Opinion Statement FC 11/2015

on the revised OECD Discussion Draft

on Preventing Tax Treaty Abuse (BEPS Action 6)

Prepared by the CFE and AOTCA

Submitted to the OECD

in June 2015

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Its functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. The CFE is registered in the EU Transparency Register (no. 3543183647-05).

AOTCA (The Asia-Oceania Tax Consultants´ Association) was founded in 1992 by 10 tax professionals' bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.

AOTCA and CFE unite almost 500,000 individual tax professionals in 37 countries (19 OECD member states).

Introduction

The following comments relate to the OECD's Revised Public Discussion Draft "*Preventing Tax Treaty Abuse*"[1] (hereinafter, the "*Discussion Draft*"), published on 22 May 2015, pertaining to Action 6 of the OECD/G20 BEPS (Base Erosion and Profit Shifting) Action Plan. They complement the joint CFE and AOTCA Opinion Statement FC 2/2015 of January 2015 on the OECD Discussion Draft of 21 November 2014[2].

We will be pleased to answer any questions you may have concerning CFE's and AOTCA´s comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

CFE´s and AOTCA´s observations

We welcome the OECD´s readiness to consider the stakeholder comments received in its follow-up work on certain BEPS Actions and the commitment to provide further examples.

The proposed simplified LOB (Limitation On Benefits rule) is a considerable improvement which appears much better fit-for-purpose than the detailed LOB. It also seems more likely that countries will adopt the simplified LOB.

We would nevertheless like to underline remaining concerns relating to the uncertainty that both the LOB or PPT (Principle Purpose Test) rules may cause, as well as on the increase of the difficulties in their application. Further guidance is needed and the OECD should not rush to release a proposal/deliverable within this Action, if certainty and clarity on the new proposed recommendations are not ensured.

On the PPT, we note that none of the concerns for small countries that have been raised has been addressed. We believe that the Commentary should contain an example to highlight that the PPT should not fail merely because a countries´ treaty network was one of a number of reasons for locating there. A similar example could be added to the commentary on the discretionary relief section of the LOB.

Collective investment vehicles

With respect to CIV-funds, the revised Discussion Draft merely refers to the 2010 CIV Report and concludes that no action needs to be taken. The Draft states that commentators have observed that the recommendations of the Report have not been followed by "some countries". In our perception, this understates the seriousness of the situation. Although the Commentary on the OECD Model Convention was amended to reflect the recommendations by the 2010 CIV Report, such changes do not impose on countries a binding obligation to deal with the issue of treaty protection of CIVs. To the best of our knowledge, hardly any action (if any at all) has been taken by the OECD countries to address this issue.

With respect to non-CIV funds, the Draft recognizes that most such funds will not qualify for treaty protection under the LOB provision, and then states that the Working Party should continue to

[1] http://www.oecd.org/ctp/treaties/discussion-draft-action-6-follow-up-prevent-treaty-abuse.pdf
[2] http://www.cfe-eutax.org/node/4094

explore solutions. We urge the Working Party to find such solutions as the existence and economic rationale of these funds could be seriously threatened in the absence of protection of tax treaties.

Discretionary relief section of the LOB

As noted in the Discussion Draft, both the PPT rule and the discretionary relief provision of the LOB rule include a test based on whether one of the principal purposes is the obtaining of benefits under a tax treaty. Our concerns with the possible application of the PPT on smaller economies are equally applicable to the discretionary relief section of the LOB. More examples should be added.

Derivative Benefits Provision

We consider that both proposals contained in § 53 increase uncertainty and lack clear guidance and should therefore be revisited:

§ 53 Proposal 1:

The new proposal on "special tax regimes" looks potentially very broad, there is very little time to consider it and there is no guidance. In our opinion, issues relating to "special tax regimes" should be addressed in the context of the OECD work on Harmful Tax Practices, and not within Action 6.

§ 53 Proposal 2:

This proposal for a new general treaty rule intended to make a tax treaty responsive to certain future changes in a country's domestic tax laws increases the level of uncertainty for taxpayers. For the sake of clarity and certainty, the concerns that this proposal intends to address could be easily safeguarded through a simple renegotiation of the Treaty.

Active Business Test

We note that the substantiality test for dealings with connected parties is still included. This requirement impacts small countries disproportionately. While it seems obvious that an active business in a small country requires a smaller workforce than an active business in a large country, smaller member countries (e.g. Ireland) in practice have made the experience that the Active Business Test as contained in US tax treaties is difficult to meet. We are concerned that such challenges will be magnified if adopted across multiple jurisdictions.

We suggest that the OECD proposals are amended so that it is clear that business support activities (where the workforce in the smaller economy conducts substantial managerial and operational activities over those support services) can qualify as an active business even where those activities are provided for the benefit of related group parties and where there are no or limited sales of the relevant Group's products / services in the small country concerned.

In addition, an appropriately designed "safe harbour test" should be included.

Combination of Simplified LOB and PPT

While the simplified LOB is welcome, we note that the Discussion Draft proposes that it should only be used in conjunction with a PPT. However, the combination of both tests will result in increased

uncertainty for international businesses as to their entitlement to the benefits of double tax treaties and the application of the treaty provisions to their business activities.

The option should be available for treaties to adopt the simplified LOB without requiring a PPT to also be included.

PPT rule and Dispute Resolution Mechanisms

§ 80 – 82 summarise the discussions held on "*Whether the application of the PPT rule should be excluded from the issues with respect to which the arbitration provision of paragraph 5 of Article 25 is applicable*": We welcome the fact that the OECD appears to agree on the essentiality of subjecting the application of the PPT rule to MAP/arbitration (so as to ensure certainty). Disputes arisen in connection with the PPT rule should be solved through mandatory arbitration resulting in a legally binding outcome.

Application of the new treaty tie-breaker rule

§ 99-102 Proposal: The term "expeditiously" in the provision "*The competent authorities to which a request for determination of residence is made under paragraph 3 should deal with it expeditiously and should communicate their response to the taxpayer as soon as possible"* should be defined. A fixed time-frame would be welcome, so as to ensure certainty.