A research report submitted to the Faculty of Commerce, Law and Management, University of Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Commerce (Specialising in Taxation)

ANALYSING THE TAX AGREEMENTS OF THE EXCHANGE OF INFORMATION THAT EXISTS BETWEEN THE SOUTH AFRICAN GOVERNMENT AND OTHER GOVERNMENT AUTHORITIES AROUND THE WORLD

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Date: 27 March 2015

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Declaration:

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Commerce at the University of the Witwatersrand, Johannesburg. It has not been submitted for any other degree or examination in any other university.

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ABSTRACT

South Africa had entered into 97 double taxation agreements (at the time of this study in 2014) with other countries which generally contain an article which authorises the exchange of information between South Africa and the treaty partner. The 2008 global financial crisis re-emphasized the increase in tax planning structures as a result of globalisation to avoid or evade taxes and this highlighted the need for a more transparent tax information sharing platform.

Since the 2008 economic crisis, one of the key themes has been the attempts to co-ordinate reform of the global financial system in the pursuit of greater international transparency. Since 2012 Treasury started entering into agreements with various other countries to enhance the transparency of taxes paid by entering into exchange of information agreements: these includes the Bilateral Tax Information Exchange Agreements (TIEA) and the Multilateral Mutual Administrative Assistance (MAA) Agreements and the agreement entered into with the United States of America known as the FATCA (Foreign Account Tax Compliance Act) agreement, signed 9 June 2014. This will support the Double Tax Agreement already in place to enhance the information sharing regime. Government Notices 508 and 509, Gazette number 37778, were published on 27 June 2014 in order to facilitate FATCA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30.

As FATCA is a new agreement, there is a limited overview of the impact of this exchange of information agreement. This report is to gain insight into the reasons for implementing these agreements, an overview of these agreements and the implications of these agreements, with a specific focus on the newest agreement, FATCA.

Key words:	*FATCA, Foreign Account Tax Compliance Act, Double Tax Agreement, DTA, exchange of information, automatic exchange of information, tax information sharing, transparency, Bilateral Tax Information Exchange Agreements, TIEA, Multilateral Mutual Administrative Assistance Agreement, MAA, international tax, AEOI*

CHAPTER 1: INTRODUCTION

1.1 Background

When original legislation, such as the Income Tax Act, was drafted and came into effect, it was not drafted with globalisation in mind. At that stage only a few international transactions took place and no-one could have anticipated the impact globalisation would have on businesses and transactions in the modern day.

Since the mid-1990's, the internet has had a revolutionary effect on culture and commerce, including the rise of near-instant communication by electronic mail, instant messaging, VOIP (voice over internet protocol) telephone calls, two-way interactive video calls, and the world wide web with its discussion forums, blogs, social networking, and online shopping sites. This was the start of globalisation. Globalisation is defined in the Oxford Dictionary as 'the process by which businesses or other organisations develop international influence or start operating on an international scale'. (Oxford Dictionary Online, 2013)

Globalisation has had a major effect on how business is conducted worldwide and this gave rise to increased international transactions and the formation of multinationals. Having business operations worldwide started to have benefits, one of them being better tax planning opportunities. Multinationals soon realised that with an increasingly globalised world, it is easier for taxpayers to arrange their tax affairs to avoid or potentially evade taxes. (SAIT, 2013); (Croome, 2014)

As a result, the Group of Twenty countries, known as the G20 countries, convened and one of the priorities was to create a more transparent economic environment. The G20 is the premier forum for its members' international economic cooperation and decision-making. Its membership comprises 19 countries, including the European Union. G20 leaders, finance ministers and central bank governors meet regularly to discuss ways to strengthen the global economy, reform international financial

institutions, improve financial regulation, and discuss the key economic reforms that are needed in each of the member countries. (G20, n.d.)

In addition to South Africa forming part of the G20 countries, the G20 countries also have close relations with the Organisation for Economic Co-operation and Development (OECD) convention. The OECD comprises 34 official members, and has working relations with 6 other countries (one of these being South Africa). The OECD brings together 40 countries that account for 80% of world trade and investment, giving the OECD a pivotal role in addressing the challenges facing the world economy. It became apparent that both of these organisations have, as one of their main priorities, to increase transparency in the global tax arena. (OECD, 2014a)

South Africa has entered into 97 double taxation agreements (at the time of this study in 2014) and these agreements generally contain an article which authorises the exchange of information between South Africa and the treaty partner (SARS, 2014d) (Baranowska, 2013). The 2008 global financial crisis re-emphasized the increase in tax planning opportunities as a result of globalisation to avoid or evade taxes. The increased tax planning structures gave rise to the G20, once again raising the need for a more transparent tax information sharing platform (SAIT, 2013). The increasing global drive for transparency is transforming the international tax arena, giving rise to a new era of exchange of information legislation. One of the key themes is co-ordinated reform (KPMG, 2014). Since 2012 National Treasury started entering into agreements with various other countries to enhance the transparency of taxes paid by entering into the exchange of information agreements, the most recent being the agreement entered into with the United States of America known as the FATCA (Foreign Account Tax Compliance Act) agreement signed on 9 June 2014. The FATCA agreement will support the Double Tax Agreements already in place to enhance the information sharing regime. Government Notices 508 and 509, Gazette number 37778, were published on 27 June 2014 in order to facilitate FATCA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30. (SARS, 2014c)

As this is a new agreement, there is a limited overview of the impact of this exchange of information. This report is to analyse these agreements and the impact these has on the taxpayers of South Africa.

1.2 Research problem and sub-problems

What are the consequences for South African taxpayers of the existing exchange of information agreements that the South African Government has in place?

The research focuses on analysing and giving an overview of the three types of agreements on the exchange of information between the South African government and other government authorities around the world.

The three types of agreements are:

- Bilateral Tax Information Exchange Agreements (TIEA)
- Multilateral Mutual Administrative Assistance (MAA) Conventions / Agreements
- USA Foreign Account Tax Compliance Act (FATCA) Intergovernmental Agreement

An in-depth analysis lists the requirements for the South African Revenue Authorities to exchange information with the agreed countries and under what circumstances this information will be shared. There is a specific focus on the newest agreement, FATCA.

1.3 The sub-problems

1.3.1 How do the new exchange of information agreements between the government of the Republic of South Africa and other government authorities interact with domestic laws and Double Tax Agreements?

The first sub-problem is to establish how the new exchange of information between South Africa and other government authorities interacts with domestic laws and Double Tax Agreements and to ascertain if domestic laws such as the Promotion of Access to Information Act, 2000 and the new Tax Administrative Act, 2011 are not in direct conflict with the exchange of information agreements.

1.3.2 To what extent is the SARS expected to assist in the gathering of the required information to comply with the exchange of information agreements?

The second sub-problem is to ascertain the extent to which the SARS is expected to assist to obtain this information.

1.3.3 Are there any identifiable problems that the exchange of information agreements may pose for the South African taxpayers?

The third sub-problem is to identify any problems that the agreements may pose for the South African taxpayer, understand the limitations of these agreements and the possible future problems taxpayers may encounter.

1.4 Purpose of the research

This research report will, primarily, give an overview of the international intergovernmental agreements that South Africa has entered into with other jurisdictions, to exchange information either by way of a specific request or automatically. This study is designed to give the reader an overview of the specific exchange of information agreements the South African government has in place with other jurisdictions and also to identify what information South Africa will be able to exchange with the contracting parties and in what circumstances. Due to the fact that the FATCA and the MAA Convention were entered into recently, there is only a limited understanding of the impact of these agreements and this study is to shed more light on the implications these agreements have for the South African taxpayer. This study will also give an overview of how these agreements support or contradict other secrecy and confidentiality provisions in other legislation.

1.5 Significance of the study

South Africa has actively taken part in and, in some instances has been a regional leader in matters relating to the gathering of information and sharing this with other countries to ensure that taxes are paid where they should rightfully be paid. Countries are entering into bilateral and multilateral agreements aimed at assisting one another in the collection of information and taxes.This study is vital as the SARS have made it clear that their intention is to expand the exchange of information with most jurisdictions, as they are in support of the OECD's vision to encourage tax transparency worldwide. The SARS has taken the first step towards international tax transparency but will expand on these agreements in future. (Magolego, 2014); (OECD, 2014a); (OECD, 2014b)

The exchange of information agreements is relatively new. At the time of this study there has only been limited academic research published on this topic. There has been some research published by accounting and legal firms. Therefore this study will give a much needed overview of this intergovernmental exchange of information

agreements and highlight the implications and difficulties that might arise as result of the implementation of this exchange.

1.6 Scope

The scope of this study will focus on the specific information sharing agreements that South Africa has entered into. These agreements are:

a) Bilateral Tax Information Exchange Agreements (referred to as 'TIEA')
b) Multilateral Mutual Administrative Assistance Conventions / Agreements
c) USA Foreign Account Tax Compliance Act Intergovernmental Agreement (referred to as 'FATCA IGA')

This study will also investigate whether the above mentioned agreements are supported or contradicted by the actual DTA signed with the relevant country. This study will also explore whether the exchange of information agreements are supported or contradicted by any other secrecy or confidential provisions as set out in the following legislation:

- Constitution of the Republic of South Africa Act No 108 of 1996 (referred to as 'the Consitution')
- Promotion of Access to Information Act 2 of 2000 (referred to as 'PAIA')
- Tax Administration Act 28 of 2011 (referred to as 'TAA')

1.7 Limitations

Most DTA's have a standard information sharing provision included. This is usually a general provision enabling the two contracting States to share information, and upon request, to assist in determining where the tax liability should arise. In certain instances these DTA's also provide that the contracting parties should assist in the collection of the actual tax liability. This study will only focus on the specific DTA's entered into with States if there is a TIEA, Multilateral Mutual Administrative Assistance Agreements or FATCA IGA entered into and ratified by parliament.

a) Bilateral Tax Information Exchange Agreements (TIEA)

There are nine TIEA agreements signed and effective at the time of this study, and all nine will be investigated individually and discussed collectively (SARS, 2014e). All anomalies or exceptions (if any) will be highlighted per individual agreement.

b) Multilateral Mutual Administrative Assistance Conventions / Agreements

There are three Multilateral Mutual Administrative Assistance (MAA) agreements at the time of this study, however only one agreement was published in the Government Gazette Notice and was in effect at the time of this study, the Multilateral Convention on Mutual Administrative Assistance (referred to as 'the MAA Convention'). The remaining two agreements have been signed but not ratified, therefore, the overview will be limited to the agreement ratified by Parliament. The MAA Convention was published in the Government Gazette Notice 37221 on 21 February 2014. The MAA Convention was approved by Parliament in terms of section 231 of the Constitution of South Africa and the MAA Convention took effect on 1 March 2014. (Croome, 2014); (SARS, 2014f)

c) USA Foreign Account Tax Compliance Act Intergovernmental Agreement (FATCA IGA)

FATCA IGA will be the primary focus of this study, due to the fact that this agreement was signed and ratified most recently. The FATCA IGA has the widest reaching consequences as a result of the scope of information that needs to be exchanged annually.

d) Other considerations:

The SARS has proposed a 196 page Business Requirement Specifications (BRS) document to support South African Financial Institutions and businesses in the reporting specifications and requirements when reporting automatically. Due to the BRS not being the focal point of this study, only a brief introduction of this document is explored in chapter 3.

When exploring whether the exchange of information agreements are in contradiction or support the current secrecy and confidentiality provisions in the existing legislation, only the following three specific Acts will be explored and concluded on:

- Constitution of the Republic of South Africa Act 108 of 1996 (referred to as 'the Constitution')
- Promotion of Access to Information Act 2 of 2000 (referred to as 'PAIA')
- Tax Administration Act 28 of 2011(referred to as 'TAA')

1.8 Methodology

The research method adopted consists of a review of the relevant provisions of the Acts (including the Constitution, PAIA and the TAA), agreements entered into by the South African National Treasury relevant to this research, publications by the South African National Treasury and the SARS publications and discussion papers relevant to this research, South African and international textbooks, policies, guidelines, legislation and case law as well as international treaties relating directly to the objective of this research.

CHAPTER 2: AN OVERVIEW OF THE DIFFERENT KINDS OF EXCHANGE OF INFORMATION AGREEMENTS

South Africa has actively taken part and, in some instances been a regional leader, in matters relating to the gathering and sharing of information with other countries to ensure that taxes are paid where they should rightfully be paid. Countries are entering into bilateral and multilateral agreements aimed at assisting one another in the collection of information and taxes. (Magolego, 2014); (OECD, 2014a)

South African National Treasury has entered into the following agreements (SARS, 2014g):

a) Bilateral Tax Information Exchange Agreements (referred to as 'TIEA')
b) Multilateral Mutual Administrative Assistance Conventions / Agreements (referred to as 'the MAA Convention')
c) USA Foreign Account Tax Compliance Act Intergovernmental Agreement (referred to as 'FATCA IGA') (SARS, 2014g)

In this chapter each of these agreements will be discussed.

CHAPTER 2.1: Overview of the Bilateral Tax Information Exchange Agreements (TIEA):

2.1.1 Introduction to TIEA

TIEA exist between two countries to enable them to exchange tax information on request. South Africa has entered into these agreements with the following countries: Argentina, Bahamas, Bermuda, Cayman Island, Gibraltar, Guernsey, Jersey, Liberia and San Marino. The SARS is in the process of signing and ratifying agreements with 8 other countries, and negotiating a further 11 agreements (at the time of this study in 2014) (SARS, 2014e). The full list of TIEA signed, not yet ratified, and still in negotiations is attached, refer to Annexure 1- Summary of all Tax Information Exchange Agreements (SARS, 2014e); (Croome, 2012); (Edward Nathan Sonnenbergs, 2012)

2.1.2 Scope and overview of the basics of TIEA

The purpose of the TIEA is described as being to promote international efforts in the fight against financial crimes and other crimes, including the targeting of terrorist financing, as well as facilitating terms and conditions governing the exchange of information relating to taxes (SAICA, 2012); (Magolego, 2014).

The scope of the TIEA is that the related parties will provide assistance through their competent authorities, usually their revenue authorities, through the exchange of information that is relevant to the administration and enforcement of the domestic laws of the parties concerning the signed agreements. This includes information that is relevant to determine, assess, enforce, or collect taxes with respect to the persons subject to such taxes, or to the investigation of tax matters or the prosecution of criminal tax matters in relation to such person. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

Article 2 in all the TIEA except the TIEA signed with Gibraltar and Liberia, specifies that the information will relate in the case of South Africa only to the following 5 taxes:

a) Normal Tax;
b) Secondary tax on companies, (or any identical tax imposed after the date of signature of the agreement, in which case this will relate to Dividend Tax);
c) Withholding tax on royalties;
d) Tax on foreign entertainers and sportspersons; and
e) Value added tax.

The TIEA signed with Gibraltar and Liberia refers to every kind of tax and any identical tax imposed after the date of signature of the agreement (SA National Treasury, 2013a) (SA National Treasury, 2014b).

The definition of "information" contained in all the TIEA's includes any fact, statement, document or record in whatever form. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

Based on the above, the span of the TIEA is extensive and will include most forms of taxes. For the TIEA signed with Gibraltar and Liberia all taxes are included, however for the TIEA entered into with Argentina, Bahamas, Bermuda, Cayman Island, Guernsey, Jersey, and San Marino are only the above specified taxes. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

Based on the above it is concluded that the types of taxes not included in the scope of this TIEA with all the countries, except for Gibraltar and Liberia, will be, amongst others, estate duty, donations tax, turnover tax and withholding taxes on interest, service fees and the sale of immovable property. Any information pertaining to the taxing of estate duty, donations tax, turnover tax or withholding taxes on interest, service fees and the sale of immovable property cannot be requested under the TIEA signed with any party, except for Gibraltar and Liberia (due to the fact that all kinds of taxes are covered in those agreements).

It is imperative to understand that the scope of the TIEA only includes the collection and sharing of relevant tax information. There is no provision made for the further collection or recovery of the actual tax debt arising out of the relevant information shared. The SARS is only able to share information requests with the TIEA partners once the TIEA is effective.

2.1.3 What the SARS needs to exchange information and the extent that the SARS must go to to obtain the relevant information required by the TIEA

Article 4 of all the signed TIEA stipulates that the requested party is not obliged to provide information which is neither held by its authorities nor in the possession of (or obtainable) by persons who are within its territorial jurisdiction. The term “requesting party” is the jurisdiction or State requesting the information, while the term “requested party” is the jurisdiction or State from which this information was requested. The relevant rights and safeguards secured to a person by the laws or administration practice of the requested party remain applicable. The requested party shall use its best endeavours to ensure that the effective exchange of information is not duly prevented or delayed. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b); (SAICA, 2012)

The requested party is obliged under all the TIEA to exchange the requested information, irrespective of whether the requested party needs that same information for its own benefit.

It is important to note that the requesting party can only request information per the TIEA’s when the requesting party was unable to obtain the requested information by its own means. There is one exception to this rule, where the remedy to such means would give rise to disproportionate difficulty. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b); (SAICA, 2012)

Where the information is in the possession of the requested party, it is not sufficient to enable it to comply with the requested information, the requested party shall use

information gathering measures it considers relevant to obtain the information (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b).

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The term “information gathering measures” is defined in all the TIEA’s to mean laws and administrative or judicial procedures enabling a requested party to obtain and provide the information requested. The information provided will be limited to what is allowable under the requested party’s domestic laws, in the form of depositions of witnesses and valid copies of original documents. In certain cases the requesting party may even request to enter the territory of the requested party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior consent of the individuals or other persons concerned, and even attend tax examinations as conducted by the SARS. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b); (SAICA, 2012)

Therefore the article provides that each country will ensure that it has the authority to obtain and provide, via the competent authority as defined on request, information held by banks and similar financial institutions, including nominees acting as agents or in a fiduciary capacity, information regarding legal and beneficial ownership of companies, partnerships and similar businesses and in the case of trusts, information on settlors, trustees and beneficiaries. It is required that any request for information must be formulated in detail specifying in writing the following:

a) The identity of the person under examination or investigation.
b) The period for which the information is requested.
c) The nature of the information requested and the form in which the requesting party prefers to receive it.
d) The tax purposes for which the information is sought.

e) The reasons for believing that the information requested is foreseeably relevant to the tax administration and enforcement of the requesting party.
f) The grounds for believing that the information requested is present in the requested party or is in the possession of or obtainable by a person within the jurisdiction of the requested party.
g) To the extent known, the name and address of any person believed to be in possession or able to obtain the information requested.
h) A statement that the request conforms to the laws and administrative practices of the requesting party.

A statement that the requesting party has pursued all means available in its own territory to obtain the information, except where that would give rise to disproportional difficulty. (SAICA, 2012); (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

The requested party should then acknowledge receipt of the request from the requesting party and will to their best to obtain the requested information. (SAICA, 2012); (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

It is possible that a request for information be denied if the request does not comply with the TIEA (SAICA, 2012).

2.1.4 Implication of implementation of the TIEA for individuals and businesses and possible compliance problems

The SARS should only share tax information that they would have had access to or expected to have access to (SAICA, 2012). In the event where the SARS should implement information gathering measures, the information gathering process should still be within their means in terms of South African legislation(SA National Treasury, 2014a); (SAICA, 2012). The SARS can request the relevant information from the taxpayer and the taxpayer will have to submit the required information in accordance with the TAA (refer to chapter 4.3).

Based on the above it is concluded that only relevant tax information that SARS will be expected to have can be requested. To comply with the TIEA should, therefore, have minimal effect on the taxpayers as no additional reporting is required and it is only upon request that the taxpayer should submit information to the SARS.

A major concern for companies and like institutions is the type of information shared that can lead to trade secrets being disclosed. The TIEA article 6 recognises information subject to legal privilege and seeks to protect trade, business, industrial, commercial or professional secrets or trade processes and, in such cases, the request for information may be declined. Additional measures are also taken by way of article 7 where any information received by the requesting party should be kept confidential in the same manner as information obtained under the requesting party's domestic laws and other confidential clauses applicable to that jurisdiction. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

The fact that the taxpayer is disputing an amount of tax does not prevent the tax authority from requesting information from the other country (SAICA, 2014a).

There is one possible compliance issue where, per section 46 of the TAA, the SARS requests a third party to submit to the SARS the taxpayer's information, has further implications for the third party providing the information (Tax Administration Act 28 of 2011). Often when entering into a client relationship, a confidentiality agreement is signed, for instance when auditors provide audit services to a company and have access to the client's financial statements. If the SARS request the financial statements from the auditor, as allowed per section 46 of TAA, the SARS can use this information or pass the information on to the relevant requesting party per an exchange of information agreement. Where there is possible litigation and penalty implication for the taxpayer, the effect of this issue has been addressed in Chapter 5, issue 1.

2.1.5 Summary of the extent of information to be shared under the TIEA and the requirements which need to be met in order for SARS to share this information

In conclusion, the requested party can only be requested by the requesting party to submit information pertaining to a specific tax related matter once the requesting party has exhausted their own means to gather the information themselves. This tax matter has to be a tax as covered by the specific TIEA. There are specific forms and requirements to be met to request information. Only when all of the requirements of the TIEA are met, will the requested party apply all information gathering measures to obtain the information. The tax information to be shared can only be shared upon a specific request. The requested party should share this information only if the information requested is foreseeably relevant to the administration and enforcement of the domestic laws of the requested party relating to the specific taxes covered by the TIEA. This requested information should be handed over to the requesting party as efficiently and quickly as possible. Any fact, statement, document or record in whatever form is deemed to be included in the term information, and this should all form part of the

information handed over to the requested party. The information obtained by way of the TIEA will still be kept confidential per the judicial laws in the requested party's domestic laws. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b); (Croome, 2012)

The TIEA only enables the parties to collect and share information necessary for tax matters as highlighted above. The scope of these agreements does not extend to the actual collection or recovery of tax debts. The relevant parties will use the provisions of the DTA's in place to recover or collect debts on behalf of the requesting party if a DTA is in place and if the DTA allows for that (Magolego, 2014). South Africa has not entered into a DTA with any one of the contracting states where a TIEA is in place (SARS, 2014d), therefore, the information sharing agreement will only be limited to the actual TIEA. No recovery of debts can be enforced with these agreements. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

Based on the fact that the request needs to be supported with many specific details, it is implied that the TIEA cannot be used as a fishing expedition by the relevant states. The requested information must be concise, the exact taxpayer and specific reasons must accompany the request. (SA National Treasury, 2011b); (SA National Treasury, 2012a); (SA National Treasury, 2012b); (SA National Treasury, 2012c); (SA National Treasury, 2012d); (SA National Treasury, 2012e); (SA National Treasury, 2013a); (SA National Treasury, 2014b)

CHAPTER 2.2: Overview of the Multilateral Mutual Administrative Assistance (MAA) Conventions / Agreements:

2.2.1 Introduction to the MAA

The MAA agreements are between two or more countries to enable them to exchange tax information on request, spontaneously or automatically, as well as provide assistance in the collection of taxes. South Africa has signed various types of MAA agreements (SARS, 2014f):

a) The Multilateral Southern African Development Community Agreement on Assistance in Tax Matters was signed 17 August 2013. The 15 parties to this agreement includes: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. This agreement has not yet been ratified;
b) The Multilateral African Tax Administration Forum Agreement on the Mutual Assistance in Tax Matters. The 36 parties to this agreement includes: Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Cote d'Ivoire, Egypt, Eritrea, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. This agreement was signed 17 January 2014 but has not yet been ratified and
c) The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (referred to as 'the MAA Convention') as amended by the Protocol published in the Government Gazette Notice on 1 June 2011, and came into effect 1 March 2014. (Croome, 2014); (SARS, 2014f)

As of 13 October 2014 South Africa and 68 other countries have signed the MAA Convention. Countries which have entered into this agreement include (but not limited to) the UK, Australia, China, Nigeria and France (SAICA, 2014b). The full list of participating countries of the MAA Convention agreement has been attached; refer to Annexure 2-

Jurisdictions Participating in the MAA Convention on Mutual Administrative Assistance in Tax matters status- 13 October 2014. (SARS, 2014f) (SAICA, 2014b)

The main focus of this overview is on the MAA Convention that came into effect 1 March 2014, as the remaining MAA's have not yet been ratified. The MAA Convention was approved by Parliament in terms of section 231 of the Constitution of South Africa and the MAA Convention took effect on 1 March 2014 in South Africa. (Croome, 2014); (SARS, 2014f); (SAICA, 2014b)

2.2.2 Scope and overview of the basics of the MAA Convention

The purpose of the MAA Convention is to increase the co-operation amongst tax authorities around the world to combat tax avoidance, tax evasion on international levels and to endorse international efforts in the fight against financial and other crimes, including the targeting of terrorist financing, as well as facilitating terms and conditions governing the exchange of information. Another purpose of the MAA Convention is to allow for revenue authorities to obtain information with the view to assess their residents correctly in terms of their tax liabilities. (Croome, 2014); (Magolego, 2014); (SARS, 2005)

The MAA Convention is entered into and it recognizes that international co-operation can play an important part in facilitating the proper determination of the tax liabilities and helping the taxpayers protect their rights (SA National Treasury, 2011a).

South Africa has elected that the MAA Convention will apply to the following taxes:

a) income tax;
b) withholding tax on royalties;
c) tax on foreign entertainers and sportspersons;
d) turnover tax on micro businesses;
e) dividend tax;
f) withholding tax on interest, effective 1 March 2015;
g) capital gains tax;

h) estate duty;
i) donations tax;
j) transfer duty;
k) value added tax;
l) excise tax and
m) securities transfer tax (SA National Treasury, 2011a)

The effective date for this MAA Convention is 1 March 2014 (SA National Treasury, 2011a), therefore the information sharing commitments from the South Africa National Treasury is only from that date onwards. (SA National Treasury, 2011a)

The type of information covered by the MAA Convention will be any information that is foreseeably relevant to the administration and enforcement of the domestic laws concerning the taxes covered by the MAA Convention. The information will include any fact, statement, document or record in whatever form, as long as it is foreseeably relevant. (SA National Treasury, 2011a)

Similarly to the TIEA, The MAA Convention allows for information to be exchanged upon request (SA National Treasury, 2011a). In addition to the exchange of information per request of the requesting party, article 8 and 9 of the MAA Convention also provides for the spontaneous exchange of information and simultaneous tax examinations where the taxpayers residing in the states which have adopted the MAA Convention may simultaneously conduct an examination of the taxpayer's affairs (Croome, 2014); (SA National Treasury, 2011a). The spontaneous exchange of information is where the MAA Convention is significantly different from the TIEA. The TIEA only allows for information to be exchanged if the information is specifically requested (as detailed in Chapter 2.1.3).

In contradiction with the TIEA, the MAA Convention allows for any information to be exchanged willingly, without prior request from the requesting party in the following circumstances: (SA National Treasury, 2011a)

1) One party (country A) has grounds for supposing that there may be a loss of tax in the other party's country (country B).
2) A person liable for tax uses a reduction in or exemption from tax in the one party's tax liability (country A) and this, in turn, will give rise to an increase in tax in the other party country's (country B) tax liability.
3) Business dealings between persons liable to pay tax in the one party (country A) and a person liable to pay tax in another party (country B) are conducted through one or more countries in such a way that a saving in tax may result in one or the other party or in both (these dealings, through other countries are resulting in tax savings in country A or B or both).
4) Any party (either country A or B) has grounds for supposing that a saving of a tax may result from artificial transfers of a profit within groups of companies.
5) Information forwarded to the first-mentioned party (country A) by the other party (country B) has enabled information to be obtained which may be relevant in assessing liabilities to tax in the latter party (country B). (SA National Treasury, 2011a)

The SARS should also put measures and procedures in place to ensure the above mentioned circumstances are identified and the information is shared spontaneously per article 7(2) of the MAA Convention. (SA National Treasury, 2011a)

Contrary to the TIEA (as described in chapter 2.1.2) article 11 of the MAA Convention does not only allow for the sharing of information but also allows for the recovery of the tax claims by one party on behalf of the other party (SA National Treasury, 2011a).

Therefore South Africa could request the other signatories of the MAA Convention to assist in the recovery of taxes due to the SARS out of assets owned by a South African taxpayer in a state which is a contracting State to the MAA Convention, and vice versa. (Croome, 2014)

Certain DTA's concluded by South Africa with other States allow South Africa to request assistance from its treaty partner to assist in the collection of its outstanding tax debts from that relevant taxpayer and vice versa. This assistance of tax recovery on behalf of a treaty partner per the DTA is supported with the case of Commissioner for the South African Revenue Service v Krok and Another where the High Court held that the SARS was entitled to assist the Australian Tax Office in recovering taxes allegedly due by Mr Krok to the Australian Tax Office. In another case HMRC and another v Ben Nevis (Holdings) Ltd the English High Court held that HMRC was empowered to assist the SARS in the collection of taxes that were due by Ben Nevis. (Croome, 2014)

South Africa is entitled to exchange information with any other party that has adopted the MAA Convention even with the absence of a DTA with that country (Croome, 2014).

2.2.3 What the SARS needs to exchange information and the extent that SARS must go to to obtain the relevant information required by the MAA Convention

Per article 5 of the MAA Convention, in the event where a party requests information, the requested State should take all relevant measures to provide the requested information. In chapter 2.1.3 of the TIEA only information gathering measures should be taken, for purposes of the MAA Convention all relevant measures should be taken. Therefore per the MAA Convention, the SARS should do everything in their capabilities to obtain the relevant information. (SA National Treasury, 2011a)

In order for the SARS to provide the requested information, the following documentation should be obtained by the SARS (SA National Treasury, 2011a):

1) A declaration that the tax claim concerns a tax covered by the MAA Convention and, in case of recovery, that the tax claim may not be contested.
2) An official copy of the instrument permitting enforcement in the applicant state.
3) Any other document required for recovery or measures of conservancy.

4) The authority or agency which initiated the request by the competent authority.
5) The name, address, or any other particulars assisting in the identification of the person in respect of whom the request is made.
6) In the case of assistance in recovery of a tax claim, the nature of the tax claim, the components of the tax claim and the assets from which the tax claim may be recovered.
7) In case of a request for service of documentation, the nature and subject of the document to be served.
8) Whether it is in conformity with the laws and administrative practices of the applicant State.
9) Any other information relevant to the request. (SA National Treasury, 2011a)

In addition to this the SARS should also put into place procedures to document any information that might trigger an automatic exchange of information event as highlighted above (in chapter 2.2.2). The MAA Convention states that each party should take - measures to implement procedures necessary to identify information that should be exchanged automatically. (SA National Treasury, 2011a)

To assist in the SARS's responsibility to exchange information automatically (as highlighted in chapter 2.2.2) the SARS has proposed a Business Requirement Specification (referred to as BRS) Reporting Document to require certain taxpayers to report annually on required information. An overview of the BRS reporting requirements are set out in chapter 3 of this study.

To add to the duties of the SARS, the MAA Convention also provides that the SARS take all necessary steps to help recover the tax claims of the contracting State, as if the outstanding tax was its own tax claims (SA National Treasury, 2011a).

The requested information does not need to be relevant to the requesting party's own tax affairs per article 21 (SA National Treasury, 2011a).

All information shared under the MAA Convention is subject to the secrecy provisions in article 26. The information must be treated as secret and protected in the same manner as information obtained under domestic laws of that requesting party. The necessary level of protection of personal data and safeguards apply as would those under domestic legislation. Information may be shared with Courts, administrative bodies or supervisory bodies or similar authorities concerned with the assessment, collection or recovery in respect of that matter. (SA National Treasury, 2011a)

Any ordinary costs will be borne by the SARS, and extraordinary costs will be borne by the requesting party. (SA National Treasury, 2011a)

The MAA Convention covers a much wider range of taxes and extends co-operation to some countries with which South Africa does not have DTA's. Even without any DTA in place, the MAA Convention allows that South Africa can exchange information with any other MAA Convention party under this agreement. The MAA Convention in relation to all taxes even in the absence of a DTA or existing DTA's does not provide for that wider coverage of the taxes. (SARS, 2014a)

2.2.4 Implication of implementation of the MAA Convention for individuals and businesses and possible compliance problems

As the SARS has obligations not only to provide information requested by the MAA Convention party but also to exchange information automatically (SA National Treasury, 2011a) with the MAA Convention party, the SARS will require information from financial institutions and other taxpayers for purposes of exchanging information. The SARS has proposed a BRS reporting document in order to help the SARS gather the required information. (Refer to chapter 3) The onus on the taxpayer to report all information required under the BRS is onerous as much of tax information and personal information is required.

A major concern for companies and institutions is that the type of information shared can lead to trade secrets being disclosed. Article 21 of the MAA Convention takes specific measures to protect that type of information, as it disallows (subject to certain exceptions) for the SARS to share information pertaining to trade, business, industrial, commercial or professional secrets, trade processes or information, the disclosure of which will be contrary to public policy. Additional to this specific requirement the general secrecy provision as set out in article 26 states that any information received by the requesting party should be kept confidential in the same manner as information obtained under the requesting party's domestic laws' confidential clauses applicable to that jurisdiction. Therefore there can be an issue for the taxpayer with confidentiality if the requesting party does not have domestic laws containing confidential clauses. (SA National Treasury, 2011a)

The SARS will only be able to request information needed from the taxpayer or a third party expected to have the required information (SA National Treasury, 2011a). The SARS will only be able to request information that they would have been entitled to. Therefore there will be limited compliance issues for individuals and businesses alike; they are only required to provide the SARS with information upon request.

There is one possible compliance issue where per section 46 of TAA the SARS requests a third party to submit to the SARS the taxpayer's information has further implications for the third party providing the information (Tax Administration Act 28 of 2011). Often when entering into a client relationship, a confidentiality agreement is signed, for instance when auditors provide audit services to a company and have access to the client's financial statements. If the SARS request the financial statements from the auditor per section 46 of TAA, the SARS can use this information or pass the information on to the relevant requesting party per an exchange of information agreement. There is possible litigation and penalty implication for the taxpayers if they were to comply. The effect of this issue has been addressed in Chapter 5, issue 1.

2.2.5 Summary of the extent of information to be shared under the MAA convention and the requirements which need to be met in order for SARS to share this information

It is clear that the TIEA information sharing can only occur upon request from the country and the information to be shared is only limited to certain taxes as mentioned in chapter 2.2.2. In the MAA Convention, the information sharing can occur upon request but it also allows for automatic sharing of information. Therefore the SARS is forced to comply and share information with their MAA Convention parties if they are aware of or even just suspect possible tax liabilities in the other party's countries. The MAA Convention even takes it further by providing the party's relevant authority to collect and recover the liability of the tax claims of the other party. It is clear the TIEA was the first step in information sharing but the MAA Convention is actually sharing and helping the contracting parties to receive the actual liability not recovered yet. (SA National Treasury, 2011a)

Due to the fact that the MAA Convention only allows for information to be exchanged if it is foreseeably relevant to the administration and enforcement of the domestic laws concerning the taxes covered by the MAA Convention (SA National Treasury, 2011a) it is implied that in no instance may any party request information for a fishing expedition. The requested information must be concise and the precise taxpayer and relevant reasons must accompany the request (SA National Treasury, 2011a).

As mentioned above the information exchanged is still subject to the confidentiality provisions included in the MAA Convention (SA National Treasury, 2011a).

In conclusion the MAA Convention is allowing more information to flow between the contracting States. The type of information does not need to be specifically requested but automatic exchange of information is also provided for. Furthermore the MAA Convention allows the contracting States to recover outstanding taxes on each other's behalf. (SA National Treasury, 2011a)

The recovery of taxes supports the DTA's already in place where DTA's also allow for trading partners to assist each other in the collection of the debts. The MAA Convention places more emphasis on the assisting party, as they are required to collect the debts as if they were their own. Nevertheless, South Africa will be entitled to exchange information with any other party that has adopted the MAA Convention, even with the absence of a DTA with that country (Croome, 2014).

CHAPTER 2.3: Overview of the FATCA IGA

2.3.1 Introduction to the FATCA IGA

The United States enacted the Foreign Account Tax Compliance Act (FATCA) in 2010, which introduces an onerous reporting regime for all Foreign Financial Institutions (as defined) with respect to certain accounts. The reason for the United States's implementation of FATCA was to ensure tax compliance by United States citizens and residents. The FATCA enhances the United States Internal Revenue Service's ability to collect tax imposed on income earned by United States persons through non-United States investments and or non-United States accounts (PWC, 2012b). In essence, FATCA imposes a compliance monitoring and reporting obligation on Foreign Financial Institutions, by requiring them to identify and report information to the United States Internal Revenue Service (IRS) on all clients that are United States persons or non-United States entities with substantial United States ownership (KPMG, 2013); (Deloitte, 2013).

FATCA IGA is becoming a topical discussion and understanding the impact of FATCA IGA is vital, as failure to comply with FATCA IGA will result in a punitive 30% withholding tax on United States gross proceeds from the sale of United States Securities and non-United States sources payable to that non-compliant Foreign Financial Institution (PWC, 2012a). Therefore this is a withholding tax on all payments derived from United States investments (SAIT, 2013).

FATCA regulations have been promulgated by the United States IRS. The basis of FATCA lies in the ability to classify customers properly (including counterparties, account holders) according to the FATCA classification criteria and to report on United States persons whether they own an account directly or indirectly through foreign entities (PWC, 2012a).

FATCA requires non-United States banks, custodians, investment vehicles, and insurance companies (referred to as Foreign Financial Institutions) to identify United States account holders and report on account information such as account balances and addresses, account numbers, and like information to the United States IRS (PWC, 2012c). Foreign Financial Institutions should also be able to identify other Foreign Financial Institutions and certain Non-Financial Foreign Institutions (including when these Non-Financial Foreign Institutions have substantial United States persons ownership) (PWC, 2012c).

The implementation of FATCA raised a number of issues, the main one being that Foreign Financial Institutions may not be able to comply with FATCA due to juridical constraints on data privacy and confidentiality. Many countries, including South Africa, have rules about data protection, in some jurisdictions elevated to “banking secrecy” which prohibited compliance (SAIT, 2013). Due to these constraints, the United States was of the view to enter into Intergovernmental Agreements (IGA), to facilitate a more effective and efficient implementation of FATCA, also addressing the legal restrictions. (KPMG, 2013)

Without the FATCA IGA, South African Financial Institutions (as defined includes South African banks, custodial institutions, depository institutions, investment entities or specified insurance companies, brokers, asset managers and private equity funds) would have had to report directly to the United States IRS. However as result of the FATCA IGA, the South African Financial Institutions should now report to the SARS, and the SARS will exchange the required information with the United States IRS. Another benefit of the FATCA IGA, is that South African Financial Institutions are deemed to be FATCA compliant, and, therefore, the punitive 30% withholding tax on United States source income does not apply. It is, however, important to note that per the FATCA IGA certain non-participating South African Financial Institutions still have a reduced withholding tax imposed on them. The exemption of the 30% withholding tax is only available to South African Financial Institutions that are FATCA IGA compliant. (SA National Treasury, 2014c); (Magolego, 2014); (KPMG, 2013)

Per article 26 of the DTA between South Africa and the United States, these contracting parties have already agreed to exchange information, relating to every kind of taxes imposed, upon request (SA National Treasury, 1997). The FATCA IGA enables South Africa and United States of America to exchange information automatically under the legal framework provided for by this DTA. This agreement requires that South Africa's Financial Institutions collects and reports on certain information to the SARS from the 1 July 2014 (SARS, 2014a). South African Financial Institution will be required to obtain information on United States citizens from 1 July 2014 and report such information to the SARS (SARS, 2014a). In turn the United States will provide the SARS with similar information relating to South African taxpayers. The aim of FATCA is to improve international tax compliance and transparency. (Magolego, 2014); (SARS, 2014a)

The FATCA IGA was only the first step taken by South Africa to assist in the exchange of information. There have been developments in the international arena to use Automatic Exchange of Information (referred to as 'AEOI') systems to identify non-compliance by taxpayers using foreign accounts (SARS, 2014a). The OECD together with the G20 has developed a standardised, secure and cost effective model for bilateral AEOI, which led to a common reporting standard for AEOI among many tax authorities (SARS, 2014a). These standards call on tax authorities to obtain information from their Financial Institutions exchange information automatically with other authorities on an annual basis (SARS, 2014a). Soon the onerous reporting requirements applicable to United States will be needed for most OECD countries (OECD, 2014b).

2.3.2 Scope and overview of the basics of the FATCA IGA

In essence, FATCA imposes a compliance monitoring and reporting obligation on Foreign Financial Institutions, by requiring them to identify and report information to the United States Internal Revenue Service (referred to as 'IRS') on all clients that are United States persons or non- United States entities with substantial United States ownership (PWC, 2012b). Based on the above, it is clear that the FATCA IGA is entered into so that the South African government supports the United States in their quest to obtain

information pertaining to tax evaders. Thus the scope of the information that can be shared extends to all kinds of taxes and does not limit to exclude any form of taxes.

The foundation of FATCA lies in the ability to classify customers properly (including counterparties, account holders) according to the FATCA classification criteria and report on whether United States persons they own an account directly or indirectly through foreign entities. FATCA requires the Foreign Financial Institutions (as defined) and any other withholding agent to collect the appropriate withholding certificates, statements and documentary evidence from their customers. FATCA compliance also requires the Financial Instution to validate and store the document received. The Fincancial Institutions must determine whether they have any "reason to know" that claims made on the customer documentaion is unreliable or incorrect, monitor their customers to detemine whether a change in circumstances has occurred that could impact a customer's FATCA status, and monitor the expiration of the documentation received. (PWC, 2012a).

To understand how the FATCA IGA will work there are three considerations that need to be addressed:

a) how the information will be exchanged.

b) when the information will need to be exchanged.

c) what type of information will be exchanged.

a) HOW THE INFORMATION WILL BE EXCHANGED

To comply with FATCA IGA the South African Financial Institutions will have to verify all their accounts as at 30 June 2014 (when FATCA IGA came into effect) to see if they have a United States person as an account holder either directly or indirectly. This is a substantial task, which can take years and will require many customers to complete extra forms to ensure their categorisation per FATCA is correct. This will impact United States customers and non-United States customers alike, as the information is needed to

categorise the customer base. This will need to be done for both existing and new account holders alike. (PWC, 2012a); (KPMG, 2013)

Thereafter the Financial Institutions must prepare reports, designed for the United States IRS, and submit them to the SARS automatically (KPMG, 2013). The SARS have published Government Notices 508 and 509, Gazette number 37778, on 27 June 2014 in order to give effect to the requirements of FATCA IGA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30. Per the Government Notices 508 and 509, Gazette number 37778, it is now legislation that all South African Financial Institutions must submit the required records and information. (SA National Treasury, 2014d); (SA National Treasury, 2014e)

b) WHEN WILL THE INFORMATION NEED TO BE EXCHANGED

Information will only be exchanged automatically on '*United States Reportable accounts*' (as defined) and '*South African Reportable accounts*' as defined in the FATCA IGA (SA National Treasury, 2014c). The SARS will report to the Unites States IRS on all United States Reportable accounts and the SARS will receive information from the United IRS on all South African Reportable accounts (SA National Treasury, 2014c). It is crucial to understand what will be included in each country's Reportable accounts before understanding what information will be shared on these accounts.

United States Reportable Account:

The term *United States Reportable Account* is defined in article 1 of the FATCA IGA as meaning a Financial Account maintained by a Reporting South African Financial Institution and held by one or more Specified United States Persons or by a Non-United States (SA National Treasury, 2014c). It will also include an entity with one or more controlling persons that are Specified United States Person. An account shall not be a United States Reportable Account if such account is not identified as a United States

Reportable Account after application of the due diligence procedures in Annexure I of the FATCA IGA. (SA National Treasury, 2014c)

Annexure I stipulates the due diligence procedures that are required from the South African Financial Institutions to perform in order to determine if an account will be deemed to be a United States Reportable account. It distinguishes between pre-existing accounts and new accounts, and distinguishes between high value accounts and low value accounts. A pre-existing account is an account that was maintained by the Financial Institution on or before to 30 June 2014. It stipulates in what instances the South African Financial Institution should do a review procedure and when an enhanced review procedure needs to be performed. It lists the exact requirements from electronic and paper record searches and when a relationship manager should be appointed for each account. (SA National Treasury, 2014c)

In summary, an account will be a United States Reportable Account when the following criteria are met:

For individuals:

A pre-existing individual financial account or a depository account with a balance of $50 000 or less, as at 30 June 2014, will not be deemed a reportable account (SA National Treasury, 2014c). Therefore as soon as any account exceeds the $50 000 threshold, it will need to be reported as a United States Reportable account. (SA National Treasury, 2014c)

Any account that exceeds the thresholds or any new accounts opened that exceeds the threshold must be reported within 90 days after the end of the calendar year in which the account met these reporting requirements. (SA National Treasury, 2014c)

For entities:

The annexure gives guidance that pre-existing accounts, either with respect to all pre-existing accounts or separately, with respect to any clearly identified group of accounts with a value does not exceed $250 000 as at 30 June 2014 is not required to be

reviewed, identified or reported as a United States Reportable account until the value exceeds $1 000 000. Any new accounts for entities that do not exceed $50 000 do not need to be reported. In all instances where the above exempt thresholds are exceeded that account will constitute a United States Reportable Account and should be reported as such. (SA National Treasury, 2014c)

South African Reportable Account:

As stipulated above, the United States IRS will also provide the SARS with information relating to any *South African Reportable Account*. The term *South African Reportable Account* is defined in article 1 as a Financial Account maintained by a Reporting United States Financial Institution if:

(i) in the case of a depository account, the account is held by an individual resident in South Africa and more than $10 of interest is paid to such account in any given calendar year or

(ii) in the case of a financial account other than a depository account, the account holder is a resident of South Africa, including an entity that certifies that it is resident in South Africa for tax purposes, with respect to which U.S. source income that is subject to reporting under chapter 3 of subtitle A 10 or chapter 61 of subtitle F of the U.S. Internal Revenue Code is paid or credited. (SA National Treasury, 2014c)

The information will need to be exchanged if it meets the definition of a United States Reportable Account or a South African Reportable Account. All information to be exchanged by the SARS and the United States IRS should be exchanged within nine months after the end of the calendar year to which the information relates per article 3(5) of the FATCA IGA. (SA National Treasury, 2014c)

c) WHAT INFORMATION WILL NEEDED TO BE EXCHANGED

The information to be automatically exchanged between South Africa and the United States is stipulated in the FATCA IGA article 2 as follows (SA National Treasury, 2014c):

South Africa (specifically the SARS) will report to the United States IRS on each United States Reportable Account of each Reporting South African Financial Institution:

1) The name, address, and United States Taxpayer identification number of each Specified United States (as defined) person that is an account holder of such account.

   This definition broadly includes all United States persons excluding a corporation which regulary trades on a stock market, any organisation exempt from US taxes, any United States regulated bank, investment trust, retirement plan, real estate investment trusts, company, share dealer or broker.
2) In the case of a Non-United States entity where it is identified as having one or more controlling persons that is a specified United States person, the name, address, and specified United States taxpayer identification number (if any) of such entity and each such specified United States person.
3) The account number (or functional equivalent in the absence of an account number).
4) The name and identification number of the reporting South African Financial Institution.
5) The account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year, immediately before closure.
6) In the case of any custodial account:
   a. The total gross amount of interest, dividends and of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period and

b. The total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the reporting South African Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the account holder.

7) With respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period and
8) The total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the reporting South African Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the account holder;
9) In the case of any depository account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period and
10) In the case of any account (other than a custodian account), the total gross amount paid or credited to the account holder with respect to the account during the calendar year or other appropriate reporting period with respect to which the reporting South African Financial Institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the account holder during the calendar year or other appropriate reporting period. (SA National Treasury, 2014c)

In return for the above information gathered from South Africa and shared with the United States IRS, the United States will provide South Africa with the following information relating to each South African Reportable Account of each Reporting United States Financial Institution:

1) The name, address, and South African taxpayer identification number of any person that is a resident of South Africa and is an account holder of the account
2) The account number (or the functional equivalent in the absence of an account number)
3) The name and identification number of the Reporting United States Financial Institution

4) The gross amount of interest paid on a depository account
5) The gross amount of United States sourced dividends paid or credited to the account and
6) The gross amount of other United States sourced income paid or credited to the account. (SA National Treasury, 2014c)

It is clear that the FATCA IGA allows for more than tax information to be shared between the agreed parties. The information includes tax information and taxpayer's personal information as detailed above. This information will not be exchanged on request but rather automatically. Therefore the SARS is forced to comply and share information with the United States automatically every year. The FATCA IGA even takes it further by providing the parties the relevant authority to collect and recover the liability of the tax claims of the other party. (SA National Treasury, 2014c)

2.3.3 What the SARS needs to exchange information and the extent SARS must go to to obtain the relevant information required by the FATCA IGA

As documented in article 26 of the DTA with the United States, the SARS can only request and exchange information from a South African taxpayer to the extent of South African jurisdiction (SA National Treasury, 1997). This will also apply for the automatic exchange of information (SA National Treasury, 2014c). Due to the fact that the SARS have published government Notices 508 and 509, Gazette number 37778, on 27 June 2014 in order to give effect to the requirements of FATCA IGA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30, the SARS have jurisdiction to obtain all required information from South African Financial Institutions. The implication of this is that the SARS should use all possible measures available to obtain and collect the needed information to share with United States. (SA National Treasury, 2014d); (SA National Treasury, 2014e)

Therefore per the FATCA IGA the SARS (and the United States) should do everything in their power to obtain the relevant information. No documentation is needed to request information as this is an automatic exchange of information, and all information noted should be exchanged between the parties annually. (SARS, 2014b); (SA National Treasury, 1997)

Per the DTA article 26(2) between South Africa and the United States information pertaining to trade, business, industrial, commercial or professional secrets, or trade processes will not be shared, and, therefore, also not be shared per the FATCA IGA. (SA National Treasury, 1997)

All information shared under the FATCA IGA is subject to secrecy provisions contained in article 26 of the DTA and article 3(7) and (8) of the FATCA IGA. The information must be treated as secret and protected in the same manner as information obtained under domestic laws of that requesting party. The necessary level of protection of personal data and safeguards applies as it would under domestic legislation. Information may, however, be shared with courts, administrative bodies or supervisory bodies or similar authorities concerned with the assessment, collection or recovery in respect of that matter. (SA National Treasury, 1997); (SA National Treasury, 2014c)

2.3.4 Implication of implementation of the FATCA IGA for individuals and businesses and possible compliance problems

The FATCA IGA has a material impact on the operational and strategic activities of South African Financial Institutions. As noted above, FATCA IGA imposes various obligations on South African Financial Institutions as defined. These include but are not limited to South African banks, depositories and custodians, brokers, asset managers and private equity funds. (KPMG, 2013); (Magolego, 2014).

These South African Financial Institutions are now forced to capture extra information that was not needed in the past, such as the customer's place of birth and where the

power of attorney resides. And all bank accounts with a $50 000 balance or above is now required to be reported to the SARS (PWC, 2011).

A major concern for companies and like institutions is the type of information shared that can lead to trade secrets being disclosed. The FATCA IGA article 3(8) takes specific measures to protect that type of information, by disallowing the SARS to share information pertaining to the limitations per the DTA already entered into. Therefore, per the DTA article 26 trade, business, industrial, commercial or professional secrets, or trade processes or information where the disclosure will be contrary to the public policy. Additional to this specific exemption, the general secrecy provision as set out in article 26, of the DTA, states that any information received by the requesting party should be kept confidential in the same manner as information obtained under the requesting party's domestic laws and other confidential clauses applicable to that jurisdiction. (SA National Treasury, 1997) (SA National Treasury, 2014c)

The FATCA IGA is in place to support article 26 of the DTA between South Africa and the United States of America. The FATCA IGA is effective from 1 July 2014 and financial institutions in South Africa are required to report the required information to the SARS, which will then exchange information with the United States under domestic legislation provided by the DTA that exists between South Africa and the United States. South African financial institutions will be required to obtain information on United States citizens in accordance with the FATCA IGA from 1 July 2014 and report such information to the SARS. The first reporting period is 1 July 2014 to 28 February 2015 and the required information will have to be submitted to the SARS by June 2015. Information will thereafter be submitted to SARS annually. (SARS, 2014a)

This means that FATCA IGA compliance is not a statutory obligation under domestic law and is no longer envisaged as a contractual arrangement with the United States. As such, it is necessary for each Financial Institution to determine the effect these local FATCA IGA laws have on their operations and the necessary steps need to be taken in

order to comply. Failure to comply may result in violation of South African laws. (KPMG, 2013)

The FATCA IGA sets out the following obligations for South African Financial Institutions:

1) all entities must determine their FATCA status, the status of their contracting parties (any party they are doing business with) and account holders;
2) changes to the on-boarding (taking on new clients) procedures should be implemented;
3) applications of enhanced FATCA IGA due diligence obligations, including remediation of pre-existing accounts;
4) identification of reportable accounts and annual reporting of certain information in respect these accounts to the SARS;
5) reporting in respect of payments made to non-participating Financial Institutions; identification of related entities and compliance with certain obligations in respect of related entities that are non-participating Financial Institutions;
6) all South African Financial Institutions are required to register with the United States IRS and must receive a registration number (Referred to as GIIN) as evidence of their status. The IRS registration portal opened 15 July 2013 and all Institutions were required to register by 25 October 2013. (KPMG, 2013)

SARS has proposed a Business Requirement Specification (BRS) to cater for automatic periodical reporting of specified information by financial institutions. Government Notices 508 and 509, Gazette number 37778, were published on 27 June 2014 in order to give effect to the requirements of FATCA IGA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30. In addition SARS also uses this information-gathering per BRS to obtain similar information for domestic purposes, and this is administered under the TAA. (SARS, 2014a)

The BRS is more extensive than what is required by the FACTA and a high level introduction to the BRS is dealt with in chapter 3 in this study.

PWC has highlighted key challenges that Financial Institutions should understand as they start to implement FATCA IGA. (PWC, 2012a)

a) Challenge 1: Customer due diligence;

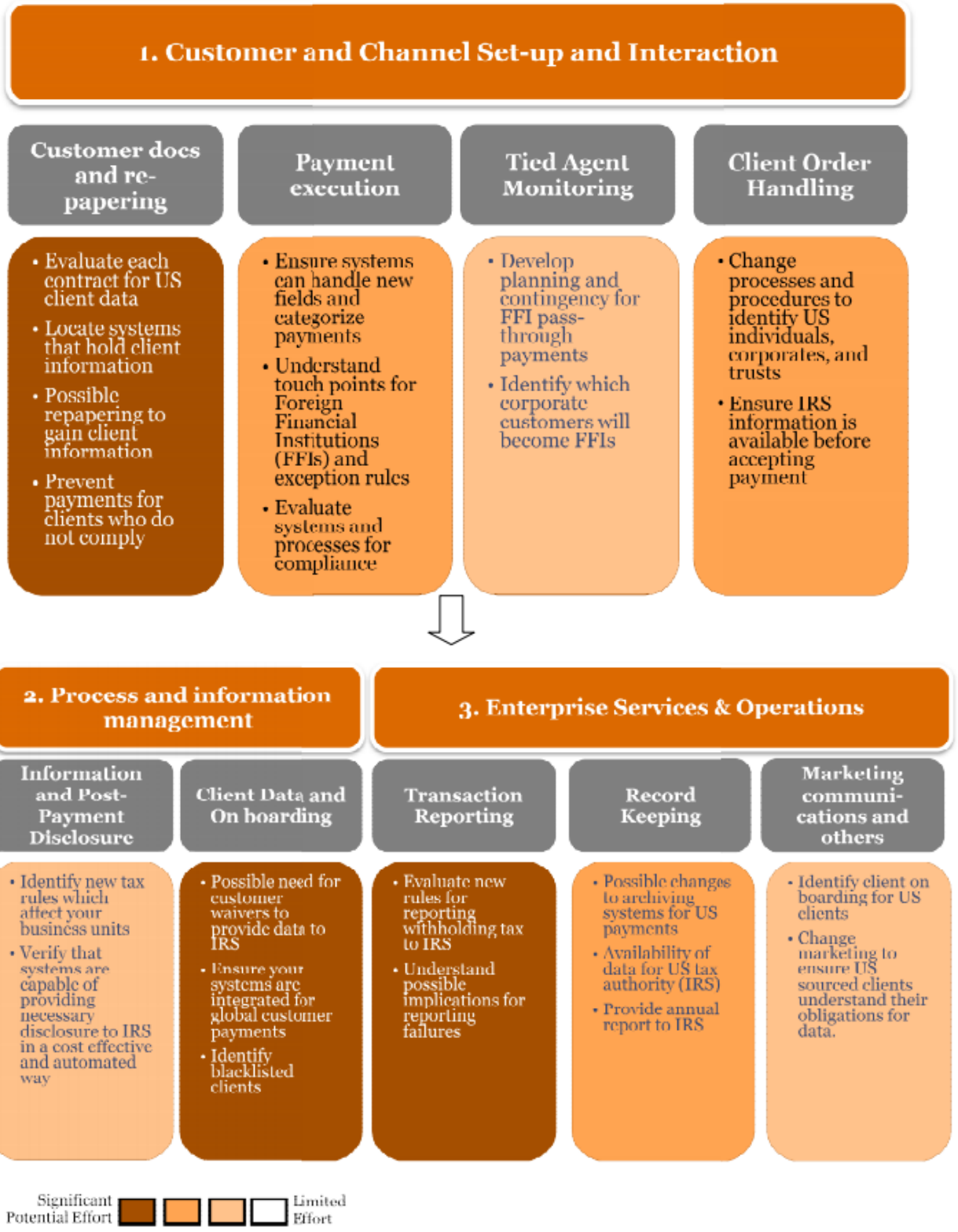
b) Challenge 2: Process and technology coordination;

c) Challenge 3: Oversight and programme governance and

d) Challenge 4: Cost implication of the implementation of the FATCA IGA.

There are considerable changes to staff complement, process, technology and internal governance systems that are needed to handle the increase in due diligence procedures.

The illustration 1 by PWC below depicts a few considerations: (PWC, 2012b)



(Illustration extracted from (PWC, 2012b)

The detailed description of each challenge is described below.

a) Challenge 1: Customer due diligence (PWC, 2012a)

- The FATCA IGA rules require that Financial Institutions should perform a customer due diligence and this requires the Financial Institution to collect, review and validate information.
    - This process requires that all accounts (subject to certain de minimis thresholds) be reviewed for United States indicia.
    - FATCA further requires that a Financial Institution knows whether a 10% owner of certain entities is a United States person. Due to the IGA entered into the prescribed FATCA 10% ownership threshold, increases to a 25% ownership as South Africa is a FATCA compliant jurisdiction.
    - All information collected as part of the account opening procedure must be made available for a tax audit by the SARS or United States IRS. All information collected should also be validated to ensure information such as the residence and telephone numbers are correct and reliable (as detailed above in chapter 2.3.2).
- Furthermore this customer due diligence does not end upon opening of the account but must also identify all changes in circumstances which may affect a customer's FATCA status. For example, if a previously documented non-United States person has changes in account information e.g. changed to a United States address, or have a significant shareholder from United States, the Financial Institution must perform additional due diligence to determine if the customer's status as a non-United States person has, in fact, changed.
- A practical issue this requirement is causing is linked to the fact that many South African Financial Institutions currently do not have tax operations function that should ideally be responsible for the reviewing of customer data collected. (PWC, 2012a)

b) Challenge 2: Process and Technology coordination (PWC, 2012a)

- FATCA requires that all information collected during account openings should be reviewed. Any data collected that is in conflict with previous collected data should be investigated for United States FATCA status purposes.
- FATCA complicates the on-boarding process by adding incremental tax requirements. The difficulty to comply with FATCA is compounded by disjointed operational processes and technology silos that store customer data and documentation. It is often an operational issue that front office, middle office and back office operations do not rely on the same data sources. It is imperative to harmonize these relevant on-boarding and account maintenance processes and systems to implement FATCA successfully.
- Providing original captured data to a tax operations function or any other area for review and validation is a significant change from the current practices of the Financial Institutions and will require banks to review their current operating models, data privacy rules and customer on-boarding processes. (PWC, 2012a)

c) Challenge 3: Oversight and programme governance (PWC, 2012a):

- FATCA IGA requires that South African Financial Institutions enter into a Foreign Financial Institution Agreement with the Unites States IRS. Therefore all Financial Institutions should ascertain their FATCA status. Any information required by FATCA must be reported to the SARS on an annual basis. The following certificates are required:
    - Pre-existing high value accounts: The responsible officer must certify to SARS within one year of the effective date of the Agreement that they have completed the review of all high value accounts. (greater than $1 000 000 for individuals).
    - Remaining pre-existing accounts: The responsible officer must certify to SARS within two years of the effective date of its agreement that it has completed reviews of all remaining pre-existing accounts.
    - Policies and Procedures: The responsible officer must certify that the Financial Institution did not have any formal or informal practices or

procedures in place from 6 August 2011 through the date of such certification to assist account holders to avoid FATCA.

- Compliance certificate: The agreement requires that it adopts written policies and procedures governing its FATCA requirements relating to customer due diligence, withholding and reporting. Furthermore the Financial Institution should conduct periodic reviews of FATCA compliance, and should annually certify to SARS that they have complied with FATCA and disclosed all materials.

- Considering that most Financial Institutions have a global footprint, the scopes of these certificates are extensive. The Financial Institutions have a significant responsibility, and they require significant skills and knowledge spanning tax affairs, compliance, operations, technology and controls. (PWC, 2012a)

d) Challenge 4: Cost implication of the implementation of the FATCA IGA (PWC, 2012b)

Financial Institutions are faced with the significant cost of implementing FATCA reporting. Financial Institutions must consider whether the cost of compliance under FATCA outweighs the tax consequences and reputational risk of non-compliance. Therefore the Financial institution will have to make one of three decisions. Either they (a) need to comply, or (b) they can opt-out alternately they can (c) choose not to comply. The implications of all these choices are set out by PWC. (PWC, 2012b)

a) In order to comply affected businesses will be required to:
   i) Enter into a documentation and reporting agreement with the United States IRS;
   ii) Comply with specified due diligence and verification procedures to determine which account holders are United States account holders and
   iii) Report to the SARS certain information about the United States account holders on an annual basis. (PWC, 2012b)

b) If the Financial Institution chooses to opt-out:
    i) Some institutions may decide that complying with the above may not be cost-effective and choose to discontinue making United States investments or seeking United States customers. In this option the Financial Institution is merely choosing to opt out of their United States customer base, and this by no means implies that the Financial Institution is not complying. In the opt-out scenario the Financial Institution will still be subject to the SARS FATCA IGA certification and audit procedures to ensure that the Financial Institution has really opted out. (PWC, 2012b)

c) Lastly if the Financial Institution choose not to comply:
    i) The institution will be subject to a 30% withholding tax on certain United States-sourced payments that they would receive, irrespective of whether the income is received on a client's behalf.
    ii) United States sourced income includes interest, dividends, rents, premiums, annuities and royalties, and gross profits from the sale of assets that produce United States sourced interest and dividends, as well as other payments attributable to withholdable United States sourced payments.
    iii) Non-compliance could be perceived as an attempt to shield United States tax evaders. This may cause risk for the institution's reputation in the marketplace. (PWC, 2012b)

In conclusion, it is evident that the FACTA IGA reporting requirements pose a lot of implications for the taxpayer and many challenges that need to be addressed by the individual taxpayers, such as the customer due diligence; process and technology coordination; oversight and programme governance; and the cost implication of the implementation of the FATCA IGA as discussed in detail above.

2.3.5 Summary of the extent of information to be shared under this FATCA IGA and the requirements that need to be met in order for SARS to share this information

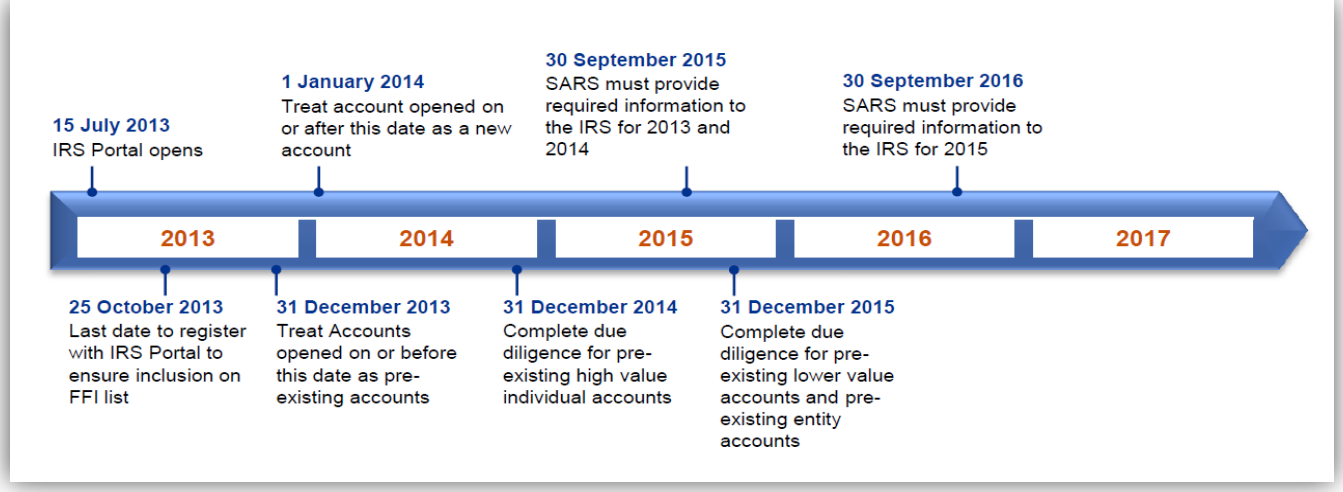
It is clear that the FATCA IGA is the most far-reaching information sharing agreement, and based on the IGA all information per the agreement will be shared automatically on an annual basis. (SA National Treasury, 2014c)

This part of the chapter also notes of how these three categories above enhance the double tax agreements already effective.

WHEN TO REPORT:

The first reporting period is from 1 July 2014 to 28 February 2015 and thereafter annually for every tax year ending February. There is a phase in period for the information. The commencement date for collection of the required financial account information is 1 July 2014. The collected financial account information for the first reporting period must be submitted to SARS by 30 June 2015. (SARS, 2014h)

FATCA IGA timeline as below in illustration 1 by KPMG summarises the implementation of the FATCA IGA: (KMPG, 2013)



WHAT TO REPORT:

Under the FATCA IGA, South African Financial Institutions must report to the SARS annually the information pertaining to any United States Reportable Account (PWC, 2011).

United States Reportable accounts will include all accounts belonging to or related to a United States person with balances higher than $50 000 (or pre-existing entity account exceeding $250 000) (PWC, 2011). The financial information with respect to a Reportable account includes: interest; dividends; account balances; income from certain insurance products; sales proceeds from financial assets and other income generated with respect to assets (SARS, 2014h). Information such as the United States individual's personal address, income tax number, account number; account balance, and like information should be reported (PWC, 2011).

Reportable accounts include accounts held by individuals, entities and passive entities (SARS, 2014h).

HOW TO REPORT:

The Business Requirement Specification (BRS) provides guidelines on the submission of the information by Foreign Financial Institutions (SARS, 2014h).

The SARS will retrieve the required information needed for the FATCA IGA terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30. Per Government Gazette Notices 508 and 509 published 27 June 2014 the SARS have enacted the BRS set out by the SARS to give reporting guidelines. It is important to note that the BRS as enacted requires information from the South African Financial Institutions that exceeds the information needed per the FATCA IGA. A high level indication of the BRS is given in Chapter 3. (SARS, 2014a).

OTHER CONSIDERATIONS:

It is clear that the FATCA IGA allows for a detailed amount of information to be shared between the agreed parties. The information to be shared will include a great extent of information, and this information will not be exchanged on request, but rather automatically. Therefore the SARS is forced to comply and share information with the United States automatically every year. The FATCA IGA even takes it further by providing the parties the relevant authority to collect and recover the liability of the tax claims of the other party. (SA National Treasury, 2014c)

The recovery of taxes supports the DTA's already in place where DTA's article 26 also allow for trading partners to assist each other in the collection of the debts. The FATCA IGA places more emphasis on the assisting party, as they are required to collect the debts as if it was their own. (SA National Treasury, 1997) (SA National Treasury, 2014c)

A major concern for companies and like institutions is the type of information shared that can lead to trade secrets being disclosed. The FATCA IGA article 3(8) takes specific measures to protect that type of information, by it disallowing the SARS to share information pertaining to the limitations per the DTA already entered into. Therefore per the DTA article 26 trade, business, industrial, commercial or professional secrets, or trade processes or information whereby disclosure will be contrary to the public policy. Additional to this specific exemption, the general secrecy provision as set out in article 26 of the DTA states that any information received by the requesting party should be kept confidential in the same manner as information obtained under the requesting party's domestic laws and other confidential clauses applicable to that jurisdiction. (SA National Treasury, 1997) (SA National Treasury, 2014c)

CHAPTER 3: DATA SUBMISSION BUSINESS REQUIREMENT SPECIFICATIONS AS PROPOSED BY THE SARS

There have been developments internationally to use the Automatic Exchange of Information (referred to as AEOI) systems to identify non-compliance by taxpayers using foreign accounts (SARS, 2014a). The OECD, together with the G20, has developed a standardized, secure and cost effective model for bilateral AEOI, which led to a common reporting standard for AEOI among many tax authorities. These standards call on governments by way of their tax authorities, to obtain information from their Financial Institutions and exchange information automatically with other authorities on an annual basis. For this reason, the scope of the proposed BRS has been extended to require affected Financial Institutions to provide similar information regarding all non-residents (Christenson, 2014). Although the FATCA IGA will cater for elective thresholds, these will not apply to the extended ambit of the BRS catering for AEOI with other treaty partners, as well as domestic requirements. Once the information is available the SARS will be able automatically to share the relevant information with its treaty partners on a reciprocal. (SARS, 2014a)

In order to assist taxpayers, specifically South African Financial Institutions, to comply with the onerous FATCA IGA reporting requirement, the SARS has proposed a BRS document to cater for automatic periodical reporting of specified information by financial institutions. Due to the fact that the FATCA IGA was only the first step for South Africa to comply with international tax transparency, the information proposed to be collected by way of the BRS document, will facilitate a wider range of information so that the SARS will have the relevant information for every jurisdiction, and not just the United States as limited by FATCA IGA at this point in time. To give effect to the requirement to provide information for purposes of FATCA, SARS issued a public notice under section 26 of the Tax Administration Act, 2011 (TAA) requiring a return as specified in the BRS and a public notice under section 29(1)(b) of the TAA requiring the record keeping of this information. (SARS, 2014a)

Based on the above, it is clear from the SARS that the purposes of the information flow under the proposed BRS is threefold:

1. To obtain information required by the SARS for purposes of exchange of information under the FATCA IGA;
2. To allow for automatic exchange of similar information on a reciprocal basis with South Africa's other treaty partners, based on the OECD common reporting standard on financial accounts and
3. To obtain information that will be used by the SARS under domestic law to tax source based income from non-residents. (SARS, 2014a).

An overview of the 196 page document proposed by SARS named Business Requirement Specifications: IT3s Data Submission is documented below. The following high level overview is given on the reasoning for the SARS to implement the BRS, the conceptual design of the BRS system, the required parties to submit the relevant information per the BRS and the type of information that will need to be disclosed per the BRS.

1) Introduction to the BRS

The SARS has been modernising tax processes since 2007. The SARS has changed tax processes to align with international best practice. As part of this process, the SARS implemented a Third Party Data Platform to enable taxpayers to submit third party supporting data to SARS through the Direct Data Flow channel. The Direct Data Flow Channel utilises either the Connect: DirectTM technology or the Hypertext Transfer Protocol Service via Secure Web link. (SARS, 2013)

To align the Third Party Data submissions to the SARS with this new strategy, the submission channels were changed from the File Transfer Protocol technology and compact disc to the Direct Data Flow Channel for the submission of the Third Party Data for the 2012 tax year. A further step that the SARS is taking is to align the principles of the various Third Party Data products (i.e. IT3b, IT3c, Medical and Insurance Contributions, Dividends Tax, etc). The purpose of the BRS document is to address discrepancies for the IT3b, IT3c and IT3e data sets and ensure more uniform reporting across the different products. (SARS, 2013)

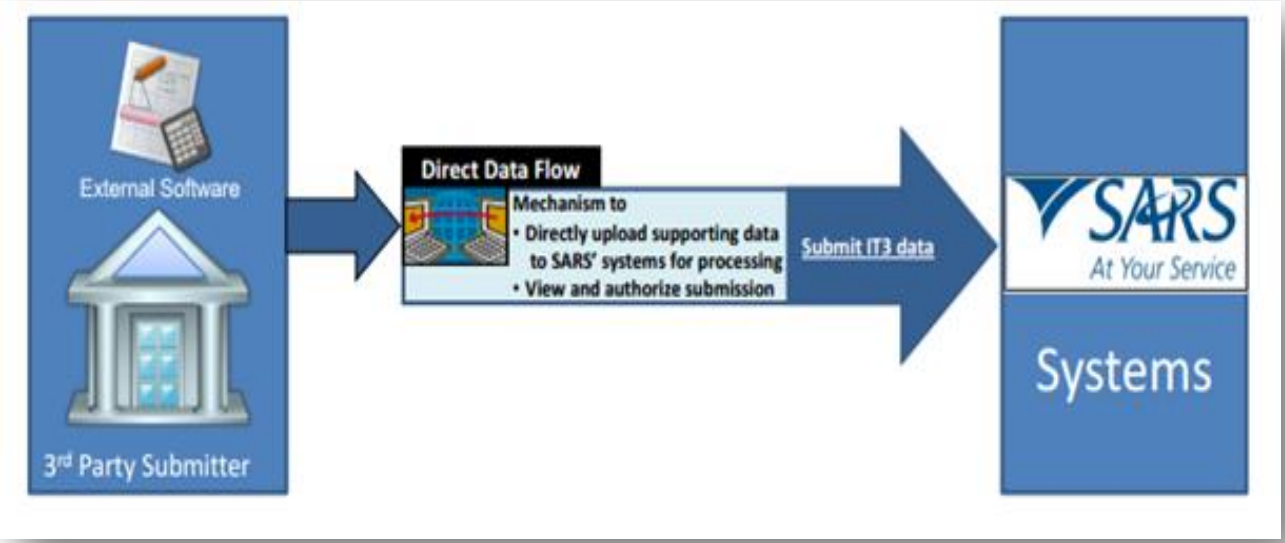
2) BRS CONCEPTUAL DESIGN

The SARS have designed the system so that the account holder's (the person required to submit information per the BRS as detailed below) data can be captured and maintained in the organisation's proprietary system. The submitting entity will be able to generate a file containing all account holders' data and submit this file to SARS. (SARS, 2013)

This data file can be submitted to the SARS using the Direct Data Flow channel. Direct Data Flow channel will be the only channel available in the first phase. The submitting entity must validate the file against the requirements specified in the BRS document before submission to SARS. The submission will then be validated and verified on the SARS's side before being accepted. (SARS, 2013)

The SARS has depicted the conceptual design in Illustration 3 on the next page. (SARS, 2013)

Illustration 3: Conceptual design for Business Requirement Specification (SARS, 2013)



The SARS will validate each file and inform the submitting entity of the outcome of the validated file. (SARS, 2013)

3) PERSONS REQUIRED TO SUBMIT INFORMATION PER THE BRS

The following persons are required, in terms of section 26 of the Tax Administration Act, 2011, to submit Third Party Data:

- Banks regulated by the Registrar of Banks in terms of the Banks Act, 1990, or the Mutual Banks Act, 1993;
- Co-operative Banks regulated by the Co-operative Banks Development Agency in terms of the Co-operative Banks Act, 2007;
- The South African Postbank Limited (Postbank) regulated in terms of the South African Postbank Limited Act, 2010;
- Financial Institutions regulated by the executive officer, deputy executive officer or Board, as defined in the Financial Services Board Act, 1990, whether in terms of that Act or any other Act (including a "Financial Institution" as defined in the Financial Services Board Act, 1990, other than an institution described in paragraph (*a*)(i) of the definition);

- Companies listed on the JSE, and connected persons in relation to the companies, that issue bonds, debentures or similar financial instruments;
- State-owned companies, as defined in section 1 of the Companies Act, 2008, that issue bonds, debentures or similar financial instruments;
- Organs of state, as defined in section 239 of the Constitution of the Republic of South Africa, 1996, that issue bonds or similar financial instruments;
- Any person (including a co-operative as defined in section 1 of the Income Tax Act, 1962) who purchases any livestock, produce, timber, ore, mineral or precious stones from a primary producer other than on a retail basis;
- Any medical scheme registered under section 24(1) of the Medical Schemes Act, 1998;
- Any person, who for their own account, conducts business as an estate agent as defined in the Estate Agency Affairs Act, 1976, and who pays to, or receives on behalf of, a third party, any amount in respect of an investment, interest or the rental from property; and
- Any person, who for their own account practices as an attorney as defined in section 1 of the Attorneys Act, 1979, and who pays to or receives on behalf of a third party any amount in respect of an investment, interest or the rental from property. (SARS, 2013)

4) INFORMATION REQUIRED FOR SUBMISSION PER THE BRS

The data that must be included in the submission is as a result of the following:

IT3(b)

- Interest due to or accrued to the taxpayer;
  - Interest paid or accrued to individuals, trusts or companies as a result of a loan to a business;
  - Interest on loans and mortgage bonds (except loans or bonds due to banks);
  - Interest on funds invested with the taxpayer;
  - Interest on debentures; and
  - Interest on current savings accounts
- Profit payable as a result of the redemption of bearer instruments;

- Income paid or accrued to property owners as rent, either by a tenant or collected by an agent;
- Royalties or fees paid out in respect of the use of patents, design, trademarks or copyright or the imparting of knowledge connected with the use of a patent, design, trademark or copyright in the Republic;
- Foreign dividends paid out or accrued to shareholders.
- Monthly debit and credit movement of transactional accounts. For the purposes of IT3b reporting, a transactional account is defined as an account held at a bank or other financial institution, for the purpose of securely and quickly providing frequent access to funds on demand, through a variety of different channels. The debits and credits must be reported they are reflected on the account holder's statement. (SARS, 2013)

IT3(c)

- The proceeds from the sale of unit trusts.
- The proceeds from the sale of other financial instruments.
- The disposal of unit trusts or other financial instruments. (SARS, 2013)

IT3(e)

- All farm produce, timber, livestock, ores, minerals or precious stones acquired by you by purchase, barter or exchange (purchased from licensed dealers not to be included);
- All farm produce, timber, livestock, ores, minerals or precious stones sold by you as agent for the producer;
- All farm produce, ores or minerals or precious stones shipped by you as forwarding agent for the producer to selling agents outside the Republic;
- Bonuses paid or accrued to members of co-operative companies or societies. (SARS, 2013)

This BRS document explains the way data should be imported and transmitted to the SARS, and also other data submission information. (SARS, 2013)

It is clear from this overview that the BRS document was originally drafted to assist the SARS in obtaining the information required under the FATCA IGA. However the benefit of this information has become clear to the SARS, and the SARS has extended the information needed to include all South African taxpayers. Refer to Annexure 3- Business Requirement Specifications: IT3s Data Submission, for the full document.

CHAPTER 4: ANALYSIS TO DETERMINE HOW THESE EXCHANGE OF INFORMATION AGREEMENTS SUPPORT OR CONTRADICT OTHER DOMESTIC LEGISLATION CONTAINING SECRECY AND CONFIDENTIALITY PROVISIONS

As investigated in chapter 2, it is evident that the exchange of information agreements that were entered into supported or expanded on the current DTA's that are in place in those relevant jurisdictions. In the case of the TIEA, these agreements did not expand on the DTA's as there are no DTA's in place in these countries. For the MAA Convention, it is clear that the exchange of information agreements support the DTA in place but where no DTA's are entered into with a MAA Convention party, this MAA Convention agreement allows for the exchange of information. Lastly, the FACTA IGA supports and expands on the DTA between South Africa and United States.

The exchange of information agreements may, however, contradict other domestic legislations. Other domestic laws have confidentiality and protection of information of the taxpayer sections. Therefore, in this this chapter, other legislations will be analysed to determine if exchange of information contradicts the following legislation, specifically:

- Constitution of the Republic of South Africa Act 108 of 1996 (referred to as the Constitution)
- Promotion of Access to Information Act 2 of 2000 (referred to as PAIA)
- Tax Administration Act 28 of 2011 (referred to as TAA)

4.1 Constitution of the Republic of South Africa Act No 108 of 1996

Section 231 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) provides for international agreements entered into South African legislation once they have been approved by Parliament, unless they are inconsistent with the SA Constitution.

As the judgement of *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 181 noted:

> 'The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.'

Therefore the Constitution is the highest form of legislation in South Africa and will override any other domestic or international laws passed by Parliament that impact South African legislation. The Constitution lays the foundation for an open society based on democratic values, social justice and fundamental human rights and is hailed worldwide as very progressive. It is the supreme law of our country and ensures government by the people under the Constitution. In other words, the Constitution is the highest law of the land and everyone must act according to its provisions and principles, even Parliament. Because South Africa is a constitutional state, all laws made by Parliament must pass the test of constitutionality. So Parliament has to ensure at all times that the laws it makes are in keeping with the letter and spirit of the Constitution. (Parliament of the Republic of South Africa, n.d)

In the judgement *CSARS vs Van Ketz* Case No: 13446/2011 at para 25, Judge Davis expressed the following opinion:

> 'It would thus appear as if the DTA provisions become part of domestic income laws. Given the manner in which the DTA stands to be treated in terms of s 231 of the Constitution, its provisions must rank at least equally with domestic law, including the Act. For this reason, the provisions of the DTA and the Act, should, if at all possible, be reconciled and read as one coherent whole.*'*

Therefore, as result of s231 of the Constitution read together with s108 of the Income Tax Act 58 of 1962 it is clear that the Double Tax Agreements and the Income Tax Act 58 of 1962 should be read together. As the Constitution s 231 refers to 'all international agreements' and not just DTA's, it is concluded that the TIEA's, MAA's (specifically the MAA Convention) and FATCA IGA will be international agreements as soon as they are approved by Parliament.

The only reason that these TIEA, MAA's or FATCA IGA will be invalid is if it is in direct conflict with the SA Constitution. The Constitution is the cornerstone of the South African democracy. The Bill of Rights contained in the Constitution strives to protect the people of South Africa's democratic values of human dignity, equality and freedom (Constitution of the Republic of South Africa Act 108 of 1996). Based on the above the SARS share information with other countries, but retain the confidentiality of the information by way of the confidentiality agreements and secrecy provisions incorporated in the exchange of information agreements, so none of the values of the Bill of Rights is contravened.

Based on the above, it is with certainty that the exchange of information agreements that South Africa entered into with other countries appear to be supported by the Constitution and are not in contravention of the Constitution.

4.2 Promotion of Access to Information Act 2 of 2000

Promotion of Access to Information Act 2 of 2000 (PAIA) was drafted with the intention to comply with section 32 of the Constitution of the Republic of South Africa Act 108 of 1996. Section 32 gives the people of South Africa the right of access to information (Constitution of the Republic of South Africa Act No 108 of 1996).

The SARS disclosure of confidential information is limited by numerous secrecy and confidentiality provisions in the legislation. These secrecy and confidentiality provisions are administered by the SARS in order to ensure that the taxpayers' disclosure to the SARS are made to a comprehensive extent and this provides the taxpayer comfort that the information of the taxpayer and trade information is confidential, except under limited circumstances. The PAIA reinforces the confidentiality of this information by providing that it must not be disclosed in terms of the PAIA, except to the person to whom it relates or that person's authorised representative.

The PAIA was introduced with the main objective that taxpayers may obtain personal information about themselves such as a copy of their own tax return, assessment, statement of account and similar records, including records submitted to the SARS by the taxpayer or on the taxpayer's behalf. The SARS will provide such information on request to the office where the records are held. A fee may be charged for copying of records, depending on the volume requested. The SARS must deny a request for a record if it contains information that SARS holds or has obtained for the purposes of enforcing revenue legislation, unless that information is about or relates to the requesting taxpayers themselves or a representative. The SARS may refuse a request for access to a record if it constitutes SARS confidential information or a record that may be refused in terms of PAIA. (SARS, 2014b)

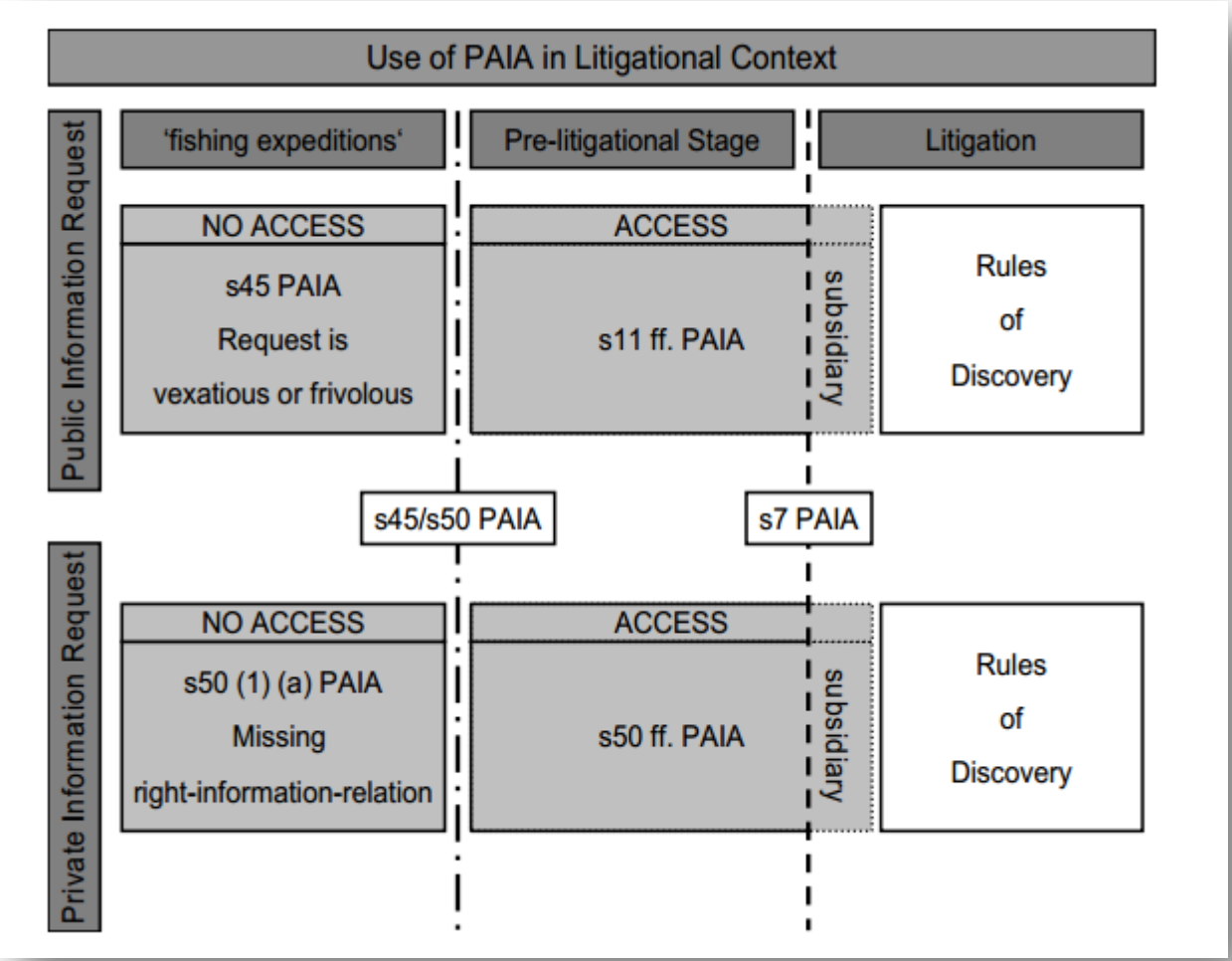
Section 35 of the PAIA gives effect to the constitutional right of access to information. This protection is further underpinned by case law wherein strict requirements are laid down before a Court will order disclosure of tax information to third parties, which requirements have now mostly been codified in TAA. (SARS, 2012)

In terms of PAIA sections 11 and 41 support the concept that private information may be disclosed to protect international relationships. Therefore, PAIA supports the overall DTA's and exchange of information agreements.

Section 45 of PAIA access to information that is frivolous or vexatious will be refused- this is in line with the TIEA and the MAA Convention in which access to information will be denied if it is a fishing expedition. The FATCA IGA agreement does not adhere to the same restrictions, because to all required information per the IGA will be disclosed on an annual basis.

PAIA does not contravene the exchange of information agreements but rather supports the relevant agreements in place. (PAIA)

Illustration of PAIA extracted from (Roling, 2007)



The PAIA's protection of international relationships (s 41 (1) (a) (iii)) is an integrated necessity and constitutionally justified in the light of the right of access to information and the nature of those limitations. (Roling, 2007)

4.3 Tax Administration Act 28 of 2011

Under the Tax Administration Act 28 of 2011 (TAA) the SARS is permitted to gather relevant information from taxpayers for the purposes of proper administration of the tax laws by way of inspection, verification or audit (Magolego, 2014). The TAA also empowers the SARS to collect information and outstanding debts from third parties and collect outstanding debts to or on behalf of other jurisdictions (Tax Administration Act 28 of 2011). If at any time before or during the course of an audit it appears that a taxpayer has committed a serious tax offence (as defined below), the matter may be referred for criminal investigation. (Magolego, 2014)

A serious tax offence is defined in section 1 of the TAA:

> *'means a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine ot to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991 (Act No. 101 of 1991)'*

It must be determined what powers are entrusted to the SARS:

a) to collect information;
b) consideration should be given to the confidentiality the SARS should treat the obtained information with, so as to understand whether the SARS are at liberty to share the taxpayers' information;
c) it should be determined what powers the SARS have to receive debts owed to the SARS and to other jurisdictions.

a) THE SARS POWER TO COLLECT INFORMATION

The SARS has been entrusted with powers under sections 40 to 61 in Chapter 5 of the TAA, which came into effect 1 October 2012. (Tax Administration Act 28 of 2011)

The TAA distinguishes between:

- Taxpayer information and
- SARS confidential information.

SARS confidential information is information that is relevant to the administration of a Tax Act that is, for example, confidential information such as internal policies, legal opinions and memoranda. The concept of confidential information is narrowly defined and only information relevant to tax administration is included. (SARS, 2012)

The reason for this distinction is to differentiate clearly between taxpayer information, in respect of which the right to privacy applies and stricter disclosure rules apply, and SARS information that is confidential but to which less strict disclosure rules apply. (SARS, 2012)

<u>The request of information pertaining to a taxpayer:</u>

Section 46 of the TAA entrusts the SARS with the power to request relevant material and states

> ‘(1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.
> (2) A senior SARS official may require relevant material in terms of subsection (1) in respect of taxpayers in an objectively identifiable class of taxpayers.
> (3) A request by SARS for relevant material from a person other than the taxpayer is limited to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.
> (4) A person receiving from SARS a request for relevant material under this section must submit the relevant material to SARS at the place and within the time specified in the request.
> (5) SARS may extend the period within which the relevant material must be submitted on good cause shown.
> (6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.
> (7) A senior SARS official may direct that relevant material be provided under oath or solemn declaration.

(8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.'

(Tax Administration Act 28 of 2011)

Based on the above the SARS may, for purposes of the administration of the Tax Act in relation to a taxpayer, require such taxpayer or another person (third party) to submit relevant material that the SARS requires within a reasonable period (SAICA, 2014a).

Such a request is limited to 'relevant information' (as defined) related to the records maintained or should reasonably be maintained by the third party in relation to the taxpayer. (Tax Administration Act 28 of 2011); (SAICA, 2014a)

'Relevant material' is defined in section 1 of the TAA to mean:

'any information, document or thing that is forseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed;'

(Tax Administration Act 28 of 2011)

The Standing Committee on Finance indicated that the ambit of the information gathering powers of the SARS as contemplated in section 46 of the TAA must be seen in the context of the following principles established in international case law:

- Information is vital to the audit activity of a tax authority and the burden of taxation would fall only on diligent and honest taxpayers if a revenue authority had no power to obtain confidential information about taxpayers who may be negligent or dishonest.
- Comprehensive information gathering powers are critical to a revenue authority's effective operation – particularly in an environment of increasing self-assessment.
- The aim of taxpayers' rights should not be to undermine a revenue authority's duty and ability to obtain information in order to collect tax that is legally due.
- The need for broad information gathering powers has been recognized internationally. (SAICA, 2014a)

These provisions do not contradict the exchange of information agreements in place. It is clear that it is in the powers of the SARS to request any information that they might need, either for their own tax investigation or for reasons to support their reporting obligations to their contracting parties per the exchange of information agreements.

This provision in section 46 of the TAA exposes the third party providing the SARS with requested information to possible litigation if confidentiality agreements were entered into with their client. This may expose the third party to possible damage claims: further discussion will be done in this regard in chapter 5.

It is clear from the above that the SARS can request and obtain the required information from the taxpayer; however the question remains whether the SARS is within their powers to share the obtained taxpayers' information with the requesting party of the exchange of information agreements.

The SARS will need to balance the provision of this information with its obligations to retain confidential information as set out in Chapter 6 of the TAA.

The term 'taxpayer information' is defined in section 68(1)(b) of the TAA as:

> 'any information provided by a taxpayer or obtained by the SARS in respect of the taxpayer, including biometric information'. (Tax Administration Act 28 of 2011)

In terms of the SARS' Short Guide to the TAA, the term 'taxpayer information':

> 'includes all material provided by a taxpayer or obtained by the SARS in respect of a taxpayer, and specifically includes biometric information. It may safely be said that most information that relates to a taxpayer and a taxpayer's affairs is taxpayer information'.

It is implied that tax information and personal information will be included as 'taxpayer information'. (SARS 2012)

b) THE CONFIDENTIALITY PROVISION THAT THE SARS SHOULD TREAT OBTAINED INFORMATION WITH

Section 69(1) of the TAA stipulates that a SARS official (current or former) must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS' official, subject to the exceptions set out in section 69(2) of the TAA.

In the TAA section 69(1) does not prevent the disclosure of taxpayer information by a person who is not a SARS official if it is done under any other Act which expressly provides for the disclosure of the information despite the provisions in this chapter. (Tax Administration Act 28 of 2011)

The purpose of the secrecy provisions in the TAA is that taxpayers have a right to expect that any information provided by them or about them under the tax Acts is treated in confidence and is used for tax purposes only. The public policy in South Africa behind the secrecy provisions is to encourage taxpayers to register and make full and proper disclosure of their income.(SARS, 2012)

Regarding access by third parties to taxpayer information, the protection of such information is reinforced by the mandatory protection of the SARS's records by PAIA section 35, as explained above, which Act gives effect to the constitutional right of access to information. This protection is further supported by case law wherein strict requirements are laid down before a court will order disclosure of tax information to third parties, which requirements have now mostly been codified in TAA. (SARS, 2012)

Disclosure provisions may, however, be justified where the public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals' privacy. It is accepted in South Africa and internationally that exceptions to the obligation to protect taxpayer information are necessary because information collected by a

revenue authority can be vital to other arms of government in performing their functions properly. Specifically, it is recognized that in the context of law enforcement—

- where certain taxpayer information is likely to be of value to a criminal investigation, it is in the public interest that the information is available to law enforcement agencies within certain limits and
- such limited disclosure will ensure that there is potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and vice versa. (SARS, 2012)

The SARS is acting on their entrusted powers to share taxpayers' information with other States as the bilateral and multilateral agreements will be deemed to be other legislations. Therefore the SARS is not breaking the secrecy or confidentiality clauses in supplying other countries with the taxpayers' information.

c) THE SARS COLLECTION OF AMOUNTS DUE TO SARS AND OTHER JURISDICTIONS

The third party liability:

Sections 179 to 184 in Chapter 11 of TAA further empower the SARS to collect and recover an outstanding tax debt owed by a taxpayer from a third party, referred to as the responsible third party. Outstanding debt refers to an amount of tax debt not paid to the SARS by the due date. A responsible third party, as defined in section 158 of the TAA, is a person who becomes liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity. (Tax Administration Act 28 of 2011)

The SARS has the same powers of recovery against the assets of a responsible third party as the SARS has against the assets of the taxpayer. The responsible third party has the same rights and remedies as the taxpayer has against the SARS's powers of recovery as set out in section 184(1) of the TAA. (Stiglingh *et al*., 2014)

Section 179 of the TAA enables a senior SARS official to notify a third party by notice to pay an amount to the SARS in satisfaction of a taxpayer's outstanding debts. The third party may be required to pay such amount to the SARS: if the third party holds or owes or will hold or will owe any money, including salaries, wages, pension funds or any other form of remuneration, to a taxpayer and if the third party fails to do so, such person may be personally held liable for the money. (Magolego, 2014)

If the third party is unable to comply with the notice, it has to inform the senior SARS official of the reasons for this. The third party, who receives the notice, must pay the SARS in accordance with the notice. The SARS may, on request of the third party, amend the notice to allow the amount to be paid over an extended period to allow the taxpayer to pay basic living expenses. (Stiglingh *et al*., 2014) (Tax Administration Act 28 of 2011)

Section 185 as set out in Part E of Chapter 11 of the TAA deals with the tax recovery on behalf of foreign government and empowers the SARS to:

- Apply for a preservation order in relation to any asset of a taxpayer where a foreign state has requested a conservancy of an amount alleged to be due to the foreign state by the taxpayer under the laws of the foreign state, where there is a risk of dissipation or concealment of assets and
- Collect an outstanding tax debt by applying to a Court for an order compelling the taxpayer to repatriate assets located outside South Africa in order to settle tax debts. (Tax Administration Act 28 of 2011)

Based on the above, the SARS has extensive powers to collect information and tax debts not only owing to itself but to the tax authorities of various other countries (Magolego, 2014). The SARS's powers have far reaching implications: the SARS cannot only request information from a third party but can also hold the third party liable for the taxpayer's outstanding taxes. (Tax Administration Act 28 of 2011)

The bilateral and multilateral agreements with other countries will assist the SARS to obtain and exchange information relating to collection of outstanding tax debts owed to SARS from assets situated outside of South Africa. It is clear that the bilateral and multilateral agreements support the TAA.

CHAPTER 5: THE LIMITATIONS OF THESE EXCHANGE OF INFORMATION AGREEMENTS AND THE POSSIBLE FUTURE PROBLEMS TAXPAYERS MAY ENCOUNTER AS RESULT OF THESE AGREEMENTS

This chapter will focus on whether there are any shortcomings identified in the said legislation and any possible future problems the taxpayer might encounter as a result of the exchange of information agreements.

Possible problem 1: s46 of TAA

The implementation of section 46 of TAA where a third party is requested to provide the SARS with the taxpayer's information has implications for the third party. (SAICA, 2014a)

Often when entering into a client relationship, a confidentiality agreement is signed. For instance, when auditors provide audit services to a company and have access to the client's financial statements. If the SARS request the financial statements from the auditor per section 46 of TAA the SARS can use this information or convey the information to the relevant requesting party per an exchange of information agreement. (SAICA, 2014a)

SAICA published a response to this issue and advised the following:

> *'To limit possible litigation the third party is advised to establish either from the SARS or from the taxpayer whether the taxpayer has been requested to furnish the information and documentation and whether the taxpayer refused to co-operate in this regard. It is not recommended that a third party not provide the information requested without, inter alia, enquiring as to whether such information is relevant to the SARS enquiry and without first establishing, if relevant, the reasons as to why the taxpayer has not provided the information. If the taxpayer suffers a loss as a result of the information being provided by the third party and the third party was not legally obliged to provide the information then the third party may expose itself to a damages claim, especially in instances where the third party may have contracted with the taxpayer and such contract includes*

provisions relating to the confidentiality of information – which is normal in circumstances such as a due diligence or sale agreement.

Notwithstanding the above, it is imperative that a person requested to provide relevant material in relation to a taxpayer cooperates with the SARS and accedes to any request by the SARS for the provision of relevant material in relation to a taxpayer.

Sometimes the question of whether the third party is obligated to provide the information to the SARS is clear cut. Most often though, it is not clear cut and given the potential exposure of third parties to the taxpayer or to a fine or imprisonment, third parties should carefully consider their position before deciding whether to provide the information or not.' (SAICA, 2014a)

Possible problem 2: Is sensitive information such as trade secrets exempt from information sharing between the jurisdictions?

Another major concern for companies and like institutions is the type of information which, shared, can lead to sensitive and valuable information being disclosed. The valuable information includes trade, business, industrial, commercial or professional secrets or trade processes. In all instances included in the TIEA, the MAA Convention and the FATCA IGA there is a specific exemption by which South Africa may deny information requests that will relate to the protection of the taxpayer's right to keep the valuable information private, and this may not be shared with other jurisdictions. There is also the general secrecy provision in all the agreements and DTA's that states that any information received by the requesting party should be kept confidential in the same manner as information obtained under the requesting party's domestic laws and other confidential clauses applicable to that jurisdiction.

Possible problem 3: The far-reaching FACTA IGA implications

In chapter 2.3.4 the far reaching implications for taxpayers were identified and four challenges were highlighted and discussed:

a) Challenge 1: Customer due diligence;

b) Challenge 2: Process and technology coordination;

c) Challenge 3: Oversight and programme governance and

d) Challenge 4: Cost implication of the implementation of the FATCA IGA.

Possible problem 4: Where does this information gathering stop?

Tax authorities worldwide, including the SARS, have seen that once the FATCA data collection and reporting machinery is in place throughout the world, it will be relatively easy for all other jurisdictions to join. The OECD, which has a "tax transparency" initiative, sees FATCA as a catalyst to promote automatic exchange of information. In July 2013, France, Germany, Spain, Italy and United Kingdom announced that they were in negotiations to sign the "G5 pilot" Agreement. This agreement will work towards a multilateral automatic exchange of information between those countries, using a FATCA based engine. Many other countries have joined the pilot since then; South Africa announced that they will join the pilot on 12 October 2013. The finance industry has built this engine, and it will be relatively easy for any country to sign up and use it. This initiative has high level plausibility and political commitment. (SAIT, 2013); (Croome, 2014)

Based on this, the SARS has enacted a new disclosure requirement programme for South African Financial Institutions in terms of the BRS (refer to chapter 3) to simplify compliance with the FATCA IGA and also to expand the nation's access to information, relevant to its own domestic investigations. Due to the fact that the FATCA IGA was only the first step for South Africa to comply with international tax transparency, the information to be collected by way of the BRS document, will facilitate to collect a wider range of information so that the SARS will have the relevant information for every jurisdiction, and not just the United States as limited at this point in time. (Charalambous, 2014)

Finally, it is emphasized that South Africa will continue to "play a leading role in the global movement towards greater transparency and exchange of information in tax matters to ensure greater trust and fairness in the international tax system. South

African taxpayers who have not yet regularized their position with respect to their offshore holdings are reminded that the SARS offers a voluntary disclosure programme. (Charalambous, 2014)

CHAPTER 6: CONCLUSION

What are the consequences for South African taxpayers of the existing exchange of information agreements that the South African Government has in place?

DTA's were the first agreements that made reference to the exchange of information. This was a general clause in the DTA's by which the DTA allowed contracting parties to exchange information to assist in tax affairs. Based on the above information it is evident that there are three types of exchange of information agreements:

1. TIEA
2. The MAA Convention
3. FATCA IGA

Consequences for the taxpayers of South Africa increase with every one of these agreements. In the TIEA, the requesting party should first try to obtain the relevant information themselves; only if that is unsuccessful should they then request, in writing, the required information from South Africa.

Based on the MAA Convention, the SARS should exchange information as requested but also go one step further and automatically exchange information with the contracting parties. Then the FATCA IGA requires SARS to annually exchange all information required per the agreement. Therefore it is imperative to understand the SARS must disclose all relevant information. South Africa can only exchange information that it is expected to have per the TIEA, the MAA Convention and FATCA IGA. The FATCA IGA agreement expects the SARS to have obtained much of information as stipulated (refer to chapter 2.3.2).

It is also imperative that according to the TIEA the SARS is only expected to obtain the requested information, and share this information with the contracting party if the information relates specifically to the taxes specified in that agreement. The SARS have no obligation to help collect outstanding tax debts on behalf of the contracting parties.

Contrary to the TIEA, SARS do have a recovery obligation per the MAA Convention and the FATCA IGA and this is supported by the DTA's. Recovery obligation in the MAA Convention the SARS is expected to help recover the taxes owed to the contracting party. Because of the FATCA IGA the SARS is expected to go one step further and to help the United States recover outstanding tax liabilities owed to them as if it was a liability owed to the SARS.

The SARS will have additional reporting obligations to meet by way of automatic exchange or requested information from treaty partners, as result of these agreements.

The effect on the South African taxpayer is that SARS is at liberty to share information. The SARS can also request additional information from the South African taxpayer to obtain information needed for compliance with the exchange of information agreements. The information requests can pertain to the actual taxpayer or a related party or third party: the taxpayer is expected to have the required information. The ultimate impact for the taxpayer is that the SARS are entering into these agreements in order to facilitate and ensure taxes are paid correctly and in the correct jurisdictions. These agreements are directed to impact only on the South African taxpayers who have or should have or might have a tax liability in the treaty partner's jurisdictions. It can also impact on South African taxpayers who have information or are expected to have information (pertaining to another taxpayer) that the SARS needs in order to meet their obligations to their treaty partners.

The impact of the exchange of information for the South African taxpayer will be that the taxpayer's international affairs can be automatically collected and can be transmitted by the SARS to any other treaty partner through these agreements. In return the SARS can also expect to receive the same type of information from treaty parties relating to a foreign national with South African tax affairs.

How do the new exchange of information agreements between the government of the Republic of South Africa and other government authorities interact with domestic laws and Double Tax Agreements?

It is clear that all domestic laws are written to support the exchange of information agreements. All exchange of information agreements, have confidentiality clauses included to prevent the disclosure of the information obtained by the requesting party. The information must be kept secret as if it was obtained by the requesting party in the first place. All exchange of information agreements still protect the taxpayer's rights but endeavor to share information to identify taxpayers not paying their share of taxes in the relevant jurisdictions. Information obtained can only be used to support tax claims, criminal offences or legal proceedings.

Most countries where DTA's are entered into contain a generic paragraph to share information required for tax disclosure purposes. In most cases the exchange of information agreements will support this article and even extend the scope to cover more taxes than indicated in the DTA's.

To what extent is the SARS expected to go to obtain the required information?

In all the exchange of information agreements, apart for the FATCA IGA, the SARS is only expected to obtain and share information that they are expected to have. If information is needed beyond what SARS will have in the normal course of business, for TIEA purposes, SARS is not expected to go any further. For the MAA Convention, the SARS should support the requesting state in obtaining the information as if they themselves needed the information. Therefore for purposes of the MAA Convention the SARS should take all possible options as supported by local legislation to obtain the required information. For the MAA Convention, the SARS is even expected to assist in the collection of debts owing to the other State as if it were their own debts, and use all collection methods available to them in the collection process.

The FATCA IGA agreement the South African government committed to obtain a vast amount of information, and exchange this automatically annually. This is enacted by Government Notices 508 and 509, Gazette number 37778, published on 27 June 2014 in order to facilitate FATCA compliance in terms of the Tax Administration Act 28 of 2011 (TAA) sections 26, 29 and 30. By way of the TAA all Financial Institutions are required to report to the SARS on all the information needed. The SARS is then only required to exchange the collected information with the United States's IRS. If the Financial Institutions do not report the relevant information to the SARS, the SARS is required to obtain the information by way of imposing all possible domestic legislation.

It is also vital to understand that per the TIEA, the SARS is only expected to obtain the requested information and share this information with the contracting party if the information relates specifically to the taxes in that agreement. The SARS have no obligation to help collect outstanding tax debts on behalf of the contracting parties per the TIEA. Contrary to the TIEA, SARS do have a recovery obligation per the MAA Convention and the FATCA IGA and this is supported by the DTA's with these countries. Per this recovery obligation in the MAA Convention the SARS is expected to help recover the taxes owed to the contracting party. Per the FATCA IGA the SARS is expected to go one step further, and the recovery obligation goes to the extent that the SARS is expected to help the United States recover outstanding tax liabilities owed to them as if it was a liability owed to the SARS themselves.

Based on the above, it is imperative that the extent the SARS is required to go to obtain the information will be dependent on what agreement the information is based upon.

Are there any identifiable problems that these exchange of information agreements may pose for South African taxpayers?

The exchange of information poses multitude of problems for the South African taxpayers, as described in chapter 5 summarised as follows:

1) Potential exposure of third party litigation, fines or imprisonment if the SARS were to request information from the third party in relation to the taxpayer to be disclosed to

them per s 46 of the TAA. When the third party has a confidentiality agreement with the taxpayer the disclosure of any information to the SARS may be deemed a breach of contract and the taxpayer, may take legal action. The third party, on the other hand, still has a legal obligation to the SARS to disclose the relevant information upon request, and if this is not complied with, the SARS may also impose a fine or imprisonment.

2) The actual financial implications of the Financial Institutions to comply with the FATCA IGA, will lead to extra costs in changing their software and data capturing processes. This will ultimately cause the clients of the financial institution further costs as these costs will need to be recovered. The recovery will ultimately fall upon the normal client base namely, the taxpayers of South Africa.

3) The actual practical implications of Financial Institutions to obtain the necessary information in order to comply with the FATCA IGA, then to review, store and maintain the information presents logistical difficulties. Financial Institutions will have to recreate policies and procedures to ensure the necessary data is captured and collected, stored and maintained regularly. The onus is on the Financial Institutions to verify the collected data is correct. This has far-reaching implications for the financial institutions, and the practical implication is highlighted in chapter 5.

4) Additional reporting requirements to be met by all South African Financial Institutions.

5) Ongoing administrative tasks and costs. FATCA IGA procedures do not end once the account has been opened. Any change in ownership or change in circumstance that can cause this customer to move to a US taxpayer needs to be captured and updated accordingly. This is an ongoing administrative task and costs the financial institutions.

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CHAPTER 8: ANNEXURE

- **Annexure 1 -** Summary of all Tax Information Exchange Agreements (SARS , 2014e)
- **Annexure 2 -** Schedule of Jurisdictions participating in the convention on Mutual Administrative Assistance in Tax Matters status document- updated 13 October 2014. (SARS, 2014f)
- **Annexure 3 -** Business Requirement Specification IT3s Data Submission (SARS, 2013)