



International Chamber of Commerce Comments to the OECD Discussion Draft on “Preventing Treaty Abuse”

General Comments

The International Chamber of Commerce (ICC) welcomes the opportunity to provide comments to the Discussion Draft regarding BEPS Action Point 6 on preventing the granting of treaty benefits in inappropriate circumstances. The aim of preventing the abuse of tax treaties through both treaty provisions and domestic law anti-abuse rules is fully supported by ICC. ICC has serious concerns, however, that the Discussion Draft is focusing only on combating treaty abuse without due regard for the impact on the vast majority of potential beneficiaries of income tax treaties that do not engage in abusive practices and who, in many cases will be deprived of the certainty and predictability that is the fundamental goal of tax treaties.

ICC is aware that it is very difficult to reach full consensus in the given timeframe of the BEPS project. However, complex issues require the time and care to work through the analysis and study the repercussions of any changes. Failure to take the time necessary to do this will result in faulty rules which will give a very hard time to businesses and will take years for governments to amend. Their impact on the global economy and the prospect of developing countries is not to be underestimated.

It seems that there is not enough time to resolve differences of opinion among the delegates. In order to really come to a sound proposal, governments urgently need more time to discuss the very complex tax issues they are dealing with. Given the short comment periods, it is impossible for business to give the careful thought necessary to identify and comment on all the issues in each of these proposals. Our following remarks are therefore aimed at a high level summary of our concerns and suggestions.

Comments on the Discussion Draft

Where it is clear that a transaction is upheld by a proper analysis of functions carried out, risks taken and assets used and adequate substance is present, it should be clear that there is no question of abusive behavior, or trying to gain access to a tax treaty where there should not be. Business must be able to organize their affairs in a way that is commercially optimal and concentrate their activities in their global value chain as they see fit, as long as adequate



substance is attributed to these activities and the accompanying transactions are according to the arm's length standards. This is vital to strengthening the integrity of the tax system, furthering a global level playing field and, at the same time, improving certainty for international business to foster cross border investments and trade. ICC, therefore, makes the following recommendations:

- Reject the overly restrictive standards in the proposed Entitlement to Benefits (ETB) article that is patterned after the current U.S. Limitation on Benefits article and adhere more closely (with modifications discussed below) to the version that already appears in the Commentaries;
- Reject subjective main purpose or general anti-avoidance treaty solutions; they are not predictable enough creating unacceptable levels of uncertainty thereby creating unnecessary obstacles for international trade and business. There is no compelling reason to also subject transactions that pass the LOB-tests to a main purpose test as well. Only in extraordinary and specific circumstances – specifically when there is no other provision applicable that could target abuse – can recourse to a main purpose test be acceptable;
- Provide that, if the decision is made to retain a main purpose test, enterprises that meet any of the other criteria for eligibility for the benefits of the treaty under the Entitlement to Benefits article should be presumed not to fail the main purpose test unless the relevant Competent Authority establishes by clear and convincing evidence that the test should apply;
- In the course of endorsing effective anti-abuse measures, provide a clear mandate for countries to adhere to the fundamental precept already recognized in the Commentaries that, consistent with the goal of promoting bi-lateral trade and investment through establishing rules that provide the greatest degree of certainty and predictability for *bona fide* beneficiaries of tax treaties, rules that create subjectivity and uncertainty, or that rely on cumbersome pre-clearance procedures straining the resources of tax administrators are to be avoided; and
- Consider adding a mechanism for a home country tax administration of a Multinational Enterprise group to certify the non-abusive practice of such group, as confirmed in bilateral APAs or other agreements, which will facilitate Competent Authority processes for such a group.