PRESS RELEASE
2012 Update to Article 26 of the OECD Model Tax Convention

QUESTIONS & ANSWERS

What are the main points in the update of Article 26 and its Commentary?

- The Commentary was expanded to develop the interpretation of the standard of "foreseeable relevance" and the term "fishing expeditions" , including with respect to a group of taxpayers not individually identified;

- The text of Article 26(2) of the OECD Model Tax Convention was amended to allow the competent authorities of Contracting States to use information received for tax purposes for non-tax purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorizes such use (see also revised paragraphs 12.3-12.4 of the Commentary). This language was previously included as an optional provision in paragraph 12.3 of the Commentary. This makes an important contribution to fighting tax crimes and other crimes more effectively by allowing different tax and law enforcement agencies to cooperate more closely and is directly linked to the OECD's work in connection with the "Oslo Dialogue" (www.oecd.org/ctp/taxcrimes).

- Optional language has been included in the Commentary for Contracting States wishing to improve the speediness and timeliness of exchange of information under Article 26 by agreeing on time limits for the provision of information.

- Language has been added to the Commentary to clarify a number of terms and concepts used in Article 26:

    - Clarified that the confidentiality rules in paragraph 2 of Article 26 also apply to the competent authority letter requesting the information (see paragraph 11);

    - Clarified that in the case of breach of tax confidentiality by the requesting State the requested State may suspend assistance under Article 26 until such time as proper assurance is given by the requesting State that the confidentiality rules will indeed be respected. (see paragraph 11);

    - That the principle of reciprocity applies in situations in which a Contracting State applies measures not normally foreseen in its domestic law or practice, such as access to bank information (see paragraph 15); and

    - Clarifies that Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State and irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State (see paragraph 19.7).

What requirements must be satisfied in order for a request on a group of taxpayers not individually identified to meet the standard of foreseeable relevance?

Where a request for information relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative.

In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis. It further requires a showing that the requested information would assist in determining compliance by the taxpayers in the group. As illustrated in example (h) of paragraph 8, in the case of a group request a third party will usually, although not necessarily, have actively contributed to the non-compliance of the taxpayers in the group, in which case such circumstance should also be described in the request. Furthermore, and as illustrated in example (a) of paragraph 8.1, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.

Many countries have always interpreted Article 26 to include group requests. For some countries this represents a new interpretation.

How does the 2012 update accommodate Contracting States wishing to improve the speediness and timeliness of exchange of information under Article 26 by agreeing on time limits for the provision of information?

The 2012 update contains optional language for addition to Article 26 which provides for a default standard of time limits within which the information is required to be provided unless a different agreement has been made by the competent authorities of the Contracting States on longer or shorter time limits (see new paragraphs 10.4-10.6). The default standard time limits are two months from the receipt of the information request if the requested information is already in the possession of the tax authorities of the requested Contracting State and six months in all other cases. Such optional language also supports the peer review work of the Global Forum on Transparency and Exchange of Information For Tax Purposes reflected in its terms of reference which are directed at achieving information exchange.

Have any of the OECD's member countries or other countries participating in the work of the Committee on Fiscal Affairs made any reservations or observations to Article 26 and its Commentary, as updated?

No, the 2012 update of Article 26 and its Commentary reflects a consensus. No country made a reservation or observation in relation thereto.

Which countries participate in the work of the CFA?

The 34 member countries[1], plus Argentina, India, the People's Republic of China, the Russian Federation and South Africa participate in the work of the CFA.

[1] Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. The European Commission also takes part in the work of the OECD.