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Confederation of Swedish Enterprise - Comments on the OECD Public Discussion Draft entitled: "BEPS Action 10: Proposed Modifications to Chapter VII of the Transfer Pricing Guidelines Relating to Low Value-Adding Intra-Group Services" 3 November 2014 - 14 January 2015

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 10: Proposed Modifications to Chapter VII of the Transfer Pricing Guidelines Relating to Low Value-Adding Intra-Group Services" 3 November 2014 - 14 January 2015 (hereinafter referred to as the Draft).

General Comments

The globalization has led to an increase of intra-group services. For commercial reasons and cost efficiency Multinational Enterprises (MNEs) often choose to centralize services. Chapter VII of the OECD Transfer Pricing Guidelines provides guidance on determining if an intra-group service has been provided and how the price of such a service is to be calculated.

The interpretation of the Arm's Length Principle (ALP) differs among States, making the interpretation subject to disputes leading to costs for both companies and States. The Confederation of Swedish Enterprise therefore welcomes the initiative to simplify the interpretation of the ALP in relation to low value-adding intra-group services. The area of low value-adding services relates only to a small proportion of an enterprise's revenues and profits, making the cost and effort dedicated to seeking agreement regarding the taxation of this area disproportionate, relative to the small amounts of tax it concerns. In order for the new guidelines to facilitate for less administration and cost for companies and tax authorities, they need to be clear and simple to operate with limited documentation requirements.

To be effective, it is naturally important that any amendment to the OECD Transfer Pricing Guidelines gains recognition and is implemented widely, and not just by tax administrations in OECD countries. Consequently, the new guidelines need to be attractive also for non-OECD members.

The aim of the proposal should be to give MNEs the opportunity to centralize low value-adding intra-group services, where from a business perspective it is most profitable, without concerns of double taxation. It needs to be acknowledged that it is highly unlikely that a company would incur a cost solely for the purpose of obtaining a tax deduction. Consequently, the focus should be to find a suitable allocation method, not to evaluate if the cost is valid from a business perspective.

Specific Comments

Shareholder activities and duplicative costs

The Draft proposes amendments to section B paragraph 7.11 which provides examples of shareholder activities. The Confederation of Swedish Enterprise welcomes the additional examples provided in the Draft which clarifies the scope of shareholder activities.

The Draft also provides additional clarification on the duplicative costs set out in paragraph 7.12. We welcome the clarification that any consideration of possible duplication of services needs to examine the nature of services in detail. The fact that a company both performs services in-house and also is charged for services that are similar in nature is not, as stated in the Draft, by itself enough to conclude duplication. Since companies often are denied deductibility for services charged on the grounds that services have been duplicated, it is an important amendment to the Transfer Pricing Guidelines that there must be an examination in detail of the nature of the services before it is established that a service is indeed duplicated.

Low value-adding intra-group services

Section D of the Draft introduces a new simplified method for services falling within the category of low value-adding intra-group services. If the simplified method for low value-adding services indeed is simple to operate, it should have good prospects in lowering the administrative burden for tax payers as well as for tax authorities. In order for the simplified method to be effective, it is essential to ensure a uniform adoption and implementation. The OECD should therefore recommend all countries to apply the new provisions in order to ascertain a uniform adoption.

The Confederation of Swedish Enterprise shares the view that, if possible, a MNE should apply the simplified method in all countries. However, paragraph 7.51 seems to imply that a MNE is disqualified from applying the simplified method if the MNE

does not use the simplified method in all countries in which it operates. Such a requirement seems unnecessarily harsh. The fact that a tax payer might be unable to apply the simplified method in a country that does not accept the OECD transfer pricing guidelines should not disqualify the tax payer from using the method in other countries. We therefore urge the OECD to clarify or reconsider this aspect.

Low value-adding intra-group services are defined in paragraph 7.46 of the Draft, outlining four requisites that together constitute such a service. Paragraph 7.48 contains a list of bullet points which provides examples of services that would likely meet the definition of low value-adding services. We encourage the OECD to specify if the list provided in paragraph 7.48 is exclusive or illustrative, in order to clarify which services fall within the category of low value-adding intra-group services.

When a tax payer has found that services rendered are indeed falling within the low value-adding category, the initial step in applying the simplified approach is for the MNE to calculate, on an annual basis, a pool of all costs incurred by all members of the group in performing low value-adding intra-group services. The cost should be pooled according to category of service. In our view additional guidance on the costs that should be considered when calculating the cost pool is necessary, as the guidance in this area is limited.

The Confederation of Swedish Enterprise welcomes the opportunity laid down in paragraph 7.52 to keep costs for in-house activity, only benefiting the company performing the activity, outside the cost pool. However we encourage OECD to further extend the possibility to keep costs outside the cost pool. Paragraph 7.53 outlines a procedure where a cost attributed to a service performed by one group member solely on behalf of one other group member in a first step is allocated to a cost pool, and then in a second step be removed from the cost pool. This two-step procedure seems excessive. The cost should be allowed to be kept outside the cost pool already in step one, treating it the same way as an in-house activity. It should also be possible to keep costs outside the cost pool when only a small number of members of a MNE are receiving a service.

According to paragraph 7.57 of the Draft, the MNE provider of services shall, in determining the arm's length charge for low value-adding services, apply a profit mark-up to all costs in the pool. The same mark-up shall be utilized for all low value-adding services irrespective of the categories of services. The mark-up should be between 2 % and 5 % of the relevant cost.

There is a clear risk of double-taxation due to the fact that tax administrations may make different interpretations of which mark-up that should be used. If a mark-up range is to be kept, additional guidance is needed. To eliminate the risk of double-taxation and to create a safe harbor, a single mark-up percentage would be preferable.

Is it a requirement to apply a mark-up in order to be able to use the simplified method? If so, how does this relate to paragraphs 7.37-7.39? The said paragraphs refer to services where it would be within the arm's length principle to recharge the services at cost only. If a mark-up is mandatory for the use of the simplified method, this would mean that services normally recharged at cost only must be charged with a mark-up if the simplified method is applied. The Confederation of Swedish Enterprise suggests that paragraphs 7.57 and 7.37-7.39 are coordinated to adjust the above-mentioned problem.

We note that the mark-up percentage proposed in the Draft is different to the mark-up proposed by the EU Joint Transfer Pricing Forum's guidance for similar low value-adding services, which suggest a mark-up between 3-10 %.

We welcome the clarification in paragraph 7.61 on documentation required when a MNE elects application of the simplified method. We would however also welcome a statement that electing the simplified method means an exemption from the normal requirements on transfer pricing documentation. The Draft should also address the impact of other BEPS actions concerning transfer pricing, especially action 13 on country-by-country reporting.

The requirement for a MNE using the simplified method to document all provision of services through written contracts seems unnecessary. It should be enough to provide one document that identifies the entities involved and the terms under which services are provided, rather than requiring formally signed agreements for each service. This would lower the administrative burden for MNEs while at the same time not affect tax authorities' possibility to acquire necessary information. The needed information is still provided, just not in the formalized nature of an agreement.

On behalf of the Confederation of Swedish Enterprise

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