

FATCA, CRS and Brazil: where are we and where are we going?

The automatic exchange of financial information is a world reality. By the end of September the third round of exchange among several countries and the United States, under the Foreign Account Tax Compliance Act (FATCA), shall be completed and the early adopters of the Common Reporting Standard (CRS), designed and overseen by the Organization for Economic Cooperation and Development (OECD), shall start their mutual exchanges.

History

Although the exchange of tax information is historically provided for in double taxation conventions and in specific tax information exchange agreements, it was usually restricted to the exchange by request. Even in cases where the automatic exchange was provided for, the absence of rules and procedural standards prevented its applicability. There was the will, but not the means to establish what we may call the “Global Revenue Service”.

Everything changed at the beginning of this decade due to the Hiring Incentives to Restore Employment Act (Hire), signed on March 18, 2010, by the former President of the United States of America, Barack Obama. Among the measures envisaged in the Hire Act, special attention was given to FATCA, a regime that imposed to financial institutions and entities alike located outside the US (Foreign Financial Institutions – FFI) the duty to provide information to the Internal Revenue Service (IRS) about assets and financial accounts owned or controlled directly or indirectly by American citizens and residents. Failing to do so would require American paying sources to withhold income tax at a 30% rate over any payments made to the non-compliant FFIs.

In order to make FATCA possible and to avoid violating other countries' sovereignty the US signed several Intergovernmental Agreements (IGAs). Brazil and the US had already signed a bilateral Tax Information Exchange Agreement (TIEA) in 2007 – internally approved by Decree No. 8,003 of March 15, 2013. On September 23, 2014, both countries signed the IGA, which regulates the automatic exchange of information under FATCA, approved in Brazil by Decree No. 8,506 of August 24, 2015¹. Since then, Brazil has exchanged tax information with the USA automatically².

In parallel with FATCA, in 2011 Brazil signed the OECD's Convention on Mutual Administrative Assistance in Tax Matters, which was internally approved on August 29, 2016 (Decree No. 8,842). Subsequently, on October 21, 2016, Brazil also signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA), which provided the rules and standards that make the worldwide automatic exchange possible.

By means of the MCAA, Brazil adopted the CRS, annex to the Agreement in which the common standard for identification, diligence and exchange of information on accounts and assets held by non-residents was established. This standard is similar, but not identical, to that established by FATCA. On March 20, 2017, Brazil provided notifications to OECD confirming that it has in place all necessary laws to implement the automatic exchanges under CRS and intends to perform the first data transmission until September 2018, with information relating to calendar-year 2017.

The MCAA allows countries and jurisdictions to automatically exchange information related to periods different than from those provided for in CRS. On these grounds, for instance, Brazil has agreed with Argentina to automatically exchange information dating back to 2012; conversely, Brazil and Switzerland have declared their intent to perform the first automatic exchange only in 2019, with information relating to calendar-year 2018. Since the Convention also provides for exchange of information by request, nothing prevents the Brazilian Federal

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¹ [The IGA – FATCA's New Ally as Respects Brazil](#)

² [FATCA and Brazilian Citizens Holding Assets Abroad: Can the Apple Fall Far From the Tree?](#)

Revenue Service (*Receita Federal do Brasil* – RFB) to request information of previous years to Switzerland or any other country or jurisdiction – and the RFB has already expressed its intent to do so.

In Brazil

Internally, RFB gathers information to be exchanged under FATCA and CRS through the “*e-Financeira*”, an ancillary tax obligation established by Normative Ruling (IN) No. 1,571 of July 2, 2015. It must be complied with by the financial institutions and entities alike until the last business day of August and February, containing information related to the first and second semesters of the previous calendar-year, respectively. Specifics of CRS were addressed by IN No. 1,680 of December 28, 2016, which also postponed the provision of information related to the first semester of 2017 to the last business day of February 2018. Information gathered by RFB will be transmitted to the IRS, under FATCA, and to the competent authorities of each country and jurisdiction taking part in CRS; likewise, these authorities shall transmit information in the interest of RFB directly to it.

An obvious consequence of the automatic exchange of tax information is the discovery of undisclosed accounts and assets owned by Brazilian taxpayers and the use of such information to charge taxes in Brazil. These effects shall become more frequently observed after all information received during the two rounds of the Brazilian voluntary disclosure program (the second round ended on July 31, 2017) is analyzed and after the processing of the first lot of information received under CRS, starting from September 2018.

Future

Once Brazilian taxpayers start being charged with taxes assessed due to information received under FATCA or CRS, several legal issues currently discussed only in books and articles shall be taken to the courts and administrative tribunals resolution.

The conflict between the automatic exchange of information and the protection of personal data provided for in Brazilian Law shall be a frequent topic of discussion, especially considering the possible use of that information for criminal prosecution, and also the absence of express authorization in Complementary Law No. 105 of January 10, 2001 (Bank Secrecy Law) for such exchange with foreign authorities³. This matter was not directly addressed by the Brazilian Federal Supreme Court (STF) in February 2016, when it deemed constitutional the transfer of confidential information from financial institutions to Brazilian tax authorities, so long as the secrecy of the information is maintained.

International agreements usually establish safeguards for the protection of personal data and secrecy of financial information subject to exchange, but it is also usually left to the receiving country or jurisdiction to discipline such protection. What assurances can the Brazilian government offer that the secrecy of information will be protected abroad at the same standards observed by Brazilian authorities? Would this uncertainty prevent the provision of information? Are the international agreements competent to enable the provision of confidential information kept by Brazilian authorities?

Brazilian Law treats internally approved international agreements as supra-legal acts, meaning that they would be formally capable of authorizing the exchange of information. However, the Convention and the TIEA exclude the obligation to exchange information protected by professional secret, gender of which the bank secrecy is specie. Therefore, any supply or reception of confidential information by Brazilian authorities is deemed illegal, unless the Bank Secrecy Law is amended.

An alternative to the amendment of the Bank Secrecy Law is to submit the MCAA and CRS to internal approval by the Brazilian National Congress. This would validate the automatic exchange. The exception to bank secrecy would become part of Brazilian Law. However, only the IGA has gone through congressional approval. CRS still lacks submission to the

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³ [Brazil, the OECD and the Decline of Banking Secrecy](#)

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same procedure and its absence prevents the supplying of the more complex information required under OECD's standard.

These and other issues shall occupy the center of future debates. Brazil has come a long way for implementing the worldwide automatic exchange of tax information. The most burdensome measures have already been taken. However, others would be welcome: the amendment of the Bank Secrecy Law or the congressional approval of the MCAA and CRS are among these measures.

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