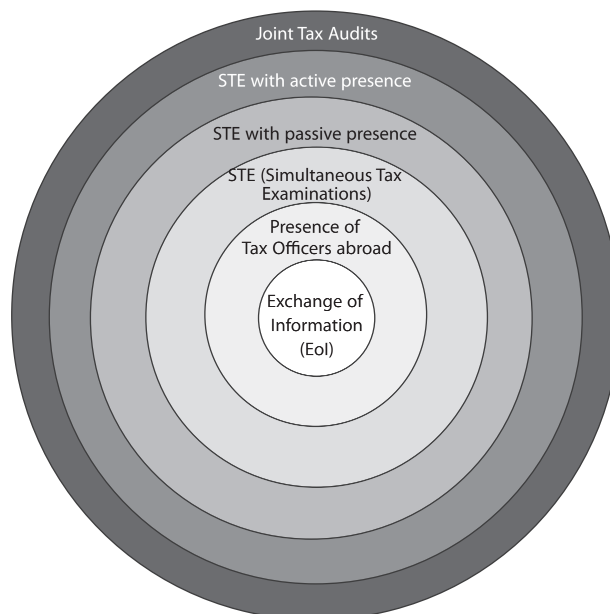
Chapter 1

Joint Audits within international tax co-operation

20. Mutual administrative assistance covers a wide range of different forms of international tax co-operation ranging from a simple request for information to a Joint Audit as defined in the 2010 Report. Graphically, the degree of enhanced co-operation can be depicted as follows:



1.1. Exchange of information

21. At the core of international tax co-operation is exchange of information (EOI). EOI covers information exchange upon request (EOIR), where a jurisdiction, for instance during the course of an ongoing audit, requests information that is foreseeably relevant for its tax assessment or enforcement of its domestic laws. It also covers spontaneous or automatic information exchange of information (AEOI), such as the exchange of information on rulings under BEPS Action 5 or the exchange of CbC reports under BEPS Action 13, which inform risk assessment and help focus audit resource on particular taxpayers and/or issues. AEOI covers data exchanges on a standardised set of information regarding large numbers of taxpayers, whereas EOIR focusses on exchange of data in specific cases of individual taxpayers or a few related taxpayers.

22. Over the years tax administrations have significantly advanced the practical operation of exchange of information. While traditionally information exchange upon request

was a paper based process often involving several parties and layers within each tax administration, it is now often much more streamlined, using digital means, single points of contact (SPOC), central liaison officers or functional equivalents, and is supplemented by phone calls, videoconferences or face-to-face meetings between the participating tax administrations.

23. While there are many instances where exchange of information is all that is needed, tax administrations have long realised that there are also situations where more enhanced forms of tax co-operation lead to better outcomes and a more efficient process. These additional features of enhanced tax co-operation include the presence of tax officials abroad,[1] simultaneous tax examinations[2] and a combination of both.

1.2. Presence of tax officials abroad

24. Presence of tax officials abroad is a term chosen within the context of this Project to cover similar types of actions that can be arranged under different legal instruments, and involve the presence of tax officials of one jurisdiction in the territory of another jurisdiction to be present at the appropriate part of a tax examination of the host tax administration in that jurisdiction.[3]

25. When a tax official is present abroad as described in para 24 and interacts directly with the taxpayer, in the tax administration's offices or at the premises of the taxpayer, and interviews individuals and examines records this is referred to as "active presence", whereas "passive presence" indicates that a foreign tax official can only be present in the tax office of – or during an enquiry carried out by – the requested tax administration without interacting directly with the taxpayer.[4]

26. The presence of tax officials abroad requires the consent of the requested host jurisdiction as it includes the exercise of governmental functions on foreign territory. Whether this is permissible, and whether passive or active presence will be allowed, depends on the applicable legal framework and typically also on the consent of the hosting tax administration and in some jurisdictions also of the taxpayer concerned. This is further addressed in Chapter 4.

1.3. Simultaneous tax examinations

27. Simultaneous tax examinations (STE) refer to an arrangement between two or more tax administrations to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest,[5] with a view to exchanging any relevant information which they so obtain.[6] The conduct of a simultaneous tax examination means to align domestic audit activities in two or more jurisdictions.

28. Simultaneous tax examinations can also be combined with forms of presence of tax officials abroad, thus having two or more tax administrations examining simultaneously the tax affairs of one or more persons in which they have a common or related interest in the presence of the tax officials of the respective other tax administration. The presence of the tax officials abroad during the conduct of such audits can be either active or passive as outlined above, depending on the applicable law.

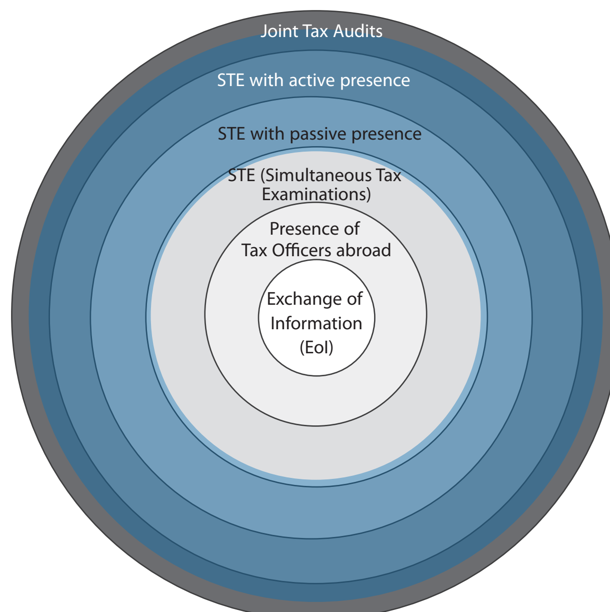
1.4. Joint Audits

29. The conduct of a Joint Audit was first articulated and described in the 2010 Report (OECD, 2010) and was summarised as follows:

- "*two or more countries joining together to form a single audit team*
- *to examine an issue(s)/transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organised in the participating countries, and in which the countries have a common or complementary interest;*
- *where the taxpayer jointly makes presentations and shares information with the countries,*
- *and the team includes Competent Authority representatives from each country.*"

30. The Project showed that the concept of Joint Audit is interpreted very differently in practice: the term is used for different and more basic tools of mutual assistance yet also for more enhanced forms of co-operation where simultaneous audits are combined with forms of active and passive presence and which came very close to the 2010 Report definition of Joint Audits.

31. This is illustrated below by the blue layer overlapping the different circles.



32. While substantively many international engagements would deserve the classification of "Joint Audits" a close reading of the "2010 definition" raised a number of questions.

33. For instance, read narrowly most jurisdictions would currently be unable to engage in a Joint Audit as defined, because legally they cannot form a "single audit team" if the term is understood to imply the exercise of the same audit powers by all team members throughout the process.

34. The 2010 Report (OECD, 2010) itself already recognised that the term "Joint Audits" was rather a management than a legal term to express the idea that two or more tax

administrations work together. But even if viewed from a management perspective, it may be difficult to decide whether the audit is run by two (or more) highly integrated teams or in fact is run as a single audit team.

35. While the experience from participants in this project shows that tax administrations were, in practically all cases, able to agree on the key conclusions from the audit, they also reported that each audit team will usually also prepare a separate national audit report. Since a final joint audit report has no legal validity in itself, participants also prepare an audit report according to their domestic rules and procedures that serves as a basis for the respective national tax assessment in each participating jurisdiction.

36. In short, from evaluating the experience since 2010, a number of very constructive audits were reported that came very close to the Joint Audit definition of the 2010 Report, operated by a highly integrated team and succeeded in resolving the case even if they may not have fully met this definition.

37. It is for these reasons that this report introduces a slightly amended, broader and more functional definition of Joint Audits that seeks to avoid potential misunderstandings while being fully consistent with the direction and the spirit of the 2010 Report. It allows to capture the most highly integrated forms of co-ordinated audit activity, i.e. those that in substance are rightly classified as "Joint Audits" while leaving room for jurisdiction specific features and case specific variables that should not be seen as affecting the substantive classification of working jointly.

38. Using this approach a Joint Audit for purposes of this report is understood as

- two or more tax administrations joining together to
- examine an issue(s)/transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organised in the participating jurisdictions, and in which the tax administrations have a common or complementary interest;
- proceeding in a pre-agreed and co-ordinated manner guaranteeing a high level of integration in the process and including the presence of officials from the other tax administration
- where the tax administrations jointly engage with the taxpayer, enabling the taxpayer to share information with them jointly
- and the teams include Competent Authority representatives from each tax administration for the exchange of information.

39. It clarifies that engaging in a Joint Audit does not imply that all those involved have to exercise the same audit powers, but that the tax officials involved are fully co-ordinated and have assigned the audit tasks among them in a manner that increases efficiency and is indicative of a joint approach. They engage jointly with the taxpayer, even though the role of the foreign tax official may be limited during the conduct of the audit activities in the other jurisdiction.

40. Joint Audits can be used in all situations including those that can be characterised as co-operative or as non co-operative. Co-operative situations are those Joint Audits that may have been suggested by the taxpayer and where all parties, including the taxpayer, work together co-operatively with the common objective of reaching the correct tax outcome

without subjecting the taxpayer to double taxation. In co-operative situations Joint Audits can be important in creating early tax certainty, as is further described in Chapter 2.

41. Joint Audits can also be used in situations motivated by tax avoidance or evasion risks, where concerns about double taxation are less in focus and where the engagement between tax administrations and taxpayer is often more antagonistic (non co-operative situations).

42. In current practice, a Joint Audit combines the elements of a simultaneous tax examination with features of presence of tax officials abroad and is run jointly by two or more highly integrated teams that engage jointly with the taxpayer. While such Joint Audits may be performed by combining existing legal instruments, certain challenges exist, especially in non-co-operative situations. Therefore a desire for a more solid legal base was expressed, which will be further addressed in Chapter 4 of this report.

43. The practical input from the 20 tax administrations that participated in the preparation of this report showed that since the publication of the 2010 Report they collectively engaged in almost 500 simultaneous tax examinations, with several coming close to the Joint Audit definition and capturing the elements as introduced in the revised definition above, which is used in this report when reference is made to these cases in practice.

44. It also showed that some jurisdictions are more experienced than others. Those jurisdictions have explored the opportunities and are the driving force to strive for constructive improvements to facilitate future developments. They also provided input for practical guidance and might be able to share knowledge and help build capacity in other less-experienced jurisdictions as further addressed in the Chapters 6 and 7 of this report.

45. While the experience of the participating tax administrations indicate that they realise added value from Joint Audits, it was also clear that tax administrations need to carefully consider the management information substantiating the key benefits foreseen. Therefore, this report also includes Chapter 3 on cost and benefits as well as on practical guidance to facilitate the Joint Audit process.

Notes

1. Reference is made to presence of tax officials abroad in the EU Directive 2011/16 Art. 11 para. 1 and 2, Art 9 of the Mutual Assistance Convention, Article 6 para. 2 TIEA and Paragraph 9.1, 2nd bullet point of the Commentary to Article 26 Model Tax Convention.

2. EU Directive 2011/16 Art. 12, Art. 8 of the Mutual Assistance Convention, para. 35 of the Commentary on Art. 5 TIEA, TIEA and Paragraph 9.1, 2nd bullet point of the Commentary to Article 26 Model Tax Convention.

3. This is more narrow in scope than "Tax Examination Abroad" that is sometimes also used to refer to cases where a tax administration conducts a tax examination of a domestic taxpayer and conducts audit activities abroad, for instance because the taxpayer keeps the administration abroad (Joint Audit report 2010, par. 39). For this type of audit the consent of the taxpayer is always requested and the audit is conducted by using domestic audit powers. This type of action as a unilateral matter is not considered to be part of the spectrum of mutual assistance as described in this chapter.

4. See below para. 162.

5. Common interest should be understood broadly and is not limited to situations where not both tax administrations expect an upward adjustment of their tax assessment.

6. Art. 8 (2) of the Convention; Art. 12 (1) of EU-Directive 2011/16; Art. 12 of the Nordic Convention; para. 9.1, 2nd bullet point of the Commentary to Article 26 Model Tax Convention; Manual on the Implementation of Exchange of Information provisions for tax purposes (2006), Module 5.

References

OECD (2010), *Joint Audit Report*, OECD Publishing, Paris, available at www.oecd.org/tax/administration/45988932.pdf.

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