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TAX AND EXCHANGE CONTROL ALERT

IN THIS
ISSUE

AUTOMATIC EXCHANGE OF INFORMATION – FATCA, CRS, UK CDOT AND OTHER OMINOUS ACRONYMS

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By now, we're all familiar with the term, Automatic Exchange of Information (AEOI), otherwise referred to as 'routine exchange', but do we really appreciate what it means?

From a South African fiscal perspective, AEOI involves the systematic and periodic transmission of taxpayer information by the source jurisdiction to the residence jurisdiction. This may also include instances where tax residence is based on differing criteria (eg domicile in the United Kingdom (UK); citizenship in the United States of America (USA) or where an entity or person has tax obligations in several jurisdictions. An effective model for AEOI requires a common standard on the information to be reported by financial institutions and exchanged with residence jurisdictions to ensure that the financial institutions' reporting is aligned with the interests of the residence country. An effective model will also increase the quality and predictability of the information that is being exchanged. In consequence, the residence country will be able to significantly enhance compliance and make optimal use of the information (eg through automatic matching with domestic compliance information and data analysis).

Globalisation is increasing and cross-border activities are the norm. Now, as never before, tax administrations need to work together to ensure that taxpayers pay the correct amount of tax into the appropriate jurisdiction's fiscal coffers.

Critical to this endeavour is equipping tax administrations with the necessary legal, administrative and IT tools for verifying compliance of their taxpayers. The exigencies of the globalised economy necessitate enhanced cooperation between tax authorities through AEOI in order to align national tax administration with international standards.

AEOI requires jurisdictions to annually obtain non-resident financial account information from their financial institutions (ie deposit-taking banks, custodial institutions, and certain investment entities and insurance companies) and automatically exchange that information with the tax authorities in the account holders' (individuals and entities, including trusts and foundations) jurisdictions of residence. It sets out the financial account information (including account balances, interest, dividends, and sale and redemption proceeds from financial assets) to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, together with prescribed common due diligence procedures (drawn from international anti-money laundering standards) to be followed by financial institutions.

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The purpose of the CRS is to obtain financial account information from financial institutions and automatically exchange that information with other jurisdictions on an annual basis.



In the South African context, AEOI has, until recently, been associated with the process of exchanging information between South Africa (SA) and the US. During 2013, the National Treasury and the South African Revenue Service (SARS) commenced negotiations with the US Treasury to formulate an inter-governmental agreement (IGA) with respect to the US's Foreign Account Tax Compliance Act (FATCA). However, AEOI extends far beyond the SA/US IGA on US FATCA.

The Common Reporting Standard (CRS), also referred to as the Standard for AEOI, is an information standard for AEOI, developed within the context of the Organisation for Economic Co-operation and Development (OECD). The purpose of the CRS is to obtain financial account information from financial institutions and automatically exchange that information with other jurisdictions on an annual basis. The legal basis for the exchange of information is the multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention), which was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The Multilateral Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to combat tax evasion and avoidance.

A key element of the successful implementation of the CRS is the establishment of an international framework that allows the automatic exchange of CRS information between jurisdictions. More than 95 jurisdictions have committed to exchanging information with each other under the CRS, and as stated above, exchange relationships between jurisdictions are typically based on the Multilateral Convention and the CRS Multilateral Competent Authority Agreement (CRS MCAA), which is itself based on Article 6 (AEOI) of the Multilateral Convention. In limited instances, where it is not yet possible to rely on the Multilateral Convention and the CRS MCAA to exchange information, jurisdictions may rely on bilateral agreements, such as double taxation agreements (DTAs) or tax information exchange agreements (TIEAs).

The CRS MCAA specifies what information will be exchanged and when. On 29 October 2014, 51 jurisdictions, SA amongst them, participated in the first ever signing ceremony for the CRS MCAA in Berlin. On 12 May 2016, at the Meeting of the Forum on Tax Administration, Israel and the Russian Federation became the latest countries to sign the CRS MCAA, bringing the current total number of signatories to 82.

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At the domestic level, the exchange of information may be divided into the following categories:

- US FATCA IGA – the agreement between the tax administrations of US and SA for AEOI under the SA/US DTA;
- OECD CRS MCAA; and
- Bilateral TIEAs - agreements between the tax administrations of two countries to enable them to exchange tax information upon request. (SA has TIEAs with Argentina, Bahamas, Belize, Barbados, Bermuda, Cook Islands, Cayman Islands, Gibraltar, Guernsey, Jersey, Liberia, Liechtenstein and San Marino).

In addition, the Tax Administration Act, No 28 of 2011 (TAA) defines 'international tax standard' in s1 of the TAA as:

“(a) the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters; (b) the Country-by-Country Reporting Standard for Multinational Enterprises specified by the Minister; or (c) any other international standard for the exchange of tax-related information between countries specified by the Minister.”

Since 1 July 2014, South African financial institutions have been collecting and reporting on certain information required under FATCA and the OECD CRS on financial accounts.

To illustrate SARS exchanges US residents' financial account information received from South African financial institutions with the US Treasury through a process of AEOI under the legal framework provided by the SA/US DTA.

Asset managers have closely monitored the evolution of guidance on the application of US FATCA to funds resident in certain key jurisdictions. Several jurisdictions that are relevant to the asset management industry are also subject to the equivalent British regime, colloquially referred to as UK CDOT, which applies between the UK and the 10 Crown Dependencies (CDs) and Overseas Territories (OTs). The 10 jurisdictions in which UK CDOT applies are Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey, Montserrat, and the Turks and Caicos Islands.

The introduction of the UK CDOT regime raised questions regarding the interaction between it and US FATCA and while Her Majesty's Revenue and Customs (HMRC) averred in guidance notes that the objective of UK CDOT is to maximise consistency between the US/UK IGA and those negotiated between the CDs and OTs so as to minimise additional costs and burdens to businesses trying to comply with both regimes; HMRC acknowledged that there were areas where it was not appropriate to replicate the US model due to differences in context.

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Fortunately from a South African perspective, on 1 March 2016, SARS released the updated draft business requirement specification (BRS) for AEOI for submissions by end May 2017.



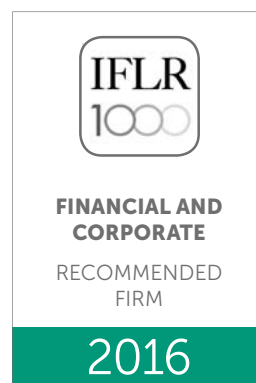
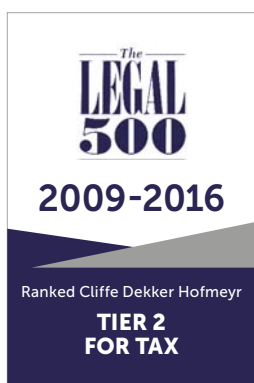
Fortunately from a South African perspective, on 1 March 2016, SARS released the updated draft business requirement specification (BRS) for AEOI for submissions by end May 2017. The BRS combines FATCA and future CRS for the OECD. It contains amendments proposed by the financial industry.

South African tax residents are alerted to the fact that in terms of the CRS MCAA, SA becomes entitled to its first information exchange, when it will receive the financial account information of South African residents from other jurisdictions, in September 2017.

The Special Voluntary Disclosure Programme (VDP) will apply for six months from 1 October 2016 until 31 March 2017, giving non-compliant South African tax resident taxpayers (individuals and companies) the opportunity to voluntarily disclose offshore assets and income, and to regularise their tax and exchange control affairs through a single process. The VDP will operate on the same basis as is currently provided for in Chapter 16 of the TAA.

Time is of the essence!

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