




Impact of BEPS on Tax Treaties

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OECD Work

- Proposals
- Changes of the OECD Model Convention
- Changes of the OECD Commentaries



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BEPS ACTION 1: DIGITAL ECONOMY



- Art 5 par 4
 - Delete whole paragraph
 - Delete subparagraphs
 - Delete "delivery"



BEPS Action 2: NEUTRALISE THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS



- Partnership Report: Confirmation (?)
- Extension to trusts and others
- Criteria:
 - income
 - derived by or through an entity or arrangement
 - that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State
 - shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.



BEPS ACTION 6: PREVENTING GRANTING TREATY BENEFITS



- Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.
- Clarify that tax treaties are not intended to be used to generate double non-taxation.
- Identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country.



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BEPS ACTION 6: PREVENTING GRANTING TREATY BENEFITS



- Recommendation:
 - to include in the title and preamble of tax treaties a clear statement that the Contracting States, when entering into a treaty, wish to prevent tax avoidance and, in particular, intend to avoid creating opportunities for treaty shopping
 - to include in tax treaties a specific anti-abuse rule based on the limitation-on-benefits provisions included in treaties concluded by the United States and a few other countries.
 - in order to address other forms of treaty abuse, include treaty shopping situations that would not be covered by the specific anti-abuse rule



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BEPS ACTION 6: PREVENTING GRANTING TREATY BENEFITS



- Art X par 1 – 6:
- LoB Clause
- US Treaty Practice
- Deviations



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LoB



- Scope:
 - Distributive rules
 - Method Article
 - But e.g. not Art 25
- Qualified persons
 - Individuals (Collective investment vehicles?)
 - State and state owned entities
 - Companies with shares publicly traded
 - Charitable organizations and pension funds
 - Ownership / Base erosion



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LoB



- Active conduct of a business
- Derivative benefits
- Discretionary relief (principal purpose test)



OECD Proposal for Art X Par 7 OECD MODEL Convention



- “Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income and capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.”



Context



- General trend
- Different suggestions (UK, India, EU etc)
- Consequences of changes in tax treaties



Scope Art X par7



- "Benefits under this convention"
- No benefit under domestic tax law
- No benefit under under treaties
- Definitions?
- Allocation rules
- Method article
- Art 24 OECD Model Convention?
- Art 25 OECD Model Convention?
- Articles 26 and 27 OECD Model Convention?



Scope Art X par 7



- Per country or overall approach?
- Different allocation rules
- Lex specialis?



Principal purpose



- Objective analysis?
- Intention of taxpayer
- "Reasonable to conclude"
- Other persons?
- "sole purpose", "essential purpose", "Main purpose", "principal purpose" – "one of the principal purposes"
- EU: ECJ Competence
- Treaties: Domestic courts: In dubio pro patria
- Relaxing the criteria through Commentaries?



Object and purpose



- Additional requirement
- “established”
- Regular legal methodology
- Consequence: Literal interpretation in all other cases?
- Consequence: Art X par 7 irrelevant



Legal consequences



- “shall not be granted”
- Example: Art 11: which other rule?
- Consequence in other country?
- Triangular situations?



Further consequences of a treaty GAAR



- Anti-abuse-rules destroy the legal culture
- Only bad lawyers need it
- Opposition from the US?



Other measures I



- Splitting-up of contracts
 - Art 5 par 3 OECD MC: 12 months; different companies
- Hiring-out of labour cases
 - Art 15 par 2 OECD MC
- Transactions intended to avoid dividend characterisation
 - Dividend, interest, capital gains
 - Redefining the terms dividend and interest?
- Dividend transfer transactions
 - 5 % limitation: 365 days holding period
 - Exceptions for corporate reorganizations



Other measures II



- Transactions that circumvent the application of Article 13(4)
 - Shares and comparable interests, such as interests in a partnership or trust
 - 365 days
- Tie-breaker rule for determining the treaty residence of dual-resident persons other than individuals
 - MAP: incorporation, "otherwise constituted", "any other relevant factor"
 - Absence of general MAP: individual MAP
- Anti-abuse rule for permanent establishments situated in third States
 - Less than 60 % of tax which would be imposed in residence state
 - Consequence: Other rate for dividend, interest and royalty
 - Any other income remains taxable in state of source



Other measures III



- Clarification that tax treaties are not intended to be used to generate double non-taxation
- Tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country



Conclusions



- Many Proposals
- Speed kills?
- Complexity increased
- OECD Model Convention versus Commentaries
- “Flexibility” for states: Model will lose relevance
- More discretion for administrative bodies (MAP)
- Implementation



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