

Session 4: Draft Practical Guide for Exchange of Information (EOI) for developing countries

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Why a Practical Guide on EOI?

- Developing countries are not presently obtaining full advantage of EOI instruments (DTCs, regional agreements)
- They are increasing their network of EOI instruments by negotiating new DTCs, TIEAs and new regional tax agreements and are increasingly interested in the Multilateral Convention
- Limited use of EOI requests due to lack of awareness about EOI among tax auditors or reluctance to make requests (perception that responses take too long)

Why a Practical Guide on EOI

- The ATAF Working Group on Exchange of Information and Tax Treaties identified the need for a Practical Guide for Exchange of Information for developing countries
 - what exchange of information has to offer to counteract tax evasion and avoidance
 - how to implement efficiently exchange of information while ensuring tax confidentiality
- The OECD Task Force on Tax and Development is assisting in developing such a Guide

Outline of the Draft Practical Guide

1. Background
2. Purpose of the Guide
3. What legal basis can developing countries use for exchange of information for tax purposes?
4. What does EOI have to offer to developing countries?
5. What are the key principles governing EOI?

Outline of the Draft Practical Guide

6. How to exchange information in practice:
EOI on request, spontaneous exchange
7. Processes and operation of exchange:
 - Organisation of EOI Units,
 - Human and financial resources,
 - IT support,
 - Record keeping and Statistics,
 - Performance measures
8. The Key role of tax auditors in EOI : need
for awareness, motivation and training

How is it a Practical Guide?

- Examples provided throughout the draft guide - detailed Case studies in Annex
- Optional Model templates are included in Annex: request under TIEAs, feedback
- Check lists provided: on how to draft a request for information , how to draft a response, on how to provide information spontaneously
- Guidance for competent authorities and tax auditors on searching publicly

Questions put to ATAF members

- Does the draft guide cover all the issues you consider should be addressed?
- If not what other issues should be included?
- Are there issues in the draft guide that should be addressed in more/less depth?
- Is there a need for more optional model templates, checklists ?

1. Background

- The new international cooperative tax environment
- Challenges of developing countries:
 - loss of revenues from concealed assets held offshore in low tax jurisdictions
 - Illegitimate Profit shifting
 - Aggressive Tax Planning
 - VAT fraud

2. Purpose of the Practical Guide

- Help developing countries benefit from the international cooperative environment
- Raise the awareness on the legal instruments available for EOI
- Assist developing countries and in particular ATAF members to improve the effective use of exchange of information in order to counteract tax evasion and avoidance

3. What legal basis for EOI? (1)

- Existing Double Tax Conventions (they may not be used as much as they could)
- Existing and new Regional agreements :
 - Eastern African Community Income Tax Treaty (new not yet in force)
 - Règlement UEMOA N° 08/CM/UEMOA
 - The SADC Agreement on Assistance in Tax Matters (new not yet in force)
 - The ATAF Agreement on Assistance in Tax Matters (new not yet in force)

3. What legal basis for EOI?(2)

- Tax Information Exchange Agreements :
 - Growing number of developing countries are signing TIEAs
- The Multilateral Convention on Mutual Assistance in Tax Matters: 34 signatories and growing interest among developing countries

3. What legal basis for EOI?(3)

Other possible legal basis for Exchange of information for criminal tax matters :
Multilateral treaties on mutual legal assistance that also apply to criminal tax matters:

Example: The South African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters (2000),

4. What does EOI have to offer?

- Assist in ensuring correct application of DTC provisions:
 - entitlement to treaty benefits, assist in ensuring a correct allocation of profits and in identifying a possible manipulation of transfer pricing
 - counteract cross border tax avoidance and evasion,
 - And also possibly to assist in counteracting tax crimes and other financial crimes.

4. What does EOI have to offer?

Exchange on request and spontaneous exchange (bank, ownership, identity, accounting, income information etc) can assist in detecting:

- Unreported legal or illegal income
- False /inflated deductions
- Concealed residence
- Misallocation/manipulation of profits
- VAT fraud
- Aggressive tax planning

4. What does EOI have to offer?

Exchange of information can also assist in detecting potential abuse of tax incentives targeted at FDI

NB : requests for information can be used as a source of intelligence by the requested country to detect domestic non-compliance

4. Benefits from other forms of exchange

- Tax examinations abroad
- Simultaneous tax examinations and joint audits
- Bilateral or multilateral Industry-wide exchange (sharing of non taxpayer specific information)
 - (example: banking sector, mining industry, mobile phone, construction sector)
 - Allows to build expertise and intelligence on a particular sector and to improve the efficiency of tax audits
 - Allows to identify cases for simultaneous tax examinations and joint audits

4. Benefits from other forms of exchange

Automatic Exchange of information :

- Matching records received against tax returns :
- How to make effective use of large volume of information received even where no capacity to automatically match records against tax returns :
 - Example: Selection of certain records where high amounts are reported to determine whether the taxpayers concerned have filed a tax return and if so whether they have or not reported this foreign source income

5. What are the principles governing EOI?

- Who has the authority to exchange information ?:
 - the competent authority and designated representatives
- Who are the persons covered by EOI?
- What taxes are covered by EOI?
- What are the tax years covered by EOI?

5. What are the principles governing EOI

- The obligation to provide requested information that is **foreseeably relevant** for the administration or enforcement of the domestic laws concerning the taxes covered by the exchange provisions of the relevant instrument with no possibility to engage in “**fishing expeditions**” (speculative requests for information that have **no apparent nexus** to an open inquiry or investigation).

5. What are the principles governing EOI ?

- **Example of Foreseeable relevance**
- The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.

Example of a Fishing expedition :

State A asks State B the identity of all the residents of State A who own real estate in State B.

5. What are the principles governing EOI ?

In what cases a request of information can be declined ?

- No obligation to carry out administrative measures **at variance** with the laws and administrative practice of either EOI partner ;
- No obligation to supply information which is **not obtainable** under the laws or in the normal course of the administration of either EOI partner;
- No obligation to supply information which would disclose any **trade, business, industrial, commercial or professional secret** or trade process, or information the disclosure of which would be **contrary to public policy**
- If limitations apply : no obligation but **discretion** to provide or not the information requested

5. What are the principles governing EOI ?

Information exchanged must be kept secret in the same manner as information obtained domestically

- Legal framework : domestic legislation on tax confidentiality / secrecy and sanctions in case of breach
- Administrative policies and practices to protect tax confidentiality and information exchanged
 - Before the exchange
 - During the physical or electronic transmission of information (registered physical mail, encryption of electronic exchange)
 - Information and incoming requests received from a foreign competent authority must be appropriately classified, securely stored and steps taken to ensure its use and disclosure are in compliance with the treaty or information exchange mechanism.

Checklist on tax confidentiality (1)

Checkpoints for a jurisdiction to ensure tax confidentiality is adequate

1. Treaty or other exchange of information mechanism is in place and provides for the confidentiality of tax information.
2. Domestic legislation is in place to adequately protect the confidentiality of tax information.
3. Domestic legislation includes sufficient sanctions for breaches of confidentiality.
4. A comprehensive policy on confidentiality of tax information is in place and endorsed at the top level of the administration.
5. A specified person is responsible for implementing the comprehensive policy.
6. The comprehensive policy includes:
 - (a) background checks/ security screening of employees, (b) employment contracts, (c) training (d) access to premises, (e) access to electronic and physical records, (f) departure policies, and (g) information disposal policies and (h) managing unauthorized disclosures

Checklist on tax confidentiality (2)

Check points for a jurisdiction to ensure that tax confidentiality is adequate

7. All aspects of the policy have been implemented in practice

8. Have any breaches in confidentiality occurred? If yes

(a) was the breach been investigated?

(b) was a report with recommendations prepared?

(c) did the recommendations in the report result in a high degree of confidence that the changes, once implemented, would ensure that a similar breach would not occur?

(d) were the recommendations effectively implemented?

(e) were the sanctions provided for in domestic law applied to the person or persons responsible in a manner that will deter future breaches?

5. What are the principles governing EOI ?

- **Disclosure rules**
 - Can the information received be disclosed?
 - in public court proceedings or in judicial decisions?
 - to the taxpayer his proxy or to a witness?
 - to oversight authorities ?
 - to a third jurisdiction ?
- **Confidentiality provisions of EOI instruments take precedence over domestic Freedom of Information Legislation**

6. How To Exchange Information In Practice: EOI on request

- Before making a request:
 - Using all available means to obtain the information on its own territory
 - Using available public and commercial websites
- Making the best use of publicly available information :
 - Country public websites
 - may allow tax auditors to find directly information
 - may allow the requested competent authority to respond quickly to a request
 - Example www.companies-house.gov.uk gives free access to Companies Name and Address
 - Commercial websites

6. How To Exchange Information In Practice: EOI on request

Requesting Party	Requested Party
STEP 1 preparing and sending a request: checklist of what to include in a request	STEP 2: Receiving the request ,acknowledging receipt and checking whether the request is valid and complete
	STEP 3: Gathering the requested information (if the request is valid and complete) checklist of what to include in a request
	STEP 4: Gathering the information and replying to the request: checklist of what to include in a response
STEP 5 : Using the information and providing feedback	STEP 6 : Analysis of the feedback if any

Optional Model Template Request for Information Tax Information Exchange Agreement 1

1.	To: ¹		
2.	From: ²		
3.	Contact point ³	Name:	
		Email:	
		Telephone:	
		Fax:	
		Language skills:	
4.	Legal Basis:		
5.	Reference numbers and related matters	Reference number: ⁴	
		Initial request:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No If no, please provide reference number(s) and date(s) of any related request(s):
		Acknowledgement needed:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No
		Number of attachments to the request:	
		Total number of pages for all attachments:	
6.	Urgency of reply	Date, if any, after which information would no longer be useful:	
		Urgent reply required due to:	Please check the box: <input type="checkbox"/> Statute of limitation; date: <input type="checkbox"/> Suspected fraud <input type="checkbox"/> Court case <input type="checkbox"/> Other reasons (please specify):

Optional Model Template Request for Information Tax Information Exchange Agreement 2

7.	Identity of person(s) under examination or investigation: ¹	
8.	Request to refrain from notifying the taxpayer(s) involved: ²	<p>Please check the box:</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p> <p>Reasons:</p> <p><input type="checkbox"/> If yes, the competent authority confirms that the requesting country would be able to refrain from notification in similar circumstances.</p>
9.	Time period or taxable event for which or in relation to which the information is sought: ³	
10.	Tax(es) to which the request relates: ⁴	
11.	Tax purpose for which the information is requested:	<p>Please check the box:</p> <p><input type="checkbox"/> determination, assessment and collection of taxes⁵,</p> <p><input type="checkbox"/> recovery and enforcement of tax claims⁶,</p> <p><input type="checkbox"/> investigation or prosecution of tax matters⁷,</p> <p><input type="checkbox"/> other (please specify):</p>

Optional Model Template Request for Information Tax Information Exchange Agreement 3

12.	Relevant background: ¹		
13.	Information requested: ²		
14.	Grounds for believing that the requested information is held in the requested jurisdiction or is within the possession or control of a person within its jurisdiction:		
15.	Name and address of any person believed to be in possession of the information requested (to the extent known):		
16.	Form, if any, in which information is requested: ³	For copies of documents what type of authentication, if any, is requested:	
17.		Other form requirements, if any:	
17.	Translation of reply requested:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No Language requested:	
18.	<p>In making the request, the requesting competent authority states that:</p> <p>(a) all information received in relation to this request will be kept confidential and used only for the purposes permitted in the agreement which forms the basis for this request;</p> <p>(b) the request is in conformity with its law and administrative practice and is further in conformity with the agreement on the basis of which it is made;</p> <p>(c) the information would be obtainable under its laws and the normal course of its administrative practice in similar circumstances;</p> <p>(d) it has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.</p>		

6. Timelines and costs

- Ensuring timely information
 - Time to acknowledge a request (60 days)
 - Time to substantively respond or provide a status update (90 days).
 - Best practices : time to respond 60 days if information is available to the tax administration / 120 days otherwise
- Allocation of costs :
 - Ordinary and Extraordinary Costs
 - Example of provisions on allocation of costs in a Memorandum of Understanding between competent authorities

6. How To Exchange In Practice: Spontaneous exchange

- The value of spontaneous exchange
- What to do with information provided spontaneously by an EOI partner
- Initiating spontaneous exchange:
 - What type of information can be provided spontaneously?
 - Steps of spontaneous exchange
- Providing feedback as a way to motivate spontaneous exchange

7. Organizational aspects and processes

- Need to provide updated information on Competent Authorities and designated representatives to EOI partners
- Organization of EOI Units: the various models
- Human resources of EOI Units :
 - Typical skills of staff working on EOI
- Financial and IT resources of the EOI Unit

Example competent authority: Liberia

- **EXCHANGE OF INFORMATION AND ASSISTANCE IN COLLECTION**

- a) **All Taxes including Customs**

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7. Example of organisation of a EOI Unit

- In New Zealand, the Chief Advisor (International Audit) is delegated authority to act as competent authority:
 - Two full time staff (a tax auditor and a service officer) assist the Chief Advisor respond to exchange of information requests.
 - They have access to the data base of New Zealand Companies Office and Land Information.

7. Organisational aspects and processes

- Processes for incoming requests and outgoing requests :
 - Record keeping in EOI management system (registration of requests, monitoring etc)
 - Reporting
 - Statistics
 - Performance measures
 - Setting a baseline

8. The Key role of tax auditors in EOI

- Tax auditors play a key role in EOI, as they may:
 - Provide the information requested by an EOI partner
 - Request information
 - Receive and act on information received
 - Provide information spontaneously
 - Identify potential cases for simultaneous tax examinations
 - Provide feedback

8. The Key role of tax auditors in EOI

- Need to include EOI in the yearly objectives for performance evaluation
- Need to provide guidance on how to make requests
- Need to provide training and awareness on EOI
- Need to motivate spontaneous exchange

8. How to make a request: checklist for tax auditors

What should a tax auditor include in a request to be passed on to his competent authority thru official channels ? 1

- ✓The Jurisdiction to which the request is to be made
- ✓Date the information is required : if urgent why urgent
- ✓Identification of the person under examination
- ✓Any concern about notifying the taxpayer
- ✓Specific years for which the information is requested
- ✓Tax (es) to which the request relates
- ✓Summary of the facts, tax issues, findings to date
- ✓Statement on efforts undertaken to obtain the information

8. How to make a request: checklist for tax auditors

What should a tax auditor include in a request to be passed on to his competent authority thru official channels ? 2

- ✓Type of case (civil , criminal)
- ✓Any relevant background information
- ✓Details of information sought
- ✓Explanation of why the information is requested
- ✓Grounds for believing the information is within the requested jurisdiction
- ✓Type of case (civil , criminal)
- ✓Copies of all relevant data
- ✓If available
name and address of the person believed to be in possession of the information

8. Training and awareness

- Identify who requires EOI training:
 - Basic training of new staff,
 - Periodic training of international tax auditors
- Determine the nature, extent and frequency of EOI training required
- Determine who will conduct the programme: EOI Unit?
- Produce a training syllabus that covers the key topics.
- Consider the most effective methods of carrying out the programme (on line training, classes etc
- Identify and create training and awareness materials.
- Evaluate the usefulness and effectiveness of material

8. How to promote spontaneous exchange

- Mandatory publishing of spontaneous exchange statistics in annual reports
- Carrying out comprehensive, regular and properly targeted awareness training to local tax officials.
- Negotiating Memoranda of Understanding and other similar instruments that seek to encourage, promote and facilitate effective spontaneous exchange of information.
- Providing templates for spontaneous exchange
- Encouraging feedback (optional model feedback form in annex).

Annexes (under construction)

- **Annex 1 Model OECD and UN Article 26 and Commentary Legal instruments**
- **Annex 2 Example of a MOU on EOI**
- **Annex 3** Keeping it safe: the OECD Report The OECD Guide On The Protection Of Confidentiality Of Information Exchanged For Tax Purposes (to be published)
- **Annex 4** Case studies
- **Annex 4 Templates and checklists**
 - Optional Model template for requests under TIEA
 - Optional Model template for spontaneous exchange
 - Optional Model Template for feedback
- **Annex 5 Publicly available information :**
- relevant public and commercial websites
- Reference guide of relevant websites for competent authorities
- **Annex 6 Glossary of terms ?**

ANNEXES

- Useful links:
 - Global Forum website
www.oecd.org/tax/transparency
 - Global Forum EOI Portal
 - Multilateral Convention on Mutual Administrative Assistance in Tax Matters (in English and French Spanish and Portuguese)
www.oecd.org/ctp/eoi/mutual
 - OECD EOI Manual in English French Spanish
www.oecd.org/ctp/eoi
 - ATAF CIAT websites ITDweb etc

Next steps

- Amendments to the draft guide based on comments and new submission to the ATAF WG on EOI and TT
- Finalisation of the annexes : inclusion of additional case studies , etc
- Finalisation of the draft guide: fall 2012
 - Need to build up a train the trainers module ?

Proposed format of the Practical Guide and dissemination

- A CD ROM including Practical Guide and annexes
 - Available in English and French
- Electronic version available on
 - ATAF secure Website
 - The Global Forum secure site
 - Intranet of tax administrations ?

THANK YOU

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