Confidentiality in International Exchange and taxpayers rights

Mexico, March 2012
Importance of Confidentiality

- Confidentiality encourages compliance with tax laws and taxpayers can trust the taxing authority to keep their information secure.

- Domestic administrative or judicial sanctions apply for violation of confidentiality laws by tax officials.
Article 26(2) of OECD Model Tax Convention

- Information received under a treaty must be kept confidential in the same manner as information obtained under the laws of the receiving country.

- Information may be used for civil TAX and criminal TAX purposes ONLY.
Confidentiality

- Covers all forms of exchange
- Information exchange in the framework of article 26 but also Article 25 Mutual Assistance Procedure) and assistance in tax collection (article 27)
- Covers specific and non specific information (exchange of information on tax evasion schemes etc)
Article 26(2) of the OECD Model Convention

Two levels of confidentiality apply

1. Domestic tax secrecy rules apply

2. “Treaty” tax secrecy rules impose a higher standard of confidentiality: information may only be used for tax purposes; information only available to tax authorities, appeal bodies, courts etc.
Information may be disclosed to

- Oversight authorities (authorities that supervise the tax administration and enforcement authorities as part of the general administration of the government of the contracting parties)

- Information received may also be communicated to the taxpayer his proxy or to a witness:
  - The letter of the competent authorities should not be disclosed
Notification Right

- Some countries are under the obligation to notify the taxpayer or the person concerned by the exchange
  - Ex: Germany, Luxembourg, Sweden, Switzerland, Netherlands, United States (when the summons procedure is used)
- This right may be a simple right to be informed (Sweden) or also include a right to challenge the exchange of information.
- Countries generally provide for exceptions to the notification procedure in case it would jeopardise the investigation (i.e. in case of tax evasion).
Confidentiality laws in the United States

- 26 U.S.C. section 6103 provides the general rule that taxpayer information must be kept confidential.

- Some exceptions:
  - May be disclosed to persons involved with tax administration or having a material interest.
    - Taxpayer is deemed to have “a material interest” in his own information.
  - May be disclosed to foreign competent authority under the tax convention and used only for tax administration purposes.
  - May be disclosed for tax investigative purposes.
Confidentiality laws in the United States

- 26 U.S.C. section 6105 provides the general rule that information received from a treaty partner under a tax convention must be kept confidential.

- Exceptions are specified in 26 U.S.C. section 6105(b) and include disclosure to persons authorized under the treaty; and with regard to non-taxpayer information, if disclosure will not impair tax administration.
Practical ways to ensure confidentiality

- Treaty stamp to protect confidentiality of Information sent to or received from abroad is stamped for example in Canada, UK and USA:
  “This information is furnished under the provisions of an income tax treaty with a foreign government and its use and disclosure must be governed by the provisions of such treaty.”

- locking procedures, secure electronic folders, password protection, etc.
Impact of Freedom of Information Act (FOIA) legislation on confidentiality

- Under FOIA, a third party may request government agency records, rules, opinions, orders and proceedings.
- The government agency must make this information publicly available unless one of the exceptions apply.
The Commentary to Article 26 provides – “information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents”.
Possibility of using information for other purposes

- Paragraph 12.3 of the Commentary to Article 26 provides optional language to include in bilateral treaties to allow under certain conditions the sharing of tax information by tax authorities with other law enforcement authorities on certain high priority matters such as to combat corruption, money laundering and terrorism financing.

- Conditions:
  - the laws of both countries allow the sharing of tax information by tax authorities with other law enforcement authorities
  - The country providing the information allows the sharing of the information
Possibility of using information for other purposes

- Optional language to add at the end of Paragraph 2 of Article 26:

  “Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.”
Growing number of Countries including the optional language of 12.3 in the EOI articles of their tax treaties

- in particular
  - Belgium
  - Germany
  - Mexico (treaties with Belgium and Switzerland)
  - Spain
  - Norway
  - Switzerland

- Also in some TIEAs: TIEA between the Cayman Islands and the UK