de Nederlandse Orde van Belastingadviseurs
Commissie Wetsvoorstellen

European Commission
Directorate-General for Taxation and Customs Union
Direct Tax Policy & Cooperation – Unit TAXUD/D2
Rue de Spa 3, Office SPA3 06/069
B-1049 BRUSSELS
Belgium

Amsterdam, 9 May 2016

Re: Consultation on Improving Double Taxation Dispute Resolution Mechanisms

Dear Sir / madam,

The Dutch Association of Tax Advisers (hereinafter referred to as: the Association) has read with interest the content of the consultation document "Consultation on Improving Double Taxation Dispute Resolution Mechanisms" and the Action Plan of 17th June 2015 "a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final". Interested parties were invited to respond to the consultation document on 16 February 2016 and the Association is pleased to provide its response below.

Firstly, the existing mechanism for avoiding double taxation from the perspective of the Netherlands is described in Section A. The shortcomings of this mechanism are covered in Section B and Section C contains suggestions for improvements. Section C also covers questions 2, 3 and 4 of the Internet consultation.

A. EXISTING MECHANISM

If a natural or legal-entity tax subject in a cross-border situation is confronted with double taxation he can attempt to mitigate the tax levy by presenting the issue to the national court, the supranational court or by instigating a consultation or arbitration procedure based on a bilateral treaty or the EU Arbitration Convention.

When requested, and on its own initiative, the NOB Legislative Proposals Committee responds to tax-relevant (legislative) proposals, based on the expertise of its members. Important criteria are practicability, effectiveness and efficiency, regulatory burden, retrospective effect, compatibility with law and the consequences for the investment climate.

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National court

The national court shall test the national tax levy in relation to the applicable national legislation as well as in relation to a bilateral tax treaty and supranational treaties. In some cases the national court can or must request a preliminary ruling from the European Court of Justice.
However, the national court is unable to rule on the levying of taxes in a different State. The other State is not a party to the proceedings in a national court. The national legal remedies do not therefore offer any guarantee that the levy conflicting with a treaty will be removed. If the decision is in the Inspector's favour, in full or in part, a double taxation situation will remain (according to the decision by the State Secretary for Finance, 29 September 2008, no. IFZ2008/248M).

Multinational court

Only after all national legal remedies have been exhausted is it possible for a tax subject to submit a claim to the European Court of Human Rights with regard to a breach of the European Convention of Human Rights (ECHR). The case must be brought before the Court within six months after the date of the definitive national ruling.
If the European Court of Human Rights declares a claim to be admissible it shall not just investigate the main case but it shall also endeavour to broker a settlement between the tax subject and the Member State. If no settlement can be reached and the claim is upheld the European Court of Human Rights will award fair compensation.

Consultation and arbitration procedure

All tax treaties that the Netherlands has concluded contain a provision on the basis of which the Netherlands can enter into dialogue with the other State that is party to the treaty in order to find a mutual solution to remove double taxation or at least a tax levy that is not in concordance with the treaty.
In the case of an intercompany transfer price correction between affiliated companies based within the EU there is also the possibility of a mutual agreement procedure based on the EU Arbitration Convention. If the competent authorities are unable to reach agreement within the two-year period within the framework of a mutual agreement procedure this will be followed by a mandatory arbitration procedure. The EU Member States involved in this shall then be obliged to set up an advisory committee.

A request to instigate a mutual agreement procedure can, where it involves the Netherlands, be submitted as soon as a tax subject has a reasonable suspicion that he is faced with a tax levy that is not in concordance with a tax treaty to which the Netherlands is a party. However, the bilateral consultation shall not start until the moment at which the final assessment has been levied.
A request to instigate a mutual agreement procedure must be submitted no later than three years after the initial notification from which it appears there is a tax levy that is not in concordance with the Convention.

The competent authority can declare the request to be valid or invalid or that it will not deal with the request. There are no legal remedies against this decision. If a request is declared to be valid the issue is either resolved unilaterally by the Netherlands or a mutual agreement procedure is instigated.

In principle, the mutual agreement procedure is a government-to-government procedure, which means that it is generally conducted without the presence of the relevant tax subject.
The competent authority in the Netherlands has a target of completing the mutual agreement procedures within a period of two years.

A limited number of Dutch tax treaties offers the possibility of arbitration and its use is decided by the competent authorities on a voluntary basis. The arbitration provision agreed in 2007 for the OECD Model Convention results in mandatory arbitration if the competent authorities are unable to find a solution. The Netherlands aims to include such a mandatory arbitration provision in all new and concluded Dutch tax treaties.

Practical experiences
The Association has practical experience of the fact that if there is a case of double taxation for a modest amount the Netherlands often resolves this issue unilaterally in a short period of time through consultation with the competent Inspector.

The Association has also found that mutual agreement procedures with the competent authority/authorities of the other State(s) involved are settled quicker if there is regular consultation with that authority or those authorities, such as the competent authority in Germany for example. Also, these procedures often result in a satisfactory outcome. On the other hand, a mutual agreement procedure with the competent authority in South Korea was still not settled after 10 years as far as the Association is aware.

As far as transfer price issues are concerned, the two-year period in the EU Arbitration Convention often means that agreement is reached between the competent authorities within this period. The ‘threat’ of an arbitration procedure that would otherwise follow automatically apparently encourages faster completion of the mutual agreement procedure.

B. SHORTCOMINGS IN THE EXISTING MECHANISM

The following are the most important shortcomings in the existing mechanism.

Within the mutual agreement procedure the Member States are free to reach agreement without an (independent) expert having to become involved in the dispute to represent the interests of the tax subject. Because the Member States have a conflicting interest in such procedures in principle they should achieve a satisfactory outcome for the tax subject through negotiation. However, the process of the mutual agreement procedure is not verifiable. At the moment the negotiations take on a political level then the legal certainty is at issue. A consequence of this is

that the mutual agreement procedures often cost a great deal of time and money and the outcome of the procedure is extremely uncertain for the tax subject. After all, the tax subject's interest is not just in resolving the double taxation issue but also where (at what rate and under what regime) income and profits are to be taxed.
Specifically in those cases where there is no mandatory and binding arbitration there is no time pressure for the competent authorities to reach mutual agreement and for the tax subjects this causes uncertainty about their tax position for a long period of time, which is an undesirable outcome.

Sometimes the three-year period appears to be prohibitive, specifically when one first has to wait for the completion of proceedings in the national court. In addition, the moment at which the three-year period commences is not set in the same way by all States. To prevent problems with the three-year period a mutual agreement procedure *and* national court proceedings would have to be initiated simultaneously in all relevant cases (as much as possible). This of course involves additional costs and the tax subject's position is unclear if the procedure/proceedings that is/are completed first rule against the tax subject.

C. SUGGESTIONS FOR AN ALTERNATIVE MECHANISM

The question is in which way the mandatory and binding arbitration procedure proposed under point 14 of the BEPS Action Plan has to be implemented.

The Association believes it is very important that a tax subject who is a natural person or legal entity and who is confronted with double taxation in a cross-border situation has direct access to an independent body that is tasked with ensuring a satisfactory outcome for the tax subject; an outcome which is binding on all States involved.
Two or more States are involved in a double-taxation situation. In many cases only EU Member States will be involved, however, situations will arise – potentially increasing in number – which also (in part) involve non-EU Member States. The Association is therefore of the opinion that, preferably in an OECD-context, a principle is created for the aforementioned commencement of legal proceedings, for example an OECD arbitration convention that States can sign up to. However, the arbitration must be mandatory and binding on those States that sign up. If three or more States are involved in a double-taxation situation all of these States must be included in the procedure/proceedings insofar as they are involved.

The independent body could be co-located with the already existing Permanent Court of Arbitration. The aforementioned suggestion could be implemented easily by adding a tax section to the Permanent Court of Arbitration. An alternative would be the establishment of an entirely new supranational court.
The existing private "Tribute" initiative can fulfil a useful temporary function during a transition phase. However, the Association believes it is down to the governments to provide a definitive solution. A further disadvantage is that a tax subject who is a natural person or legal entity does not in principle have access to this initiative, as advocated above by the Association.

The Association believes it is of major importance that value-free experts are included in the arbitration court, for example former judges that no longer undertake any additional commercial engagements. If the case is appropriate, for example in the event of discussion about transfer pricing, other value-free experts will be eligible in addition to former judges. It is imaginable that Member States involved in a dispute procedure each appoint a judge. Those judges in turn jointly appoint a third judge. There is already a similar arrangement for the Permanent Court of Arbitration. Naturally, the former judges to be appointed must possess the necessary expertise and experience of international tax law.

The Association expects that the creation of an OECD arbitration convention will take some time. Until such a convention is created the primary aim must focus on a mandatory and binding mutual agreement procedure for all cases of cross-border double taxation, which in a number of cases is still being undertaken on a voluntary basis.
The Association believes that a second important improvement to the existing mutual agreement will be achieved by allowing the tax subject who is a natural person or legal entity to join the mutual agreement procedure as *amicus curiae*. This will improve the verification of the process and will help resolve an important disadvantage of the current mutual agreement procedure.

The provision of legal proceedings, whether or not preceded by an improvement in the existing mutual agreement procedure, does not detract from the fact that both the tax subject and the States involved will be forced to incur costs in order to resolve double-taxation situations. In addition, not all cases involve major interests. To prevent unnecessary procedures/proceedings, the Association proposes a ‘standard solution’ in the case of a relatively small difference in rates between the States involved, combined with a relatively small absolute interest with regard to the relevant tax subject. This standard solution could exist on the basis of an equal share of the financial loss between the relevant States.

Finally, the Association also notes the following aspect. A large number of States have relatively high tax rates. Furthermore, a number of States, including the Netherlands, have an asymmetrical system of interest on tax, which means that no interest is paid on overpaid tax. The result of this can be that a tax subject is faced with high interest charges on a correction abroad while, for example in the Netherlands, there is no interest paid on a corresponding adjustment for overpaid tax. If only the share of the tax between States is brought up for discussion, and not or not also the extent of this amount, it will be possible to satisfy the aforementioned objection by suspending the interest accrual on any tax debt on condition that the amount of tax is paid into a blocked, interest-bearing account. The outcome of the procedure/proceedings will then determine the entitlement of the relevant States to the amount in the blocked account, including the interest.

The Association is of course willing to clarify the above further.

The Association has no objection to the publication of this response.

Yours faithfully,

The Dutch Association of Tax Advisers,

Machiel Lambooij
Chairman of the Legislative Proposals Committee