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3 February 2023

International Co-operation and Tax
Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation
and Development
Paris, France

Via email: taxpublicconsultation@oecd.org

RE: Comments on Pillar Two – Tax Certainty for the GloBE Rules

Dear Sir or Madam:

The Organisation for Economic Co-operation and Development ("OECD") published a public consultation document regarding a tax certainty for the global anti-base erosion ("GloBE") rules on 20 December 2022 (the "Consultation Document"). The GloBE rules contemplate jurisdictions introducing and applying the GloBE rules in a consistent and coordinated manner. The Consultation Document requests input from interested parties to inform the OECD's work on tax certainty. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to respond to the OECD's request.[1]

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in North and South America, Europe the Middle East & Africa ("EMEA"), and Asia. TEI, as the preeminent association of in-house tax professionals, worldwide, has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our over 6,000 individual members represent over 2,800 of the leading companies in the world.

[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).

TEI Comments

TEI commends the OECD/G20 Inclusive Framework on BEPS ("OECD/IF") for its work on the GloBE model rules and particularly the work on tax certainty in the Consultation Document. Tax certainty is of utmost importance to TEI members and is critical to ensuring the GloBE rules, and Pillar Two generally, are workable for multinational taxpayers, as well as tax authorities. TEI has consistently warned of the risk of differing rule interpretations across jurisdictions even if those jurisdictions adopt identical rules under Pillar Two. Differing interpretations would undermine the success of Pillar Two and the GloBE rules by impairing the necessary coordination to make the system work.

The Consultation Document states that because the GloBE rules and their associated commentary and administrative guidance "may not address specific issues of interpretation or application of the GloBE Rules that arise between jurisdictions, it would always be possible for the jurisdictions concerned to refer an issue to the [OECD/G20] for clarification."[2] We recommend any such clarification process be open to taxpayers to initiate as well as the tax authorities involved in the dispute.

The Consultation Document also states, "[t]he recognition of a 'qualified' rule status for an IIR, a UTPR or a DMTT is a fundamental mechanism for ensuring the coordinated application of the GloBE Rules."[3] While a process for certifying whether a particular tax meets the requirements of the GloBE rules would be welcome, it is unclear what recourse a multinational enterprise would have when the relevant tax authority is misinterpreting a "qualified" rule or any relevant OECD commentary and guidance. For this reason, there should be a common understanding/approval process led by the OECD to certify a DMTT as "Qualified" (e.g., an "OECD stamp of approval). Given the critical importance of QDMTTs for jurisdictions under the GloBE rules, as well as the fact that disputes regarding QDMTTs may result in double taxation on otherwise Pillar Two compliant multinationals, the OECD/IF itself (i.e., not through peer review) should both document and perform the certification process before the end of they year in which the QDMTT is introduced in a jurisdiction.

The OECD's Pillar One and Two projects represent one of the largest reorganizations of the international tax system in history. Countries which are a part of the OECD/G20 will have agreed to apply a common understanding and interpretation of the rules underlying the two Pillars upon adoption. For this reason, agreeing to dispute resolution should be a condition for a country imposing a top up tax so that taxpayers have recourse in the case of disagreement across jurisdictions.

In addition, taxpayers should not be required to pay a disputed top-up tax amount until the dispute is effectively resolved. For example, suppose in Year 1 there is a dispute over whether Country A's domestic tax is a Covered Tax. Without a Covered Tax, Country A may be viewed as undertaxed, and Country B may decide a top up tax is due (whether via the IIR or UTPR) requiring the taxpayer to remit such tax to Country B. However, assume in Year 4 the dispute over Country A's domestic tax is resolved and it is decided that the tax is a Covered Tax such that Country A is no longer an undertaxed

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2 Consultation Document at page 4.

3 *Id*.

jurisdiction. What recourse would the taxpayer have to recoup the top up tax paid in Year 1, which was subsequently determined not to be due in Year 4?

The preferred dispute resolution mechanism under Pillar Two is the Multilateral Convention ("MLC"). However, the Consultation Document notes:

> developing an MLC may entail efforts on the part of jurisdictions to agree on common concepts and wording, especially concerning legal basis for common solutions within the framework of a common approach where jurisdictions have implemented GloBE Rules domestically. This would be particularly so as the development of an MLC would also require jurisdictions to consider whether other aspects of the GloBE implementation framework should be included in such an instrument. In addition, procedural aspects like ratification of the MLC and parliamentary procedures related to international agreements should also be considered.[4]

Again, a possible solution to the example above and for potential inclusion in the MLC is a kind of "grace period" for multinational corporations involved in these disputes. Under such a system, the taxpayer could take a favorable position – such as that the domestic tax in the example above is a Covered Tax – and not have to pay a top up tax until the dispute is resolved. This would obviate the need for taxpayers to go back to Country B years later and request a refund of the top up tax. Instead, the tax would be paid in Year 4 if the decision went against the taxpayer.

Finally, the Qualified Exchange Agreement on GloBE Information Returns should be effectively in force (i.e., part of the MLC) before a top up tax can be levied. Without such an Exchange Agreement in place, if jurisdictions have diverging viewpoints regarding Pillar Two, taxpayers may be filing different returns with different identifying numbers, making dispute resolution in such circumstances difficult, if not impossible.

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TEI appreciates the opportunity to comment on the Consultation Document. Should you have any questions regarding TEI's comments, please do not hesitate to contact Ralf Thelosen of Citco at rthelosen@citco.com or Benjamin Shreck of TEI's legal staff at bshreck@tei.org or + 1 202 464 8353.

Respectfully submitted,

Wayne G. Monfries
International President

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4 *Id*. at p.8-9.