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19 June 2018

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Via email: transferpricing@oecd.org

RE: Potential Revisions to Chapters IV and VII of the OECD Transfer Pricing Guidelines

Dear Mr. Vanderwolk:

On 9 May 2018, the OECD issued two invitations for comment regarding potential future revisions to the OECD's Transfer Pricing Guidelines (the Guidelines). One request asks for comment on the scope of revisions to Chapter IV (administrative approaches) of the Guidelines (the Chapter IV Request). The Chapter IV Request seeks input regarding "how the guidance in Chapter IV could be revised or supplemented to reflect the latest developments on administrative procedures aimed at minimizing transfer pricing disputes and to help resolve them . . . ."

The second request asks for comment on the scope of future revisions to Chapter VII of the Guidelines regarding intra-group services (the Chapter VII Request). The Chapter VII Request notes it is concerned with the "practical application" of the guidance in Chapter VII, rather than its underlying principles.

On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's requests for comments.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in Europe, North and South America, and Asia. 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 2,800 of the leading companies in the world.[1]

Comments regarding the Chapter IV Request

General Comments

TEI commends the OECD for seeking comments regarding the scoping of potential revisions to Chapter IV of the Guidelines. In general, TEI prefers countries adopt a transparent cooperative approach to tax administration, which would help avoid disputes, including audits and arbitration. In this regard, TEI recommends the OECD improve current practices rather than introduce completely new mechanisms. New mechanisms present new complexities and compliance burdens, when the overall direction of administrative approaches to preventing transfer pricing disputes should be toward simplicity and shorter timelines.

Over the past several years the OECD has introduced several initiatives and new concepts that have increased taxpayers' compliance burden (most notably, country-by-country reporting). These initiatives have increased the incidence of double taxation. The OECD should thus aim to address how double taxation can be avoided or relieved in the new guidance. Finally, we note safe harbor guidelines can be very useful as long they are accepted by all countries/member states, but unilateral measures are not efficient. The OECD should thus aim to facilitate multilateral safe harbor measures.

Comments on Specific Questions

The Chapter IV Request asks "What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?" TEI suggests a number of elements should be included in future guidance to improve transfer pricing compliance practices. First, tax authorities should share their risk assessments with taxpayers so taxpayers can improve their compliance processes where appropriate, or engage in a discussion with tax authorities regarding their view of the taxpayer's compliance risk. Second, to avoid transfer pricing disputes, Chapter IV should urge tax authorities to focus audit activity on transactions that are more likely to be tax motivated (i.e., between high and low tax jurisdictions), rather than simple intercompany transactions where the taxpayer makes reasonable efforts to price the transactions and where the possibility of a tax motivation is remote. For example, head office cost allocations between countries with relatively comparable tax rates should be viewed as low risk. Finally, the OECD should encourage countries to consider halting interest and penalties if dispute resolution takes longer than two years and if the country does not have a mandatory arbitration procedure.

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[1] TEI is a corporation organized 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).

The Chapter IV Request also asks about relevant aspects of the minimum standards and best practices included in the OECD's final BEPS report on Action 14 regarding effective dispute resolution, including whether "there [is] any additional guidance that would be useful in relation to corresponding and/or secondary adjustments to minimize the risk of double taxation?" TEI recommends the OECD include information regarding the impact of transfer pricing adjustments on areas other than the corporate income tax, such as indirect taxes, withholding taxes, and customs duties. For example, on 20 December 2017, the Court of Justice of the European Union (CJEU) ruled that a customs transaction value may not be based on a transfer price that was subject to a retroactive adjustment. Customs values are established by the price actually paid or payable for the goods when they are sold for export, the CJEU held.

In addition, the Chapter IV Request asks what additional guidance could be provided regarding advance pricing arrangements. In TEI's view, the OECD should provide guidance on the consequences and potential taxpayer remedies if advance pricing arrangements or other transfer pricing rulings are overturned by a non-tax governmental body that is not a court (e.g., the circumstances present in the current EU state aid tax cases).

Finally, the Chapter IV Request invites comments about "[a]ny other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed . . . ?" The Guidelines should address how taxpayers can attend to tax legislation changes around the world. In many cases, new rules in one country may effectively result in double taxation. For example, the recent U.S. tax reform legislation includes a "base-erosion anti-abuse" tax that may apply to certain payments even if those payments taxable in another country. Such guidance would be particularly helpful where it is uncertain that double taxation relief is available under an applicable tax treaty, such as where the tax imposed may not qualify as a tax on income as defined under the treaty.

Comments regarding the Chapter VII Request

The Chapter VII Request identifies a number of practical challenges regarding the Chapter's application. One challenge is "[d]emonstrating that a service has been rendered and/or that the service rendered provides benefits to the recipient." In this area, multinational enterprises are moving toward using independent companies to provide the enterprise with "software as a service" (e.g., basic software, software infrastructure, unified communication via software, etc.). After contracting with the independent provider, the multinational enterprise shares the software among its affiliates. Under these circumstances, tax authorities often question how to characterize software as a service for tax purposes. Moreover, tax authorities' view of such characterization is inconsistent across jurisdictions. To help alleviate these inconsistent views, the OECD should provide uniform guidance on the characterization of software as a service. Also, guidance would be useful on what documentation is necessary to demonstrate that a service recipient received a benefit.

A second practical challenge identified in the Chapter VII Request is "finding an appropriate allocation key for charging intra-group services." TEI recommends the Guidelines emphasize that a taxpayer should be allowed to select any allocation key that provides a reasonable approximation of relevant benefit for the related parties to the transaction and, to the extent possible, the allocation key selected should be simple and based on easily obtainable and verifiable data. The Guidelines should also recommend, but not require, reasonable allocation keys for defined types of intra-group transactions. Helpful allocation keys would be: (i) allocating human resources cost by relative headcount; (ii) allocating marketing expenses by relative revenue; and (iii) allocating information technology costs, including software licenses, by computer user count. Such guidance would effectively provide safe harbors and reduce potential disputes over head office cost allocations, which are mostly not tax motivated but simply an effort by taxpayers to be compliant and practical. Finally, guidance on what documentation is necessary to demonstrate that a particular allocation key is appropriate would also be helpful.

Conclusion

TEI appreciates the opportunity to comment on the requests regarding the scope of future revisions to Chapters IV and VII of the Guidelines. These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Giles Parsons. If you have any questions about the submission, please contact Mr. Parsons at +44 1455 826561, parsons_giles@cat.com, or Benjamin R. Shreck of the Institute's legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.

Robert L. Howren
International President