BUSINESSEUROPE

COMMENTS

21 May 2012

European Commission
Directorate-General for Taxation and
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Identification number in the register: **3978240953-79**
Registration date: **13/01/09**

BUSINESSEUROPE – Comments on the European Commission Consultation paper on double non-taxation

The Commission has launched a public consultation in order to establish evidence concerning double non-taxation within the EU and in relation to third countries. The consultation runs from February 29 until May 30, 2012.

The Commission has previously taken initiatives to remove double taxation and other obstacles within the single market, something which BUSINESSEUROPE fully supports. BUSINESSEUROPE welcomes the opportunity to provide comments on the Commission Consultation paper on double non-taxation. Considering the political pressure associated with this topic, we understand that the Commission, in holding the consultation, is aiming at establishing whether or not there is a need to act in this area, and if so to identify and develop the appropriate policy response to double non-taxation.

BUSINESSEUROPE's prime focus is to make sure that companies can operate their business efficiently within the single market and worldwide with as few obstacles as possible and without being subjected to double taxation.

BUSINESSEUROPE is fully supportive of fighting artificial tax schemes. We do however find the questionnaire to go beyond aggressive tax planning and artificial schemes. Rather than to answer the specific questions in the consultation paper we have decided to provide a few comments of a more general nature.

There is an obvious risk that there will be a variety of national non coordinated initiatives in this area. In order to avoid double taxation as well as double non-taxation it is of utmost importance that countries can agree on a common set of principles and apply them consistently. Furthermore, it must be recognized that non-taxation is not always a result of aggressive tax planning. On the contrary, non-taxation is often an intentional consequence of national tax policy objectives. A general prohibition of double non-taxation would depart from such national objectives.

It is therefore crucial to have a very clear notion of “double non-taxation”. Some fiscal administrations consider e.g. tax incentives for research and development or notional interest deductions as double non-taxation. BUSINESSEUROPE considers that tax measures that have been introduced by national legislators to incentivize certain behaviour of tax payers should not be stigmatized. Otherwise every deviation between two national tax systems (e.g. differences in depreciation rules) would have to be regarded as double non-taxation. We consider it to be the right of a sovereign state to design differences in its tax system.

Consequently, in this context, the questions in the consultation paper go beyond what we normally consider to be double non-taxation. We believe it is important to make a clear distinction between actual double non-taxation cases (e.g. due to mismatches of hybrid entities and hybrid instruments) and tax competition (low taxation). However, some of the questions in the Consultation paper seem to relate to the latter. The right to set corporate tax rates constitutes an important part of a country’s tax sovereignty. The ECJ has clearly ruled in support of the right to take advantage of lower rates, unless the “arrangements are wholly artificial”. Rather than sweeping broadly for potential double non-taxation, BUSINESSEUROPE would fully support focused and coordinated actions to deal with such “wholly artificial” and abusive structures. However, it is essential to uphold the principle of a country’s tax sovereignty and to respect the clear guidance given by the ECJ.

Furthermore, according to the OECD Guidelines for Multinational Enterprises (MNE-Guidelines) companies should adhere to the “spirit of the law” in the countries in which they operate. Consequently, companies could very well be in a situation where they adhere to the spirit of the laws in two countries and still end up with double non-taxation.

Tax within the EU is a national competency and as such governments make decisions about their own tax policy and these decisions may, or may not, synchronise with decisions by other member states. Mismatches between tax systems may, or may not, arise as a result giving rise to "double non taxation" (as well as double taxation for that matter). The ECJ has stated in a number of cases that, even if double taxation is an obstacle to the internal market, overlapping taxation caused by consistent application

of local tax legislation has to be accepted[1]. Even if member states and the Commission would believe double non-taxation is a problem, such ECJ jurisprudence would confirm it is a consequence of un-harmonised legislation between countries. The only way such mismatches (double non-taxation but also double taxation) could be avoided would be for governments to liaise on their tax policy with other governments to mutually agree a policy to avoid these mismatches. Such a review would also need to consider how to avoid any unintended consequences and in particular any double taxation caused by any actions considered. In these circumstances it is difficult to see how business could comment on the policy changes that would need to be considered as changes could be made in either national context.

On behalf of the BUSINESSEUROPE Tax Policy Group

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[1] E.g. Kerkhaert&Morres C513/04