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Tending bridges to tax compliance: Is it Latin America losing momentum?

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On august 7, 2015, OECD released its *Update on Voluntary Disclosure Programmes: A pathway to tax compliance*, a renewed edition of the survey published in 2010, aimed at providing guidance to governments wishing to offer taxpayers the chance to come forward and become compliant, regularizing their tax affairs and declare income and wealth that have been concealed in the past.

When the first edition appeared, it was just a year and a half after the G20 leaders declared the end of the banking secrecy era in tax matters, and called upon countries to implement the standard on exchange of information upon request. Since then, considerable progress was made on this front as it is evidenced by (i) more than 500 standard-complying TIEAs in force, and (ii) a revitalized work of the Global Forum on Transparency and Exchange of Information, which included a peer review program to ensure that transparency the standards are effectively implemented.

The updated 2015 survey come after a new major milestone in tax transparency was reached in 2014, *i.e.*, the adoption of the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, which called on governments to obtain account information from their financial institutions and exchange it with other governments automatically and on a yearly basis. In this context, a large number of countries (including most financial centers) have already committed to implement automatic exchanges in 2017 or 2018.

The new OECD Standard on Transparency and Automatic Exchange of Information together with the conventional operation of FATCA under IGA 1 and 2 models, sharply increase the risk that taxpayers with offshore undeclared assets and income be detected in a foreseeable future. As a result, taxpayers will face severe consequences, including the payment of taxes not covered by the statute of limitations, interest, fines and criminal prosecution, all of which represent a heavy and concrete threat for keeping themselves non-compliant.

In this scenario, while entering full transparency times and prior to the effective implementation of the automatic exchange, governments might well wish to provide a last window of opportunity to non-complying taxpayers with concealed foreign assets and income to regularize their tax situation. After overpassing ethical objections, if any, this could be achieved through the launching or improvement of temporary special-purpose voluntary disclosure regimes that guarantee some form of effective protection against criminal prosecution, and, additionally, offer (though not necessarily) waivers or reductions of interest and/or fines to make it even more attractive.

These practices, whether in the form of general or special programs targeting undeclared offshore assets and income, are already widespread; in fact, the annex to the OECD 2015 Updated Survey inventoried the practical experience of 47 countries around the globe.

As the OECD Survey recognized, when the rules are properly designed and fit within the long-term compliance strategy of the tax administration, the regimes benefit the taxpayers making the disclosure, compliant taxpayers and governments as well. In this regard, it is understood that the key to success centers on allowing non-compliant taxpayers to come forward voluntarily paying more than they would, had they been fully compliant from the outset, but facing less punitive sanctions than evaders who choose to remain undisclosed and are later detected by the tax administration. In this last regard, consistency with anti-money laundering rules is also highly advisable.

A bridge to the compliant category for non-compliant taxpayers is worth building it not only for tax reasons (including short-term positive revenue impact to governments) but also to avoid creating a new tax pariah since, in times of full transparency, financial institutions are not willing to open or maintain accounts unless it is proved that funds are declared or have been regularized pursuant to the tax laws in the depositor’s home country. Of course, this is also a mobilizing reason for non-compliant taxpayers to consider coming forward under voluntary disclosure programs.

Based on the foregoing, temporary special voluntary disclosure regimes are suitable to take advantage of the momentum, by offering non-compliant taxpayers an opportunity to regularize previously concealed offshore assets/income (perhaps accumulated offshore even by predecessors –parents or grandparents–), while enlarging the national tax basis by the incorporation of such taxpayers.

In this regards, it is worth mentioning that despite the existence of a widespread experience, Latin American countries appear to be one step behind as it is demonstrated by the scarce examples of voluntary disclosure programs in the region. A variety of reasons might have led to this situation: (i) on the LATAM government side, the ill-conceived, abusively repeated, and unsuccessful experiences with tax amnesties in the past, which deeply undermined tax compliance in the long run. Tax amnesties, however, are rather different tools that implied the waiver of defaulted taxes, a feature which is absent in voluntary disclosure regimes, as recently legislated in several countries outside the region; (ii) on the taxpayer side, the lack of interest on these programs might have been based either on a sense of being beyond the rich of the law, typical of risk-taking recalcitrant evaders, and/or on more justified concerns associated with coming forward under these regimes, such as lack of certainty on criminal consequences, confidentiality and potential misuse of disclosed information which may adversely affect business or personal reputation, personal security, and future (perhaps aggravated) compliance monitoring and audits based on high-risk tax profile categorization.

As regards aggressive risk-taking taxpayers, it should be borne in mind that, as anticipated, FATCA and OECD automatic exchange of financial information have created a new massive exchange information net which should cause them to re-evaluate past behavior and come forward not only for strict tax reasons (*i.e.*, avoid severe criminal consequences), but also for the economic protection of personal wealth, since there would no longer be a secure place to hide. Insofar as the remaining factors are concerned, much will depend on the overall policy regarding compliance, and the fine tuning of the voluntary disclosure legislation, so that taxpayers’ worries regarding confidentiality, security, risk profile characterization and so on, may be overturned by a well-designed piece of legislation.

The fact is that, as of March 2015, aside from Mexico's general program (*i.e.*, not particularly targeted to undisclosed offshore funds), and Argentina's unsuccessful experience (forcing taxpayers to repatriate funds as a mandatory requirement for participation in the special program created),(1) only Chile has introduced a workable special regime patterned after successful experiences in other countries outside the region (*e.g.*, Italy and Spain, just to name a few).

The Chilean special program's main characteristics include the following: (i) it is a one-time temporary regime which would be in effect between January 1 and December 31, 2015; (ii) it applies a reduced fixed rate tax of 8% on the value of the assets and income declared, without further interest charges and fines; iii) there is no criminal prosecution under tax, foreign exchange and securities laws, but criminal prosecution is possible under anti-money laundering law; (iv) conditions for eligibility include, *inter alia*, reporting requirements concerning ownership of the assets and income declared, as well as valuation in accordance with Chilean tax laws; submission of a special return before December 31, 2015, and payment of the special 8% tax within 10 business days as from the date in which the taxpayer receives the SII's order of payment; finally, assets to be declared must have been acquired before January 1, 2014, and fall within the expressly listed type of assets allowed to be declared under the program.

Latin American administrations, aware of the troubles presently encountered by non-compliant taxpayers with undisclosed foreign liquid assets, should take advantage of the momentum by establishing temporary, voluntary disclosure regimes specially-targeted to offshore assets, couched into their national compliance strategy, following OECD guidance,(2) and avoiding overambitious goals such as the repatriation of capital which may somehow conspire against the success of the program itself.(3)

1 Funds must be used to subscribe government securities, *i.e.*, CEDIN (Investment Deposit Certificate) or BAADE (Argentine Bond for Economic Development). Besides, this program has certain features concerning the waiver of tax, interest and penalties that make it closer to a tax amnesty.

2 See Update on *Voluntary Disclosure Programmes – A Pathway to Tax Compliance*, particularly Chapters 3 and 4, p. 18-22 and p. 23-27, respectively.

3 Unless funds/assets are kept in non-cooperative (ring-fenced) jurisdictions in which case relocation may be a sound eligibility condition to facilitate the exchange of information.

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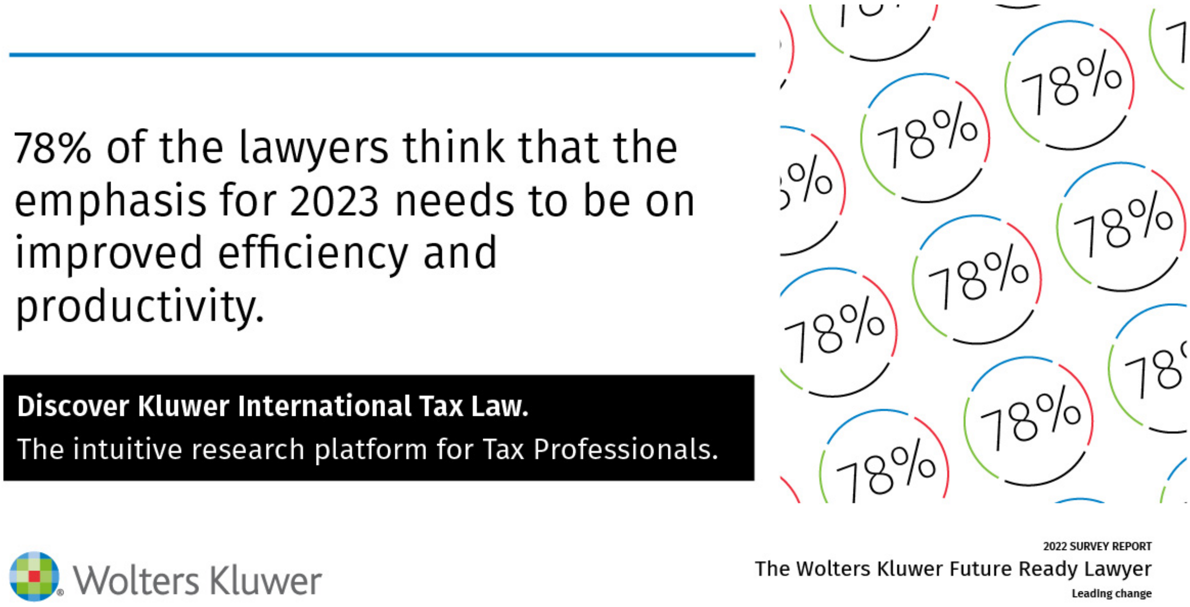

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