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CASE UPDATE: AXY v CIT (2018)

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The Court of Appeal has recently published its decision to dismiss the taxpayer's appeal for leave for judicial review against the Comptroller of Income Tax ("CIT") in *AXY v CIT* (2018) ("*AXY*"). This represents closure for the taxpayer in this case and serves as a timely reminder that the Automatic Exchange of Information ("AEOI") regime does not stand alone. It sits next to the Exchange of Information ("EOI") regime, under which tax authorities can seek from their overseas counterparts, a much wider range of information.

CASE SUMMARY

The Korean National Tax Service ("NTS") made requests under the EOI regime against the taxpayers, a family of Korean nationals and their associates, who were allegedly involved in a tax evasion scheme in Korea. The request was made covertly, and the taxpayers only found out after they were informed by the NTS.

The taxpayers challenged the decision and applied for leave for judicial review on grounds of illegality and irrationality. The Court dismissed the appeal because it found there was nothing to suggest that the CIT did not follow its internal procedures.

The Court found that the CIT did take steps to review the request and make follow up questions to the NTS to understand the grounds for the request before complying. This included two rounds of written requests to obtain clarification from the NTS, as well as a meeting with the NTS to ensure its concerns were addressed.

KEY TAKEAWAYS

AEOI and EOI regimes give tax authorities access to a wide range of information

While taxpayers have placed significant emphasis on managing the exposure of their information under the AEOI regime, they should also be aware of the potential exposure of their information under the EOI regime.

The difference between the two regimes is that AEOI is broad-based and captures all taxpayers at all times, while the EOI regime would likely apply to taxpayers facing an ongoing investigation upon request of another tax authority.

While *AXY* was a case where information was sought regarding bank accounts, which would be reportable under the AEOI regime, the information requested could be broader than that. The threshold to determine if information can be released is "foreseeable relevance".

Given the broad powers of the CIT to obtain information, the scope of information that can be obtained under the EOI regime will be much greater than that of the AEOI regime.

Requests can be made covertly

The taxpayer only found out about the requests in this case because the NTS informed them of the request. It is entirely possible that other tax authorities may not take this step and taxpayers may not have a warning or be able to take action against such requests.

The CIT treats taxpayer confidentiality seriously

While there is a risk of exposure of confidential information under the EOI regime, taxpayers should take comfort in the fact that the CIT takes confidentiality of taxpayer information seriously.

While the taxpayer failed in this application, this case has shown that the CIT will not reveal information without first verifying the requests are legitimate. In this case, the CIT took steps to ensure that the NTS made a legitimate request before complying.

What next?

Taxpayers should expect that tax authorities will be able to obtain information from them worldwide. As such, the emphasis should now be in ensuring that their tax structures are defensible. This is especially the case where the structures have not been reviewed for some time, as what was considered safe under the pre-AEOI / EOI era may now be susceptible to increased scrutiny.

HOW WE CAN HELP

At BDO, we have the expertise and experience in a broad range of services including but not limited to efficient tax planning, reviews of structures and resolving tax disputes. We have also been working closely with clients to avail themselves to attractive tax incentive programmes that minimise their tax liabilities in a tax compliant manner.

Please feel free to contact us and let us know how we can assist you.

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