STEPP response to Consultation document PREVENTING ABUSE OF RESIDENCE BY INVESTMENT SCHEMES TO CIRCUMVENT THE CRS

1. STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

2. STEP takes this opportunity to comment on the Consultation on preventing abuse of residence by investment schemes to circumvent the CRS given the importance of the issue to its members and their clients.

Comments

3. The OECD consultation paper notes that “More and more jurisdictions are offering “residence by investment” (RBI) or “citizenship by investment” (CBI) schemes. These are schemes that allow foreign individuals to obtain citizenship or temporary or permanent residence rights in exchange for local investments or against a flat fee. While recognising that individuals may be interested in these schemes for a number of legitimate reasons, the consultation paper notes that they can also offer a backdoor to money-launderers and tax-evaders. In addition, the consultation paper notes that from “information released in the market place and obtained through the OECD’s CRS public disclosure facility” the abuse of RBI and CBI schemes to circumvent reporting under the Common Reporting Standard (CRS) has been highlighted.

4. The OECD is also considering a range of additional approaches to prevent the abuse of CBI/RBI schemes. This may include tax compliance and policy related measures and will take into account the possible role of all stakeholders involved, including the jurisdictions offering these schemes, the tax administrations of jurisdictions participating in the CRS, financial institutions subject to CRS reporting, the intermediaries promoting the schemes and taxpayers.
5. The Consultation Paper notes that CBI/RBI schemes do not offer a solution for escaping the legal scope of reporting pursuant to the CRS. These schemes grant a right of citizenship of a jurisdiction or a right to reside in a jurisdiction. They generally do not provide tax residence. Reporting under the CRS is based on tax residence, not on citizenship or the legal right to reside in a jurisdiction. Even where tax residence can be obtained through some RBI schemes, they do not by themselves affect the tax residence in the original country of residence of the individual. The CRS requires taxpayers to self-certify all their jurisdictions of residence for tax purposes.

6. Nevertheless, the Consultation Paper notes that CBI/RBI schemes can potentially be exploited to help undermine the CRS due diligence procedures. This may lead to inaccurate or incomplete reporting under the CRS, in particular when not all jurisdictions of tax residence are disclosed to the Reporting Financial Institution (RFI). Such a scenario could arise where an individual does not actually reside in the relevant jurisdiction, but claims to be resident for tax purposes only in such jurisdiction and provides his Financial Institution with supporting documentary evidence (e.g. certificate of residence; ID card; passport; utility bill of second house).

7. The Consultation Paper states that OECD’s initial assessment is that the risk of abuse of CBI/RBI schemes is particularly high when the scheme has one or more characteristics that the document outlines.

8. To a large extent, the circumvention of the CRS through the abuse of CBI/RBI schemes can be prevented by the correct application of the existing CRS due diligence procedures. Important in this regard are:

8.1 The requirement to have a real, permanent physical residence address (and not just a PO box or in-care-of address) for the application of the residence address rule and the necessity to confirm the presence of a real, permanent physical residence through appropriate Documentary Evidence;
8.2 The requirement to instruct Account Holders to include all jurisdictions of tax residence in their self-certification.

8.3 The rule that Financial Institutions cannot rely on a self-certification or Documentary Evidence if they know, or have reason to know, that such self-certification or Documentary Evidence is unreliable, incorrect or incomplete.

9. A RFI is required to obtain a self-certification that allows the RFI to determine a Reportable Person’s or Controlling Person’s residence for tax purposes. It can confirm the reasonableness of such self-certification based on the information obtained in connection with the opening of the account or from carrying out the relevant searches set out in the Standard, including any documentation collected pursuant to AML/KYC Procedures. It can rely on such self-certification if it does not know or have reason to know that the self-certification is incorrect or unreliable. As confirmed in the Standard, a RFI is not expected to carry out an independent legal analysis of relevant tax laws to confirm the reasonableness of a self-certification (paragraph 23, page 133).

10. A number of points arise out of this:

10.1 The CBI/RBI scheme only works if the Reporting Person does not provide information about other jurisdictions in which he is tax resident. RFIs will have carried out due diligence, including requesting self-certification from the Reporting Person as to all jurisdictions in which he is tax resident.

10.2 We understand that the purpose behind any additional steps being taken is to (1) enable RFIs to identify high risk jurisdictions; (2) provide clear guidance to RFIs as to what additional due diligence should be carried out in relation to account holders tax resident in such jurisdictions.

Alternative Options
11. To achieve its stated aim of preventing abuse by residents by investment schemes to circumvent the CRS, there are potentially other routes that could be taken. For example, the OECD could formally identify which jurisdictions it considers a high-risk for the purposes of the CBI/RBI scheme. The identifying features outlined above are sufficiently wide that they could catch a relatively large number of jurisdictions.

11.1 Alternatives:

(a) One alternative would be to permit Participating Jurisdictions to draw up their own lists of which jurisdictions are considered to be a high-risk for the purposes of a CBI/RBI scheme. This is much less desirable as it would mean that different Reporting Jurisdictions could take different views which would inevitably result in inconsistent reporting under the Standard.

(b) Another alternative would be to leave it up to individual RFIs to identify which jurisdictions should be considered a high-risk of a CBI/RBI scheme. This is contrary to the Standard which expressly states that RFIs are not under an obligation to carry out an independent legal analysis of relevant tax laws. This would put an unreasonable burden on RFIs. Different RFIs would take different views and this would inevitably lead to inconsistent reporting under the Standard.

11.2 Once the list of high-risk jurisdictions is drawn up, the Standard could be amended to provide that RFIs will need to obtain additional information about individuals claiming tax residence in that jurisdiction.

(a) As the OECD notes, the majority of individuals who are tax resident in that jurisdiction will have provided correct information to the RFI, either on the basis that it is their only jurisdiction of tax residence or they have provided full information about all other jurisdictions of tax residence. Requiring all RFIs to carry out additional investigations with respect to residents of such jurisdictions will place an additional burden upon RFIs.
(particularly those based in the relevant jurisdiction). Any requirements therefore must be proportionate to the risk.

(b) If the RFI as part of its enquiries carried out pursuant to the Standard is aware that the Reportable Person is only tax resident in a CBI/RFI country or is resident in a CBI/RBI jurisdiction but is also resident in another jurisdiction which is not a Participating Jurisdiction (a 'Relevant Reportable Person') and the RFI does not have a self-certification for such Relevant Reportable Person they should obtain a self-certification from such Relevant Reportable Person to confirm that he is not tax resident in any other jurisdiction.

(c) If the RFI as part of its enquiries carried out pursuant to the Standard is aware that the Relevant Reportable Person previously was tax resident in another jurisdiction on or after [2014 but within 6 years [suggested as most jurisdictions require tax payers to keep records for a maximum period of 6 years] of the year in which the enquiry is made] the Relevant Reportable Person could be required to provide satisfactory evidence to the RFI to demonstrate that he has ceased to be tax resident in that other jurisdiction, failing which the RFI should provide a report to that other jurisdiction. Evidence could be provided by a letter from an independent lawyer or accountant or RFI carrying on business in that other jurisdiction or confirmation from the tax authorities of that other jurisdiction.

(d) If on the opening of a Reportable Account, the Relevant Reportable Person provides evidence that (1) he is only tax resident in a CBI/RBI jurisdiction (or, in addition, he is resident in a Non-Participating Jurisdiction); and (2) he became tax resident in that jurisdiction after [2014] and within [six] years of opening the account, the Relevant Reportable Person could be asked to provide satisfactory evidence to the RFI that he is only tax resident in that CBI/RBI jurisdiction (or in that CBI/RBI
jurisdiction and Non-Participating Jurisdiction). Evidence could be provided by a letter from an independent lawyer or accountant or RFI carrying on business in the CBI/RFI jurisdiction (provided that the CBI/RFI jurisdiction is a Participating Jurisdiction).

(e) Similar requirements could apply where the Relevant Reportable Person provides evidence that he is only tax resident in a Non-Participating Jurisdiction, excluding the US which is subject to FATCA.

Conclusion

12. The current approach by the OECD is seen as too broad and unlikely to help the organisation achieve its aims. Our alternative approach, as outlined above, suggests a more targeted scheme should be more successful.

13. STEP would be happy to participate in future consultations and discussions on the subject.