

## Forms of Cooperation for Tax Purposes in Germany

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### A. Introduction

Germany is part of an international network for the cross-border exchange of information for tax purposes and is committed to fighting international tax evasion both by means of international cooperation as well as by unilateral measures.

### B. Cross-Border Information Exchange

In Germany, cross-border information exchange is based on European laws, bilateral tax treaties, exchange of information agreements and unilateral domestic laws.

#### 1. European Information Exchange

Cross-border information exchange between the tax authorities of the European Union member states is governed by the European Council Directive 77/799/EEC of 19 December 1977 concerning the *Mutual Assistance by the Competent Authorities of the Member States in the Areas of Direct Taxation and Taxation of Insurance Premiums*, which Germany implemented in 1985<sup>1</sup>.

This Directive provides that the competent authorities of the Member States must exchange any information which would enable them to carry out a correct assessment of taxes on income and on capital as well as any information relating to the determination of taxes on insurance premiums.

Information is provided by the German tax authorities upon request of another EU member state's tax authority<sup>2</sup> but the German tax authorities may *not* provide information to foreign tax authorities if:

- the transmission of the requested information is not in accordance with German law;
- data protection is not guaranteed in the other member state;
- the public order is not respected in the other state, particularly in regard to international tax secrecy, or
- the danger exists that a resident taxpayer may suffer damage through the disclosure of trade or business secrets.<sup>3</sup>

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<sup>1</sup> EU Law on Mutual Assistance (*Gesetz zur Durchführung der EG-Richtlinie über die gegenseitige Amtshilfe im Bereich der direkten Steuern, bestimmter Verbrauchsteuern und der Steuern auf Versicherungsprämien - EG-Amtshilfe-Gesetz*, or EGAHiG).

<sup>2</sup> Sec. 2 (1) EGAHiG.

<sup>3</sup> Sec. 3 (1) EGAHiG.

The German tax authorities may also, in their sole discretion, provide information spontaneously (i.e. without being requested to do so) to other EU member states, provided that there are concrete indications that tax laws of the other state have been breached, such as possible tax evasion or avoidance or transfer pricing agreements which do not meet arm's length standards.<sup>4</sup>

Affected German taxpayers are entitled to be heard prior to the transmission of any information abroad<sup>5</sup> and a taxpayer may challenge such a transmission.

## **2. Bilateral Tax Treaties**

The OECD Model Convention includes exchange of information provisions not only to enforce the relevant tax treaty (limited exchange of information clause) but also to enforce domestic tax claims of one of the contracting states (extended exchange of information clause)<sup>6</sup>.

Under the extended exchange of information clause, the competent authorities of the contracting states must exchange all information which is foreseeably relevant for carrying out the provisions of the convention or for the administration or enforcement of the domestic tax laws of either state to the extent that the resulting taxation is not contrary to the convention<sup>7</sup>.

The exchange of information clauses have regularly been amended in order to strengthen the powers of the contracting states to pursue tax-relevant information which is only available in the other state. One such amendment, which appeared in the OECD Model Convention of 2005, adopted the following changes:

- an easing of confidentiality obligations to allow the forwarding of obtained information to supervisory authorities.<sup>8</sup>
- clarification that a state can also provide information in which it does not, itself, have an interest;<sup>9</sup> and
- clarification that a state may not claim bank secrecy as a reason for denying the information request of the other contracting state.<sup>10</sup>

All of the 88 DTCs which Germany has concluded include an exchange of information clause, of which a dozen include the exchange of information standard of the OECD Model Convention 2005. The latest amendments of DTCs to include that standard were

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<sup>4</sup> Sec. 2 (2) EGAHiG.

<sup>5</sup> Sec. 1 (2) EGAHiG, Sec. 117 (4) AO.

<sup>6</sup> Sec. 26 OECD Model Convention.

<sup>7</sup> Sec. 26 (1) OECD MC 2008.

<sup>8</sup> Sec. 2 OECD MC.

<sup>9</sup> Sec. 4 OECD MC 2008.

<sup>10</sup> Sec. 5 OECD MC.

concluded with Luxemburg, Albany and Great Britain. Negotiations with Liechtenstein and Austria are pending.

### **3. Exchange of Information Agreements**

Another form of cross-border agreement regarding exchanges of tax information are Tax Information Exchange Agreements (TIEAs) which serve to promote the exchange of tax-relevant information between the contracting states.

Germany has concluded or amended a number of such agreements (e.g. with Jersey, Aruba and the Bahamas) in the aftermath of the so-called "Liechtenstein-affair" of February 2008 in which an employee of the Liechtenstein LGT Bank stole a CD containing the names of several hundred German residents who had deposited untaxed capital in accounts at the bank and sold it to the German government. TIEAs are particularly useful for small countries -- which are often classified as tax havens -- since they can be signed, ratified and implemented in a much shorter period of time and with less effort than is generally required for the conclusion of DTCs.

### **4. Domestic German Law**

Cooperation by exchange of information may also take place between Germany and a non-European, non-treaty country on the basis of German domestic law<sup>11</sup> under which the German tax authorities may provide information to the extent that:

- reciprocity is granted by the other country;
- the recipient country observes tax secrecy practices comparable to those applicable in Germany;
- the state requesting information agrees to avoid possible double taxation by way of a mutual agreement procedure, and
- the request does not interfere with either public order or with trade or business secrecy standards.<sup>12</sup>

As in regard to other exchanges of information, affected taxpayers have the right to be heard before information is sent to foreign tax authorities.<sup>13</sup>

German tax law also allows German tax authorities to request information from foreign tax authorities and allows, in such cases, the disclosure by the German authorities of information otherwise protected by tax secrecy provisions where disclosure is necessary for purposes of the information request.

All exchanges of information between German and foreign tax authorities are subject to the principle of appropriateness which

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<sup>11</sup> Sec. 117 (3) AO

<sup>12</sup> Sec. 117 (3) AO.

<sup>13</sup> Sec. 117 (4) AO.

means that requests for information must be absolutely necessary in order to ensure proper taxation. Furthermore, foreign tax authorities must generally show that they have exhausted all means available to them for procuring the information internally before the German authorities will grant an information request. Finally, the German constitution, through the right to informational self-determination (*Recht auf informationelle Selbstbestimmung*),<sup>14</sup> also prohibits cross-border information exchanges unless they are absolutely necessary and German resident taxpayers are legally protected.

### **C. Multilateral Cooperation on Information Exchange for Tax Purposes**

In April 2008, Germany joined the *OECD and European Council Convention on Mutual Administrative Assistance in Tax Matters*. This Convention implements instruments to counteract international non-compliance in today's open and more integrated economy. It covers all types of taxes and allows exchanges of information and multilateral, simultaneous tax examinations as well as mutual assistance in tax collection.

Furthermore, Germany is part of the G7 and G20 groups of countries and, together with France, has initiated two conferences on the *Fight against International Tax Fraud and Evasion by Promoting Transparency and the Exchange of Information in Tax Matters*. Germany's intent in this regard is to enforce implementation of the OECD standards on transparency and the exchange of information in tax matters.

Germany's efforts in this regard can be seen by examining the outcome of the 2<sup>nd</sup> Conference on the Fight against International Tax Fraud and Evasion held in Berlin on 23 June 2009. The following are the most important aspects as well as future objectives set forth by the conference:

- Endorsements of the OECD information-exchange standards by many significant financial centres.
- Implementation of a multilateral, impartial and transparent monitoring and peer-review process for all jurisdictions which ensures effective implementation of the standards on a global basis. This process is already being carried out within the scope of the OECD Global Forum on Taxation.
- Development of defensive measures, including those listed below, to protect the tax base of participating states against those countries and territories which do not implement the OECD standards:
  - increased withholding taxes in regard to a wide variety of payments made to non-cooperative jurisdictions;
  - denial of deductions for expense payments to recipients resident in non-cooperative jurisdictions;

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<sup>14</sup> Art. 2 German Constitution (*Grundgesetz*).

- termination of treaties with countries and territories which refuse to participate in exchanges of information;
- increased disclosure requirements on national and foreign financial institutions and collective investment vehicles to report transactions involving non-cooperative jurisdictions;
- denial of the participation exemption; and
- requests to international financial institutions to review their investment policies with respect to non-cooperative jurisdictions.

Additionally, the conference recognized the importance of the availability of information regarding the beneficial owners of bank accounts, investment vehicles and other financial assets for taxation purposes. The Conference also asked the OECD, the Financial Action Task Force (FATF) and the EU to explore ways to facilitate access to information in regard to trusts, foundations, shell corporations and other arrangements which may be used for tax-evasion purposes.

#### **D. German Solo Attempts**

The *Act to Combat Destructive Tax Practices and Tax Fraud* (the “Tax Fraud Act”), passed in 2009, extends taxpayers’ reporting obligations to dealings with persons in those foreign countries which are specified by the German Finance Ministry as being in non-compliance with OECD transparency standards and exchange of information requirements (tax havens). The Tax Fraud Act imposes increased documentation and verification obligations in regard to such business relationships while denying the tax exemption of inter-company dividends and the deduction of business expenses related to such transactions. While this law has entered into force it currently has no effect since the German Finance Ministry has not named any countries which do not meet the specified standards.

Nevertheless, the Tax Fraud Act fulfilled its intention of putting increased pressure on countries which do not comply with the OECD standards regarding the exchange of tax-relevant information between countries. Even though the OECD “black list” was already empty when Germany started the legislative procedure in regard to the Tax Fraud Act, German Finance Minister Steinbrück pointed out that until the promises of the “gray-list” states are kept and the respective information exchange agreements are concluded, the need for regulations to prevent tax fraud resulting from insufficient information exchange continues to exist. Furthermore, since passage of the Tax Fraud Act, several states have entered into negotiations with Germany in regard to TIEAs.

Another path being taken by Germany to put pressure on states which do not comply with OECD exchange of information standards is data purchase. As mentioned above, the first purchase of data regarding tax evasion occurred in the Liechtenstein Affair of 2008. While the German government paid EUR 4.6 million for the CD, to date it has collected

approximately EUR 200 million in evaded taxes and penalties through criminal proceedings as well as from self-reporting by taxpayers, and another EUR 100 million are expected to result from additional criminal proceedings which are currently pending. In February 2010 another “tax-evader CD” -- which reportedly contains information on approximately 1,500 persons who have deposited money into Swiss bank accounts without declaration to the German tax authorities -- was purchased by the Federal Government for EUR 2.5 million. The open discussions on whether Germany should buy the data and the subsequent purchase resulted in self-reporting by more than 16,000 taxpayers through the end of April 2010.

In Germany, taxpayers committing tax fraud can obtain exemption from prosecution by self-reporting<sup>15</sup> but only if the self-reporting is made before a crime is discovered by tax or prosecution authorities and only in regard to the self-reported crimes<sup>16</sup>. Evaded taxes plus interest for the time of delay must be paid to the tax authorities within a period set in the discretion of the relevant tax authority.<sup>17</sup> So far, Germany has obtained approximately EUR 1.25 billion from self-reporting in reaction to the purchase of the Swiss data CD.

The information purchase was strongly criticised by the Swiss government, which threatened to discontinue cooperation with Germany in tax matters. After Germany nevertheless bought the data, a bilateral working group was created by Switzerland and Germany, two of the main goals of which are ensuring the German taxation of non-declared assets deposited in Switzerland as well as negotiating a revision of the DTC currently in force.

Since appearance of the Swiss CD, a number of other CDs have been offered to various German Federal States, some of which have announced to purchase the CDs and others of which have declined to purchase the information due to qualms about their legality. It appears that these CDs containing the names of tax evaders are still in negotiation with various German tax authorities.

## **E. Conclusion**

German enforcement of exchange of information standards provided by the OECD model convention as well as other means of enforcing information exchange, not to mention the purchase of data stolen from foreign banks, bring us continually closer to the transparent taxpayer.

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<sup>15</sup> Sec. 371 AO.

<sup>16</sup> Sec. 371 (2) AO.

<sup>17</sup> Sec. 371 (3) AO.