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Date of Publishing: January 18, 2016

**Information Exchange on Tax Matters - Important Development in Indian legislation****VANDANA SHAH\***

As a part of a global drive to exchange information freely between countries, India has signed various agreements with other countries for information exchange. For instance, India has signed "Tax Information Exchange Agreements" with certain countries. Further, India has signed Inter-Governmental Agreement (IGA) and Memorandum of Understanding (MOU) on 9th July 2015 with the United States to improve international tax compliance and to implement FATCA. India has also joined Multilateral Competent Authority Agreement (MCAA) on 3rd June 2015.

The MCAA is a multilateral framework agreement that provides a standardised and efficient mechanism to facilitate the automatic exchange of information. As a step towards the implementation of FATCA provisions and with a view to provide automatic exchange of information to other countries under MCAA, necessary legislative changes have been made in India.<sup>1</sup> With the introduction of these provisions, specified financial institutions in India are under an obligation to furnish the details of reportable accounts to the prescribed income tax authorities. Financial institutions are required to carry out necessary due diligence procedures to identify reportable accounts and thereafter, furnish the statement of reportable account in Form No. 61B for every calendar year by 31st May following that year.

This Article provides an overview of certain measures adopted by the Organisation for Economic Co-operation and Development (OECD) and the amendments recently made in the Indian legislation with a view to exchanging information on tax matters.

***Measures by the OECD***

1. OECD has come up with "Common Reporting Standard for Automatic Exchange of Information" (CRS). A Common Reporting Standard Implementation Handbook (CRS Handbook) has recently been issued in August 2015 to provide practical guidance to assist in the effective implementation of the Standard.
2. Some of the relevant aspects of CRS Handbook are outlined below:
  - a. The OECD model for standardised automatic exchange is built on the FATCA IGA to maximise efficiency and minimise costs. While the OECD model mirrors the FATCA IGA to a large extent, there are certain differences in terms of removal of US specificities and approaches less suited to multilateral context of the Standard.
  - b. With respect to the *modus operandi*, OECD has outlined the following four core requirements to implement the Standard:
    - i. Translating the reporting and due diligence rules into domestic law, including rules to ensure their effective implementation

- ii. Selecting a legal basis for the automatic exchange of information
  - iii. Putting in place IT and administrative infrastructure and resources
  - iv. Protecting confidentiality and safeguarding data
3. CRS-related FAQs clarifying general reporting requirements, due diligence requirements, etc. have been issued by the OECD in August 2015.
  4. Portal on Automatic Exchange of Information has been launched in October 2015 to support the implementation of automatic exchange of information in tax matters.
  5. It is proposed to conduct a peer review process to review jurisdictions' legal and practical frameworks for compliance with the Standard and ensure globally consistent implementation of the Standard. The purpose is mainly to evaluate the effectiveness of implementation of the Standard, including meeting confidentiality and data safeguard requirements.

### ***Indian Amendments in relation to information exchange on tax matters***

1. Section 285BA was amended by the Finance Act 2014 to provide for furnishing of statement by a prescribed reporting financial institution in respect of a specified financial transaction or reportable account to the prescribed income-tax authorities.

2. CBDT has notified detailed Rules<sup>2</sup> on 7th August 2015 to give effect to Section 285BA read with Section 295 of Income Tax Act (ITA). The Rules prescribe in great details the categories of financial institutions which are required to comply with the reporting requirements, categories of reportable accounts and transactions, and nature of information required to be reported.<sup>3</sup>

### ***3. Maintenance and Reporting of Information***

- a. **Rule 114G** provides for the following information to be maintained and reported by reporting financial institution in respect of each reportable account:

<b>Sr. No.</b>	<b>Particulars</b>
<b>1</b>	Name, address, Taxpayer Identification number <sup>4</sup> , date and place of birth (in case of an individual) of each reportable person.
<b>2</b>	<b>Entity having one or more controlling persons that is a reportable person</b>  Name, address, Taxpayer Identification number of entity  and  Name, address, date and place of birth and taxpayer Identification number of each such controlling person
<b>3</b>	Account Number  (or Functional equivalent in the absence of account number)
<b>4</b>	Account balance or value at the end of relevant calendar year or value immediately before closure, in cases involving account closure.
<b>5</b>	<b>Custodial Account</b>  (i) Total gross amount of interest/dividend/other income paid or credited to the account during the calendar year with respect to assets held in the account.

	(ii) Total gross proceeds from sale/redemption of financial assets paid or credited to the account during the calendar year.
<b>6</b>	<b>Depository Account</b>  Total Gross amount of interest paid or credited to the account during the relevant calendar year.
<b>7</b>	<b>Other Accounts</b>  Total Gross amount paid or credit to the account holder including aggregate amount of any redemption payments, during the relevant calendar year.
<b>8</b>	<b>Account held by Non-participating financial institution for calendar year 2015 and 2016</b>  Name and aggregate amount of payments made to each non-participating financial institution.

**b. Some aspects to note in connection with the reporting requirements are as follows:**

**i. Reporting Period**

There are different reporting periods for US and non-US reportable accounts. For US reportable accounts, most pieces of information are reportable starting calendar year 2015, some information being reportable even for calendar year 2014. For non-US reportable accounts, most pieces of information are reportable starting calendar year 2016. It is relevant to note that in cases where no account is identified as a reportable account, a nil statement is required to be furnished by a reporting financial institution.

**ii. Reporting Financial Institution**

The "reporting financial institution" has been defined under Rule 114F to mean (i) a financial institution (other than non reporting financial institution<sup>5</sup>) which is resident in India but excludes any branch of such institution, that is located outside India and (ii) any branch located in India of a financial institution (other than non-reporting financial institution) which is not a resident of India.

**iii. Reportable Account**

A reportable account means a financial account which is identified pursuant to due diligence procedure specified in Rule 114H as held by specified persons.<sup>6</sup>

**iv. Taxpayer Identification Number**

It is recognised that all countries may not issue Taxpayer Identification Number, and there are some relaxations provided in cases where issuance or collection of such numbers is not mandated.

It is very important to note that in cases involving dual tax residency, the reporting financial institution shall maintain the taxpayer identification number in respect of each country/territory where the taxpayer is a resident.

**v. Procedural Aspects**

- The statement of reportable account is required to be furnished in Form No. 61B for every calendar year by 31st May following that year.
- The statement is required to be digitally signed and furnished online to the Director of Income Tax (Intelligence and Criminal Investigation) or the Joint Director of Income Tax (Intelligence and Criminal Investigation).
- Every reporting financial institution is required to nominate a Designated Director and Principal Officer. Every such institution is also required to obtain registration number, and provide contact details of the Designated Director and Principal Officer to the Principal Director General of Income Tax (Systems).

Designated Director means a person designated by the reporting financial institution to ensure overall compliance under section 285BA and includes:

- Managing Director or whole time Director, duly authorised by the Board of Directors, in case of company
- Managing Partner in case of a partnership firm
- Proprietor in case of a proprietorship concern
- Managing Trustee in case of a trust
- Person controlling and managing affairs of the reporting financial institution in case of association of persons or body or individuals or any other person

Principal officer means an officer designated by the reporting financial institution, for the purpose of relevant compliances.

- The statement shall be signed, verified and furnished by Designated Director of reporting financial institution. In case reporting financial institution is a Non Resident, statement may be signed and furnished by a valid power of attorney holder from such Designated Director.

#### **4. Due Diligence Procedure to be Followed by Reporting Financial Institution**

- a. **Rule 114H** of Income Tax Rules deal with due diligence procedure to be followed by every reporting institution. The due diligence procedure is aimed at ensuring that all reportable accounts and transactions are adequately identified by the reporting financial institution.
- b. The due diligence procedure is applicable for existing accounts as well as new accounts maintained by the financial institution. A detailed due diligence procedure has been prescribed for existing (individual and entity) accounts - low value accounts and for high value accounts and new (individual and entity) accounts.
- c. Broadly, for low value pre-existing individual accounts, due diligence based on review of electronically searchable data for relevant indicia (identification of overseas tax residency, current overseas mailing/residence address, overseas telephone number, standing instructions to transfer fund to account maintained outside India, overseas power of attorney holder, a "hold mail" instruction or "in care of" address of overseas country) is required to be done. However, for high value pre-existing individual accounts, in specific cases, review of the paper record search maintained by the financial institution is required to be done and importantly, if the relationship manager assigned to such account has knowledge that the account holder is a reportable person, then the account is to be considered as reportable account.
- d. Further, in case of pre-existing entity accounts, information maintained for regulatory or customer relationship (including information maintained under the Prevention of Money Laundering Act, 2002) is to be reviewed to determine whether the account holder is a reportable person.
- e. The Rules also provide that reliance can be placed on self certification from the account holder to establish whether the account holder is a tax resident of overseas country. Further, the Rules mandate financial institution to obtain self certification from account holders regarding their tax residence in the case of new accounts.
- f. The Rules also provide that as a part of the due diligence procedure, the reporting financial institution may not rely on self certification or documentary evidence if it knows or has reason to know that certification/evidence is incorrect or unreliable.

#### **5. Penalties for Non Compliance with relevant provisions**

Relevant Section	Particulars	Penal Implications
271FA	Failure to furnish annual information return under section 285BA within the prescribed time limit	Rs. 100 per day during which such failure continues
	Failure to furnish return under section 285BA within	Rs. 500 per day from the day immediately

	period specified in the notice issued by the Income Tax Authority	following the date of expiry of time period specified in the notice
271FAA	Furnishing of inaccurate information by prescribed reporting financial institution under section 285BA in certain specified situations.	Rs. 50,000

### ***Concluding Remarks***

Automatic Exchange of Information based on CRS, when fully implemented, would enable India to receive information from several countries, including offshore financial centres; and would be instrumental in getting information about overseas assets of Indians tax residents, including those held through entities in which Indians residents are beneficial owners. This is expected to help the Government curb tax evasion by tracking and taxing black money.

Needless to mention, the newly introduced Rules have placed significant compliance burden on Indian financial institutions.

Indian financial institutions will need to examine the applicability of these Rules to them on an immediate basis. For existing accounts, financial institutions will need to go back to the account holders and seek additional information which they may not have gathered at the time of opening of such accounts.

For new accounts, the existing KYC norms currently adopted by financial institutions will need to be revisited and strengthened, if need be. It is imperative for financial institutions to also upgrade their data gathering and reporting systems, to add relevant functionalities to be able to address these additional compliance requirements.

At an organisation level, the financial institutions may also gather requisite information from the relationship managers appointed for their respective accounts. In view of the additional onus placed on the concerned employees (including relationship managers), the Principal Officer as well as the Designated Director, it will be extremely critical for financial institutions to make their personnel aware of the new requirements.

Financial institutions will need to have in place adequate checks and safeguards to ensure that reportable accounts are appropriately flagged off, reportable transactions and their amounts are readily identified in a reportable format, and accurate compliances are done in a time bound manner.

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1. Reference: Press Release dated 3rd June 2015, Press Information Bureau, Government of India, Ministry of Finance
2. Income tax Rules (11th Amendment) Rules, 2015.
3. While this Article highlights some key aspects of the Rules, it is advised that the Rules are read in detail and interpreted carefully before implementing the same.
4. Taxpayer identification number means a number assigned to a person in the country or territory in which he is resident for tax purposes and includes a functional equivalent in case no such number is assigned.
5. Detailed definition of non reporting financial institution has been provided in the Rules.

6. Detailed definition regarding reportable person, non US entity with one or more controlling persons that is a specified US person, passive non financial entity with one or more controlling persons, etc. has been provided in the Rule 114F.