Federation of European Accountants
Fédération des Experts comptables Européens

European Commission
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24 May 2012

Re: DTA/ITA/PWE/MBR

Dear Sir or Madam,

Re: European Commission's Consultation on double non-taxation

FEE (the Federation of European Accountants) is pleased to provide you with its comments on the European Commission's Consultation on double non-taxation. FEE's ID number on the European Commission's Register of Interest Representatives is 4713568401-18[1].

FEE has noted with interest and with some concern the European Commission's consultation on double non-taxation. As stakeholders are invited to provide factual examples of cases of double non-taxation on cross-border activities that they have encountered, we regret that we do not dispose of the relevant data and can thus not respond to the questions in detail.

Nevertheless, we want to contribute to the debate and share some fundamental thoughts with the European Commission in this regard.

FEE supports any initiatives of the European Commission to remove market distortions and to create a direct tax policy framework in which businesses can compete freely and on a level playing field and in which the freedoms enshrined in the EC Treaty are protected.

[1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 45 professional institutes of accountants and auditors from 33 European countries, including all of the 27 EU Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 700.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

However, it appears that this consultation primarily results from the need of Member States for additional tax revenues after the economic and financial crisis as well as from political pressure pushing for more equal taxation of different types of taxpayers (corporate and natural persons). There is a concern that initiatives which only tackle double non-taxation, will negatively impact the competitiveness of businesses located in Europe by reducing tax competition and legal tax planning strategies. In this context we would also like to underline that the ongoing discussion should focus on factual and legal arguments.

As direct tax is an area of Member States' sovereignty, Member States frequently use tax legislation to pursue non-tax objectives, such as stimulating economic growth, incentivising research and development, attracting investments to less developed peripheral regions or supporting the protection of the environment. Where Member States use taxation as a means to stimulate economic growth, the European Union may not interfere, unless such national measures directly affect the establishment or functioning of the internal market.

Double taxation and double non-taxation within the EU are consequences of the fact that EU Member States' corporate income tax systems are not coordinated or aligned, even in situations where they apply to a taxpayer operating in more than one Member State. Sometimes this works to the advantage and sometimes to the disadvantage of taxpayers. Since it is settled ECJ case law that double taxation is simply a disparity and not against EU law, it follows that double non-taxation per se does not violate EU law principles either. It is up to Member States to better coordinate their legislation so that there are fewer mismatches that create double taxation or double non-taxation.

The Consultation document does not properly define the concept of "double non-taxation". In particular, it does not differentiate whether a situation of double non-taxation arises from a special tax regime which reflects a legitimate policy decision of a Member State (e.g. favourable tax rules for income from intellectual property) or from the taxpayer taking advantage of a Member States' tax regime that qualifies as "harmful tax competition".

Companies may use the differences in Member State's tax law to benefit from a more favourable tax regime in another Member State, exercising legitimately the fundamental freedom of establishment. As long as it is not tax evasion, which is of course not acceptable, such arrangements may be subject to national anti-abuse or CFC legislation. For these cases the CJEU has clearly ruled,[2] that national measures restricting the freedom of establishment are only justified where they specifically relate to wholly artificial arrangements aimed at circumventing application of the legislation of the Member State concerned. Any measures proposed as a result from the Consultation should not deviate from this principle.

FEE is of the view that the issue of double non-taxation cannot and should not be seen as separate from the issue of double taxation. They are two sides of the same problem and should be addressed together. This seems to have been the Commission's view in the Communication on Double Taxation in the Single Market[3]. However, FEE notes that no concrete results, not even binding principles appear to have emerged to date with regards to the pressing issue of double taxation.

[2] Cadbury Schweppes (Case C-196/04, 12 September 2006)

[3] COM(2011) 712 final published on 11 November 2011

Factual examples of double non-taxation cases that might be reported in the consultation process would also need to be carefully analysed, bearing in mind that (i) non-taxation can be due to other reasons that are not necessarily related to double non-taxation, for example in case of tax losses (even if tax losses are explicitly excluded from the scope of the Consultation), (ii) examples can be a snap-shot that does not necessarily reflect reality, because taxation of a company may need to be seen in a longer-term context or (iii) examples maybe do not take into account the fact that the company is taxed in a third country.

FEE notes that there are several other initiatives in progress both on EU and international level that address aspects of double (non-) taxation, e.g. the recast of the interest and royalties Directive[4] and the CCCTB proposal[5], the EU Code of Conduct Group's discussion on profit participating loans[6] and the OECD report on Hybrid Mismatch Arrangements[7]. Any measures proposed by the Commission on double non-taxation – if any – should take into account the impact from the above initiatives.

Overall, the European Commission should carefully consider whether – based on the results of the consultation – there is enough evidence to propose isolated measures regarding double non-taxation without at the same time solving the issues of double taxation.

For further information on this letter, please contact Petra Weymüller, FEE Senior Manager, at +32 2 285 40 75 or via email at petra.weymuller@fee.be.

Yours sincerely,

Philip Johnson
President

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[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0714:FIN:EN:PDF

[5] http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf

See also the FEE working paper regarding CCCTB:
http://www.fee.be/fileupload/upload/FEE%20working%20paper%20CCCTB%20final2410200851636.pdf , page 3.

[6] http://register.consilium.europa.eu/pdf/en/10/st16/st16766.en10.pdf

[7] http://www.oecd.org/dataoecd/20/20/49825836.pdf