



Tax Treaties
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Confederation of Swedish Enterprise - Comments on the OECD Public Discussion Draft entitled: "BEPS Actions 8-10 Revised Guidance on Profit Splits "4 July - 5 September 2016

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 Actions 8-10 Revised Guidance on Profit Splits "4 July - 5 September 2016 (hereinafter referred to as the Draft).

As the global economy develops, so does the number of ways in which value can be created. This leads to possibilities for MNEs to structure their value chains in many new ways. Due to the integrated nature of many MNE groups and the new ways in which they interact it is often difficult if not impossible to find perfect comparables. Consequently, we welcome the wording in para 18 of the Draft stating that "a lack of comparables alone is insufficient to warrant the use of a transactional profit split of actual profits under the arm's length principle".

The Confederation of Swedish Enterprise is concerned that an increased reliance on profit split methods may gradually reduce the reliance on the arm's length standard with resulting increased uncertainty for businesses. The risk of disagreement between tax authorities over which allocation factors to use should not be underestimated. To avoid the risk for increased uncertainty, costly litigation and increased administrative burdens, a profit split method should therefore only be applied where a reliable one-sided measure is not available. The arm's length

standard, properly applied by both taxpayers and governments, still offers the best prospect of classifying transactions according to “real-world” economics, and equitably and consensually dividing income between countries based on economic activity. If this is not clearly articulated, and practical supporting guidance is not provided, we are concerned that we will see an acceleration in a worrying trend (already apparent in the transfer pricing audit practices of several countries), where a broad interpretation of “BEPS principles” is used to justify new unilateral applications and the automatic application of non-arm’s length approaches in routine situations.

The challenge for governments and businesses is indeed enormous. Not only is the theory and insights into how profits arise not well understood and defined, the need for a uniform interpretation and implementation in perhaps as many as 50 countries for a truly global company, in profit and loss situations, is still utopia. The risk of disputes and double taxation in situations where the understanding of value creation in complex structures, assessing the importance of risk taking, synergies and hard to value intangibles, is considerable and it imposes large demands on guidance and rules.

There is no solid economic analysis of how profits arise in the proposal. Further, the analysis of how the proposed steps and measures are going to work is insufficient. The discussion draft presents a global profit split approach (whereby all profits or losses are divided between the relevant parties). We believe that the splitting of residual profits (or losses) represents a more appropriate framework in most cases. This latter method takes into account one-sided methods to price routine or ‘benchmarkable’ transactions before residual profit or losses are split between unique contributions. We would welcome reinforcement of this point in the final draft.

The discussion draft implies that the splitting of actual profits should be a preferred method to splitting anticipated profits in situations where both parties to the profit split are sharing the significant risks. Additional guidance would be appreciated in respect of this point as, in some cases, splitting actual profits will be too complex to be practicable.

The Confederation of Swedish Enterprise envisages a risk that the transfer price of more and more products and services will be disputed by at least one tax authority and that demands for a profit split therefore will become increasingly common. If net total profit is fully recognized and if governments are willing to accept the shares allocated to them, arm’s length prices will only represent the intermediary mechanism in allocating the profit to various tax authorities. The complexity will be very large and may entail too large economic costs to be viable. Governments must therefore act responsibly and a profit split method within a framework of arm’s length pricing should be applied with considerable restrictiveness and based on the facts and circumstances of each individual case to ensure arm’s length outcomes of the application.

Last but not least, it is important to keep in mind the diversity of different MNE groups, also those that are not fully integrated. Any profit split method needs to be developed in a way that it can be applied to any business model. This is especially important considering the constant development of the economy.

On behalf of the Confederation of Swedish Enterprise

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