

Tax Information Exchange

By: Jaime González-Béndiksen

BendiksenLaw

As time passes, everything in our lives becomes more and more globalized. Taxes are no exception. In today's world, worrying about tax collection and enforcement is not circumscribed to each particular country. The OECD, in conjunction with the Global Forum, has taken the forefront in promoting and reviewing the internationally accepted standard of transparency. This standard calls for international exchange of tax information. The OECD first, years ago, included those countries who did not exchange tax information in a black list. Members of the OECD and eventually the international community at large, were encouraged to impose domestic sanctions or hurdles to such countries. By agreeing to sign at least 12 tax information exchange agreements, countries were removed from the black list. All surveyed countries have now signed at least that amount of agreements. Next are peer reviews conducted by the OECD to ascertain effective exchange of information and to make recommendations where all obstacles have not been removed.

Mexico has, long before the OECD process began, been convinced of the benefits of exchange of information.

This article discusses Mexico's domestic provisions dealing with exchange of information, Mexico's treaties to the effect and Mexico's practical experience in this area.

Domestic Regime

Under Mexico's Constitutional principles no one may be deprived of their liberty or their property, possessions or rights, except in a proceeding before the established courts, in accordance with the essential procedural formalities and the laws issued before the fact. This means that our authorities, including the tax administration of course, can only do that which they authorized to do

in a written law passed by Congress, signed by the President of the Republic and published in the Federal Official Gazette.

Based on this principle, Mexico's domestic tax provisions expressly regulate tax exchange of information.

First, among its authority to verify that taxpayers, jointly liable parties or related third parties have complied with their tax obligations, to determine unpaid taxes or tax deficiencies, and to determine the commission of tax crimes, the tax administration is expressly empowered to provide information to other tax authorities.

Further, the facts learned as a result of inspections as well as those found in the files, documents or databases kept or accessed by, or in the possession of, the tax authorities may be used as the basis to determine the tax situation of taxpayers. Our laws also include information and documentation provided by other tax authorities. Of course, in order to protect the right to due process, when other authorities provide files or documents to the Mexican tax authorities, the tax administration must grant taxpayers a period of 15 days to make any written statement they deem appropriate. These allegations from the taxpayer shall form part of the corresponding administrative file.

On the other side of the spectrum, information may be supplied to the tax authorities of foreign countries under a reciprocal exchange agreement provided that such information shall be used solely for tax purposes and the corresponding tax secrecy is kept in the recipient country.

Treaty Law

The OECD Model Convention sets the basis for tax information exchange. Such exchange is applicable to all kinds of taxes, including taxation of nonresidents, such as taxation in Mexico of US residents.

OECD principles call for:

- Secrecy of information received, unless disclosed to authorities and courts with respect to the determination, collection, proceedings or appeal of the taxes in question.
- No obligation to adopt administrative measures or disclosure in opposition to domestic law or practice.

- No obligation to disclose trade secrets or to contravene public policy.
- Obligation to supply information even where the country receiving the request does need the information.
- There should be no refusal to supply information held by a bank, financial institution, agent, representative or trustee or because it relates to a shareholding.

All agreements executed by Mexico follow the OECD model.

All include 3 types of exchange:

- Automatic exchange.
- Exchange by request.
- Spontaneous exchange.

Now, the binding effect of tax treaties within Mexico is established by our Constitution, which provides that the Constitution itself, the laws enacted by Congress, and all treaties executed by the President of the Republic with the Senate's approval, are the supreme law.

Mexico has entered into 41 Conventions for the Avoidance of Double Taxation and Prevention of Fiscal Evasion, with all OECD members and other countries. All of these conventions include information exchange clauses.

Further, Mexico has entered into specific tax Information exchange agreements with the Bahamas, Bermuda, Canada, Netherlands Antilles and the United States of America.

Specific exchange agreements are also being negotiated with Cayman Islands, Costa Rica, Gibraltar, Guernsey, Isle of Man, Jersey, Marshall Islands, Monaco, Samoa, Turks and Caicos, Vanuatu and Virgin British Islands.

Of the total conventions, many are regarded as "broad" information exchange agreements, listed in Exhibit 1. The "Broad" TEIAs offer certain specific tax benefits, which can be highlighted as follows:

- Foreign tax credit for taxes paid by companies in which the taxpayer has an interest of at least 10%.
- Credit for foreign tax withholding.
- Deduction of pro rata expenses with parent companies or other foreign

establishments.

- Ownership of holding company shares under tax consolidation regime.
- Authorization to defer taxes on sale of shares issued by Mexican companies in the framework of corporate restructurings.
- Loss of Mexican residence upon setting residence in another country.

Actual Exchange of Information

Mexico is especially active in the exchange of information, both supplying and receiving information with OECD member and nonmember countries, including Australia, Brazil, Canada, Chile, Czech Republic, Denmark, Ecuador, Italy, Luxembourg, Portugal, Singapore, Spain, Switzerland and, of course, the United States of America.

The types of information most commonly exchanged include:

- Automatic information, especially with U.S.A., on payments of interest, royalties and dividends.
- Information to determine tax residence or dual tax residence.
- Information on tax domicile.
- Information of bank accounts in Mexico or abroad.
- Sham exports.
- Payments made and properties in Mexico.
- Online property rental.
- Purchase and sale of property.
- Authenticity of ruling issued by SAT.
- Tax rulings issued by a given country to specific taxpayers.

Although, as mentioned above, Mexico exchanges information with a number of countries, it comes as no surprise that exchange with the United States accounts for 90% of the total. Nonetheless, the Mexican tax administration has indicated its high satisfaction with information exchanges with Brazil, Chile and Ecuador.

Conclusion

Mexico is convinced of the enormous benefits of exchanging tax information. Therefore, Mexico intends to continue to expand and implement its tax exchange of information agreements network. Given Mexico's active exchange

of information and the worldwide trend headed by the OECD, taxpayers must now bear in mind the old saying “you can run but not hide”. Proper tax planning, thus, now consists of compliant techniques and structures, based on the certainty that they will, sooner than later, come to be known by the tax administrations involved.