STEP Society of Trust and Estate Practitioners | AETPF L'Association des Experts de la Transmission du Patrimoine Familial

Response to EU Commission DG Tax consultation on double non-taxation

Question -You could be included in one of the following groups:

Other: **Global professional body for trust and estate practitioners**.

Name/denomination of your organization/entity/company: **Society of Trust and Estate Practitioners.**

Country of domicile: **STEP has branches in 9 EU Member States and 50 countries worldwide.**

Contact details, including e-mail address:
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Brief description of your activity or your sector: **Professional body for trust and estate practitioners.**

Do you agree to publication of your personal data?
Yes

Do you agree to have your response to the consultation published along with other responses?
Yes

Introduction

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With branches in 9 EU Member States and more than 7,000 members in the EU (and over 17,500 members around the world), STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.

This response has been prepared by the STEP EU Committee which is composed of representatives of STEP branches across the EU Member States. The EU Committee assists national and international institutions on legal, tax and other matters relevant to STEP members across the EU.

STEP's ID number on the European Commission's register of interest representatives is 64339983762-18.

STEP welcomes the opportunity to respond to the Commission's staff working paper: *The internal market: factual examples of double non-taxation cases - consultation document*.

We admit to some confusion as to whether the consultation only covers direct corporate tax issues. The consultation paper begins by stating that it "concerns taxes which companies or other entities pay directly to tax authorities (i.e. "direct taxes") such as corporate income taxes, non-resident income taxes, capital gains taxes, withholding taxes, inheritance taxes and gift taxes." However, at the end of the consultation document a rather narrower scope for the consultation is suggested: "it should be recalled that the consultation only concerns taxes which companies and other entities pay directly to the tax authorities (i.e. "direct corporation taxes")' and that respondents should therefore only include double non-taxation issues concerning direct corporation taxes."

STEP members deal mainly in taxes associated with estate planning – inheritance tax, gift tax, capital gains tax, wealth tax. We would note that these are all direct taxes which fit with the first description of relevant taxes given in the consultation and for which they are instances of double non-taxation. After discussion with DG Tax officials STEP is therefore responding to this consultation in relation to such direct taxes.

We would begin by noting that double non-taxation arises in the same manner as double taxation as a result of a lack of co-ordination between national tax authorities regarding the basis on which taxes are levied. The problems of double non-taxation and double taxation should therefore be addressed via similar remedies.

Issue 1 Mismatches of entities

Question A – Do you find such mismatches of entities relevant in the future discussions on double non-taxation?

Yes

Questions B – Are you aware of mismatches of entities between member states or towards third countries?

Yes

Question C - Please give relevant details about these mismatches of entities *(max 500 words)?*

Two examples of such mismatches include French SCIs and UK LLPs:

i. A French S.C.I (Société Civile Immobilière) is generally treated as tax transparent in France but as tax opaque in the United Kingdom.

ii. A UK LLP (Limited Liability Partnership) is regarded as tax transparent in the UK but as a corporate entity in other states.

Question D – Please provide any suggestions you might have for ways in which these mismatches of entities could be tackled *(max 500 words)*.

The EU could establish a list of EU-wide entities that should have identical tax treatment throughout the EU.

Issue 2 Mismatches of financial instruments

Question A – Do you find such mismatches of financial instruments relevant in the future discussions on double non-taxation?

No

Question B – Are you aware of mismatches of financial instruments between member states or towards third countries?

No

Question C - Please give relevant details about these mismatches of financial instruments.

N/A

Question D – Please provide any suggestions you might have for ways in which these mismatches of financial instruments could be tackled.

N/A

Issue 3 Application of Double Tax Conventions leading to double non-taxation

Question A – Do you find such cases relevant in the future discussions on double non-taxation?

Yes

Question B – Are you aware of cases where member states application of double tax conventions lead to double non-taxation?

Yes

Question C - Please give relevant details about these cases *(max 500 words)?*

Many double tax conventions in relation to inheritance tax lead to the primary taxing right being vested in a state that does not levy inheritance tax, or that gives different exemptions resulting in low or non-taxation.

Question D – Please provide any suggestions you might have for ways in which this problem could be tackled *(max 500 words)*.

The EU could encourage Member States to ratify conventions in model form.

Issue 4 Transfer pricing and unilateral Advance Pricing Arrangements

Question A – Do you find unilateral advance pricing arrangement relevant in the future discussions on double non-taxation?

No

Question B – Are you aware of unilateral advance pricing arrangements that could lead to double non-taxation?

No

Question C - Please give relevant details about these unilateral advance pricing arrangements.

N/A

Question D – Please provide any suggestions you might have for ways to tackle unilateral advance pricing arrangements leading to double non-taxation.

N/A

Issue 5 Transactions with associated enterprises in countries with no or extremely low taxation

Question A – Do you find transactions with associated enterprises in no/low tax countries relevant for the future discussions on double non-taxation?

No

Question B – Are you aware of transactions with associated enterprises in no/low tax countries that could lead to double non-taxation?

No

Question C - Please give relevant details about these kinds of transactions *(max 500 words)?*

We note that some commentators regard trusts administered from "low" tax countries as being operated to enable double non-taxation to occur. In reality, typically beneficiaries' in Member States will see their receipts from such trusts taxed. We would further note that it is a matter for Member States each to decide how they tax businesses or entities operating from outside the EU.

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled.

N/A

Issue 6 Debt financing of tax exempt income

Question A – Do you find these cases relevant for the future discussions on double non-taxation?

No

Question B – Are you aware of cases where debt financing of tax exempt income is deductible?
No

Question C - Please give relevant details about these case(s).

N/A

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled.

N/A

Issue 7 Different treatment of passive and active income

Question A – Do you find these special regimes relevant for the future discussions on double non-taxation?

No

Question B – Are you aware of such special regimes leading to double non-taxation?

No

Question C - Please give relevant details about these case(s).

N/A

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled.

N/A

Issue 8 Double Tax Conventions with third countries

Question A – Do you find double tax conventions with third countries to be relevant for the future discussions on double non-taxation?

Yes

Question B – Are you aware of double tax conventions with third countries that can be used to achieve double non-taxation?

Yes

Question C - Please give relevant details about these double tax conventions with third countries *(max 500 words)?*

Many double tax conventions in relation to inheritance tax lead to the primary taxing right being vested in a state that does not have inheritance tax, or that gives different exemptions, resulting in low or non-taxation.

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

The EU could encourage Member States to ratify conventions in model form.

Issue 9 Disclosure

Question A – Do you agree that targeted disclosure initiatives could be a way to tackle double non-taxation?

No.

Question B – Do you have knowledge of the experiences with disclosure rules in member states?

Yes

Question C – If your answer is yes to A, please specify which disclosure initiatives you believe could be a way to tackle double non-taxation.

N/A

Question D - If your answer is yes to B, please specify what the experiences in member states are *(max 500 words)*?

There are two main types of disclosure initiative we are familiar with. One, which has been widely used by several Member States declaring tax amnesties, is based on the ex-post disclosure of illegal tax evasion. The most prominent current examples of this are perhaps the UK's Liechtenstein Disclosure Facility and the current Spanish

amnesty. Such schemes are not appropriate in the case of double non-taxation since this does not usually rest on (fraudulent) tax evasion.

Other "disclosure" initiatives focus on the requirement to alert tax authorities to the use of various identified, often highly contrived, tax planning schemes. The UK DOTAS arrangements are an example of such a disclosure scheme. Again we do not see such disclosure initiatives as relevant to most cases of double non-taxation since these are typically not based on "schemes". It would not be appropriate, for example, to label a Dutchman exercising his right to live in Spain as a 'tax planning scheme' even if in certain circumstances this produced double non-taxation.

Issue 10 Other issues

Question A– Are you aware of double non-taxation not described above?

Yes

Question B - Please give relevant details about these kinds of double non-taxation case(s) *(max 500 words)?*

STEP members deal mainly in taxes associated with estate planning such as inheritance tax, gift tax, capital gains tax and wealth tax. In these instances double non-taxation arises in the same manner as double taxation and reflects the failure of national governments to develop a common approach to taxation. This can reflect differences in the basis on which a tax common to two Member States is levied. Alternatively, it can reflect that fact that some Member States do not levy taxes on an event which attracts tax in another Member State.

For example, on death:

- Spain taxes Spanish assets and worldwide assets received by beneficiaries resident in Spain.
- The Netherlands taxes Dutch assets and those of someone dying within 10 years of having been Dutch resident

Thus there is double non-taxation for the estate of a Dutch resident in Spain who lives there for more than 10 years but holds assets outside the Netherlands or Spain. There is also double taxation (subject to some measure of unilateral relief) for a Dutch resident who leaves their estate to a Spanish resident.

There are many similar examples of differing tax systems between Member States leaving gaps. For instance, the estate of a person with domicile in France (in the

common law sense) but resident in the UK for less than 17 out of 20 tax years will not be taxed in the UK or in France in relation to assets outside the UK or France.

There also examples where citizens will not be required to pay tax in certain circumstances because Member States do not tax events attracting tax in other Member States. For example, Sweden and Austria have no inheritance tax. If a UK resident moves to either of those states before death they would not pay inheritance tax, although we would question whether this should be seen as an example of double non-taxation.

Question C – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

Greater co-ordination between Member States in developing their tax systems would help tackle both the twin issues of double taxation and double non-taxation. Theoretically this might result in identical taxation mechanisms throughout the EU, although this clearly raises national sovereignty issues. A more practical solution in the near term may therefore be a comprehensive range of double tax treaties between Member States that would enhance the effectiveness of Member States' tax systems, although this would require compromise between Member States. For example, in the Dutch/Spanish inheritance tax case we highlighted earlier, the Netherlands could continue to tax the estates of Dutch nationals until such a person has been resident outside the EU for 10 years rather than the Netherlands for 10 years. This would mean that Spain would have to agree to the Netherlands retaining primary taxing rights. We would, however, highlight the need for double taxation, as well as double non-taxation, to be properly and fully dealt with under any such double taxation agreements to avoid unfairness and artificial restrictions on the free movement of capital and people.

Question D - Please provide any other suggestions of increased information measures – not being disclosure - you might have for ways to tackle double non-taxation *(max 500 words)*.

We would suggest that the prime need is for Member States to have better information on the tax regimes of the other Member States and a better understanding how they work in practice for citizens with cross-border families, assets or origins.

For example, the UK has only recently begun to consider imposing capital gains tax in relation to the disposal of property in the UK owned by non-residents and imposing an annual charge on residential property held by overseas corporate

structures. This is in spite of the fact that these are matters that France and Spain have dealt with, and taxed, satisfactorily for many years.

France by contrast has now imposed a taxation mechanism on trusts that is different to every other Member State's mechanism. This will impose a double tax charge on many trusts. However, trusts with French resident trustees with non-French assets or beneficiaries will be exempt from tax.

Clearly there are strong long term efficiency arguments for greater harmonisation of national tax systems among Member States. In addition clearer exchange of information between tax authorities on best practice on cross-border taxation issues would be both helpful to national governments and also help eliminate examples of both double taxation and double non-taxation.

STEP EU Committee

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