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EU JOINT TRANSFER PRICING FORUM

SECRETARIAT DRAFT DISCUSSION PAPER ON EARLY NOTIFICATION OF TRANSFER PRICING ADJUSTMENTS BETWEEN MEMBER STATES

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**Centre de Conférences Albert Borschette
Rue Froissart 36 - 1040 Brussels**

Working document

Contact:

Edward Morris, Telephone (32-2) 295.15.67 Edward.Morris@cec.eu.int

Wolfgang Büttner, Telephone (32-2) 299.99.38 Wolfgang.Buettner@cec.eu.int

1. This paper discusses one possible approach for speeding up the elimination of double taxation under the Mutual Agreement Procedure (MAP). Under this new approach, a tax administration could notify another tax administration automatically once a transfer pricing adjustment is made. This notification would come even before the taxpayer has made a request for MAP under a double tax treaty. The tax administrations would receive notification of transfer pricing adjustments much earlier than is the present case: hence "early notification." Tax administrations would also receive notification of all transfer pricing adjustments which potentially affected taxpayers in their jurisdiction under this new system.
2. There is a usual chain of events which results in dispute resolution between countries becoming necessary. A multi national enterprise (MNE) group files its tax returns on the basis of singular taxation. A tax administration commences an audit. A transfer pricing adjustment is agreed or imposed. This creates, or is likely to create, double taxation. The taxpayers concerned consider whether to present their cases under the MAP or the Arbitration Convention, live with the double taxation or else resolve the double taxation in some other way not acceptable to tax administrations, for instance so-called "Do It Yourself" (DIY) adjustments. A presentation of a case under the MAP article of the relevant tax treaty is made, and/or a similar request under the Arbitration Convention. The taxpayer requiring relief for the adjustment would usually make such requests to its Competent Authority (CA). This CA will usually ask for a position paper from the CA of the original adjusting country. The taxpayer in this country which has been subject to a transfer pricing adjustment will usually also have to make requests for assistance under the tax treaty or the Arbitration Convention (although whether one or both taxpayers have to make requests, before countries will allow a MAP, will vary between countries).
3. This chain of events lengthens the time taken to resolve double taxation under an MAP or the Arbitration Convention. Anything that can be done to streamline or automate this will be advantageous for all parties, especially the taxpayers who may be suffering liquidity issues from having paid the tax in each country involved.
4. One way of shortening the above process would be for tax administrations, through the CA, to inform the other tax administration potentially involved when a transfer pricing adjustment has taken place. This early notification could merely take form of a short notice identifying the taxpayer in the other state and the amount of the adjustment, or it could also provide a rationale behind the adjustment. If the full facts were not available to the CA of the adjusting country it could merely notify as soon as possible and then provide the full facts once they became known. It is possible that enough facts could be provided for the receiving CA to give relief under the treaty with no more communication between the CAs. Hence a full MAP would be avoided – as envisaged in the first sentence of paragraph 2, Article 25 of the OECD model tax convention. Even if this was not the case and a subsequent full MAP was viewed as necessary, the CA of the receiving country could contact the taxpayer proactively when the notification was received, requesting further details. This would enable the MAP to proceed more quickly.
5. Member States could also consider whether they have to wait for both taxpayers to make requests for assistance before entering into an MAP. With an early notification between CAs, this should prove unnecessary. Of course, a taxpayer cannot be compelled to enter MAP but

at the very least, upon receiving an early notification from another country, a CA could contact its taxpayer asking if a MAP is needed.

6. Member States might like to reflect that this system of early notification would allow them to track the incidence of transfer pricing adjustments where no double tax relief had been sought by taxpayers. There is no requirement for taxpayers to utilise the MAP or Arbitration Convention to eliminate double tax although these remedies remain the proper ways of achieving this aim. Where no remedy is sought using these channels, there is always a possibility that so called DIY adjustments have been made. Nevertheless, the uncovering of these should be seen as an incidental advantage of early notification. The immediate aim is to shorten the MAP process and to take account of the general consensus that MAP works but that it works too slowly.
7. It is evident that this system of early notification does require the CA of a tax administration to be aware of all transfer pricing adjustments being made by its administration. In many countries this is already the case. Even where it is not, details of adjustments may be held centrally already and it would be easy to pass them to the CA, itself normally part of the central administration. Where details of transfer pricing adjustments are not held centrally, it would not be too difficult for Member States to have an administrative rule compelling local tax offices to notify the CA when an adjustment has been made. This will help a speedier resolution of any MAP.

Question 1: Does the Forum agree that "Early Notification" would remove delay from the MAP process?

Question 2: Does the Forum recommend that Member States adopt this form of "Early Notification"?