1

GENERAL INTRODUCTION

The power to levy taxes is one of the key features of the Sovereignty of States. At the beginning, taxes were levied on a territorial basis, focusing on the place of situation of the assets or the location of transfers of goods. Later, with the development of industrial States and the need to finance global infrastructures and social services, modern States tended to move towards more global systems of taxation, notably on worldwide income tax. This major development led to a need to combat double international taxation (with rules such as exemption or credit methods) and, as a consequence, exchange of information. Indeed, in order to insure a fair international level of tax, each State has to be able to verify the global position of any relevant taxpayer.

Parallel to this development, globalization led to an effort to develop instruments to combat international tax fraud and evasion. Sophisticated taxpayers, such as multinational companies, could try to use the international legal framework, typically double taxation treaties (DTT), in order to insure double non-taxation. Other taxpayers, including individuals, were developing schemes of tax evasion or aggressive tax planning through the use of offshore, hybrid or complex structures. The transfer of the place of residence to tax favourable countries also started to develop.

As a consequence, international organizations and governments entered into exchange of information networks around the world with a view to fostering global transparency.

In fact, the need for international agreement in tax matters is the result of a conflict, based on international public law, between the principle of universality in taxation, on the one hand, and the principle of territoriality for the implementation of the tax rules, on the other hand. Indeed, it is generally recognized that states have the right to tax persons (individual or entities) globally (universally), so long as there is a personal connection with that state (universality). By contrast, states are usually locked inside their territory in order to implement or enforce their tax rules. States therefore need international treaties, bilateral or multilateral, in order to solve this conflict and in

1 Seer/Gabert (2009), p. 23.
particular obtain information or collection measures to ensure a fair and global taxation of their taxpayers.

1.05 While the trend towards exchange of information in tax matters started a long time ago, namely during the works of the League of Nations in 1919, it really developed globally after the publication of the various OECD Models of double taxation convention, as of 1963, and took another impetus, following the publication, in 1998, of the OECD Report against harmful tax competition.

1.06 Following the financial crisis of 2008, a major acceleration of the movement took place in the ‘big bang’ of 2009. This led to the renegotiation of hundreds of double taxation conventions based on the OECD Model Double Taxation Convention (DTC) around the world and the signature of tax exchange of information agreements (TIEA) with tax haven countries in an unprecedented way. The United States, with the enactment of FATCA in 2010, was pushing towards a global standard and has succeeded in designing a system, which is now adopted around the world, notably through the mechanism of the intergovernmental agreements.

1.07 Countries started to exchange information around the world like never before. In 2013, a step further was reached: the global consensus towards the automatic exchange of information as the new global standard. In 2014, the Common Reporting Standard (CRS) was published. Participating jurisdiction began to implement the CRS through international legal instruments (multilateral or bilateral treaties). As of 2017 the first automatic exchange of financial account information following the CRS took place between ‘early adopters’, and notably EU states. In parallel, in 2013, following a mandate of the G20, the OECD agreed on a plan against Base Erosion and Profit Shifting (so-called BEPS Programme) addressing notably, double non taxation, tax avoidance, or aggressive tax planning among multinational companies. The BEPS Programme entails 15 actions, which were published in 2015. Among those, actions 5, 12 and 13 developed rules designed to implement a spontaneous exchange of information on rulings, mandatory disclosure rules and a country-by-country reporting, which will further enhance global transparency.

1.08 This tremendous development toward exchange of information, and more generally administrative assistance in tax matters, with its constant and rapid evolution, raises of course many issues. Different, sometimes conflicting, rules and models have been developed in parallel by different institutions and governments. There is therefore a need for coordination and consultation
among the various actors. In addition, while the focus relied on the efficiency and global acceptance by countries of the rules of the exchange of information, the legal positions of the persons involved, the taxpayers, have remained of less concern. In fact, their situation remains mostly a question of domestic law, with all the potential differences that this may cause.

The purpose of this book is therefore to describe the main developments in the area of exchange of information in tax matters, the various existing instruments, their interaction and the position of the persons involved during the process.

We will thus start by describing the historical development towards a mechanism of global exchange of information in tax matters. Then, we will focus on an analysis of the main instruments providing for international exchange of information in tax matters. This includes double taxation treaties, TIEAs, the CoE/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (CMAAT), European Directives, the Swiss Rubik models and the FATCA regime. We will move on to the development of a global model of international automatic exchange of information. The proper implementation of this new system has therefore to take into account the complexities of the existing models and try to coordinate them. Moving towards automatic exchange of information also requires taking a look at potential solutions for solving the past. Furthermore, the new rules of exchange of information introduced by the BEPS Programme will also be taken into consideration.

Finally, after having analyzed in detail the various systems of international exchange of information, their interaction and complexities, we will then move on to look at the position of the taxpayers involved. This should lead us to define more precisely the level of protection of the taxpayers, during the whole exchange of information process, and the existing rights that may be challenged during it. More precisely, we will distinguish between substantive rights, such as human or constitutional freedoms, which cover essential rights of protection of human features (privacy, possession, data protection, etc.), and procedural rights, namely rights of defence in the process as such.