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8 January 2015

Marlies de Ruyter
Head, Tax Treaties, Transfer Pricing and Financial
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Via Email: taxtreaties@oecd.org

**RE: OECD Public Discussion Draft *Follow Up Work on
BEPS Action 6: Preventing Treaty Abuse***

Dear Ms. de Ruyter:

On 19 July 2013, the OECD published an *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries' tax bases are being eroded or profits shifted improperly. Pursuant to Action 6 of the Plan "Prevent treaty abuse," the OECD issued a public discussion draft on 21 November 2014 entitled *Follow Up Work on BEPS Action 6: Preventing Treaty Abuse* (hereinafter the Discussion Draft or Draft). The Draft follows on the OECD's first public discussion draft under BEPS Action 6 released on 14 March 2014, and requests additional input on various issues after the release in September 2014 of the OECD's report on BEPS Action 6 regarding *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* (the Report).

The OECD requested comments on the Discussion Draft no later than 9 January 2015. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's request for comments on the Draft.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North

and South America, and Asia.¹ As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 3,000 of the largest companies in the world.

TEI Comments

TEI submitted comments to the OECD regarding preventing treaty abuse in response to the issuance of the first public discussion draft under BEPS Action 6, in a letter dated 8 April 2014.² Our comments focused primarily on the proposed limitations on benefits provision (LOB provision), treaty anti-abuse rule (the principal purposes test), and the need for transition relief.

As we stated in those comments, the principal purposes test is highly subjective and susceptible to inconsistent and unpredictable interpretations by tax authorities. This continues to be the case with the test in the Report, which would deny treaty benefits

if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction . . . unless it is established that granting that benefit . . . would be in accordance with the object and purpose of the relevant provisions of this Convention.

This provision will inject a high degree of uncertainty into the determination of whether a taxpayer is entitled to treaty benefits. For this and other reasons, TEI opposes the inclusion of a principal purposes test in the OECD model treaty. Nevertheless, the Report recommends treaties based on the OECD model include such a provision, or a more targeted provision addressing specific concerns, unless there is an adequate domestic law anti-abuse regime to police treaty abuses that are not addressed by an LOB provision. In light of this recommendation, TEI reiterates its suggestion that jurisdictions adopt an effective process through which a taxpayer can obtain a timely independent administrative determination regarding the application of the test if the government asserts it applies to deny the relevant treaty benefit. There is considerable dismay among MNEs that the principal purposes test will cause sufficient uncertainty regarding whether an MNE is entitled to treaty benefits that the MNE may not satisfy its burden for reporting the benefit on audited financial statements under the relevant financial accounting standard. An MNE may thus forego the investment or transaction at issue because of the uncertainty, which would have a corresponding negative

¹ TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

² See TEI letter to OECD regarding *Discussion Draft on BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, available at <http://www.tei.org/news/Pages/TEI-Comments-on-OECD-BEPS-Action-6-Prevent-Treaty-Abuse.aspx>.

impact on foreign direct investment and economic growth. An effective and timely administrative ruling process would help allay this concern.

Moreover, in cases where a treaty also incorporates an LOB provision, the Report makes it clear that treaty benefits may be denied under the principal purposes test even if a multinational enterprise (MNE) has satisfied the LOB provision.³ Thus, having gone through the time consuming, but relatively objective, exercise of testing its eligibility for treaty benefits under the LOB provision, an MNE may nevertheless find the benefit denied under the principal purposes test. For treaties that adopt both provisions, TEI recommends that tax authorities use the LOB provision as the primary tool to combat perceived abuses, as it is the more objective test. The primary purposes test would then be limited to the most egregious cases of abuse and not the main tool for policing access to treaty benefits, which would be simpler and more certain for taxpayers as the test is vague and susceptible to subjective interpretation.

TEI also reiterates its recommendation that the OECD set forth standards for transition relief for MNE structures that presently qualify for benefits under various bilateral income tax treaties, but would no longer qualify under the revised OECD model. TEI recommends an effective date for the changes in the Report of at least two years from when the provision enters into force for new structures, and significant additional time for structures in place before the effective date. The new rules should also be accompanied by a directive that the principal purposes test may only be applied by tax authorities prospectively to arrangements and transactions that arise after the effective date and only to preexisting structures once the transition period expires.

Conclusion

TEI appreciates the opportunity to comment on the OECD public discussion draft regarding follow up work under BEPS Action 6. These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of TEI's legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.



Mark C. Silbiger
International President

³ See Report at p.67.