Abstract

Michael J. McIntyre, "The OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes," 7 Florida Tax Review 622-647 (2006).

The OECD has proposed amendments to its Model Tax Convention and Commentary that would establish a system for the mandatory arbitration of tax disputes between two treaty countries when the tax officials of those countries have been unable to resolve those disputes within a two-year period. Many of the disputes are likely to involve attempts by multinational companies to minimize their taxes through the aggressive manipulation of transfer-pricing rules. The OECD proposal is undoubtedly well-meaning and does address a small but significant problem—the "rare cases" (OECD characterization) of potential double taxation that are unresolved through the existing tax-treaty mechanism. The costs, however, are exceedingly high — not only in the loss of sovereign control of the tax system but also in the loss of accountability and the ability to control potential corruption.

The OECD proposal for mandatory arbitration is directed primarily at resolving disputes over transfer pricing, although resolution of other types of disputes also is contemplated. The proposed process would be entirely secret. Not even the names of the multinational companies whose claims are being adjudicated by an international arbitration panel would be disclosed to Congress (or other national legislative bodies) or to the public at large. No report explaining the basis for the decision or the amount of revenue given up by the countries involved would be released without the expressed, written consent of the taxpayer involved. The result will be secret tax law and a high risk of corruption.

The OECD has not taken even minimal precautions against corruption. For example, the international arbitrators are not required to disclose conflicts of interest and are not prevented from working for the multinational company under review immediately after the arbitration proceeding has concluded. In other contexts, the OECD has recognized the need for transparency and safeguards against corruption. It has chosen to promote a secret process for international arbitration because that is the system the multinationals have been promoting.

International arbitration of disputes may be justified when the point of the arbitration is to advance well-established domestic policies. For example, the United States has agreed to allow an international panel to resolve certain trade disputes as part of a program that advances the U.S. commitment to free trade and helps ensure international compliance with free-trade principles. As a safeguard, however, it has insisted that the process be open and transparent. The OECD proposal for turning over U.S. adjudication of transfer-pricing disputes (and other disputes) a secret international panel has no similar justification. In many cases, multinational companies will be seeking not to avoid international double taxation, but to avoid taxation in all countries. In effect, the secret panels will be asked to give their seal of approval to aggressive tax avoidance schemes that the multinational companies are not prepared to defend in an open forum.

For full text, see http://www.law.wayne.edu/mcintyre/research.htm.