Implementation of provisions of mutual assistance in tax affairs

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EATLP Congress 2009
4-6 June 2009, Santiago de Compostela

Structure

- National legal framework for implementation
- Plurality of legal sources
- Application of mutual assistance provisions – freedom of choice or precedence in application?
- Effect of „opening clauses“
- Outlook

National legal framework (German perspective)

- Mutual assistance under certain restrictions:
  - prodecural: principle of legality: information exchange solely on the basis of properly-enacted law
  - substantive: right of the taxpayer to be heard, duty to refuse the exchange of information under certain circumstances

Plurality of legal sources


Plurality of legal sources (cont’d)

- Art. 26 OECD MC 2005 covered types of taxes:
  - Income tax
  - Capital gains tax
  - Corporate tax (Local business tax)
  - Wealth tax
  - Real estate tax
- Taxes on income and on capital imposed (cf. Art. 2 OECD MC 2005)
- Scope subject to negotiations of Contracting States (broad / narrow exchange of information clause)
- Requested information would carry out inquiries contrary to its legislation or administrative practices
- Would lead to disclosure of commercial, industrial and professional secrets / contrary to public policy
- Requesting Member State is unable, for reasons of fact or law, to provide the same type of information (principle of reciprocity)
- Requested information would carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State
- Would lead to disclose any trade, business, industrial, commercial or professional secrets / contrary to public policy
- Information is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State
- Optional cause for refusal (assistance on voluntary basis admissible)


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<td>widely correspondent, minor differences:</td>
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<td>causes for refusal</td>
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<td>- recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties (if national laws provide for non-recovery in similar national claims as well)</td>
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<td>- claim is more than five years old</td>
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<td>- claim amounts less than 1,500 €</td>
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<td>- administrative measures would be at variance with the laws and administrative practice of the assisting or of the requesting state</td>
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<td>- administrative burden of assistance is clearly disproportionate to the benefit to be derived by the requesting state</td>
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<td>subsidiarity</td>
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<td>requesting tax authority must have applied appropriate recovery procedures and the measures taken by the requesting State have not resulted in the payment in full of the claim</td>
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<td>requesting State must have pursued all reasonable measures of collection or conservation</td>
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Application of implemented mutual assistance provisions

**Freedom of choice?**
- Mutual assistance provisions of different levels as *leges alienae*
- "Closed systems" that can be applied alternatively within discretion of national tax authorities

**Precedence in application?**
- General supremacy of EU law / rule of conflicts of law
- Council Directives set up a minimum standard
- No barrier effect of EU law due to opening clauses (no prevention of "greater measure of mutual assistance")
- No transfer of restrictions (no most favoured clause from taxpayer’s perspective)
Freedom of choice or precedence in application?

Mutual assistance allowed?

EU level (+)  EU level (+)  EU level (-)

(international level (+)  (international level (-)  (international level (+)

freedom of choice  supremacy of EU law  scope of application / opening clause on EU level?

Precedence in application (within the EU)

1st
EU level (mutual assistance based on EU Council Directives/Regulations)

reasons:
Supremacy of EU law
EU law takes precedence in both the (national) legal order applicable and the respective provisions in international conventions

2nd
International level (mutual assistance based on DTCs/other bi- or multilateral agreements)

Lex posterior rule / Rule of conflicts of law

3rd
National level

Precedence in application – exceptions

EU level (mutual assistance based on EU Council Directives/Regulations)

International level (mutual assistance based on DTCs/other bi- or multilateral agreements)

National level

Precedence in application - typical cases

- Recourse on international level can be made if taxes are affected that are not within the scope of the respective Community law
  - Cooperation with regard to inheritance tax
- Intensity of duty to exchange information under Double Taxation Convention goes beyond the minimum standard set out in Community Law
- Recourse if divergent competence rules on inferior level allow a more effective information exchange
  - Direct information exchange with local tax authorities
Relevance of opening clauses – bank secrecy

Supranational level (e.g. implemented Council Directive 77/799/EEC)
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)
  - cause for refusal since disclosure would be contrary to national law (Art. 8 para. 1 Council Directive)

International level (e.g. implemented Art. 26 OECD MC 2005)
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)
  - fact that requested information is held by a bank is no cause for refusal (Art. 26 para. 5 OECD MC 2005)

National level
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)

Fact that requested information is held by a bank is no cause for refusal (Art. 26 para. 5 OECD MC 2005)

Outlook
  - **Most favoured nation clause**: Member States are obliged to provide to another Member State the level of cooperation that they have accepted in relation to a third country
  - **Bank secrecy**: prohibition from invoking bank secrecy as a reason for refusing to supply information


Outlook – proposed Mutual Assistance Directive

Supranational level (e.g. implemented Council Directive 77/799/EEC)
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)
  - fact that requested information is held by a bank is no cause for refusal (Art. 17 para. 2 prop. Council Directive)

International level (e.g. implemented Art. 26 OECD MC 2005)
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)
  - fact that requested information is held by a bank is no cause for refusal (Art. 26 para. 5 OECD MC 2005)

National level
- bank secrecy (e.g. Austria: Sec. 38 Banking Act)

Outlook
  - **Most favoured nation clause**: Member States are obliged to provide to another Member State the level of cooperation that they have accepted in relation to a third country
  - **Bank secrecy**: prohibition from invoking bank secrecy as a reason for refusing to supply information


Literature
- Seer, Steuerverfahrensrechtliche Bewältigung grenzüberschreitender Sachverhalte, in Spindler/Tipke/Rödder (eds.) *Steuерzentrierte Rechtsberatung (Festschrift für Harald Schaumburg)* (2009), pp. 151 et seq.
- Seer, in Tipke/Kruse, *AO*, Sec. 117 (July 2008)