

Article 26 (Exchange of Information) of the Protocol to the Double Tax Treaty between Cyprus and Russia

The Protocol

The Protocol to the Double Taxation Agreement (DTA) between Cyprus and Russia was signed on 16 April 2009 following 12 months of negotiations between Cyprus and Russia which were initiated, amongst others, due to the inclusion of Cyprus in the List of Preferential Tax Regimes as pronounced by the Russian Federation. Provided the Protocol is ratified by the contracting states Russia and Cyprus in accordance with their respective national laws, it will become effective as from 1 January 2010 (with limited exceptions on the applicability of specific articles).

Article 26 of the DTA was revised to bring it in line with Article 26 of the 2008 OECD Model Tax Convention, which aims to clarify, standardise and confirm the fiscal position of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation.

Although Cyprus is not a member of the OECD, it adheres to its recommendations in line with the country's commitment to the establishment of a reliable international financial center and the avoidance of harmful taxation practices.

Article 26 of the OECD Model Tax Convention

Article 26 of the OECD Model Tax Convention creates an obligation to exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of the contracting states.

Countries are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

In formulating their requests, the applicant state should demonstrate the foreseeable relevance of the requested information. In addition, the applicant state should also pursue all domestic means to access the requested information except those that would give rise to disproportionate difficulties.

Where information is exchanged it is subject to strict confidentiality rules. It is expressly provided in Article 26 that information communicated shall be treated as secret and that it can only be used for the purposes provided for in the convention.

Cyprus legal framework

Before the signing of the Protocol to the DTA and the relevant amendment of Article 26, Cyprus had, as from 25 July 2008, amended The Assessment and Collection of Taxes Law of 1978 to 1999 (“ACT Law”) in order to comply with the requirements of the OECD recommendations and to strengthen domestic practices for the elimination of harmful taxation practices.

The relevant legislation deals specifically with the issue of exchange of information which arises as a result of DTA compliance.

Section 6 of the ACT Law empowers the Director of Taxes to request information from any third party (which may be a bank or other credit institution) in relation to a valid enquiry that has been made by the respective competent authority (also referred to as the “applicant party”) of the other Contracting State. This power is granted irrespective of any prevailing legislation which provides for confidentiality or other restriction in supplying the said information (e.g. banking secrecy, professional confidentiality – with the exception of lawyer-client confidentiality in the capacity of a lawyer acting as a legal adviser and not in providing any fiduciary services). In accordance with the provisions of the said section 6 of the law, the Director of Taxes may request the books, records or other documents or information which are held or owned by a third party, as considered necessary, in relation to any person, including a company or a partnership that has been dissolved.

The Director of Taxes is obliged to provide information to the third party from whom information is being sought, in relation to the origin of the competent authority which has made the initial enquiry to him. The third party should supply all the necessary information to the Director of Taxes in full satisfaction of the request.

The Director of Taxes will refuse to proceed with the enquiry further unless the following information is received from the competent authority of the Contracting State making the enquiry:

- (a) the identity of the person under examination or investigation;
- (b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the Director of Taxes;
- (c) the tax purpose for which the information is sought;
- (d) grounds for believing that the information requested is held by the Director of Taxes or is in the possession or control of a person within the Republic of Cyprus;
- (e) to the extent known, the name and address of any person believed to be in possession of the requested information;
- (f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice;
- (g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

In addition to the above requirements, the Director of Taxes needs to obtain the written consent of the Attorney General before he proceeds with a formal enquiry to a third party.

The Attorney General acts as the legal advisor of the Republic of Cyprus and will not provide such consent unless he is satisfied that all requirements of the law have been met and that the request is under all circumstances appropriate.

The latter provision of the law demonstrates the responsible manner with which Cyprus examines requests for exchange of information by a foreign tax or other competent authority.

Given that section 6 of the said law provides that the power of the Director of Taxes is given irrespective of other legislation on confidentiality or bank secrecy, it is submitted that when a third party is asked to comply with requests from the Director of Taxes, it will not be held in contravention of any confidentiality or bank secrecy rules. Moreover it is noted that virtually all countries have bank secrecy or confidentiality rules and meeting the standard of Article 26 of the Protocol requires only limited and generally acceptable exceptions to bank secrecy rules and would not undermine the confidence of citizens in the protection of their privacy.

To conclude:

- (i) The Protocol to the DTA between Cyprus and Russia and more specifically the revised Article 26, does not change in any way the existing legal framework and practice followed by the Cypriot tax authorities in relation to the exchange of information obligations arising as a result of the Cyprus/Russia or any other DTA.

- (ii) Third parties need to abide by the provisions of The Assessment and Collection of Taxes Law of 1978 to 1999 as from 25 July 2008, following a valid enquiry as explained above.

- (iii) The enforcement of the Protocol should not give rise to unnecessary concerns as it is subject to generally acceptable principles and heavy scrutiny.

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