Dbriefs Bytes Transcript

23 May 2014

For comments on Action 2, see **the highlighted text below**.

BEPS

Action 13

On Monday of this week, the OECD held a public consultation meeting on BEPS Action 13, which deals with country-by-country reporting and the master file / local file structure for transfer pricing documentation.

And I think it's fair to say that a spirited debate occurred on the question of how the country-by-country reports should be filed.

On the one hand, there's the private sector commentators who are generally saying this :

The country-by-country reports should be filed by the parent company with its home country tax authority.

That home country tax authority should then share those reports with all of the tax authorities where the subsidiaries are located, pursuant to the exchange of information article under the double tax treaties between the home country and all of those other countries.

The key reason given for requiring the reports to be filed in such a manner is confidentiality.

And confidentiality arises in at least two ways:

Firstly, it is argued that, by distributing the reports pursuant to the exchange of information article, an obligation of confidentiality is placed upon the receiving tax authority.

And secondly, the reports would be provided directly to the local country tax authority, and they would not be channeled through the local country subsidiary. This would help guard against the possibility of disgruntled employees of the local country subsidiary disclosing that information either publicly or to competitors. Also, if the local country subsidiary happens to be a joint venture company between two corporate groups who are generally competitors, by-passing the local joint venture company would help to ensure that each group's information is kept confidential from the other group.

However, several arguments against this approach were made, generally by civil society groups :

The first argument was that home country filing and distribution would be a time-consuming process, and would limit the ability of the local country tax authorities to obtain the reports in a timely manner.

A second argument is that not all countries have wide treaty networks. If distribution of the reports is to be based on the exchange of information article in the double tax treaty between the parent company's home country and the local country, what do you do when there is no such treaty? I must say that this argument is a little less compelling, when you think that a comprehensive double tax treaty is not required – a tax information exchange agreement (TIEA) should suffice.

Joe Andrus from the OECD made a strong point in regard to the sovereignty of the local countries.

He said that the approach which involves the reports being filed by the parent company with its home

country tax authority, seems to assume that the local country tax authorities can be prohibited from demanding that the reports be filed with them.

He said :

“If that’s what you intend, who will prohibit those countries from doing that? You are ascribing a little more authority to the OECD than it has.”

A “third way”, so to speak, was identified by France and supported by China.

Under this “third way”, the parent company would file the reports directly with the various local country tax authorities, by-passing the local subsidiaries.

According to Sun Yimin, the China SAT’s delegate, this third way :

Would by-pass the local subsidiaries, and thereby address one of the confidentiality concerns of the private sector.

But it would also ensure that the reports are obtained by the local country tax authorities in a timely manner, even if those countries don’t have extensive treaty networks.

Action 2

The OECD’s public consultation meeting on BEPS Action 2 (hybrid mismatch arrangements) was held on 15 May, and I covered it in last week’s Dbriefs Bytes.

One further point to note was an interesting comment by the China SAT delegate, Yuxian Wu.

As background, a lot of the discussion at the meeting focused on the idea of limiting the proposed domestic law changes to arrangements between related parties – and, of course, that then led into the question of the definition of related parties.

Ms Wu said that, even if the proposed rules are limited to related parties:

“from our point of view, some countries may have sufficient capacity to address hybrid mismatches that happen between unrelated parties. And in this case there seems to be no reason to prevent them from extending the scope [of the rules to unrelated parties].”

Which, to my mind, is yet another indication of potential unilateral action.