NON-RESIDENT ALIEN INTEREST REPORTING RULES UPHELD

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Tags
F.A.T.C.A.

On January 13, 2014, the District Court for the District of Columbia dismissed the Florida Bankers Association and the Texas Bankers Association (collectively, the "Plaintiffs") lawsuit that challenged the 2012 regulations requiring U.S. banks (including U.S. offices of non-U.S. financial institutions) to report to the I.R.S. the amount of interest paid to certain non-residents.[55]

Pursuant to the United States' relentless fight against offshore tax evasion, the I.R.S. finalized regulations requiring U.S. banks to report certain information on non-U.S. account holders. These regulations are necessary, in part, for countries that request reciprocal information on their resident account holders who have U.S. financial accounts as a precondition to signing an I.G.A. with the U.S.[56] In particular, the regulations require reporting of deposit interest aggregating $10 or more paid to N.R.A.s on Form 1042-S (Foreign Person's U.S. Source Income Subject to Withholding) for the calendar year in which interest is paid. Interest is reportable even if there is no withholding requirement. The regulations apply to all payments of interest made after January 1, 2013, and the first Form 1042-S must be filed with the I.R.S. by March 15, 2014. The reporting will be made with respect to an N.R.A. who is a resident of a country that is identified as a country with which the U.S. has in effect an income tax agreement relating to the exchange of tax information.[57]

In *Florida Bankers Association*, the Plaintiffs argued that the regulations violated the Administrative Procedure Act ("A.P.A.") and the Regulatory Flexibility Act ("R.F.A."). The A.P.A. generally requires courts to hold unlawful and set aside acts that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and acts that are unsupported by substantial evidence. The R.F.A. generally requires agencies to either analyze a proposed rule's impact on small businesses or to certify that the rule will not have a significant economic impact on a substantial number of small entities. It is sufficient to state that the Court ultimately rejected these arguments, in very brief summation, stating that the I.R.S. considered the issues and had a reasonable basis for the regulations (*i.e.*, to deter foreign tax cheats).

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55 *Florida Bankers Association v. Treasury*, No. 1:13-cv-00529 (D.D.C. 2014)(Doc 2014-821).

56 Prior to finalizing these regulations, the only country the United States required banks to provide information on deposit interest was Canada.

57 See T.D. 9584 (effective 04/19/2012).

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What is important here is that, although F.A.T.C.A. initially faced stiff resistance, automatic exchange of information is here to stay and other governments are warming up to the idea. This is self-evident in the I.G.A.s, recent efforts by the O.E.C.D.,[58] and statements made at the G20 summit in St. Petersburg Russia last September.

For example, the Model 1 I.G.A. most recently adopted by Canada provides as follows:

> The Parties are committed to working with Partner Jurisdictions, the Organisation for Economic Co-operation and Development, [and the European Union,] on adapting the terms of this Agreement and other agreements between the United States and Partner Jurisdictions to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions.[59]

This is consistent with declarations made by the Leaders at the G20 summit:

> Calling on all other jurisdictions to join us by the earliest possible date, we are committed to automatic exchange of information as the new global standard, which must ensure confidentiality and the proper use of information exchanged, and we fully support the OECD work with G20 countries aimed at presenting such a new single global standard for automatic exchange of information by February 2014 and to finalizing technical modalities of effective automatic exchange by mid- 2014. In parallel, we expect to begin to exchange information automatically on tax matters among G20 members by the end of 2015.[60]

Thus tax non-compliance with respect to foreign accounts is no longer limited to the United States, it is becoming a global issue.

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[58] See O.E.C.D.'s efforts to create a Model of Automatic Exchange at: http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm.

[59] See, *e.g.*, Model 1A I.G.A, Article 6, paragraph 3, last revised 11-4-2013, available at : http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-4-13.pdf.

[60] See Tax Annex to the St. Petersburg G20 Leaders' Declaration available at: http://www.whitehouse.gov/sites/default/files/image/files/g-20taxannex.pdf.