Review of Double Taxation Treaties 2019/20: CIOT responds to the Stakeholder Consultation

International Tax

01 February 2020

Every year HMRC undertakes a review of the priorities for the UK's network of double taxation agreements for the coming year and invites stakeholders to input into this. The CIOT recently sent our views on this to HMRC.

The first question that HMRC asked was how the UK's existing double taxation agreements (DTAs) could be improved. We took this as an opportunity to focus in particular on how the mutual agreement procedure (MAP) provisions in the UK's treaty network are being managed and how they can be improved.

We noted that the DTA landscape has changed significantly as a result of the OECD Multilateral Instrument (MLI). In the light of the MLI and the UK's support for mandatory binding arbitration provisions, we said that we would like to encourage the government to also step up the UK's policy for seeking to negotiate such provisions in its treaty network.

We also asked about whether policy decisions have been taken on how to improve the MAP process; not just once MAP has been formally engaged, but also in the pre-MAP period leading up to it. We noted that one particular issue is what form arbitration should take. We recommended that the UK takes the lead in stating its order of preferred methods to avoid a situation where the method is left to be agreed (as is possible under the MLI), leading to unnecessary delay and uncertainty.

We said that it would be helpful for the UK government to publish the status and outcome of negotiations with other countries on this point and encouraged the UK government to lead the OECD community in supporting the use of supplementary

dispute resolution processes first recommended in 2007 in the OECD's Manual on Effective Mutual Agreement Procedures (MEMAP) Report and supported in the DTA Commentary.

We also took the opportunity to note that the work currently being undertaken by the Inclusive Framework in Addressing the Tax Challenges of the Digitalisation of the Economy, under Pillars One and Two, is going to require enhanced dispute prevention and resolution mechanisms including, in our view, mandatory, multilateral, binding arbitration. Any changes to the international tax system as a result of the outcome of this work will undoubtedly have a significant impact on the resources of HMRC around DTAs and dispute resolution.

The second question related to Brexit, and asked whether there are any changes that the UK government should seek to negotiate in any specific DTAs as a result of Brexit.

We suggested that after Brexit, UK companies may want to see some existing treaties renegotiated because they may suffer in relation to withholding tax, albeit at a reduced rate – for example, on dividends paid from Germany and Italy and royalties involving Luxembourg – compared to the current protection under the Parent Subsidiary and Interest and Royalties Directives and in comparison to comparable payments within the EU in future. They will also lose the benefit of the Merger Directive and would, therefore, benefit from a new addition to Article 13 of the OECD Model for treaties with EU/EEA members that would extend the Merger Directive bilaterally.

We said that renegotiation of the UK's treaties with EU countries should be prioritised (and a strategy developed to demonstrate that, while the UK does not levy withholding taxes, it would still be in these countries' interest to seek to restore the 'pre-Brexit' fiscal outcomes).

We said that we would also be interested to know whether additional resource will be available within the double tax treaty team after Brexit. We would expect that, pending renegotiation of treaties, treaty rulings will be required in respect of payments from member states as a result of the Directive no longer applying.

In addition, the US Limitation of Benefits tests includes tests for 'derivative benefits' and 'equivalent beneficiaries', which in some cases require investors to be located in the EU (or EEA). We would be interested to understand what (if anything) HMRC is

able to do to ensure continuation of benefits under the treaties between the US and other EU member states with UK investors.

In response to the question on the overall competitiveness of the UK's DTA network, we reiterated what we have said previously, that other issues should also be considered when assessing the UK's competitiveness. In recent years, the UK has introduced measures into domestic law which (arguably) are outside of the scope of its treaties but which impact on the UK's international position.

In addition to diverted profits tax and tax on offshore receipts in respect of intangible property, so far as we are aware, the intention is that a UK digital services tax will be introduced, which would apply to residents of treaty partners. Together, these measures contribute to the actual and perceived competitiveness of the UK. These unilateral measures could be more harmful than negotiating a less competitive treaty.

Responding to the question on whether there are any gaps in the UK's DTA network, we commented that we understand that businesses would welcome DTAs with Peru and Brazil in particular.

Our full response can be found at:
http://www.tax.org.uk/ref622.

Sacha Dalton
sdalton@ciot.org.uk