

Exchange of Information-Global and Indian Perspective



With the increased globalisation, offshore tax evasion has become a serious issue across the jurisdictions all over the world. To enhance tax transparency and overcome these challenges of tax evasion and tax avoidance through international transactions, co-operation among the governments across the globe is critical, and one among the key aspects of such co-operation is the exchange of information (EOI) of financial accounts of the taxpayers maintained outside their country of residence. The government of India is taking serious measures to fight against tax evasion and black money which includes renegotiating DTAs with other countries to bring the Article on EOI to international standards. India has recently entered into a multilateral agreement on automatic exchange of information that would enable an effective exchange of information among countries. This article discusses the concept of EOI, its significance from Indian and global perspective, its present scope and the recent developments on the subject. Read on...

Introduction

The 'exchange of information' (EOI) as per the existing provisions (which is generally on request basis) has resulted in improving transparency. The scope of EOI is quite limited, since the information is sought for only when an investigation in a particular case is commenced and is very case specific.

To enhance the scope of EOI as well as harmonising the same with the global norms, there is a need for paradigm shift from request based EOI to automatic EOI (AEOI) on global platform.

It is not that the automatic AEOI is not in existence. Many countries have been exchanging information on an automatic basis. However, there has been no uniformity in the nature and type of information exchanged. And further, there are no standards on the periodicity of exchange or on the technical solutions to be utilised for collection and

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On the basis of the information reported in compliance with CRS, the tax authorities of the recipient country would be able to match the information so received with the information available in its databases (e.g., information submitted by taxpayers in their tax returns about the financial assets held abroad either in their own name or as beneficial owners) and thus, non-compliance/tax evasion can be identified.

transmission of information. Thus, the information exchanged on an automatic basis has often been perceived to be of limited utility to the receiving country.

The need of the hour is to ensure that AEOI should be implemented on a fully reciprocal basis compliant with the common reporting standards (CRS). If this is implemented, it would, most likely result into proper allocation of income arising to two jurisdictions to enable each state to have its fair share of taxes on such allocated income. This may help in prevention of tax evasions/tax avoidance.

Evolution of EOI

The traditional arrangement for EOI has been bilateral and revolves around the stipulations provided in the 'double taxation avoidance agreements' (DTAAs/Tax Treaties) as well as 'tax information exchange agreements' (TIEAs). The EOI which was primarily on 'request basis', has been narrower in scope to the extent that the requesting state must already be in possession of some information received during the course of an investigation, pursuant to which the information is sought for from the other state.

The evolution of EOI can be traced from the international norms which initially provided assistance to other countries only on satisfaction of the norms of 'dual criminality', *i.e.*, in cases of drug trafficking, corruption, terrorist financing, *etc.* which are criminal acts in both the countries. The next level (*i.e.* the current position) moved a step ahead, where the cooperation extended to cases of tax evasion and avoidance and countries are obliged to exchange the information requested (either on requestor spontaneous) in terms of the provisions of tax treaties/TIEAs.

In order to plug in this loophole (receiving information on request basis), the next stage is the automatic exchange of financial account information

without the countries having to make requests for the same. This would lead to real time EOI enabling the receiving country to utilise this information to verify whether it is a case of tax evasion/avoidance and to take necessary action against the same.

Various agreements by which EOI is effected could be either in the form of (1) bilateral agreements such as DTAA and TIEA, or (2) multilateral agreements such as "OECD Convention on Mutual Administrative Assistance in Tax Matters" (MAAT) and "SAARC Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters" (SAARC MA). These agreements form the legal framework for receiving and providing information amongst countries/jurisdictions.

Automatic Exchange of Information (AEOI) and Common Reporting Standards (CRS)

Automatic EOI, in simple layman terms, means sharing of information without making a specific request for the same. The AEOI involves systematic transmission of information from the competent authority where the account is held for tax administration where the taxpayer is resident. The EOI by way of AEOI is permitted under the provisions of bilateral agreements (unless specifically prohibited) as well as under the multilateral conventions.

Organisation for Economic Co-operation and Development (OECD), in response to G20's call for automatic EOI to be the new standard, released the "Standard for Automatic Exchange of Financial Account Information in Tax Matters" ("Standard") on 21st July 2014. The Standard consists of the Model Competent Authority Agreement (MCAA), intended as a template for inter-governmental agreements, and the CRS that contains the reporting and due diligence standard that underpins the AEOI. A single uniform and global standard, known as "Common Reporting Standard for Automatic Exchange of Information" (CRS for AEOI), has been developed to ensure that meaningful information is exchanged. Moreover, for information to be effective, it must be specifically designed to meet residence jurisdiction's tax compliance.

The Standard states that the financial information to be reported includes all types of investment income (including interests, dividends, income from certain insurance contracts and other similar types of income) and also includes account balances and

sales proceeds from financial assets. Moreover, the accounts that need to be reported include accounts held by individuals and entities, including trusts and foundations, and the Standard also includes a requirement to look through passive entities, such as shell companies and trusts, to report with respect to individuals that ultimately control these entities.

On the basis of the information reported in compliance with CRS, the tax authorities of the recipient country would be able to match the information so received with the information available in its databases (*e.g.*, information submitted by taxpayers in their tax returns about the financial assets held abroad either in their own name or as beneficial owners) and thus, non-compliance/tax evasion can be identified. This will foreseeably act as deterrence against the existing inconsistent models leading to fragmentation of standards and reducing the overall effectiveness of the information exchanged.

Synchronising FATCA

Foreign Account Tax Compliance Act (FATCA) is a US legislation which aims at tackling the issues of tax evasion by obtaining information in respect of offshore financial accounts maintained by US residents outside its territory. FATCA could be implemented by entering into Inter Governmental Agreements (IGA). Pursuant to such IGAs being entered, the financial institutions are obliged to report the required information to their own government, which then exchanges the information with US Internal Revenue Services (IRS).

The inter-governmental implementation of FATCA has acted as a catalyst for the move towards automatic EOI in unilateral/multilateral context. While FATCA is a pre-existing system which draws close similarities to the CRS, the inter-governmental approach to FATCA reporting does deviate in certain aspects from the CRS. The differences are driven by the multilateral nature of the CRS system

Paragraph 5 of the Article 26 of the OECD Model stipulates that a contracting state shall not decline to supply information to a treaty partner solely because of the reason that the information is held by a bank or other financial institution. This article has very wide application as it seeks to operate even if the information is in the possession of other agencies.

and other US specific aspects, in particular, the concept of taxation on the basis of citizenship and the presence of a significant and comprehensive FATCA withholding tax. Model 1 IGA of FATCA may be reciprocal or non-reciprocal and Model 2 IGA involves financial institutions reporting directly to the IRS, supplemented by EOI upon request. In contrast, the Model Competent Authority Agreement is based on the principle that automatic exchange is reciprocal (exceptions may persist in cases where one of the jurisdiction does not have any tax levy). FATCA is much narrower in scope than the CRS and only focuses on certain US persons and therefore, the program built in for this standard cannot simply be enhanced to comply with AEOI.

Changes to Article 26 of the OECD Model

Article 26 embodies the framework within which information can be exchanged to the widest possible extent. The text of the Article 26 on EOI (OECD Model Convention) as well as its commentary has undergone a number of changes in the recent past, some with the intent to remove doubts as to its proper interpretation and others to ensure that it reflects the current practices and is in line with the recent developments. The important changes are being discussed briefly hereunder:

- Paragraph 1, prior to what is stated in its current form, had a restricted scope where information could be sought if it was necessary for carrying out the provisions of the agreement. The expression 'necessary' has been replaced with 'foreseeably relevant'. It implies that in the context of EOI upon request, the standard requires that at the time a request is made, there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. Similarly, with an intent to substantially widen the scope of the Article, the words 'to the administration or enforcement' of domestic laws has been inserted and prevention or detection of tax evasion is no longer a condition for EOI. Generally, the recently concluded tax treaties have a specific clause in their respective Article that the EOI is not restricted by Articles 1 and 2 of the said treaty which means that the obligation to supply information exists even with respect to non-residents of either of the contracting State.

- Paragraph 2 was amended to allow the competent authorities to use the information received for other purposes, provided such use is allowed under the laws of both the States and the competent authority of the supplying State authorises such use of information. The EOI can be effected despite of the fact that the information is not being primarily used for tax purposes. When a receiving State desires to use the information for an additional purpose (*i.e.* non-tax purpose), the receiving State should specify to the supplying State the other purpose for which it wishes to use the information and confirm that the receiving State can use the information for such other purpose under its laws.
- Paragraph 4 deals explicitly with the obligation to exchange information in situations where the requested information is not even required by the requested State for domestic tax purposes. Nonetheless, the Article provides that the contracting States must use their information gathering measures even though invoked solely to provide information to the other contracting State.
- Paragraph 5 of the Article 26 of the OECD Model stipulates that a contracting State shall not decline to supply information to a treaty partner solely because of the reason that the information is held by a bank or other financial institution. This article has very wide application as it seeks to operate even if the information is in the possession of other agencies. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested contracting State to decline to supply information on grounds of bank secrecy.

Measures Undertaken By the Indian Government

India for many years has been advocating the need for a high level of transparency and automatic EOI for tax purposes. India has entered into DTAA with more than 90 countries and where DTAA have not been entered, India has started negotiating for entering into TIEAs. In recent times, India has played a very proactive role for establishing an EOI mechanism as per the global mandate which has also been endorsed by G20 forum. India has consistently taken measures for an effective EOI

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mechanism which are in the form of introducing new legislations, bringing amendments to the existing provisions, amending the provisions of the treaty and many other administrative reforms with a view to make the same compatible with the global standards.

A. Invoking Provisions of Section 94A

DTAA between two nations casts an obligation on both the treaty partners to share information on tax evasion. The Finance Act, 2011 introduced Section 94A in the Act as an anti-avoidance measure to specifically discourage transactions by a resident taxpayer with persons located in any country or jurisdiction which does not effectively exchange information with India.

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This is a firm step in the direction that no respite would be given when it comes to tackling offshore tax evasion and tax avoidance and unearthing of unaccounted money stashed abroad.

¹ Notification no 86/2013 and Press release dated 1-11-2013

B. CBDT Releases EOI Manual

Currently, India has EOI relationship with more than 130 jurisdictions (DTAAs and TIEAs). In view of increased global consensus on necessity of co-operation amongst the countries to tackle the problem of tax evasion/avoidance, the Indian administrative authorities, have recently released a revised edition of the 'Manual on Exchange of Information'.

The Manual provides detailed guidelines to Indian tax officers for making specific requests for EOI under various legal instruments and also contains guidelines to be followed in case a request is received. Other forms of administrative assistance possible under the tax treaties as well as assistance that can be sought under other legal instruments have also been described in detail. It provides an overview of the recent international developments in tax transparency including the global adoption of the standards on AEOI. The confidentiality which permeates all forms of assistance obtained and provided under the tax treaties has been clearly brought out.

C. India Joins The MCAA

India, though a non-OECD G20 member and representative, has been fully supportive of various initiatives on tax transparency, including AEOI. In persistence of this assurance, India has joined the Multilateral Competent Authority Agreement (MCAA) on AEOI on 3rd June 2015 taking the total number of countries/jurisdictions agreeing to exchange information automatically in accordance with MCAA to 61.

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their readiness to join the global mandate. AEOI based on CRS, when fully implemented, would enable India to receive information from almost every country in the world including offshore financial centres and would be the key to prevent international tax evasion and would be instrumental in getting information about the assets of an Indian held abroad-including through the entities in which Indians are beneficial owners. Moreover, joining MCAA has enabled India to meet its commitment to be an "early adopter" committed to exchange information automatically by the year 2018.

D. Widening Scope Of Article 26 Of DTAAs

As on 1st May 2015, India has DTAAs with 94 countries and DTAAs with 7 more countries are being negotiated. In case of those countries, where India is not in a position to expeditiously enter into a DTAA, usually TIEA's are entered (which have provisions only for EOI). As on 1st May 2015, India has entered into 16 TIEA's and further 29 are being negotiated.²

India has been actively engaged in updating Article 26 on EOI in its existing tax treaties. There are quite a number of tax treaties which have been amended in the recent past. Such amendments are being carried out with the intention of synchronising the same with the global standards. The scope of Article on EOI of the DTAAs entered with the following countries has been amended recently:

Country	Specific Amendments to DTAAs
Denmark (Article 26)	<ul style="list-style-type: none"> – 'certified copies of documents' included in the scope; – 'necessary' replaced with 'foreseeably relevant'; – for 'administration or enforcement of domestic laws' inserted; – 'prevention of fraud or evasion of tax' deleted; – use of information for 'other purposes' made permissible subject to authorisation of the supplying State.
South Africa (Article 25)	<ul style="list-style-type: none"> – 'necessary' replaced with 'foreseeably relevant'; – for 'administration or enforcement of domestic laws' inserted; – use of information for 'other purposes' made permissible subject to authorisation of the supplying State.

² Source: Manual on Exchange of Information issued by Government of India in May'2015

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Country	Specific Amendments to DTAAs
Australia (Article 26)	<ul style="list-style-type: none"> – ‘documents or certified copies of documents’ included in the scope; – ‘necessary’ replaced with ‘foreseeably relevant’; – for ‘administration or enforcement of domestic laws’ inserted; – ‘prevention of fraud or evasion of tax’ deleted; – use of information for ‘other purposes’ made permissible subject to authorisation of the supplying State.
UAE (Article 28)	<ul style="list-style-type: none"> – ‘necessary’ replaced with ‘foreseeably relevant’; – for ‘administration or enforcement of domestic laws’ inserted; – ‘prevention or detection of evasion of taxes’ deleted; – use of information for ‘other purposes’ made permissible subject to authorisation of the supplying State.
Switzerland (Article 26)	<ul style="list-style-type: none"> – scope widened by deletion of exchange of such information which is at the disposal under the domestic laws; – ‘necessary’ replaced with ‘foreseeably relevant’; – for ‘administration or enforcement of domestic laws’ inserted; – use of information for ‘other purposes’ made permissible subject to authorisation of the supplying State.

Further, the following amendments have been made in all the above DTAAs:

- Information to be exchanged using information gathering measures irrespective of the fact that such information is not used for domestic tax purposes.
- Information to be exchanged irrespective of the fact that it is held by banks, financial institutions, *etc.*

While concerted efforts were made by India to amend the above stated (illustrative) DTAAs to bring them in line with present international norms, many DTAAs still have the old provisions pending such revision.

It is evident from the above that India has advocated and is in constant process to advocate the EOI between jurisdictions to match pace



with the current agreed international standards for EOI. For implementation of these standards in India and with a view to provide information to other jurisdictions, necessary legislative changes have also been effected by amending relevant provisions of the Income-tax Act, 1961.

Parting Thoughts

All the countries have a mutual interest to honour their tax systems and the same can be achieved through co-operation between tax administrations. A key aspect of that co-operation is EOI. Since tax evasion/avoidance and unearthing of black money stashed abroad is a global issue, the standard for EOI needs to have a global reach so that it addresses the issue of offshore tax evasion and does not merely relocate the problem rather than solving it. Apart from having a global reach; it is imperative that some mechanisms may also be developed to encourage compliance to EOI amongst the countries.

In view of the foreseeable complexity attached with its interpretation and implementation (because of dependency over the relevant governmental bodies of participating jurisdictions), there is still some level of uncertainty over the scope within which CRS will be implemented. It is also not certain whether the timeline of September 2017 rolled out for implementation of first automatic EOI would be met. ■