European Commission
Directorate-General for Taxation and Customs Union
Rue de Spa 3, Office 8/007
B-1049 Brussels
BELGIUM

30 May 2012

Dear Sir, Madam,

Consultation on factual examples and possible ways to tackle double non-taxation cases

1. Introduction

We welcome the opportunity to contribute to the European Commission's "Consultation on factual examples and possible ways to tackle double non-taxation cases". This consultation takes place at a time when the European Union faces unprecedented challenges. The economic and financial crisis, together with low rates of economic growth, has put considerable pressure on the tax revenues of EU Member States. The Stability and Growth Pact contains clear reference values for public deficit and debt which would seem to require economic reform in a number of EU Member States in the medium term. For the short term, however, raising the level of taxation – in combination with cuts in public spending – may be inevitable in some Member States to meet the requirements of the Pact. At the same time, the objectives of raising money have to be weighed, economically at least, against possibly competing objectives such as stimulating growth. This is the context in which the current public consultation on double non-taxation takes place. It is clear that the issue of double non-taxation is important and that it is not limited to the European Union alone. It is also clear that this issue is extremely complex. Both the importance and complexity of the issue of double non-taxation necessitate that it is approached in a well-balanced way. This letter aims to contribute to this goal. It sets out some of the background to the issue and emphasises the need for transparency, conceptual clarity, international co-ordination, the elimination of international double taxation and the importance of clear guidance for businesses going forward.

2. Transparency

PwC supports the enhancement of financial transparency and accountability. We therefore also support the EU's initiatives – expressed in parts of the consultation document – to enhance fiscal transparency. At the same time it is important that the fundamental right to privacy which companies enjoy under EU and human rights law remains adequately respected.

3. Conceptual clarity

The most significant problem is the lack of a definition in the Consultation Document of the term 'double non-taxation' since we consider there will be considerable disagreement about this. For

PricewaterhouseCoopers International Limited
1 Embankment Place
London WC2N 6RH
T: +44 (0) 20 7583 5000, F: +44 (0) 20 7822 4652

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Registered Office: 1 Embankment Place, London WC2N 6RH.

example, tax incentives in a Member State for the promotion of research and development are likely to be regarded by that State as key to achieving the objectives of the Europe 2020 growth strategy. It is in our view not clear why Issue 7 of the Consultation Document mentions such tax incentives in the context of double non-taxation. The more general point is this: why could the use of tax measures with clear underlying policy choices by an EU Member State amount to 'double non-taxation'? After all, the level of taxation is exactly what the EU Member State in question wanted to achieve. Another example can be found in Issue 6 of the Consultation Document which mentions the deductibility for taxation purposes of costs made to obtain income or gains from assets (such as substantial shareholdings) which a Member State has deliberately decided should be tax exempt. Real economic costs which negatively impact the commercial profits of a company should, in our view, be deductible for taxation purposes. Without further explanation, it is not clear why the Consultation Document apparently labels this deductibility as 'double non-taxation'. A final example to mention is the suggestion in Issue 4 of the Consultation Document that unilateral advance pricing arrangements (APAs) may result in 'double non-taxation'. Although this statement may be correct in theory, it is – in our experience – generally not correct in practice and could lead to a conclusion that APAs are a bad thing. By contrast, APAs can be an important element in providing the certainty to business that is so essential in encouraging the investment required for economic growth. We consider that the absence of a definition in this area means that there is no framework by which commentators (including those in Member States) are able to consider or propose specific examples of "double non-taxation".

4. International co-ordination

On 5 March 2012, the OECD published a report on 'Hybrid Mismatch Arrangements – Tax Policy and Compliance Issues'. This publication underlines the fact that the issue of double non-taxation is not limited to the European Union. In fact, it is a global issue. It is, therefore, essential that it is approached in a way which is co-ordinated globally. There is a danger that a 'unilateral' policy response by the European Union and/or its Member States will put European businesses at a competitive disadvantage whilst the phenomenon of double non-taxation will continue to exist. We appreciate that many EU Member States have to raise the level of taxation so as to reduce their public deficit and debt, but a 'unilateral' approach may not achieve the intended aims (either in terms of effectively raising the level of taxation or in terms of abolishing double non-taxation). We therefore recommend that the European Commission should pursue this issue in close co-operation with the OECD and other international bodies.

5. International double taxation

Within the EU, the effective corporate income tax rate of multinational companies is affected by a wide variety of factors which can cause it to be above or below the applicable statutory corporate income tax rate, despite the alleged existence of situations of double non-taxation.

In addition, in our experience, any situations of possible double non-taxation may well be coupled with situations where the company or group faces international double taxation issues, double administrative burdens and the denial of cross-border loss relief (notwithstanding the case law of the European Court of Justice which would allow for cross-border relief for 'final losses' in some cases and in some – but not all – EU Member States). One important example can be found in the area of transfer pricing: it is not uncommon that tax administrations of different States take opposite positions which lead to double taxation. The dispute mechanisms to resolve this double taxation are often insufficient and/or ineffective.

The crucial point is that the phenomena of both double taxation and double non-taxation – are inevitable consequences of the fact that the corporate income tax systems of EU Member States have not been harmonised. There are strong arguments both for and against such harmonisation and there seems limited desire by many Member States at present to move in that direction. In our

view, both phenomena – double taxation and double non-taxation – are two sides of the same coin. One should not be addressed without the other.

6. Other EU initiatives

The present consultation does not take place in a legal vacuum. The Treaty on the Functioning of the European Union limits the freedom which EU Member State enjoy when exercising their tax sovereignty. Member States can neither discriminate against cross-border economic activity as compared with domestic economic activity, nor can they grant State aid through the tax system without prior approval of the European Commission. It is important that the European Commission clarifies how these rules and principles relate to the current public consultation. In our view, the legal certainty which is so important for economic activity requires this.

7. Way forward

We fully understand the context in which the current public consultation on double non-taxation takes place. The issues it raises are however complex and more work is needed in a number of areas before decisions on the optimal way forward can be made.

If you have any questions regarding the content of our response, please contact Bob van der Made (PwC EUDTG EU Public Affairs, telephone +32 (0)477 787936) or John Preston (PwC Global Head of Tax Policy, telephone +44 (0) 207 804 2645).

We agree to this response being published along with other responses.

Yours sincerely,

Ian Dilks

Global Leader, Public Policy & Regulatory Affairs
1 Embankment Place, London WC2N 6RH, UK
PwC IL
Interest Representative Register ID: 60402754518-05