EDITORIAL

Resolving International Tax Disputes

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In a world with a rapidly increasing number of double taxation treaties, there is an accompanying demand that they should be effective in their application and operation. Treaty provisions are there to encourage investment and trade and therefore if disputes arise as to their meaning or application in particular circumstances which cannot readily be resolved the objective of the treaty may be frustrated.

One approach open to the taxpayer is litigation but this may not be a cost-effective remedy or he may feel that the courts do not have the level of experience of treaty interpretation to ensure a fair hearing. There is, too, the Mutual Agreement Procedure set out in Art. 25 of the OECD Model but, as each year's intake of international tax law students quickly learns, this procedure, which is really in the form of a diplomatic remedy, has its own limitations. The taxpayer is not a party to the procedure as such and is not therefore currently entitled to be represented. The states which are parties to the treaty are under no obligation to achieve a settlement but are merely to endeavour to do so. Problems with domestic time limits or with the right of the taxpayer to litigate the issue may get in the way of an agreement, and so on.

Breaking down the issues which may arise it is clear that different types of issue may call for different forms of resolution. Thus, for example, transfer pricing and profit allocation issues may lend themselves to resolution by way of arbitration, as seen in the provisions of the EC Arbitration Convention.[1] Practical procedures for the implementation of the mutual agreement process, agreed between treaty partners and published for the information of taxpayers, as seen for example between the US and the UK, may help to smooth the path to settlement.

There is much which could be done therefore, even in quite small ways, to improve the present mechanisms and this is why one should give a very warm welcome to the recent announcement by the OECD that it has launched a major project on dispute resolution, building on the existing mechanisms. Particularly to be appreciated is the invitation to individual taxpayers, industry bodies and professional firms to provide input to the project. This is the opportunity to draw the attention of the OECD to the difficulties, obstacles, threats etc. which may be encountered in simply trying to ensure the application of the treaty, as well as those cases where for their own good reason the states may disagree on the interpretation of the treaty leaving the taxpayer in a position of unresolved double taxation.

Respondents should not however be carried away on a wave of enthusiasm as to what can be achieved in the short term. This is a very prickly area for many of the states, raising issues of national sovereignty and of *amour propre* if there should be seen to be winners and losers. But there are a number of steps which could be taken to breathe more transparency and openness into the process – if only in agreeing, say, a set of broad guidelines as to how the procedure will be approached. It would seem therefore very helpful to the OECD project if respondents to the invitation for input not only recorded their own experiences but also considered making constructive suggestions as to how, given those experiences, the procedure may be improved.[2]

Notes

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1 The International Fiscal Association, in pursuit of the Tillinghast Research Programme, has sponsored the preparation of a major report, still in draft at the time of writing, on the use of arbitration in the settlement of international disputes.

2 Replies have been requested by the OECD by 15 September 2003, which because of publishing timetables will be before the publication date of this issue but it is to be hoped that this will not be a bar to good, sound, practical ideas being fed in at a later stage.

