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BALANCE OF CONFIDENTIALITY AND TAX TRANSPARENCY IN LEGAL REGULATION OF AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN THE UNITED STATES

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The subject of research, relevance. Exchange of information is an important measure of administrative cooperation between and among tax authorities aimed at the fight with tax evasion. Tax evasion is a problem that has gone beyond national borders, thus individual states can't cope with it alone. In the light of this problem tax authorities develop new forms of administrative cooperation such as automatic exchange of information. While developing new forms, states should remember about the balance of private and public interest. In the context of automatic exchange of information this problem looks like a problem of finding a balance between confidentiality and tax transparency.

The purpose. The article discusses the problem of finding a balance between confidentiality and tax transparency on the example of the United States. The choice of the United States may be explained by its national approach to such a balance that differs from the approach of other states that have implemented the Common Reporting Standard and Mandatory Disclosure Rules. The aim of the article is to show what peculiarities in national and international regulation in the United States influence their unique approach and what is the effect of this approach on the global system of automatic exchange of information and the rights of the US taxpayers.

The methodological basis. The following scientific methods were used: comparative-legal, formal-juridical and historic-legal. The research was conducted in compliance with the principles of independence and verification of the results.

The main results, scope of application. The conclusion of this article is that the balance of private and public interest in the context of automatic exchange of information is reached by the United States through confidentiality provisions exclusively. They use their national state legislation on beneficial ownership and the lack of reciprocity in intergovernmental agreements implementing FATCA to attract foreign investors (non-resident aliens) wishing to avoid reporting under the Common Reporting Standard. Meanwhile, the United States acquire full information on the financial accounts of their citizens and resident aliens who are beneficial owners of such accounts held in foreign financial institutions. Such a state of affairs is dangerous for the effectiveness of the global system of automatic exchange of information. Moreover, it impairs the rights of Accidental Americans who permanently reside in foreign states and have no connection with the United States except for their citizenship but still have reporting obligations before the US Internal Revenue Service.

Conclusions. Automatic exchange of information should be developed in compliance with the principle of balance between tax transparency and confidentiality. States should follow one and the same approach to providing such a balance. At the same time the taxpayers' rights, in particular the rights of Accidental Americans, should be protected and they can't be outweighed by the need of administrative cooperation between or among tax authorities.

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1. Introduction

Automatic exchange of information is an important measure of international cooperation between or among tax authorities aimed at combating tax evasion, as pointed out by foreign researchers [1, p. 203], and countering the erosion of tax base, as written by domestic authors [2, p. 77]. It is thanks to this type of information exchange that transparency in the tax sphere significantly increased and "household assets in tax havens decreased by an estimate of 67 per cent" [3, p. 850].

Meanwhile, when ensuring tax transparency through the automatic exchange of information, it is necessary to remember that we are talking, in particular, about financial information, the disclosure of which may cause damage to the taxpayer. Therefore, a balance must be found between tax transparency and confidentiality, or between public and private interest.

A number of scientific publications are devoted to the problem of the relationship between confidentiality and tax transparency [4]. There are also a number of studies specifically devoted to tax transparency in the context of international cooperation between or among tax authorities [5]. There are works concerning the same issue in the context of automatic exchange of information [6] as well as confidentiality [7].

However, the correlation problem has not been sufficiently studied. Thus, the ratio of confidentiality and tax transparency in the context of automatic exchange of information on financial accounts differs depending on the jurisdiction, which is due to the peculiarities of the tax policy of a particular state.

Some researchers identify certain patterns in this matter. For example, Pietro Boria notes that the countries of Anglo-Saxon law follow the concept of the priority of private interest while the countries of continental law proceed from the priority of public interest in taxation [8, p. 10]. In our opinion, a conclusion regarding each individual jurisdiction can be made only after the analysis of its legislation and law enforcement practice.

In the United States automatic exchange of information on financial accounts is based on Foreign Account Tax Compliance Act (FATCA). Initially this law was adopted to improve the effectiveness of the voluntary disclosure rules under the Offshore Voluntary Disclosure Program[1]. As some Russian authors write, the United States, in principle, "pays special attention to achieving precisely voluntary compliance with tax laws" [9, p. 8].

It should be noted that for participating in this program taxpayers, who deliberately concealed financial assets abroad and, as a result, did not pay taxes on these assets, received the opportunity to be released from criminal liability and settle financial issues with the budget [10].

The modern global trend, on the contrary, comes from increasing the efficiency of automatic exchange of information on financial accounts through the mandatory disclosure rules [11]. The relevant Model Rules[2] have been developed by the OECD but have not yet become universally recognized. For example, the United States has not implemented them in national legislation. The territory of actual application of these rules is currently limited only to the EU[3].

In other words, the United States, unlike the EU, is in no hurry to improve tax transparency. On the contrary, opposite tendencies take place in the United States, which follows from the analysis of their international legal position and national law.

[1] Offshore Voluntary Disclosure Program of 2014. URL: https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program (date of access: 18.09.2022).

[2] Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures. URL: https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf (date of access: 19.09.2022).

[3] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0822 (date of access: 19.09.2022).

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2. National law and international legal position of the United States

The first trend is that the United States has historically entered into double tax treaties and tax information exchange agreements, stating that they deal exclusively with exchange of information on federal taxes. Moreover, when joining the Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 1988, the United States made a corresponding declaration and reservation[4].

The second trend is expressed in the fact that the United States in intergovernmental agreements implementing FATCA[5] excludes the provision of information on beneficial ownership on its part but expects it to be received from a partner state. Since the majority of partner countries, when automatically exchanging information on financial accounts, proceed from the Common Reporting Standard (CRS), which demands the provision of information about beneficial ownership, such an expectation is justified [12, p. 4].

Recall that the United States did not join this international standard developed by the OECD since they created their own system of automatic exchange of financial account information based on FATCA [13, p. 919]. In this regard, Victoria Wöhrer notes that "even though the FATCA agreements do not provide for full reciprocity but allow the United States to provide less information than their counterparty is required to provide, the OECD has acknowledged the compatibility and consistency of the FATCA agreements with the CRS" [14, p. 67].

According to foreign researchers, for the United States "this represents a key advantage over traditional tax havens, which now automatically exchange information on foreign accounts under the CRS" [15, p. 2].

For example, Article 2 of the intergovernmental agreement between the United States and France[6] establishes the international legal obligations of both parties. The French side, among other things, undertakes to provide information on the name, address and TIN in relation to each "specified US person"[7] and in the case of a non-US entity that has one or more controlling persons that are specified US persons – the name, address, and US TIN of such entity and each such specified US person. In contrast, the American side undertakes to provide information only about the name, address, TIN (in the case of an entity) or date of birth/TIN (in the case of an individual) of a person who is a resident of France and the holder of the corresponding account.

Such a difference in international legal obligations causes bewilderment among taxpayers, which is confirmed by judicial practice. For example, in France a case[8] was considered, in which one of the arguments of the plaintiffs in favor of the cancellation of the intergovernmental agreement between the United States and France was the failure of the United States to fulfill mutual obligations to provide relevant information. This state of affairs is unacceptable in terms of Article 55

[4] Reservations and Declarations for Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 1988. URL: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/127/declarations (date of access: 21.09.2022).

[5] It should be noted that in the United States FATCA is applied both directly and through intergovernmental agreements implementing it. These agreements are concluded according to several models. This article will consider only those that are concluded according to Model 1A. URL: https://home.treasury.gov/system/files/131/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf (date of access: 20.09.2022).

[6] Agreement between the Government of the United States of America and the Government of the French Republic to Improve International Tax Compliance and to Implement FATCA of 2014. URL: https://home.treasury.gov/system/files/131/BilateralAgreementUSFranceImplementFATCA.pdf (date of access: 20.09.2022).

[7] In accordance with section 1473(3) of the US Internal Revenue Code, "specified US person" means any US person, other than a closed list of entities, including corporations whose shares are regularly traded on organized securities markets, banks, trusts and others.

[8] Conseil d'État, Assemblée, 19/07/2019, 424216, Publié au recueil Lebon. URL: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038801233 (date of access: 22.09.2022).

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of the French Constitution of 1958. But the Council of State of France considered that the parties themselves determine their scope of rights and obligations when concluding an intergovernmental agreement, therefore, there is no violation of the French Constitution of 1958 [16].

As far as US national law is concerned, there are provisions, under which limited liability companies incorporated at the state level are not required to provide information about beneficial owners. So, Sergei Yakovlev writes that "now in the states of Wyoming, Delaware and Nevada when registering a company, it is not necessary to report who its true owner is. All paper work is done by agent firms quickly, cheaply and without any questions" [17].

For example, in the state of Delaware the regulation of limited liability companies is enshrined in the Limited Liability Companies Law, which is found in Chapter 18 of Title 6 of the State Code[9]. According to paragraph 18-201(a), "in order to form a limited liability company a person or persons authorized must draw up a certificate of incorporation". This certificate, submitted to the Secretary of State, must include: (1) the name of the limited liability company; (2) the address of the registered office and the name and address of the registered agent for service of court documents; (3) other information at the discretion of the members of the limited liability company. It follows from this list that the disclosure of information about beneficial ownership is indeed not mandatory.

At the same time, as foreign researchers note, "the United States, for instance, does not oblige banks to identify the beneficial owners of trusts for AEI purposes under FATCA" [18, p. 6]. In other words, trusts, like limited liability companies, can be used by foreigners to circumvent the rules of the Common Reporting Standard when investing in the United States.

Thus, a brief analysis of the international legal position and national law of the United States as well as law enforcement practice allows us to conclude that in the United States, in order to avoid the rules of the Common Reporting Standard, it is enough for a foreign investor to establish a limited liability company and open an account with an American financial institution from his or her name but in their own interests.

3. Adoption of the US Corporate Transparency Act

In this regard, it is noteworthy that in 2019 the US Congress discussed the draft of Corporate Transparency Act[10]. Under the bill, new and existing small corporations and limited liability companies are required to disclose information about beneficial ownership. Moreover, the draft provides for civil and criminal law sanctions for providing false information about beneficial ownership as well as for the willful failure to provide complete or up-to-date information.

It was this bill that formed the basis of Corporate Transparency Act passed in the United States in 2021 as part of the National Defense Authorization Act[11]. Recall that the draft of FATCA was also not adopted as an independent law [19, p. 29] but as part of Hiring Incentives to Restore Employment Act[12]. Officially, FATCA was named as the source of funding for the main law. Unofficially, FATCA was difficult to pass through the US Congress as a separate law due to its controversial nature, so it was adopted as part of such a law that was impossible not to pass. A similar situation has developed around Corporate Transparency Act.

Under this law, corporations, limited liability companies and other similar institutions are required to provide information. The category of "exempt entities" is also introduced. These include,

[9] Delaware Code. URL: http://delcode.delaware.gov/ (date of access: 20.09.2022).

[10] Corporate Transparency Act of 2019 (Bill). URL: https://www.congress.gov/bill/116th-congress/house-bill/2513#:~:text=Corporate%20Transparency%20Act%20of%202019%20This%20bill%20requires,companies%20to%20disclose%20information%20about%20their%20beneficial%20owners (date of access: 20.09.2022).

[11] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Bill). URL: https://www.congress.gov/bill/116th-congress/house-bill/6395 (date of access: 20.09.2022).

[12] Hiring Incentives to Restore Employment Act of 2010. URL: https://www.congress.gov/111/plaws/publ147/PLAW-111publ147.pdf (date of access: 20.09.2022).

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for example, banks. Reporting institutions provide information on all beneficial owners to the US Financial Intelligence Unit (Financial Crimes Enforcement Network, FinCEN). Failure to provide information or providing false information is punishable by a civil law sanction of up to $500 per day of violation and criminal law penalties of up to 2 years in prison and a fine of up to $10,000.

The adoption of Corporate Transparency Act certainly changes the perception of the US law regarding beneficial ownership. But it does not change things in the context of automatic exchange of information on financial accounts for two reasons. Firstly, banks are classified by this law as "exempt entities". Secondly, the content of intergovernmental agreements implementing FATCA remains the same: they still do not provide for a counter obligation on the part of the United States to provide information about the ultimate owners of financial accounts.

4. Comparison of the legal status of foreign investors and the US citizens in automatic exchange of information on financial accounts

Features of the national law and the international legal position of the United States open up wide opportunities for hiding information on financial accounts by foreign investors. With the adoption of Corporate Transparency Act there will be fewer such opportunities but, according to foreign experts[13], they will remain.

Information on financial accounts is a secret for the tax authorities of those jurisdictions where foreign investors are tax residents. But, if we talk about the US Internal Revenue Service, it is not. Moreover, by virtue of Chapter 3 of the US Internal Revenue Code, dedicated to the "qualified intermediary regime"[14], the US Internal Revenue Service is able to obtain information on the income of foreign investors from the US sources even from foreign financial institutions [20, p. 113].

In other words, the United States through confidentiality provisions provide for their public interest by attracting the assets of foreign investors while respecting their private interest by offering them the opportunity to avoid the rules of the Common Reporting Standard. However, at the same time foreign investors pay income taxes in the United States, unlike traditional offshores, where there is no income tax.

As far as the US citizens are concerned, Ross McGill rightly remarks that "despite the de facto assessment of the US as offshore, the rising tax rates applicable to wealthy Americans, even in the Trump era, are such that these Americans have a strong incentive to relocate and locate their state outside the US, usually in complex corporate structures that hide their true ownership or control structure and have access to lower tax rates than those that would otherwise apply to the relevant income" [21, p. 158].

The question arises whether the US citizens, like foreign investors, can create a structure abroad between themselves and a financial institution in order not to fall under the effect of intergovernmental agreements implementing FATCA and hide information about their financial accounts?

It appears that they can't. The United States receives full information from partner countries on the financial activities of their citizens since information about them is transmitted in accordance with the Common Reporting Standard. This international standard, as mentioned above, demands the disclosure of information on beneficial ownership. In other words, for the US citizens there is hardly an offshore where they could hide information about their financial accounts.

It should be noted that here we are talking about the Common Reporting Standard not in form but in essence. Naturally, the transfer of information about the financial accounts of the US citizens to the US Internal Revenue Service takes place on the basis

[13] Mayling C. Blanco. Corporate Transparency Act: New beneficial ownership reporting requirements for all entities with US operations. URL: https://www.nortonrosefulbright.com/en-hk/knowledge/publications/f99c2d40/corporate-transparency-act (date of access: 24.09.2022).

[14] Under this regime, an agreement is entered into between an intermediary that is a foreign financial institution and the US Internal Revenue Service, after which the intermediary becomes qualified. As part of this agreement he undertakes to withhold tax at a rate of 30% from the passive income of non-resident aliens and foreign corporations from the sources in the United States.

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of an intergovernmental agreement implementing FATCA. But the obligations of the partner state in it correspond to those enshrined in the Common Reporting Standard. On this basis, we can essentially talk about the transfer of information corresponding to the list enshrined in the Common Reporting Standard.

As a result, as some researchers rightly point out, "this situation allows the US to raise maximum revenue out of US citizens investments abroad, but by not reciprocating to essentially become one of the most attractive places to hide foreign capital as well, increasing the competitiveness of its domestic financial institutions" [22, p. 111].

It is noteworthy that even those US citizens who have no ties with the US, other than political and legal one, can't avoid the obligation to report to the US Internal Revenue Service [23]. This category of the US citizens is called "Accidental Americans" [24]. Specifically in their case there is a clear bias towards the priority of public interest over private one. But with all this, national and foreign law enforcement practice is not in their favor [25, pp. 154-155].

For example, in Crawford et al v. United States Department of the Treasury et al[15], the case heard in the United States, the plaintiffs, among other things, sought to challenge the effect of intergovernmental agreements and FATCA on "Accidental Americans" by citing the due process and equal protection clauses embodied in the V and XIV Amendments to the US Constitution of 1787, respectively.

But the court did not agree that the US citizens living abroad are different in their legal status from the US citizens living in the United States since the reporting requirements are the same for all the US citizens. Moreover, the court noted that "the reporting requirement established by FATCA aims to address the problem of using offshore accounts for tax evasion purposes, to strengthen the system of voluntary tax compliance by placing taxpayers who have access to offshore investment opportunities on an equal footing with US taxpayers who invest stateside".

Similarly, in Virginia Hillis and Gwendolyn Louise Deegan v. the Attorney General of Canada and the Minister of National Revenue[16], the case heard in Canada, the plaintiffs attempted to prevent the collection and disclosure of taxpayer information to the US Internal Revenue Service by the Canadian Minister of National Revenue where "the collection and disclosure of the taxpayer information subjects US nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and requirements connected therewith to which Canadian citizens resident in Canada are subjected".

However, the court concluded that the plaintiffs' reliance on Article XXV of the US-Canadian double tax treaty[17] ("Non-discrimination") was untenable as there were no more onerous obligations. So, according to the court, Canadian citizens have a similar obligation under similar circumstances. This means that, based on the Common Reporting Standard, information on the financial accounts of Canadian citizens is collected by American financial institutions and transmitted automatically through the US Internal Revenue Service to the tax authority of Canada [26, p. 145].

Thus, the legal status of the US citizens in automatic exchange of information differs from the legal status of foreign investors. This is expressed in the fact that in relation to the US citizens there is a priority of public interest over private one while the private interest of foreign investors is in balance with the public interest of the United States. Among the US citizens the problem of the imbalance of private and public interest is especially acutely felt by "Accidental Americans" who, having no ties with

[15] Crawford et al v. United States Department of the Treasury et al, No. 3:2015cv00250 – Document 30 (S.D. Ohio 2015). URL: https://law.justia.com/cases/federal/district-courts/ohio/ohsdce/3:2015cv00250/185901/30/ (date of access: 25.09.2022).

[16] Virginia Hillis and Gwendolyn Louise Deegan v. the Attorney General of Canada and the Minister of National Revenue, September 16, 2015. URL: https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/119873/1/document.do (date of access: 25.09.2022).

[17] United States–Canada Income Tax Convention of 1980. URL: https://www.irs.gov/pub/irs-trty/canada.pdf (date of access: 15.09.2022).

the United States except for political and legal one, are forced to fulfill tax obligations and face the risk of being held liable for non-compliance.

5. Conclusion

Based on the results of the study, it can be concluded that the US citizens and foreign investors have different legal status in automatic exchange of information on financial accounts.

With regard to foreign investors the US maintains a balance of private and public interest but does so to the detriment of the public interests of other states. This balance is achieved thanks to the rules on confidentiality although the current global trend is different – to ensure tax transparency.

This state of affairs is unfavorable for other states since taxpayers find in the United States a tax jurisdiction, which allows them to avoid the rules of the Common Reporting Standard. The situation may worsen with the implementation by other states of the Model Mandatory Disclosure Rules developed by the OECD.

If we talk about the US citizens, then in certain cases, namely in the situation with "Accidental Americans", their private interest is lower than public interest of the United States. Between them and the United States there is only a political and legal but not a financial connection, therefore, legal relations in the tax sphere should hardly arise. But the jurisprudence of the United States and foreign countries proceeds from the opposite.

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