CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 6/2016

on improving double taxation dispute resolution mechanisms

Prepared by the CFE Fiscal Committee

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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 individual members. Our 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).

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at brusselsoffice@cfe-eutax.org.

Introduction

The CFE has read with interest the content of the consultation document "Consultation on Improving Double Taxation Dispute Resolution Mechanisms"[1] and the Action Plan of 17 June 2015 "a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final"[2]. The CFE has responded to the electronic public consultation opened on 16 February 2016 and is pleased to explain its views in more detail below.

The existing mechanism for avoiding double taxation is described in Section A. The shortcomings of this mechanism are covered in Section B. Section C contains suggestions for improvements and also covers questions 2, 3 and 4 of the electronic consultation.

A. EXISTING MECHANISM

If a natural person or legal entity tax subject is confronted with double taxation in a cross-border situation, he can attempt to mitigate the tax levy by presenting the issue to the national court of a member state, the supranational court or by instigating a consultation or arbitration procedure based on a bilateral treaty or, in matters concerning the adjustment of profits of associated enterprises, the EU Arbitration Convention.

National court

The national court of the EU member states shall test the national tax levy in relation to the applicable national legislation as well as in relation to a bilateral tax treaty and supranational treaties. In some cases, the national court can or must request a preliminary ruling from the European Court of Justice.

However, the national court is unable to rule on the levying of taxes in another member state. The other state is not a party to the proceedings in a national court. The national legal remedies do not therefore offer any guarantee that the levy conflicting with a treaty will be removed. If the decision is in favour of the national tax authorities, in full or in part, a double taxation situation will remain.

Multinational court

Only after all national legal remedies have been exhausted is it possible for a tax subject to submit a claim to the European Court of Human Rights (ECtHR) with regard to a breach of the European Convention of Human Rights (ECHR). The case must be brought before the ECtHR within six months after the date of the definitive national ruling.

If the European Court of Human Rights declares a claim to be admissible it shall not just investigate the main case but it shall also endeavour to broker a settlement between the tax subject and the Member State. If no settlement can be reached and the claim is upheld, the European Court of Human Rights will award fair compensation.

[1] http://ec.europa.eu/taxation_customs/common/consultations/tax/double_tax_dispute_en.htm

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1462192031827&uri=CELEX:52015DC0302

Consultation and arbitration procedure

Many tax treaties that the EU member states have concluded contain a provision on the basis of which the relevant EU member states can enter into dialogue with the other state that is party to the treaty in order to find a mutual solution to remove double taxation or at least a tax levy that is not in concordance with the treaty (the "Mutual Agreement Procedure" of art. 25 of the OECD Model Convention).

In the case of an intercompany transfer price correction between affiliated companies based within the EU there is also the possibility of a Mutual Agreement Procedure based on the EU Arbitration Convention. If the competent authorities are unable to reach agreement within the two-year period within the framework of a Mutual Agreement Procedure this will be followed by a mandatory arbitration procedure. The member states involved in this shall then be obliged to set up an advisory committee.

A request to instigate a Mutual Agreement Procedure can, normally, be submitted as soon as a tax subject has a reasonable suspicion that he is faced with a tax levy that is not in concordance with a tax treaty to which the EU Member State is a party. However, the bilateral consultation shall not start until the moment at which the final assessment has been levied.

A request to instigate a Mutual Agreement Procedure must be submitted no later than three years after the initial notification from which it appears there is a tax levy that is not in concordance with the Convention. The competent authority can declare the request to be valid or invalid or that it will not deal with the request. There are no legal remedies against this decision. If a request is declared to be valid the issue is either resolved unilaterally by the EU Member State or a Mutual Agreement Procedure is instigated. In principle, the Mutual Agreement Procedure is a government-to-government procedure, which means that it is generally conducted without the presence of the relevant tax subject.

A limited number of member state's tax treaties offers the possibility of arbitration and its use is decided by the competent authorities on a voluntary basis. The arbitration provision agreed in 2007 for the OECD Model Convention results in mandatory arbitration if the competent authorities are unable to find a solution.

Practical experiences

The CFE has found that Mutual Agreement Procedures with the competent authority/authorities of the other state(s) involved are settled quicker if there is regular consultation with that authority or those authorities. Also, these procedures often result in a satisfactory outcome.

As far as transfer price issues are concerned, the two-year period in the EU Arbitration Convention often means that agreement is reached between the competent authorities within this period. The 'threat' of an arbitration procedure that would otherwise follow automatically apparently encourages faster completion of the Mutual Agreement Procedure.

B. SHORTCOMINGS IN THE EXISTING MECHANISM

The CFE is of the view that the following are the most important shortcomings in the existing mechanism:

Within the Mutual Agreement Procedure, the member states are free to reach agreement without an (independent) expert having to become involved in the dispute to represent the interests of the tax subject. Because the member states have a conflicting interest in such procedures in principle they should achieve a satisfactory outcome for the tax subject through negotiation.

However, the process of the Mutual Agreement Procedure is not verifiable. At the moment the negotiations take on a political level, legal certainty is at issue. A consequence of this is that the Mutual Agreement Procedures often cost a great deal of time and money and the outcome of the procedure is extremely uncertain for the tax subject. After all, the tax subject's interest is not just in resolving the double taxation issue but also to know where (at what rate and under what regime) income and profits are to be taxed. Specifically in those cases where there is no mandatory and binding arbitration there is no time pressure for the competent authorities to reach mutual agreement and for the tax subjects this causes uncertainty about their tax position for a long period of time, which is an undesirable outcome.

Sometimes the three-year period appears to be prohibitive, specifically when one first has to wait for the completion of proceedings in the national court. In order to avoid this, the CFE recommends that in all relevant cases a Mutual Agreement Procedure and proceedings with the national court be instigated simultaneously.

C. SUGGESTIONS FOR AN ALTERNATIVE MECHANISM

The question is in which way the mandatory and binding arbitration procedure proposed under point 14 of the BEPS Action Plan has to be implemented.

The CFE believes it is very important that a tax subject who is a natural person or legal entity and who is confronted with double taxation in a cross-border situation has direct access to an independent body that is tasked with ensuring a satisfactory outcome for the tax subject; an outcome which is binding on all states involved. In many cases only EU member states will be involved, however, situations will arise – potentially increasing in number – which also (in part) involve non-EU states. The CFE is therefore of the opinion that, preferably in an OECD-context, a principle is created for the aforementioned commencement of legal proceedings, for example in the form of an OECD arbitration convention that states can sign up to. The CFE recommends that the arbitration be mandatory and binding on those states that sign up.

The independent body could be co-located with the already existing Permanent Court of Arbitration. The aforementioned suggestion could be implemented easily by adding a tax section to the Permanent Court of Arbitration. An alternative would be the establishment of an entirely new supranational court.

The CFE believes it is of major importance that independent and impartial experts are involved in arbitration, for example former judges or academics who have the necessary expertise and experience

in international tax law. It is imaginable that member states involved in a dispute procedure each appoint an arbitrator. Those arbitrators in turn jointly appoint a third arbitrator. There is already a similar arrangement for the Permanent Court of Arbitration. The Permanent Court of Arbitration may act as an appointing authority when the member states in dispute are not able to agree on suitable arbitrator(s).

The CFE expects that the creation of an OECD arbitration convention will take some time. Until such a convention is created the primary aim must focus on a mandatory and binding Mutual Agreement Procedure for all cases of cross-border double taxation, which in a number of cases is still being undertaken on a voluntary basis.

The CFE believes that a second important improvement to the existing mutual agreement will be achieved by allowing the tax subject who is a natural person or legal entity to join the Mutual Agreement Procedure as amicus curiae. This will improve the verification of the process and will help resolve an important disadvantage of the current Mutual Agreement Procedure.

Furthermore, the CFE recommends that the arbitration procedure impose on the jurisdictions involved the obligation:

(i) to grant the taxpayer extension of payment of the tax due until the time that the arbitration procedure has been completed; and

(ii) not to impose penalties with respect to those issues that are disputed between the jurisdictions involved.