

OECD's Forum on Tax Administration releases Joint Audit 2019 report on enhancing tax cooperation and improving tax certainty

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Executive summary

On 28 March 2019, the Organisation for Economic Co-operation and Development's (OECD) Forum on Tax Administration (FTA) published a report titled "Joint Audit 2019 - enhancing tax co-operation and improving tax certainty" (the report). The report identifies both the benefits that may arise from the greater use of joint audits, as well as the challenges that must be overcome to ensure that those benefits can be realized as effectively and efficiently as possible, for both tax administrations and taxpayers.

The report is divided into seven chapters. The first chapter outlines the approach of the FTA Joint Audits Project, the second chapter illustrates the role that joint audits can play in enhancing tax certainty, and the third chapter provides an overview of the key benefits and the cost associated with the conduct of joint audits. The fourth chapter describes the current international landscape from the perspective of the exchange of taxpayer information in connection with joint audits, and the fifth chapter addresses the role of the taxpayer during the joint audit. The sixth Chapter deals with building capacity, relationships and trust in a dedicated network for international cooperation in joint audits. The report concludes with a summary of the joint audit process and includes practical guidance and best practices for conducting joint audits.

Detailed discussion

Background

The FTA was created in July 2002 by the OECD's Committee on Fiscal Affairs (CFA), with the aim of promoting dialogue between tax administrations and identifying good tax administration practices. FTA collaborative work is organized under three pillars: supporting the international agenda; improving compliance; and future tax administration. Among others, the FTA has been in recent years working on risk assessment and effective use of Country-by-Country reports, joint audits, tackling offshore evasion, effective taxation of sharing and gig economy participants and on-line cash registers.

The global drive by multilateral organizations and tax authorities for higher levels of international tax transparency, disclosure, documentation, and information exchange has increased the likelihood of double taxation and tax disputes. To tackle this issue, the OECD's FTA initiated a report on Joint Tax Audits to identify both the benefits and challenges of such cooperative procedures for tax administrations and taxpayers alike, and to initiate a discussion about best practices in this relatively new area of field work. While joint audits can be used for different types of taxes, the current report focuses on the use of joint audits to resolve direct tax issues.

Joint Audit 2019 report

On 28 March 2019, the OECD's FTA published the report "Joint Audit 2019 - enhancing tax co-operation and improving tax certainty" (the report). The report was prepared by a group of FTA members who are known to be proponents of such cooperative procedures, namely Germany, Italy, the Netherlands, Norway, South Africa, the United Kingdom and the United States. Fourteen other countries also provided input. The report builds on previous work performed by the FTA in 2010, also resulting in a report discussing joint and simultaneous audits (the 2010 report). Since then, multilateralism and cooperation between tax administrations has risen significantly. The report states that the 20 countries contributing to the report engaged in almost 500 simultaneous audits, in a generally coordinated manner, while only a limited number of these instances expanded to fully coordinated, jointly conducted audits.

The purpose of the 2019 report is to take stock of enhanced tax cooperation, focusing on joint audits, and to analyze current obstacles, challenges and opportunities. It also

provides guidance including best practices for the conduct of joint audits and makes recommendations of how and where improvement could be made to further maximize their potential.

The report commences by exploring the different forms of enhanced cooperation that may take place between tax administrations, ranging from the Exchange of Information (EoI) to audits that are conducted in an aligned manner by one single audit team. Taking these inputs, the report delivers a new, relatively broad definition of the term joint audit. According to the report, a joint audit is understood as:

- ▶ Two or more tax administrations joining together to:
 - Examine an issue(s)/transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organized in the participating jurisdictions, and in which the tax administrations have a common or complementary interest;
 - proceeding in a pre-agreed and coordinated manner guaranteeing a high level of integration in the process and including the presence of officials from the other tax administration;
 - where the tax administrations jointly engage with the taxpayer, enabling the taxpayer to share information with them jointly;
 - and the teams include Competent Authority representatives from each tax administration for the exchange of information.

The report clarifies that engaging in a joint audit does not imply that all those involved have to exercise the same audit powers or are conducting the audit jointly under one procedural umbrella or legal basis, but rather that the tax administrations are fully coordinated and have assigned the audit tasks among them, combining elements of simultaneous audits with the presence of tax officials in the other country(s). In addition, the report also establishes that joint audits are a tool for the tax administrations that can be both, conducted cooperatively with the taxpayer, but also non-cooperatively against the will and without involvement of the taxpayer.

In the context of the OECD's tax certainty agenda, the report comes to the conclusion that there is a significant benefit for both tax administrations and taxpayers alike to take all controversy management tools available, (i.e., international

risk assessment, joint audits, Advance Pricing Agreements (APAs) and the Mutual Agreement Procedure (MAP) into account and to manage them holistically in order to achieve a resolution at the earliest possible juncture. The report therefore recommends ensuring that the MAP Competent Authority is available if required to conclude a joint audit or to initiate MAP procedures as early as possible in cases where resolution cannot be achieved at the audit level.

According to the report, the key benefits of a joint audit for dispute resolution are predominantly in a joint approach to fact-finding involving both the participating tax administrations and the taxpayer, thus limiting the risk of misunderstandings, and allowing a more efficient, expedited process compared to separate audits and subsequent MAPs. In contrast to this, joint audits may require more time and resources than a purely domestic audit that is settled at the national level. This may include time to initiate and to conduct the joint audit, costs for travel and accommodation, differing language skills, and the need to have international tax experts on the team who are familiar with the particularities of information exchange and audit cooperation. In order to achieve a positive cost/benefit ratio as an incentive for tax administrations to engage in joint audits, the report recommends developing further guidance to ensure that appropriate cases are considered, namely those where there is a significant risk of double taxation, e.g., because the tax authority's MAP inventory indicates that comparable cases are already part of the existing MAP pipeline. In addition, the report suggests that tax administrations set clear short, immediate, and long-term objectives, and develop an evaluation framework that allows accurate assessment of whether such objectives are met.

The report also studies the legal framework in which joint audits can be conducted. Although there are a relatively large number of international regulations that allow for joint audits (e.g., the Mutual Assistance Convention, double tax treaties mirroring Article 26 of the OECD Model Convention, Tax Information Exchange Agreements (TIEAs) EU Directive 2011/16, as well as the Nordic Convention) there are still a number of uncertainties with regard to the rights and obligations of tax administrations and the interplay of local laws and regulations in the context of a joint audit. To remedy these legal obstacles, the report suggests that the OECD carry out work to further address these uncertainties, e.g., by model legislation applicable to the presence of foreign officials abroad, and to streamline the conduct of joint audits.

With regard to the role of the taxpayer, the report recommends that the taxpayer should be involved at an early stage during case selection, and emphasizes the benefit of tax authorities cooperating closely with the taxpayer. However, the precise involvement of the taxpayer will depend on the specific circumstances, and there will be differences between a joint audit in a cooperative and in a non-cooperative context, but even in the latter case, open engagement by tax administrations can sometimes result in a change of taxpayers' behavior. Further, the report recommends close cooperation with the concerned taxpayer(s) by engaging and consulting on a regular basis, unless the facts and circumstances of the case suggest otherwise. According to the report, tax administrations should share results with the taxpayer before they finalize the audit, providing the taxpayer with the opportunity to identify possible misunderstandings, and to provide any missing documentation or other evidence.

The report concludes with a summary of the joint audit process, and includes practical guidance and best practices for conducting joint audits. Among other recommendations, the report suggests determining a strategic approach to joint audits and the implementation of organizational measures accordingly, as well as to integrate joint audits within the tax certainty agenda by managing different tools and programs (e.g., international tax risk assessment, joint audits, APAs, MAP) holistically. A further recommendation is to measure costs and benefits and optimize their ratio including through case selection and program evaluation.

Additionally, the report highlights the importance of countries possessing a solid legal framework, both domestically and internationally, and of strengthening the rules applicable to the presence of tax officials abroad. The report also recommends that countries engage in training and joint audit pilots to gain higher levels of practical experience. Finally, the Report encourages tax authorities to build on the experiences of others, and to consider the best practices and recommendations contained in the report.

Implications

The report sets out that joint audits have proven to be an effective tool to ensure the right amount of tax is paid, while also minimizing the risk of double taxation. The findings, best practices and recommendations contained in this report should enable all tax administrations to engage successfully

in a joint audit. However, the findings of the report also demonstrate that there is still significant work to be carried out in order to make joint audits an efficient tax controversy management tool at the global level. In particular, the question of how joint audit results can be more effectively translated into MAP and APA procedures should be resolved by the tax administrations as soon as possible.

Although the report is a clear step in the right direction, it remains vague with regard to taxpayers' rights – for example, the right for their views and positions to be better understood before information is exchanged between tax administrations. Taking these rights further into consideration would assist in increasing taxpayers' confidence and trust in such collaborative procedures to the benefit of all stakeholders.

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