Technical Group Discussion

Exchange of Information Provisions

How Much Should You Disclose?

23 October 2012, Tuesday

Accredited Tax Advisor (Income Tax and GST) Mr S Sharma shared his valuable interpretations on the Exchange of Information Provisions

The recent developments on Exchange of Information (EOI) Provisions have created much confusion and uncertainty to taxpayers. To address these issues, and to offer tax professionals greater clarity, SIATP organised a technical discussion, "Exchange of Information Provisions: How Much Should You Disclose?".

In this lively seminar, Mr S Sharma, Accredited Tax Advisor (Income Tax and GST) and Consultant at ATMD Bird & Bird LLP, brought participants through what should be noted when disclosing information to the Comptroller of Income Tax ("the Comptroller") for transmission to a foreign tax authority.

Mr Sharma kicked off the session with the background and purpose of the EOI provisions. Thereafter, he gave an in-depth analysis on the differences between the previous and new Organisation for Economic Co-operation and Development (OECD) standards for EOI provisions and consequently, the amendments to Singapore's Income Tax Act (ITA) provisions, and their possible implications for taxpayers.

For greater illustration, and to encourage participants to put on their thinking caps, Mr Sharma also shared and invited discussions on the recent case of *Comptroller of Income Tax v AZP*. He ended his presentation with a list of key takeaways that taxpayers should keep in mind should they encounter a request for information under the EOI provisions.

Background and Purpose of EOI Provisions

The EOI provisions have been in existence for some time and they can be found in many Double Taxation Agreements (DTAs) that Singapore has signed with various foreign jurisdictions.

The purposes of the EOI provisions are to:

1) facilitate requests for information;
2) facilitate responses to request for information; and
3) ensure that requests and responses are within legitimate parameters.

In recent years, as cross-border transactions become more common due to globalisation of businesses, there has been a need to redefine the EOI standards to facilitate international cooperation in tax matters in order to combat tax avoidance and evasion.

In view of this development and increasing acceptance of the new EOI standards, the Ministry of Finance announced on 6 March 2009 that Singapore would endorse the new OECD standards for EOI (Article 26) and amend its tax legislation, including DTAs. Mr Sharma explained that since then some DTAs have been amended through Protocols, while others have not. Some of the Protocols have yet to come into force.

Differences between the "Old" and "New" OECD Standards for EOI

With these changes in place, it is crucial for taxpayers to be aware of the differences between the previous and new OECD standards for EOI, and their impacts. Mr Sharma elaborated on the key differences, highlighted as follows:

- ***Not limited to residents***

  The old standards only allowed the tax authority of Country A to seek information from the tax authority of Country B about a resident of Country B. If a taxpayer is not a resident of Country B, the tax authority of Country B is not obliged to reveal any information about the taxpayer. This condition is no longer applicable in the new standards. In other words, the tax authority of Country A may seek information about a non-resident of Country B according to the new standards.

- ***Not limited to taxes under DTA***

  Under the old standards, the tax authority of the foreign jurisdiction was only permitted to request information on the taxes covered under the DTA with its treaty partner. If a tax type (e.g. goods and services tax, stamp duty, etc) was not stated in the article on "Taxes Covered" in the DTA, the tax foreign authority could not seek information on such a tax type.

  The new standards no longer restrict the information requested to the taxes covered in a DTA. The Requesting State is able to seek information relating to other taxes.

- ***Use of information given not limited to taxes covered***

  In addition to the expansion in scope (covered above), the new standards also removed some limitations on the usage of information obtained. In the past, the information obtained by a tax foreign authority can only be used for the purpose of its taxes covered under the DTA.

- ***No need for domestic interest to obtain information***

  This stipulation is lifted in the new standards in the new paragraph 4 of Article 26 of the OECD Model Tax Convention (amended by the 2005 Update) which states among other things that "… the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes". This is aimed at enhancing international cooperation for information exchange.

- ***Information held by bank, other financial institutions, nominees, agents and fiduciaries or information relating to ownership interests in a person***

  The new EOI provisions have also added paragraph 5 to Article 26 of the OECD Model Tax Convention, which provides that a Contracting State cannot "decline to supply information solely because the information is held by bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because the information relates to ownership interests in a person". The purpose of adding paragraph 5 is to ensure that the limitations stated in paragraph 3 of Article 26 (which restricted the obligations put on the Requested State) cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries as well as ownership information.

With the above changes, how then did Singapore's ITA evolve? Mr Sharma continued the session with a succinct explanation of key pertinent sections of the ITA with regard to the new EOI provisions.

Singapore's ITA Provisions

Before 2009

Sharing of information by the Comptroller with foreign tax authorities has been common practice prior to 2009. Section 49(5) of the ITA allows the Comptroller to disclose information to treaty partners notwithstanding the secrecy provisions in section 6 of the ITA. However, the Comptroller could not obtain information protected by secrecy laws (e.g. in Banking Act) to pass on to a foreign tax authority.

Since 2009

New provisions on EOI have been incorporated and they are found in Part XXA of ITA (i.e. Sections 105A to 105H of ITA) and Part XXB of ITA (i.e. Sections 105I to 105M of ITA). Part XXA of ITA covers the EOI under avoidance of double taxation arrangements and EOI arrangements, whereas Part XXB of ITA covers the court orders relating to restricted information, such as information protected from disclosure under the Banking Act.

These new EOI provisions expand the scope of information sharing, with some safeguards on taxpayers' rights.

Section 105D of ITA

Section 105D generally states the details and documentary evidence that a foreign tax authority must provide in its request when seeking information from the Comptroller.

Section 105D(1) provides that the request must concern the tax position of a person. The definition of "tax position" sets the parameters of the request that can be made by a foreign tax authority and the definition can be found in Section 105A(1) of ITA. Broadly, only countries that have entered into DTAs or EOI arrangements with Singapore can make requests for information to Singapore and the information requested must be covered by the EOI provisions of the said DTAs or EOI arrangements. The information requested can relate to information on a person's position regarding:

1) past, present and future liability to pay any tax covered by the said EOI provisions;
2) penalties, interest and other amounts that have been paid/ are or may be payable in connection with any such tax; and
3) claims, elections, applications and notices that have been or may be made/ given in connection with any such tax.

The request made by the Requesting State must set out the information and documentary requirements prescribed in the Eighth Schedule of ITA, which serves to screen out "fishing expeditions". In short, the Eighth Schedule requires requests to be specific, detailed and relevant to the tax affairs of the taxpayer in question. This is to ensure that fair and independent assessments of the validity of requests are performed as a safeguard to respect taxpayers' rights and avoid any superfluous requests.

Nonetheless, the Comptroller may permit a request which does not comply with the Eighth Schedule by virtue of Section 105D(2) of ITA. This implies that the Comptroller has extensive powers to decide whether a request is valid under this section, in the first instance.

Section 105E of ITA

Section 105E generally sets out the details for the Comptroller to serve the notice of request on certain persons. These are the person identified in the request as the person in relation to whom the information is sought, and the person who is believed to have possession or control of the information.

The Comptroller will serve the notice of request on the above persons when he is satisfied that the request under Section 105D is not protected from unauthorised disclosure under Section 47 of Banking Act (including any regulations made under subsection (10) of that section) or Section 49 of the Trust Companies Act.

Section 105J of ITA

The Comptroller is required under Section 105J of ITA to obtain an order from the High Court to access the information protected from unauthorised disclosure under Section 47 of the Banking Act or Section 49 of the Trust Companies Act.

The Court has to be satisfied that the order is justified in the circumstances of the case and that the request is not contrary to public interest.

The first condition (i.e. the making of the order is justified in the circumstances) needs to be determined by the Court on a case-by-case basis. It requires the Court to decide if the supporting evidence on hand is sufficient to justify the request made by the foreign tax authority.

The second condition (i.e. request not contrary to public interest) may or may not be satisfied depending on whether and how public interest is affected in the circumstances of each case.

Comptroller of Income Tax v AZP (2012)

To heighten the understanding of the implication of the new EOI provisions, Mr Sharma rounded off the session by highlighting the case of *Comptroller v AZP* which was heard and decided in 2012.

Facts

The Indian tax authority's suspicions were raised based on two unsigned transfer instructions allegedly issued by an Indian national relating to the bank accounts of Company X and Company Y in a bank in Singapore, the Defendant.

It subsequently launched a tax investigation on the Indian national suspecting him of remitting undeclared income into these bank accounts and made a request under Article 28(1) of the Singapore-India DTA for information pertaining to the said accounts. The Comptroller subsequently sought production of records and information concerning the accounts held by the Defendant.

Decision

Before a court order can be granted, Article 28(1) of the Singapore-India DTA requires the requested information to be foreseeably relevant for carrying out the provisions of DTA or to the administration or enforcement of the domestic laws of taxes of India and Singapore. Section 105J(3) also requires that the making of the order is justified in the circumstances of the case and it is not contrary to public interest.

Company X

The Indian tax authority had relied on an unsigned transfer instruction to prove that monies had been remitted by the Indian national to Company X's Account 1 in Singapore. The transfer instruction was a letter dated 19 December 2005 instructing a bank in Switzerland to transfer monies from New York to Account 1. It was unclear if the instructions were executed.

Mr Sharma explained that even if the instructions were executed, the transfer instruction was issued outside the period stated under the Article 28(1) of the Singapore-India DTA for exchange of information (i.e. before 1 January 2008). Furthermore, the Indian tax authority did not provide evidence of any transaction between Company X and the Indian national within period on or after 1 January 2008. As such, the High Court did not grant the request for information on Account 1 as there was a lack of clear and specific information supporting the request.

Company Y

In relation to Company Y, the Indian tax authority also relied on an unsigned transfer instruction to prove that the Indian national had remitted monies to Account 2. The transfer instruction was a letter dated 16 July 2000 to instruct the same Swiss bank to transfer monies to an account purportedly held by Company Y with a bank in Dubai. Mr Sharma explained that for this transfer, similar to that with Company X, there was no evidence that monies had been transferred to or from Account 2, nor was there any evidence of any transaction for Account 2 between Company Y and Indian national during period on or after 1 January 2008.

As the request and supporting evidence were not sufficiently clear and specific to be foreseeably relevant to the enforcement of India's tax laws and investigations on the Indian national, the High Court did not grant the information requested on Account 2 either.

Mr Sharma noted several other points made by the High Court in the *AZP* case provided guidance for future cases on EOI provisions.

Takeaways

Mr Sharma ended his presentation with a summary of key takeaways that taxpayers should keep in mind when they encounter a request for information under the EOI provisions:

- Understand clearly what the EOI regime in Singapore entails, and know how it works. This includes finding out the latest developments and any changes made to the EOI provisions.
- Read and evaluate notices, letters, etc from the Comptroller promptly.
- Seek advice early on appropriate responses to them.

The session ended with a presentation of token of appreciation by SIATP Board Member, Mr Yee Fook Hong, to Mr Sharma.

A big thank you to Mr Sharma for sharing his valuable insights on the EOI provisions!

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About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

About Mr S Sharma

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Mr Sharma has been identified as a leading individual in Singapore's corporate tax market by *Who's Who Legal Singapore 2008* as having worked extensively with IRAS and is also highly recognized for his knowledge of the tax aspects of corporate restructurings and handling of both contentious and non-contentious work. Mr Sharma also advises on international tax and acts for clients in court cases, including on EOI. With more than 25 years of practical legal and tax experience from working in the public and private sectors, Mr Sharma has honed his knowledge and skills when it comes to dissecting tax issues and serving clients.

This technical event commentary is written by SIATP's Tax Manager, Ms Lee Shin Huay. An Accredited Tax Practitioner (Income Tax), Shin Huay has over six years of experience in corporate and individual tax. Previously from Deloitte & Touche LLP, she now champions various initiatives of Singapore's first dedicated professional body for tax specialists, to enhance Singapore's position as a centre of tax excellence.