

Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
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January 13, 2014

Dear Sir or Madam,

Comments on Technical Changes to be included in the next update to the OECD Model Tax Convention

On November 15, 2013, the OECD invited public comments on a discussion draft on technical changes to be included in the next update to the Model Tax Convention; this letter includes our comments in response to this invitation.

Comments

(1) Paragraph 28 of the Commentary on Article 10

It might be helpful to clarify whether and when share-buy-back transactions qualify as "*disguised distributions of profits*".

When we talk about listed companies it is not uncommon to hold a treasury stock that allows to moderate share price fluctuations; it is our best understanding that the acquisition of its own shares by listed Companies should not be deemed as a disguised distribution of profits. On the contrary, in some jurisdictions direct redemption is not always an option, and therefore the Company shall buy back its shares from shareholders to redeem them; therefore, such share-buy-back transactions should be included as "*disguised distributions of profits*".

Finally, it might also be considered all the intermediary situations/transactions in order to determine whether they qualify or not.

(2) Paragraph 20 of the Commentary on Article 11

The paragraph 20.1 shows two different approaches for the tax treatment on accrued interest in the State of Source:

- a) taxing the acquirer of the bond or debenture on the full amount of interest payable), and;
- b) taxing the seller of the bond on the accrued interest.

The paragraph sets forth that double taxation on the accrued interest should be avoided in the State of source by means of not taxing such amount when the interest become payable. Nonetheless, no comment is included regarding the potential double taxation due to the different qualification by the State of source and the State of residence.

Different qualification on each of the States: (a) interest in the State of source, and (b) capital gain in the State of residence might entail that the State of source taxes the seller of the bond on the accrued interest, and the State of residence taxes the same amount as a capital gain.

Hence, including a reference to paragraphs 32.1-32.7 of the Commentary on articles 23A and 23B might be clarifying.

(3) Paragraph 3 of the Commentary on Article 13

Allowing the taxation on the entire capital gain “*even in the case of a new treaty that replaces a previous one that did not allow such taxation*” should be reconsidered for those cases where the new tax treaty has retroactive effects.

This dynamic understanding might harm legitimate expectations and jeopardize the principle of legal certainty. Such a risk is especially significant when the date the provision became effective is prior to the first draft publication date; in these cases the taxpayer has no room for maneuver

The unanticipated changes in a tax Convention might jeopardize Multinational’s exit strategies for tax purposes; this circumstance might encourage Multinationals to carry on tax-driven transactions in order to crystalize tax-free gains.

(4) Paragraph 31 of the Commentary on Article 13

See our comment above on Paragraph 28 of the Commentary on Article 10

We have no additional comments on any of the remaining changes included in this discussion draft.

Please do not hesitate to contact me should you need further clarification on any of the above comments.

Yours faithfully,

Manuel Calviño

Director

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