

European Business Initiative on Taxation - EBIT

Comments on the OECD's revised Discussion Draft on a new Article 7
(Business Profits) of the OECD Model Tax Convention and of related
Commentary changes

Mr. Jeffrey Owens
Director
OECD Centre for Tax Policy and Administration (CTPA)
2, rue André Pascal
75016 Paris
FRANCE

Brussels, January 2010

Dear Mr Owens,

Re: Revised Discussion Draft on a new Article 7 (Business Profits) of the OECD Model Tax Convention and of related Commentary changes

This letter sets out the comments of the European Business Initiative on Taxation (EBIT)¹ on the OECD's revised Discussion Draft on a new Article 7 (Business Profits) of the OECD Model Tax Convention and of related Commentary changes.

EBIT considers this to be a very important topic for the business community and therefore we welcome this opportunity to provide our comments on the revised Discussion Draft. EBIT wishes to commend the OECD for its work so far and for having taken on board a great number of the recommendations from the business community and other interested parties during the previous public consultation. This has already made the revised Discussion Draft more even-handed and coherent.

However, in spite of these improvements and the clear step forward in the right direction, EBIT considers that there are still a few major concerns which remain, and which should still be addressed and modified by the OECD. These concerns are explained in more detail below.

In developing this submission, EBIT has relied more on the practical and daily experience of its members, who are experienced tax directors of multinational enterprises, than on a theoretical analysis.

Excessive documentation requirements

EBIT welcomes the wording of Paragraph 24 of the revised Discussion Draft that the OECD does not intend to create more burdensome documentation requirements for taxpayers regarding dealings than for transactions between associated enterprises. Yet, unfortunately, in the very same paragraph, it is stated that the preparation of documentation by taxpayers is nevertheless needed to substantially reduce the potential for controversies among OECD Member States regarding the approach taken to dealings. .

EBIT fears that the lack of clear guidance and unambiguous wording in this part of the revised Discussion Draft could actually lead to more extensive documentation requirements

¹ At the time of writing this submission, members of EBIT included: AIRBUS, BOMBARDIER TRANSPORTATION, CATERPILLAR, EADS, GE, DEUTSCHE LUFTHANSA, JTI, METRO GROUP, MTU AERO ENGINES, NUTRECO, ORACLE, ROLLS-ROYCE, ROMPETROL GROUP, SAFRAN GROUP, SANOFI-AVENTIS, SES GLOBAL and TUPPERWARE.

for enterprises regarding dealings than before. EBIT appeals to the OECD not to go down this route but to focus more on the practical implications of documentation requirements for businesses and ensure the actual usefulness of the information for the tax authorities.

Mere Purchasing

Regarding new Paragraph 41 of the revised Discussion Draft, EBIT notes the proposed deletion of the wording from Article 7 regarding no profits being attributed to a Permanent Establishment by reason of the mere purchase by that Permanent Establishment of goods or merchandise for the enterprise. EBIT notes also the cross-reference to the extant Article 5 continuing exclusion of mere purchasing activity for the enterprise not on its own or together with other excluded activities giving rise to an Article 5 Permanent Establishment. EBIT would wish to place on record its concern that there is no agenda to extend the revision of the OECD Model Tax Convention with respect to mere purchasing activity as regards Article 5 and would appreciate confirmation thereof.

Avoiding mismatches between OECD jurisdictions

On a general note, EBIT recommends avoiding any mismatches between jurisdictions in case of cross-border transactions and would like any final report to be aligned with earlier judgments and decisions by OECD Member States' national supreme courts and the European Courts, and with EU Treaty principles. An example of where the revised Discussion Draft may for instance be in direct conflict with a decision of the French Supreme Court in the Groupe Schneider Electric case (Conseil d'Etat No. 232276 of 28 June 2002) on CFC rules is Paragraph 12 of the revised Discussion Draft.

EBIT would like to encourage the OECD in its further consultation and finalising its report as soon as possible now given the long period the discussions on this matter have taken already. EBIT hopes that the above concerns are helpful and are taken into account in your final report. EBIT looks forward to any further discussions in this respect.

Yours sincerely,

The European Business Initiative on Taxation – January 2010

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