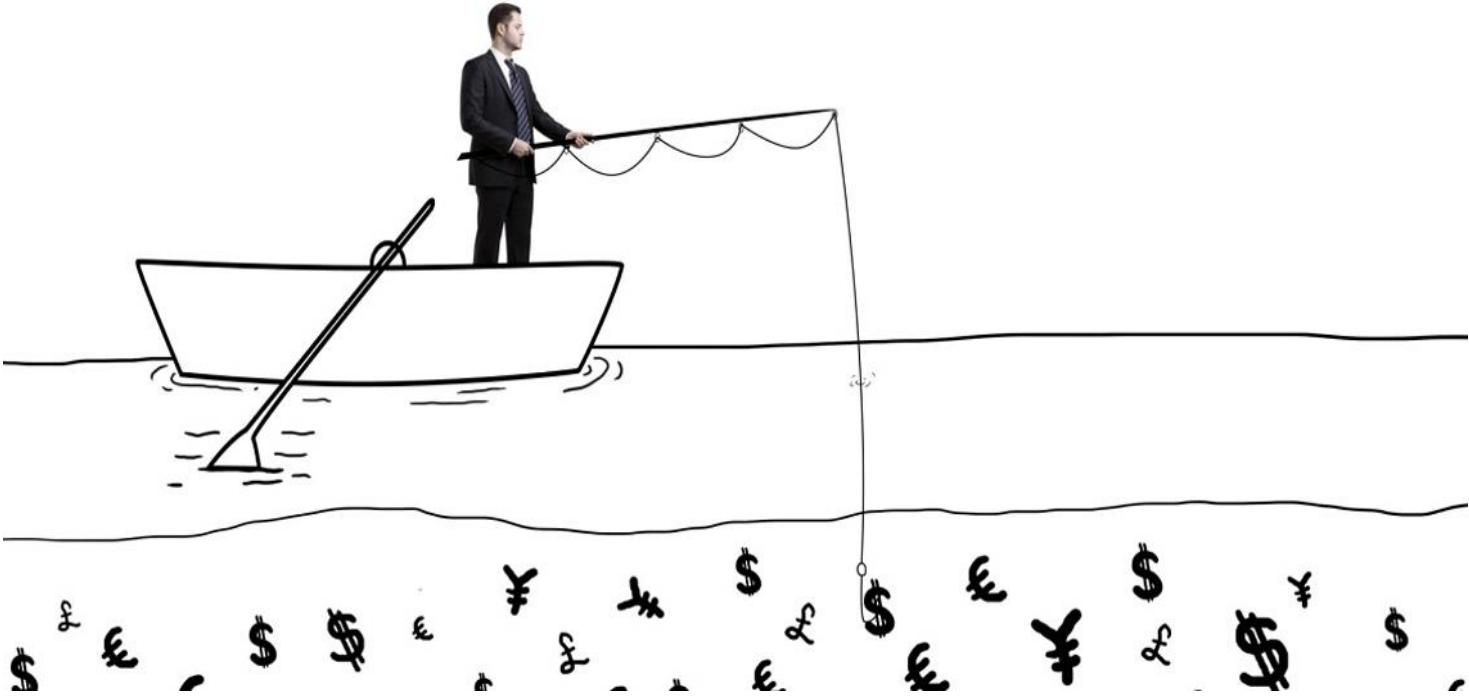
Domestic Information Gathering: Rights and Obligations



EOI Request: Rights and Obligations

- Information of taxpayer in EOI request?
 - Is taxpayer informed about EOI request from abroad?
 - Absent this information, no protection possible against abuse of EOI procedure
 - Is taxpayer informed about EOI obtained from abroad?
 - Information will be used in tax assessment
- Objection against supply of information?
 - Tax authorities' obligation of confidentiality under domestic law?

Australia

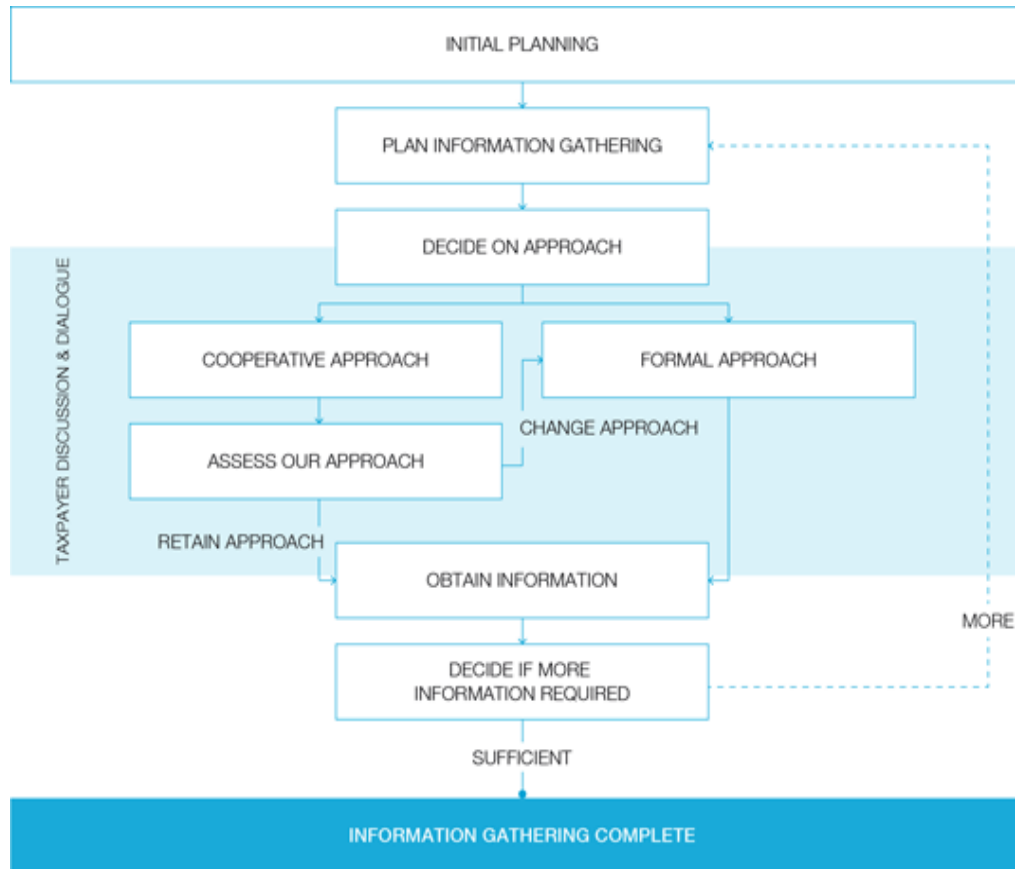


Australia: Current Landscape

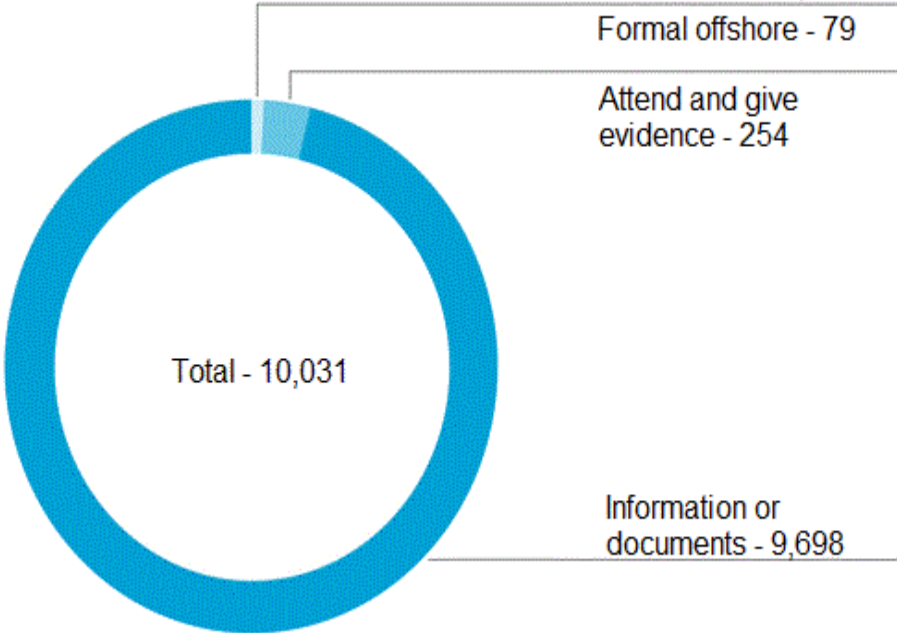
- ATO has a clear mandate, focusing on multi-nationals
- ATO wanting to understand the **full value chain** – even if it is not obviously relevant to the Australian tax base
- Unilateral measures (MAAL / DPT)
- New Tax Taskforce



Australia: ATO's Approach to Information Gathering



Australia: Domestic Powers



Australia: Domestic Powers – Very Broad

- Can request information for any purpose required for Commissioner to fulfill his functions under the Act

Industrial Equity case:

"The Commissioner will still be acting for the purposes of the Act so long as he is endeavouring to fulfil his function of ascertaining the taxable income of taxpayers. [par 21]."

Australia: Domestic Powers - When Will Commissioner Exercise These?

– Onshore notices

Express right to issue a notice requiring a person to:

- give information required for the purpose of administration or operation of a taxation law; or
- produce to the Commissioner of Taxation any documents in a person's custody or under their control

Requirement to respond overrides a client's contractual right of confidentiality but **not** legal professional privilege

Australia: Domestic Powers

Continued...Offshore Information Requests

- Can request information if the ATO has reason to believe that:
 - information relevant to the assessment of a taxpayer is **within the knowledge of a person outside Australia**, or **recorded** in a document **outside Australia**, or kept by means of a mechanical, electronic or other device outside Australia, or
 - documents relevant to the assessment of a taxpayer are **outside Australia**.
- No obligation to inform taxpayer if there is a request

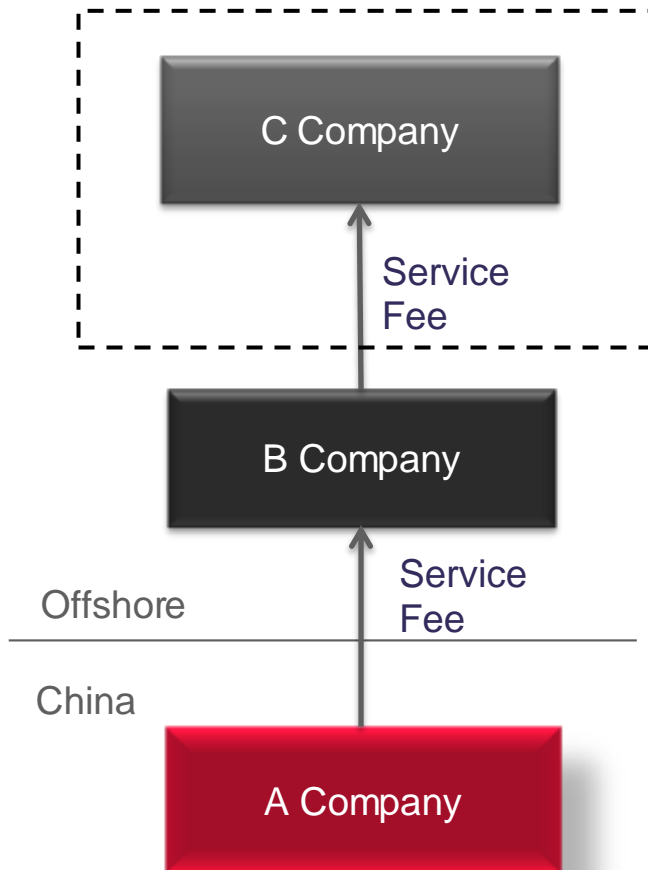
Australia: ATO's Recent EOI Activity

- 514 EOI requests
 - 281 Outgoing
 - 233 Incoming
- Raised AUD 255mill in Australian tax revenue
- Trend to continue?

EOI Cases

China

Verify Information on Outbound Service Fees via EOI



- Tax bureau noticed that A Co. paid RMB9.05 million as service fees to B Co.
 - Key service claimed to be service for application of a greenseal certification (E Co., an unrelated advisor, was engaged in the application)
- SAT sent information request regarding:
 - B Co.'s tax declaration data
 - Whether A Co. and B Co. were related parties
 - E Co's tax declaration data
 - Audit reports of B Co. and E Co.

Verify Information on Outbound Service Fees via EOI (Cont'd)

- Information received
 - E Co. only received a service fee of USD60,000 (approx. RMB0.4 million) from A Co.
 - Both A Co. and B Co. were controlled by C Co.
 - Audit reports of B Co. and C Co.
 - Service fees from A Co. were B Co's only source of income
 - Majority of the service fees were paid to C Co.
 - B Co. received service fees totalling RMB81.1 million from A Co. and paid RMB56.2 million to C Co. over the past 8 years
- Outcome
 - Tax bureau partially denied deduction of A Co's service fees (RMB42.3 million), and collected RMB12.3 in EIT from A Co.
 - Tax bureau collected RMB2.5 million in EIT from C Co. on service fees (C Co. treated as the actual service provider)

Germany

EOI Request from ATO

- Australian Taxation Office (ATO) files EOI request with German tax authority concerning German taxpayer, demanding information concerning distribution structure and methods operated in Germany
- German domestic law
 - Constitutional Law: German taxpayer is to be consulted before information is granted
 - Reason: Grant of information can be harmful to taxpayer, harm cannot be remedied once information is granted
 - Result: Taxpayer has to be given a chance to raise objections to protect his interests, possibility to file suit
- Local tax authority (Bavaria) proposes to accede to the request and supply information as requested

EOI Request from ATO (Cont'd)

- Taxpayer files objection and requests hearing for the following reasons:
 - Limited extent of Art 24 DTC Australia information exchange when compared to Art 26 OECD Treaty information exchange purposes:
 - Execute the DTC
 - Execute DTC to prevent tax fraud for taxes covered by the DTC
 - Execute statutory provisions against fraudulent underpayment of taxes
 - ATO EOI request does not indicate that it seeks to obtain information concerning the above objectives – “ultra vires”
 - Instead, client notes that Australian affiliate observed its tax filing and declaration obligations.
 - No indication in ATO EOI request whether and how the requested information is supposed to serve for the above purposes
 - Instead, ATO appears concerned with collecting information on how taxpayer operates globally, as confirmed by articles in the financial press - indication of fishing expedition

EOI Request from ATO (Cont'd)

- Taxpayer files objection and requests hearing for the following reasons (cont'd):
 - ATO EOI request not foreseeably relevant for specific ATO tax interest and none specified
 - Australian market and German market for taxpayer products vastly different, substantially larger landmass (x20) and much smaller population (x0.25) in Australia, resulting in totally different distribution setup in either country
 - Information requested in view of different territory not foreseeably relevant
- Local authority (Bavaria) suggested to use estimates in order to bridge gap in financial impact of market differences - but not for German tax authority to compensate deficiencies in ATO EOI
- Invocation of operating and business secrets limitation to ATO EOI, If information granted should become available to (horizontal) competitors or large-scale (vertical) suppliers or customers

EOI Request from ATO (Cont'd)

- Closing note in objection filing:
 - Tax secrecy is protected by section 355 of the Penal Code
 - This criminal law rule also applies to the supply of protected data to a foreign tax administration
 - General tax code justifies breach of tax secrecy when this is in line with an EOI based on a tax treaty
 - In the present case, EOI is not in keeping with treaty provisions, it is non-specific, it is a fishing expedition, it violates business secrets, it is not necessary for taxation in Australia
 - Consequence: no justification for breach of tax secrecy
 - Civil servant engaged in supplying EOI information liable to prosecution for breach of tax secrecy - and so specified in objection filing
- Result: EOI did not receive a response from Germany, client interests were safeguarded

Singapore

Case I: ABU v CIT [2015] SGCA 4

– Facts

- Appellant was a Japanese national
- National Tax Agency of Japan (JNTA) sought to determine if the Appellant had failed to report distributions received from foreign securities investment funds
- JNTA made a request for information to the Singapore Comptroller of Income Tax (CIT) for, inter alia, the production of certain bank statements protected by the Banking Act (Cap. 19)
- CIT applied for a court order under s 105J of the ITA for the production of the bank statements. The SGHC granted the order
- The Appellant appealed

Case I (Cont'd)

- #1: Whether the Court would review the letter of request to verify the assertions within
 - Under s 105J (now repealed), the High Court may direct the production of the information if it is satisfied that it is justified in the circumstances of the case and not contrary to the public interest.
 - Query whether it was sufficient for the request for information to comply with the information prescribed in the Eighth Schedule, or if the Court would also seek to verify the truth of its factual assertions?
 - SGCA held the Court was not required to verify the truth of factual assertions within a request for information. It also held that the standard of “foreseeably relevant” (Art 26(1) of the DTA) was satisfied upon meeting the Eighth Schedule requirements.

Case I (Cont'd)

- #2: Whether the EOI regime applies to information relating to past periods
 - Appellant argued that statutes should not have retrospective effect. Hence, he argued that Singapore's EOI regime did not permit the disclosure of information relating to periods:
 - before the Japan-Singapore Protocol was given effect (14 July 2010), or, alternatively;
 - before the date on which the EOI regime was added into the ITA (9 February 2010).
 - In interpreting s 105J of the ITA, the Court focused on a purposive interpretation (s 9A of the Interpretation Act), rather than the presumption rule against statutes having retrospective effect (a common law rule). It thereafter held that the scope of information which could be exchanged under the EOI regime related to any period of time, unless expressly restricted by a DTA provision.

Case II: AXY and Others v CIT [2015]

SGHC 291

– Facts

- National Tax Service of the Republic of Korea (NTS) issued a request for information to the CIT for the provision of certain Korean taxpayers' banking activity in Singapore.
- CIT served notice to various banks under ss 65B and 105F of the ITA to obtain the requested information. In response, the taxpayers applied for a judicial review of the CIT's decision to issue the notices.
- The issue before the Court involved an application for discovery for certain documents, including the NTS request for information, the correspondence between the CIT and the Korean tax authorities.

Case II (Cont'd)

- Application for discovery in the context of leave to commence judicial review
 - Court held that the threshold issue in determining the scope of discovery was whether tax investigations by a foreign tax authority would be prejudiced;
 - The application for discovery was allowed in part:

Document	Discovery granted?
NTS's request for information	Yes
CIT's correspondence with NTS	Yes
CIT's notice to the banks	Yes
Documents relating to investigations in Korea	No
Application for income tax returns	No
Application for EOI Review Committee documents	No

Case II (Cont'd)

- Legislative response? s 105HA of the ITA
 - Introduced in the Income Tax (Amendment) Act 2014 (No. 37 of 2014);
 - s 105 restricts a taxpayer from inspecting or taking a copy of a request of information from a foreign tax authority. Documents relating to the request of information are also protected;
 - Query whether taxpayers are denied access to confidential documents that could be relevant to mounting a judicial review?

Case II (Cont'd)

Confidentiality requirements for judicial review proceedings

105HA.—(1) This section applies to a judicial review instituted by any person in respect of —

- (a) any action taken by the Comptroller to obtain information to comply with a request made under section 105D;
- (b) any disclosure or intended disclosure by the Comptroller of information pursuant to an arrangement that has effect under section 49 or 105BA; or
- (c) any action taken by the Comptroller under this Part or a failure to take such action,

as well as any proceedings in court (however instituted) for a liquidated sum, damages, equitable relief or restitution if a Mandatory Order, Prohibiting Order, Quashing Order or declaration is made pursuant to the judicial review.

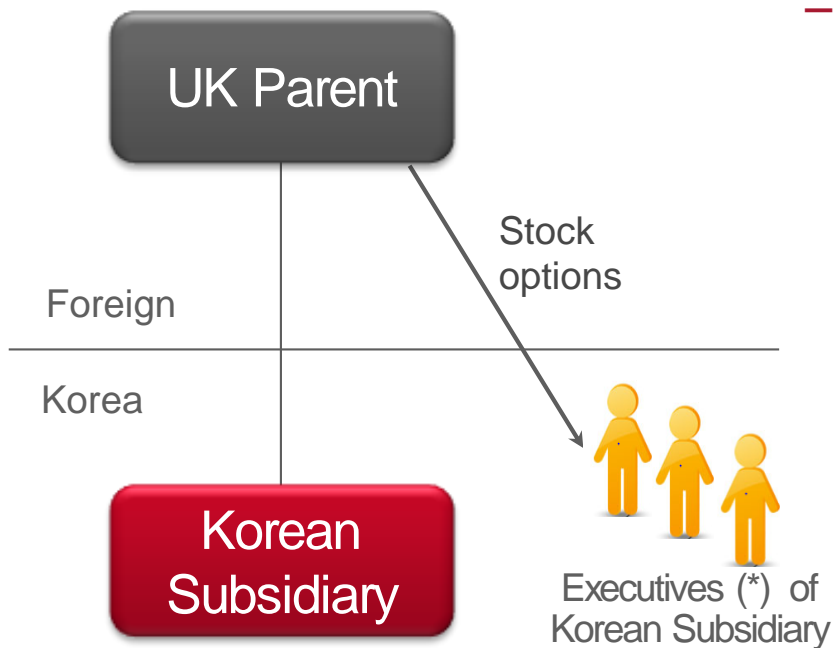
(2) In any proceedings to which this section applies, no person may inspect or take a copy of any of the following documents without the leave of court:

- (a) a request made under section 105D;
- (b) any document relating to the request which is given by or to the Comptroller, to or by the competent authority or a person acting on behalf of the competent authority.

(3) Leave shall not be given under subsection (2) in relation to any document if the court is satisfied that the competent authority has requested the Comptroller not to disclose that document to any person.

Korea

Case I: Multi-nationals



(*) Tax residents in UK and other jurisdictions

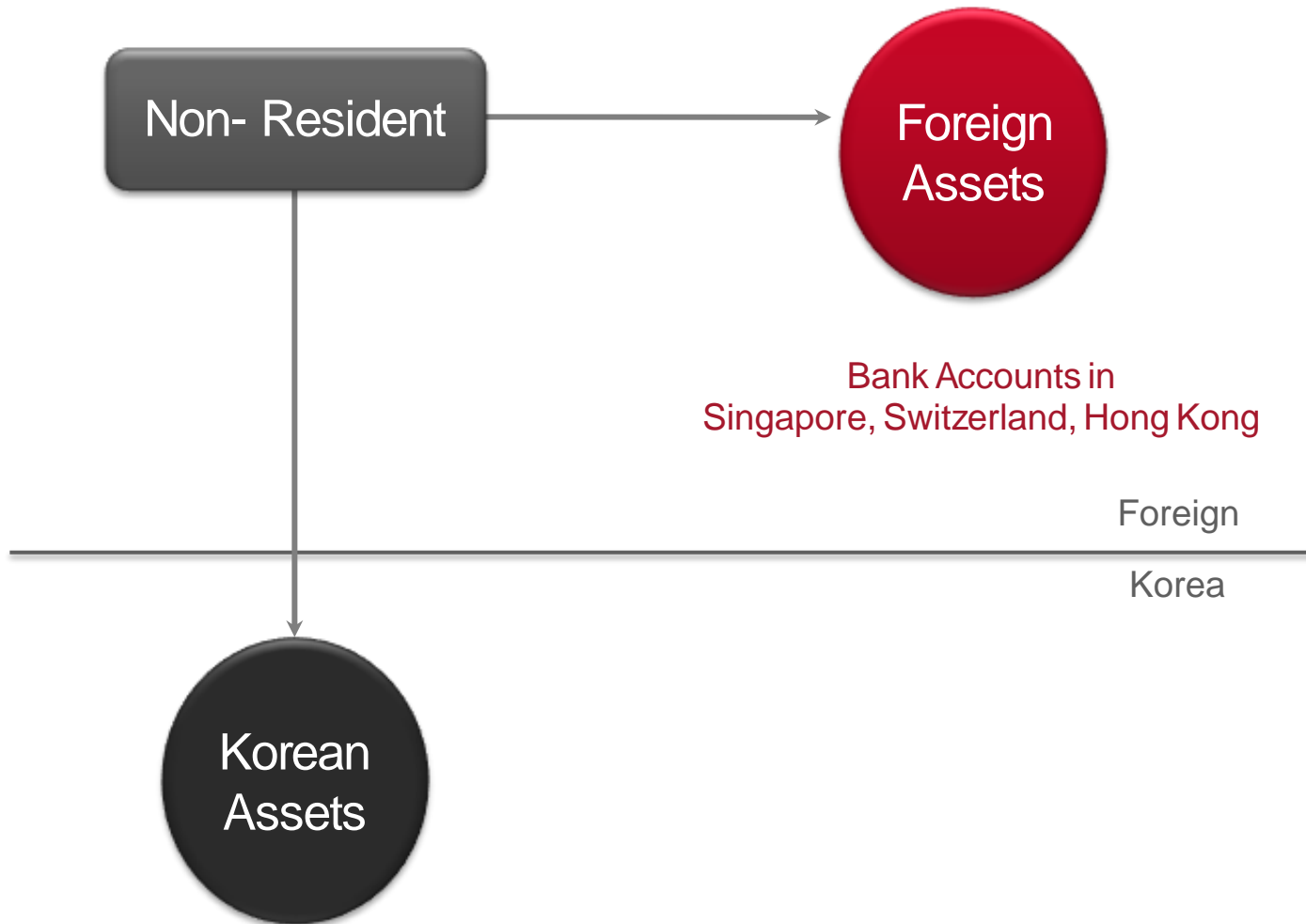
– Background

- Korean Subsidiary audited by the NTS
 - Some of the executives did not report Class B income with respect to the taxable benefits of stock option provided by the UK Parent
 - Korean Subsidiary is neither a taxpayer nor withholding agent
 - No legal requirement to comply with the document request concerning the overseas stock option (potential breach of the Personal Information Protection Act)
- The NTS sent an official EOI request to the UK tax authorities (HMRC) seeking the details of the benefits provided by the parent company

Case I: Multi-nationals (Cont'd)

- Legal issues
 - Whether the EOI meet the requirement under the Korea/UK tax treaty (Pre-2005 OECD MTC Article 26, “Old EOI Provision”)
 - Whether the enforcement of the EOI is restricted by the UK domestic laws
- Outcome
 - Some of the executives are not UK tax residents
 - The requirements for the enforcement of the EOI under the Korea/UK treaty have not been satisfied
 - Restriction of such international co-ordination under the UK domestic laws
 - HMRC refused to respond to the EOI request
- Consideration
 - What if Post-2005 OECD MTC Article 26 (“New EOI Provision”) had been in force in the Korea/UK tax treaty?
 - Necessary vs. foreseeably relevant

Case II: High Net Worth Individuals



Case II: High Net Worth Individuals (Cont'd)

- Background
 - Korean national with a tax residency in a foreign country audited by the NTS
 - He is a non-resident under the Korean tax laws and the tie-breaker rule of the applicable tax treaty
 - No tax reporting and payment obligations with respect to the income earned outside Korea and no reporting obligation for foreign financial accounts
 - The NTS took a view that he is a Korean tax resident and sent an official EOI request to the tax authorities of Singapore and Switzerland
 - The scope of the financial and account information subject to the EOIs was extremely broad (they requested the information relating to all the offshore entities in which the Korean national has certain direct/indirect shareholding or is registered as a director)
- Legal issues
 - Whether the EOI meet the requirement under the Korea/Singapore and Korea/Swiss tax treaties with the New EOI provision?
 - Whether the enforcement of EOI is restricted by the Singapore/Swiss domestic laws

Case II: High Net Worth Individuals (Cont'd)

– Outcome

- Tax authorities of both Singapore and Switzerland broadly interpreted “foreseeably relevant” requirement
- The two tax authorities took a view that a technical issue such as tax residency should not have an impact on the enforcement of the EOI
 - They decided to enforce the EOI as requested by the NTS
- The taxpayer brought a legal action seeking an injunction against the enforcement of EOI in both countries.

– Consideration

- What is the scope of information subject to the EOI under the New EOI Provision?
- What issues are in dispute in the EOI legal proceedings? (e.g. procedural issues, prohibition of “fishing expedition”)

Alternative D: Exchange of Information

Chair: Christian Brodersen, Germany

Shih Hui Lee, Singapore

Kyu Dong Kim, Yulchon LLC

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Noam Noked, Hong Kong