EXCHANGE ON INFORMATION AND ITS ADVANCEMENT

NUPUR JALAN

Email id: jalannupur8@gmail.com

1. BRIEF OVERVIEW ON NEED OF EXCHANGE OF INFORMATION & ITS MEANING:

1.1 With the increase in cross border transactions in the era of globalised world there has been increase in the number of cases tax evasion & avoidance. The problem of tax evasion in developing countries is therefore exacerbated, where evasion even by a wealthy few can have a comparatively large impact. The revenue needs of developing countries, in combination with the severity of corruption, tax evasion and fraud in many developing countries, highlight the importance of increasing global transparency concerning the location of untaxed wealth. Globalization and the liberalization of economic activity, resulting in the exponential increase in cross border commercial and financial transactions, has in effect converted the private sector into a world without borders. This has created a major problem for national tax authorities because globalization in the private sector has not been accompanied by similar changes in the reach and enforcement powers of national tax authorities.

1.2 In confronting the impact of globalization and liberalization of economies, national tax authorities face several problems. Some of them are illustrated below:

1. National tax authorities have administration of one national government.
2. There is no concept of international tax administration yet.
3. There is a traditional legal rule that one government does not enforce the tax laws of other governments.
4. Bank secrecy and other confidentiality laws ("de jure bank secrecy") in many jurisdictions prevent the disclosure of relevant information by financial institutions to government authorities, except in specified limited fact situations. This de jure bank secrecy exists in some countries which are international financial centers, and in some tax haven jurisdictions. Tax havens present a "double problem". Some are financial centers, which receive bank deposits and other passive investments. And often investments from third countries are routed through tax havens to acquire the cloak of confidentiality.
5. Many governments do not normally obtain from financial institutions and other payers of cross border income the relevant information. Therefore, those governments do not have the relevant information to exchange with other governments. This results in "de facto bank secrecy".
6. The laws of several countries prohibit the transfer of tax related information to other governments except if there is an international agreement between the governments of two country.

1.3 Due to the rampant evasion of taxes, it is often believed that much illegitimate wealth is generated. This wealth even though has its source in legitimate activities but due to the non-payment of taxes assumes the character of illegitimate wealth. In order to handle this cases of tax evasion & avoidance by some taxpayers having global operations by structuring of different transactions, tax authorities of different jurisdiction aim at sharing information on relevant matters to prevent such issues.

Types of legal instruments for administrative assistance including Exchange of Information:

- Double Taxation Avoidance Agreements (DTAAs)
- Tax Information Exchange Agreements (TIEAs)
- Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention)
- SAARC (South Asian Association for Regional Cooperation) Limited Multilateral Agreement

1.4 Effective exchange of information will promote economic cooperation and relations between various countries. Exchange of information provisions offers a legal framework for cooperating across borders without violating the sovereignty of other countries or right of taxpayers. Exchange of information thus aims to offer legal framework for cooperating across borders without violating the sovereignty of the other country rights. The procedural formalities, extent and manner of information exchange, treatment of the exchanged information are some aspects which has become debatable. The continued viability of an open world economy depends on international cooperation including cooperation in tax matters. The main objective is that tax authorities of one country may assist that of the other country with information which may be utilized in collecting the due share of taxes of the later state, as per law/ procedures, thus leading to genesis of legal framework of Exchange of information.

2. FORUMS THAT ADDRESS THE ISSUE OF PROMOTING TRANSPERANCY & COOPERATION:

2.1 Generally, this tax treaties aims at harmonizing & resolution of the conflicts arising from assertion overlapping tax jurisdiction by one or more state which too has facilitated in Exchange of Information.

Several forums have been created to address the matter of lack of transparency and cooperation between tax authorities like:

- Organisation for Economic Co-Operation and Development (“OECD”),
- United Nations (“UN”),
- European Union (“EU”) and
- Financial Action Task Force (“FATF”) etc.

3. ARTICLE ON EXCHANGE OF INFORMATION:

3.1 Article 26 on the model conventions talks about Exchange of Information. It obliges the tax administrators to exchange information which is foreseeably relevant for carrying out the provisions of the DTAA’S or the administration or enforcement of domestic laws concerning taxes of every kind. The scope of Exchange of information under Article 26 of the OECD Model covers all tax matters without prejudice to the general rules & legal provisions governing the rights of defendants and witnesses in judicial proceedings. However, the information covered is not limited to taxpayer's specific information but the competent authorities may also exchange other sensitive information related to tax administration & compliance improvement.

3.2 Basically, treaties aim at providing provisions for avoidance of double taxation, however, to ensure that this is done properly the contracting countries exchange information which may include:

- Article 12: Royalty
  Information about the amount of royalty transmitted.

- Confirmation about the residential status of individual and whether the individual is beneficial owner so as to grant lower rate of withholding tax.

- Associated company:
  Proper information at times may be needed for proper allocation of profits or for determination of profit of Permanent Establishment.

- Article 25: Information may be needed for applying Mutual Agreement procedures.

3.3 Be any type of information that is exchanged the standard of foreseeable relevance need to be maintained. Foreseeable relevance requires that at the time request is made there is reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. In case doubt arises, the competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information not clear to the requested states.

3.4 Certain important provisions emphasized in Article 26 of OECD Model convention:

3.4.1 The scope of Article 26 is wide & not only limited to matters covered Article 1 & Article 2. It means that Article 26 is not limited by article 1, the contracting states are obliged to exchange information which are available with them but relates to person who are not residents of either the contracting states. Article 26 is not limited by article 2 means that contracting states are obliged to exchange information relating to taxes not specifically mentioned in DTAA.

3.4.2 Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.

3.4.3 In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

3.4.4 If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

3.4.5 In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

3.5 Certain important lines picked up from wordings on Commentary of OECD on Article 26:

3.5.1 The present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic tax laws of the Contracting States and for the application of specific provisions of the Convention.

3.5.2 The matter of administrative assistance for the purpose of tax collection is dealt with in Article 27, but exchanges of information for the purpose of tax collection are governed by Article 26.

3.5.3 Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation.

3.5.4 The Article and the Commentary were further modified in 2012 to take into account recent developments and to further elaborate on the interpretation of certain provisions of this Article. Paragraph 2 of the Article was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorizes such use.

3.5.5 The Commentary was expanded to develop the interpretation of the standard of "foreseeable relevance" and the term "fishing expeditions" through the addition of general clarification, language in respect of the identification of the taxpayer under examination or investigation, language in respect of requests in relation to a group of taxpayers and new examples.

3.6 Developments that evidence some progress toward increased exchange of information in tax matters:

3.6.1 The OECD's 1998 Report, Harmful Tax Competition: An Emerging Global Issue, attacked bank secrecy in tax matters, and emphasized the need for effective exchange of information between national tax authorities. This 1998 OECD Report led to the OECD Proposals on Harmful Tax Practices, calling for restrictions on tax havens (required transparency and some limited exchange of information).

3.6.2 In 2005 the OECD revised its Article 26, Exchange of Information, of its Model Income Tax Treaty, in order to provide specifically that the obligation of national governments to exchange information must override bank secrecy and other confidentiality laws. That is, under the revised Article 26 of the OECD model income tax treaty, if a government requests tax information from another government, that other government must generally provide that information in spite of bank secrecy or other confidentiality laws in that other country.

3.7 Ways of exchanging information:

Para 9 of Article 26 basically enumerates that there are three ways of exchanging information:

On Request:

In this competent authority of one country asks for particular information from competent authority in another country. The information sought generally relates to an examination, inquiry or investigation of taxpayer's tax liability for specific tax years.

This procedure is normally effective only if (a) the Requesting authority presents a sufficiently detailed request (for example, the name and location of the bank or other financial institution where the taxpayer has a bank account) and (b) the Requested authority can obtain the relevant information. If the Requesting authority does not present a sufficiently detailed request, and if the Requested authority does not have sufficient information, exchange of information upon request will not be productive.

On automatic Basis:

Automatic Exchange of Information (AEOI) is the routine and periodic transmission of information about non-resident persons, sent by the jurisdiction in which income or assets are located to the jurisdiction in which the person may owe tax. The exchange of information is automatic in that it occurs on a regular basis (e.g., annually) and the scope of the information to be reported has been agreed in advance, rather than being preceded by a specific request. The information may already be held by the tax administration, or be provided by third parties, such as financial institutions. It achieves a similar goal to the widely used practice of requiring employers to report to the tax administration in respect of the wages paid to their employees, it gives tax administrations a reliable source of information as to tax liabilities, without having to rely solely on a taxpayer to properly report all their income and assets. Other types of third-party reporting are increasingly common in tax compliance management, such as on interest income in bank accounts and on social security payments.

AEOI has been widely used to date. For example, since 2005, European Union members have been automatically exchanging information on savings interest. In 2010, in response to the discovery of large sums of wealth concealed abroad, the United States enacted the Foreign Account Tax Compliance Act (FATCA), which requires financial institutions worldwide to automatically report financial information of US persons to the United States Internal Revenue Service, or otherwise be liable to 30% withholding on payments made by US persons. In April 2013, the Finance Ministers of France, Germany, Italy, Spain and the UK announced their intention to exchange FATCA-type information amongst themselves, in addition to exchanging information with the United States.

Automatic exchange of information is difficult to implement for at least three major reasons:

(a) The Transmitting Government and the Receiving Government have to specifically agree to such automatic exchange of information. The Commentary to the OECD Model Income Tax Treaty and the Commentary to the UN Model Income Tax Treaty refer to automatic exchange of information, but do not require it. The EU Directive on the Taxation of Savings requires automatic exchange of income on certain interest paid within the EU to individuals' resident within the EU (except for Austria, Belgium and Luxembourg which during an interim period impose a withholding tax).

(b) Automatic exchange of information would normally involve the transfer by the Transmitting Government to the Receiving Government of a substantial volume of data. In order for the Receiving Government to be able to process such information, such information should be compiled based on the Taxpayer Identification Number ("TIN") used for taxpayers (companies and also individuals) by the Receiving Government. That would require the Transmitting Government to gather, compile, maintain and transmit such information based on the TIN used by the Receiving Government. The OECD has been working on the mechanics of automatic exchange of information.

(c) Two countries (country X and country 2) may agree to implement automatic exchange of information. But the resident corporate or individual of country X may route Accountancy business through the investment in country Z through a corporation in a third country, such as a country Y tax haven, as discussed above. Therefore, the resident of country X can "defeat" the automatic exchange of information between country X and country Z, unless country X and country Y agree on automatic exchange of information, and country Y and country Z agree on automatic exchange of information.

Spontaneously:

Spontaneous exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials (e.g., tax auditors, etc). Information provided spontaneously is usually effective since it concerns particulars detected and selected by tax officials of the sending country during or after an audit or other type of tax investigation.

When to Consider a Spontaneous Exchange of Information?

Several circumstances may arise that could prompt a spontaneous exchange of information. The list below provides examples of where a spontaneous exchange of information should be considered:

- Grounds for suspecting that there may be a significant loss of tax in another country;
- Payments made to residents of another country where there is suspicion that they have not been reported;
- A person liable to tax obtains a reduction in or an exemption from tax in one country which could give rise to an increase in tax liability to tax in another country;
- Business dealings between a person liable to tax in a country and a person liable to tax in another country are conducted through one or more countries in such a way that a saving in tax may result in one of the other countries or in both;
- A country has grounds for suspecting that a saving of tax may result from artificial transfers of profits within groups of enterprises; and
- Where there is likelihood of a particular tax avoidance or evasion scheme being used by other taxpayers.

In this information is exchanged spontaneously when one of the contracting parties having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes on this information without the latter having asked for it.

Spontaneous exchange of information occurs when one government (Transmitting Government) has information which it believes would be of interest to the other government and spontaneously provides such information to the other government (Receiving Government). This is a very limited form of exchange of information.

It also provides that the contracting state may use other techniques to exchange information such as simultaneous examination, tax examination abroad & industry wide EOI.

3.8 **Comparison between OECD Model Convention & UN Model Convention**:

3.8.1 The language in the UN Model, for most part, mirrors the language contained in Article 26 of the OECD Model. However, there are two important differences.

- The UN Model explicitly requires an EOI to combat tax avoidance as well as tax evasion. The result is that countries following the UN Model cannot refuse to exchange information on the ground that only tax avoidance is involved.
- The UN commentary goes well beyond the OECD commentary in promoting an effective EOI.

As much of the language of Article 26 is also found in the comparable article of the OECD Model Convention, the OECD commentary to that article generally is relevant in interpreting Article 26 of the United Nations Model Convention.

3.8.2 One difference in the wording of Article 26 and the comparable provision of the OECD Model Convention is that Article 26 includes in paragraph 1 the following sentence: “In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes.” The phrase “that would be helpful to a Contracting State in preventing avoidance or evasion” was inserted in 2008. That change was thought to be useful by members of the Committee, especially members from developing countries, to make clear in the text of article 26 a point that already was clear in the commentary and was implicit in the language of the last sentence of prior paragraph 1, now revised and moved to paragraph 6. The statement of the purposes of information exchanges in the text of article 26 is intended to provide guidance to the Contracting States on the proper interpretation of the article.

4. Exchange of information under Tax Information Exchange Agreement (TIEA’s):

4.1 A Tax Information Exchange Agreement is a bilateral agreement that has been negotiated and signed between two countries to establish an official system for the exchange of information relating to taxes. More specifically, a TIEA’s allows for the free exchange of financial tax information irrespective of differences in either country's requirement or definition of a predicate crime to money laundering. However, it must be duly noted that information will only be provided if a proper request is made pursuant to all of the treaty provisions, which require that the requesting party first make a prima facie case. The OECD spear-headed the substantial campaign for negotiation of TIEA’s with the main purpose of enabling countries to access information about their own residents’ offshore investment activities in and through tax havens.

4.2 A TIEA is not an automatic information exchange between the two signatories to the treaty. TIEAs are by request only. All TIEAs set forth specific guidelines and criteria by which the Requesting party must submit a request for information. These guidelines and criteria expressly provide that all requests must be validly made and relevant to the matter at hand. All requests must be set forth with specificity, detailing the nature of the information being requested and the substance of the evidence to support the request.

4.3 It basically covers matters when the information requested relates to a particular examination, inquiry or investigation and thus doesnot covers automatic or spontaneous exchange of information.

4.4 TIEA'S doesnot obliges the contracting party to disclose any trade, business, industrial, commercial or professional secret or trade process.

5. Multilateral Agreements:

5.1 Multilateral convention provides wide range of administrative assistance amongst the parties to the convention including exchange of banking information and without having domestic interest, assistance in collection of taxes, tax examination abroad etc. This cooperation ranges from Exchange of information, including automatic exchanges to the recovery of foreign tax claims.

5.2 A multi-lateral tool titled the Convention on Mutual Administrative Assistance in Tax Matters (MAAT) was developed by the Global Forum5 to effectively exchange information. MAAT provides for a legal basis for multi-country co-operation to facilitate EOI and assistance in recovery of taxes was developed jointly by European Council & OECD in 1998.

5.3 Global Forum on Transparency and Exchange of Information for Tax Purposes brings together 121 countries and jurisdictions for wide-ranging discussions on transparency and exchange of information.

5.4 SAARC Limited Multilateral Agreement has provisions on Exchange of information, assistance in collection of taxes, trainings to tax administrators, sharing of tax policies and such other related issues aimed at tax cooperation amongst Member States. The SAARC Member States i.e., India, Pakistan, Bangladesh, Nepal, Bhutan, Sri Lanka and Maldives are signatories to this Agreement.

Certain provisions of SAARC Limited Multilateral Agreement:

The Competent Authorities of the Member States shall exchange such information, including documents and public documents or certified copies thereof, as is necessary for carrying out the provisions of the SAARC-MA or of the domestic laws of the Member States concerning taxes covered by this agreement insofar as the taxation there under is not contrary to the SAARC-MA.

Any information received by a Member State shall be treated as secret in the same manner as information obtained under the domestic laws of that Member State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. However, there is no obligation of the Member States to carry out administrative measures at variance with the laws and administrative practices or supply information (including documents and public documents or certified copies) which are not obtainable under the laws or in the normal course of the administration or disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

In case of conflict between SAARC MA & DTA the provisions of the SAARC MA or DTAA that is signed or amended at a later date shall prevail.

The categories of information that may be exchanged varies from ownership of entities, copies of tax returns, banking information, accounting information, transfer pricing information, copies of contracts/ agreements, copies of invoices etc.

5.5 Several other agreements are effective to date.

6. Recent developments from India's perspective:

6.1 India has played a very proactive role for establishing an Exchange of Information ('EOI') mechanism in today's scenario of intertwined economies resulting from internationalisation of global trade. India for many years has been strongly advocating the need for a high level of transparency and Exchange of information for tax purposes. India in its advent has been attempting to advocate the expansion and streamlining of Information Exchange between treaty partners.

6.2 India's efforts are evident through a series of dialogues with G20 forum in this regard, even urging the G20 countries to exert pressure on countries that do not meet international standards of transparency. The Indian representatives have taken a lead role in formulating the above referred to communiqué by G20 leaders. It is worth mentioning here that India is the first country outside the block of OECD & Council of Europe to join the multilateral convention on mutual administrative assistance in tax matters.

6.3 Rectification has been made in existing DTAA'S to bring them at par with international standards. The Government of India has also identified priority countries/ jurisdictions for negotiation of Tan information exchange agreement.

6.4 Measures taken by Indian Government:

6.4.1 Various new legislations and amendments have been included in the tax laws like Income Tax Act, 1961, relating to Extension of time limit for reopening income escaping assessments (Section 147 of the Act) , Powers equivalent to Civil Courts given to Income tax authorities (Section 131 and Section 133A of the Act), Disclosure requirements in Income tax returns and Extension of time limit for completion of assessment (Section 149). Section 138 of the Act provides for non-disclosure of information received by Income tax Authorities. Section 280 provides for prosecution for disclosure of information in contravention of Section 138 of the Act.

6.4.2 Introduction of Section 94A in Income tax Act:

Conditions for applicability:

- There is a country outside India with whom India does not have effective exchange of Information.
- Such country/ area is specified by notification in official Gazette as NJA having regard to the lack of effective exchange of information with such country or territory.
- An assessee enters into a transaction where one party is a person located in NJA.

Following person will be considered to be located in NJA:

- A person who is resident of the NJA
- A person not being an individual which is established in India
- A permanent establishment of the person not falling in clause(a) or clause(b) in the NJA

Special measures in respect of transactions with persons located in notified jurisdictional area –

The Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify by notification in the Official Gazette such country or territory as a notified jurisdictional area in relation to transactions entered into by any assessee.

Notwithstanding anything to the contrary contained in this Act, if an assessee enters into a transaction where one of the parties to the transaction is a person located in a notified jurisdictional area, then—
(i) all the parties to the transaction shall be deemed to be associated enterprises within the meaning of section 92A;
(ii) any transaction in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, income, losses or assets of the assessee including a mutual agreement or arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to the assessee shall be deemed to be an international transaction within the me Meaning of the section 92B and the provisions of sections 92, 92A, 92B, 92C except the second proviso to sub-section (2), 92CA, 92CB, 92D, 92E and 92F shall apply accordingly.

Notwithstanding anything to the contrary contained in this Act, no deduction, —
(a) in respect of any payment made to any financial institution located in a notified jurisdictional area shall be allowed under this Act, unless the assessee furnishes an authorisation in the prescribed form authorising the Board or any other income-tax authority acting on its behalf to seek relevant information from the said financial institution on behalf of such assessee; and

(b) in respect of any other expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified jurisdictional area shall be allowed under any other provision of this Act, unless the assessee maintains such other documents and furnishes such information as may be prescribed, in this behalf.

Notwithstanding anything to the contrary contained in this Act, where, in any previous year, the assessee has received or credited any sum from any person located in a notified jurisdictional area and the assessee does not offer any explanation about the source of the said sum in the hands of such person or in the hands of the beneficial owner (if such person is not the beneficial owner of the said sum) or the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory, then, such sum shall be deemed to be the income of the assessee for that previous year.

Notwithstanding anything contained in any other provisions of this Act, where any person located in a notified jurisdictional area is entitled to receive any sum or income or amount on which tax is deductible under Chapter XVII-B, the tax shall be deducted at the highest of the following rates, namely: —
(a) at the rate or rates in force
(b) at the rate specified in the relevant provisions of this Act
(c) at the rate of thirty per cent

In this section, —
(i) “person located in a notified jurisdictional area” shall include, —
(a) a person who is resident of the notified jurisdictional area;
(b) a person, not being an individual, which is established in the notified jurisdictional area; or
(c) a permanent establishment of a person not falling in sub-clause (a) or sub-clause (b), in the notified jurisdictional area
“permanent establishment” shall have the same meaning as defined in clause (iiia) of section 92F;
“transaction” shall have the same meaning as defined in clause (v) of section 92F.

6.4.3 Amendments have been made in the India Swiss tax Treaty to ensure information exchanged between the two countries to be foreseeably relevant thereby widening the extent to which information can be exchanged. Prohibiting fishing expeditions, all information requests can only be made if all normal tax procedures under domestic tax laws have been exhausted, and such requests must contain relevant particulars such as name of the person, period of time for which information is sought etc and appropriate secrecy of information sought to be maintained.

It is worth mentioning the case of Comptroller of Income tax VS. AZP: In this case Indian income tax authorities has requested the Singaporean tax authorities for information relating to two bank accounts held in the name of Company X & Company Y in which Indian national allegedly remitted money through unsigned transfer instructions. The comptroller as per the requirements in their domestic laws filed an application before the court for production of documents by the bank which was opposed by bank concerned.

It was held that company X & company Y are not under examination in india and neither they are incorporated in India. The court therefore held that the request and the supporting evidence was not sufficiently clear and specific for it.

Thus, the application was basically rejected on the basis that the information requested was not “foreseeably relevant” due to the inadequacy of the supporting documentation provided by the Indian tax authorities.

In the case of **Ram Jethmalani v. Union Of India** , a writ petition was filed against the Union of India and its various regulatory and law enforcement agencies including Directorate of Enforcement, Department of Revenue, Ministry of Finance, etc. against the purported inaction of the Government to arrange for recovery of large sums of unaccounted money stashed/deposited by Indian citizens in foreign banks, in particular in Swiss banks.

6.4.4 Computerized Exchange of Information (‘EOI’) cell has been created in the Foreign Tax & Tax Research division of the CBDT.

6.4.5 Eight more Income Tax Overseas Units (‘ITOUs’) has been set up apart from two existing Indian tax Overseas Units (‘ITOUs’) in Mauritius and Singapore.

6.4.6 Effective curbing of structuring through the Tax Havens, proposed General Anti Avoidance Regulations(‘GAAR’) vide Finance Act, 2012, aimed to target complex tax avoidance arrangements not dealt directly by the special anti-avoidance rules.

6.4.7 A new policy has been implemented for deployment of manpower to Directorate of Transfer Pricing and International Taxation.

6.4.8 The Government has also setup various cyber forensic labs, investigation wings and also devised new IT tools to extract more and more information from various sources effectively.

6.4.9 On 3rd June 2015, India joined the Multilateral Competent Authority Agreement (MCAA) in support of its various tax transparency initiatives including Automatic Exchange of Information (AEOI). AEOI results in sharing of information without making a specific request for it. It also helps to facilitate sharing of bulk taxpayer information in a systematic and periodic manner amongst various jurisdictions which have joined this agreement.

6.4.10 Standard Global accounting and financial reporting system will provide a common financial reporting platform to ensure transparency in financial business transactions.

6.4.11 CBDT has released a Manual on Exchange of Information:
Manual aims at providing guidance to field officers on the scope and manner of exchange of tax-related information under the various tax treaties and agreements that India has entered into. The manual has been revised considering the revisions that was required.

6.4.12 Foreign Account Tax Complaince Act (FATCA):
FATCA was passed in March 2010 to improve compliance with US tax laws by imposing certain due diligence and reporting obligations on non-US financial institutions. The Act imposes a 30% withholding on US source payments to foreign financial institutions that do not

participate/cooperate by supplying account information to the US Internal Revenue Service [IRS].

India on 9th July 2015 signed the inter-governmental agreement (IGA) on Foreign Account Tax Compliance Act (FATCA) with the United States of America (US). The government would now receive information about Indian “tax resident” persons having financial accounts in the US. For FATCA to be official in India, the Indian government is required to inform the US about completion of the internal procedures. The date of such notification would become the “effective date” of FATCA implementation.

Coverage:

FI’s are defined to effectively cover those that hold the client or investor’s financial account in the form of deposit of money or investments. As such, banks, deposit taking NBFC’s, depository participants, custodians, brokers, insurance companies and all funds are covered, unless any specific exemptions may be available under the Intergovernmental Agreement. Some of the exemptions available include exemptions for government bodies and government owned entities, retirement and savings fund (such as provident funds) subject to conditions, small banks, local banks, fund managers as well as brokers, subject to meeting given tests for each category.

For FATCA purposes, the definition of “tax resident” specifically covers US citizens and green card holders. The coverage of reportable persons goes beyond individual customers. It extends to “non-participating FIs” and the controlling persons of “passive entities”. To enable identification, FI’s will have to obtain “self-declaration” regarding their FATCA status and classification from relevant customers and counterparties. While onus of providing a correct self-declaration rest on the customer/ counterpart, the FI should exercise due diligence in evaluating the same for consistency with other information or documentation.

Procedural Aspects:

Towards FATCA compliance, FI’s will need to reach out to relevant customer accounts that existed as of 30 June 2014 (known as pre-existing accounts) as well those opened from 1 July 2014 (known as new accounts). Depending upon the size of the account, the account may be out of scope (where aggregate balance with the FI is up to $50,000) or requiring a detailed enquiry of paper records as well as information with the relationship manager (where the aggregate balance is above $1,000,000. Having identified accounts, the FI may, in relevant cases, rely on any declaration and/or documentary evidence from the customer establishing his non-US status and not report such a customer.

The reporting period for FATCA is the calendar year, though as an exception, the first period of coverage is the six-month period from 1 July 2014.

FATCA requires detailed change management processes covering the complete customer life cycle (account opening, account maintenance as well as closure) and several functions such as compliance, product design, customer on-boarding and front end, operations as well as IT. The road to the implementation of FATCA in the short term, especially meeting the immediate reporting deadline, is certainly not a smooth one. All parties, especially FIs, need to quickly understand how FATCA impacts them and work out their action plan for FATCA. In the long run, matter should have to be settled down with the hope that all governments, including India, will greatly benefit from improved tax compliance.

Under FATCA, as many as 110 tax jurisdictions have committed to share information.

6.4.13 Black Money Act:

The Act imposes liability for abetting or inducing another to willfully attempt to evade tax or to make false statements/declarations in relation to foreign income and assets. The objective of this provision is to target professional advisors such as private banks, accountants, lawyers and other consultants whose actions may potentially be covered under 'abetment or inducement'. This move is intended to make the Act comprehensive in its scope.

One of the important highlights of the Black Money Taxation Act is the one-time compliance opportunity to those who have undisclosed assets situated overseas. Such persons now can declare their undisclosed assets in the prescribed form with the prescribed authorities and come clean by paying tax and penalty thereon. No prosecution will be launched against them under the Black Money Taxation Act.

The compliance window under Black Money Act was open from 1st July 2015 till 30th September 2015. Tax @ 30% plus penalty @ 30% was paid to the Government till 31st December 2015 to avoid prosecution. The information contained in the declaration will be kept confidential as Section 138 of the Income-tax Act is applicable to the declarations.

If declaration is not made till 30th September, then tax will be at flat 30% tax rate (without surcharge and cess) on the value of total undisclosed foreign income and asset plus penalty 90% in addition to tax.

Some other key highlights of Black Money Act:

- Act is effective from 1 April 2016 onwards (Assessment Year 2016-17) and extends to whole of India.
- This act is applicable to all person's resident in India. In case of Individuals, it applies to ordinary resident under ITA.
- Tax will be on value of UFIA (Undisclosed Foreign Income & Assets) as on the date of enactment of this new legislation
- No exemption, deduction or set-off of any carried forward of losses
- Contents of declaration cannot be used as evidence for imposing penalties under any other law or for prosecution under ITA, Wealth tax, FEMA, Companies Act 2013, or Customs Act 1962
- Wealth Tax will not be levied on UFA (Undisclosed Foreign Assets) declared.

7. Limitations of Exchange of Information:

A Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. The State which needs to render information need not go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. Thus, a State may refuse to provide information where the requesting State is precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g., failure to provide sufficient administrative resources) results in a lack of reciprocity.

8. Conclusion:

Much is being discussed about the trends, growth, procedure and practice of the Exchange of Information (EOI). In general, the effectiveness of exercise of "Exchange of Information" depends on the effort of every participating sovereign in judicious and diligent application of its underlying principles and a disciplined adherence to the same. The procedural formalities, extent and manner of information exchange, treatment of the exchanged information are some aspects which become contentious. A lot has been done, but a lot still needs to be done, to strengthen and capitalize the foundation efforts so well-conceived and executed. All stated above can only be achieved if the Global community adopts a moralistic approach and commits itself to establishing a conducive business environment by working in a transparent manner, adhering to domestic and international laws.

Cooperation in matters also reflects that basic principle that participation in global economy carries both benefits & responsibilities. However, each country needs to have a specific mechanism in place to check the movement of money before any information about a taxpayer is given to another country. Moreover, though several modes have been designed for effective exchange of information, yet countries have to find a balance between the need to have access to information for tax purposes & their privacy rights.