



ICC Comments on the Platform for Collaboration on Tax Discussion Draft: The Taxation of Offshore Indirect Transfers

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to comment on the Platform for Collaboration on Tax Discussion Draft: The Taxation of Offshore Indirect Transfers – A Toolkit (hereafter referred to as the Discussion Draft or toolkit).

ICC appreciates the work of the Platform to collectively produce “toolkits” for developing countries for appropriate implementation of responses to international tax issues under the G20/OECD Base Erosion and Profit Shifting (BEPS) project, as well as additional issues of particular relevance to developing countries that the project does not address. However, in this instance, ICC believes that the Platform is likely not the best forum to address such substantial changes within the international tax arena. Decisions in taxing rights for “source” and “residence” would cause significant shifts across markets and ICC would therefore recommend that such matters be addressed in a multilateral forum where the tentative recommendations included would be subject to open dialogue as well as legal and economic analysis.

In this case, the aim of the toolkit is to provide the analysis, options and recommendations for the tax treatment of offshore indirect transfers.

ICC’s general comments on the Discussion Draft are outlined below.

Is the definition of an offshore indirect transfer of assets satisfactory?

ICC considers that the first step of the analysis of this topic should be a clear definition of indirect transfers. We believe that it is essential to have an accurate definition of indirect transfers as this would help countries adapt it to their own circumstances and be in a position to establish their legal and tax regimes while remaining consistent with the rest of the tax system. It would also be useful to consider offshore derivative instruments which typically do not give an indirect ownership interest in the underlying asset.

The definition provided by the toolkit is as follows:

“An indirect transfer involves the disposition of an indirect ownership interest in an asset, in whole or in part. It is the underlying asset that is being *indirectly* transferred.” (page. 11)

According to this definition, if an individual is selling four shares of an entity with immobile assets all around the world; is he or she selling part of the immobile assets and, consequently, should pay taxes in each country where the immobile assets are? It is clear that this is not the aim of the toolkit.

If, as opposed to an individual, an entity with liquidity and profitability problems is obliged to sell a package of 5% of their shares, is this company under the scope of the indirect transfer definition? Is the toolkit referring to an indirect participation of X % or is it referring to the control of the immobile asset? Are listed companies in the scope of the definition?



ICC believes that the definition that the Discussion Draft provides could be a major obstacle for international investments and the financing of these investments as it does not prevent double/multiple taxation and increases the price of investments, apart from other considerations. We recognize that further technical and policy work with a realistic approach is required.

Does this draft toolkit effectively address the rationale(s) for taxing offshore indirect transfers of assets?

No. The Discussion Draft assumes that the “source” country has the primary right to tax the gain on the underlying property and does not explore the rationale for residence based taxation of shares. Furthermore, it misstates the current treaty rule. The country of residence has the right to tax capital gains other than those explicitly enumerated by the treaty. The political economy argument focuses on a few high-profile cases that are not necessarily representative of the vast majority of asset transfers, whether direct or indirect. It is ICC’s view that the high-profile cases might be more appropriately addressed with narrower targeted rules.

In addition, the Discussion Draft does not effectively lay out the rationale for limiting the tax treatment to only immovable assets (with its suggested possible expansion). The three illustrative cases provided in the draft toolkit correspond to cases where government licenses were granted, however some countries have implemented law providing for taxation of indirect transfers irrespective of whether the value has been derived from immovable property (including the expanded proposed definition).

Does it lay out a clear principle for taxing offshore indirect transfers of assets?

ICC holds that tax on indirect transfers of assets can be an impediment to business restructuring. If the disposal is taxed but the acquisition qualifies for tax relief there is a certain degree of consistency (subject to timing), however taxing gains on indirect transfers (where there is clearly no tax relief for the acquirer) would make transactions more expensive. This would mean that in some cases, a transfer which would be economically rational could not take place.

The two proposals outlined are clear enough in their general outlines, but, as noted below, there are various challenging issues that are disregarded or treated cursorily.

Is the suggested possible expansion of the definition of immovable property for the purposes of the taxation of offshore indirect transfers reasonable?

No. The Discussion Draft abandons the treaty definition of immovable property and advocates an expansive definition of immovable property, which the Draft acknowledges would be difficult to capture in legislative language. ICC believes that this could be a prescription for uncertainty and double taxation.

In addition, the draft toolkit could be improved by inclusion of examples, such as the types of licenses which could be considered in the possible expansion. For example, there could be certain areas which could require licensing from the Government but still not be regarded as



using the country's natural resources (such as banking licenses, running hospitals and schools, etc.).

Is the concept of location-specific rents helpful in addressing these issues? If so, how is it best formulated in practical terms?

The concept of LSRs in the Draft is not helpful in addressing these issues. The Draft acknowledges that access to a local market could be considered to generate location specific rents. ICC would like to note that a concept that is intended to be interpreted expansively, but is inadequately defined could be interpreted in ways that would reduce certainty and deter investment.

Is the draft toolkit's preference for the 'deemed disposal' method appropriate?

No. The main reason for this is that the local entity would not have the cash from the sale but would be responsible for payment of taxes. While this could create tax credit issues (as also mentioned in the Draft Toolkit), it could also result in inability to get a reimbursement of the taxes from the offshore seller due to reasons such as exchange control issues and reimbursement of taxes which could result in additional taxes, etc. It could also be difficult for the local entity to be aware of changes in the indirect shareholding and be penalized for failure to pay taxes.

The approach in the Draft seems to ignore the difficulties associated with imposing a tax on an entity that has no proceeds and may be unable to pay the tax. Moreover, depending on the thresholds, it may be difficult for the entity holding the local property to know that a transfer triggering gain recognition has occurred.

Are the complexities in the taxation of these international transactions adequately represented?

No. The simplified example that forms the basis of the analysis contained in the Discussion Draft does not take into account the complexities involved in determining whether the transaction should be subject to tax. The Discussion Draft also disregards or glides over the difficulties dealing with minority shareholders, valuation issues, the treatment of losses, and how economic double-taxation would be avoided.

There are some complexities in taxation of international transactions which should have been covered – for example, issues that arise due to multiple holding company structures where each country taxes the ultimate seller for indirect transfer of assets, issues arising in determining location of certain intangibles such as patents registered in multiple countries, exploitation of rights granted by local authorities where knowledge and knowhow has been developed in a foreign jurisdiction, computational challenges, etc. The Draft Toolkit should also have provided that tax should not be levied on internal reorganisations including successive transfers pursuant to a restructuring. The Draft Toolkit should not apply to a global sale/acquisition of a company. The Draft Toolkit should also provide recommendations concerning the applicability in the event of private equity structures where the indirect holding structures are not targeted towards avoiding tax arising on direct transfers; and small shareholder exemptions including threshold limits, etc.



ICC respectfully notes that the Discussion Draft does not appear to address other key concerns for business, given that, from the onset, the document presents the idea of avoidance of direct tax and/or the simplicity of the “stylized three-tier ownership structure” pattern used.

ICC believes that the Discussion Draft does not fully address a relatively common situation when all three entities - the owner of an immovable property, the seller and the purchaser- are all non-residents of Country L. In such a case Model 1 (deemed disposal by a local entity) would not provide a satisfactory taxing mechanism for all industries.

ICC offers its knowledge and experience to assist in presenting business views on further issues and discussion drafts presented by the Platform.