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Cross-Border Information

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The German Approach

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Overview

- 1. Obligation for taxpayers to deliver information**
 - a) Obligation to file a tax return
 - b) Obligation to provide information
 - c) Obligation to keep proper accounting records and to store the data carriers belonging thereto
- 2. Information located abroad**
- 3. Sanctions in case of Non-Compliance**

1. Obligation for taxpayers to deliver information

a) Obligation to file a tax return

- Income Tax: § 25 III EStG
 - ✓ People subject to unlimited tax liability in Germany – Worldwide income
 - ✓ People subject to limited tax liability if tax due is not covered by withholding taxes – German income
 - ✓ People subject to extended restricted tax liability (§ 2 AStG) – Worldwide income
- Corporation Tax: § 31 KStG > § 25 III EStG

1. Obligation for taxpayers to deliver information (cont.)

- a) Obligation to file a tax return (cont.)
 - VAT: § 18 UStG
 - ✓ Periodic tax returns every quarter of a year - self computation of tax due with regard to supplies and other services in Germany or the EU
 - ✓ Yearly tax return – self computation of tax due/tax credit

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information

- Inland Revenue to find facts and clarify matters of its own motion

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- Taxpayer to provide information
- Burden of Proof:
 - ✓ Taxable Receipts (e.g. earnings): Inland Revenue
 - ✓ Deductible costs (e.g. business expenses): Taxpayer

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information (cont.)

- National Context:

✓ § 90 I AO

- **General** obligation to co-operate
- Disclosure of relevant facts and evidence; „particular circumstances of the case“

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information (cont.)

- International Context:
 - ✓ *§ 90 II 1-2 AO*
 - **Increased** obligation to co-operate
 - Clarification of facts and seizure of evidence

1. Obligation for taxpayers to deliver information

(cont.)

b) Obligation to provide information (cont.)

- International Context:

Principle of Proportionality

✓ § 17 I AStG

- Extended obligation to co-operate for taxpayers holding equity interests in foreign interim companies
- Clarify business relationship and provide relevant documents (e.g. balance sheets, profit and loss accounts)

1. Obligation for taxpayers to deliver information

(cont.)

b) Obligation to provide information (cont.)

- *§ 90 II 3 AO*
- ✓ Added as of 01/01/2009 to fight tax evasion and force non co-operative jurisdictions to co-operate
- ✓ Objective indications that taxpayer has business relationship with financial institutions in tax havens
- ✓ Taxpayer has to affirm under oath that his statement is correct and also has to authorise the Inland Revenue to seek information with the foreign bank in the name of the taxpayer

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information (cont.)

- *§ 90 III AO*
- ✓ Cross border operations
- ✓ Records about business relationship with **related** companies
- ✓ Profit distribution parent company – subsidiary
- ✓ Obligation to document the content, scope, handling and economic as well as legal framework of the operation >

Functional and Risk Analysis

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information (cont.)

- *§ 90 III AO* **Principle of Proportionality**

- ✓ Obligation to document a legal appreciation of the business operation as well as the market and competition circumstances > **Transfer Pricing Analysis**
- ✓ For purposes of a tax audit
- ✓ Special transactions (e.g. group restructuring): **Prompt** documentation (= within 6 months)

1. Obligation for taxpayers to deliver information (cont.)

b) Obligation to provide information (cont.)

- *§ 160 AO, § 16 AStG*
- ✓ Naming of recipient of payment <> deduction of business expense
- ✓ *§ 16 AStG*:
 - Business relations with entities non –/insignificantly taxed: No prohibited income or profit shifting abroad
 - Comprehensive disclosure of relationship between taxpayer, company and other entities

1. Obligation for taxpayers to deliver information (cont.)

c) Obligation to keep proper accounting records and to store the data carriers belonging thereto

- Legal obligation to keep records: § 146 II AO

✓ General rule: In **Germany**

- For national permanent establishments
- For permanent establishments abroad, providing the foreign law does not oblige the entity to keep the records in the home country > in the latter case the results have to be implemented in the national German records

1. Obligation for taxpayers to deliver information (cont.)

c) Obligation to keep proper accounting records and to store the data carriers belonging thereto (cont.)

- ✓ Electronic records abroad upon request: *§ 146 II a AO*
 - Taxpayer to inform Inland Revenue about location of data processing register
 - Taxpayer to fulfil his duty of information
 - Full access to electronic data has to be possible
 - No obstacle to taxation
- > In case of non-complicance obligation to shift electronic data back to

Germany

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2. Information located abroad

- Taxpayer: Increase in mobility and cross-border transactions
- Inland Revenue: To carry out a **correct, equal and neutral** tax assessment in both a national and international context

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- International Law: Principle of **Territoriality**

(P) Tax investigation on foreign territory

2. Information located abroad (cont.)

- Means to acquire “international” information
 - ✓ National provisions
 - ✓ EU-Law
 - Mutual Assistance Directive
 - Interest Directive
 - ✓ International Agreements
 - Double Taxation Agreements (DBA)
 - Bilateral- and multilateral agreements on exchange of information
 - Foreign Account Tax Compliance Act (FATCA)

2. Information located abroad (cont.)

- National Provisions

✓ § 117 AO

- § 117 I AO: Inland Revenue **seeking** information
- § 117 II AO: Inland Revenue **giving** information
- § 117a AO: Transmission of personal data between EU-Member States; prevention of crime
- § 117b AO: Use of data received: for transmission purposes **only**; to protect ordre public; all other cases: if transmitting state agrees

2. Information located abroad

- Provisions based on EU-Law
- ✓ As of 01/01/2013: *EU-AHIG* based on Art. 8 *Mutual Assistance Directive 2011/16/EU*
 - Income and Capital Gains taxes
 - Information to be most likely relevant for taxation > OECD-Standards; no “fishing expeditions”
 - Seeking and receiving of information in specific cases as well as spontaneous information; routine information to grant to other states > no right to be heard for taxpayer!
 - Time limits
 - Prohibition

2. Information located abroad

- Provisions based on EU-Law
- ✓ § 9 II ZIV based on *Interest Directive 2003/48/EG*
 - Routine exchange of information on interest payments; withholding tax
 - Revised Directive 2014/48/EU: Payments within EU and abroad; interest payments and their equivalents (e.g. life insurance certificates); additional information (e.g. tax identification number)

2. Information located abroad (cont.)

- International Agreements
 - ✓ *Art. 26 OECD-Model Agreement:*
 - Exchange of national and international information on all taxes
 - ✓ *Bilateral agreements on exchange of information with several countries (e.g. Antigua and Barbuda, Bermuda, Cook Islands)*
 - ✓ *FATCA: Unilateral Agreement by USA*
 - 5 Partner States (G, UK, Fr, I, Sp)
 - Prevention of transfer of untaxed US funds to tax havens
 - Exchange of information/Withholding tax

2. Information located abroad (cont.)

- Information unlawfully obtained
- (P) Purchase of tax data – CD by the German Government containing information about bank accounts of German citizens in low/no tax countries > prohibition of exploitation?
- ✓ Criminal procedure:
 - No specific provision legalizing purchase of data - CD
 - Illegally obtained information <> Compensation of tax loss
 - Unlawfully obtained information by private person > prohibition of exploitation if government initiated the illegal approach
 - Functional criminal procedure <> Right to a fair trial : § 136a StPO (no unlawful methods of interrogation) > objective prosecution
 - Political correctness : Criminal offences should not lead to a financial advantage > “Committing crime to follow up crime as a constitutional contradiction”

2. Information located abroad (cont.)

- Information unlawfully obtained
- (P) Purchase of tax data – CD by the German Government containing information about bank accounts of German citizens in low/no tax countries > prohibition of exploitation?
- ✓ Tax procedure
 - Prohibition of exploitation in criminal procedure does not necessarily lead to a prohibition of exploitation in tax procedure
 - Exchange of information /Double Tax Agreements with low tax countries
 - § 90 II 3 AO > Estimation of tax base

2. Information located abroad (cont.)

- Information unlawfully obtained
- ✓ Constitutional Court of Rheinland-Pfalz, 24/02/2014 VGH B 26/13
 - Evidence collection to be constitutional
 - Do Public officials make themselves liable to prosecution buying tax data CDs?
 - In future acting of a private whistle-blower who unlawfully gained data might be assigned to the government
 - If government is actively involved in gaining data/repeats the purchase from the same seller
 - Tax fairness and regular tax revenue
 - Obligation of taxpayer to provide information in cross-border matters according to § 90 II AO and therefore a lowered protection of the data
 - Unclear legal situation reg. purchase of data - CD as no provision or Supreme Court decision

2. Information located abroad (cont.)

- Information unlawfully obtained
- ✓ Constitutional Court of Rheinland-Pfalz, 24/02/2014 VGH B 26/13 (cont.)
 - Purchase from a private person (in general a bank employee) > to be assigned to the German government?
 - Yes, if private person was motivated by several governmental purchases beforehand and becomes an extended arm of the government
 - No, if seller acts of his own accord

3. Sanctions in Case of Non-compliance

- ✓ Estimation of tax base (§ 90 II 1, § 160 II 1 AO)
- ✓ Disputable presumption that income/assets in non-cooperative states exist/are higher than declared (§ 90 II 3, § 162 II 3 AO)
- ✓ Disputable presumption that income/assets in Germany are higher than declared (§ 90 III, § 162 III AO); high end of transfer pricing scale to be used to the disadvantage of taxpayer
- ✓ Additional „tax“ (§ 90 III, § 162 IV AO): Minimum 5.000 € if records do not exist or cannot be used; 100 € – 1.000.000 € if records are presented late
- ✓ No deduction of business expenses (§ 160 AO, § 16 AstG)

Thank you for your attention.