European Business Initiative on Taxation - EBIT

Contribution to the European Commission's public consultation
on double taxation problems in the EU

Introduction

This letter sets out the comments of the European Business Initiative on Taxation (EBIT) on the European Commission's public consultation on double taxation problems in the EU.

EBIT's Members span the following business sectors: aerospace and defence, aircraft engine manufacturers, airlines, earth moving equipment, food, food containers, healthcare equipment, oil, pharmaceuticals, retail, satellite networks, software, and train manufacture. At least one of EBIT's corporate members is represented on the EU Transfer Pricing Forum.

On behalf of EBIT's current 15 corporate members[1], EBIT has pleasure in responding to this public consultation, which it welcomes as an extremely valuable exercise in mapping the practical problems businesses still face with double taxation in Europe and how they should be dealt with at EU-level without further delays. 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 theory.

Summary

The general experience of those EBIT Members who participated in the EBIT exercise to seek to identify instances of unrelieved economic or juridical double taxation is that there are few if any recent material instances of unrelieved double taxation within the EU.

As regards some of the sectors covered, e.g. airlines (with the OECD Model Article 8 allocation of taxing rights to the State of effective management), this is perhaps unsurprising. Similarly, arguably, as regards businesses such as retail, where sales to third party customers are ordinarily local. This finding is, however, perhaps more surprising as regards other sectors represented, given the OECD statistic that 60% of international trade is comprised by cross border intercompany transactions within multinationals.

Notwithstanding the absence of specific 'war stories', EBIT would wish to offer the following suggestions to the Commission for improving the existing framework for the relief of double taxation.

EBIT notes that the ECJ currently offers little support (e.g. in the cases of Block, Damseaux and Kerckhaert-Morres) in the fight against double taxation other than as regards source taxation being on a net basis (see the ECJ's decision in the Gerritse case referred to below).

- **Encouraging the adoption of OECD Model double tax treaty Article 26 arbitration in all intra-EU bilateral tax treaties**

EBIT would recommend to the Commission to encourage Member States to adopt OECD model tax treaty Article 26 binding arbitration in their bilateral intra-EU tax treaties, effectively as an EU tax treaty 'norm'. For example, the recent new UK/France treaty contains such a provision at Article 26 paragraph 5. This, in EBIT's view, will offer a more direct route to arbitration than via the Arbitration Convention, which currently requires domestic and tax treaty remedies to have been exhausted. It would also deal with unresolved intra-EU competent authority claims.

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

- **Allowing comprehensive cross border loss relief throughout the EU**

Given the relative narrowness of the ECJ's Marks and Spencer plc judgment, affording cross border loss relief only for 'final' losses, EBIT would encourage the Commission to revisit ways of providing for cross border loss relief beyond the Marks and Spencer decision, for example via the optional Common Consolidated Corporate Tax Base (CCCTB). For branches, at the very least, EU Member States exempting branches in other Member States from the head office tax base should be allowing Deutsche Shell type foreign exchange losses on closure of such branches .In EBIT's view, the absence of comprehensive cross border loss relief within the EU is another form of double taxation.

- **Computing withholding taxes on a net income basis**

EBIT notes with some concern the ECJ's recent dismissal of the Commission's infringement case against Portugal, regarding ostensibly differential taxation of cross border bank loans, as compared with loans made by Portuguese banks to Portuguese customers. EBIT would urge the Commission to continue in its endeavours to ensure that the Gerritse principle that withholding tax be computed only on the net local source income after deduction of directly attributable expenses, wherever incurred, be followed but particularly as regards withholding tax on interest, royalties and, where relevant, management, service or technical assistance fees. This is particularly important as regards some Member States, such as the United Kingdom, which, since 2005, limit relief for foreign tax incurred in a trade to the UK tax attributable to the particular transaction, rather than the entire trade profit, as used to be the case.

- **Extending the scope of the EU Interest and Royalties Directive**

In relation to the above, EBIT would urge the Commission to seek to get the Member States to extend the ambit of the Interest and Royalties Directive to beyond first tier subsidiaries. EBIT recognises that, in the current economic climate, this may politically have to be more of a medium term objective, but nonetheless believes that the relief afforded by the Directive should not forever remain constrained by what was politically possible at the time.

EBIT encourages the Commission in its consultation efforts and hopes that the above suggestions are helpful and taken into account. The EBIT Secretariat (Bob van der Made, Peter Cussons) would be happy to discuss EBIT's submission and if helpful meet with the Commission as appropriate.

Yours sincerely,

European Business Initiative on Taxation – 2010

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