United Nations E/C.18/2007/CRP.7

Economic and Social Council

Distr.: General
22 October 2007

Original: English

Economic and Social Council
Committee of Experts on International Cooperation in Tax Matters
Third session
Geneva, 29 October-2 November 2007

Dispute Resolution*

* The present paper was prepared by the Coordinator of the subcommittee on Dispute Resolution (Professor Waldburger). The views and opinions expressed do not necessarily represent those of the United Nations.

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1. Introduction

At its 2006 meeting, the Committee of Experts on International Cooperation in Tax Matters ("the Committee") took note of the Developments in this area in the OECD and decided to evaluate possibilities to including a similar provision in the UN Model Tax Convention[1]. According to its mandate[2], the Committee has especially to take into account possible changes in light of the specific situation of developing countries and countries in transition.

At the 2006 meeting there was consensus in the Committee that effective Dispute Resolution mechanisms - including arbitration - may be a positive factor for developing countries and countries in transition to enhance foreign investments, since such mechanisms do increase the legal certainty of investors by avoiding the risk of economic or actual double taxation.

2. Methodology of this Paper

Since the OECD has already done a lot of very valuable work in this area and published its report in February 2007 it would not make sense to repeat what the OECD already has analyzed and published (The OECD report can be read and downloaded under www.oecd.org/Center of Tax Policy and Administration/Dispute Resolution/Documents & Publications/Reports[3]).

This paper therefore raises questions of specific interest to developing countries and countries in transition to be discussed at the 2007 meeting of the Committee. Emphasis is put on possible deviations from the OECD Report and its recommendations.

Finally the paper contains a proposal for trying to reach a multilateral approach in order to make possible changes to the UN Model effective as soon as possible.

3. Questions Regarding Possible Deviations from the OECD Report

3.1. Scope of Arbitration?

The OECD approach complements the mutual agreement procedure by an arbitration mechanism. As a consequence *entire cases* may not be brought before the arbitration body but only *issues* that could not be resolved in the MAP. A consequence of this concept is that the taxpayer cannot request arbitration in cases where the competent authorities have agreed on an issue or on the case as a whole where he is of the opinion that the result of the MAP is not in accordance with the tax treaty.

Question:
Is this approach appropriate for the UN Model as well, or should a wider concept of arbitration be applied?

3.2. Mandatory arbitration?

Under the OECD rules the arbitration is mandatory; if the conditions are met. The taxpayer may initiate the arbitration procedure without prior consent of the competent authorities if his case has not been settled within two years after the case was submitted by the country of residence of the taxpayer to the competent authorities of the other country.

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[1] Report of the Committee's second session (E/2006/45: E/C.18/2006/10) paras 57-60.
[2] Economic and Social Council Resolution 2004/69.
[3] http://www.oecd.org/findDocument/0,3354,en_2649_37989739_1_119666_1_1_37427,00.html

Questions:
a) Should the UN Model also provide for mandatory arbitration?
b) Is the delay of two years appropriate or is it too short for the UN Model?

3.3. Relation to internal legal procedures

The OECD rule states that arbitration is not possible if a court or a administrative tribunal has already rendered a decision on the case. The footnote however states that OECD Member Countries may be able to remove that condition

Question:
What approach should the UN Model take in this area. (flexible, the same as with the OECD? Strict in one way or another?)

3.4. Possibility for the taxpayer to refuse the arbitration solution?

Since the arbitration procedure is embedded in the MAP, the taxpayer is - as regarding MAP solutions - given the right to refuse the arbitration solution. If he does so, the case is treated according to the national laws and procedures in both contracting states. The commentary of the OECD provision however states that the cases where a taxpayer rejects the result of a MAP are very rare. This will most probably true for the arbitration solution as well. Nevertheless it has to be decided, whether the taxpayer should be given the right to reject the result decided by the arbitration body.

Question:
Should the taxpayer have the right to reject the arbitration solution?

3.5. Nomination of arbitrators to the arbitral tribunal

The OECD model provision provides for the nomination of one arbitrator by each competent authority and the arbitrators designate a president. In case no agreement can be reached between the two arbitrators elected by the competent authorities (or if one of the competent authorities fails to appoint an arbitrator in due time) the Director of the OECD Centre for Tax Policy and Administration designates the president. The OECD model provision allows government officials to be appointed as arbitrators.

Questions:
Should the UN chose the same approach as the OECD for the nomination of the arbitrators and if yes, who shall appoint the president if no agreement can be reached on this issue?

Should government representatives be allowed to be part of the arbitral tribunal as well (as provided for in the OECD model provision)?

3.6. Mutual agreement settling the mode of application of the arbitration clause

The last sentence of the new paragraph 5 to Art. 26 states, that the mode of application of this paragraph shall be settled by mutual agreement by the competent authorities. The OECD report contains a model mutual agreement solution and comprehensive comments (including alternatives, for some issues, to this provision.

The basic question for the Committee is whether such a model provision should be worked out as well by this group.

If the Committee decides to do so, the following areas could be discussed from a point of view of the developing countries and the countries in transition:

- Is a three month period for working out the terms of reference enough in the context of the UN Model?
- The OECD model provision provides for the costs of the arbitration to be borne by the two countries equally. Is this appropriate for the UN Model or should the costs eventually be borne by the tax payer(s) involved? The question can be discussed regarding the responsibility for the logistical arrangements for the arbitration panel
- As to the arbitration decision, it can be discussed whether in case of disagreement between the arbitrators designated by the contracting partners the majority decision should be decisive or whether in such a case the president of the panel has discretion to decide. Example: One arbitrator votes for a royalty rate of 2% while the other arbitrator votes for 5%. Has the president to vote for either 2% or 5% or can he fix the rate to e.g. 3.5%?
- Under the OECD model provision the arbitration panel has six months available for coming to its conclusions. Is this period sufficient in the context of the UN Model?
- According to the OECD model provision the arbitration decision can be challenged before courts in given circumstances. Should this concept be copied by the UN?

4. A Multilateral Approach?

If the Committee shares the opinion that effective dispute resolution mechanisms including arbitration are an important factor to enhance investment in developing countries and in countries in transition, a mere inclusion of an arbitration provision in the UN Model Convention is not very efficient since it will take a long time until this model provision would be translated into bilateral tax treaties.
It is therefore proposed to discuss the idea of a multilateral approach to this matter and to discuss whether the subcommittee on Dispute Resolution should be given a mandate from the Committee to explore with both the OECD Secretariat and the EU Commission possibilities to work out a multilateral convention regarding arbitration for double taxation issues.

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