Taxpayer Rights in International Exchange of Information

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Taxpayer Rights in International Exchange of Information

"Little else is requisite to carry a State to the highest degree of opulence from the lowest barbarism but peace, easy taxes, and a tolerable administration of justice: all the rest being brought about by the natural course of things" – Adam Smith

1. Introduction

1.1. A tax system is vital to any modern nation. It is the cornerstone of the nation's economic engine. The ability to raise tax revenue underwrites the nation's credit, its ability to borrow and its currency. A well-functioning and efficient tax system promotes economic stability and prosperity, while a poorly functioning tax system can lead to bankruptcy and economic ruin. The quality of administration has a direct correlation with taxpayer happiness and their contribution to the exchequer.

1.2. Countries around the world are seeking to provide improved services to the taxpayer. There are visible changes in the attitude of the tax administration vis-à-vis the taxpayer. Modern day tax systems require increased co-operation from the taxpayer to operate efficiently. Co-operation is more forthcoming if mutual trust exists between the taxpayer and the administration. Over the past several decades, the obligations placed on taxpayers have increased considerably aided by the complexity of tax legislation and the burden of tax compliance. But in the area of taxpayer's rights, arguably less (if any) progress has been made. The focus on the duty to pay is not matched by an equal focus

on the rights of the taxpayers. The taxpayer's rights are to be clearly enumerated and protected to arrive at a balance between taxpayer rights and taxpayer responsibilities.

1.3. According to the 'Stanford Encyclopedia of Philosophy', Stanford University, *"Rights dominate most modern understandings of what actions are proper and which institutions are just. Rights structure the forms of our governments, the contents of our laws, and the shape of morality as we perceive it. To accept a set of rights is to approve a distribution of freedom and authority and so to endorse a certain view of what may, must, and must not be done"*[1].

1.4. When embodied in particular doctrines, such as in international human rights documents, the language of rights expresses the standards for minimally acceptable treatment that individuals can demand from those with power over them.

1.5. Taxpayers' rights should be seen in the broader context of human rights, which have established principles of fundamental human rights. There are international and European covenants on human rights that have been adopted and widely ratified. Tax payers' rights have to be in tune with such rights, albeit modified suitably as the context demands. As the Organization for Economic Co-operation and Development[2] ("OECD") observes, a clear statement of taxpayers' rights and accompanying protection will be positive in terms of enhancing taxpayers' collective levels of compliance and providing a mechanism for taming ever more powerful tax administrations.

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[1] *The Stanford Encyclopedia of Philosophy authored by Wenar and Leif, Fall 2015 published by Metaphysics Research Lab, Stanford University*

[2] *'A comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers been "Short-changed"?' by Adrian J Sawyer; March 2000*

1.6. While substantive tax legislation differs from country to country as a result of national sovereignty, in determining tax policy and law, basic taxpayer rights should be substantially similar. Since taxpayers' rights are derived from higher obligations, whether in constitutional law or human rights instruments, the latter should always prevail where good administration and the protection of taxpayers' rights are in conflict.

1.7. As the national taxpayer advocate Nina E. Olson puts it, "At their core, taxpayer rights are human rights".[3]

1.8. The standard catalogue of rights applicable to tax payers include the following (this is not an exhaustive list):

a) the right to privacy, including the protection of confidential information from disclosure;

b) the right to a fair trial, including a fair investigation prior to trial and appeal rights; this includes the rights to an independent and impartial tribunal established by law, and a determination within a reasonable time

c) freedom from discriminatory or arbitrary tax laws or procedures

d) freedom from self-incrimination, at least in so far as criminal penalties (including substantial fines) are concerned

e) respect for the rule of law in tax legislation and tax procedures

1.9. The world is getting increasingly globalised. It has become relatively easier for taxpayers to make, hold and manage investments through foreign financial institutions. Factors of production such as labour, capital, entrepreneurship are becoming increasingly mobile. With rapid technological advancements, speed of transfer is

[3]*May 9 2013 at the Laurence Neal Woodworth Memorial Lecture at the meeting of the American Bar Association Section of Taxation*

improving, geographical boundaries have become meaningless, and audit trails have become more distant. There are newer forms of capital like bitcoins etc., due to which, the identity of a taxpayer can remain hidden, leading to an increased propensity to abuse. Offshore tax evasion is a serious problem for jurisdictions all over the world. In advocating tax payer's rights, one cannot be oblivious to the current reality of the many ways by which the duty to pay tax is sidestepped. The advocacy of tax rights is to be balanced by the attention on measures to combat evasion. Co-operation between tax administrations is critical in the fight against tax evasion. A key aspect of that co-operation is exchange of information. Exchange of information is the most effective tool to combat cross border tax evasion and avoidance.

1.10. Vast amounts of money kept offshore go untaxed if taxpayers fail to comply with tax obligations in their home jurisdictions. This creates huge losses to governments all over the world. As per "Illicit Financial Flows from Developing Countries: 2004-2013,"[4] developing and emerging economies lost US$7.8 trillion in illicit financial flows from 2004 through 2013, with illicit outflows increasing at an average rate of 6.5 per cent per year – nearly twice as fast as global GDP.

1.11. The 'Panama Papers', a data-leak of 11.5 million documents held by the Panamanian law firm Mossack Fonseca, gave detailed financial and attorney-client information of more than 214,488 offshore entities. These documents contained personal financial information about wealthy individuals and public officials that had previously been kept private. Reporters found that some of the Mossack Fonseca shell

[4] *Published by Global Financial Integrity ("GFI") in December 2015*

corporations were used for illegal purposes, including fraud, tax evasion, and evading international sanctions.

1.12. Similarly, the Paradise Papers were a set of 13.4 million confidential electronic documents relating to offshore investments that were leaked to the German newspaper Süddeutsche Zeitung. The documents originated from the Bermuda based offshore law firm Appleby, and the Singapore based corporate services provider Asiaciti Trust. The documents contained the names of more than 120,000 people and companies, shedding new light on the murky world of offshore finance, revealing the arcane schemes used by the world's wealthiest individuals and corporations. Heads of state, technology giants and government officials were among those whose interests in tax havens were brought to light.

1.13. Data leaks such as the Panama Papers and Paradise papers reveal how shell companies are used to transfer funds between national jurisdictions for both legitimate and illegitimate reasons. This has wide-ranging implications for national tax revenues, with the European Commission citing estimates of revenue losses due to tax evasion and tax fraud amounting to at least EUR 1 trillion.

1.14. Jurisdictions around the world, small and large, developing and developed, OECD and non-OECD, have therefore come together in calling for action to address the issues of international tax avoidance and evasion. Increased transparency is being brought, among others, through sharing of information. A breakthrough towards transparency was accomplished in 2009 with "Information Exchange upon Request" ("EOIR") and in 2013 with "Automatic Exchange of Information" ("AEOI") becoming international standards. The restructured Global Forum on Exchange of Information and

Transparency for Tax Purposes and the US Foreign Account and Tax Compliance Act ("FATCA") started monitoring the implementation of the standard through peer reviews. The international standard laid down in the terms of reference of the Global Forum for monitoring and reviewing progress towards transparency and exchange of information considers the availability of relevant information within a given jurisdiction, the ability of the competent authority to access it swiftly, and whether the information may be exchanged effectively with its partners in information exchange.

1.15. At present, changes in international tax transparency are being driven by developments around the globe with unprecedented political support for automatic exchange of information. In April 2013, the G20 finance ministers and central bank governors endorsed AEOI as the new standard. In light of the automatic information exchange standard, the G8 Presidency requested a report from the OECD to analyse how jurisdictions could implement automatic exchange in a multilateral context. It invited reflections on specifications for the information to be exchanged, the legal basis for the exchange and consideration of the necessary platform to exchange the information. Participating jurisdictions that implement AEOI send and receive pre-agreed information each year without having to send a specific request.

1.16. These new global standards, EOIR and AEOI, will reduce the possibility of tax evasion. It will enable governments to recover tax revenues, and will further strengthen international efforts to increase transparency, co-operation, and accountability among financial institutions and tax administrations. The two standards are complementary, working together to enhance the effectiveness of tax administrations' efforts in addressing international tax evasion.

"Offshore tax evasion is a global issue requiring global solutions – otherwise the issue is simply relocated, rather than resolved." – OECD Report for the G8 Summit, June 2013.

1.17. Global solutions demand a global standard. The global standard should minimise costs for businesses and governments while at the same time enhancing effectiveness, maintaining confidence in open markets and best serving society at large if they are to be globally accepted.

1.18. Up to now, developing countries have generally made limited use of information exchange provision of their double tax conventions and regional tax agreements. This is perhaps due to either a lack of awareness among tax administrations of the potential such exchange of information holds to detect tax evasion and avoidance or of knowledge on how to implement exchange of information.

1.19. This write up examines the legal framework to protect the taxpayers' rights, demonstrating the concept of foreseeable relevance, protecting against fishing expeditions, information exchange under various treaties, confidentiality of information exchanged, and the administrative policies and practices to protect confidentiality.

1.20. The write up also sets out best practices related to confidentiality and provides practical guidance, including recommendations and a checklist, on how to meet an adequate level of protection while recognising that different tax administrations may have different approaches in ensuring that, in practice, they achieve the required level of effective protection of confidentiality.

2. Tax Information Exchange Agreements (TIEAs)

2.1. In past years, fighting money laundering, tax evasion and corruption have become an important topic at both the European and global level. Due to the far-reaching revelation of the Panama Papers and Paradise Papers, many institutions and governments decided to strengthen national and international laws in order to combat leakage of tax revenues by adoption of structures or strategies involving tax havens and financial offshore centres.

2.2. At the European Union level, the Panama Papers led to discussions on appropriate legislative measures. In July 2016, the European Commission published the Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

2.3. The proposal could be traced to the need for tax authorities to have greater access to information on the beneficial owners of intermediary entities. The objective of this initiative was to enable tax authorities to have consistent access to information concerning money laundering in the process of monitoring the proper application of the Directive on Administrative Co-operation by Financial Institutions.

2.4. The approach of the EU to dealing with tax havens has been generally consistent with the initiatives of the OECD under the guidance of the G20 since 2009. At the OECD level, the OECD and its partners worked together to:

a) Set the global standard for tax transparency and exchange of information, with the Global Forum on Transparency and Exchange of Information for Tax Purposes assessing almost 150 jurisdictions around the world on their compliance with the

standard, helping to ensure that the identity of beneficial owners of companies, trusts, and partnerships is available to tax authorities when needed;

b) Develop a global standard on regular and automatic exchange of financial account information, which is now being implemented by more than 100 jurisdictions. This ensures the ownership of bank accounts and other financial accounts around the world are more transparent and harder to hide;

c) Share best practices and collaborate in mobilising a 'whole of government' response to financial crime, capitalising on the potential of data and technology to uncover fraud, taking action against the professional enablers that tax fraud relies upon, and building capacity to respond to these issues across the world.

2.5. Participants at the conference from around the world emphasised the importance of internationally co-ordinated work on combating tax crimes and other financial crimes, and welcomed efforts to proceed on the following five-point action plan:

a) Focus on targeted responses to professional enablers.

Although professional advisors and intermediaries can play a really important role in helping the financial system run smoothly, some of the recent big data leak stories show that a number of professionals enable some of the most complex and global forms of tax crime. At the Forum, participants considered a broad range of possible approaches to professional enablers, including supervisory and regulatory measures, designing criminal liability regimes, and targeted strategies.

b) Increase inter-agency co-operation across governments to partner in the fight against financial crime.

Building a comprehensive global response to tax crime cannot be achieved by one part of government, or one country alone: instead government agencies must work in partnership.

c) See the full picture – implement the ten global principles necessary for fighting tax crime.

The Forum agreed that countries must have all of the key building blocks that are needed to effectively fight tax crimes, including legal, strategic, organisational, and operational measures. This provides countries around the world with clear benchmarks and highlights best practices.

d) Improve international co-operation amongst agencies fighting tax crimes.

In the era of "big data", there are multiple sources of data held by different agencies and countries that can be relevant to uncovering financial crime. Where the threat is international, fast, secure and effective ways are needed for tax crime investigators to share intelligence and information with their international counterparts.

e) Strengthen capacity building to effectively combat financial crimes.

Modern tax crime and other financial crimes are often conducted across borders. This means collaboration is key to responding to tax crimes and stopping the illicit flow of money across borders. For this reason, many jurisdictions and development agencies have committed to building capacity to investigate tax crimes effectively.

2.6. Grace Perez-Navarro, Deputy Director of the OECD's Centre for Tax Policy and Administration[5] said: "Financial crimes affect countries around the world. Criminals

[5]*http://www.oecd.org/tax/crime/closing-statement-oecd-forum-on-tax-and-crime-november-2017.pdf - Fifth OECD Forum on Tax and Crime: A Whole of Government Approach, 8 November 2017*

operate across international boundaries, constantly trying to find new ways to break the law, and hide their illicit profits. The most effective response is partnership. Partnership between countries, partnership across different parts of government, and partnerships between policy-makers and operational leaders."

2.7. The Global Forum on Transparency and Exchange of Information for Tax Purposes at the OECD reports annually on the implementation progress of the internationally agreed standard on the exchange of information for tax purposes. This standard for the automatic exchange of taxpayer data is known as the Common Reporting Standard ("CRS"). The first exchange of taxpayer data among the jurisdictions implementing the standard occurred in 2017.

2.8. OECD introduced the CRS at the February 2014 meeting of G20 Finance Ministers and the Global Forum declared in its 2016 annual report that 101 jurisdictions have now committed to the automatic exchange of taxpayer information under CRS.

2.9. India has been amongst the first 49 countries to implement the CRS standard for automatic exchange of information. Although, as of now, no legislations have been made in India in this regard, this is a huge step taken in the direction of combating tax evasion.

2.10. As per the Agreement on Exchange of Information on Tax Matters, by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"), 2000-

"Tax Information Exchange Agreement is a bilateral agreement that is negotiated and signed between two countries to establish an official system for the exchange of information relating to taxes."

2.11. The purpose of TIEA is to promote international co-operation in tax matters through exchange of information. The OECD spear-headed the campaign for negotiation of TIEAs to enable countries to access information about their own residents' offshore investment activities in and through tax havens. TIEAs 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.

2.12. The information will be provided only 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. Experience suggests that countries narrow the conditions that trigger the requirement to exchange information, and restrict the categories of data that would have to be transferred.

2.13. OECD has established standards on transparency and exchange of information for tax purposes, and has strongly encouraged countries to adopt these standards. The OECD and the Financial Action Task Force, members of which are the G-20 countries, have stated that a country must have a minimum of twelve TIEAs in order to be regarded as co-operating in matters of tax information exchange transparency. Jurisdictions that fail to do so will be regarded as non-cooperative jurisdictions. The G-20 countries have stated that action will be taken against such jurisdictions.

2.14. Whilst twelve TIEAs are the minimum standard for the present, G-20 countries are encouraging international financial centres to execute collaborative treaties in excess of

this mandated requirement. Currently, OECD and non-member countries are negotiating tax information exchange agreements, many of which will be signed and ratified over the coming years. TIEAs are intended to allow full exchange of information on criminal and civil tax matters between the two signatories. Each TIEA will come into force once both countries have given legal effect to it.

2.15. Most TIEAs are based on an OECD Model Agreement, which was published in 2002 by the Global Forum on Taxation, a loose institution formed in 2001 as a result of the OECD's Harmful Tax Practices Project. This Forum includes many international financial centres, such as Aruba, Bermuda, the Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, Seychelles, and San Marino.

2.16. The Model TIEA requires the provision of information exchange only 'upon request'. It includes strict conditions about the form of such request, designed to prevent so-called 'fishing expeditions'. A request must be detailed, with specified criteria set out. This ensures that the requesting party has a genuine, strong case before requesting the information.

3. Exchange of Information ("EOI")

3.1. Exchange of Information ("EOI") is the cross-border sharing of taxpayer information by tax administrations. A tax administration may ask for specific information on a particular case from another jurisdiction. When this happens, it is known as Exchange of Information on Request or EOIR. Alternatively, a jurisdiction may freely offer information it believes to be of interest to another tax authority. This voluntary sharing is called Automatic Exchange of Information or AEOI.

3.2. In the area of tax policy, EOI is a critical tool in assuring compliance with tax codes. As the economy becomes increasingly globalised, taxpayers gain greater freedom to move between countries and regions. Tax authorities, however, are restrained by national borders. In order for governments to ensure the proper application of their tax laws, free and accurate exchange of information is critical. The OECD Centre for Tax Policy and Administration works to improve the flow of information in this area and establish a legal framework to facilitate it.

3.3. A number of distinctions can be made between EOIR and AEOI within the broad topic of EOI.

3.4. EOIR takes place in the context of a specific investigation about a particular taxpayer and is likely to involve a range of information required as part of the investigation. The growth in AEOI in recent years will mean that huge amounts of financial data relating to taxpayers will flow between tax authorities. This huge growth in AEOI is likely to mean that much financial information about taxpayers resident in a jurisdiction will already be available to the tax authorities of that jurisdiction. Therefore, EOIR, in principle, will become less common and more focused at obtaining specific

information. The growth of AEOI may mean that EOIR is used only in cases where the information is critical to an investigation.

3.5. The issues of taxpayer protection in the cases of EOIR and AEOI are not identical. For EOIR, one of the key issues is the obligation to notify the taxpayer concerned before information is exchanged. By contrast, the issue of the security of the data is far more significant for AEOI than it is for EOIR.

3.6. The next distinction that needs to be made is between the protection of the taxpayer in the requesting state and in the requested state. This is an issue primarily for EOIR. In the case of EOIR, the requesting state has to decide before it makes its request what rights of the taxpayer might be engaged when it seeks information from another country, and how those rights might best be protected. In the case of the requested state, that state has to decide with regard to the rights of taxpayers if it needs to use its powers to obtain information for the purpose of exchange. The requested state also needs to consider the guarantees for the taxpayer offered by the requesting state in respect of information supplied to it. Once information has been supplied, the requesting state has to protect the rights of the taxpayer with regard to that information. In the case of AEOI also, the state that is gathering the financial information for the purposes of exchange needs to consider what rights of taxpayers are impacted by the process of gathering and processing the data, and to consider what safeguards are necessary for the transmission of the data to the recipient state, and what safeguards are offered by the recipient state for that data once received. The recipient state, once it has received the financial data, also has to decide how to protect the rights of taxpayers with respect to that data: for

example, with regard to the security of data and with regard to access by the taxpayer to the data to check its accuracy and correct any inaccuracies.

3.7. A third and final set of distinctions needs to be drawn for the purposes of EOIR between

a) information already held by the requested state relating to the taxpayer;

b) information that the requested state needs to obtain from the taxpayer personally; and

c) information that the requested state needs to obtain from a third party.

3.8. In the case of information already held by the tax authority, there are clearly no further steps needed to gather the information and the requested authority could supply the information if it is convinced that the taxpayers' rights are adequately protected. On the other hand, if information has to be obtained from the taxpayer personally, the taxpayer will be informed. Where information is being sought from a third party, the question is whether the requested state needs to inform the taxpayer and give him the right to challenge the collection of the information or its transmission.

4. Model Agreement on Exchange of Information on Tax Matters (Model TIEA)

4.1. The purpose of the model agreement is to promote international co-operation in tax matters through exchange of information. The agreement represents the OECD's initiative on harmful tax practices and contains two models for bilateral agreements. The agreement is not a binding instrument but many bilateral agreements are based on it. .

4.2. Exchange of information on request was supplemented by an automatic process on October 29, 2014. The automatic process is based on a Common Reporting Standard.

4.3. Typically, a TIEA comprises the following:

a) It provides for exchange of information that is "foreseeably relevant" to the administration and enforcement of domestic tax laws on the contracting parties.

b) The information provided under TIEA is protected by confidentiality obligations. Disclosure can be made to courts or judicial forums only for the purpose of determination of the taxation matter in question.

c) Information requested may relate to a person who is not a resident of a contracting party.

d) There is an obligation on part of the requested party to gather information if it is not in its possession, notwithstanding the fact that it does not itself need that information. Therefore, no "domestic interest" for tax purposes is required for providing the information.

e) Information is defined in an expansive manner to cover banking details, ownership details of companies/persons/funds/trusts etc.

f) Apart from exchange of information, representatives of one party may be permitted to conduct tax examinations in the territory of another party including interviews of individuals and examination of records.

4.4. Every country strives to elicit information in relation to its potential taxpayers from offshore jurisdictions, especially those that are considered as tax havens. Indian revenue authorities are in negotiations with various countries/jurisdictions for TIEA. Currently, India has entered into TIEAs with the following 19 countries:[6]

1. Argentina
2. Bahrain
3. Bahamas
4. Bermuda
5. Belize
6. British Virgin Islands
7. Cayman Islands
8. Gibraltar
9. Guernsey
10. Isle of Man
11. Jersey
12. Liberia
13. Macau SAR
14. Maldives
15. Monaco
16. Principality of Liechtenstein
17. Saint Kitts & Nevis
18. San Marino and
19. Seychelles

[6] *http://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx*

5. Tax Payer Rights

5.1. Exchange of information, whether on request, spontaneous or automatic, is about achieving global tax co-operation. Enormous progress has been made in the recent past in establishing high standards of tax transparency and information sharing. This evolution has considerably improved tax authorities' ability to deter, detect, disrupt and put an end to secrecy, tax evasion and avoidance.

5.2. Increased cross border opportunities pose a challenge for a government in maintaining investment flows and to simultaneously ensure effective collection of taxes. At the same time, the need to focus on the challenges to a taxpayer's privacy rights and interests presented by TIE assumes importance. International agreements need to help protect taxpayer privacy rights while at the same time encourage a more effective sharing of taxpayer information across borders. The implementation of tax information exchange ("TIE") should be accompanied by assurance to governments that the rights of their citizens and residents will be respected.

5.3. Taxpayers are struggling to uphold this entitlement to privacy. To be meaningful in such a struggle, the various rights of an assessee need to be identified. The taxpayer should understand these rights and limitations to ensure that he is not caught up in unnecessary tribulation. There is nothing wrong with asking questions and wanting answers from the authorities. As Benjamin Franklin said, "It is the first responsibility of every citizen to question authority."

6. Fundamental Principles supporting Taxpayer Rights

6.1. A tax system must be rule-based. The rule of law requires strict interpretation of the law to provide legal certainty. It also requires that the relationship between the government and its nationals be governed by law. The laws must be made through proper constitutional procedures by the legislature or government agencies under delegated lawmaking powers, and they must be applied uniformly. No organisation or individual should be above the law. Therefore, government, its agencies and private citizens must all abide by the law.

6.2. What tools can we use to maintain a legitimate and effective tax system? How can one approach vague areas where law, regulation and practice merge? It is easy to go straight to the rules that are enshrined in any compilation that taxpayer rights should be protected. However, it is useful to identify the principles that have been used over the centuries to identify what is required of a tax system. Although they vary, depending on the context, they reflect the approach taken in most reviews of tax systems. More importantly, they provide, together with the fundamental rules, a basis for any framework of taxpayer rights, legal or otherwise.

6.3. A fundamental principle affecting tax law is that all taxes must be based on a law made by the legislature (i.e. no taxation without representation), and they should not be determined by administrative or judicial discretion. Governments and their agencies must act by laws and not decrees; they must comply with laws passed by parliament. Taxpayers must have legal certainty. They should be able to predict in advance and with sufficient certainty the tax consequences of their actions.

6.4. The principles can be summarised as follows:

6.4.1. Equity and fairness:

a) The design of the taxation system should exhibit horizontal and vertical equity.

b) The public should perceive the tax system as fair.

c) Inter-nation equity should be considered for international elements.

6.4.2. Certainty and simplicity:

a) Tax rules should not be arbitrary. Tax rules should be applied to commerce in accordance with the structures and mechanisms by which commerce operates. Commerce should not be compelled to operate in a manner which is convenient for the collection of tax.

b) Tax rules should be clear and simple to understand, so that taxpayers can anticipate in advance the tax consequences of a transaction including knowing when, where and how the tax is to be accounted.

c) There should be transparency and visibility in the design and implementation of tax rules.

6.4.3. Efficiency:

a) Compliance and administration costs should be minimised and payment of tax should be easy.

6.4.4. Neutrality:

a) The tax system should not impede or reduce the productive capacity of the economy.

b) Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.

c) Capital import neutrality and capital export neutrality should be attained.

6.4.5. Effectiveness:

a) The system should collect the right amount of tax at the right time without imposing double taxation or unintentional non-taxation at both the domestic and international levels.

b) The system should be flexible and dynamic to ensure a match with technological and commercial developments.

c) The potential for active or passive non-compliance should be minimised while keeping counter-acting measures proportionate to the risks involved.

6.5. As per the General Report on Taxpayer Rights by Baker and Pistone,[7] the principles relating to taxpayer rights in a tax audit can be categorised as follows:

6.5.1. Principle of Proportionality:

a) The principle of proportionality is based on facts and circumstances, and implies that the intervention into the realm of the taxpayer, the duration, the intensity and any disadvantages suffered must be in proportion to the object of the tax audit.

b) Theoretically, proportionality is linked to the principle of reasonableness. Both concepts are different models of the concept of "avoidance of arbitrariness". Both intend to serve the principle of fairness.

6.5.2. Ne bis in idem:

[7] *'The practical protection of taxpayers' fundamental rights' – General Report by Philip Baker and Pasquale Piston, 2015*

6.5.2.1 Ne bis in idem or Non bis in idem, which translates literally from Latin as "not twice in the same [thing]", is a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action.

6.5.2.2 The ne bis in idem principle is also known as the prohibition of double jeopardy. It is a principle that aims at achieving stability in legal relations and avoiding exposure to an obligation to defend one's rights more than once.

6.5.2.3 In relation to tax audit, this principle implies that the taxpayer can be subjected to only one audit in respect of the same taxable period, i.e. a legal prohibition of repeated audits.

6.5.2 Audi alteram partem:

6.5.2.1 Audi alteram partem is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing. Each party should be given the opportunity to respond to the evidence against them and the right to a fair trial.

6.5.2.2 The specific implications of this principle are that, starting from the activities connected with the issuing of a tax notice, taxpayers also enjoy the right

a) to be notified of all decisions taken,
b) to attend all relevant meetings with tax authorities,
c) to be heard and provide factual information,
d) to present their views and objections

before any decision of the tax authorities becomes final.

6.5.2.3 The Supreme Court of India in C.B. Gautam v. Union of India [1992] 65 Taxman 440 (SC) has made the following observations on the audi alteram partem rule ('Hear the other side'):

"26. It must, however, be borne in mind that Courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

6.5.2.4 In the case of Olga Tellis v. Bombay Municipal Corporation [1985] Suppl. 2 SCR 51 at 89, a Constitution Bench comprising five learned Judges had an occasion to deal with the provisions of section 314 of the Bombay Municipal Corporation Act, 1888. Chandrachud, CJ went on to observe as follows:

"…There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be

shown to exist, when so required, the burden being upon those who affirm their existence."

6.5.3 Nemo tenetur se detegere:

6.5.3.1 This principle talks about the right against self-incrimination, i.e. the right to remain silent.

6.5.3.2 This right has particular importance in matters of criminal relevance that may arise in the context of any tax audit. The taxpayer should not be under pressure to answer questions, whether orally or in writing, which might lead to self-incrimination.

6.5.3.3 Only information disclosing the subjective intention of the taxpayer, such as his statements on actual facts related to the procedure, should be protected. Accordingly, this right should not be invoked in order to allow taxpayers to escape their obligation to co-operate with the tax authorities, in particular when the tax system relies on them to keep documents, which are of crucial importance for the determination of taxable income.

6.6. These principles will always compete and overlap with each other. The art of taxation design is to balance the principles most effectively in achieving the intended purpose. Vertical equity, for example, is often sacrificed to achieve other principles.

6.7. As the Carter Commission[8] put it in 1966:

"We realize that some of the objectives are in conflict, in the sense that movement toward one goal means that others might be achieved less adequately. Simultaneous realization of all the goals in some degree will constitute success if, as we hope, our

[8] *'Income Tax reform in Canada: The report of the royal commission on taxation' by Boris J Bitter*

choices as to the appropriate compromises adequately reflect the [informed] consensus..."

6.8. The principles outlined above form the basic rights of taxpayers in tax systems. They demonstrate that the 'social compact' of the state and its citizens is underpinned by the exercise of these rights in conjunction with the imposition of obligations to pay taxes.

7. Demonstrating "Foreseeable Relevance"

7.1. "Foreseeable relevance" implies that the requesting state provides an explanation as to how the information requested would be relevant for the tax affairs of the taxpayer concerned relating to investigation, assessment or collection of taxes. The information sought needs to be relevant at the time when the request is made. It is immaterial whether the information, once provided, actually proves to be relevant or not.

7.2. The information requested should be "foreseeably relevant" for

a) carrying out the provisions of the DTAA or

b) administration and enforcement of domestic laws concerning taxes of every kind and description imposed by the contracting state or their political sub-divisions and local authorities.

7.3. In some of the DTAAs, in place of the words "foreseeably relevant", the word "necessary" is used. However, it is internationally accepted that these two terms broadly convey the same meaning.

7.4. While making the initial request, all the relevant facts of the case should be clearly brought out. The relevance of information for the purposes of administration and enforcement of tax laws should be spelt out in sufficient detail. This is essentially done to help foreign tax authorities to provide the information requested, prevent legal challenges to proceedings in accessing information, if any, in the requested state, and obviate the need for further clarifications on their part, thereby avoiding delays.

7.5. All the TIEA entered into by India require the presence of "foreseeable relevance" at the time of making requests except the TIEA with Bermuda where Article 1 provides

that *"Contracting Parties shall provide assistance through exchange of information that is "relevant" to the administration and enforcement of the domestic laws."*

8. Protection against Fishing Expedition

8.1. A fishing expedition is a search or investigation undertaken with the hope of discovering information. In the context of exchange of information, 'fishing expedition' refers to a speculative request that has no apparent nexus to the inquiry or investigation in the requesting state.

8.2. A state does not have the liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. If a state is confronted with a request to provide administrative assistance and exchange information in cases of fishing expedition, the requested state is under no obligation to provide information.

8.3. The commentary to Article 26 of the OECD Model Tax Convention provides the following illustrations of what would constitute a 'fishing expedition':

a) *Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information.*

b) *Company B is a company established in State B. State A requests the names of all shareholders in Company B resident of State A and information on all dividend payments made to such shareholders. The requesting State A points out that*

Company B has significant business activity in State A and is therefore likely to have shareholders resident of State A.

The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.

8.4. The above examples assert that when a request for information is made only with the hope of discovering some information, it is regarded as a fishing expedition. Generally, the requesting state must provide the name and address of the person whose information is sought to be obtained. However, some requests made without stating the name and address of the person concerned are also allowed. This happens when the requesting state identifies the 'person under examination' in a manner other than by stating its name and address. In essence, the request is considered as a fishing expedition when it is not targeted at specific persons under examination.

9. Right to Confidentiality

9.1. Confidentiality is the protection of personal information. Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems. A taxpayer's information, including sensitive financial and personal information, must be kept private. The tax administration is obliged to ensure that this information is not disclosed inappropriately, either intentionally or by accident.

9.2. Article 26(2) of the OECD Model DTAA provides for confidentiality provisions. It states that information received under the provisions of a tax treaty shall be treated as secret in the same manner as information obtained under the domestic laws of the receiving state. It also provides the purposes for which the information may be used and limits the disclosure of the information to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, enforcement, prosecution; and determination of appeals in relation to the taxes with respect to which information may be exchanged under the treaty. The information can also be disclosed to oversight bodies, which includes bodies which supervise the work of tax administration and enforcement authorities as part of the general administration of the government.

9.3. The above referred persons or authorities can use the information only for tax purposes and may disclose the information during their proceedings if such proceedings are open to the public, or in their judicial verdicts. Once the information becomes public in this way, the information can be used for other purposes.

9.4. The Commentary on Article 26 (concerning the Exchange of Information) in paragraph 12 states that the information received under the tax treaties may not be disclosed under domestic information disclosure laws such as freedom of information or other

legislation that allows access to governmental documents. In India, the information received from a foreign government is exempt under section 8(1)(a) and 8(1)(f) of the Right to Information Act, 2005, and thus the information cannot be disclosed under the said Act.

9.5. The Supreme Court of India, in the case of Girish Ramchanda Deshpande vs. Central Information Commissioner & Ors.,[9] has held that the details disclosed by a person in his income tax returns are "personal information", which stand exempted under clause (j) of section 8(1) of the Right to Information Act, 2005, unless it involves a larger public interest.

9.6. The Commentary on Article 26 in paragraph 11 states that the confidentiality rules apply to all types of information exchanged including information provided in a request as also information transmitted in response to a request. Thus, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information.

9.7. Paragraph 11 of the Commentary to the OECD model convention says that in situations where the requested state determines that the requesting state does not comply with its obligations regarding the confidentiality of the information exchanged under Article 26, the requested state may suspend assistance under Article 26 until such time as proper assurance is given by the requesting state that those obligations will indeed be respected.

[9] *SLP (Civil) No. 27734 of 2012*

9.8. Every country negotiates a TIEA according to its bargaining power and readiness to exchange information. India has signed various Tax Information Exchange Agreements. Article 8 of most of the TIEAs that India has entered into contains provisions relating to confidentiality (Article 9 in Jersey, Guernsey and Bermuda). It is observed that TIEAs with Liberia and Belize do not explicitly contain an article on confidentiality. However, by international consensus, information shared under the exchange agreement cannot be divulged. Confidentiality is thus to be maintained even if the TIEA does not explicitly contain a provision to that effect. Any divulgence of data without consent could strain international relations and prevent further exchange of data.

10. Domestic Provisions for maintaining confidentiality and Precedence of Treaty Provisions

10.1. International standards, as monitored by the Global Forum, require that the domestic legislation should have provisions to ensure that all treaty obligations are respected under domestic law. This may be done through a specific provision in domestic law or through a judicial interpretation that the provisions of tax treaties take precedence over domestic law in case of inconsistencies. The Global Forum guide on the protection of confidentiality of information exchanged for tax purposes published in 2012 sets out the best practices related to confidentiality. It also provides practical guidance, including recommendations and a checklist, on how to meet an adequate level of protection. This is after due consideration to the fact that different tax administrations may have different approaches to ensuring that in practice they achieve the level required for the effective protection of confidentiality.

10.2. The Commentary on Double Taxation Convention by Klaus Vogel[10] explains the provision of confidentiality in tax treaties and its precedence over domestic law in the following words:

"Apart from that, the fifth sentence of Article 26(1) envisages the possibility for persons authorized to use the information to disclose it in public court proceedings or in judicial decisions. This refers exclusively to court proceedings within the meaning of the third and fourth sentences of Article 26(1), i.e., cases dealt with by fiscal courts or in penal proceedings for fraud or other tax offences. Once

[10] *Pg. 1415 of 'Klaus Vogel on Double Taxation Conventions' (Third Edition, 1997) published by Kluwer Law International*

information has thus been disclosed, it should be regarded as common knowledge and ceases to be subject to the restriction on the uses to which it may be put under the third and fourth sentences of Article 26(1) of Model Convention. However, the Model Convention does not allow any disclosure outside court proceedings or for reasons other than those named in Article 26. To the extent that domestic rules on secrecy in tax matters envisage such possibilities for disclosure, they are not applicable to information received under the international exchange of information system."

10.3. Under Indian jurisprudence, international agreements take precedence over domestic or municipal laws. The Supreme Court of India in the case of Azadi Bachao Andolan[11] has held that provisions of agreements entered into under sections 90 and 90A of the Income-tax Act, 1961, would operate even if inconsistent with the provisions of domestic law.

10.4. Accordingly, even if domestic laws allow sharing of taxpayer information in certain circumstances, sharing of information received under tax treaties is not possible if the same is not allowed under the relevant tax treaties. Information received under a tax treaty shall be treated as secret in the same manner as information obtained under the domestic laws of the receiving state.

10.5. Section 138 of the Income-tax Act, read with the notification[12] issued under that section, provides that, subject to certain exceptions, no public servant shall furnish any information contained in any statement made, return furnished or accounts or

[11] *10 SCC 1 (2004)*

[12] *Notification no. S.O.2048, dated 23 June 1965*

documents produced under the provisions of the Act, or in any evidence given, affidavit or depositions made in the course of any assessment proceedings under the Act. Section 280 of the Income-tax Act provides that if a public servant furnishes any information or produces any document in contravention of the above, he shall be punishable with imprisonment which may extend to six months and shall also be liable for fine.

10.6. Sections 138 and 280 would also apply to information received under the tax treaties including the competent authority letters and the letters requesting the information. Thus, any unauthorised disclosure by a public servant may attract action under section 280 in addition to administrative actions.

10.7. In furtherance to the matters covered under section 138, the central government issued a notification No. S.O.2048, dated 23 June 1965, in which disclosure of information including production of documents or records in certain circumstances to some notified authorities has been permitted. These includes the C&AG or any officer appointed by the C&AG, RBI, any officer or department of the central government or state government for the purpose of investigation into the conduct and affairs of any public servant or to a court in connection with any prosecution of the public servant arising out of any such investigation.

10.8. Importantly, section 138 provides that revenue officers may provide information gained in the course of their duties to other civil servants performing functions under tax or foreign exchange legislation, or if it is deemed to be in accordance with the public interest. Any disclosure made to prevent or combat fraud could be considered to be in

public interest. The notification[13] stated above allows exceptions to the general confidentiality requirements, including

a) where the information is needed under court order or

b) where the information is needed as a part of a prosecution proceeding, or

c) where the information is needed by authorised officers for tax matters, or

d) where it is needed for foreign exchange or balance of payments work, and

e) where the information is to be shared with "an authorised officer of the government of any country outside India for the granting of relief in respect of, or for the avoidance of double taxation as maybe necessary for the purposes of section 90 of the Act".

10.9. Indian tax authorities are required to keep taxpayer information received by them confidential under section 138 of the Income-tax Act. Such a status would be applicable to the information received under tax treaties also. An office memorandum,[14] dated January 1, 2015, on section 138 of the Income-tax Act was issued in circumstances where the board noticed reporting of certain information to media by public servants. Relevant extracts of the memorandum are as follows–

"Privacy of taxpayer must be respected as the information respecting an assessee is held in fiduciary capacity and maintaining its confidentiality is a statutory obligation of the department.

[13] *Notification No. S.O.2048, dated June 23, 1965*
[14] *Office memorandum [F.NO.DIR. (HQRS.)/CH.(DT)/29/2014] dated 01 January 2015. Government of India, Ministry of Finance, Department of Revenue [Central Board of Direct Taxes]*

The above legal position is brought to the notice of all officers and officials of the Department for strict compliance. Any breach of the aforesaid statutory obligation will be viewed seriously by the Board and necessary action will be initiated.

All supervisory authorities must sensitise their subordinates about the statutory position and ensure that the Board's directions are complied with both in letter and spirit."

This office memorandum draws the attention of the officers to sections 138 and 280 of the Income-tax Act and reminds them of their obligation to protect taxpayer information.

11. Domestic provisions for collection of information

11.1. The Income-tax Act contains provisions (e.g. Section 285A and 285BA) which facilitate collection of information by creating obligation on certain persons to furnish information or report certain transactions.

11.2. Section 285A of the Act mandates furnishing of information or documents by an Indian concern in certain cases. It requires an Indian company or entity through/in which a foreign company holds assets in India, to furnish information in the prescribed manner. The Indian concerns have to report any transaction having the effect of directly or indirectly altering the ownership structure or control of the said Indian concerns. Section 271GA levies penalty for failure to furnish information or documents under section 285A.

11.3. Section 285BA of the Income-tax Act provides for obligation to furnish a statement of financial transactions or reportable accounts. Section 285BA was inserted by Finance Act, 2003. Para 81 of Circular no. 7/2003, dated September 5, 2003, explaining the substance of the new provision for filing of Annual Information Return. An extract of para 81.1 of the circular is as under:

"In order to provide a mechanism wherein the flow of information regarding the material financial transactions entered into by a taxpayer with other persons is automatic so that the same can be utilised for widening and deepening of the tax base, the Finance Act, 2003 has inserted a new section 285BA."

11.4. Thereafter, an amendment via Finance Act (No. 2), 2014, effective April 1, 2015, widened the scope and effect of section 285BA. Specified entities (filers) are required

to furnish a statement of financial transactions or reportable accounts in respect of specified financial transactions or any reportable account registered/recorded/maintained by them during the financial year to the income-tax authority or another prescribed authority. With the help of the statement, tax authorities collect information on certain prescribed high value transactions undertaken by a person during the year.

11.5. Section 271FA provides for penalty for failure to furnish a statement of financial transactions or reportable accounts within the time limit prescribed. Further, furnishing an inaccurate statement of financial transactions or reportable accounts attracts penalty under section 271FAA.

12. Foreign Account Tax Compliance Act (FATCA)

12.1. America gave the world a big push in the direction of information exchange in 2010 when it passed the Foreign Account Tax Compliance Act. FATCA imposes extensive reporting obligations on US taxpayers and foreign financial entities that deal with them. The sanctions for non-compliance are so severe that failure to comply can conceivably result in penalties in excess of the unreported foreign assets, says Nina Olson, the National Taxpayer Advocate, in her annual report to Congress.[15]

12.2. Nina Olson's report asked the IRS to introduce three main safeguards to protect US persons against FATCA:

a) The IRS should issue guidance indicating lenient treatment of 'benign' non-filers, allowing reduction or waiver of penalties, particularly in the early years of the FATCA regime. Without such guidance, a real danger exists that 'reasonable cause relief' under the FATCA regime may be available in theory but not be applied in practice, she says.

b) It should develop a faster and cheaper mechanism for US taxpayers to challenge reporting errors by foreign banks.

c) It should adopt constructive suggestions from third parties, especially expat Americans, to make FATCA less onerous – something that Olson believes it has not done.

[15] *https://taxpayeradvocate.irs.gov/2013-Annual-Report/*

12.3. FATCA's intrusiveness has caused concern among banks and fund managers. Nina Olson, the official defender of US taxpayers' rights, has warned that the Foreign Account Tax Compliance Act (FATCA) is likely to be burdensome, overly broad, and detrimental to US taxpayers. It raises big questions about data privacy. Compliance costs, mostly borne overseas, are likely to be at least double the revenue that the law will generate for America. The necessary overhauls of systems and procedures and the extra "digging" to identify American clients could add significantly to a bank's administrative costs. No wonder bankers have dubbed FATCA, the "Fear and Total Confusion Act".[16]

12.4. FATCA began as a brazenly unilateral move but has slowly become more inclusive. America has already signed or is in the process of negotiating bilateral agreements with various countries, each of which would accept some version of FATCA. In return, America would offer information on its holdings of money by citizens of the reciprocating country. The patchwork of resulting intergovernmental agreements, each one different, will add to the compliance burden for international banks and fund managers.

12.5. Inspired by America's chutzpah, other countries like Britain are drawing up similar legislation of their own. India has amended its domestic laws to mandate a reporting obligation similar to that of FATCA. A large part of the rules amended is based on the Inter-Governmental Agreement between India-USA and the CRS on AEOI. Rule 114F [Definitions[17]], Rule 114G [Information to be maintained and reported] and Rule 114H

[16]*Special Report in economist dated 16 Feb 2013. http://www.economist.com/news/special-report/21571561-way-make-exchange-tax-information-work-automatic-response?fsrc=rss*
[17]*Definitions for the purpose of Rule 114G and 114H of Income-tax Rules, 1962*

[due diligence requirement] of Income-tax Rules, 1962, are inserted[18] in this regard. The statement of Reportable Account under sub-section (1) of section 285BA[19] of the Income-tax Act, 1961 as obligated by sub-rule (8) of Rule 114G is to be filed under Form 61B.[20] The Government of India has also issued a guidance note titled 'Guidance Note on FATCA and CRS'[21] to explain the reporting requirements of FATCA and CRS in a simple manner. It provides guidance to financial institutions, regulators and officers of the Income Tax Department to ensure compliance with the rules[22] notified by the Government of India.

[18] *Inserted by the Income-tax (Eleventh Amendment) Rules, 2015 w.e.f. August 7, 2015*
[19] *Section 285BA- Obligation to furnish statement of financial transaction or reportable Account*
[20] *Applicable w.e.f. January 1, 2017*
[21] *Guidance Note issued by Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, Foreign Tax and Tax Research Division. Updated as on November 10, 2016. Originally issued on August 31, 2015*
[22] *Rule 114F to 114H and Form 61B of the Income-tax Rules, 1962*

13. Immunity against use for other purposes

13.1. As per para 12 of the OECD Commentary to Article 26 of the Model Tax Convention, the information received can be shared with the taxpayer or its proxy in cases where the information is likely to be used against him, for giving an opportunity of being heard. However, only the information which is relevant to him or is likely to be used against him should be provided to the taxpayer. The taxpayer should also be given a reasonable chance to correct inaccurate information. Personal information fields like address, telephone number, e-mail address and the like could be allowed to be corrected by the taxpayer himself. In specific cases where the tax payer provides supporting evidence, even tax related information may be allowed to be corrected by tax authorities. There is little point in the taxpayer accessing information if he does not have the opportunity to correct inaccuracies.

13.2. The information which is used against the taxpayer may be made part of the assessment order. The letter of the Competent Authority, under no circumstance should be made part of the assessment order, e.g. by scanning and pasting in the order, although the relevant contents of the letter or extracts may be included.

13.3. The information received by the authorities will be available only to the assessee and nobody else. However, when the information is laid before a public court, used in the proceedings and an order containing details of tax evasion is passed on culmination, such information could be available in public domain. Then, it can be used by other law enforcement agencies dealing with corruption, money laundering, terrorist financing, etc. However, this does empower authorities having any additional information in this regard to provide the same to any unauthorised person.

13.4. When a receiving state desires to use the information for an additional purpose (i.e. non-tax purpose), the receiving state should specify to the supplying state the other purpose for which it wishes to use the information and confirm that the receiving state can use the information for such other purposes under its laws. Where the supplying state is in a position to do so, having regard to, amongst others, international agreements or other arrangements between the contracting states relating to mutual assistance between other law enforcement agencies and judicial authorities, the competent authority of the supplying state would generally be expected to authorise such use for other purposes if the information can be used for similar purposes in the supplying state.

13.5. Normally, the supplying state would not give its consent in a general manner. The request for sharing information for other purposes should be made on a case-to-case basis, clearly specifying the grounds for believing that the information may be useful for other purposes.

14. Our Findings and Recommendations

14.1. The right to tax is a hallmark of sovereignty. In today's world, nobody could credibly dispute the right of a sovereign nation to levy tax according to its laws, such as they may be, and to administer and enforce its tax system.

14.2. Taxpayers have an obligation to comply with the requirements of such a tax system. These obligations are well known and include matters such as providing true and complete information, filing tax returns on a timely basis, paying undisputed tax, co-operating with the tax authorities in the administration and enforcement of the tax system, and so forth.

14.3. *"Taxes are what we pay for a civilized society."* - This famous quote by US Supreme Court Justice Oliver Wendell Holmes Jr.[23] is inscribed above the entrance to the headquarters of the Internal Revenue Service. Governments across the globe argue that taxes are a necessary evil – the price of a "civilised society". At the time when Justice Holmes wrote that statement, the average tax rate in the Land of the Free was about 3.68%.[24] The scenario has been dramatically changing since then. With respect to the federal income tax on individuals, The Internal Revenue Code of 1954 imposed a progressive tax with 24 income brackets applying to tax rates ranging from 20% to 91%.[25] The highest marginal tax rate for individuals for US federal income tax purposes for the tax year 2013 was 39.6%.[26] The overzealous and over-reaching behaviour of administrative authorities has resulted in an erosion of trust between

[23] *In Compañia General de Tabacos de Filipinas vs. Collector of Internal Revenue, 275 U.S. 87, 100 (1927)*
[24] *General average rate of tax per individual return for the year 1927 (Page 28 of 'Statistics of Income for 1927' prepared under direction of the Commissioner of Internal Revenue by the Statistical Section, Income tax unit)*
[25] *https://en.wikipedia.org/wiki/Internal_Revenue_Code#Internal_Revenue_Code_of_1954*
[26] *Tax rate in top bracket for year 2013 from table 'History of income tax rates adjusted for inflation (1913-2010)'.https://en.wikipedia.org/wiki/Income_tax_in_the_United_States#cite_ref-67*

taxpayers and tax gatherers. When tax authorities extract beyond the 'right' amount of tax, they fail to maintain a fair balance between the rights of tax authorities and the rights of taxpayers.

14.4. As H.L. Mencken put it in his book 'A Mencken Chrestomathy',[27] *"The intelligent man, when he pays taxes, certainly does not believe that he is making a prudent and productive investment of his money; on the contrary, he feels that he is being mulcted in an excessive amount for services that, in the main, are useless to him, and that, in substantial part, are downright inimical to him."*

14.5. Decisions on cross border movement of capital, labour, technology and material are taken considering a variety of economic and commercial factors. However, when these decisions are implemented, they are done with tax benefits in the forefront. The central goal of every company is shareholder value enhancement. The principal means of achieving this end are revenue maximisation and cost minimisation. The first component, revenues, is hugely driven by external forces like market competition, size and demand. This forces management to meticulously plan and control the second component – costs like employee expenses, promotion costs and taxes. Taxpayers cannot be expected to part with their money easily, certainly not without an exploration of all reasonable and legal ways to minimise or defer the tax outflow. It is unrealistic to think that the relationship between taxpayers and the tax administration will invariably be a harmonious one, without conflict or dispute.

14.6. On practical as well as ideological grounds, citizens should co-operate with governments and tax avoidance is not to be encouraged. However, Justice Sabyasachi

[27] *An Autobiography by H. L. Mencken, published April 12th 1982 by Vintage. Originally published in 1949.*

Mukharji observes that wasteful expenditure of government greatly influences tax avoidance.

"But the question which many ordinary tax-payers very often in a country of shortages with ostentatious consumption and deprivation for the large masses ask, is does he with taxes buy civilization or does he facilitate the wastes and ostentatiousness of the few. Unless wastes and ostentatiousness in Government's spendings are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance."[28]

14.7. Taxpayers' feeling that their contribution is not being utilised in the manner it ought to be is vicious for a country. It is no longer enough for tax authorities to offer only basic services. Taxpayers expect more. Tax authorities need to become more accessible. They should instil a belief that money contributed to the state is worth the benefits availed by them. A positive mindset develops confidence in the system, making the collection process more efficient.

14.8. Taxpayers are deterred from challenging decisions in courts because they fear the risk of public disclosure of their identity and financial dealings. Confidentiality issues pose the risk of reputational harm to businesses if there is an implication from the hearing that they were not fully compliant with their tax obligations. This is an obstacle in proper administration of justice. To address the issue, judicial proceedings could be heard in private and judgements be anonymised.

[28] *In Commissioner of Wealth Tax, vs. Arvind Narottam (Indl.) 1988 AIR 1824, 1988 SCR Supl. (2) 266*

14.9. In the information exchange epoch, the rights of taxpayers must be acknowledged. Authorities have had clear power over the taxpayer. With the focus of BEPS on more powers to limit base erosion or profit shifting, the intimidation of the revenue is bound to aggravate. Reform in exchange of information is needed. The state should take the time to do it right. It must be ensured that the changes do not come at a heavy price to the public. This is a surgery to be performed with a scalpel, not a butcher's knife. One would expect that the plethora of rules would correspond with an increase in taxpayer protection. As stated by P. Pistone, *"…stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights."*[29]

14.10. The taxpayers should be able to wage an effective fight against harassment by tax authorities. They should be equipped to question the source, timing and purpose of the data available with authorities to test its authenticity. The taxpayer should not be subject to unreasonable difficulty and his assets not be confiscated, seized or encumbered without due process. A separate office of tax ombudsman or taxpayer advocate could be established. However, it will serve the purpose of protecting a taxpayer only when it is independent from normal operation of the tax authority.

14.11. The concept of taxpayer rights is not a new one. The authorities are supposed to acknowledge it in their everyday work. While these rights have always been available to taxpayers on common law grounds, it is time to highlight and showcase these rights in the form of a separate legislation.

[29] *World Tax Journal, 2014 (Volume 6), "Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law" February 4, 2014*

14.12. Robust steps in the form of a legislation dealing with taxpayers' rights will lend a 'voice' to taxpayers stuck in the tight clutches of anxious authorities. The establishment of a separate legislation dealing with the taxpayer's rights will instil belief that taxpayers can adequately protect their rights. This institutional framework is the most important practical aspect of protection of taxpayers' rights.

14.13. It will serve as proof of commitment that the authorities are considering taxpayer concerns seriously and that it accepts its responsibility to treat taxpayers fairly. A set of defined rights will build upon the government's values of professionalism, respect, integrity, and co-operation. A comprehensive legislation in this regard is far from being just a Bill of Rights; at its best, it will serve as a mission statement.

14.14. It is appropriate that a balance exists between taxpayer responsibilities and taxpayer rights, with the overriding goal being that the tax system of a particular country, whatever that system may be, should – broadly speaking – be fair.

14.15. There is certainly no agreed worldwide standard for the rights of taxpayers. There is considerable variation in its understanding. It is important, therefore, to consciously explore and lay out taxpayer rights, and the attitude of taxpayers and tax advisors towards the subject of taxpayer rights. As in various BEPS action plans – particularly in information exchange – there should be a common minimum standard on which such rights should be based.

14.16. The rights enunciated must be clear, understandable and accessible. They should be incorporated as an accepted part of the existing tax regime. Specifically, the legislation must lower the compliance burden placed on taxpayers, improve taxpayers' access to

the redressal system, provide compensation to taxpayers who experience departmental abuse, and strengthen taxpayer protection.

14.17. The legislation must describe in detail the treatment that taxpayers are entitled to when they deal with the government authorities. This will ensure that their interactions are conducted as efficiently and effectively as possible. Taxpayers can expect that they are served with high standards of accuracy, professionalism, courteousness, and fairness.

14.18. *"A* right *isn't a right if it has no remedy."*

This is the philosophy behind the elementary maxim of equity jurisprudence '*ubi jus ibi remedium'*. Herbert Broom, author of Legal Maxims, 1845 defines this maxim as follows:

"If a man has a right, he must, it has been observed, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal."

14.19. Taxpayer rights should be appropriately backed by remedies. Severe consequences would deter authorities from taking such rights leniently. If this shield is not available, the rights will be reduced to mere words with only 'happy talk' in it.

14.20. The power to tax is so powerful that if abused, it can destroy lives. That is why law and jurisprudence must set up safeguards to prevent possible abuses. Taxpayer concerns should not be disregarded. It is crucial to ensure that taxpayers feel satisfied. If taxpayers have faith in the fairness and integrity of tax systems (in the areas of both administration and policy including legislation), all stakeholders including the government, taxpayer and tax advisors would benefit.

ANNEXURE – I: Administrative Policies and Practices to Protect Confidentiality[30]

In addition to the legal provisions as stated above, as per international standards, the jurisdiction receiving the information should have adequate administrative policies and practices to effectively implement their obligations under the treaty and domestic law. These policies and practices, which are applicable to information received under the provisions of the tax treaties, are summarised in the following paragraphs.

i. Classification of Treaty Exchanged Information

The information received under tax treaties needs to be safeguarded since its unauthorised disclosure may cause embarrassment to the government. Accordingly, the information received from a treaty partner is classified as "confidential" in terms of the Departmental Security

Instructions issued by the Ministry of Home Affairs guidelines for handling "confidential papers", which are encapsulated below:

- A confidential paper is intended for the perusal of a limited number of persons who have direct concern with the subject manner. It should be addressed to an officer by name and should be opened by the addressee by name or in his absence by an officer performing his duties.
- The confidential papers should be kept in safe custody in a locked safe or steel cupboard.
- The confidential papers should move from one office to another in a single sealed cover addressed by name and marked "Confidential"

[30] *Manual on Exchange of Information by Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, Foreign Tax & Tax Research Division - May, 2015*

- All confidential documents when sent by post should be enclosed in double covers. The inner cover should be marked "Confidential" and sealed with the metal departmental seal giving a distinct and clearly legible impression on the sealing wax, and addressed by name to the officer for whom it is intended. The number of the documents and particulars of the enclosures, if any, should also be mentioned on the inner cover. The outer cover should bear only the name, designation and official address of the addressee and the frank of the dispatching officer.

ii. Measures for Protection of Treaty Exchanged Documents

The CIT/DIT concerned should take adequate measures for protection of treaty exchanged information/documents, which should include the following:

- There should be restricted entry to the building/premises for security reasons, including the protection of confidential tax information. Measures for security may include presence of security guards, policies against unaccompanied visitors, security passes, etc. The employees may wear visible badges to prevent unauthorised access to the premises by others.
- The physical documents should be stored in locked steel cupboards and cabinets and access should be strictly controlled and on a need to know basis.
- The cabin/room/chambers where sensitive data/information is stored should be locked when not in use.
- "Clean Desk Policy" should be followed, including requiring supervisors/last employee out of the office to spot check employees' desks after office hours.
- Electronic documents should be kept on secure servers and firewalled and password protected to be accessed only through a unique id and password with record of access by the

employee concerned. The original CDs or storage media should be kept in the personal custody of the officer concerned.

- It should be ensured that the information transmitted through mail or electronically is transmitted securely and, in the case of electronic transmission, only with an appropriate level of encryption. In cases where information is sent in CD, the same should be encrypted and password conveyed separately.
- The information, whether physical or electronic, should be disposed of in a secure manner to ensure that it is not used subsequently.

iii. Training and Awareness

The CIT/DIT concerned should conduct internal training programmes on data protection safeguards and guidelines to maintain the confidentiality of tax treaty information. The training programme should be updated to incorporate the evolving threat landscape. Reminders should be issued on a regular basis, which makes clear to the officers/staff posted under them of their responsibilities with respect to confidential tax information including a clear understanding of where they can obtain assistance, if they have questions or require assistance.

iv. Investigation for Unauthorised disclosure

If an unauthorised disclosure takes place, the Chief Commissioner/Director General concerned should undertake an investigation and prepare a complete report, fixing responsibility and recommending actions to be taken against the person(s) concerned for the breach. The report should also suggest measures to be taken to avoid similar incidents in the future. This report may be forwarded to the Information Security Committee constituted by the Central Board of Direct

Taxes. Action for breach of confidentiality including under the conduct rules and initiation of proceeding under section 280 of the Income-tax Act may be taken in appropriate cases.

Declarations

While making the request for any information from a foreign jurisdiction, the following, including confidentiality, which is a major concern for many developed countries should be ensured and a declaration to that effect should be given as under:

- All information received in relation to the request will be kept confidential and used only for the purposes permitted in the agreement, which forms the basis for the request.
- The request is in conformity with Indian laws and administrative practice and is further in conformity with the agreement on the basis of which it is made.
- Such information would be obtainable under Indian laws and the normal course of administrative practice in similar circumstances.
- The revenue officers have pursued all means available to obtain the information, except those that give rise to disproportionate difficulties.