

European Commission
Directorate-General for Taxation and Customs Union
Direct Tax Policy & Cooperation - Unit TAXUD/D2
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B-1049 Brussels
Belgium

Via <https://ec.europa.eu/eusurvey>

10 May 2016

Dear Sir/Madam

Consultation on Improving Double Taxation Dispute Resolution Mechanisms

Thank you for the opportunity to participate in the consultation on improving double taxation dispute resolution mechanisms.

Multinational businesses should be taxed only once on their commercially generated profits and other business income. Governments have long recognised that agreeing double tax treaties and other mechanisms for providing assurance and certainty (such as the EU Arbitration Convention) are essential to remove a potentially significant barrier to international trade, and are important factors in countries' ability to attract inward investment.

The mutual agreement procedure (MAP) provisions in Article 25 of the OECD Model Tax Treaty and Section 3 of the EU Arbitration Convention are key elements in ensuring that double taxation is eliminated in practice. They provide for resolution where two tax authorities may take different views on taxation of items subject to a tax treaty. They are particularly relevant (or, in the case of the arbitration convention, limited to) and have been used most often to date for resolution of disputes arising from taxation of trading profits: in relation to transfer pricing, permanent establishments and business profits where the establishment of countries' taxing rights is heavily based on the gathering and interpretation of facts.

Some tax authorities have made significant progress in ensuring that treaty and arbitration convention MAP obligations are met, and there are many examples where the process has worked well. In our experience most cases that get into MAP are ultimately resolved.

However, we agree that there is more that needs to be done. The main issues that arise currently are i) getting access to MAP under double tax treaties or the EU Arbitration Convention and ii) the length of time that it takes for disputes to be resolved. In addition, the volume and pace of change arising from the G20/OECD BEPS project in areas including permanent establishment and transfer pricing is likely to lead, in the short to medium term at least, to

an increase in the number of disputes between tax authorities as new rules and approaches become established. This will increase the importance of having effective dispute resolution practices.

It remains important that countries have robust legislative and tax authority governance frameworks to ensure that disputes between tax authorities and businesses are dealt with efficiently. This will ensure that cases that go to MAP under tax treaties or the arbitration convention are appropriate.

The most appropriate and important resolution mechanism under MAP in tax treaties or the EU arbitration convention remains mandatory binding arbitration. This is the only outcome that will ensure that a business is not taxed twice on the same profits and it should be a minimum standard in EU Member States' tax treaties with other Member States as well as in the arbitration convention.

It is also notable that mandatory binding arbitration in a double tax treaty or the arbitration convention acts as a deterrent, such that cases may be settled by tax authorities by agreement without the need for the arbitration process to be invoked. This is in itself a useful safeguard. At the same time, it is important that the pre-arbitration parts of MAP/arbitration convention procedures functions as efficiently as possible in order to minimise the occasions when arbitration is necessary. It would be an unhelpful outcome if the presence of binding arbitration requirements were to encourage practices where tax authorities may seek to deny access to MAP/arbitration convention in the first place.

Improvements that result from this work by the European Commission will be welcomed by business. Further comments on some of the options proposed in the consultation are set out in the attached appendix.

If you would like to discuss any of the points raised in this letter, please do not hesitate to contact either Bill Dodwell (bdodwell@deloitte.co.uk) or Alison Lobb (alobb@deloitte.co.uk).

Yours faithfully



PP.

Bill Dodwell
Deloitte LLP

Specific comments on sections of the consultation:

- 2.1 Double taxation can be resolved through domestic court procedures (or other domestic settlement routes) or alleviated under binding arbitration in MAP procedures in tax treaties or the EU Arbitration Convention. It is important that businesses have a choice of recourse to domestic procedures or MAP as appropriate for the dispute. Many countries provide the option of 'staying' domestic procedures pending the outcome of MAP.
- 2.4 Compliance costs and the burden of eliminating double taxation can limit the viability of cross-border trade. Double taxation creates uncertainty for trade both into and within the EU. This can be alleviated where systems are in place to effectively eliminate double taxation within a reasonable timeframe.
3. Efficiency and low costs for tax administrations, whilst clearly desirable, are not the prime focus of the work on dispute resolution and alleviation of double taxation. The consequences for investment, growth and jobs of an uncompetitive, costly and uncertain environment for businesses is likely to have an impact on future tax receipts in any event.

In relation to transparency and publication of cases resolved, this would be helpful where the matter relates to the legal interpretation of a double tax treaty or other legal matter which will have precedent value for other taxpayers and tax authorities. However, many instances of double taxation relate to fact-specific cases (e.g. transfer pricing or permanent establishment cases) and therefore have limited or no precedent value. Any additional costs or time for tax authorities to write anonymised case notes will not aid the primary goal of alleviating double taxation in a timely manner. In addition, it is essential that confidential commercial information is not revealed in this process.

- 4.1 EU Member States could be required by Directive to adopt the G20/OECD Action 14 standards for dispute resolution, including binding arbitration, in treaties with other Member States, and to use their best endeavours to include binding arbitration in treaties agreed with non-Member States. This would ensure compatibility with best internationally agreed standards.

Dispute resolution mechanisms under tax treaties and the EU Arbitration Convention should, between them, cover all areas of taxation (and not be limited to transfer pricing and attribution of profits to permanent establishments). This would include, for example, cases that turn on whether a permanent establishment exists and cases where a 'principal purposes test' or other treaty anti-abuse provision is invoked. Such mechanisms would allow tax authorities to reach agreement on taxing rights, or refer the matter for binding arbitration.

Other practical matters may be required to ensure timely and efficient dispute resolution. For example, in transfer pricing cases involving profit splits, it may be helpful to require joint audits by countries, with an automatic roll-over of the audit process into MAP, to reduce the need for multiple separate audit and MAP procedures.