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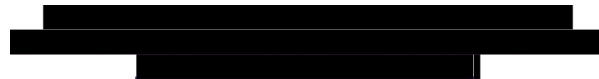
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United States of America Experience with and Administrative Practice
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United States of America
Experience with and Administrative Practice concerning
Mutual Assistance in Tax Affairs
prepared for the
European Association of Tax Law Professors 2009 Annual Meeting
(Prof. Dr Roman Seer, General Reporter)
by
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This report will use the following abbreviations:

IRC (followed by § and a number) refers to the Internal Revenue Code of 1986, as amended, which is Title 26 of the US Code. The IRC constitutes the tax laws of the United States.

IRM refers to the Internal Revenue Manual that contains a series of administrative guidelines and procedures for use by tax administrators.

IRS refers to the Internal Revenue Service, the branch of the United States Department of the Treasury that administers the tax laws of the United States and serves as the US competent authority for treaty and TIEA purposes.

Treas. reg. (followed by § and a number) refers to a regulation that the US Department of the Treasury promulgates to interpret a section of the IRC.

TIEA is a tax information exchange agreement.

I. Introduction. Directives of the Council of Europe and the European Commission have no direct application to the United States or to the relationship between the IRS and the taxing authorities of the Member States of the European Union (“EU”). Nevertheless, the United States has one or more tax treaties with each of the Member States of the EU, so that the law governing mutual assistance in tax matters within the EU generally impacts the relationship between the individual Member States and the United States. For example, an exchange of information with the United States may lead a Member State to investigate specific aspects of a taxpayer’s operations or tax reporting that might result in the spontaneous exchange of information with another Member State as Article 4 of Council Directive 77/799/EEC of 19 December 1977 requires.

The following paragraphs provide some observations about assembly of tax information in the US and the US view of information sharing and mutual assistance. In the body of the report, I will elaborate upon most topics I raise in this introduction. Accordingly, I intend this introduction to provide some general context necessary to an understanding of the information sharing and mutual assistance issues in the US. Since the US is not an EU member and, therefore, subject to neither EU directives nor European Court of Justice's decisions, this report will differ structurally from other reports in this project. Many of the outline questions simply are inapplicable to the US.

At the same time as non-membership in the EU separates it from the EU members, the US also differs from the EU in several additional respects important to taxation. Like the Member States of the EU, the states comprising the United States, with the exception of tariffs with respect to which the states have no authority, have both taxing jurisdiction and collection authority within their geographic territory separate from and co-extensive with any central authority. Moreover, the states may structure their taxes and collect information without regard to the risk that taxes in one state may duplicate taxes in another state. In fact, while the states generally use formulary apportionment for distribution of business income among the states in which a business is active, the federal government has no authority to impose an overarching apportionment formula upon the states. While the Multistate Tax Commission, a voluntary association of the states, seeks to coordinate taxation methods and information sharing among the states, the same income of a taxpayer may become subject to income tax at state level more than once (or not at all). However, US constitutional law does limit the power of states to discriminate against citizens or residents of other states in their taxation and prohibits states from imposing cross-border collection obligations for sales taxes where the vendor has no presence in the state that seeks to impose that obligation.

The relationships between the states of the US and the United States and the Member States of the EU and the EU also differ in major respects. States of the United States lack independent diplomatic authority. The states may not conclude treaties with foreign governments. To the extent that the states possess information they gather in the course of tax administration or seek information from outside the US, the states of the US may not enter into information sharing or mutual assistance treaties with foreign governments although they may cooperate with foreign authorities. The authority of the states in this respect is derivative of the United States. And with regard to internal information sharing generally, there is no central clearing house at national level for tax information. The states do not share tax information automatically with the federal government or with the governments of the other states.

Further, the United States, unlike the EU, has general taxing jurisdiction co-extensive with the jurisdiction of its Member States. Accordingly, US taxpayers are subject to income taxes at both federal and state levels although not all states impose an

income tax. State income taxes universally carry maximum rates that are significantly lower than maximum federal income tax rates. The federal income tax allows a limited deduction for state income taxes a taxpayer pays. Some states allow a deduction in computing the state income tax for income taxes paid at federal level. Nevertheless, state and federal income taxes are somewhat duplicative. The value added tax that accounts for nearly half the revenue in most EU states has no counterpart in the US. Although there has been extensive academic and political discussion of enactment of a national sales or value added tax, the US Congress has not enacted such a tax. Most, but not all states, impose sales taxes on goods and some impose a sales tax on services as well.

Mutual assistance and exchange of income tax information are matters of particular importance to the US. Unlike most (all) Member States of the EU, the US taxes its citizens and residents, including US corporations and other entities, on their worldwide income from all sources.¹ And, unlike some EU states, the US has a longstanding tradition of taxpayer self-reporting of income and self-assessment of the income tax. Each US taxpayer who or which has income in excess of a minimum exempt amount must file an annual federal income tax return with the IRS. See IRC §§ 6011, 6012. On the return document, the taxpayer reports income and expenses from all the taxpayer's worldwide sources of income and expense. Despite the tradition of the annual return for self-reporting and assessment, the imposition of penalties for negligent underreporting of income and more substantial financial and criminal penalties for intentional underreporting of income, taxpayers frequently intentionally underreport their incomes. Taxpayers are particularly likely to underreport their incomes in those instances where they believe that the taxing authority has limited resources for audit of reported information and few reliable methods for simple verification of the taxpayer's reporting. Foreign-source income is difficult to track, so that with worldwide taxation, collection of data from outside the US is critical to the assessment of US income taxes.

In order to enhance its ability to verify taxpayers' self-reporting and assessment domestically, the US increasingly relies on third-party reporting of information. Like most of the Member States of the EU, taxpayers tend to report employment, as opposed to self-employment income, accurately because their employers must report the wages to the taxing authority, collect the taxes on that income, and pay the collected sums over to the government.² With respect to other types of payments, the US has a wide array of

¹ Despite worldwide income taxation, a variety of rules targeted to protect the competitiveness of US business enable US businesses to defer taxes on income they earn outside the US.

² Underreporting of employment income emerges when that simple control of employer reporting breaks down, as it often does when the employer enjoys no tax benefit from payment of the wages. For example, domestic service and home maintenance and repair are activities in which the employer's expense is not deductible, so that there is little incentive for employer reporting. In fact, the employer's failure to report and withhold on wages for domestic service is so common that in the US it has proven a stumbling block for high-level political appointments on a number of occasions. Similarly, undocumented workers of all kinds – not just workers in domestic service -- often receive payment in cash from employers where employers are not sensitive to deduction of the payment or the wage differential between reported and

third-party reporting provisions that require financial institutions, real estate and securities brokers and, more generally, all businesses that make payments of USD 600 or more to report the amounts of payments and the names and taxpayer identifying information for the recipients to the IRS. See IRC §§ 6041 *et seq.* As third parties report much of this information in electronic form, the IRS is able to computer match the information with the information taxpayers report on their federal income tax returns. Matching is particularly efficient for interest and dividend payments which financial institutions and corporate dividend payers report electronically, but less efficient for other types of payments, many of which continue to be reported on paper.

Further information reporting comes from tax-transparent entities that do business in the US. Many US entities are wholly or partially tax transparent, that is, the entities report their income and deductions on their own, primarily informational, federal income tax returns. The entity's income and expense, however, is not taxable or is only partially taxable to the entity itself. Rather the entity's beneficial owners include their respective shares of the entity's income and deductions in computing the beneficial owners' separate tax liabilities. Corporations that meet certain ownership criteria and make an election, partnerships, both general and limited, and limited liability companies all pass their income and deductions through to their owners, as if their owners received the income or deduction from the entity's source. Matching of the income the entity reports and its inclusion by the owners is the subject of an ongoing, but imperfect, information-matching program. Similarly, some trusts are tax transparent, while others pay tax at trust level. With respect to trusts that pay tax, their beneficiaries include the trust's income in their own incomes when the trust actually distributes money or property to the beneficiaries. At the time of the actual distribution, the beneficiaries gross up the income received with the amount of tax the trust paid and then receive a credit for the taxes paid at trust level. And certain regulated investment vehicles, including regulated investment companies, real estate investment trusts, and real estate mortgage investment conduits are tax transparent with respect to income that they distribute to their owners but are not transparent with respect to their net losses.

As a strong infrastructure for reporting income from a variety of activities in the US is already in place, the IRS has or can obtain substantial amounts of information to share with its treaty partners who require the information with respect to taxpayers who are subject to the treaty partner's jurisdiction. Cooperation of treaty partners in sharing tax information with the US is critical to the US's ability to monitor and tax the ever

unreported wages is large enough to offset any tax savings from the employer's deduction. Undocumented workers generally receive wages below the market wages for documented workers, and the employer does not report the payment. Enforcement in this area has increased in recent years, so that undocumented workers often provide employers with artificial or stolen tax identification numbers, and employers report wage withholding for workers who never file federal income tax returns. Erroneous taxpayer identification results in loss to employees of tax payments that might have been refunded to the employees had they filed income tax returns showing incomes less than the minimum taxable amount.

increasing volume of activities in which US taxpayers engage outside the United States. In this context, the US tends to emphasize information sharing in its tax treaty negotiations and often makes reduced dividend and interest withholding rates for payments to recipients in treaty partner countries contingent upon the treaty partner's willingness to share information.

In 2001, the IRS established the qualified intermediary system under which the IRS relies on the certification of participating foreign financial institutions that the beneficial owner of a US-source payment qualifies for treaty benefits. For non-treaty benefit qualifying recipients of US-source dividends the qualified intermediary withholds in bulk and pays the withheld amounts over to US. In addition, qualified intermediaries report US-source interest and dividends received for the benefit of US taxpayers in the same manner as the institutions would report those payments if the institutions were US institutions. Foreign institution participation in the US qualified intermediary program is contingent upon information sharing and reporting although recent developments with Switzerland and Liechtenstein disclose that some foreign participants encouraged their US clients to create entities in low-tax jurisdictions to receive the US-source payments and circumvent the strictures of the qualified intermediary rules. US settlements with Swiss institutions on discovery of the practice suggest that the information sharing is less important to the US in practice than it is in theory.

Currently under discussion in Congress and the Department of the Treasury are plans to enhance the requirements of the qualified intermediary program. One enhancement would require qualified intermediaries to report the foreign-source income of US citizens and residents as well as US-source payments. The second enhancement would apply a "know your customer" rule to compel qualified intermediaries to identify the beneficial owners of non-US entities and, if the beneficial owners are US persons, to report payments to those entities to the US.

The foregoing paragraphs introduced some features of the US tax system and its collection of taxpayer information. With that by way of background, this report will follow the structure that the general reporter selected for this project. This report's responses appear in boldface text. The general reporter's questions appear in ordinary text.

II. Questions of implementation

- 1) As far as the mutual assistance in tax affairs is concerned not only the tax assessment but also the collection of the taxes is of importance. Consequently several Council Directives are relevant for this topic.

When did your country implement the following Council Directives:

- “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”,
- “Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation”,
- “Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”,
- “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments”.

Not applicable. The US is not a member of the EU.

2) In which legal rules can the implementations be found?

Not applicable. The US is not a member of the EU.

3) Does your country’s legislation provide a constitutional frame that rules the mutual assistance in tax matters? Are there any conflicts or inconsistencies among constitutional guarantees for the taxpayer and rules concerning mutual assistance? Are there any conflicts or inconsistencies among the rules of human rights treaties and those concerning mutual assistance?

Art. II, Section 2(2) of the US Constitution gives the President (executive branch) the power to make treaties with the advice and consent of a two-thirds majority of the US Senate. Generally, the US Constitution does not protect the privacy interests of people who are neither citizens nor residents of the US, but, without regard to citizenship, IRC §6103 prohibits disclosure of tax returns and tax return information absent a specific exception within IRC §6103. Tax return information is a broad concept that includes substantially all tax information that the government may receive or collect with respect to a taxpayer. IRC §6103(b). Disclosure is permissible under various exceptions to the general non-disclosure rules, including an exception for disclosure of tax information to the competent authority of a treaty partner or TIEA counter-party. The US treaties and TIEAs require that a contracting state must protect the secrecy of the information it receives.

Interestingly, decisional law in the US allows greater leeway in collecting information for the competent authorities of foreign states than for domestic tax purposes. The leading case of *United States v. Stuart*, 489 U.S. 353 (1989), held that in issuing and enforcing a summons pursuant to a request for information from the

Canadian tax authority, the IRS was under no obligation to determine whether or not proceedings had reached a level in Canada analogous to a US Department of Justice referral for criminal prosecution. In order to protect the rights of the taxpayer, IRC §7602(c) precludes the IRS from further civil collection of information under its summons power, if the taxpayer is subject to a Department of Justice referral for criminal prosecution. See discussion below in response to question III. 1). On the other hand, if the summons complied with statutory requirements in the US, the summons was enforceable even if the information obtained and transmitted to Canada would assist in a criminal prosecution in Canada of Canadian residents or citizens. In the case, the information the Canadian authorities sought pursuant to the summons was bank records from a US bank in which the Canadian citizens and residents had deposits.

- 4) Article 9 of the Council Directive 77/799/EEC allows Member States to make bilateral agreements on specific matters of fiscal cooperation (automatic exchanges of information, simultaneous assessments etc.). Has your country concluded this kind of agreements? If so, with which Member States?

Not applicable. The US is not a member of the EU. The US exchange of information agreements with Member States appear in bilateral tax treaties with those States. The US has an ever increasing number of information exchange agreements with low-tax jurisdictions that, in some instances, the OECD considered to be “tax havens.” Note also that in 2004 the IRS joined with the revenue agencies of the UK, Canada and Australia to form the Joint International Tax Shelter Information Centre (“JITSIC”), an information-gathering and sharing project to identify and address abusive tax structures and schemes, so-called tax shelters. Japan joined the group in 2007 and China has become an observer. The group has offices in Washington D.C. and London, and, according to an IRS news release (IR-2007-104, May 23, 2007):

JITSIC members have identified and challenged the following highly artificial arrangements:

- **A cross-border scheme was marketed, involving hundreds of taxpayers and tens of millions of dollars in improper deductions and unreported income from retirement account withdrawals.**
- **Highly structured financing transactions created by financial institutions in which taxpayers generated inappropriate foreign tax credit benefits.**

- **Brokers provided made-to-order losses on futures and options transactions for individuals in other JITSIC jurisdictions, leading to a tax loss of more than USD 100,000,000.**

Beyond those public announcements, limited information is available concerning the operations and databases of JITSIC.

JITSIC is an example of industry wide exchange of information. IRM 4.60.1.1.6.D. identifies industry-wide exchanges as a general exchange program in addition to automatic, spontaneous, and on request exchanges. Of industry-wide exchange, the IRM states:

These exchanges involve meetings between US and treaty partner Examination or Criminal Investigation personnel. Industry-wide Exchanges of Information do not involve specific taxpayer information. Instead they are exchanges of information about trends, operating practices, pricing policies, know-how or experience, etc. in particular industries or economic sectors. Exchange of Information Team program analysts work with field personnel, IRS Tax Attachés and foreign officials in arranging these meetings.

- 5) According to article 1 paragraph 4 of the Council Directive 77/799/EEC paragraph 1 should also apply to any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3. This Council Directive has been amended by the “Council Directive 79/1070/EEC of 6 December 1979”, the “Council Directive 92/12/EEC of 25 February 1992”, the “Council Directive 2003/93/EC of 7 October 2003”, the “Council Directive 2004/56/EC of April 2004” and the “Council Directive 2004/106/EC of 16 November 2004”. Through these amendments more taxes became part of the scope of application of the Council Directive 77/799/EEC. Apart from these taxes did the scope of application of this legal rule increase in your country?

Not applicable. The US is not a member of the EU.

- 6) According to article 8 of the Council Directive 77/799/EEC a Member State’s competent authority has the right to refuse the provision of information in the cases named in article 8. How has this right been implemented in your country’s legal rules? For which of these reasons to refuse the exchange of information has a prohibition to provide information and for which the right (possibility) to refuse information been implemented in the national legal system? Why?

While the US is not party to Council Directive 77/799/EEC, two of the three Article 8 limitations on exchange of information generally are part of the tax treaties between the US and the Member States. See response to section 7) following. In IRM 4.60.1.1.2.C., the IRS identifies the following circumstances as grounds for refusal to provide information to a requesting party to a treaty or TIEA, the information:

- **is not obtainable, either by the requesting competent authority under its own laws or by the receiving competent authority;**
 - **would require the receiving competent authority to carry out administrative procedures at variance with its laws or those of the requesting country; or**
 - **would disclose trade secrets or other information contrary to public policy.**
- 7) Between the Member States information can also be exchanged on the basis of double tax treaties. In some double tax treaties there are extensive information clauses (like in article 26 of the OECD model tax treaty) and in others petit information clauses.
- a) What kind of information clauses can be found in your country's double tax treaties with the other Member States? In which of the double tax treaties are extensive information clauses and in which petit information clauses? (Please name for each double tax treaty with a Member State the kind of information clause that has been implemented.)
 - b) In case there are extensive information clauses in the double tax treaties with some Member States and petit information clauses in the double tax treaties with other Member States please name the reasons for these distinctions. Is there a certain policy that defines with which countries what kind of information clause is arranged?
 - c) The revised article 26 of the 2006 version of the OECD model double tax treaty includes a new paragraph 5 that prohibits to refuse the provision of information just because the information is held by a bank, a trustee etc. Is the new article 26 included in any of your country's double tax treaties? Do laws on bank secrecy exist in your country that make some information not obtainable for your tax authorities? If so, please describe if there are situations in which the information can be obtained by the tax authorities anyway.

Each Member State, except Malta, has an income tax treaty with the United States. Malta and the US signed a treaty in 2008 but have not ratified it as yet. In many instances treaties also are in effect for estate and gift taxes, transportation, and social security. The response to this question limits itself to income tax treaties. Each tax treaty includes a provision for the exchange of information and administrative assistance. While the provisions vary widely in their specific language, variants are largely a function of the age of the treaty. Recent treaties

include extensive exchange of information provisions that generally follow the OECD and US Model Treaties. Some treaties expressly permit information requests for criminal investigation and prosecution. For example, Austria’s treaty with the US includes the following language in the exchange of information provision: “[t]he carrying out of provisions of the domestic laws of the Contracting States concerning taxes includes penal investigations with regard to fiscal offenses relating to taxes covered by this Article.” (See, 3-AUST1 Rhoades & Langer, U.S. Int’l Tax’n & Tax Treaties AUST § 1.25.)³ Some, like the treaty with Bulgaria from 2007, include the limitation on bank secrecy. For example, Article 25 of the treaty with Bulgaria includes extensive language on exchange of information and reads as follows:

The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes of every kind imposed by a Contracting State insofar as the taxation thereunder is not contrary to the Convention, including information relating to 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 Convention. The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered). 2.

If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings). 3.

Any information received under this Article 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, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to above, or the oversight of the above. 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. 4.

In no case shall the provisions of the preceding paragraphs be

³ Rhoades & Langer, U.S. Int’l Tax’n & Tax Treaties, assembles all the US tax treaties and is the source for most of the treaty information this report includes.

construed so as to impose on a 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 that 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 that 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 (*ordre public*). 5.

If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 4 but in no case shall such limitation be construed to permit a Contracting State to decline to supply information because it has no domestic interest in such information. 6.

In no case shall the provisions of paragraph 4 be construed to permit a Contracting State to decline to supply information because the information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person. (See 3-BULG2 Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties BULG § 1.25)

Older treaties follow older versions of exchange of information language. For example, the treaty with Greece is from the original 1950 income tax treaty and is more general than language in the newer treaties. Article XVIII reads as follows:

The competent authorities of the Contracting States shall exchange such information (being information which such authorities have at their disposal) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes which are the subject of the

present Convention. No information shall be exchanged which would disclose a technical secret, or process relating to trade, industry, business, or a profession. (See 4-GREC1 Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties GREC § 1.18)

As the Member States and the US have negotiated new treaties and protocols to existing treaties, the newer versions have replaced limited exchange of information provisions with broader language that lies closer to the model language and the language of the treaty with Bulgaria quoted above. The following paragraphs exhibit a variety of modifications of the treaty language that I label as “petite+” in the table that follows.

The following paragraph appears in the treaties with Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovak Republic, and Sweden:

If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of such other State with respect to its own taxes.

The following paragraph is contained in the treaties with France, Germany:

If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall, if possible, provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

And with respect to the requesting state’s entry into the other state’s territory to interview and examine books, the following paragraph is in the treaties between the US and Estonia, Latvia, and Lithuania with similar language in the treaty with France and Ireland:

The competent authority of the requested State shall allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the persons contacted and the competent authority of the requested State.

The following table lists in columns numbered (i) – (viii):

(i) the Member States in alphabetical order,

(ii) the year of the treaty version currently in force between the Member State and the US (the year the treaty took effect often is later than the year listed since ratification lagged completion of negotiations),

(iii) the treaty article(s) for exchange of information,

(iv) whether the article is *petite* or *grande petite*+ means that the treaty expands the *petite* language but is less inclusive than current treaty language. There are various versions of treaty language that expand upon the simplest version appearing in the treaty between Greece and the US. *Grande/3* means that the exchange may be of information or third-country taxpayers to whom or which the treaty does not apply.

(v) whether the article includes a limitation on bank secrecy,

(vi) {*responding to question 8 of this questionnaire*} whether the treaty provides for general collection assistance, limited collection assistance generally meaning only that collection assistance to protect the treaty benefits so that unintended benefit recipients do not receive the treaty benefits,

(vii) the article in which the collection assistance appears if other than the information assistance article, and

(viii) (*responding to question 18 below*) whether the Member State engages in simultaneous examinations with the US.

If a year and Prot appear in the table, in the designated year the treaty partners added a protocol to the treaty provision that limited or expanded the provision's application. The table identifies the current version of income tax treaties and, in those cases in which new treaties await ratification, the table provides the information for those new treaties as well – under the assumption that the treaty partners will ratify the new treaties. When they take effect, the new treaties will broaden the information exchange agreement.

(i) Member State	(ii) Year	(iii) Treaty Article	(iv) Type of Clause	(v) Express limitation on Bank Secrecy	(vi) Collection Assistance	(vii) Collection Assistance Article (if different)	(viii) Simultaneous examination
Austria	1996	25	Grande/3	yes in protocol	Yes		anticipated
Belgium	2006	25	Grande	yes on specific request	Yes	26	no
Bulgaria	2007	25	Grande	yes	no		no
Cyprus	1984	28	Petite+	no	Limited	29	no
Czech Republic	1993	27	Petite+	no	no		no
Denmark	1999	26	Grande/3	yes	Yes	27	no
Estonia	1998	26	Grande/3	yes	Limited		no
Finland	1989	26	Petite+	no	Limited		no
France	1994	27	Grande	no	Yes	28	yes
Germany	1989	26	Petite+	no	Limited		yes
Greece	1950	18	Petite	no	Limited	19+1953 Prot	no
Hungary	1979	23	Petite+	no	no		no
Ireland	1997	27	Grande	no	no		no
Italy	1984	26	Petite+	no	Limited	6 Prot	yes
Italy proposed, but not in force	1999	26	Petite+/3	no	Limited	6 Prot	yes
Latvia	1998	27	Grande	yes	Limited		no
Lithuania	1998	27	Grande	yes	Limited		no
Luxembourg	1996	28	Grande/3	no	Limited		no
Malta (not in force yet)	2008	26	Grande/3	yes, partial	no		no
Netherlands	1992	30 & 32	Grande	yes	Yes	31	no
Poland	1974	23	Petite	no	no		no
Portugal	1994	28	Petite+	no	no		no
Romania	1973	23	Petite+	no	Limited		no
Slovakia	1993	27	Petite+	no	no		no
Slovenia	1999	26	Grande	no	no		no
Spain	1990	27	Petite+	no	no		no
Sweden	1994	26	Grande	no	Yes	27	yes
United Kingdom	2001	27	Grande/3	yes in notes	Limited		yes

The IRS publishes its general standards for exchange of information in IRM 4.60.1. The published standards do not provide detail on the actual practice, amount of information transmitted to treaty partners, or statistics on usage of information exchange programs.

- 8) In the 2002 version of the OECD model double tax treaty a new article 27 on the assistance in the collection of taxes has been included. Did your country adopt in some of its double tax treaties a rule identical or similar to the new Art. 27 OECD? If so, in which of the double tax treaties can such a regulation be found?

Yes, see columns vi. and vii. of the table appearing in the response to 7) above.

- 9) Has your country ratified the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters signed in Strasbourg on 25th January 1988?

Yes, the US signed the Convention June 28, 1989. The US Senate ratified the Convention in 1991, but with the following three reservations: (i) no assistance for taxes of political subdivisions, (ii) no collection assistance, and (iii) no service of process, except by mail.

- 10) In 2002 the OECD developed the “Model agreement on exchange of information on tax matters”. The purpose of this model agreement is to serve as a basis for countries to conclude bilateral exchange of information agreements with third States considered as “tax havens”. What are your country’s criteria to declare another country as a “tax haven”? Did your country conduct negotiations with third States (“tax havens”) to adopt this OECD model agreement? Has your country concluded any bilateral or multilateral treaties on the exchange of information based on this model agreement? If so, please describe in which parts these treaties follow the model agreement and name the reasons for discrepancies if they exist.

The US has a model TIEA that it released in draft form in 1984 that provides substantially for as broad an exchange of information as the OECD Model. The US Model’s design is as a bilateral document without a multilateral version. The TIEA is for use with jurisdictions with which the US has no tax treaty, and the exchange of information provision models itself after the exchange of information language in its most expansive form that appears in the US Model Tax Treaty. Article 4 of the Model provides for both automatic and spontaneous exchange of information, as well as for information exchange that the other state requests specifically. The expectations under the Model are that the requested party will use its information gathering powers, including personal interviews, examination of documents, and requests from third parties, without regard to bank secrecy and similar limitations,

to collect the information that the requesting party requests. In addition, the Model provides for representatives of the competent authority of the requesting state may enter the territory of the requested state to interview witnesses and examine books and records. Currently, the US has TIEAs that follow the Model in whole or part in force with Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominica, Dominican Republic, Grenada, Guernsey, Guyana, Honduras, Isle of Man, Jamaica, Jersey, Marshall Islands, Mexico, Netherlands Antilles, Peru, and Trinidad and Tobago. The US also has proposed TIEAs (not yet in force) with Colombia St. Lucia. (3-71 Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties § 71).

The US does not declare other countries to be tax havens. There is no statutory definition of the concept. On the other hand, the tax haven concept certainly is in common use both among tax professionals and governmental representatives. For example, IRM 4.60.1.3. Guidelines and Procedures for Implementing the US Simultaneous Examination Program identifies the use of tax havens for transactions as one criterion for a simultaneous examination and defines the concept:

A tax haven, for the purpose of the Simultaneous Examination Program, is a country or jurisdiction that has a zero or low tax rate, or that allows an escape from taxes on economic gains which could otherwise be taxable in the US and the country or countries involved with the transaction.

Senator Levin aptly titled legislation he recently introduced: the “Stop Tax Haven Abuse Act.” The proposed legislation does not create a defined term “tax haven,” but identifies a concept of “offshore secrecy jurisdictions” and lists initially the following jurisdictions, including three Member States and several jurisdictions with which the US has TIEAs in place, as jurisdictions with financial or business secrecy laws or practices and inadequate exchange of information: (i) Anguilla, (ii) Antigua and Barbuda, (iii) Aruba, (iv) Bahamas, (v) Barbados, (vi) Belize, (vii) Bermuda, (viii) British Virgin Islands, (ix) Cayman Islands, (x) Cook Islands, (xi) Costa Rica, (xii) Cyprus, (xiii) Dominica, (xiv) Gibraltar, (xv) Grenada, (xvi) Guernsey/Sark/Alderney, (xvii) Hong Kong, (xviii) Isle of Man, (xix) Jersey, (xx) Latvia, (xxi) Liechtenstein, (xxii) Luxembourg, (xxiii) Malta, (xxiv) Nauru, (xxv) Netherlands Antilles, (xxvi) Panama, (xxvii) Samoa, (xxviii) St. Kitts and Nevis, (xxix) St. Lucia, (xxx) St. Vincent and the Grenadines, (xxxi) Singapore, (xxxii) Switzerland, (xxxiii) Turks and Caicos, and (xxxiv) Vanuatu. (See Senate Bill 506 available at LEXSTAT 2009 WTD 39-25 (March 3, 2009)).

US taxpayers historically and continuously have turned to jurisdictions with financial institution secrecy, minimal regulation, and low or zero rates of income tax in order to secrete assets and income from the IRS, as well as other creditors, spouses, and business partners. Proximity to the US, favourable vacationing weather, and relative political stability have caused US citizens and residents to prefer jurisdictions in the Caribbean. Congress created economic incentives for entry into TIEAs with the US for those favoured jurisdictions with the Caribbean Basin Initiative in the Caribbean Basin Economic Recovery Act of 1983. Eligible jurisdictions in the Caribbean that have entered into the agreements with the US may host conventions and meetings for US taxpayers that the IRC then treats as conventions or meeting held in North America, a condition for participants' deduction of expenses for US tax purposes. (See IRC §274(h)(6) and 3-71 Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties § 71.02).

- 11) Do rules exist in your country that oblige subsidiaries (e. g. in cases of transfer pricing issues) to provide information held by the parent company? If so, please describe what these rules look like and how they affect the (international) taxation.

IRC §482 authorizes the IRS to allocate income, deduction, credits, and allowances between or among parent and subsidiary entities and among taxpayers under common control in order to reflect the income of each entity accurately and prevent evasion of taxes. Under this broad rubric, the IRS has the power to adjust transfer pricing and, accordingly, gather information from any member of a related group that is subject to US jurisdiction. Since the parent company's records are critical to determination of the income tax liability of the US subsidiary, it is incumbent upon the US company to provide the IRS with all information necessary to make the US tax determination, including supplying parent company records. All such information is subject to the IRS's general subpoena power, and, if the subsidiary or the parent fails to provide the necessary information, the IRS may determine the subsidiary's tax liability based upon a reasonable estimate that may overstate the tax liability of the subsidiary substantially.

- 12) With which of the Member States have bilateral treaties concerning legal assistance on law regarding fiscal offences been concluded? What kind of exchange of information on tax crimes has been arranged in these treaties? How is this exchange organised?

The US has concluded bilateral treaties addressing mutual legal assistance in criminal matters with the following Member States, but not all the treaties are in force as yet and that is noted: Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland (not in force), France, Germany (not in force), Greece, Hungary, Ireland (not in force), Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania,

Sweden (not in force), and the United Kingdom. Only ratification of the US treaty with Luxembourg expressly addressed the question of fiscal offenses. (See 3-71 Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties § 71.11). As a general matter on MLAT agreements with the US, see the Department of State website at http://travel.state.gov/law/info/judicial/judicial_690.html for the following statement:

Each country designates a central authority, generally the two Justice Departments, for direct communication. The treaties include the power to summon witnesses, to compel the production of documents and other real evidence, to issue search warrants, and to serve process. Generally, the remedies offered by the treaties are only available to the prosecutors. The defense must usually proceed with the methods of obtaining evidence in criminal matters under the laws of the host country, which usually involve letters rogatory.

- 13) Has your country ratified the European Convention on Mutual Assistance in Crime matters and its additional protocol in tax matters? What is the definition of tax fraud/tax crime/tax offence in your country?

In 2003, the EU and the US signed an MLAT. While the Agreement provides generally for legal assistance in criminal matters, the Agreement expressly includes fiscal matters including money laundering and other fiscal offences. The Agreement would supersede bilateral treaty limitations on the use and collection of information. The Official Journal of the EU published the Agreement July 19, 2003. The US has not ratified the Agreement as yet.

The IRC includes several provisions that define various tax fraud and tax crime offences. See IRC §§ 7201 and following provisions. The most general provisions include IRC § 7201 that defines the crime as follows: “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title (Title 26 of the US Code, the IRC) or the payment thereof shall ... be guilty of a felony” IRC § 7202 addresses collection of tax and payment to the US: “[a]ny person required under this title to collect, account for, and pay over any tax ... who willfully fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony....” IRC § 7203 has similar language for the wilful failure to file a return, supply information or pay a tax. Willfully false or fraudulent statements and the aiding or abetting of tax fraud also draw criminal liability and possible imprisonment. Wilful as opposed negligent acts separate tax crimes from acts that may draw financial penalties but are not crimes. Intention to do the wrongful act or withhold information is the hallmark of a tax offence that gives rise to the possible imprisonment of the individual.

In addition, there are a series of tax offences relating to unauthorized disclosure of return or return information that is protected under IRC §6103 or even to inspect returns or return information beyond the information that is necessary to the conduct of an ongoing examination. The offence requires wilfulness – intent. See IRC §§ 7213 and following provisions.

- 14) What is the borderline between the application of administrative assistance on the basis of “tax treaties” and the administrative assistance on the basis of conventions for the assistance in criminal matters? In other words: When does your country see the necessity to stop the cooperation under tax treaties and continues the cooperation under treaties concerning legal assistance on law regarding fiscal offences?

Under the decision in *United States v. Stuart*, 489 U.S. 353 (1989), that this report discusses in II.3) above, the US may continue cooperation under administrative exchange of information treaty provisions without inquiring into the issue of criminal referral, even though the IRS would have to suspend civil inquiry under US tax rules.

- 15) How have the EU regulations influenced the design of the rules and practices in your country that should avoid tax fraud and tax circumvention? Please give examples and the state of the discussion in the scientific literature where possible and appropriate.

No ascertainable influence.

- 16) Which legal foundations with the other Member States concerning the collection of taxes exist in your country? Are there this-related clauses in your country’s double tax treaties? If so, with which countries?

See response to II. 8) above.

III. Questions of use

Questions of use in relation to domestic law

- 1) What activities are the tax officials generally authorized to use when assessing taxes in your country? Can the tax authorities request additional information from another person or institution than the taxpayer himself (e. g. banks, insurances or business partners)? If so, please name which other persons or institutions these are? What are the requirements to request them?

The IRC includes extensive provisions requiring third parties having possession of records or other information relevant to the determination of tax liability of other to report that information to the IRS. IRC §6041 requires that all persons engaged in a trade or business report any payment they make of USD 600 or more in that trade or business, including the name and taxpayer identification number of the recipient of the payment. IRC §6042 requires reporting of dividends with name and identification number of the payee. Brokers must make a return under IRC §6045 showing the name, address and identification number of their customers and the amount of gross proceeds each customer receives. IRC §6049 requires reports of payments of interest. The IRC requires reports for partnerships, foreign partnerships, trusts, and so forth, with each rule identifying third parties for reporting who or which are likely to possess relevant tax information.

Under IRC §7602, the IRS has broad authority to summon the taxpayer or third parties who are in possession of information relevant to any tax examination to secure information concerning taxpayer. The case of *United States v. A. L. Burbank & Co.*, 525 F.2d 9 (2d Cir. N.Y. 1975), *cert. denied*, 426 U.S. 934 (1976), firmly established the power of the IRS to summons information for the benefit of another country even where the information had no relevance to any US tax investigation or proceeding. There are few limitations on IRS's use of this summons power, however: (i) under IRC §7602(c), the IRS must notify the taxpayer in advance of any contact it will have with a third party concerning the taxpayer's tax liability and (ii) under IRC §7602(d), the IRS may not issue or enforce a summons if a referral of the taxpayer to the US Department of Justice for possible criminal prosecution is in effect. Several special rules on summonses permit the taxpayer or a third party to intervene and seek to quash the summons of a third party.

Recently, the IRS increasingly has requested tax accrual workpapers that corporate and other business taxpayers' accountants have prepared in evaluating the taxpayers' reporting positions. Under FASB Interpretation No. 48 (commonly referred to as FIN 48), *Accounting for Uncertainty in Income Taxes*, financial statements must determine the amounts the taxpayer must reserve for financial reporting purposes for questionable or vulnerable tax positions. Taxpayers, who generally prefer not to expose the thought process that the workpapers reveal concerning the evaluation of positions, prefer not to provide the IRS with those workpapers and often argue that the workpapers enjoy privilege from disclosure as part of the preparation for litigation of tax controversies. In Announcement 2002-63, 2002-2 CB 72, the IRS adopted a policy of restraint in requesting workpapers, even though the IRS's position was that it was entitled to the workpapers because taxpayers disclose the workpapers to their independent accountants causing them to lose the disclosure exemption for litigation preparation. In *United States v. Arthur Young*, 465 U.S. 805 (1984), the Supreme Court of the U.S. generally gave the IRS

the right to obtain the workpaper. The recent decision In *United States v. Textron*, 553 F.3d 87 (1st Cir. 2009), cert. denied, gave taxpayers' hope of protecting their workpapers when a panel of the US Circuit Court of Appeals for the 1st Circuit held that taxpayer's tax accrual workpapers prepared in anticipation of litigation did not lose their disclosure exemption if the taxpayer disclosed them to non-adversarial third parties including the taxpayer's independent auditors. More recently, the 1st Circuit Court of Appeals sitting *en banc* dashed those hopes when it reversed the panel's decision and held that the IRS had the power to obtain the workpapers. *United States v. Textron*, 577 F.3d 21 (2009). And the United States Supreme Court denied certiorari at *Textron, Inc. v. United States*, 2010 U.S. LEXIS 4373 (U.S., May 24, 2010). Consistent with that latter decision, the Commissioner of Internal Revenue announced that corporate taxpayers reporting to the Securities Exchange Commission and bound by the requirements of FIN 48 must complete a new form with their annual tax returns. The form requires them to disclose some information from their tax accrual workpapers routinely. Announcement 2010-9, 2010-7 IRB 1.

- 2) What are the measures available if a requested party fails to supply information (e. g. fines, penalties etc.)? Are the same domestic measures available when your country's tax administration has received a request for information from another State?

Under IRC §7604, the IRS may petition the District Court for the district where the person the IRS has summoned resides or is located to enforce the summons. When, upon showing that the person summoned possesses knowledge or records not already in the IRS's possession, the court determines it will enforce the summons, the court may and will use all its enforcement powers, including arrest of the individual in possession of the information and civil incarceration for contempt of court if the person summoned fails to comply with the court order.

- 3) When your country's tax administration as the requested State is not in the possession of the requested information has the tax administration the legal right to change or adjust a question in order to improve the answers before forwarding the question to the taxpayer or a third person/institution?

The IRM is silent on adjustment of questions although I assume that the IRS reviews the request and modifies it to make it understandable to the parties from which the IRS will seek to secure information.

- 4) Is the tax administration allowed to use the information obtained for the purpose of assisting another country in order to adjust the already assessed domestic tax?

IRM 4.60.1.2.5.1.1.8 specifies that foreign requested information does not necessarily imply the opening of an examination, but it may. Assuming that no

Department of Justice referral is in effect, the tax year in issue is open, that is, that the statute of limitations has not expired and the taxpayer and the IRS have not entered into a closing agreement with respect to the tax year, the IRS may use the information for domestic assessment purposes. Similarly, with respect to outgoing information, there is no limitation if the IRS secures information pursuant to its powers in response to a request and provides that information not only to the requesting country, but also to a third country with which the US has an information exchange agreement or treaty. However, where the US receives information under an agreement with another country, treaty limitations on confidentiality preclude the IRS from providing information received under that agreement – treaty or TIEA to the competent authority of a third country. The exchange may be permissible, however, when the country providing the information has an agreement on exchange of information with the third country.

- 5) In 2006 the OECD published the “Manual on the implementation of exchange of information provisions for tax purposes”. Does your country follow this manual? If not, please give reasons and describe where you see deficiencies in this manual.

The IRS follows the procedures in its IRM, most of which it developed before the publication of the OECD Manual.

Questions of use in general

- 6) According to article 1 paragraph 1 of the Council Directive 77/799/EEC the exchange of information takes place between the “competent authorities” that are defined for each country in article 1 paragraph 5. What does the organisation of the exchange of information from your country’s competent authority to the competent authority of the Member State that made a request look like? Which authorities and agencies are involved in answering the request? Do (administrative) rules exist that regulate how the organisation to answer a request has to be like? If so, what is their content?
Are there any differences in this organisation concerning the automatic exchange of information according to article 3 of the Council Directive (77/799/EEC) or the spontaneous exchange of information according to article 4 of the Council Directive (77/799/EEC)?

IRM 4.60 governs exchanges of information for the US. The IRS is the US competent authority. Within the IRS, the Director, International (LMSB) [Large and Mid-size Business Division] operates as the competent authority. According to IRM 4.60.1.1.6.B: “[m]ost requests, incoming and outgoing, are handled by the IRS Tax Attachés.” IRM 4.30.3 describes the Tax Attaché function within the US embassies. There is an exchange of information team under the director that reviews both incoming and outgoing requests and forwards them to field service

personnel to collect data with respect to incoming requests and structures the request in the case of outgoing requests for transmittal by the office of the Director, International (LMSB). Ultimately, the Tax Attaché prepares or reviews the legal document of transmittal of the information. Once the IRS and the competent authority of a treaty party have established an automatic exchange of information, the data is transferred on electronic media routinely.

- 7) What do the administrative procedures in your country generally look like when the requested information is not in the hands of the requested authority?

The IRS is the US competent authority. IRM 4.60.1.2.5.1 outlines the procedures for handling information requests that follow generally the US procedures for obtaining tax information. Some differences do apply. For example, revenue agents must work with IRS Associate Chief Counsel (International) before seeking to issue or enforce a summons. Also, an additional level of review determines whether there is any information that the request generates that the IRS should transmit to the requesting competent authority.

- 8) Do special bilateral treaties concerning the administrative assistance in tax matters exist that shorten this bureaucratic way of answering requests? If so, please name these treaties and describe how the bureaucratic way is arranged there.

Exchange of information is pursuant to treaties in the US.

- 9) What does the organisation of the exchange of information look like when the request is based on articles 5 et seq. of the Council Regulation (EC) No 1798/2003 of 7 October 2003 in the field of value added tax? Which authorities and agencies are involved in these cases?

Not applicable.

- 10) Which are the authorities and agencies that deal with incoming requests for recovery according to the “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”? How is the collection organised in your country when a Member State requests for recovery? Is a judgement of a national court required to collect another Member State’s tax?

Not applicable. The IRS collects taxes for other jurisdictions with which the US has a treaty providing for collection assistance in the same manner as it collects US taxes. No judgment of a US court is necessary, but the competent authority of the state requesting collection assistance must certify in its request that there has been a final determination of the tax under the laws of the requesting state.

- 11) In case bilateral treaties concerning legal assistance on law regarding fiscal offences exist: How is the exchange of this information organised in your country?

In general, in the same manner as requests for information concerning civil tax matters, except that the Office of the Director, International will review the request for need and possible rights violations.

- 12) According to opinions a request for information can only be based on one legal instrument. Does your country follow this or does it refer to all instruments available? What is the tax authorities' opinion on conflicting rules in different instruments? What does the relationship between the double tax treaties and the Council Directive 77/799/EEC look like? Which is the preferred way to exchange information and why?

Not applicable. The US exchanges information pursuant to treaties only.

- 13) Which precautions are taken in your country to make sure that no information containing commercial, industrial, business or professional secrets or details about commercial processes are provided?

The IRS need not transmit information that discloses business or professional secrets. The IRS collects that information only if absolutely essential to the conduct of the tax examination.

- 14) Which precautions are taken in your country to guarantee that the information conveyed is kept confidential in the requesting Member State?

The US relies on the good faith of its treaty partners to protect the confidentiality of the information it transmits to a requesting partner. In addition, each transmission of information includes the following statement: "This information is furnished under the provisions of an income tax treaty with a foreign government. Its use and disclosure must be governed by the provisions of that treaty." IRM 4.60.1.2.2.4.

- 15) How can in your country be guaranteed that only the persons or agencies named in article 16 of the "Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures" have access to the documents and information given to your country by another Member State?

See answers to III. 13) and 14) above for outgoing information. The US cannot guarantee foreign competent authority's compliance with confidentiality limitations

but must rely on its treaty partners' good faith. Incoming information is tax return information for purposes of IRC §6103. Anyone who willfully discloses tax return information is criminally liable for the disclosure and penalties apply to negligent disclosures.

16) Which precautions are taken in your country to ensure that the information stored in electronic data bases is treated confidentially as required in article 23 of the "Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures"?

Same as previous question.

17) Do the authorities of your country make investigations on their own when they are the requested authority or do they (just) work with the existing files?

Yes. The IRS uses its normal domestic investigatory and data collection methods.

18) On which occasions does your country take part in simultaneous tax examinations? How often are permanent establishments in your country affected by a simultaneous tax examination? Do your country's legal rules allow foreign tax officers to take part in tax examinations?

The US has simultaneous examination programs with France, Germany, Italy, Sweden, the UK, and several additional non-Member States. The objectives of the programs, IRM 4.60.1-2 describes as follows:

- **develop guidelines for the exchange of information which will be used by both countries in their examination of selected taxpayers with special emphasis on arrangements involving tax haven countries;**
- **exchange information on apparent patterns or techniques of tax avoidance that significantly affect tax administration of either country or countries involved with a simultaneous examination;**
- **develop guidelines for evaluating tax haven transactions resulting from multiprocessing, transfer pricing issues, research and development, payment of rents and royalties, and market changes in currency; and**
- **identify payments generally referred to as "under-the-table" payments, i.e. kickbacks, bribes and "illegal" payments.**

Simultaneous examinations do not require the taxpayers' consent because each participating country is conducting its own examination independently of each other

country under its own national tax law. Currently, a particularly active area for simultaneous examination is transfer pricing. Simultaneous examinations do not contemplate exchange of personnel or participation by foreign personnel in the conduct of the examination. As the examination generates information that the competent authorities will exchange, each participant may request that the other participants develop certain facts in order to exchange the information. See IRM 4.60.1.3.7 for conduct of simultaneous examinations.

- 19) Are there cases in which the usage of a certain kind of evidence is allowed though it is normally forbidden in your country just to make the mutual assistance easier? If so, please describe this kind of evidence and name reasons for the exception.

The IRS may exercise its summons power for exchange of information where it might not be able to do so because there is criminal referral in effect. See response to II.3) above.

- 20) Is there a tendency in which situations the tax authorities use which kind of method (the exchange on request, the automatic exchange of information and the spontaneous exchange of information) to get the information they need?

The US prefers to use automatic exchanges of information to facilitate electronic information matching.

- 21) How does the exchange of information influence the possible restrictions to the free movement of capital with third countries?

Expectations are that increasing exchange of information with “tax haven” jurisdictions will lead to increasing investment in the US. If US taxpayers cannot secrete property or income offshore, the tendency to shift the assets and property to those offshore, low-tax jurisdictions will decrease since US taxpayers are taxable on their worldwide incomes with a tax credit for taxes they pay to other countries. Exchange of information should not impact non-tax avoidance movement of capital. In fact, universal exchange of information would level the playing field among countries to encourage investors to deploy their capital efficiently based upon productivity rather than unfair tax competition. Transparency encourages competition for production rather than secrecy.

- 22) What does the relationship and influence between criminal and tax proceedings and judgements in your country look like?

Relatively few civil or criminal tax disputes reach litigation. Most disputes settle without court proceedings. Informally, the tax examiner evaluates the taxpayer’s

reporting, and, while having no formal settlement authority, the examiner compromises tax issues and deficiency amounts. The Appeals Division of the IRS has formal settlement authority for civil matters based substantially on evaluation of litigation hazards for the government when taxpayers bring their disagreement with the tax examiner to Appeals. Similarly, district counsel or the Department of Justice (depending upon the court the taxpayer has selected – see below) may settle civil disagreements with taxpayers when the taxpayer has initiated court proceedings. In criminal matters, the Department of Justice may settle with the taxpayer for a smaller criminal penalty in a plea bargain rather than incur the cost of the trial and the risk of acquittal.

Criminal and civil proceedings in tax matters differ significantly in the US. Tax proceedings, like court proceedings generally in the US are adversarial without regard to whether or not the proceedings are criminal or civil. Non-adversarial settlement methods like mediation have grown in popularity, but their use is currently insubstantial relative to all tax proceedings. Discussion of the advantages of the use of out-of-court, adversarial procedures for civil matters – arbitration specifically – has increased, but currently binding arbitration is unavailable for tax disputes. The degree of the burden of proof is beyond a reasonable doubt in criminal matters and preponderance of the evidence in civil matters. The government bears the burden of proof in criminal matters and the taxpayer bears the burden in civil matters. Elaboration of this summary statement follows.

As the IRS's civil determinations of tax liability are presumptively correct, the taxpayer initiates all litigation to contest the amount of the tax and bears the burden of proof by a preponderance of the evidence. The taxpayer may choose among three available fori for the court proceedings.

If the taxpayer chooses not to pay the additional tax that the IRS assesses before litigating, the taxpayer may petition the US Tax Court for redetermination of the deficiency. The Tax Court is a legislative specialty court that Congress established under Article I, section 8 of the US Constitution. The President selects the judges from individuals with expertise in tax law to serve fifteen year terms. The Senate must confirm the appointments. District counsel for the IRS conducts the litigation in tax court on behalf of the government. Tax court trials are without juries. The taxpayer or the government may appeal decisions of the Tax Court, generally, on matters of law, but not fact, to the Circuit Court of Appeals for the circuit in which the taxpayer resides or, in the case of an entity, has its base of formal organization..

Taxpayers choosing to pay the assessed tax liability first must file a claim for refund. When the IRS denies the claim or fails to act on the claim for a period of six months, the taxpayer may sue for a refund either in the US District Court for the taxpayer's residence or the US Court of Federal Claims. The district courts are

courts of general jurisdiction. Judges of the courts hold life appointments following their Presidential appointment and Senate confirmation. Taxpayers litigating in district court may demand a jury trial. The Department of Justice conducts litigation in the district courts. Either party may appeal district court decisions on matters of law but generally not findings of fact to the Circuit Court of Appeals for the taxpayer's circuit. The US Court of Federal Claims has concurrent jurisdiction with the district courts over taxpayers' claims for tax refunds. Court proceedings are without a jury. The President with the Senate's consent appoints the judges to fifteen year terms. Either party may appeal judgments of the court on matters of law but generally not fact to the US Court of Appeals for the Federal Circuit.

As to criminal matters, once a referral of a taxpayer to the Department of Justice for criminal prosecution is in effect, the IRS's administrative power to summon testimony or documentary evidence ceases under IRC §7602(d). The Department of Justice initiates tax prosecutions in district court and has the burden to prove, as in all US criminal prosecutions, beyond a reasonable doubt that the accused is guilty of the criminal tax offence. The accused may invoke the US constitutionally guaranteed privilege against self-incrimination. The accused has the right to trial by jury as to factual matters and application of the law to the facts.

Quantities and figures

23) How many requests from other Member States does your country get per year?
How many requests to other Member States does your country make per year?
How many spontaneous and automatic exchanges of information does your country transfer to the other Member States and how many of these exchanges of information does your country get per year? If possible, please give statistical figures of the last ten years.

The IRS collects this data but does not make it available publicly. This response applies to questions 23-29. PricewaterhouseCoopers (presumably from information developed from client representation) has observed an increase in the number of requests to exchange tax-related information. The requests from foreign governments have been much more specific and are of a higher quality than what we have seen in prior years. Further, it is expected that the number of requests and the amount of information exchanged in the near future to increase in quantity and quality.⁴

⁴[http://www.pwc.com/Extweb/pwcpublishations.nsf/docid/31B82649C80B88FC85257408005B606F/\\$file/exchange_irs_foreign_tax_information.pdf](http://www.pwc.com/Extweb/pwcpublishations.nsf/docid/31B82649C80B88FC85257408005B606F/$file/exchange_irs_foreign_tax_information.pdf)

24) How often does your country's competent authority get information on basis of the "Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments" per year? If possible, please give statistical figures of the last ten years.

See response to III. 23).

25) Does your country request information more often from certain Member States than from the other Member States? Do certain Member States request more often information than the other Member States? If so, please name these countries.

See response to III. 23).

26) How long does it take your country to answer a Member State's request? How long does it take until a Member State answers your country's requests? If possible, please name for both questions the number of requests that took under three months and that took over three months to answer or to be answered. Please give statistical figures of the last ten years.

See response to III. 23). Status reports are due every 60 days with the general goal being to provide part or all the requested information within 60 days.

27) Do the incoming requests and the requests made by your country and the automatically and spontaneously exchanged information mainly focus on certain types of direct taxes? If so, please name the tax type and the quantity of the requests.

See response to III. 23). Exchange of information with the US relates primarily to income taxes. The US has no value added tax.

28) According to article 8 of the Council Directive (77/799/EEC) it is possible to refuse the provision of information. How often does your country refuse to answer incoming requests because of the reasons named in article 8 per year? How often do other Member States refuse to answer your requests because of the reasons named in article 8 per year? What is the most frequent reason to refuse the exchange of information? If possible, please give statistical figures of the last ten years. Are there any other instruments available in your country to refuse the provision of information? If so, please describe them.

See response to III. 23).

- 29) How many times per year does your country exchange information with other Member States on the basis of a double tax treaty? If possible, please give statistical figures of the last ten years.

See response to III. 23).

IV. Questions of efficiency of the mutual assistance in tax affairs

- 1) It was the Council Directive's (77/799/EEC) aim to reduce tax evasion and tax avoidance across the frontiers of Member States by strengthening the collaboration between the Member States. Comparing the exchange on request, the automatic exchange of information and the spontaneous exchange of information: Do you think one of them is more efficient to achieve these aims than the others. If so, please give reasons for your opinion.

Automatic information flow leads to further development of computer matching programs for tax information. From the US perspective, automatic exchanges are the most efficient form of exchange. With increasing electronic filing of income tax returns, the information flow with computer matching identifies taxpayers who do not report their foreign-source income. Automatic information exchange requires no exercise of discretion, avoiding possible human error in the selection of information to exchange or taxpayers whom the exchange involves. Spontaneous exchange of information is useful, but serendipitous. While the information spontaneous exchange generates for the other party may be extremely important, its randomness renders it unreliable as a basic source of information. Because the exchange of information upon request targets specific taxpayers or transactions, it is likely to generate higher-quality data than either automatic exchange or spontaneous exchange and will remain an essential tool where a tax examination is in process.

- 2) In case in your country a taxable person has larger or more duties to cooperate when the facts and circumstances affect a foreign country (cp. question V.2): Do you think they are more efficient to reduce tax evasion and tax avoidance than the possibilities to exchange information given by the Council Directive 77/799/EEC or the other instruments of cross-border information exchange?

No greater duty to cooperate.

- 3) Do you see any differences in the efficiency to reduce tax evasion and tax avoidance between the double tax treaties and the relevant Council Directives? If so, can you say what these differences are and where they result from?

Information reporting domestically of a wide range of information and automatic, electronic exchange of information to promote matching with taxpayer reports limits tax evasion.

- 4) How efficient is the exchange of information via the electronic database VIES as regulated in articles 22 et seq. of the “Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax”? Which potential problems do you see and which problems already did occur when using VIES?

Not applicable.

- 5) How efficient is the exchange of information as regulated in articles 8 and 9 of the “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments” in your opinion? Did any problems occur? Which potential problems do you see?

US is not a party.

- 6) How efficient is any kind of the exchange of information to avoid tax frauds and connected problems in the EU?

See response to IV. 3). Information reporting at the source of payments and electronic matching has reduced non-reporting in the US. However, many transactions remain unreported, and there seems to be no efficient way to avoid tax fraud other than education of taxpayer and perhaps vigorous enforcement with predictable and relentless imposition of penalties.

- 7) Article 8 of the “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments” enumerates the information that the paying agent has to report to the competent authority of the Member State where the beneficial owner is resident. Do you think this minimum amount of information named in article 8 is sufficient to ensure effective taxation of savings income? If not, which additional information would be necessary in your opinion?

See response to IV. 6).

- 8) Do you see possibilities to amend the way information is exchanged on basis of the “Council Directive 2003/48/EC of June 2003” to ensure effective taxation of savings income and to remove undesirable distortions of competition? If so, please describe what these amendments may look like.

No suggestions.

- 9) One of the problems of the mutual assistance in tax affairs between the Member States may be that misunderstandings occur because of the different languages involved. What do you think the linguistic quality of the information given to your country is mainly like? (“understandable in a good and easy way” or “understandable in bad way”) How much of the information your country gets per year is understandable in a bad way? If possible, please give statistical figures of the last five years.

English has become the standard language for international communication, so that the US generally does not have difficulty with requests but does ask for clarification if the request is ambiguous.

- 10) How many times per year do you have to address additional or further enquiries concerning information already given by a Member State? How many times per year does a Member State make additional or further requests concerning information your country has already given to that Member State?

Statistics not available.

- 11) Are there any differences between the Member States concerning the quality of the answers your country gets? What do you think the reasons (e. g. differences in the material domestic tax law, administrative tax law or bank secrecyes) for these problems are?

Information not available.

- 12) Do you think the official channels of answering incoming requests are reasonable or do you think they are too circumstantial?

No difficulties of which I am aware and the IRM identifies no problems.

- 13) Do you think there are any possibilities to make the mutual tax exchange easier and quicker? What would they be?

Increased automatic exchanges and broader routine collection of information at the source of payments.

- 14) According to article 18 of the “Commission Directive 2002/94/EC of 9 December 2002” a Member State should inform the other Member State immediately if a request for recovery or precautionary measures becomes devoid of purpose as a result of payment of the claim or of its cancellation for any other reasons or if the claims’ amount changed. What are the experiences with this rule in your country?

How well does the exchange of this kind of information between the Member States work in your opinion?

No public information.

15) According to article 11 of the “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures” the requested authority has to inform the applicant authority *immediately* about all of the measures taken that concern the request for recovery. Do you think that the exchange of information meets these requirements in practice?

Taxpayers receive notice in the US when appropriate and required.

16) How effective is the “European Convention on Mutual Assistance in Crime Matters” to solve cases that affect tax crimes in your opinion?

Not applicable to the US.

17) How effective are common audits to inhibit tax avoidance and to solve cases that affect tax crimes in your opinion?

Simultaneous audits and coordination of information exchange should be effective and especially useful on issues like transfer pricing.

18) Are there any national reforms to facilitate the usage of evidence held by banks or other institutions in the tax procedure?

The US has extensive information reporting at source and electronic matching.

19) How efficient is in your opinion the collection of taxes as regulated in the Council Directive 76/308/EEC, on the basis of double tax treaties and on basis of bilateral treaties if they exist? If possible, please name reasons for differences in the efficiency between these different legal foundations. How efficient is the “Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters” here?

No information available on which to form an opinion.

20) Do you see the reasons why foreign tax administrations fail to supply information?

No information available on which to form an opinion.

V. Questions of burden of proof

- 1) Who does generally bear the burden of proof in your country when relevant evidence for the taxation is concerned?

The IRS's determinations of tax liability are presumptively correct. See response to Question III. 22) above. If the taxpayer does not contest the IRS's assessment, the assessment becomes final, and the government may use its power to levy against the taxpayer's property, wages, etc. in order to collect the tax. As the plaintiff in any civil tax litigation, the taxpayer chooses the litigation forum and bears the burden of proof. Under IRC §7491, subject to certain substantiation requirements, if the taxpayer produces credible evidence on any factual matter in support of his or her position, the burden of proof with respect to that matter shifts to the government. IRC §7491(c) imposes the burden of proof for assessable penalties, as opposed to the tax liability itself, upon the government. See also response to question III. 22) above on the choice of forum.

In cases in which the government seeks to enforce a summons, it initiates the enforcement proceeding in court and has the burden of establishing that it does not have the information it seeks, that the information is relevant to enforcement of the tax laws and that the information will not compromise the taxpayer's commercial secrets. Generally, affidavits from the IRS officials satisfy this burden.

Similarly, the government must establish substantial grounds for denial of a taxpayer's request for information under the Freedom of Information Act. See response to Question VI. 2) below.

- 2) Has your national tax system special or different rules for tax-relevant transactions that affect a foreign country compared to tax-relevant transactions that only affect the home country when it comes to duties to cooperate?
 - a) Does a taxable person have larger or more duties to cooperate when the facts and circumstances affect a foreign country? If so, please name and illustrate them. Do they influence the law of evidence? What are the legal consequences when the taxable person doesn't meet the enlarged duties to cooperate? Who does bear the risk if relevant evidence is missing?
 - b) What does the relationship between the enlarged duties to cooperate and the mutual assistance in the European Union in your country look like? E. g.: Is a taxable person asked to meet the enlarged duties to cooperate first before the competent authority of your country requests the competent authority of another Member State to forward information on the basis of the Council Directive (77/799/EEC)? Are the enlarged duties to cooperate

used without using the possibilities to exchange information on the basis of the Council Directive (77/799/EEC) (additionally)?

The duties are the same for domestic and international tax purposes, subject to the limitation for criminal referrals discussed above in II. 3).

- 3) In various European Court of Justice procedures in tax matters Member States tried to justify an unequal treatment or regulation between facts and circumstances that affect a foreign country and the ones that affect the home country e. g. with a lack of control (cp. law suit “Danner” C-136/00). In general the European Court of Justice doesn’t accept this and similar reasons because of the existence of the “Council Directive 77/799/EEC” which would allow each Member State to get the relevant information that is necessary for a correct assessment of taxes. Did this European Court of Justice’s jurisdiction concerning the exchange of information between the Member States change the burden of proof in your country? If so, please describe how.

Not applicable to the US.

VI. Questions of legal protection

Taxable persons have in most jurisdictions certain rights in the situation of an information exchange. Describe the legal rights of a taxpayer affected by an information exchange.

Legal protection against incoming requests

- 1) What kind of legal protection does exist for the taxable person if another Member State makes a request concerning him or her? Does he or she get to know that a Member State made a request concerning him?

There is no requirement that the IRS notify the taxpayer that it has received a request for information concerning the taxpayer from the competent authority of another state. As a policy matter, where there is a simultaneous examination or the request involves sensitive and secret information, the IRS usually notifies the taxpayer, but the taxpayer generally has no right to intervene in the exchange. On the other hand, the IRS may not summon information concerning the taxpayer from a third party without giving the taxpayer reasonable advance notice of the contact. IRC §7602(c).

In a recent case, a third party, Pacific Fisheries, sought information under the Freedom of Information Act, 5 U.S.C. §552, that the US provided to Russia under a Russian request for exchange of information. Russia sought information

concerning one of its citizens who was an employee and possible owner of the Pacific Fisheries, but Russia was not investigating Pacific Fisheries. The IRS issued summons to the Bank of America for information on the employee and Pacific Fisheries, but did not pursue the summons following Pacific Fisheries' objection. Pacific Fisheries then sought the information on which the IRS based the summons and the IRS objected. Pacific Fisheries obtained the consent of the taxpayer to the release of the information, but the IRS resisted providing the information on the grounds that the provision to Pacific Fisheries might impair federal tax administration and harm the IRS's working relationship with Russia. Over several years' litigation and one appeal to the Ninth Circuit, Pacific Fisheries received some attorneys' fees because the government withheld information it should have provided and had no basis for refusing to provide and required the IRS to disclose some, but not all, the information Pacific Fisheries requested. See *Pacific Fisheries Inc. v. United States*, F.3d (9th Cir., 2008). Most recently, the district court, on the basis of an affidavit claiming that the release of the information would impair the working relationship with Russia, refused to order the IRS to disclose further information to Pacific Fisheries. *Pacific Fisheries Inc. v. IRS*, (WD Washington, 2009).

- 2) Does there have to be a hearing before information concerning him or her is transferred to another Member State? Does provisional/temporary legal protection exist in these cases?

No.

- 3) Does the taxable person have the right to bar the requested state from giving fiscal information concerning him or her to another Member State?

No.

- 4) Has an objection a suspensive effect? Has the taxable person the right to appeal and has an appeal any suspensive effects?

Yes, in the case of contact with a third party, the taxpayer may seek to intervene and quash the summons.

Legal protection against making a request

- 5) What kind of legal protection does exist for the taxable person in cases where his or hers country of residence intends to request another Member State about his or hers fiscal situation in this Member State? Does the taxable person get informed about this intention and does there have to be a consultation with the taxable person?

No.

- 6) Does the taxable person have the right to bar his or hers country of residence from requesting a Member State concerning him or her? Does provisional/temporary legal protection exist in these cases?

No.

- 7) Has an objection a suspensive effect? Has the taxable person the right to appeal and has an appeal any suspensive effects?

No.

Legal protection in general

- 8) Did this kind of legal protection exist before the Council Directive 77/799/EEC was implemented or has it been developed as a consequence of the implementation? Did the Council Directive 2004/56/EC bring any amendments in domestic law concerning this topic?

Not applicable to the US.

- 9) If the information can be obtained from a third person or institution (e. g. insurance company, business partner) does that person or institution have any specific rights?

See response to VI. 1), the third party may refuse to provide the information and require court enforcement of the summons to protect itself from unauthorized disclosure claims under IRC §6103 or other privacy rules. Further, the US will respect foreign law restrictions on disclosure, for example, in the absence of treaty provisions overriding banking secrecy laws, those law may preclude disclosure of information pursuant to an information exchange request. See *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 US 197 (1958), holding that the dismissal of the plaintiffs complaint for recovery of property from the US was improper where Swiss law barred the plaintiff from complying with certain information requests in the litigation.

- 10) Is the taxpayer also protected by human rights treaties? If so, please describe what this protection looks like.

No.

- 11) What does the legal protection of the taxpayer look like when the Member States cooperate to collect the tax? What are the limits to the obligation to provide assistance in your country?

No protection other than what is available under domestic law for domestic collections.

- 12) Can the information exchanged under the Council Directive 77/799/EEC be used in a criminal trial? Is the requesting State's tax administration obliged to ask the requested State for permission to use this information in criminal trials? Does the tax administration of the Member State that has obtained the information need a specific authorization by the national judge?

Since the IRS may not summon information when a criminal referral is in effect, it may not request information under a treaty, either. The Department of Justice would control the contact with the other state through the Tax Attaché and the taxpayer would have the same rights as the taxpayer has under domestic law with respect to information when the taxpayer is the subject of criminal prosecution.

- 13) From a more general point of view, which is the relationship and influence between criminal and tax proceedings and judgements in your country? Are there any national reforms to facilitate the use of bank or financial information as evidence in tax law cases?

See response to III. 22) above.

- 14) Is there a claim for damages for a taxable person if a state discloses his or hers commercial, industrial or professional secret by giving information to another Member State? If so, what does the claim for damage look like?

Unauthorized disclosure of tax return information is a criminal offence. In addition, the taxpayer has the power to ask a court to enjoin disclosure. Subject to claims of sovereign immunity, unauthorized disclosure may give rise to a remedy for damages.

- 15) Does the taxable person get informed when information concerning him or her is exchanged on basis of the "Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments"? Does legal protection exist in these cases? If so, please describe what the legal protection looks like.

Not applicable to the US.

16) If there is an infringement during a tax examination in State A (under request of State B) is the taxable person able to contest this infringement and the following tax assessment by State B's tax authority?

In the case of a criminal prosecution, the court might exclude the evidence, however, in tax assessment or collection, no remedy exists other than possible prosecution in the US for violation of IRC §6103.

17) Have problems of a potential infringement of privacy legal rules deriving from the mutual assistance occurred in your country?

No information available publicly.