

Exchange of Information Agreements

Chapter 15

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1. Introduction

Tax is a vital source of revenue for any State. Effective levy, and collection of taxes, is critical for sustenance of any State, especially a welfare State. It is for this reason that tax laws are described as rapidly evolving in most developed and developing economies. At the same time, most economies, today, are struggling to pull out through the ripples of a global meltdown of 2008 and look upon foreign investors as their saviors. The increased cross-border opportunities pose a dual challenge for a government viz. to maintain investment flows and to simultaneously ensure effective collection of taxes. To add on to that; while taxpayers operate relatively unconstrained by national borders, tax authorities must respect these borders in carrying out their functions. Furthermore, every State has the sovereign right to establish its own tax rules, which govern its domestic and international domain and may not have the enforcement rights over the foreign jurisdictions. The era of bank secrecy and other confidentiality laws -"de jure bank secrecy" in many jurisdictions prevent the disclosure of relevant information by the financial institutions to the tax authorities and as a result there evolved tax havens¹- the centers of receiving deposits, passive investments and thereby acquired the cloak of confidentiality for the taxpayers. Development of the tax havens and harmful preferential tax regimes distorted the financial structure and affected the real investment flows, undermining the integrity and fairness of tax structures and the economy of a particular country. Tax authorities are continuously constrained by national borders and they continue to try to enforce their legal tax laws. It increased the administrative costs and compliance burdens of tax authorities and taxpayers as several countries prohibited the sharing of the tax related information to other governments except if there is an international agreement between the two agreements.²

1. Under the OECD, four key factors are used to determine whether a jurisdiction is a "tax haven". They are:

1. Whether a jurisdiction imposes no or only nominal taxes;
2. Whether there is lack of transparency;
3. Whether there are laws or administrative practices that prevent the effective exchange of information for tax purposes with other governments on taxpayers benefiting from the no or nominal taxation;
4. Whether there is an absence of a requirement that the activity be substantial

2. OECD's "Harmful Tax Competition: An Emerging Global Issue" identifies these factors which are fallout of development of tax havens.

Due to the above reasons, the tax authorities across the world find it helpful to bridge information asymmetry amongst each other and educate themselves about the affairs of the taxpayers by mutual coordination and exchange of information (“EOI”). In simple terms, the tax departments of one State may assist that of the other State, with information which may be utilized in collecting the due share of taxes of the later State, as per its laws and procedure, thus leading to the genesis of a legal framework of EOI. Needless to add the importance attached to the international EOI and the issue of legal protection of taxpayers within this framework is crucial.

The change in role of the tax treaties:

As internationally accepted, the international treaties are the foremost source of international law, and reflect upon the express consent of the States and international organizations to regulate their interest in accordance with international law. The tax treaties are international agreements which attempt to harmonize the conflicts arising from the assertion overlapping tax jurisdiction by more than one State. The conventional account of treaties for the prevention of double taxation highlights their critical role in preventing double taxation. Beside the traditional objectives, the tax treaties have facilitated in creation of a system for EOI on tax matters between tax authorities which has helped to ensure taxpayer compliance and prevent tax evasion. Furthermore, the tax treaties have developed a mechanism to ensure mutual assistance between tax authorities in tax collection and resolution of tax disputes caused by differences in the interpretation or application of tax treaties.

In order for countries to maintain sovereignty over the application and enforcement of their tax laws and to ensure the correct application of tax conventions, there is a need for effective EOI. Even though taxpayers operate relatively unconstrained by national borders, tax authorities are under an obligation to respect these borders in carrying out their functions. EOI provisions offer them a legal framework for co-operating across borders without violating the sovereignty of other countries or the rights of taxpayers.

Most tax treaties contain a provision under which the tax authorities of one country may request the tax authorities of the other country to supply information on a taxpayer. Information may only be used for tax purposes in the receiving country and it must be kept confidential, *i.e. it can only be disclosed to the persons or authorities concerned with the assessment or collection of taxes covered by the treaty.*

In the changing economy, it has become important to maintain higher standards for accounting information for the taxpayer thereby promoting transparency and good governance. States need to increase financial stability as well as devise a way to combat criminal activity. It has become necessary to enhance the jurisdiction's reputation as a legitimate offshore financial center, and assist integration of the offshore financial center jurisdiction into the international financial system and global community. EOI facilitates all these requirements to be met by countries which provide for EOI clause under their Double Taxation Avoidance Agreements ("DTAA"). These requirements can also be met by countries when they enter into Tax Information Exchange Agreements ("TIEAs") with other jurisdictions.

2. Development of International Standards on Transparency and EOI

The focus of this section of the Chapter is on the development of the international standards on transparency and the evolution and conceptualization of effective modes of EOI. In the late 1990s, few of the international organizations launched initiatives against the tax havens, harmful preferential tax jurisdictions and against tax base erosion, despite there being a lack of common view on the definition of "tax havens" and their effects on high-tax countries.³

The international organizations have addressed the lack of transparency at length from various angles and the cooperation between tax authorities within the assistance in tax matters has been carried out through several forums like the Organisation for Economic Co-Operation and Development ("OECD"), the United Nations ("UN"), the European Union ("EU") and Financial Action Task Force ("FATF") etc.

2.1. OECD

The OECD has taken various measures to fight against harmful tax practices and has been the forerunner on this front.

3. "The Era of EOI and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters" Dr Alicja Brodzka and Dr Sebastiano Garufi, *European Taxation*, 2012 (Volume 52), No. 8 (4 July 2012)

Following the report titled “*Harmful Tax Competition: An Emerging Global Issue*” in 1998 the OECD created a special forum, “Forum on Harmful Tax Practices” to end harmful tax practices and focused on the three areas:

1. Harmful tax practices in Member Countries;
2. Tax havens;
3. Involving non-OECD economies.

In the year 2000, it published a black list which enumerated forty one jurisdictions which were non-cooperative to implement the OECD’s standards of transparency and EOI⁴. Between the years 2000 and 2002, thirty one jurisdictions made formal commitments to implement these standards as laid down by the OECD⁵.

After the G20 Paris Summit, the OECD Secretariat published a detailed report⁶ on the progress by financial centers around the world towards the implementation of an internationally agreed standard on EOI for tax purposes which *inter alia* included:

- the acceptance of Article 26;
- the renegotiation of the existing DTAA; and
- the conclusion of at least produced a “Model Tax Agreement on EOI in Tax Matters”.

4. The standard of transparency and exchange of information that have been developed by the OECD are primarily contained in the Article 26 of the OECD Model Tax Convention and the 2002 Model Agreement on Exchange of Information on Tax Matters. The standard strikes a balance between privacy and the need for jurisdictions to enforce their tax laws. They require:

- Exchange of information on request where it is “foreseeably relevant” to the administration and enforcement of the domestic laws of the treaty partner.
- No restrictions on exchange caused by bank secrecy or domestic tax interest requirements.
- Availability of reliable information and powers to obtain it.
- Respect for taxpayers’ rights.
- Strict confidentiality of information exchanged

5. TIEAs-the dawn of international super-highway? Dr. Johanna Neigel, Allgemeines Treuunternehmen

6. Tax Transparency Report, 2011: Report on Progress, Global Forum on Transparency and EOI for Tax Purposes, <http://www.oecd.org/tax/transparency/48981620.pdf>

The report consisted of three lists: black list, grey list and the white list:

- the “black list” consisted of four jurisdictions which had not committed to the internationally agreed tax standards for EOI;
- the “grey list” included thirty eight jurisdictions which were designated as jurisdictions that had committed to the internationally agreed tax standards for EOI, but had not yet implemented that standard.
- the “white list” consisted of forty other jurisdictions which had substantially implemented the internationally agreed tax standard.

After the report was published, all four blacklisted countries committed to the internationally agreed tax standard and were moved to the grey list. According to the OECD Progress Report⁷ as on 18 May 2012, there are currently eighty nine jurisdictions on the white list, three on the grey list and none on the black list.

With regard to EOI in tax matters, the OECD encouraged countries to adopt information exchange on an “upon request” basis. EOI upon request describes a situation where a competent authority of one country asks the competent authority of another country for specific information in connection with a specific tax inquiry, generally under the authority of a bilateral exchange arrangement between the two countries. An essential element of EOI is the implementation of appropriate safeguards to ensure adequate protection of taxpayers’ rights and the confidentiality of their tax affairs⁸.

2.2. FATF

The Financial Action Task Force (“FATF”) founded in 1989 with the objectives to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

7. <http://www.oecd.org/dataoecd/50/0/43606256.pdf>

8. http://www.oecd.org/document/23/0,3343,en_2649_33745_30575447_1_1_1_1,00.html

FATF has led the fight against money laundering and the financing of international terrorism. The FATF elaborated 40 recommendations which oblige banks to identify their clients and to report certain suspicious transactions. The FATF also published a black list in the year 2000 with fifteen countries which did not fulfill the recommendations laid down by them. All those who did not comply were qualified as uncooperative in the fight against money laundering. However, in the year 2006, jurisdictions which fulfilled the criteria set forth by FATF were removed from this black list.

2.3. EU

The focus of the EU has always been on the good governance standards in the tax area as meaning the principles of transparency, EOI and fair tax competition. The Member States of the EU reached common agreement on several ways of tackling the erosion of tax bases and investment allocation distortions. They acknowledged that individual national and bilateral measures can address tax erosion problems and that EU-wide cooperation is vital. The Member States have agreed on several measures which are designed to promote better governance in the tax field within the EU are as follows:

- Administrative cooperation including information exchange;
- Harmful tax competition;
- State aids;
- Transparency.

With regard to the international tax cooperation, the EU efforts reflect many of the underlying principles that have driven OECD activity against harmful tax competition over several years⁹.

To fight against money laundering, the EU has over the years provided for various directives, the aim of which has been to avoid tax fraud and asset relocation by taxpayers. Directive 76/308/EEC provides for “*mutual assistance in recovery of taxes and custom duties*”. This was the first normative reference that provides for mutual assistance. It regulates mutual assistance for the recovery of claims

⁹ Communication from the Commission to The Council, The European Parliament and The European Economic and Social Committee : Promoting Good Governance in Tax Matters COM(2009) 201 final : Brussels, 28.4.2009

resulting from operations forming part of the system of financing the European agricultural guidance and guarantee fund, as well as customs duties¹⁰.

In June 2001 another Directive 2001/44/EC¹¹ issued by the EU focused on the modernisation and extension of the mutual assistance procedure. The regulated procedure under this directive established a mutual assistance in relation to (a) information requests; (b) notification requests; (c) action interim requests; (d) collection of credit requests. In May 2008, for the recovery of claims relating to certain levies, duties, taxes and other measures, a directive on mutual assistance was issued by the EU¹².

Recently, Directive 2011/16/EU on “*administration cooperation was in the field of taxation*” aiming at facilitating and boosting the cooperation between the EU revenue authorities and reducing the time for data exchange in the area of direct taxation was adopted. One of the main goals is to decrease the possibilities for tax evasion/avoidance schemes within the EU. It applies to all taxes except the following:

- value added tax and customs duties, or excise duties covered by other EU legislation on administrative cooperation between EU countries;
- compulsory social security contributions payable to the EU country;
- fees, such as for certificates and other documents issued by public authorities;
- dues of a contractual nature, such as consideration for public utilities.

10. Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties

11. Directive 2001/44/EC: Modernisation and Extension of the mutual assistance procedure in the field of recovery of tax claims and Directive 2004/56/EC: Mutual assistance in the field of direct taxation, certain excise duties and taxation of insurance premiums

12. Directive 2008/55/EC of 26 May, 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures

The Directive, *inter alia*, contained clauses relating to EOI, grandfathering clause and anti-blocking secrecy statutes rules and automatic EOI.

2.4. UN

Substantial progress towards the elimination of double taxation has been made through unilateral relief measures and more particularly through bilateral tax conventions, which have emerged since the 1960s as a salient feature of inter-state economic relations. A Group of Experts completed the formulation of guidelines for the negotiation of bilateral treaties between developed and developing countries in the course of seven meetings, from 1968 to 1977.

In 1980, the UN published the United Nations Model Double Taxation Convention between Developed and Developing Countries, which was preceded in 1979 by the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries¹³. In 2008, the outcome of the Doha Conference was a Declaration on Financing for Development and recognized the importance of strengthening technical assistance and enhancing international cooperation in addressing international tax matters, including the area of double taxation. It also stated that each country is responsible for its tax system, but the role of international cooperation is of great importance.¹⁴

The Group of Experts, at their Eighth meeting, and the Secretariat noted that, jurisdictions that offered inappropriate tax conciliations are threats to the tax systems of both developed and developing nations. They compromise the principle of tax neutrality and that ineffective information exchange among nations aids and abets the undermining of that principle. The Group of Experts concluded that the problems stemming from harmful tax regimes could be mitigated, if there was a better process for the EOI¹⁵. It is in this way that Article 26 of the United Nations Manual for

13. <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002084.pdf>

14. United Nations, Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, 9 Dec. 2008, p. 5

15. <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002458.pdf>

the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries came into being.

In July 2005, Article 26 on EOI of the OECD Model on Income and on Capital was amended with the purpose to widen its scope and coverage. The Committee of Experts on International Cooperation in Tax Matters formed under the auspice of the UN Economic and Social Council appointed in its first meeting in December 2005 a sub-committee of experts with the mission to consider possible revision of Article 26 of the UN Model and its commentary in the light of the changes made to Article 26 of the OECD model.

3. General international legal framework of EOI

The focus of this section of the Chapter is to enumerate several types of bilateral and multilateral international agreements that contain provisions on EOI. Article on “EOI” under the DTAA, International instruments designed specifically for administrative assistance purposes in tax matters such TIEAs are the most common type of bilateral agreement that are used for effective EOI. A Multilateral Agreement (“MA”) on avoidance of double taxation is similar to a bilateral agreement but is entered into by more than two nations.

3.1 Article on the “EOI” under the DTAA

Historically, the legal authority for EOI has provisioned bilateral conventions between nation states, DTAA. Early model DTAA had relatively broad tax information exchange provisions. For example, the 1928 model developed by the League of Nations provided for provision of information on request and for automatic EOI relating to specific categories such as immovable property, while in the London and Mexico draft models of 1946, a draft agreement on administrative cooperation was included.¹⁶ Both the obligation and form of information exchange were narrowed during the formalization of the OECD Model after World War II, including by removing the obligation for automatic exchange.¹⁷

16. S. A. Dean, *The Incomplete Market for Tax Information* (2008) 49(1) Boston College Law Review 1, 21.

17. *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration* Miranda Stewart, *World Tax Journal*, 2012 (Volume 4), No. 2

The past decades have witnessed an unprecedented liberalisation and globalisation of national economies. An increasing number of countries have removed or limited, controls on foreign investment and relaxed or eliminated foreign exchange controls. This imbalance and the differences in national tax systems led OECD to address harmful tax practices by focusing on improved transparency and cooperation between tax authorities. Co-operation in tax matters also reflects the basic principle that participation in the global economy carries both benefits and responsibilities. The continued viability of an open world economy depends on international co-operation, including co-operation in tax matters.

Article 26 of the OECD Model Convention on Income and on Capital ("**OECD Model**") and the United Nations Model Tax Convention ("**UN Model**") provide for EOI and we have discussed below the key feature and elements of the said Article on "EOI" under the two Models.

3.1.1 Article 26 – "the EOI" under the OECD Model

The Draft OECD Model was first developed by the OECD Fiscal Committee in 1963, primarily for effective resolution of double taxation. The OECD Model has provided one of the most celebrated model tax treaties. Article 26 creates an obligation to exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of the contracting states. The scope of EOI under Article 26 of the OECD Model covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings.¹⁸ A limitation to the EOI is also set under the OECD Model so that information may be given only insofar as the taxation under the domestic taxation laws concerned is not contrary to the OECD Model. However, the information covered is not limited to taxpayer's specific information but the competent authorities may also exchange other sensitive information related to tax administration and compliance improvement¹⁹.

18. EOI for criminal tax matters is also based on bilateral or multilateral treaties on a mutual legal assistance (to the extent they also apply to tax crimes).

19. OECD Commentary on Model tax Convention on Income and on Capital, Condensed Version, July 2010 on the Provisions of Article 26

3.1.1.1 *Traditional forms of EOI*

The OECD Model suggests the following types of mode of EOI which may also be combined:

- i. On request:* Regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;
- ii. Automatically:* Information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State;
- iii. Spontaneously:* State having acquired through certain investigations, information which it supposes to be of interest to the other State.

There is no restriction on the possibilities of EOI and the States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry wide EOI. The Contracting States cannot provide information on third country residents that is neither held by their authorities nor is in the possession or control of persons within their territorial jurisdiction. While this concept of jurisdictional limitation is implicit in Article 26, it is explicitly stated in Article 2 of the Model Agreement.

The OECD Model on Article 26 does not contain details about processes of information exchange. However, the OECD Commentary and the “*implementation of exchange of information provisions for tax purposes*” (“**OECD EOI Manual**”) identify the above mentioned three main ways in which information may be exchanged. The OECD EOI Manual has been approved by the OECD Committee on Fiscal Affairs. The OECD EOI Manual is on the general and legal aspects of the EOI and purpose is to provide tax officials dealing with EOI for tax purposes with an overview of the operation of EOI provisions and some technical and practical guidance to improve the efficiency of such exchanges.²⁰

20. Manual on the Implementation of Exchange of Information provisions for tax purposes: Approved by the OECD Committee on Fiscal Affairs.

EOI on request

EOI on request refers to a situation where the competent authority of one country asks for particular information from the competent authority of another contracting party. Typically, the information requested relates to an examination, inquiry or investigation of a taxpayer's tax liability for specified tax years. The OECD EOI Manual provides for several steps²¹ which can be used as guidance for information exchange upon request to take place. The OECD on July 18, 2012²² has updated Article 26 of the OECD Model, which sets out the international standard on EOI and provides that EOI on request, where the information is "foreseeably relevant" for the administration of the taxes of the requesting party, regardless of bank secrecy and a domestic tax interest.

Automatic (or routine) EOI

The OECD Manual provides that the information which is exchanged automatically is typically information comprising mainly of individual cases of the same type, usually consisting of details of income arising from sources in the source country, e.g. interest, dividends, royalties, pensions etc. This information is obtained on a routine basis (generally through reporting of the payments by the payer) by the sending country and is thus available for transmission to its treaty partners. To improve the efficiency and effectiveness of automatic exchanges of information the OECD has designed both a standard paper format and a standard electronic format known as the OECD Standard Magnetic Format ("SMF"). The OECD has also designed a "new generation" transmission format for automatic exchange known as the Standard Transmission Format ("STF") to eventually replace the SMF. Automatic EOI involves the systematic and periodic transmission of "bulk"

21. The steps as provided by the OECD Manual are (i) Preparing and sending a request (ii) Receiving and checking a request (iii) Gathering the requested information (iv) Replying to the request (v) Providing feedback.

22. http://www.oecd.org/newsroom/taxoecdupdatesoecd_modeltax_conventiontoextendinformationrequeststogroups.htm

taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc.). Automatic EOI can also be used to transmit other useful types of information such as changes of residence, the purchase or disposition of immovable property, VAT refunds, etc. The OECD EOI Manual provides for a legal basis on which automatic EOI can be based.²³

In addition, countries may agree to enter into a special working agreement or Memorandum of Understanding (“MOU”) setting forth the terms and conditions of the proposed automatic exchange. Such an agreement or MOU typically sets forth the types of information to be exchanged automatically, details about the procedures of sending and receiving the information, the appropriate format to use, and provision of Taxpayer Identification Numbers. The OECD has designed a Model MOU between Competent Authorities on Automatic EOI for Tax Purposes²⁴ which can be used as a basis for an operational working agreement between the tax administrations. The OECD Model MOU provides a list of

23. The legal basis upon which Automatic EOI can be based is:

- a) The EOI article of the bilateral income tax convention between two countries;
- b) Article 6 of the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters; or
- c) Article 3 of the EU Council Directive 77/799/EEC on Mutual Assistance as last amended; or
- d) The EU Savings Directive 2003/48/EC; or
- e) Article 17 of EU Council Regulation on administrative cooperation in the field of VAT 1798/2003; or
- f) Council Regulation of 16 November 2004 on administrative co-operation in the field of excise duty; or
- g) Article 4, paragraph 3 of the CIAT Model Agreement on the Exchange of Tax Information

24. <http://www.oecd.org/tax/exchangeofinformation/2666393.pdf>

information that can be exchanged automatically²⁵, for instance, in cases of change in place of residence from one State to the other State, ownership of and income from immovable property, dividends and interest etc.

Spontaneous EOI

Information is exchanged spontaneously when one of the contracting parties, having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes passes on this information without the latter having asked for it. The effectiveness of this form of EOI largely depends on the ability of tax inspectors to identify, in the course of an investigation, information that may be relevant for a foreign tax administration.

Simultaneous Tax Examinations

The OECD EOI Manual also provides for what is known as simultaneous tax examinations. A simultaneous tax examination is an arrangement by two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of taxpayers (or a taxpayer) in which they have a common or related interest with a view to exchanging any relevant information which they so obtain.

25. The list includes:

- change in place of residence from one State to the other State;
- ownership of and income from immovable property;
- dividends;
- interest;
- royalties;
- capital gains;
- salaries, wages and other similar remuneration in respect of an employment,;
- directors' fees and other similar payments;
- income derived by artists and sportsmen, pensions and other similar remuneration, salaries,
- wages and other similar remuneration for government services, other income such as proceeds
- from gambling, other items including items on indirect taxes such as VAT/sales tax and excise
- duties and social security payments; and
- commissions and other similar payments.

Simultaneous tax examinations assist in revealing exploitation or abuse of existing laws and procedures in individual countries. Simultaneous tax examinations also ensures high level of efficiency regarding the EOI between tax jurisdictions and enable a comprehensive review of all relevant business activities. Simultaneous tax examinations may reduce the compliance burden for taxpayers by coordinating enquiries from different States' tax authorities and avoiding duplication. They can also play a role in averting double taxation and thus prevent the need to subsequently resort to a mutual agreement procedure under a provision similar to Article 25 of the OECD Model Tax Convention. The legal basis for conduct of a simultaneous tax examination is the same as that for an Automatic EOI. Simultaneous tax examination is carried out by a ten step process²⁶

The OECD has in this way addressed the issue of EOI and is continuously making efforts so that there is transparency between nations in the information that is exchanged by them.

3.1.1.2 Confidentiality

The framework of Article 26 envisages certain restrictions on EOI in Article 26. Paragraph 2 of Article 26 of the OECD Model lays down restrictions on EOI. It provides that any information received by a contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection, enforcement, prosecution or the determination of appeals in relation to taxes. Such persons or authorities shall use the information only

26. The steps are:

1. Initial Case Selection
2. Agreement on Suitable Cases
3. Conduct Preliminary Examinations
4. Contact the Taxpayers
5. Initial Planning Meeting
6. Meetings and Interviews With Taxpayers
7. Further Examinations
8. Finalisation of Case
9. Final Report

for such purposes but they may disclose the information in public court proceedings or in judicial decisions. The contracting party is not obliged to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting party, *i.e. to supply information which is not obtainable under the laws or in the normal course of the administration or 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.*

3.1.1.3 Limitations to EOI

An exception or a limitation to the main rule is craved out in Paragraph 3 of Article 26 contains certain limitations to the main rule in favour of the State requesting information. A Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. The State which needs to render information need not go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. Thus, a State may refuse to provide information where the requesting State is precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g., failure to provide sufficient administrative resources) results in a lack of reciprocity.

However, information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes. Also, a State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. The protection provided in this case does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law.

3.1.1.4 *Obligations to provide EOI in certain cases*

The OECD Model deals explicitly with the obligation to EOI in situations where the requested information is not needed by the requested State for domestic tax purposes²⁷. It is provided that the Contracting States must use their information gathering measures²⁸, even though invoked solely to provide information to the other Contracting State. The obligations is subject to the limitations mentioned above but cannot be construed to form the basis for declining to supply information where a country's laws or practices include a domestic tax interest requirement. Whilst a requested State cannot invoke the limitations and argue that its domestic laws or practices only supplies information in which it has an interest for its own tax purposes, it may, for instance, decline to supply the information to the extent that the provision of the information would disclose a trade secret.

3.1.1.5 *Declining Information*

Article 26 of the OECD Model, stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. 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.

It provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency²⁹ or fiduciary capacity³⁰. Also, paragraph 5 states that a Contracting State shall not decline to supply information solely

27. Paragraph 4 of Article 26.

28. The term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information.

29. The term "agency" is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers).

30. A person is generally said to act in a "fiduciary capacity" when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit, but for the benefit of another person as to whom the fiduciary stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part, such as a trustee.

because it relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

However, a Contracting State from invoking paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. But, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary or nominee, or the fact that the information relates to ownership interests.

3.1.2 Article 26 – “the EOI” under the UN Model

Article 26 of the UN Model is still largely based on the 1977 version of Article 26 of the OECD Model. The Committee of Experts on International Cooperation in Tax Matters formed under the auspice of the UN Economic and Social Council appointed in its first meeting in December, 2005, a sub-committee of experts with the mission to consider possible revision of Article 26 of the UN Model and its commentary in the light of the changes made to Article 26 of the OECD Model. It was felt that UN is one step behind these international organizations in the working made about EOI. While updating Article 26, the need for improving the wording was felt, considering the work made by the OECD.

The language in the UN Model, for most part, mirrors the language contained in Article 26 of the OECD Model. However, there are two important differences. First, the UN Model explicitly requires an EOI to combat tax avoidance as well as tax evasion. The result is that countries following the UN Model cannot refuse to exchange information on the ground that only tax avoidance is involved. Second, the UN commentary goes well beyond the OECD commentary in promoting an effective EOI.

This Article deals with EOI and has been amended substantially so to be effective in combating tax evasion and tax avoidance. Article 26 embodies rules under which information may be exchanged amongst contracting states both to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws.

Key features of the Article 26 under the UN Model are as under:

3.1.2.1 Scope of EOI

Article 26 of the UN Model provides for the EOI between the competent authorities of the two contracting states. It provides that the authorities shall exchange such information as is “foreseeably relevant” for carrying out the provisions of this convention or to the administration or enforcement of the laws of the Contracting States. Therefore, it is intended to provide for EOI on the tax matters to the widest possible extent and that the Contracting States are not at the liberty to request information about particular taxpayers that is highly unlikely to be relevant to the tax affairs of the taxpayer. It further brings within its ambit EOI in respect of all kinds of taxes imposed on behalf of the Contracting states and also includes taxes imposed by their political sub-divisions or authorities, in so far as the taxation thereunder is not contrary to the convention. The main objective of Article 26 under the UN Model is to help the contracting states in preventing avoidance or evasion of the taxes.

3.1.2.2 Confidentiality

Para 2 of Article 26 of the UN Model mandates any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection, enforcement, prosecution or the determination of appeals in relation to taxes. Such persons or authorities shall use the information only for such purposes but they may disclose the information in public court proceedings or in judicial decisions.

3.1.2.3 Limitations on EOI

Paragraph 3 of Article 26 contains certain limitations to the main rule in favour of the State requesting information. It provides that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. Similarly, it cannot also go beyond the administrative practise and the laws of the other Contracting State.

Similarly, there is also no obligation on the part of the Contracting state to supply for information which is neither obtainable under the laws and the administrative practises of that State or that of the other Contracting State. Similarly, there is also

no obligation to disclose any information which would disclose any trade, business, industrial, commercial or professional secret or trade process or any information which would be contrary to the public policy.

Thus, this Paragraph restricts the circumstances where the information cannot be exchanged between the Contracting States.

3.1.2.4 Exclusion of Vested interest

Paragraph 4 deals with the exclusion of vested interest. In other words, if the information requested by a Contracting state is not relevant or is not required for the tax purposes of the other Contracting State, then the other Contracting state shall use its measures to gather such information, even though such information may not be needed by the other Contracting State for its own tax purposes. However, this shall not overrule the restrictions stipulated in Paragraph 3 as discussed above. It is also incumbent on the part of the Contracting State providing the information to not to decline to supply information for the reasons stated in Paragraph 3 merely because it has no domestic interest in such information.

3.1.2.5 Declining Information

Paragraph 5 of Article 26 of the UN Model, stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. 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.

It provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency³¹ or fiduciary capacity³². Also, paragraph 5 states that

31. The term “agency” is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers)

32. A person is generally said to act in a “fiduciary capacity” when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit, but for the benefit of another person as to whom the fiduciary stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part, such as a trustee

a Contracting State shall not decline to supply information solely because it relates to an ownership interest in a person. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

However, paragraph 5 does not preclude a Contracting State from invoking paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. But, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary or nominee, or the fact that the information relates to ownership interests.

3.1.2.6 Modes of EOI

Paragraph 6 provides that the competent authorities shall develop appropriate methods and techniques through a process of Consultation, concerning matters in respect of which the exchanges of information under Para 1 shall be made. Thus, the Contracting states are given their own choice to decide and develop the mode of EOI.

On 15 March 2011 the UN's Department of Economic and Social Affairs published the 2011 Update to the United Nations Model Double Tax Convention between Developed and Developing Countries. The revised UN Commentary contains departures from the OECD Commentary, especially as regards permanent establishment vs. Independent Personal Services taxation, double non-taxation and inclusion of arbitration under Mutual Agreement Procedure and provides options to the Contracting States in treaty negotiation. Following are the essential changes made under Article 26:

Obligation to exchange information:

Article 26 (1) has been amended to suggest the words "foreseeably relevant" as against "necessary" to suggest the extent of the obligation on the contracting states to exchange information. The standard "foreseeably relevant" is intended to provide for EOI on the tax matters to the widest possible extent and that the Contracting States are not at the liberty to request information about particular taxpayers that is highly unlikely to be relevant to the tax affairs of the taxpayer. The UN Model gives options to the Contracting States for the effective EOI to alternatively use the terms like "necessary" or "relevant" or "may be relevant" with "foreseeably relevant".

Obligation to gather information:

Article 26 has been amended to mean that where information is requested in accordance with the provisions of the treaty, the requested state is under an obligation to use its information gathering measures even if the requested information may not be needed for its own tax purpose.

Limitations to obligation to exchange information:

The UN Model clarifies that limitations to the obligation shall not be construed as permitting the requested state to deny the information sought merely because the requested state has no domestic interest in such information.³³ Further, it elucidates that a contracting state cannot decline the information sought solely because the information is held by bank, other financial institution, nominee or agency or fiduciary relation.

3.2 Tax Information Exchange Agreement

TIEAs outline obligations between two States to help each other by exchanging correct tax information relevant to the administration and enforcement of their respective domestic tax laws (civil and criminal). The purpose of TIEA is to promote international co-operation in tax matters through EOI. The OECD spear-headed the substantial campaign for negotiation of TIEAs with the main purpose of enabling countries to access information about their own residents' offshore investment activities in and through tax havens. It was developed in the year 2000 by the OECD Global Forum Working Group on Effective Exchange of Information ("**Working Group**"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino³⁴.

TIEAs aim at establishing a legal framework for the mutual EOI relating to taxes, but they do not cover the allocation of taxing

33. UN Commentary on Model Double Taxation Convention between Developed and Developing Countries, 2011 on Article 26.

34. http://www.oecd.org/document/7/0,3746,en_2649_33767_38312839_1_1_1_1,00.html

rights. They are intended to ease the way for the conclusion of a DTAA, to complement DTAA's and are signed with countries for which a DTAA is not appropriate as the treaty partner does not levy any or low taxes on income or profits.

TIEAs ensure implementation and execution of individual countries' tax laws. Without such TIEAs in place, it is often formally impossible for tax authorities to exchange or request information for tax purposes from other jurisdictions, without violating the formal obligation of secrecy of such jurisdictions. A TIEA consists of agreements made between two jurisdictions, and creates for both 'treaty parties' rights and obligations which must be, embraced, implemented, obeyed, and respected³⁵.

In this age of globalization, the willingness of other governments to share information has become an important element in the enforcement of domestic tax laws. With the introduction of TIEAs, the international financial community has been provided with broad benefits as well as specific benefits for the relevant offshore financial jurisdiction.

The focus of this section of the Chapter is to bring out the key features of the TIEAs:

3.2.1 *Scope and Objective*

The 'Scope and Objective' of a TIEA is set out at first and discusses the kinds of taxes covered by the Agreement.

The Model Agreement provides that competent authorities of the Contracting Parties shall provide assistance through EOI that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the TIEA. Information that comes under the purview of TIEA should be foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. However, Article 2 of the Model Agreement provides that a requested party³⁶

35. Tax Information Exchange Agreements and Netherlands Antilles, Anne Veenland & Spigthoff Curacao, <http://www.curacao-law.com/2010/07/06/tax-information-exchange-agreements/>

36. Clause (k) of Article 3 of the Model TIEA provides that the term "requested Party" means the Contracting Party requested to provide information

is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

3.2.2 *EOI upon Request*

Article 5 of the Model Agreement provides that the competent authority of the requested Party shall provide information upon request. It states that information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested party if such conduct occurred in the requested party. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, then that party shall use all relevant information gathering measures to provide the applicant party³⁷ with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

The Model Agreement provides that each contracting party must ensure that its competent authorities have the authority to obtain and provide upon request:

- information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;
- information regarding the ownership of companies, partnerships, trusts, foundations etc.

3.2.3 *Possibility of Declining a Request*

Article 7 of the Model Agreement provides that the requested Party may decline a request for information if the disclosure of the information would be contrary to public policy. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy. However, a request for information cannot be refused on the ground that the tax claim giving rise to the request is disputed. But a requested Party may

37. Clause (j) of Article 3 of the Model TIEA provides that the term “applicant Party” means the Contracting Party requesting information

decline a request for information if the information is requested by the applicant party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

3.2.4 Confidentiality

With regard to confidentiality, Article 8 of the Model Agreement provides that information received by a contracting party shall be treated as confidential and may be disclosed to persons or authorities in the jurisdiction of the contracting party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the agreement. Such information may be disclosed in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested party.

Every country negotiates a TIEA according to its bargaining power and readiness to exchange information. Till today more than five hundred TIEAs have been signed by various countries³⁸. India has signed its first TIEA in the year 2010 with Bermuda. Thereafter, India signed TIEAs with Bahamas, Isle of Man and the British Virgin Islands in February, 2011 and the most recent one with Cayman Islands in March, 2011. On 27 June 2012, Brunei signed TIEAs with Sweden, Faroe Islands, Denmark, Finland, Greenland, Iceland and Norway³⁹.

3.3 Multilateral Agreement in tax matters

A number of MAs have been entered into in the recent past by various countries. In 1988, the OECD and the Council of Europe developed a multilateral Convention on Mutual Administrative Assistance in Tax Matters. Gradually, some EU and OECD Member

38. http://www.oecd.org/document/7/0,3746,en_2649_33767_38312839_1_1_1_1,00.html

39. *ibid*

States signed the Convention and it entered into force on 1 April 1995. In 1994, an MA was entered into between the member states of the Caribbean Community. The Andean Community comprising of Bolivia, Columbia, Ecuador, Peru and Venezuela, the Nordic Community comprising of Denmark, Finland, Iceland, Norway and Sweden have also entered into an MA⁴⁰. The Eastern African Community comprising of Kenya, Tanzania and Uganda have also entered into an MA⁴¹.

Generally, Article 24 of this MA provides for EOI and states that the member states shall exchange information which is necessary for the purpose of executing the MA and of the domestic laws of the member states concerning taxes which are covered by the MA. It also provides that the information which is exchanged shall be treated as secret shall only be disclosed to persons or authorities including Courts and other administrative bodies concerned with the assessment or collection of the taxes.

Recently, India's first multilateral agreement was entered into with the South Asian Association for Regional Cooperation ("SAARC-MA") with the South Asian Association for Regional Cooperation nations comprising Bangladesh, Bhutan, Maldives, Nepal, Pakistan and Sri Lanka and India ("**Member States**"). SAARC MA has provisions on EOI, assistance in collection of taxes, trainings to tax administrators, sharing of tax policies and such other related issues aimed at tax cooperation amongst Member States. The SAARC-MA was signed on 13 November 2005 and is in force from 19 May 2010. The SAARC-MA became effective in India from 1 April 2011 and applies in respect of income derived in tax year beginning from 1 April 2011 and subsequent years. .

The features of the SAARC-MA are:

- *Person covered:* the SAARC-MC is applicable to persons who are residents of one or more of the Member States.⁴²
- *Taxes covered:* It applies to taxes on income imposed by or on behalf of the Member States. For this purpose, all taxes imposed on total income or on elements of income, including taxes on gains from alienation of movable or

40. <http://www.mcgill.ca/tax-law/treaties/multilateral-treaties/>

41. *ibid*

42. Article 1 of the SAARC-MA

immovable property and taxes on total amounts of wages or salaries paid or deemed to be paid by enterprises are regarded as taxes on income. Also applicable to any identical or substantially identical taxes imposed after the date of signature of the SAARC-MA. The protocol to the SAARC-MA specifies that this SAARC-MA shall apply only in Member States where an adequate direct tax structure is in place. Where such a structure is not in place, the SAARC-MA shall become effective from the date on which such a Member State introduces a proper direct tax structure and notifies the SAARC Secretariat to this effect.

- *EOI*: The Competent Authorities of the Member States shall exchange such information, including documents and public documents or certified copies thereof, as is necessary for carrying out the provisions of the SAARC-MA or of the domestic laws of the Member States concerning taxes covered by this agreement insofar as the taxation thereunder is not contrary to the SAARC-MA. Any information received by a Member State shall be treated as secret in the same manner as information obtained under the domestic laws of that Member State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. However, there is no obligation of the Member States to carry out administrative measures at variance with the laws and administrative practices or supply information (including documents and public documents or certified copies) which are not obtainable under the laws or in the normal course of the administration or disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.
- *Conflict between SAARC MA and DTA*: The protocol to the MA also specifies that, in the event of a conflict between the provisions of the SAARC MA and any bilateral DTAA, the provisions of the SAARC MA or DTAA that is signed or amended at a later date shall prevail.

4. Recent developments and legal framework of EOI in India

The Indian government geared up on the issues regarding the combating of black money parked by the Indian residents in the offshore jurisdictions. The Indian government introduced a two-prong strategy to deal with the issue *i.e. firstly*, increased co-operation with the international community, and *secondly*, laying down an anti-avoidance regime specific to jurisdictions which are hesitant in exchanging information.

4.1 Co-operation with the international community

Recently, India ratified the Convention on Mutual Administrative Assistance in Tax Matters, a multilateral agreement developed jointly by the Council of Europe and the OECD that was opened for signature to all countries in June 2011⁴³. India became the first country outside the membership of the OECD and the Council of Europe to become a party to this Convention. The Convention on Mutual Administrative Assistance in Tax Matters provides a multilateral basis for a wide variety of administrative assistance, including information exchange on request, automatic exchange of information, simultaneous tax examinations and assistance in tax collection. The Convention provides governments with a valuable tool for fighting offshore tax evasion and avoidance.

In the recent G20 meeting of ministers, India has pressed for automatic EOI and has asked other member states of the G20 to follow the same. India has been a strong proponent of transparency and EOI for tax purposes.

Efforts to increase cooperation have been made through the conclusion of TIEAs and tax treaties with a wide network of countries over the last one year, as well as addition of personnel to the tax enforcement arm. India signed its first TIEA in the year 2010 with Bermuda. Thereafter, India signed TIEAs with Bahamas, Isle of Man and the British Virgin Islands in February, 2011 and the most recent one with Cayman Islands in March, 2011.

43. India also ratified the Convention on Mutual Administrative Assistance in Tax Matters, a multilateral agreement developed jointly by the Council of Europe and the OECD that was opened for signature to all countries in June 2011

4.2 *Anti-avoidance regime specific to jurisdictions*

Changes were also made in the domestic tax legislation, wherein specific “black money and toolbox provisions” were introduced applicable in cases of transactions entered into with persons located in countries and jurisdictions which do not effectively exchange information with India called as “Notified Jurisdictional Area” (“**NJA**”)⁴⁴ and deter Indian residents from parking of money in such offshore jurisdictions. Under the new section 94A of the Income-tax Act, 1961 (“**ITA**”), the Government of India is empowered to notify any country or jurisdiction outside India as notified as NJA having regard to fact that such country or jurisdiction does not have an effective exchange of information relating to taxation matters with India. Irrespective of whether the taxpayer is an Indian resident or a non-resident, enters into a transaction where one of the parties to the transaction is a person located in NJA, then such transaction would be deemed to be an international transaction⁴⁵ and the parties to this transaction would be deemed to be associated enterprise and the Indian transfer regulations would be applicable.

As a consequence of it, the taxpayer would be required to get the tax accounts audited for transfer pricing and file a tax return in India.

The provision imposes the following kinds of requirements on payments made by an Indian resident to persons situated in a notified jurisdiction.

Firstly, if the payment is to a financial institution in a NJA, such payment would be disallowed unless the paying taxpayer

44. The term “person located in NJA” includes the following:

- i. a person who is resident of NJA
- ii. a person (other than individual) which is established in NJA
- iii. a permanent establishment of a person other than (i) and (ii) in NJA

45. Section 94A(1)(2)(ii) of the ITA provides any transaction in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of the assessee including a mutual agreement or arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to assessee shall be deemed to be international transaction as under section 92B of the ITA.

authorises (in prescribed form) the Indian tax authorities to seek relevant information from such financial institutions, on behalf of the taxpayer. *Secondly*, if the payment results in any other kind of deduction of expenses / allowances (including depreciation) to the taxpayer from the transaction with the person located in NJA, they shall be disallowed unless the taxpayer maintains such documents and furnishes such information as prescribed in this regard. *Thirdly*, arrangements with persons situated in NJA would be considered subject to the transfer pricing regulations, irrespective of whether they take place between related parties

Lastly, payments to persons situated in NJA would be subject to a rate of withholding tax which is the higher of a) the rates in force b) the rates prescribed under the relevant provisions of the ITA c) at the rate of thirty per cent.

With respect to inbound remittances from persons situated in notified jurisdictions, there could be two kinds of consequences under the provision. *Firstly*, if an Indian taxpayer receives any sum from a person located in a notified jurisdictional area, the provision could apply to tax any such sum, unless the taxpayer is able to explain with respect to the source of such money in the hands of such taxpayer / beneficial owner. While similar requirements are contained in provisions of the ITA pertaining to unexplained income, this provision would place the onus on an Indian recipient to determine the source of funds of a third party payer.

Secondly, the person situated in the notified jurisdiction would be considered an associated enterprise with respect to the transacting party, and all arrangements would be required to be undertaken at arm's length. This introduces a transfer pricing component into transactions even between unrelated parties.

4.3 “White Paper on Black Money”

Another significant development on the Indian front regarding black money has been the issuance of a “White Paper on Black Money” (“**White Paper**”) by the Ministry of Finance.⁴⁶ It provides an estimate of the annual generation of black incomes in an economy and not how much black money is there in the economy.

46. **Notification** No 27/2012 Cus.,(ADD) dated: May 18, 2012

The White Paper highlighted that the EOI mechanism with foreign tax authorities has expanded significantly due to the following reasons:

- i. The time limit for completion of assessment under Sections 153 and 153B of Act has been extended by one year by the Finance Bill 2012.
- ii. International developments in recent years have contributed significantly towards increasing the pace of EOI. Countries worldwide are now recognising that transparency is required not only for detecting tax evasion but also for preventing money laundering and terror financing.
- iii. The infrastructure of the EOI Cell in India has improved significantly. The entire system and work flow has been automated and the responses to the enquiries are being closely monitored. With communication through the internet, the time lag in EOI has reduced significantly.

The Government of India has set up "Cells for EOI". The EOI works on the basis of mutual cooperation. The competent authorities of different countries provide different forms of administrative assistance to each other based on the provisions of DTAA/TIEAs or the Multilateral Convention for Mutual Administrative Assistance. Administrative assistance under these instruments of EOI, depending on the terms of the agreement, may take the form of (a) specific EOI, (b) spontaneous EOI, (c) automatic EOI, (d) tax examination abroad, (e) simultaneous EOI, (f) service of documents, and (g) assistance in collection of tax. For the increased scope for international cooperation in areas of EOI, transfer pricing, and taxation of cross-border transactions, Government of India decided to create a network of Income Tax Overseas Units ("ITOUs"). Few of the main objectives of these ITOUs is to provide assistance to the authorities in negotiation of TIEAs; expedite the EOI by the competent authorities (as per DTAA and TIEAs) of these countries as required by the competent authority in India.

Interestingly, in 2011, the Supreme Court in *Ram Jethmalani and Others vs Union of India and Others*⁴⁷ took serious note of the lack of action taken by the Government in light of the disclosure

47 [2011] 8 SCR 725

of account details by a Lichtenstein bank. In deciding the matter, the Supreme Court had an occasion to consider the DTAA with Germany⁴⁸ and the Vienna Connection. The Supreme Court observed that the DTAA with Germany would indicate that there is no absolute bar or secrecy. Instead the agreement specifically provides that the information may be disclosed in public court proceedings which the instant proceedings are. The proceedings before it, relate both to the issue of tax collection with respect to unaccounted monies deposited into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also. Comity of nations cannot be predicated upon clauses of secrecy that could hinder constitutional proceedings such as these, or criminal proceedings. In this regard, it issued various directions including the following: a) that the existing High Level Committee constituted by the Government to oversee and co-ordinate investigations into cases of money laundering and stashing black money in tax havens

48. The Supreme Court noted the relevant portions of Article 26 of the Double Taxation Avoidance Agreement with Germany, which reads as follows:

- “1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
2. In no case shall the provisions of paragraph 1 be construed so as to impose on Contracting State the obligation:
 - (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - (c) 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 (order public).”

be appointed as a Special Investigation Team (“SIT”); b) the SIT would be responsible for ongoing and future investigations regarding unaccounted monies in the cases of Hasan Ali, Tapuria, and other known instances, and all other matters with respect to unaccounted monies being stashed in foreign banks that may arise in the course of the investigation; c) that the SIT would be responsible to the Court.

The Supreme Court also ordered that the government shall disclose to the petitioners all the documents and information secured from Germany regarding the Liechtenstein names, with some reasonable conditions, and that the SIT shall expeditiously investigate the same.

5. Conclusion

The efforts of the international arena to have tax transparency and cooperation have been manifold and are evident from the increase in number of effective modes of EOI. The international standard allows the requested parties not to provide response to a request in certain identified situations where it relates to trade, business or other secret that may arise or where the disclosure of information will be contrary to public policy. Every country has to find a balance between the need to have access to information for tax purposes and the privacy rights of the taxpayers.

Some countries are unwilling to exchange information on reasons which may not be reasonable. The procedure of challenging the order in case an authority of a state denies to provide information may not be adequate and could result in non-receiving of information from the State.

In the recent decision of *Comptroller of Income Tax (Singapore) vs. AZP*⁴⁹, the Singapore High Court rejected the request of the Indian tax authorities for the production of documents and bank statements held by a bank in Singapore with respect to an Indian National. The application was rejected on the basis that the information requested was not “foreseeably relevant” due to the inadequacy of the supporting documentation provided by the Indian tax authorities. The Singapore High Court held that to fulfill the requirement of “foreseeable relevance”, it must show some clear and

49. (2012) SGHC 112

specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws as stipulated under Article 28 of the India-Singapore DTAA. The court also noted that even if there was a tenuous connection between India and the Companies under whose names the bank accounts were opened to show that the requirement of foreseeable relevance was satisfied, it was of the view that consideration as to whether an application could be justified is a process that envisages many more details than was adduced in the present case.

Under the current circumstances, with corruption at its peak in countries, EOI has become the need of the hour. With the current legislation in place, an effective check on movement of money from one country to another has taken place. Even though EOI has provided safeguards to countries to reduce the amount of black money in each Country, the mechanism should respect the rights and safeguard the taxpayers and third parties. On the presumption that all movements of money from one country to another are illegal, the taxpayer's right cannot be infringed. Each country needs to have a specific mechanism in place to check the movement of money before any information about a taxpayer is given to another country.