# Technical Excellence Decoded

## What is a Fair Exchange of Tax Information?

*The New Normal – Automatic Exchange of Information under the Income Tax Act*

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*Facilitator Accredited Tax Advisor Mr Sharma (in black jacket), a Consultant at ATMD Bird & Bird LLP, exchanged views with a participant during refreshment break.*

Singapore is significantly strengthening its framework for international tax cooperation. This is the result of amendments to the Income Tax Act under the Income Tax (Amendment) Act 2013 which commenced operation on 28 November 2013. Significant changes have been made to Singapore's Exchange of Information (EOI) regime.

As part of Singapore Institute of Accredited Tax Professionals (SIATP)'s focus on international taxation, it organised a technical discussion under its *Tax Excellence Decoded* series, on what the new global standard for the Automatic Exchange of Information (AEOI) is, the resulting impact and what taxpayers and tax advisors need to be aware of in this aspect.

The session was facilitated by Accredited Tax Advisor (Income Tax & GST) S.Sharma, Consultant at ATMD Bird & Bird LLP, who shared the implications of AEOI as tax co-operation among governments is ramped up.

**International Tax Agreements**

One of the most common international tax agreements is a comprehensive agreement for the avoidance of double taxation agreement and the prevention of fiscal evasion (DTA) which is usually entered into between two taxing jurisdictions seeking to reduce double taxation. The main objective of a DTA is to provide certainty regarding the tax treatment for various types of income in the two jurisdictions which are the parties to the DTA (the Contracting States) according to different articles of the DTA. The taxing rights of each jurisdiction are defined in the DTA and there are provisions for one of the jurisdictions to give relief, generally by way of tax credit or exemption to eliminate double taxation. The DTA also includes other supplementary provisions, including an article on the exchange of information for tax purposes.

Besides DTAs, another form of international tax agreement for exchange of information, though rare, is an exchange of information agreement which is only about exchange of information for tax purposes. Singapore currently has only one such agreement which is signed with Bermuda, for the exchange of information by request on tax matters. The information sought must be for the purpose of facilitating

provision of information, e.g. to verify the validity of relief claims and/or obtain information for the administration or enforcement of domestic tax laws, such as obtaining information to understand a company's structure to verify its group relief claims.

**Expansion of Scope under the EOI Regime**

While Singapore is not a member of the Organisation for Economic Co-operation and Development (OECD), it generally adopts the OECD Model Tax Convention on Income and Capital in its DTAs including Article 26 on Exchange of Information. As such, with OECD's revision of the international standard for exchange of information in 2005, Singapore's Ministry of Finance announced on 6 March 2009 that Singapore would endorse the new OECD standard for EOI (Article 26). The tax legislation, including a number of DTAs, was subsequently amended.

The Income Tax Act was updated in 2009 by the Income Tax (Amendment)(Exchange of Information) Act, which introduced a new Part XXA which is on the Exchange of Information under Double Taxation Agreements, a new Part XXB on Court Orders Relating to Restricted Information as well as a new Eighth Schedule to the Income Tax Act which set out various items of information to be included by the tax authority of the requesting state (foreign tax authority) in a request for information to Singapore.

The request is subject to and must be dealt with in accordance with the EOI article in the relevant DTA. The Comptroller of Income Tax at the Inland Revenue Authority of Singapore (IRAS) may seek clarification from the foreign tax authority of the requesting state about the request.

Where the requested information is protected from unauthorised disclosure, that is, information sought from banks and trust companies which is protected by confidentiality provisions in the laws on banks and trust companies, IRAS is required to serve a statutory notice upon the bank or trust company first and obtain a court order for this disclosure of restricted information.

For non-restricted information, a court order is not needed by IRAS. However, taxpayers may not necessarily be aware that information on their tax matters has been disclosed by IRAS to the foreign tax authority who requested the information.

With the further amendments in 2013, requests by foreign tax authorities are now not limited to residents of the Contracting States. This means a foreign tax authority may seek information on a person who is non-resident in Singapore. Requests may also be made on taxes *not* included in the DTA, such as Goods and Services Tax. Where the requested information is not available to the foreign tax authority from its own resources in its jurisdiction, the responsibility lies on the foreign tax authority of the requested state to obtain the information which may be available from other government agencies in that country before it makes a request to Singapore. From the requesting tax authority's perspective, it can use the information provided for assessment, enforcement, prosecution, determination of appeals and oversight, beyond recovery of taxes. Information may also be sought on ownership interests of an individual.

While the scope has been broadened with the new standard, a degree of protection remains. This is mainly because certain grounds for IRAS to decline requests are preserved in the exchange of information article in Singapore's DTAs even with the change to the new international standard in those DTAs. These include that Singapore, as the requested state, is not obliged to carry out administrative measures that are different from its own laws or administrative practices or that of the requesting state. Singapore also not obliged to supply information which is not obtainable under its laws or that of the requesting state, or not obtainable in the normal course of its or the requesting state's administration. Additionally, Singapore is also not obliged to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Neither is Singapore obliged to supply information the disclosure of which would be contrary to public policy.

**Tax Changes under the AEOI Regime**

As explained earlier, the EOI regime in Singapore was further changed in 2013 to incorporate AEOI. This followed the mandate given to G20 world leaders to fight international tax evasion and the adoption of AEOI as the OECD's new global standard for exchange of information.

AEOI provides an avenue for a systematic and periodic transmission of "bulk" taxpayer information by the source country (where the information is) to the residence country (that is the requesting country where the taxpayer is resident). The information may be about dividends, interest, royalties, salaries or GST

refunds to name a few. Besides financial information, the requested information may pertain to non-financial information such as the change of residence by the taxpayer.

One of the key changes under the changes in 2013 is that IRAS now possesses the ability to provide EOI assistance in accordance with the internationally-agreed standard across all existing DTA partners. This means IRAS can entertain requests for information even from countries where the EOI article in its DTA with Singapore is not updated to the internationally-agreed EOI standard or countries with which Singapore does not have a DTA in place.

Secondly, IRAS is no longer required to obtain a court order to seek restricted information from a bank or trust company, as indicated in Part XXB. Another key change, as reflected in the sections of the new Part XXB, allows Singapore to implement its obligations under an international tax compliance agreement. The article allows Singapore to enter into inter-governmental agreements (IGAs). One IGA is the upcoming agreement Singapore will sign with the United States (US) to facilitate compliance by financial institutions in Singapore with the US Foreign Account Tax Compliance Act (FATCA). FATCA is a US law which requires all financial institutions outside the US to pass information about financial accounts held by US persons to the US Inland Revenue Service (US IRS) on a regular basis.

IRAS will act on the principle of reciprocity, which means Singapore will provide the same level of assistance as the other country in information requests. With Singapore entering into a Model I IGA with the US, financial institutions operating here need not enter into individual agreements with the US. Financial institutions simply need to report to IRAS and IRAS will provide the bulk information to US IRS.

With the above changes, Singapore's obligations now include providing information on an automatic basis, as opposed to only on a request basis. The new Part XXB contains new sections 105O and 105P. Regulations may be made under the new section 105P to prescribe anything that can be done in the new part XXB. As such, it is advisable for taxpayers and their advisers to note the details of any regulations that may be issued under the new S105P on who the person required to provide the information is, what the specified description is, and the time or frequency to provide such information. Failure to comply with S105P would be an offence, subject to defence of reasonable excuse. Hefty penalties involving a fine, jail term or both may be incurred for non-compliance.

Section 105O allows IRAS to also use the information collected under AEOI regime for any purpose connected with the administration of the Income Tax Act in Singapore, including the investigation and prosecution of an offence suspected to have been committed under the Income Tax Act.

**AEOI is the New Norm**

With these developments, IRAS is still tasked to review every request for information. It will evaluate the validity of the request to ensure that it is clear, specific and relevant. It is now empowered to require a third party to whom it issues a request for information, such as the financial institutions, not to disclose the fact or details of the request to the taxpayer.

From the point of view of any recipient of a notice from IRAS, it is advisable to seek legal advice immediately when the request is received from IRAS. It is important to understand the legal implications for the compliance and non-compliance of such a request.

Furthermore, where previously, there was legal protection for taxpayers whereby IRAS had to first seek a court order to obtain restricted information, this is no longer the case. Instead, taxpayers may need to initiate and seek judicial review in the courts arising from IRAS' actions. On its part, IRAS must ensure that the requesting state identifies the taxpayer, explains why the request is made and establishes that the requesting state has exhausted all other means in its own jurisdiction before making the request, among other things.

With regard to the privacy of taxpayers, an assurance was given in Parliament in October 2013, during the passage of the 2013 amendments, that the removal of the court process does not mean IRAS will freely share information with EOI partners. Taxpayers will still have access to the judicial process through the judicial review. In addition, the safeguards in the international EOI standard to ensure that only clear, specific and relevant requests are acceded to, is to be maintained.

The incorporation of AEOI into Singapore's tax framework as its new norm does not mean that foreign tax authorities cannot seek information on a request basis. The two modes of exchange of information, on request basis and on automatic basis, continue to exist together.

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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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Sharma has been identified as a leading tax advisor and dispute resolution specialist in Singapore, having first worked with the tax authorities at IRAS and with major law firms in private practice. He advises on a range of tax issues spanning corporate and personal income taxes, including withholding tax, goods & services tax, stamp duty as well as on international tax issues.

In dispute resolution, Sharma's practice extends beyond court litigation to arbitration and mediation in tax and non-tax areas. He has represented clients in tax audits and tax investigations by IRAS. While in private practice, Sharma was Adjunct Faculty at the Singapore Management University, teaching the course on Revenue Law. He was also a contributory author to the sought after the second edition of Law and Practice of Singapore Income Tax and the 2004, 2008 and 2012 editions of Halsbury's Laws of Singapore.

*This technical event commentary is written by SIATP's Tax Manager, Ms Eileen Goh. With over six years of experience in both corporate and GST accumulated from mid-tier consultancy, Big Four and multi-national corporation background, 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.*