AIJA
INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

Munich, 2016

National Report of USA

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12 February 2016

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

There is a tangled web of transparency obligations under US domestic law derived from the system of worldwide taxation and the complexity of that system in avoiding double taxation, preventing deferral of income in certain circumstances, and preventing use of foreign accounts or entities to evade tax (see discussion on FATCA in Section 2.2.1). While it is possible in many circumstances to reduce the onerous reporting requirements (typically by analyzing the requirements of ownership and control and avoiding certain thresholds), the strategies are dependent on the goals of the taxpayers involved and increase the complexity of business structures.

From a broad perspective, the various reporting obligations of taxpayers on required tax and information returns typically include reporting income derived from other states, the source of that income, and in an indirect way the tax treatment of the income in the state. These reporting obligations vary greatly depending on the type of taxpayer (i.e., whether the taxpayer is an individual, corporation, partnership, trusts or estate. Specifically in the case of entities, the nature of the obligations depend on whether the entity is domestic or foreign, and, in the case of a foreign entity, the percentage ownership by a US person.

By way of example, in the context of the information returns required for a Controlled Foreign Corporation ("CFC"), the Form 5471[1], the corporations balance sheet and income statement are required to be disclose, which includes a line item for the gross tax amount. Further detail is required on Form 5471, Schedule E (Income, War Profits, and Excess Profits Taxes Paid or Accrued) which lists the state in which the tax was paid or accrued and the amount of the tax. In these required returns, the particular disclosures relate more to ensuring compliance with the CFC regime and proper reporting of tax attri butes such as, *inter alia*:

- "Subpart F" income (typically passive income for which deferral is not available (i.e., income required to be recognized on a current basis));
- Dividends (requiring earnings and profits calculations, in which taxes paid is a relevant line item); and

[1] https://www.irs.gov/pub/irs-pdf/f5471.pdf.

- Foreign tax credits, which are reported in detail on a separate form that notes detailed information related to the source and nature of that tax for purposes of limitation calculations.

In addition to varying reporting requirements, domestic corporations are required to report uncertain tax positions on a schedule (known as Schedule UTP) that is filed with a Form 1120 (US Corporation Income Tax Return). The Schedule UTP is required in all circumstances when the corporation has taken a position on its US federal income tax return for the current or a prior tax year, and either the corporation or a related party (including both domestic and foreign subsidiaries) has recorded a reserve with respect to that tax position for US federal income tax in audited financial statements or if they did not do so because they expect to litigate the position. It is interesting to note that there is no direct penalty associated with a failure to file Schedule UTP.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

The United States does not require reporting of the transfer pricing methods used or overall worldwide transfer pricing policy of taxpayer groups. Indirectly, both the information returns filed with respect to CFCs (Form 5471) and 25% foreign owned US corporations (Form 5472[2]) require disclosure of detailed information on controlled transactions with foreign entities. In the case of an audit by the IRS, the taxpayer would then be in a position to defend its transfer pricing methodology and the transactions at issue, and might be subject to penalties of 20% to 40% of the tax amount in the case of adjustments. In order to avoid such penalties, the taxpayer has the option to prepare contemporaneous documentation (i.e., prepared by the filing date of the return), update such transfer pricing documentation on an annual basis, and submit the documents within 30 days of request by the IRS.[3] With respect to cost sharing arrangements, controlled participants are required to file a Cost Sharing Statement with the IRS within 90 days after the first occurrence of intangible development costs, as well as to make specified disclosures on annual tax returns and maintain contemporaneous documentation.[4]

In addition to the above, the Department of Treasury has released proposed regulations based on the BEPS Action 13 final recommendations requiring

[2] https://www.irs.gov/pub/irs-pdf/f5472.pdf.

[3] *See* Treas. Reg. § 1.6662-6 and § 1.482-7(k)(2).

[4] Treas. Reg. § 1.482-7(k)(2).

country-by-country documentation.[5] However, as discussed in Section 2.3.1, the report will be required after publication of the final regulations.

2.1.3. Does the national law currently include obligations to report tax schemes?

United States domestic law includes provisions requiring the mandatory disclosure of reportable transaction,[6] which typically include:

- Certain listed schemes the IRS has deemed particularly aggressive tax avoidance transaction;
- Confidential transactions (where a transaction is offered under conditions of confidentiality and for which a fee is required exceeding certain thresholds);
- Transactions with contractual protection in which a full or partial refund of fees if the intended consequences of the transaction are not sustained;
- Loss transactions in which a claimed loss exceeds certain prescribed thresholds; and
- Transactions of interest listed by the IRS because they have a potential for tax avoidance or evasion.

This obligation and related penalties also exists for material advisors and promoters.[7]

The required form, Form 8886 (Reportable Transaction Disclosure Statement),[8] includes detail regarding the transaction, the participants (including all entities involved that are foreign), the advisors, and the type of tax benefit along with description of the steps of the transaction and the amount of investment.

In addition, as discussed in Section 2.1.1, Schedule UTP is required for US domestic corporations to report uncertain tax positions.

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

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[5] Prop. Treas. Reg. § 1.6038-4

[6] *See* IRC Section 6111 and IRS Notice 2009-59, 2009-31 IRB 170 (https://www.irs.gov/pub/irs-irbs/irb09-31.pdf).

[7] *See* IRC Section 6112.

[8] https://www.irs.gov/pub/irs-pdf/f8886.pdf.

The United States provides international tax assistance and exchanges information in relation to tax matters pursuant to international agreements, such as tax treaties, tax information exchange agreements ("TIEAs") and, more recently, intergovernmental agreements on the implementation of the Foreign Account Tax Compliance Act ("FATCA"). The US is also a party to the OECD Convention on Mutual Administrative Assistance in Tax Matters[9], the Convention on the Taking of Evidence Abroad in Civil[10] and mutual legal agreement treaties in criminal matters to exchange tax information and, in criminal cases, to furnish and exchange evidence.

Through these various agreements, information may be exchanged upon specific request, spontaneously and automatically. Information may also be exchanged during competent authority proceedings with respect to the prevention of double taxation of particular taxpayers or transactions, during simultaneous examinations of multinational companies and during simultaneous criminal investigations.

Exchange Upon Request

The exchange of tax information upon request involves coordinating incoming and outgoing requests for information about specific taxpayers. Request generally arise from the examination of a particular tax return or declaration, collection activities or criminal investigations.

Some foreign governments restrict investigative activity within their borders by other tax administrations. As a result, all exchanges of information with foreign tax administrations must occur through the US competent authority. Exchanges outside of competent authority channels may result in unauthorized disclosure of tax return information.

The director of the international unit at Large Business & International Division is the US competent authority and the only person authorized to exchange information with other tax authorities.

Information exchanged under tax treaties and TIEAs is confidential under the provisions of sections 6103 and 6105 of the Internal Revenue Code. Provisions in the treaties and TIEAs also require that the information may be disclosed only to persons or authorities involved in specified activities in the United States.

Requests from treaty or TIEA partners for tax information concerning specific taxpayers are considered on a case-by-case basis and require specific identification of the taxpayer, an itemized list of specific information requested, a detailed narrative identifying the tax nexus or relevance of the information sought to the taxpayer and issues examined, and an explanation

[9] http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm
[10] https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

of how the request for transactions, facts, or documents pertains to a tax or a tax liability covered by the treaty or TIEA.

The requests are typically assigned to a revenue agent ("RA") who will obtain the requested information within 60 days from the date of the transmitting memorandum. If needed for purposes of obtaining the requested information, the RA will arrange for the preparation of a summons. Once the requested information is obtained, the information is transmitted on behalf of the US competent authority to the foreign competent authority. If the information is not provided, the foreign competent authority is notified of the reason the information could not be provided.

Before exercising the formal summons authority, a RA can in some circumstances first request the information through an Information Document Request ("IDR") directed to the party in possession of the information.

If the IRS is not successful in obtaining the information requested, a summons may be required. A summons compels the person summoned to produce the records or testimony sought within a limited period. While in many instances, the taxpayer identified in the summons (in addition to the person summoned) will be provided with notice of the summons within three days of the summons's service, the ability to pose a legal challenge to the summons is quite narrow.

The IRS, including the US competent authority, exercises its powers directly and does not need to invoke special procedures, whether administrative, judicial, or otherwise, to exercise those powers effectively. In some situations when the IRS has issued an administrative summons, it may choose to bring judicial action to enforce the summons if the party summoned does not comply, and the taxpayer in some situations may start a judicial proceeding to quash the summons.

When a taxpayer or a third-party record keeper does not provide information voluntarily and it is necessary to issue and enforce a summons for information and documents, the IRS generally will seek judicial enforcement in collaboration with the Department of Justice ("DOJ"), which will represent the IRS in a judicial enforcement proceeding brought before a federal district court judge. The IRS has a close working relationship with the DOJ, which has a long and successful record of enforcing IRS summonses regarding both US tax and foreign exchange of information requests.

The IRS has the authority to obtain information in response to a request for exchange of information regardless of whether the IRS has any need for the information for its own tax purposes. To be valid and enforceable, any summons must seek information that may be relevant to the investigation, be issued under a proper purpose, seek information that the IRS does not already possess, and comply with administrative steps required in the Internal Revenue

Code.[11] A summons enforcement proceeding started on behalf of a foreign tax authority under a tax treaty or TIEA that meets the statutory requirements and is issued in good faith is valid and enforceable.[12]

If any person is summoned under tax laws to appear, testify, or to produce books, papers, records, or other data, the US District Court for the district in which that person resides or is found has jurisdiction by appropriate process to compel compliance.[13]

Nevertheless, in many cases, information requested may not be accessible. One significant limitation in obtaining information from the United States is that most information about beneficial ownership of corporation, limited liability companies and other entities is controlled by state governments in the US. Many states do not require ownership information to be provide to state authorities or even that such information be kept in the US.[14]

Spontaneous Exchange of Information

A spontaneous exchange of information is furnished to a treaty or TIEA partner without a prior specific request. It typically involves information discovered during a tax examination, investigation, or other procedure that suggests or establishes noncompliance with the tax laws of a treaty or TIEA partner.

Automatic Exchange of Information

In March 2010, the United States enacted the Foreign Account Tax Compliance Act ("FATCA"),[15] as part of the Hiring Incentives to Restore Employment (HIRE) Act, and set the world on course to automatic exchange of information as the new standard. The principal purpose of FATCA is to prevent US persons, including US entities, from using accounts and foreign entities outside the United States to evade US tax. FATCA requires US payors and foreign financial institutions ("FFIs") that enter into an agreement with the IRS to withhold 30 percent of certain payments from US sources to foreign entities unless the entity qualifies for an exemption or meets certain obligations under FATCA. As part of their obligations under FATCA, FFIs are required to report to the IRS information about financial accounts held by US persons or by foreign entities in which US person hold a substantial ownership interest.

For many FFIs, compliance with FATCA would result in violations of local financial privacy and bank secrecy laws. To facilitate the cooperation of foreign governments and compliance by foreign financial institutions, the United

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[11] US v. Powell, 379 US 48 (1964).

[12] US v. Stuart, 489 US 353 (1989); Zarate Barquero v. US 18 F3d 1311 (5th Cir. 1994).

[13] *See* IRC Sections 7604, 7609.

[14] Zagaris, Bruce, *Information Exchange Between the US and Latin America: The US Perspective, Part 1*, Tax Notes Int'l, June 9, 2014, p. 955.

[15] *See* IRC Sections 1471 - 1474.

Stated entered into, and continues to negotiate, intergovernmental agreements ("IGAs") that alter the compliance burdens under FATCA. As of 2 February 2016, 112 IGA are either in force, signed or under an agreement in substance, all of which are presently treated as "in effect".[16]

All IGAs are based on one of two models, aptly named Model 1 and Model 2. Model 1 IGAs[17] establish a framework for reporting by FFIs of financial account information to their respective tax authorities, followed by automatic exchange of that information to the IRS. This framework requires the country entering into the IGA with the US ("FATCA Partner Jurisdiction") to adopt domestic laws to facilitate the necessary reporting.

Model 2 IGAs also requires the FATCA Partner Jurisdiction to adopt domestic laws to facilitate reporting. However, unlike the Model 1 IGA, Model 2 requires FFIs in the FATCA Partner Jurisdiction to enter into an agreement with the IRS and report to the IRS directly.

Model 2 IGAs and most Model 1 IGAs are "reciprocal," meaning that the United States is required to provide certain financial account information held by tax residents of the FATCA Partner Jurisdiction. However, upon closer examination, one finds that these IGAs are not reciprocal at all. Under the IGAs, the FATCA Partner Jurisdiction and its FFIs are required to report the following information to the United States:

- Account balance and gross interest paid on depository (cash) accounts held directly US persons (including US entities) or through nonfinancial foreign entities ("NFFE") with a US person as a controlling person;
- Account balance and gross interest, dividends and other income earned by assets held in custodial accounts by US persons directly or through an NFFE with a US person as a controlling person; and
- Gross proceeds from the sale or redemption of assets held in accounts held directly by US persons or through NFFEs with a US person as a controlling person.

In contrast, the United States is only obligated to report to its FATCA Partner Jurisdiction:

- Gross interest paid on depository account directly held by individuals who are tax resident in the FATCA Partner Jurisdiction; and
- Gross interest and dividends paid from US sources, but only if already subject to reporting under Chapter 3 or 61 of Subtitle A of the Internal

[16] *See* https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[17] *See* https://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf (Reciprocal Model 1 IGA); https://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf (Non-Reciprocal Model 1 IGA).

Revenue Code and only with respect accounts directly held by individuals and entities tax resident in the FATCA Partner Jurisdiction.

The United States is not obligated to report:

- Depository accounts held by entities, even if tax resident in the FATCA Partner Jurisdiction;
- Non-cash accounts, whether held by individuals or entities, even if tax resident in the FATCA Partner Jurisdiction; or
- The controlling person of any entities, regardless of where they are formed or tax resident or whether they are owned and controlled by tax residents of the FATCA Partner Jurisdiction.

Whether valid or not, the reason why the US negotiated reciprocal IGAs that only required limited reporting by the US to its FATCA Partner Jurisdictions is because of the limited information available to the IRS for exchange under present domestic US law. The passage of legislation, requiring the cooperation of Congress and the Presidency, is likely to be required to allow the IRS to obtain the information it would need to enter into fully reciprocal arrangements with its FATCA Partner Jurisdictions.

In the meantime, 97 countries around the world (as of the 27nd of January 2016)[18] have agree to participate in a multilateral system of automatic exchange of information (commonly referred to as the Common Reporting Standard or "CRS") inspired by FATCA and heavily based on the more expansive FATCA Partner Jurisdiction reporting obligations under the IGAs, but on a fully-reciprocal basis. The jurisdiction conspicuously missing from that list of committed to adopting CRS is the United States.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

The United States is not a member of the EU and therefore not implementing the Directive 2011/16/EU of 15 February 2011.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

[18] *See* http://www.oecd.org/tax/transparency/AEOI-commitments.pdf.

The United States has indicated that it is currently engaged in automatic exchange of information with FATCA Partner Jurisdictions in accordance to the terms of the IGAs. While it acknowledges the need to achieve an equal level of automatic exchange of information with its FATCA Partner Jurisdictions and that it is committed to pursuing this objective, it has not committed to adopting CRS.

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

In general the Congress of the United States has not been directly involved in the BEPS project, and has shown little indication that there will be legislative proposals to implement the BEPS action plan items. However, certain proposals have been made related to broad-based tax reform in general, which include international provisions, some of which incorporate various concepts of the BEPS project. Little actions is suspected on any of outstanding proposals before a new administration takes office in 2017.

Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

There is a fundamental tension in the nexus/source-based approach of the Action 5 final report recommendations and the residence based approach of US tax policy. There are substantial domestic rules related to transfers of intellectual property, controlled foreign corporations, transfer pricing, etc. and without broader fundamental tax reform little is anticipated in terms of US implementation of the recommendations of the Action 5 final report.

Action 12: Mandatory disclosure rules

In the United States, domestic law includes provisions requiring the mandatory disclosure of certain reportable transactions.[19] These disclosure obligations and related penalties also exist for advisers or promoters of transactions requiring contemporaneous disclosure of aggressive tax planning with respect to reportable transactions.

Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting

[19] *See* IRC Sections 6011, 6012, 6111, and 6112.

The IRS issued proposed regulations[20] on December 21, 2015 requiring annual country-by-country reporting for a US person that is the ultimate parent entity of a multinational group. The proposed regulations are consistent with the model template in the Action 13 final report, and require the ultimate parent entity of a US multinational group with $850 million or more of consolidated group revenue to file an annual report calling for information on a country-by-country basis related to income and taxes paid, together with certain indicators of the location of economic activity. However, the proposed regulations do not implement the "master file" reporting described in the Action 13 Final Report. The reporting requirement applies to taxable years of the ultimate parent entities that begin on or after the date of publication of the final regulations—thus if the regulations are finalized in 2016 the first filing year (for companies using a calendar year taxable year) will be the year beginning on January 1, 2017, and thus the report would be due with the 2017 income tax return filed no later than September 15, 2018. Comments to the proposed regulations are due by March 22, 2016.

The United States has not signed the Multilateral Competent Authority Agreement ("MCAA") for the automatic exchange of Country-by-Country reports, which as of 16 January 2016 has been signed by 31 countries.[21] The MCAA is not before the US Senate Subcommittee on Foreign Relations for comment and recommendation and thus it is likely the US will rely on existing arrangements in bilateral tax treaties or Tax Information Exchange Agreements to exchange such information.

It is interesting to note with respect to the country-by-country reporting, that legislation, the Bad Exchange Prevention (BEPS) Act, has been introduced by Congressman Charles Boustany imposing restrictions on the power of the US Treasury Secretary to transmit country-by-country reports under the BEPS action plan. The proposed legislation prohibits the Secretary from collecting or transmitting any country-by-country report information with respect to any taxable years beginning before January 1, 2017. The legislation also requires the Secretary to suspend transmittal if the foreign jurisdiction is abusing master file documentation requirements (e.g., by seeking trade secrets, seeking consolidated financial statements not filed with the US Securities and Exchange Commission, or seeking confidential attorney-client communication).

BIBLIOGRAPHY

- Andersen, Richard E., *Analysis of United States Income Tax Treaties*, Thomson Reuter/WG&L, 2015.

[20] Prop. Treas. Reg. § 1.6038-4

[21] *See* http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm.

- Joint Committee on Taxation, *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project* (JCX-139-15), November 30, 2015.