Federation of European Accountants
Fédération des Experts comptables Européens

Mr Juan Lopez Rodriguez
European Commission
Directorate-General for
Taxation and Customs Union
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16 November 2010

Dear Mr Lopez Rodriguez,

Re: FEE comments on consultation on taxation of cross border interest and royalty payments between associated companies

FEE (Fédération des Experts-comptables Européens – Federation of European Accountants) is pleased to provide you below with its comments on taxation of cross border interest and royalty payments between associated companies.

FEE is strongly in favour of extending the directive to payments between unrelated parties within EU. The burdensome administrative formalities and cash flow disadvantages suffered by taxpayers even in situations where they can claim relief under the existing directive, as well as the limited scope of the directive in its present form are a major barrier for European companies in deriving the full benefit of the Single Market.

In purely domestic situations there is usually either no withholding tax on interest / royalty payments between unrelated parties or at least there is no risk of double taxation as the payee is usually able to recover any excess withholding tax. Interest and royalty payments should be taxed once and it is imperative to eliminate situations of double taxation.

FEE suggests that in a recast of the Directive certain terms used in the current Directive are defined in a more clear and unambiguous way in order to make sure that such terms are interpreted by all Member States in a uniform way so that the Directive is being consistently applied throughout the EU (e.g. the definition of the terms "interest", "royalties", "beneficial owner", "permanent establishment", "tax-deductible expense").

FEE is of the view that the anti-abuse measures in the Directive should be authorising denial of relief only when there is a wholly artificial arrangement. Anti-abuse measures should be proportionate bearing in mind the existence of exchange of information agreements, the directive on mutual assistance in the recovery of tax claims and other instruments available to tax administrations. Anti-abuse measures should be specific and applied consistently by Member States. The benefits of the Directive must not be denied purely on the basis of general anti-abuse rules (e.g. thin capitalisation rules; minimum holding periods; residence of major shareholders). In the scope of the Directive, the existence of an abusive situation should be assessed on a case-by-case basis.

FEE is also of the view that the holding threshold provided for the application of the interest and royalties directive (25%; direct holdings) should be aligned to that of the parent subsidiary directive (10%; indirect holdings) in order to avoid anomalies and provide legal certainty e.g. in situations where an excessive interest/royalty payment is re-characterised as a constructive dividend. In addition, the extension of the list of entities covered by the interest and royalties directive, as addressed in questions 2-4 of the enclosed questionnaire on the Consultation paper, seems to be the most straightforward area from the perspective of reducing the compliance burden. As such extension may alter taxing rights between Member States, it is potentially more difficult and/or time consuming to change or agree on. Therefore, we suggest to have the changes addressed in questions 2-4 made without delays if at all possible.

FEE's ID number on the European Commission's Register of Interest Representatives is 4713568401-18. For further information on FEE's name, country of origin, legal form, size, field of activities and cross-border activity, please refer to footnote 1.[1]

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[1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 43 professional institutes of accountants and auditors from 32 European countries, including all of the 27 European Union (EU) Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 500.000 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.

FEE's objectives are:

- To promote and advance the interests of the European accountancy profession in the broadest sense recognising the public interest in the work of the profession;
- To work towards the enhancement, harmonisation and liberalisation of the practice and regulation of accountancy, statutory audit and financial reporting in Europe in both the public and private sector, taking account of developments at a worldwide level and, where necessary, promoting and defending specific European interests;
- To promote co-operation among the professional accountancy bodies in Europe in relation to issues of common interest in both the public and private sector;
- To identify developments that may have an impact on the practice of accountancy, statutory audit and financial reporting at an early stage, to advise Member Bodies of such developments and, in conjunction with Member Bodies, to seek to influence the outcome;
- To be the sole representative and consultative organisation of the European accountancy profession in relation to the EU institutions;
- To represent the European accountancy profession at the international level.

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

Yours sincerely,

Hans van Damme
President

Encl: Questionnaire on the above consultation paper

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION

Direct taxation, Tax Coordination,
Economic Analysis and Evaluation
Company taxation initiatives

26 July 2010

Consultation paper

Note

This document is being circulated for consultation to all interested parties concerned by a possible initiative in the area of taxation of cross border interest and royalty payments between associated companies. The sole purpose of this consultation is to contribute to the debate, to collect relevant information and to help the Commission develop its thinking in this area.

This document does not necessarily reflect the views of the European Commission.

Each contribution received will be acknowledged.

Contributions received, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to publication of personal data on the grounds that such publication would harm his or her legitimate interest. In that case, the contribution may be published anonymously. Otherwise the contribution will not be published and its content will not, in principle, be taken into account. For more detailed information on how your personal data and contribution will be treated, we recommend that you read the specific privacy statement.

In the interests of transparency, organisations responding to this consultation are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and by subscribing to its Code of Conduct

(see https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en).

If the organisation is not registered, its submission will be published separately from those of registered organisations.

The parties concerned are invited to submit their comments no later than

31/10/2010

1. IDENTIFICATION OF THE STAKEHOLDER

The Commission services would be interested in receiving contributions from all interested parties on the tax policy issues described below. In order to analyse the responses, it will be useful to group the answers by type of responder.

Question 1.-You could be included in one of the following groups[1]:

☐ Multinational enterprise ☐ Large company

☐ Medium sized enterprise (SMEs) ☐ Small sized enterprise (SMEs)

☐ Microenterprise (SMEs) ☐ Tax advisor or tax practitioner

☐ Academic

[X] Others. Please specify Professional organisation

Name/denomination of your organization/entity/company Federation of European Accountants (FEE)

Country of domicile Belgium

Contact details, including e-mail address _____

Brief description of your activity or your sector _____

Do you object to publication of personal data on the grounds that such publication would harm your legitimate interests?

Yes ☐ No [X]

Do you agree to having your response to the consultation published along with other responses?

Yes [X] No ☐

[1] For the purposes of identification, please check whether your company is a medium, small or microenterprise, according to the Commission Recommendation (2003) 361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; in its annex, Title I, Article 2, SMEs are defined as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

2. INTRODUCTION

The Commission is currently considering recasting and amending Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereinafter "the Directive" or "the Interest and Royalties Directive").

In the case of cross-border interest and royalty payments, the recipient companies may face excessive or double taxation due to withholding taxes charged in the source Member State, which lead to other efficiency losses: namely burdensome administrative formalities linked to payments, resulting in compliance costs and cash-flow problems. The purpose of the Directive is to put cross-border interest and royalty payments between associated companies in the EU on an equal footing with domestic payments by exempting them from taxes imposed by the source States.

However, the effects of the Directive are limited due to its current scope. If this remains unchanged, the inefficiencies affecting the functioning of the single market will not be removed.

The Commission is launching this public consultation with a view to exploring the opinion of stakeholders on the different legislative options that are being considered in order to extend the benefits of the Directive.

The initial selection of topics is based on a Commission report on the operation of the Directive (see below) and debate amongst tax policy makers.

3. BACKGROUND

There are three main factors involved in the recast and the amendment of the Directive. In the first place, the report on the Directive, COM (2009) 179, prepared in accordance with Article 8 and published in April 2009 which refers to the need to introduce some legal amendments aimed at improving its functioning.

Secondly, the tax issue is also governed by Directives 2004/66/EC and 2004/76/EC. The application of the former extends its scope to companies and taxes of the States that became members of the EU after 2004, while the latter grants some of these new Member States temporary derogations from one or more provisions of the Directive. These texts need to be consolidated.

Lastly, in 2003, the Commission adopted a proposal amending the Directive (COM (2003) 841 final of 30.12.2003) which had two objectives: an updated annex listing the types of companies falling within the scope of the Directive (including the European Company and the European Cooperative Society) and a better targeted definition for the subject-to-tax requirement, which the Council requested when the original Directive was

adopted. This proposal has since been withdrawn but these aspects could now be incorporated into the recast of the Directive.

4. QUESTIONS SUBMITTED TO THE PUBLIC AND TO INTERESTED PARTIES

Issue 1 - The extension of the list of entities covered by the Directive

The Directive is only applicable to companies which are of a legal type listed in its annex. The list of entities is drawn up by reference to the national laws. There is an entry for each Member State where reference is made to the legal types covered by the Directive.

Council Directive 90/435/EEC on the common tax regime applicable in the case of parent companies and subsidiaries of different Member States ("the Parent-Subsidiary Directive") is also applicable to the legal types included in its own list. The latter Directive shares the aim of the Interest and Royalties Directive, namely the elimination of double taxation. However, the lists annexed to the two Directives are different. The one annexed to the Parent-Subsidiary Directive is broader and refers to more national legal types. The consequence of this is that economic agents have to adopt a legal type that is included in both lists in order to benefit from all harmonized corporate tax law.

Question 2. - Do you think that there is a need to update the list of companies covered by the Directive?

Yes [X] No ☐ Do not know ☐

Question 3. – Do you think that the list annexed to the Directive should cover the same legal types as are included in the list of the Parent-Subsidiary Directive, including the European Company and the European Cooperative Society?

Yes [X] No ☐ Do not know ☐

Question 4.- Do you think that the list should be extended so as to include other types of companies not referred to in the Parent-Subsidiary Directive?

Yes ☐ No ☐ Do not know ☐

If your answer is yes, please specify legal types: _____

Issue 2 - The extension of the definition of associated companies: indirect shareholdings

The Directive only covers payments between associated companies. For this purpose, an association is deemed to exist when one of the companies has a direct minimum holding of 25 % in the capital of the other company, or a third company has a direct minimum holding of 25 % in the capital of both the payer and the recipient companies.

As mentioned, the scope of the Directive is currently limited to direct holdings, while the scope of the Parent-Subsidiary Directive has no such limitation. The consequence is that, in order to benefit from all harmonized corporate tax law, economic agents must maintain a minimum direct holding of 25%.

Question 5.- Do you consider it beneficial to allow indirect shareholdings to be taken into account when the minimum shareholding is being determined?

Yes [X] No ☐ Do not know ☐

Issue 3 - The lowering of the shareholding thresholds required in order to be considered as associated companies

The minimum shareholding requirements of the Directive currently differ from those of the Parent-Subsidiary Directive, by requiring 25% rather than the 10% in the Parent-Subsidiary Directive.

Question 6.- Do you think that there is a need to change the minimum shareholding requirements?

Yes [X] No ☐ Do not know ☐

Question 7.– Do you think that the shareholding requirements of the Interest and Royalties Directive should be reduced to 10% and thus be aligned with those established in the Parent-Subsidiary Directive?

Yes [X] No ☐ Do not know ☐

Question 8 .- Do you think that the shareholding requirements of the Interest and Royalties Directive should be reduced to below 10%?

Yes ☐ No ☐ Do not know ☐

If your answer is yes, please specify the shareholding requirement:

_____

Issue 4 – Extending the Directive to payments between unrelated undertakings

One option might be for the Directive to eventually encompass unrelated undertakings. It is self-evident that international double taxation, burdensome administrative formalities and cash-flow problems, such as cross-border obstacles to transactions between related companies, are also present in the case of payments between unrelated parties. The current harmonized tax law fosters activities within multinational groups, but does not address the double taxation issues that are hampering the smooth functioning of the single market in the case of transactions between independent parties.

Question 9 .– Do you currently suffer from double taxation and/or additional administrative costs because the Directive does not extend to transactions between unrelated undertakings (non associated?

Yes [X] No ☐ Do not know ☐

If your answer is yes, please estimate the annual additional taxes and costs in euros_____

Our members are aware of many situations where withholding taxes on interest and royalty payments between unrelated parties give rise to juridical or economic double taxation. The main reason being that many Member States do not allow a carry-forward (or carry-back) of unused foreign tax credits (e.g. if the payee is in a loss position or if the payee's tax burden on the net interest/ royalty income is less than the withholding tax in the source state on the gross interest/royalty payments).

Issue 5 – The tax deductibility requirement applicable to payments made by permanent establishments

The Directive covers payments made by permanent establishments of companies situated in an EU Member State. In this case, the obligation of the source State to refrain from taxing is made conditional on such payments being a tax-deductible expense for the payer. It is clear from the context that the purpose of the 'tax-deductibility' requirement is to ensure that the benefits of the Directive accrue only in respect of those payments that represent expenses which are attributable to the permanent establishment. However, on its wording, the provision would also apply to cases where deduction is denied on other grounds, such as a payment not meeting all the formal requirements for tax deductibility.

Question 10.– Do your think that the text of the Directive should be clarified in order to guarantee that its benefits apply to interest or royalty payments constituting an expense attributable to permanent establishment?

Yes [X] No ☐ Do not know ☐

Issue 6 – Concerns of SMEs

The Commission services are interested in the potential impact that the above issues and others might have on SMEs. The aim is to reflect on possible initiatives targeted in particular at such stakeholders, so that the tax environment in the Single Market takes better account of their specific needs and fosters their cross-border activities.

The following questions are directed at those qualifying as SMEs as defined above in question 1.

Question 11.- Do you regard withholding taxes charged on your interest or royalty cross-border income as an obstacle to your activities?

☐ Yes, it is very burdensome as it limits cross-border activities.

[X] Yes, it is a significant tax obstacle.

☐ Yes, it is an obstacle, but it can be avoided.

☐ No

Question 12.- Do you find that the tax compliance costs linked to cross-border interest or royalty payments are:

☐ High enough to restrict cross-border activities;

[X] High;

☐ Bearable and do not distort your activities;

☐ Negligible.

Question 13 - Do you think that extending the Directive's scope to include all the entities currently covered by the Parent-Subsidiary Directive would ensure that all SMEs will be covered by it:

Yes [X] No ☐ Do not know ☐

If your answer is no, please specify what other legal types currently used by SMEs should be included in the list of the Directive_____
_____

5. WHO IS CONSULTED?

Tax professionals in practice, in business and in academia.

6. HOW CAN I CONTRIBUTE?

You are invited to reply to this consultation by completing the questionnaire below and sending it by letter, fax or email before 31/10/2010 to:

Email: TAXUD-D1-Consultation-LANDR@ec.europa.eu

Postal address: European Commission
Directorate-General for Taxation and Customs Union
Rue de Spa 3, Office 8/17
B-1049 Brussels
Belgium
Fax: +32-2-29 56377

7. WHAT WILL HAPPEN NEXT?

At the end of the consultation process the Commission will publish on the website of the Taxation and Customs Directorate General a report summarising the outcome of the consultation (http://ec.europa.eu/taxation_customs/common/consultations/tax/index_en.htm).

In addition, the Commission will carefully analyse the information provided in order to understand the reasons that underlie the reported cases of double taxation in the EU. It will then launch a debate on how these cases could be eliminated and consider whether there is a need for action at EU level.

8. ANY QUESTIONS?

Please contact: TAXUD-D1-CONSULTATION-LANDR@ec.europa.eu
or tel. + 32 2 29 74537
or fax: +32-2-29 56377

We hope you will take this opportunity to contribute your views!