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НОВЫЙ ИГРОК В МЕЖДУНАРОДНОМ НАЛОГООБЛОЖЕНИИ: АВТОМАТИЗИРОВАННЫЙ ОБМЕН ИНФОРМАЦИЕЙ В ФИНАНСОВОЙ СФЕРЕ

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Аннотация: В статье рассматривается прогресс международного налогообложения в борьбе с сокрытием доходов в офшорных юрисдикциях, а также освещаются основные моменты действующей правовой базы для обмена информацией о банковских счетах. Автор исследует основные проблемы международного налогообложения и то, как корпорации уклоняются от уплаты налогов в своей юрисдикции и как это влияет на финансовую сферу. В статье рассматривается корпоративная банковская тайна с ее вредоносными аспектами и предлагается решение текущих проблем. В заключение автор акцентирует внимание на сотрудничестве между налоговыми администрациями и положительных результатах прозрачности и обмена информацией в области международного налогообложения.
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THE NEW PLAYER IN INTERNATIONAL TAXATION: THE AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION

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Abstract: The article highlights the progress of international taxation in the fight against the concealment of income in offshore jurisdictions and exposes the lights and shadows of the current legal framework for the exchange of information on bank accounts. The author examines the major problems of international taxation and how corporations avoid paying taxes in their jurisdictions and how it affects the financial sphere. The article studies bank secrecy with its harmful aspects and develops the solution to resolve the current issues. As a conclusion, the author focuses on cooperation between tax administrations and the positive outcomes from transparency and information exchange measures on the international taxation.
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The problem of international tax evasion and the exchange of information as a measure to fight against it

One of the major problems of International Taxation is, without any doubt, the International Tax Evasion and Tax Fraud. On the one hand, it is clear how large fortunes avoid paying taxes in their countries of fiscal residence through concealing money in tax havens. A good illustrative example has been the Panama Papers scandal or the Falciani case[1]. On the other hand, since 2007, when broke out the global financial and economic crisis, we have had knowledge of the low taxes paid by big multinationals, especially technology companies[2].

If we focus on the concealment of wealth in offshore jurisdictions, the great challenge is undoubtedly to fight against the banking secrecy of domestic legislation and, in this sense, to achieve that the banking information reaches the tax administrations of the jurisdictions in which the taxpayer has his tax residence. Obviously, once the tax authorities have knowledge of our income in other jurisdictions, it is possible to comply with tax obligations correctly. The goal is to ensure that taxpayers pay the right amount of tax to the right jurisdiction. To this end, as we live in a globalized world where it is so easy to move money around, tax administrations need to work together.

To meet this objective, the paradigmatic instrument is the Exchange of Information on bank accounts between all Tax Administrations at a global level. In the words of OECD, "Exchange of information is about achieving global tax co-operation through the implementation of international tax standards and other instruments to put an end to bank secrecy and tackle tax evasion".

Currently, the most important modalities of international supply of information between tax authorities are the Exchange of Information on Request (EIoR) and the Automatic Exchange of Information (AEoI).

Exchange of Information on Request takes places when a tax administration asks for specific tax relevant information on a particular case from another jurisdiction. This modality operates in the control phase, that is, when there is already an open investigation on the taxpayer.

On the other hand, Automatic Exchange of Information occurs when there is an automatic and regular (period basis) information supply between tax administrations without the need for a prior request by one of the administrations. This modality happens during the tax management phase, before tax return is delivered.

Undoubtedly, the Automatic Exchange of Information is the best instrument to fight banking secrecy at a global level. Although it implies a huge effort to achieve a high level of international cooperation between tax administrations, reduces costs for the tax administrations and makes it more difficult to hide income abroad.

The following sections show how, in just a few years, the exchange of information in tax matters has gone from being the great forgotten to becoming the battleground of international taxation.

Exchange of information on request (lifting Bank secrecy I): progress since 2001

Until 2001, in international taxation, the exchange of information between tax administrations hardly played a role in the legal field. The OECD's efforts, at least in appearance, were focused on eliminating harmful tax competition, in order to protect the integrity of the tax systems[3]. As the OECD puts it: "Tax competition in the form of harmful tax practices can distort trade and investment patterns, erode national tax bases and shift part of the tax burden onto less mobile tax bases, such as labor and consumption, thus adversely affecting employment and undermining the fairness of tax structures"[4].

In this context, on its report 1998, OECD focused on geographically mobile activities, such as financial and other service activities, including the provision of intangibles. And, in this line, it developed criteria to identify the harmful aspects of a particular regime or jurisdiction. In particular, it focused on four factors that could cause harm by undermining the integrity and fairness of tax systems. Thus, it focused on four criteria to identify "Tax Havens": 1) Zero or nominal taxes in the case of tax havens and zero or low effective tax rates on the relevant income in the case of preferential regimes; 2) Lack of effective exchange of information; 3) Lack of transparency; and 4) No substantial activities, in the case of tax havens, and ring fencing, in the case of preferential regimes[5].

Subsequently, in 2000, OECD identified 47 potentially harmful preferential tax regimes in OECD Member countries, listed 35 jurisdictions found to meet the tax haven criteria, proposed a process whereby tax havens could commit to eliminate harmful tax practices. Those jurisdictions that make such a commitment are referred to in this Report as "committed jurisdictions" and proposed elements of a possible framework of co-ordinated defensive measures designed to counteract the erosive effects of harmful tax practices[6]. The US position, led by the Clinton Administration, was one of full support for this fiscal policy. In a press release

1 For statistics on hidden money in offshore jurisdictions see ZUCMAN G., FAGAN T.L., & PIKETTY T. (2015). *The hidden wealth of nations: the scourge of tax havens*.

2 OECD (2013a), Addressing Base Erosion and Profit Shifting (BEPS), OECD Publishing, Paris. DOI: 10.1787/9789264192744-en

3 The term appears for the first time in 1996 when Ministers called upon the OECD to «develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and report back in 1996» (See OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, Paris, https://doi.org/10.1787/9789264162945-en., page 3).

4 See OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, Paris, https://doi.org/10.1787/9789264162945-en., page 8

5 See OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, Paris, https://doi.org/10.1787/9789264162945-en., page 22 to 27.

6 See OECD (2000), *Progress Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices,* OECD Publishing, Paris, 2090192.pdf (oecd.org)

of June 26, 2000, Treasury Secretary welcomed the OECD's 2000 Report: "Treasury welcomes OECD Report on Harmful Tax Competition Havens: Treasury Lawrence H. Summers today welcomed the OECD's report on the global effort to protect the integrity of national tax systems from harmful tax competition. The report details the OECD's work in this area and identifies 35 jurisdictions as tax havens and 47 tax regimes in OECD member countries as potentially harmful. The identification of tax havens and potentially harmful tax regimes is a crucial step in preventing distortions that could undermine the benefits of enhanced capital mobility in today's global economy. It is our hope that the listed tax haven jurisdictions will take this opportunity to work with the OECD to reform their harmful tax practices"[7].

However, in 2001, a turning point occurred, and the exchange of information began to take centre stage in international tax law. Indeed, with the arrival of the Bush Jr. administration in the White House, pressure from financial lobbies and the attack on the Twin Towers in 2001 marked a decisive change in international tax policy, which now focused all its efforts on the fight against fraud and tax evasion. What is important, now is not so much for states to change the harmful elements of tax systems, but to enforce tax compliance by states in which global income is taxed, and to this aim they need knowledge of the income that is hidden in financial institutions located abroad. The challenge is to lift banking secrecy and, consequently, to begin measures aimed at transparency and exchange of information[8]. This position of the United States has undoubtedly been accentuated since the attack of September 11, 2001. In fact, measures to obtain bank information to combat the financing of international terrorism inexorably have an impact on the fight against fraud and tax evasion.

The OECD is thus complying with U.S. demands and changing its policy against tax havens. From then on, the definition of tax haven has been modified and only two criteria are necessary to identify a "tax haven", or rather, an "uncooperative jurisdiction": only the absence of the transparency requirement and the exchange of information requirement[9].

7 US Treasury Press Release, June 26, 2000 «Treasury Welcomes OECD Report On Harmful Tax Competition Havens»: http://www.treasury.gov/press-center/press-releases/Pages/ls735.aspx

8 This radical change in the US position is contained in Treasury Secretary Paul O'Neill's statement of May 10, 2001. In this declaration he states that he is reconsidering leaving the working group on harmful tax competition as this is not the priority for the US but the taxation of the worldwide income of the Americans. The modification of tax systems is not a priority for the US, but the possibility of taxing the worldwide income of Americans: «…*The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems… In fact, the Administration is actively working to lower tax rates for all Americans… the U.S. tax code generally taxes income on a worldwide basis. We have an obligation to enforce our tax laws as written because failing to do so undermines the confidence of honest taxpaying Americans in the fairness of our tax system. We cannot turn a blind eye toward tax cheating in any form…. That means pursuing those who illegally evade taxes by hiding income in offshore accounts. In today's world of instant information on the Internet, offshore bank accounts are no longer an obscure perk of the very rich. Just type in «offshore brokerage account» in any Internet search engine. The number of sites offering easy, affordable, secret offshore brokerage accounts for investing in U.S. stocks is astonishing...*». *See Press release* "Treasury Secretary O'Neill Statement on OECD Tax Havens", http://www.treasury.gov/press-center/press-releases/Pages/po366.aspx).

9 See OECD (2001), *2001 Progress Report: The OECD's Project on Harmul Tax Practices,* OECD Publishing, Paris, 2664450.pdf (oecd.org), paragraph 28, 36 to 38, pages 10 and 11: "28. *Thus, the Committee has decided that commitments will be sought only with respect to the transparency and effective exchange of information criteria to determine which jurisdictions are considered as uncooperative tax havens… 36. A jurisdiction will not be considered uncooperative if, by 28 February 2002, it commits to transparency and effective exchange of information, as discussed in paragraphs 37 and 38... 37. By committing to transparency, a jurisdiction agrees that there will be no non-transparent features of its tax system, such as rules that depart from established laws and practices within the jurisdiction, "secret" tax rulings or the ability of persons to «negotiate» the rate of tax to be applied. Transparency also requires financial accounts to be drawn up in accordance with generally accepted accounting standards and that such accounts either be audited or filed. Exceptions to this standard may be warranted where the transactions of an entity are de minimis or the entity is engaged solely in local activities and does not have foreign ownership, beneficiaries, management or other involvement. A committing jurisdiction also agrees that its governmental authorities should have access to beneficial ownership information regarding the ownership of all types of entities and to bank information that may be relevant to criminal and civil tax matters. The information to be maintained to meet the transparency criterion should be available for exchange pursuant to legal mechanisms for exchange of information as described below... 38. By committing to effective exchange of information, a jurisdiction agrees to establish a mechanism for the effective exchange of information that includes the following elements. The commitment ensures that there is a legal mechanism in place that allows information to be given to a tax authority of another country in response to a request for information that may be relevant to a specific tax inquiry. An essential element of effective exchange of information is the implementation of appropriate safeguards to ensure that the information obtained and provided is used only for the purposes for which it was sought. The adequate protection of taxpayers' rights and the confidentiality of their tax affairs is essential to preserving the integrity and effectiveness of exchange of information programmes. The OECD Member countries have agreed to provide technical assistance to establish such safeguards and more generally, to assist in the implementation of exchange of information programmes in the jurisdictions. In the case of information requested for the investigation and prosecution of a criminal tax matter, the information should be provided without a requirement that the conduct being investigated would constitute a crime under the laws of the requested jurisdiction if it occurred in that jurisdiction. In the case of information requested in the context of a civil tax matter, the requested jurisdiction should provide information without regard to whether or not the requested jurisdiction has an interest in obtaining the information for its own domestic tax purposes. The committing jurisdiction is also asked to agree that it will have administrative practices in place so that the legal mechanism for exchange of information will function effectively and can be monitored. The committed jurisdictions have been invited to work with OECD Members to develop an exchange of information instrument that could be used to satisfy their commitments. This work is described more fully in the section on Implementation of Commitments, below*".

In the light of this turnaround of fighting against tax havens, the exchange of information is beginning to play a major role in international tax law. The objective now is not to regulate «fair» tax systems but to have information on the wealth that a State's residents hide abroad. Firstly, the OECD modifies the standard of exchange of information upon request contained in the clause of Article 26 of the Model of Double Taxation Treaty. Specifically, a paragraph is introduced to lift bank secrecy, so that contracting jurisdictions cannot refuse to provide requested information on the grounds that such information is in the possession of banks. Secondly, this standard is included in the other two existing legal instruments (the Administrative Cooperation Directive and the Mutual Assistance Convention[10]) and, in addition, the Mutual Assistance Convention, until then applicable only to OECD and European Union countries, allows entry to all types of jurisdiction.

In order to conclude on the progress in the exchange of information upon request since 2001, it could be said that, although the positive aspects are unquestionable (progress in the standard, its implementation in bilateral, community and multilateral instruments, and the conclusion of information exchange instruments by opaque jurisdictions), the truth is that the standard is still very precarious in the fight against fraud and international tax evasion. It acts a posteriori (an open investigation is necessary), no deadlines are specified and no penalties for non-compliance are regulated. In addition, the new international tax policy resulted that in all jurisdictions considered as tax havens were removed from the blacklist by signing twelve information exchange agreements, without modifying their tax system at all.

Automatic exchange of information (lifting Bank secrecy II): from exception to paradigm

The unexpected breakthrough comes in connection with the automatic exchange of banking information since 2010. We have to be aware that it is close to utopia to expect a worldwide Automatic Exchange of Bank Information between Tax Administrations at the multilateral level. However this has happened.

Until 2010, the 2003 Savings Tax Directive[11] was the only regulatory example of automatic exchange of information. However, if I may say so, this instrument was a nonsense. For example, it only applied to interest received by individuals and countries such as Austria or Luxembourg were outside its scope[12].

Without no doubt, a worldwide Exchange of Bank Information was unimaginable. However, in 2010, with the Obama presidency, the United States passed the FATCA (Foreign Account Tax Compliance Act)[13]. A domestic law, with extraterritorial effects. According to this regulation, it creates an obligation of periodic and automatic supply of information from all financial entities in the world to the Internal Revenue Service (IRS). In short, all financial institutions around the world are required to periodically and massively disclose to the IRS all banking information of Americans who open accounts with them. It came into force in 2013 and, in the event of default, a 30 % withholding tax is applied to all payments from the United States to non-complying financial institutions.

FATCA compliance by financial institutions around the world, is an important tool in the fight against drug trafficking, and international terrorism, but is also crucial in the fight against international tax evasion and tax fraud. Indeed, automatic access to banking information anywhere in the world also provides valuable information for tax purposes. Under this rule, all financial institutions around the world are obliged to do so. The penalty for non-cooperation of foreign financial institutions (FFIs) with the US Internal Revenue Service (IRS) makes the measure a decisive instrument in the advancement of the automatic exchange of information at the international level.

As of 2010, in application of the U.S. standard, the U.S. began to sign bilateral Agreements, forming an important network of bilateral inter-governmental Agreements to make effective the automatic exchange of financial information required by U.S. domestic regulations (the so-called IGAs, Intergovernmental Agreements)[14].

FATCA has been the catalyst, the engine that started the automatic exchange of information worldwide. Indeed, in 2012, the G5 (Spain, Germany, Italy, France and the UK) formalised a declaration to implement the FATCA standard. In April 2013, the G5 (UK, Italy, Germany, France and Spain) announced its intention to establish a multilateral automatic exchange of information pilot project using the 2012 IGA Model as a basis and invited other EU member countries to join the project. In April and May 2013, 12 other countries joined, including 9 European countries. In May 2013, the UK's overseas territories join the project: Cayman Islands, Anguilla, Bermuda, British Virgin Islands, Montserrat, Gibraltar and Turks and Caicos Islands, as well as Isle of Man;

10 See Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Estrasburgo 1988 and the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, 27 mayo 2010 en París. To see consolidated version: The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD and Council of Europe (2011). OECD Publishing. http://dx.doi.org/10.1787/9789264115606-en

11 COUNCIL DIRECTIVE 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Official Journal of European Union, 26.6.2003, L 157/38)

12 To read more about this Directive, see, among others, MACHANCOSES GARCÍA, E. (2018): *El intercambio de información entre Administraciones en materia tributaria. Evolución, instrumentos y estándares de intercambio de información,* Instituto de Estudios Fiscales, 356 pages.

13 FATCA was passed as part of the HIRE Act (Hiring Incentives to Restore Employment Act) enacted in 2010 by the Obama Administration.

14 To see FATCA Agreements and understandings in effect by jurisdictions: Foreign Account Tax Compliance Act | U.S. Department of the Treasury

in June 2013, Mexico, Norway and Australia also join. The G20 thus initiates international pressure by calling on all countries to accede to the 2010 Multilateral Convention on Mutual Assistance without further delay and endorsing automatic exchange of information as the new global standard, through several statements.

Thus, in July 2014, the OECD published[15] an automatic standard for the exchange of information on financial accounts to be implemented globally. The new standard includes, on the one hand, a common disclosure standard (the CRS, Common Reporting Standard), which specifies the obligations of financial institutions with respect to the information they must communicate to the tax authorities in their jurisdictions and, on the other hand, a Model Multilateral Agreement between competent authorities on automatic exchange of financial account information, based on article 6 of the Multilateral Convention on Mutual Assistance in Tax Matters, as amended in 2010, which legitimises the automatic transfer of information upon agreement of the parties. In August 2014, a timetable was agreed to implement the automatic exchange of financial information globally on an equal basis. Specifically, from September 2017 and September 2018.

Finally, on the 29th of October 2014, the Multilateral Agreement between competent authorities on automatic exchange of financial account information was signed in Berlin. Consequently, at the European level, Directive 2014/107/EU was approved on 9 December 2014[16], amending the Administrative Cooperation Directive of 2011 to implement the requirements of the OECD Multilateral Agreement at the European Union level.

A utopia made real.

Conclusions: the end of bank secrecy?

Currently, 141 jurisdictions are members of the Multilateral Convention on Mutual Assistance which, among other forms of cooperation, regulates the exchange of information upon request in accordance with the new standard set by the OECD in 2002. It has been in force for Russia since 1 July 2015[17].

However, the most significant development in international taxation, in the fight against the hiding of income abroad, is the automatic exchange of financial information, which has been in place since September 2017. At present, in May 2021, 110 jurisdictions, periodically and automatically, transfer information on non-residents who open accounts in financial institutions that are resident in their territories. For example, the Russian Federation supplies automatic bank information since September 2018[18].

This is undoubtedly a new era in international tax law. Cooperation between tax administrations is unprecedented in the world of law. Transparency and information exchange measures are the main protagonists of international taxation. The automatic exchange of information at global level, utopian until a few years ago, is now the general rule. But is this really the end of banking secrecy? Although the improvements are surprising and very positive, the truth is that it is necessary for all jurisdictions to cooperate in the same direction and, in this respect, as long as countries such as the United States refuse to join this legal system, it will be difficult to complete the process of correct compliance of tax obligations.

15 OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264216525-en

16 COUNCIL DIRECTIVE 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (Official Journal of the European Union, 16.12.2016, L 359/1)

17 Jurisdictions participating in the Convention on Mutual Administrative Assistance in tax matters. Status-16 March 2021. See: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf

18 To see the status (latest of 10 December 2020) of Signatures of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and intended first information exchange: Signatories of the CRS Multilateral Competent Authority Agreement (oecd.org)

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