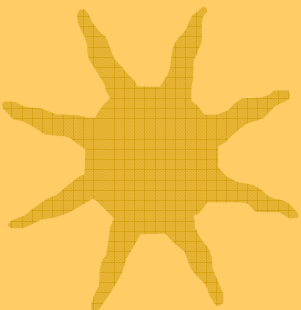
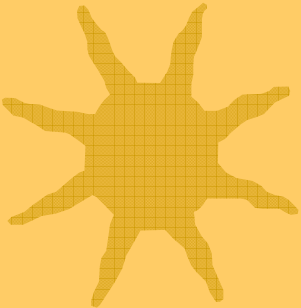
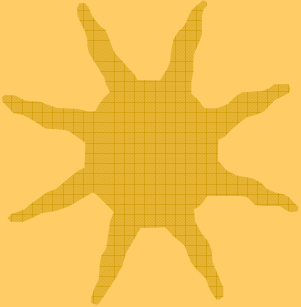


BOMBAY MANAGEMENT ASSOCIATION

EXCHANGE OF INFORMATION UNDER TAX TREATIES



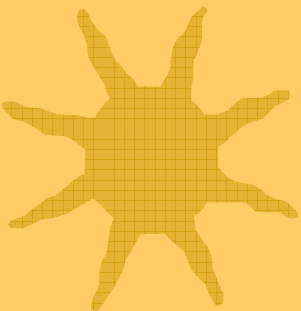
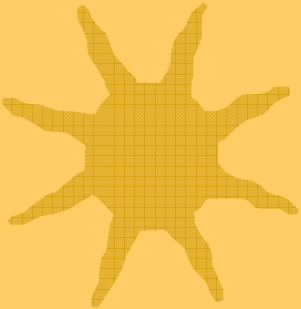
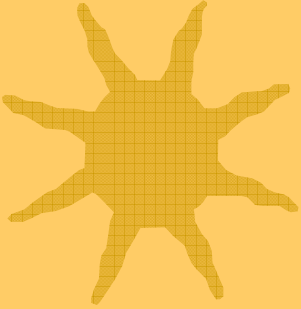
Introduction



- ★ **Effect of globalisation and increase in trading relations.**
 - **Large number of double taxation agreements.**
 - **Harmonisation of the relative clauses of treaties.**
 - **Co-operation in tax matters.**
- ★ **Mutual Assistance**
 - **tax Recovery matters.**
 - **judicial assistance.**
 - **exchange of information.**



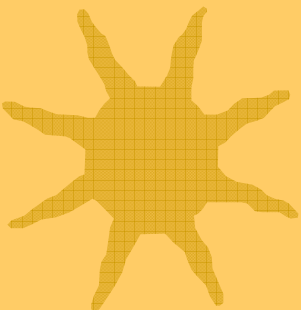
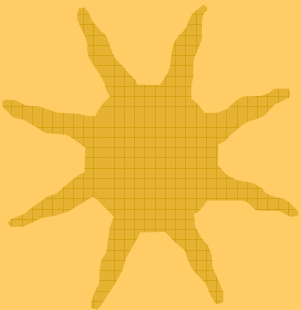
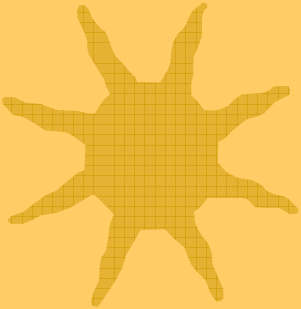
Exchange of information



- ★ To ensure proper application of the terms of treaty as also domestic laws.
- ★ Co-operation to ensure avoidance of double taxation and avoidance of tax.



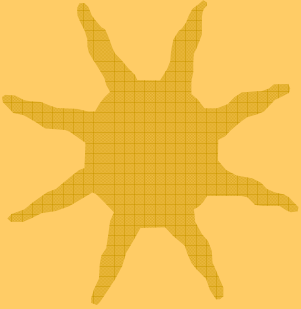
Scope...



- ★ **Variety and complexity of problems connected with interpretation and implementation of mutual assistance clauses have created several issues.**
- ★ **Model clauses and their influence on bilateral tax treaties.**
- ★ **General considerations:**
 - **Purpose of the clause**
 - **Taxpayers and taxes covered**
 - **Methods of exchange of information**

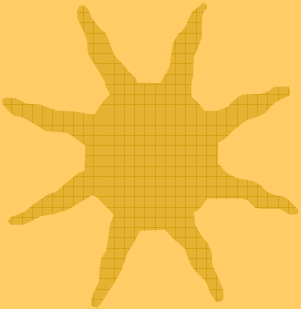


Scope...

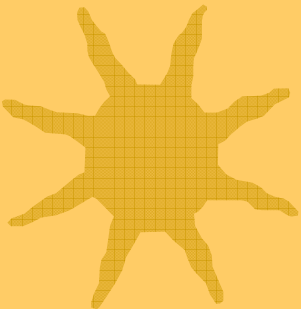


★ **Limits to the obligation to provide assistance**

★ **Protection of the taxpayer.**

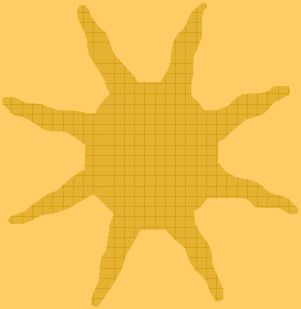


★ **Confidentiality.**

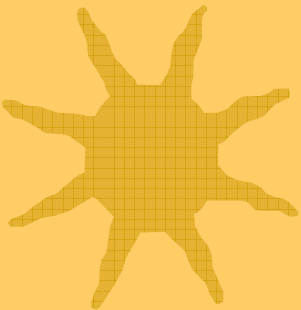




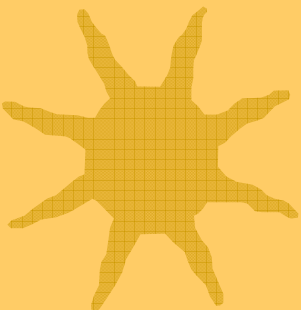
Model Clause – bilateral tax treaties...



★ **Correct implementation of treaty provision largely justify the presence of this clause.**



★ **UN, OECD and US Model – Article 26 common to all.**

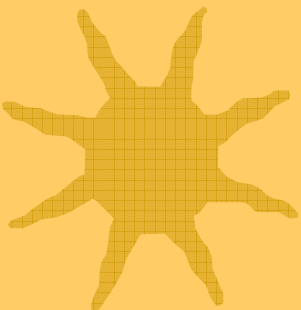
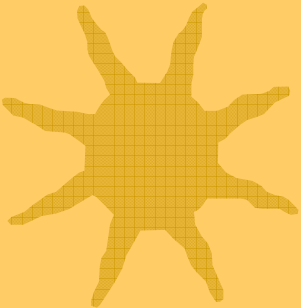
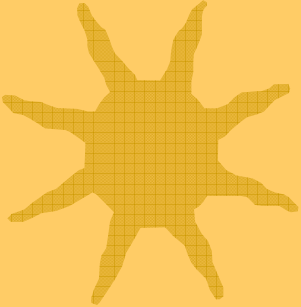


★ **Contracting States recognized the desirability to provide assistance:**

- **for the purpose of determining facts relating to the application of the treaty.**
- **in order to assure the administration of domestic laws**



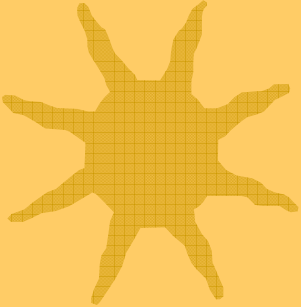
... Model Clause ...



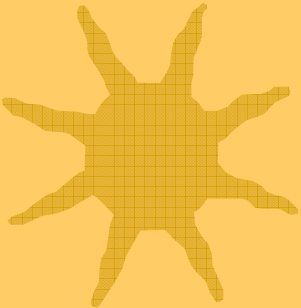
- ★ Article 26 contains rules to the widest possible extent.
- ★ OECD Model requires competent authorities to exchange such information as is “necessary”.
- ★ The term “necessary” is equivalent to “relevant” and therefore requesting state is not required to demonstrate its disability to enforce its tax laws without the information.



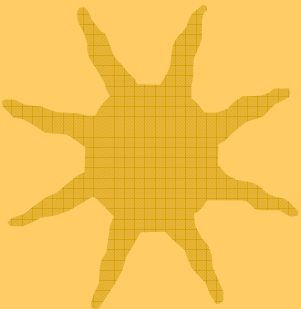
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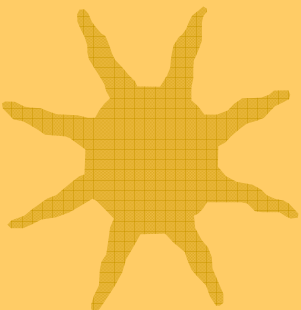
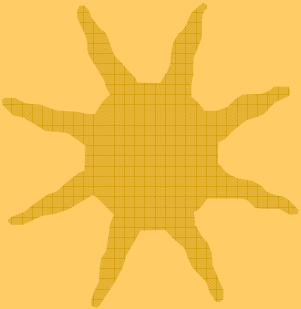
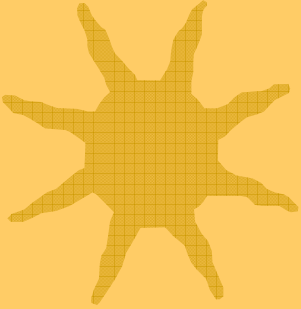


- ★ Information can be called for even for administration of tax laws even if no particular treaty Article is involved.



- ★ UN Model 2001 has three variations:
 - extension of the purpose – to the prevention of fraud or evasion of taxes covered by treaty.





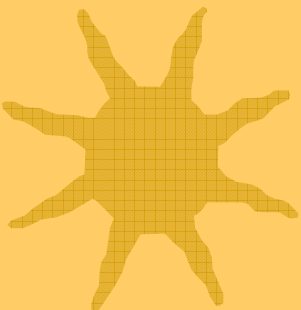
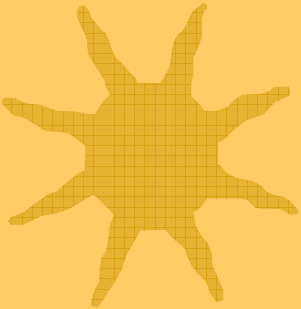
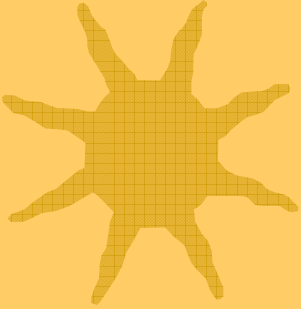
... Model Clause ...

- **secrecy requirement – information shall be disclosed only to the identified persons “if the information is originally regarded as secret in the requested state” – different secrecy requirements not an hindrance**
- **Development of conditions, method and techniques concerning the matter involved in exchange.**

★ US Model is more expansive than UN and OECD Models.



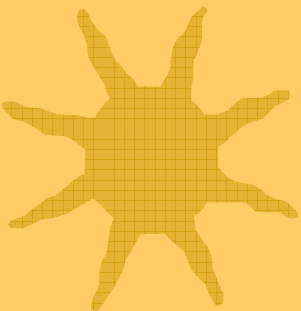
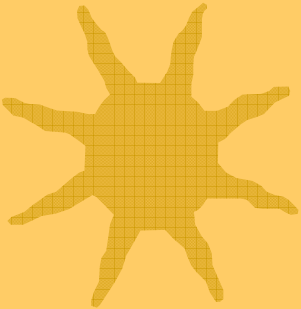
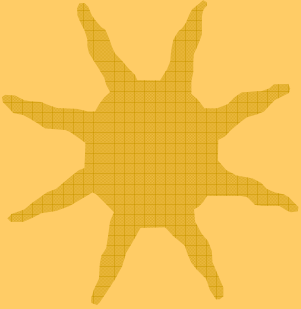
... Model Clause ...



- ★ **US Model Clause requires the requested state to provide information even if it is precluded by the laws or practices of the requested states**
- ★ **US Model is motivated by bank secrecy laws in Switzerland and other states that have frustrated US attempts to acquire information.**
- ★ **US Model clause enables the information to be collected in respect of ownership also.**



... Model Clause ...

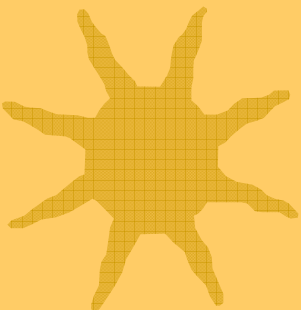
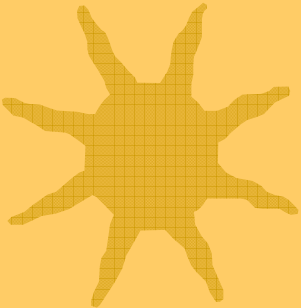
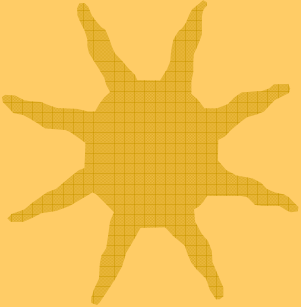


- ★ US Model clause requires the requested state to obtain the requested information as if the tax of requesting state was the tax of the requested state even though the requested state has no direct tax interest.

- ★ US Model Clause specifies that the requesting state may provide the form in which the information is to be provided:
 - deposition of witnesses
 - authenticated copies of original documents.



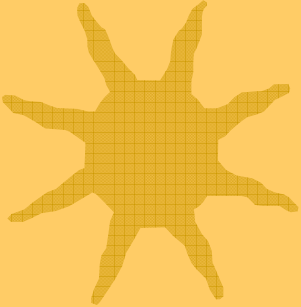
... Model Clause ...



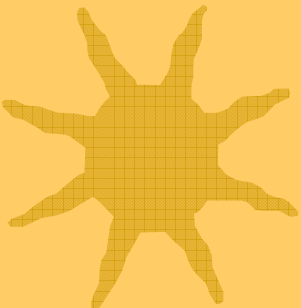
- ★ Exchange of information is permitted for all taxes imposed by requesting state and is not restricted to the “taxes covered” by Article 2.
- ★ US Model Clause authorises requesting state to depute its representatives to other state to interview individuals, examine their books etc...



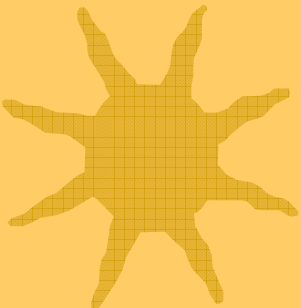
... Model Clause ...



★ **US Model Clause also provides for assistance in collection of taxes.**

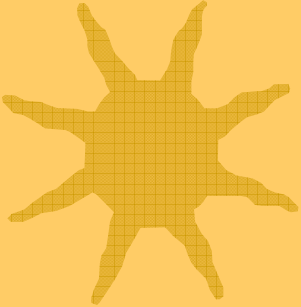


★ **2002 update of OECD Model provides for separate Article on Assistance in Collection of Taxes similar to US Model.**

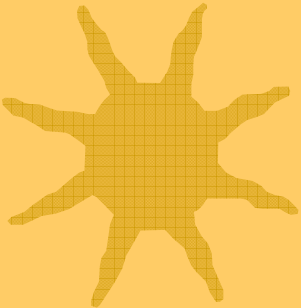




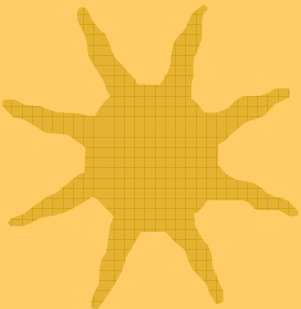
Purpose of the Tax Treaty Clause



- ★ Application of the Treaty – to secure the application and enforcement of the treaty provisions.

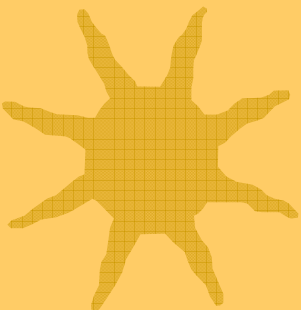
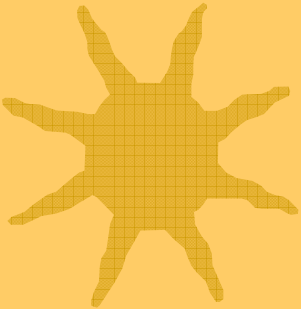
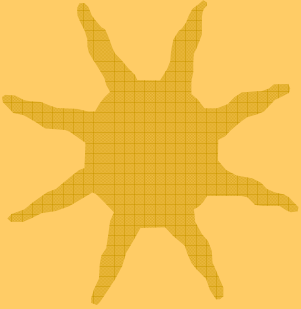


- ★ Implementation of the domestic laws – to facilitate the application of domestic tax provisions.





Application of the Treaty...

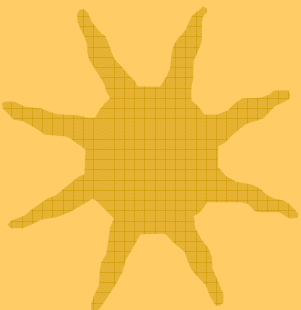
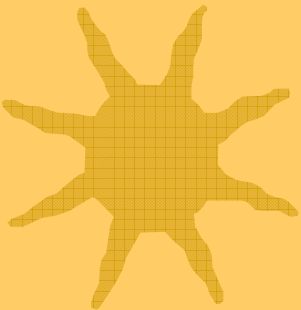
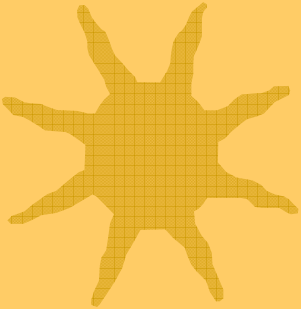


★ Examples

- When applying Article 2, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the royalty.
- To grant exemption under Article 12, State B asks State A whether the recipient is resident of State A and the beneficial owner of royalties.



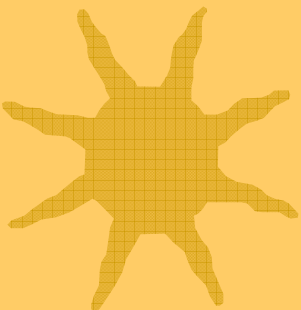
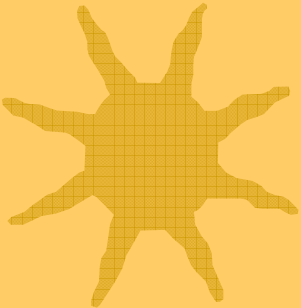
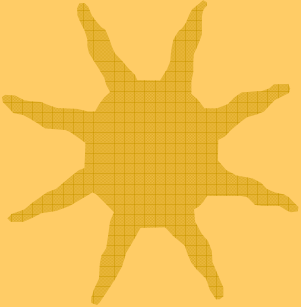
...Application of the Treaty...



- Information regarding proper allocation of taxable profits between associated companies in different states
- Information relating to the adjustment of profits between permanent establishment in one state and the head office in other state.



Implementation of the domestic laws

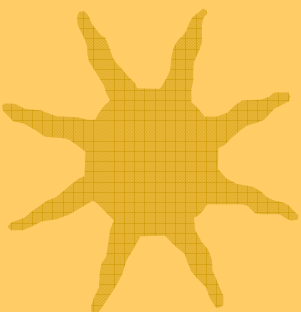
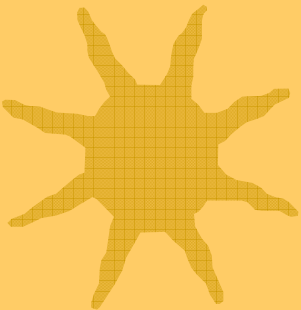
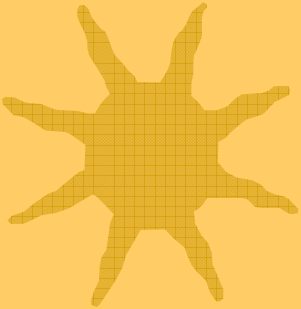


★ Examples

- A company in State A supplies goods to a company in State B. State A wants to know from State B what price company in State B paid for determining correct income of company in State A.
- A company in State A sells goods through a company in State C (a low tax country) to a company in State B. There is no treaty between State A and C or State B and C. Under treaty between State A & B, State A asks State B what price company in State B paid for the goods.



... Implementation ...

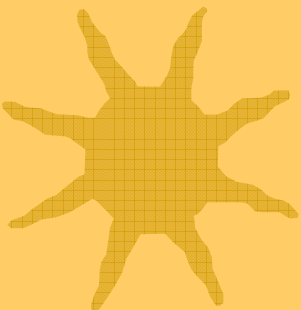
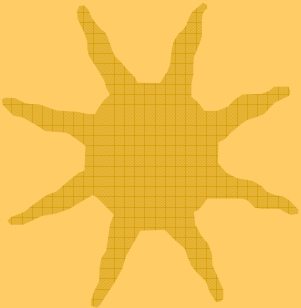
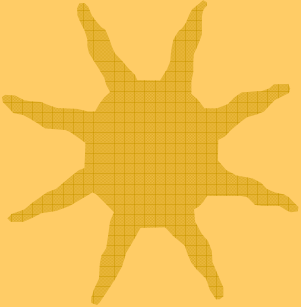


- State A asks State B for information about prices charged in State B to determine tax liability of a company in State A even though it has no dealings with companies in State B, for direct comparison.
- Transactions among related companies with particular reference to “transfer pricing” and “tax avoidance”.

★ Exchange of information in tax avoidance matters becomes difficult on account of fine line between tax evasion, tax planning, tax fraud etc.



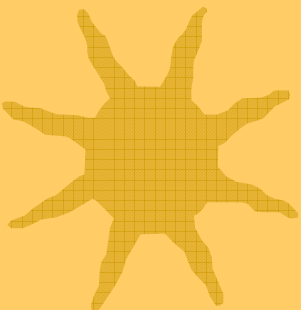
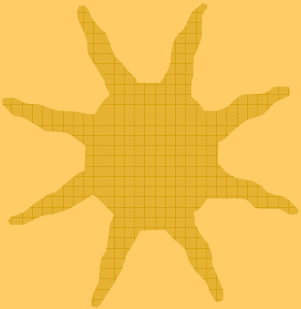
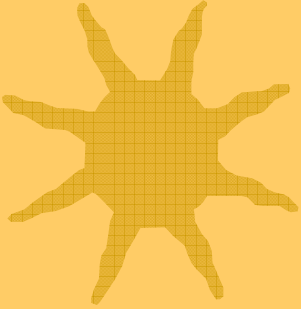
Tax Payers & Taxes Covered...



- ★ Exchange of Information is not restricted by Article 1 – it may therefore include particulars about non-resident.
- ★ It would be, however, contradictory to extend the exchange of information to non-residents, where the purpose of the information is limited to the proper implementation of the treaty provisions not applicable to non-residents.



...Tax Payers & Taxes Covered...

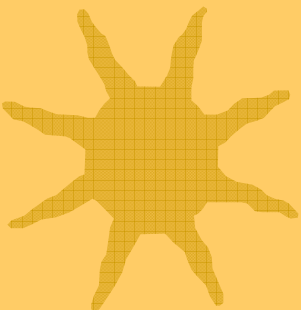
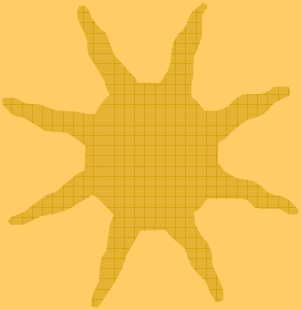
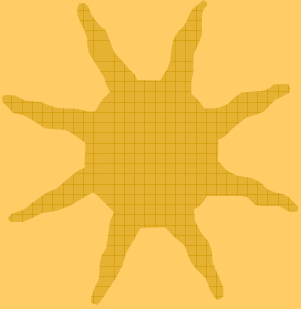


- ★ Issue arising out of request for information is in course of gathering information - Whether investigation may be directed only towards the taxpayer or whether it may also be directed against parties having dealings with tax payer.

- ★ Can Exchange of information be extended to taxes not specifically mentioned in the Treaty?
 - Approach of various administration is to limit the exchange of information to taxes covered by treaty.



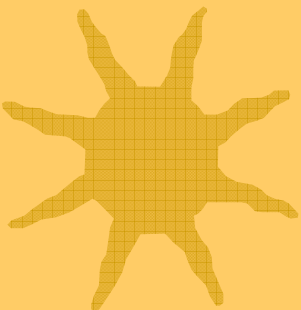
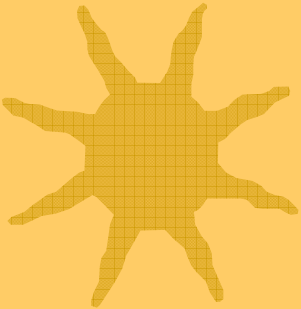
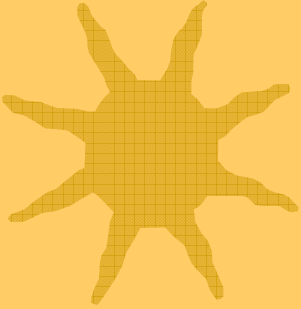
...Tax Payers & Taxes Covered...



- Exception being USA, which believes that exchange of information should be with respect to taxes of every kind.
- After 2000, OECD Model is amended to apply exchange of information to any tax imposed and to allow the use of information exchanged for purposes of application of all such taxes.



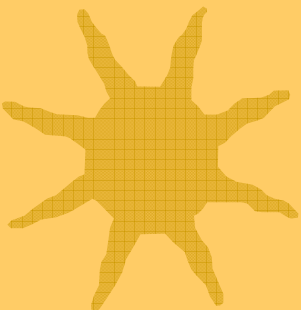
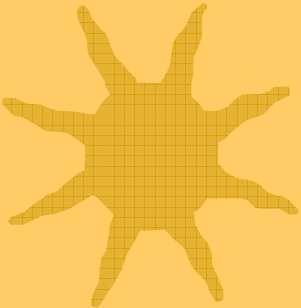
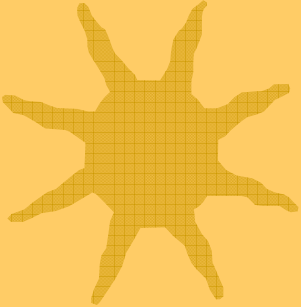
...Tax Payers & Taxes Covered...



- ★ Exchange of information concerning the application of custom duties is governed by other international conventions.
- ★ Issues arises as to whether information obtained can be utilised by requesting state to assess taxes and duties, other than income taxes.



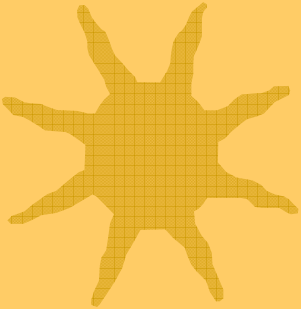
...Tax Payers & Taxes Covered...



- **General view** which prevails in most countries is that information exchanged should be utilised only to assess income taxes covered by the treaty.
- **However USA** believes the information exchanged should have the broadest possible scope.

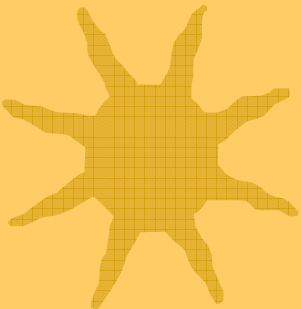
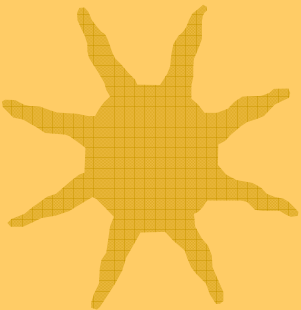


Methods of Exchange of Information..



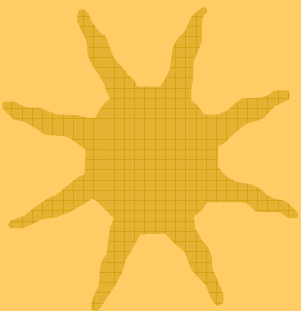
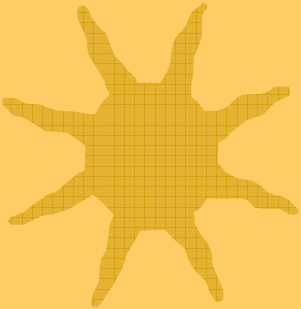
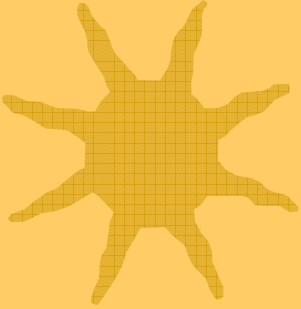
★ Methods

- **On request** - for a special case
- **Automatically** - systematic transmission of information about one or more categories of income.





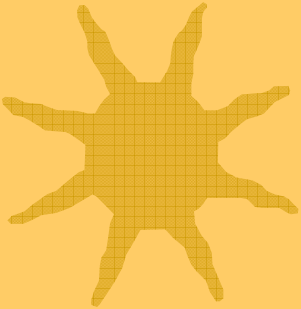
..Methods of Exchange of Information.



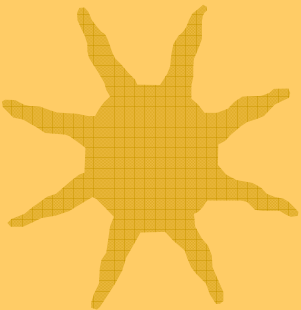
- **Spontaneously** - information gathered through investigation, which may be of interest to Other State.
- **Simultaneous examination** - arrangement between two or more parties to examine simultaneously each in its own territory.



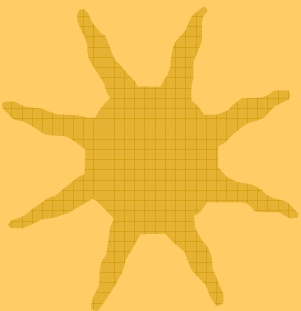
..Methods of Exchange of Information.



- **Tax examination -** through presence of representatives of the competent authority abroad

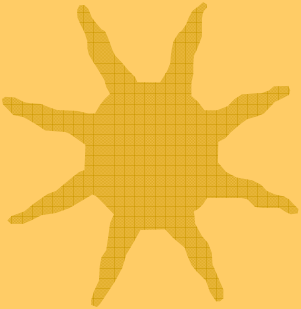


- **Industrywide exchange -** exchange of tax information concerning a whole economic sector.



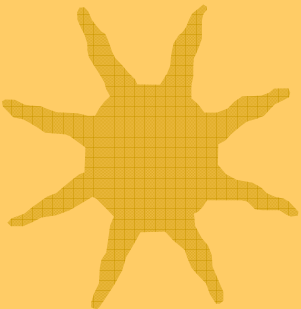
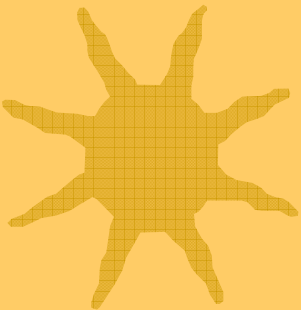


..Methods of Exchange of Information.



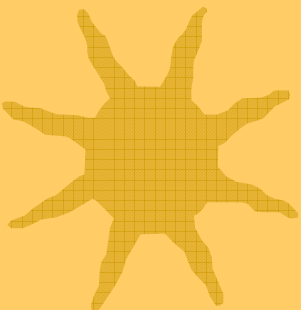
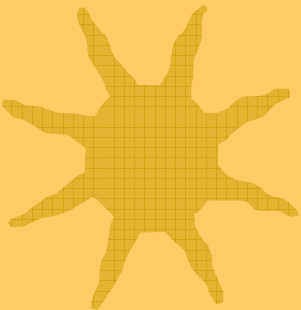
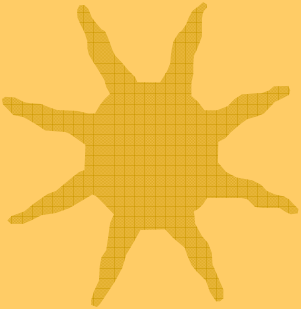
★ Types of Routine exchange of information

- Transactions relevant to the treaty itself
- Transactions relevant to special aspects of the legislation of the requested State.
- Transactions relating to activities of the residents of the requesting State in the Other State.





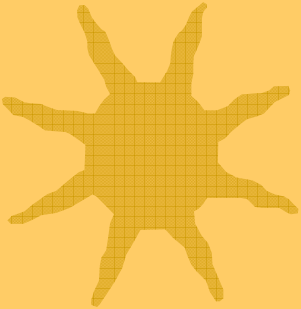
..Methods of Exchange of Information.



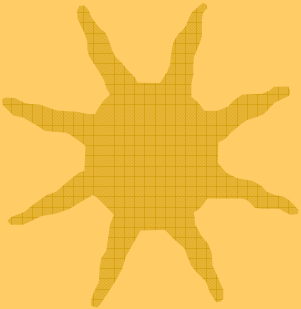
- **General information**
- **Changes in regular sources of income flowing between countries.**
- **Activities that affect or distort application of the treaty**
- **Activities that have repercussions regarding tax system of the requesting State.**



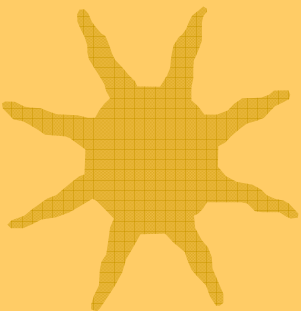
..Methods of Exchange of Information.



- ★ **Competent authorities consider various factors having bearing on operational character of routine exchange of information and its effectiveness.**



- ★ **Competent authorities also decide the permissible use of the information received.**



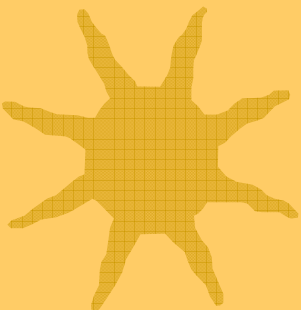
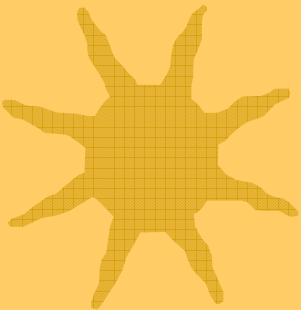
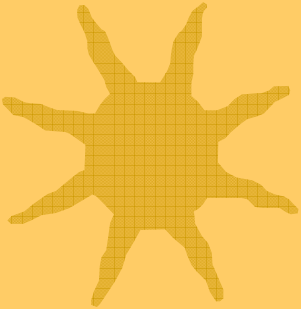
- ★ **Information received may be disclosed only to persons and authorities involved in**
 - **assessment or collection of,**



..Methods of Exchange of Information.

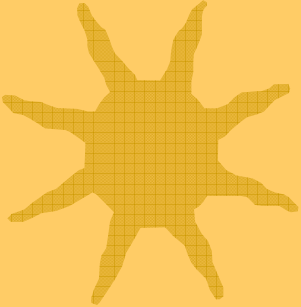
- enforcement or prosecution in respect of,
- Determination of appeals

in relation to taxes.

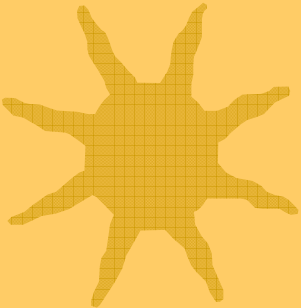




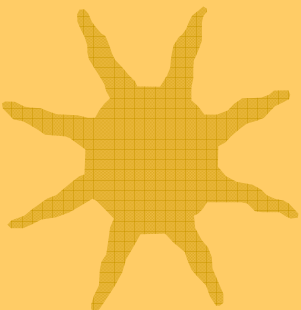
Limits to provide assistance



- ★ Divergence in rules, regulations and practices relating to the collection of information – an obstacle to the international co-operation in tax matters



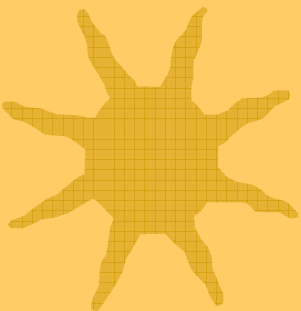
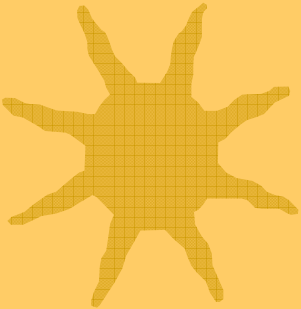
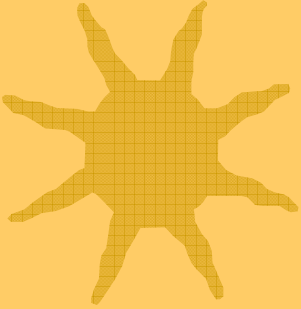
- Solution being suggesting a standardised procedure



- ★ Exchange of information is not without limitation .



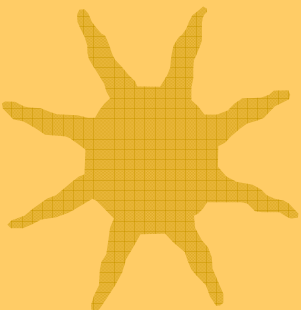
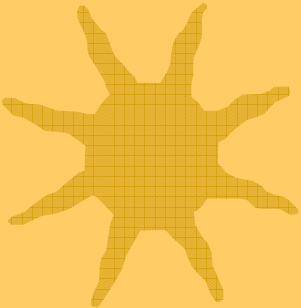
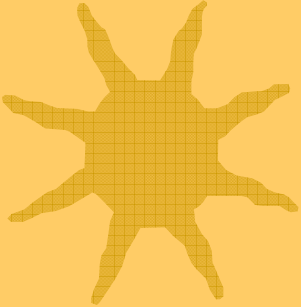
Limits to provide assistance...



- **Exchange of information may be refused**
 - **it implies carrying out administrative measures which are at variance with domestic laws or administrative practices**
 - **if the information is not obtainable in normal course of administration or domestic law of either states.**



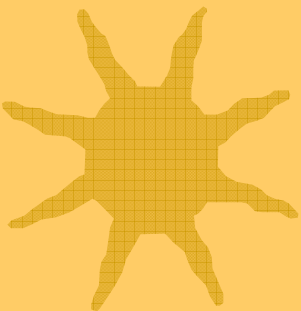
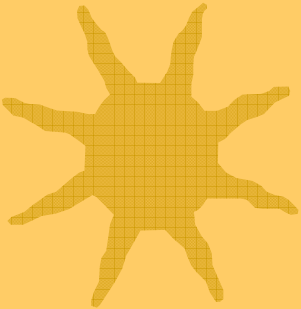
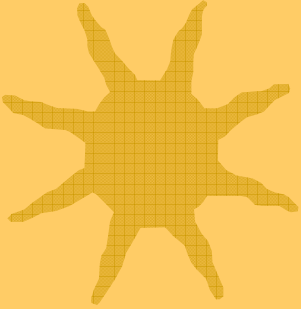
... Limits to provide assistance ...



- A state cannot take advantage of wider information system of other state
- Limits to the obligation to exchange information are measured by “ lowest common denominator ”
- Further limit to the obligation – information which discloses trade, business, industrial, commercial or professional secret or trade process may be refused.



... Limits to provide assistance ...

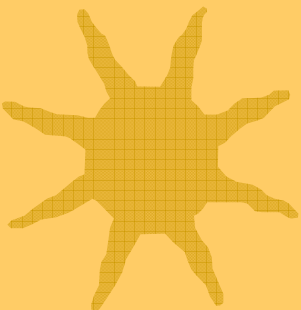
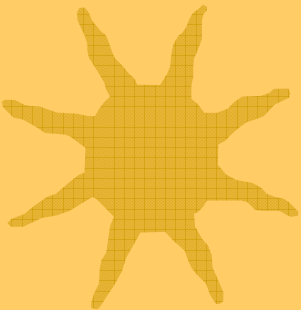
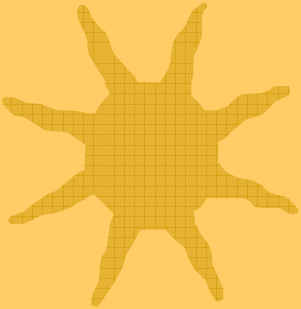


- **Bank information is a sensitive area**
 - it is justified by bank secrecy provisions e.g. Switzerland, Luxembourg, Austria
 - sometimes it is subject to careful evaluation before exchange of information.
- **Only exception to bank secrecy protection is treaty between USA and Switzerland.**



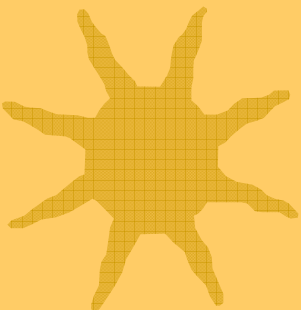
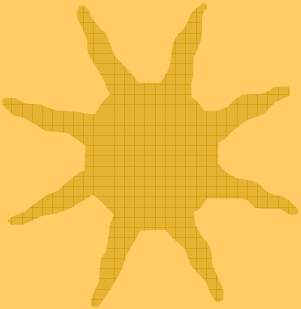
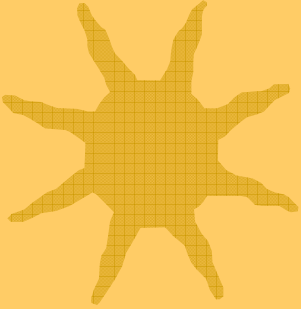
... Limits to provide assistance ...

- **Information contrary to Public Policy may also be refused.**





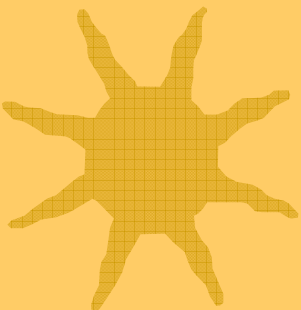
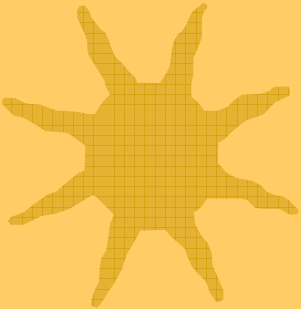
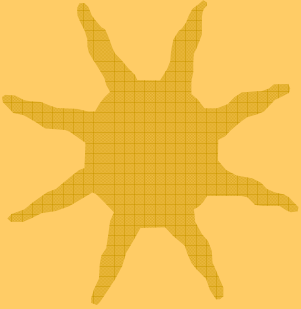
Protection of the taxpayer....



- ★ Limits to provide information is a first line of protection to the taxpayer.
- ★ Domestic legislation do not cover the problems of the taxpayer's rights.
- ★ Provisions vary in different countries for taxpayer's rights to know about exchange of information
 - informed in advance
 - Informed after the exchange of information
 - right to check files



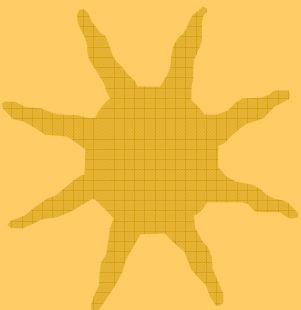
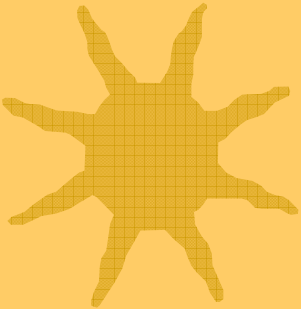
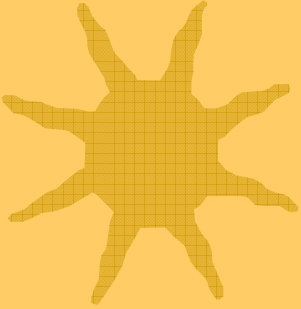
Confidentiality



- ★ **As a rule confidentiality of information supplied is sufficiently protected.**
- ★ **Difficulties arises where the information is to be disclosed to persons involved in assessment or collection of taxes on account of such persons and authorities not coinciding in various jurisdictions.**
- ★ **Tax Administration of most countries relies on good faith and fairness of the requesting state.**



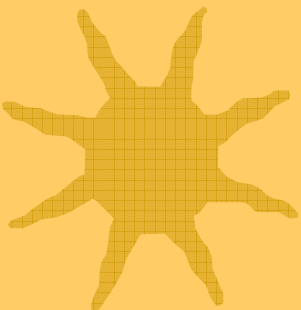
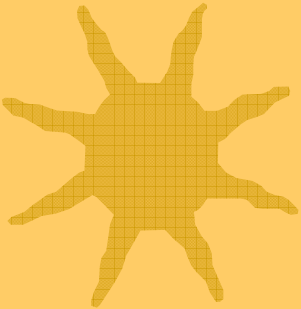
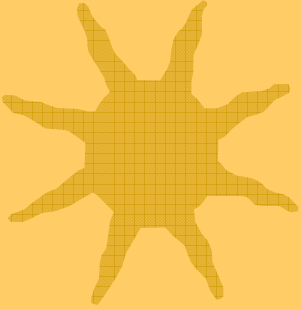
Conclusion...



- ★ **Issues relating to the limit to provide assistance, protection of the taxpayer and confidentiality are differently viewed and evaluated by various states.**
- ★ **At present, it is not surprising that the amount of information exchanged on request is rather limited.**
- ★ **globalisation has opened new ways of avoiding taxes and governments cannot always rely on domestic sources of information to enforce their tax laws.**



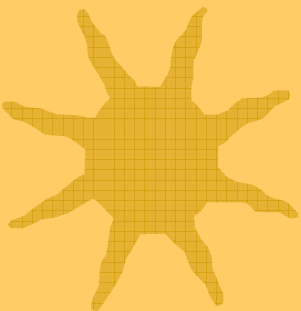
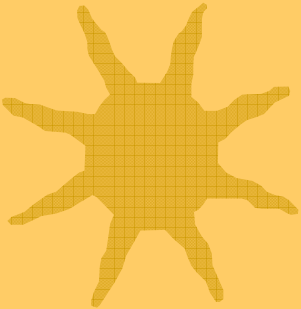
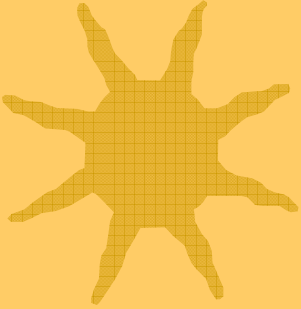
...Conclusion...



- ★ OECD's project on "Harmful Tax Practices" 2001 Progress Report recognises exchange of information as an effective means of deterring and discovering non-compliance in cross-border transactions.
- ★ It also emphasis that the essential element of effective exchange of information is the implementation of appropriate safeguards that information obtained and provided is used for the purposes for which it was sought.



...Conclusion...



- ★ OECD has formed a working group of its member countries in the development of an instrument for effective exchange of information.
- ★ The Inter-American Centre of Tax Administration has developed a model exchange of information agreement.
- ★ With effective exchange of information, a country's ability to enforce its own tax rules is enhanced.