THE TRANSPARENT WORLD: EXCHANGE OF INFORMATION HAS BEGUN & PACTS TO ASSIST IMPLEMENTATION HAVE BEEN SIGNED

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Tags
F.A.T.C.A.
I.G.A.
Exchange of Information

The Internal Revenue Service ("I.R.S.") issued a News Release on October 2, 2015 (IR-2015-111) announcing the advent of exchange of financial account information with certain foreign tax administrations, meeting the key September 30 milestone related to the Foreign Account Tax Compliance Act ("F.A.T.C.A."). The I.R.S. did not provide information on the specific data exchanged or the countries that met the key milestone.

While nothing requires countries to announce exchanging information under an Intergovernmental Agreement ("I.G.A."), Australia and Canada have voluntarily announced their exchanges with the I.R.S. Australia was the first country to announce turning over account information to the I.R.S. According to the announcement, 30,000 accounts worth over $5 billion were reported. The Australian Taxation Office said in a news release on September 23 that this is "the first step in a wave of transparency measures being implemented globally by governments and tax administrations."

Some found the Australian numbers surprising; however, only time will tell how these numbers compare to other jurisdictions. The only other country that has provided information concerning the exchange is Canada.

ATTEMPTS TO BLOCK F.A.T.C.A.

The Canadian Exchange

The Canadian exchange of information occurred in spite of an ongoing lawsuit, which challenges the I.G.A. signed in February 2014 between the U.S. and Canada. The story begins in August 2014, when two U.S.-born Canadians filed a lawsuit against the Canadian government asserting that the I.G.A. violates Canadians' constitutional rights and cedes Canadian sovereignty.

The Canadian government has rejected these assertions, and although the lawsuit is still pending, the Federal Court of Canada ruled in a summary trial motion on September 19, 2015 that the data exchange under the I.G.A. does not violate Canada's Income Tax Act or the Canada-U.S. Income Tax Treaty.

Following the summary trial ruling, the plaintiffs applied for an injunction to block the first data exchange under F.A.T.C.A. due on September 30 as per the I.G.A. Before the court responded to the injunction application, officials from the Canada Revenue Agency ("C.R.A.") spoke with the I.R.S. – presumably in an attempt to notify the U.S. agency of the expected delay in exchange of information and to provide assurances that the C.R.A. was making good faith efforts to exchange the information as soon

as possible, in accordance with Notice 2015-66. The officials concluded that the C.R.A. had no choice but to turn over information, even if the Federal court issued an injunction.

According to a September 25 affidavit made by the director of the C.R.A.'s Competent Authority Services Division, Sue Murray, the I.R.S.'s Large Business and International Division Commissioner, Douglas O'Donnell, said that the extension offered by the I.R.S. to Model 1 countries in Notice 2015-66 does not apply in this case because Canadian legislation and systems are already in place to timely effect an exchange. According to the affidavit, the I.R.S. indicated that, even if an injunction was granted by the Canadian Court, under such circumstances:

> Canadian financial institutions will risk losing the benefit of the deemed F.A.T.C.A. compliance that they would otherwise obtain through the I.G.A. In particular, as of October 1, 2015, if the information has not been received by the I.R.S. and no extension of time has been granted, it is possible that Canadian financial institutions could be considered non-compliant.

"According to a September 25 affidavit...the extension offered by the I.R.S. to Model 1 countries in Notice 2015-66 does not apply in this case because Canadian legislation and systems are already in place to timely effect an exchange."

The affidavit, which was a part of the government's response to the ongoing lawsuit, further stated that an injunction preventing transmission of information would mean that the I.R.S. would not meet its commitment to make a reciprocal transfer of information of Canadian-born U.S. residents. This would have a significant, detrimental impact on the C.R.A.'s tax compliance work.

On September 30, the Federal court refused to grant the requested injunction. The court ruled that the plaintiffs are not among the U.S. persons resident in Canada whose information is to be provided to the I.R.S., and as such, they would not be harmed if the data exchange is permitted to occur. The Canadian court has yet not set a date to hear the lawsuit and the saga continues.

On October 1, the Canadian government confirmed that the exchange under the I.G.A. took place on a timely basis. Based on the aforementioned affidavit, the first exchange of information included 155,000 "information slips." Each slip represents one account and one account holder, but the same person or entity could hold multiple accounts. While Ms. Murray could not specify a number, she confirmed that the number of individuals represented by those slips is lower than 155,000. The value of the reported accounts was not discussed in the affidavit.

U.S. Judicial Efforts to Block F.A.T.C.A.

Efforts to block F.A.T.C.A. are also being initiated within the U.S. Back in July 2015, Republican presidential candidate Sen. Rand Paul (R-KY), together with six others, sued the Treasury Department and I.R.S. over F.A.T.C.A. and the requirement to file FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* ("F.B.A.R."). The suit was filed in Federal court in Dayton, Ohio.

On September 29, Ohio Judge Thomas M. Rose ruled that Sen. Paul and the other plaintiffs do not have a standing to challenge parts of F.A.T.C.A. The judge went on to support F.A.T.C.A., indicating that the purpose of F.A.T.C.A. and F.B.A.R. reporting was to help the government stop tax evasion, and further stated that the

associated penalties have a "rational basis": "Without F.B.A.R. reporting, the government's efforts to track financial crime and tax evasion would be harmed." The judge also rejected a request for injunctive relief to block exchange of information under F.A.T.C.A., holding that the harms claimed by the plaintiffs are "remote and speculative, most of which would be caused by third parties, illusory, or self-inflicted."

"The exchange of information regarding U.S. persons under F.A.T.C.A. has already begun."

COMPETENT AUTHORITY AGREEMENTS

As the process of implementing F.A.T.C.A. continues, the U.S. Competent Authority has already signed agreements with the U.K. and Australia to help in its implementation. I.R.S. Commissioner John Koskinen said, "Together in partnership with other tax authorities, we are demonstrating how far we have come in the fight against tax evasion." He noted that numerous other competent authority accords will be signed in the near future.

The signed pacts include details on information exchange, registration, and noncompliance. It intends to help with the nuts and bolts of compliance under the I.G.A. The agreements explain when the I.R.S. will treat a partner jurisdiction's F.F.I. as being in significant noncompliance, a status which will cause such F.F.I. to be treated as a "Nonparticipating F.F.I." and thus subject to withholding. The agreements signed provide that F.F.I.'s will have the chance to rectify the situation prior to such status being imposed.

EXCHANGE OF INFORMATION UNDER CODE §6049

The exchange of information regarding U.S. persons under F.A.T.C.A. has already begun. At the same time, the U.S. is preparing to begin exchanging information regarding non-U.S. individuals earning interest income pursuant to Code §6049 and the regulations thereunder. Under these regulations, reporting of certain deposit interest paid to nonresident, noncitizen individuals after December 31, 2012 is required.

On September 29, the I.R.S. published Rev. Proc. 2015-50, which supplements the list of countries with which the Treasury and the I.R.S. have determined that it is appropriate to have an automatic exchange relationship with respect to the information collected.[1] Sixteen countries were added to the list of 18 countries already determined as appropriate. The additional countries are Brazil, Czech Republic, Estonia, Gibraltar, Hungary, Iceland, India, Latvia, Liechtenstein, Lithuania, Luxembourg, New Zealand, Poland, Slovenia, South Africa, and Sweden.

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[1] See Rev. Proc. 2014-64, 2014-53 I.R.B. 1022, updating Rev. Proc. 2012-24, 2012-20 I.R.B. 913, which was published at the time the regulations were revised to require such reporting.

CONCLUSION

As those opposing F.A.T.C.A. in the U.S. and outside the U.S. recently witnessed, repealing F.A.T.C.A. is not easy – if it is at all possible. In fact, the opposite position seems to have prevailed. F.A.T.C.A. is getting stronger. With 112 countries now having an I.G.A. treated as in effect, broad support for the legislation has been shown around the world. In addition, the O.E.C.D.'s attempt at exchange of information under the Common Reporting Standard, the drafting of which was primarily based on F.A.T.C.A., is due to begin for some countries as early as January 1, 2016.