



Die IFA erwartet, dass Nationalberichterstatter ausgewählt werden, die spezifische Kenntnisse über das zu diskutierende Thema besitzen und über die Fähigkeit verfügen, einen genauen und ausgewogenen Bericht über die steuerliche Behandlung der damit zusammenhängenden Fragen aus deutscher Sicht vorzulegen.

Ein Zwischenbericht über den Stand der Arbeit wird zur Mitgliederversammlung der Deutschen Vereinigung im Frühsommer 2012 erwartet.

Die Berichte müssen spätestens bis zum 15. Oktober 2012 fertig gestellt und den Generalberichterstattern übergeben werden. Sie werden zusammen mit den Generalberichten in den Cahiers zum Jahreskongress 2013 veröffentlicht.

Es wird erwartet, dass die Nationalberichterstatter sich an den vorgegebenen Zeitrahmen halten. Der ausgewählte Nationalberichterstatter sollte möglichst an den vorlaufenden IFA-Kongressen (Paris 2011 und Boston 2012) teilnehmen, da dort erste Zusammenkünfte mit den Generalberichterstattern und den anderen Nationalberichterstattern erfolgen. Ein über die deutsche Konzeption voll informierter Vertreter kann benannt werden. Die IFA gibt zu überlegen, ob in die Vorbereitung (research, collecting information) der Nationalberichte auch Mitglieder von YIN (Young IFA Network) eingebunden werden können.

Der Bericht soll in englischer Sprache vorgelegt werden. (Nach Rücksprache mit der IFA kann der Bericht in Ausnahmefällen auch in deutscher oder französischer Sprache abgefasst werden.)

**Wir bitten Sie, uns Ihr Interesse an der Abfassung eines der Nationalberichte anzuzeigen oder eine geeignete Persönlichkeit zu benennen, die zur Übernahme dieser Aufgabe bereit ist.**

**Die Benennung sollte bis zum 25. Juli 2011 gegenüber der Geschäftsführung erfolgen. Schriftliche Bewerbung bitte an:**

**[c.witte@bdi.eu](mailto:c.witte@bdi.eu) oder**  
**Deutsche Vereinigung für Internationales Steuerrecht**  
**c./o. Bundesverband der Deutschen Industrie**  
**Abteilung Steuer und Finanzpolitik - z.Hd. Frau C. Witte**  
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Mit freundlichen Grüßen



H.-J. Müller-Seils  
(Generalsekretär)

2 Anlagen

## Anlage 1

First Draft  
IFA 2013 Copenhagen Congress

### Outline Subject 1

#### **The taxation of foreign passive income for groups of companies**

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#### **INTRODUCTION**

The taxation of foreign passive income for groups of companies is an emerging issue for policy makers, legislators and corporations. The mobility of capital means that it may be allocated to pure low tax jurisdictions (“tax havens”) or to states that have preferential tax regimes for such income. Over the years, states have taken different approaches to tax planning schemes concerning foreign passive income. The liberalization of capital movements, which in many industrialized states started in the 1980s, and the evolvement of tax havens, has facilitated different forms of avoidance measures. The classic concept of residence taxation has been put under considerable pressure. If one accepts that income of a foreign subsidiary is not taxed to the parent at the time the income arises, but at a later point when distributed to the parent company, one also accepts tax deferral. Normally, the concept of tax deferral of corporate income will apply both in strictly internal situations and in cross-border situations, for example in relation to foreign subsidiaries.

From a cross-border perspective a basic choice is between capital export neutrality and capital import neutrality. To achieve capital export neutrality, one has to include the income of foreign activities in the tax base of a domestic company. Subject I of the 2013 IFA Congress in Copenhagen, deals with the taxation of foreign passive income within groups of companies.

An underlying assumption, based on the capital export neutrality concept, is that the foreign subsidiary is effectively taxed at an acceptable rate. To exempt income from foreign subsidiaries to be included would in such a case open up for tax planning and tax avoidance, by routing flows of income to such a low-taxed subsidiary. As some types of income, such as interest and royalties, are relatively easy to allocate to such jurisdictions, there may be a need to prevent the tax benefits of establishing in a low-tax jurisdiction.

States have taken different approaches to the loss of tax revenue where multinational corporations allocate passive income to low tax jurisdictions. If the loss of revenue is considerable, different anti-avoidance measures might be considered. States may have general anti-avoidance rules (GAAR), special anti-avoidance rules (SAAR) aimed at certain avoidance schemes or substance-over-form doctrines that have evolved in case-law. However, at the IFA Congress in Rome, one subject dealt with the general relationship between GAAR, SAAR, and tax treaties. The focus of Subject 1 in Copenhagen 2013 should therefore not be issues on that relationship, but rather an analysis whether in national laws such anti-avoidance rules are used to counteract routing passive income to low tax jurisdictions.

Of course, CFC-rules increasingly are the preferred choice in many states. But still a number of states do not yet have CFC-rules. This may be explained by the existence of other general or special rules in their domestic legislation. We are very interested in national reports from non CFC-countries examining how the problem of passive income in low tax jurisdictions can be dealt with in other ways. We expect an interesting line of different approaches. We anticipate that the final directives will be somewhat divided between countries having CFC-regimes and those that does not, allowing for the latter group to elaborate more on GAAR and SAAR, while the former group can focus more on CFC.

A general objective of the national reports is to identify how such measures apply in cross-border situations that concern the taxation of passive income within groups of companies. It is also of interest how such measures interact with each other, and their compatibility with international obligations contained in for example tax treaty law and EU law.

It may not be all clear, what is meant by passive income. But at least as a starting point, interest and royalties would qualify in this category.

For the purposes of this preliminary outline, we have chosen to divide the issues in general anti-avoidance rules (A), special anti-avoidance rules excluding CFC-rules, (B), CFC-rules (C), general tax treaty issues (D) and EU law issues (E).

#### **A. General anti-avoidance rules**

Many states have general anti-avoidance rules, and they may also apply in relation to international situations. In short, what is the scope of these rules? Do they apply also in international situations, and especially, have they been applied in relation to the taxation of passive income within groups of companies? The Dutch “fraus legis” approach, the US “substance over form” or UK “step by step” doctrine are well-known approaches.

Courts may also have developed general anti-avoidance doctrines, e.g. the “sham doctrine”, and the same issues should be discussed in relation to them. In this respect one may discuss how these measures relate to obligations contained in tax treaty law.

However, it must be again be underlined, that the focus in this part should be to examine if GAAR concepts have been used, or have the potential to be used, to tax passive income in low tax jurisdictions.

#### **B. Special anti-avoidance rules**

Of course, the main anti-avoidance measure is CFC-rules, dealt with under C. But there are alternatives to CFC-rules having similar effects. We would like the national reporters to examine such alternative anti-avoidance measures. One such measure is to have switch-over clauses. Switch over clauses are useful if a state as starting point exempts foreign income, as is often the case with income of foreign subsidiaries. A recent example can be found in the proposal from the EU Commission on a directive on the Common Consolidated Corporate Tax Base (CCCTB). However, switch-over clauses are probably difficult to use against tainted income like passive income, but should nevertheless be included in the reports.

Other domestic measures may include subject to tax provisions where a state may only render a beneficial tax treatment to an item of income or to a taxpayer if tax has been paid in the other state. There may also be domestic “beneficial ownership” rules where one considers the real recipient of the passive income to be a resident taxpayer and not the company in the low tax jurisdiction.

As capital is a highly mobile resource, internal debt in group of companies as tool to save taxes via low tax jurisdictions is sometimes used. CFC-rules are often not useful, as they lead to taxing the parent company, when it is the source state, where the interest deduction arises, that may feel a need to prevent the tax arbitrage. Such measures may for instance include subject to tax rules, i.e. that a deduction hinges on the recipient being taxed on the interest income in a reasonable manner.

Other such rules which have a similar purpose are thin cap rules. While the rationale for thin cap rules is not necessarily limited to owners located in low tax jurisdictions, any reclassification of loan to capital may be particularly relevant in such situations.

Also procedural rules may come into play. For instance, do the burden of proof rules contain elements that at least partly deal with the issue?

There are probably many ways special anti-avoidance rules may have an impact on passive income in low tax jurisdictions. The national reporters are urged to be creative in their approach to this issue and are welcome to share their thoughts with the general reporters.

As some SAARs may be applicable simultaneously, national reporters may need to describe the interrelationship between such rules.

### **C. CFC-legislation**

Such legislation is commonly known as CFC-legislation. The first country to establish such provisions was the USA, which in 1962 enacted CFC-rules in subpart F of the Internal Revenue Code. Since then, a number of countries have followed and at the moment, it is said to be around 30 countries having some type of CFC-legislation.

The topic of CFC was partly dealt with at the 2001 Congress. Since that Congress, a number of countries have adopted CFC-legislation, including some large emerging economies. Also other developments make it timely to deal with it at the 2013 congress. For instance, the development of international tax planning techniques using low-tax jurisdictions have put further pressure on domestic legislation,. Also developments in the law of the European Union (EU) contribute to making CFC-legislation a suitable topic.

Very broadly, CFC legislation can be categorised into two main groups. One group of legislations treats the foreign company as a transparent entity. That is, for tax purposes it is not recognised, similar to how partnerships are taxed in many countries. The second group accepts the foreign company, but deems that a distribution has taken place to the shareholder. In the US for instance, a dividend is deemed to have been distributed to the shareholders.

The technique for taxing the shareholder aside, there are a number of issues to examine. For instance, how is relevant CFC-jurisdictions defined, what degree of ownership is required for the rules to kick in, does the rules apply to all income or only certain types of income, etc.

Generally speaking, CFC legislation means that the shareholder of a CFC is taxed on a portion of the undistributed profits of the CFC. The OECD identified two general methods for the design of CFC legislation (Controlled Foreign Company Legislation, OECD, Paris, 1996, p. 20). First, there is the "transactional approach" which is focused on the nature of the income, such as "passive income" or "base company income". Second, there is the "jurisdictional approach" which concentrates on the location of the potential CFC. In practice, there are variations to these two broad approaches and they may intersect with each other.

There are a number of issues to consider when analysing CFC legislation. Some of the most important issues will be identified in the following.

#### a) Definition of a CFC

Defining the CFC is vital for the application of CFC legislation. The CFC is by nature a foreign legal entity from the perspective of the country applying its CFC legislation. Most likely, it will be necessary to define the CFC *in abstracto*. It is possible that the definition of the CFC will take as a starting point the general characteristics of a legal entity in the country applying its CFC legislation. However, it will also be necessary to take into account characteristics of legal entities in other countries, most notably in tax havens and in countries with “preferential tax regimes”. The CFC legislation will probably have to apply in relation to such foreign entities that would not constitute a taxable entity in the country applying its CFC legislation.

The definition of “control” is central. CFC legislation will only apply in relation to a foreign legal entity over which a national tax subject has a considerable influence. For example, according to some CFC-regimes an ownership of 25 per cent will constitute a sufficient ownership, whereas other regimes require a higher level of 50 per cent. It is also possible with one criteria regarding a general control of the CFC exercised by domestic entities, and one criteria regarding the level of control exercised by the entity actually subject to CFC taxation.

Another important issue is whether and if so to what extent indirect control is covered. If only direct control is covered, it will be relatively easy for the taxpayer to avoid CFC taxation. If indirect control is taken into account, how is it defined and how will indirect control be attributed to the ultimate controlling entity?

Regarding other entities than companies other mechanisms will have to be used in order to quantify the level of influence, and that can result in general references to “considerable influence” or similar criteria.

A final question is at which point in time control must be present? Is it, for example, at the end of the fiscal year or as an average level during the fiscal year?

#### b) Definition of “low taxation” and of a targeted territory

CFC legislation will target entities subject to low taxation in another country. There are several alternatives for identifying a low tax jurisdiction. What constitutes low taxation will ultimately be determined with reference to the level of taxation in the country applying the CFC legislation, even if it will not be necessary with such a reference in the CFC legislation itself. In this respect it is of general interest what is the level of taxation in the country applying its CFC legislation, and what the tax level is for the CFC legislation to apply. An additional issue is how the level of taxation of the CFC is calculated. Is the tax base calculated according to the tax law of the CFC country, the general provisions of the country applying the CFC legislation, or according to special rules?

Another way of identifying low taxation is by identifying low tax jurisdictions. For example, that could be made through a list of countries with acceptable tax levels (“white jurisdictions”), jurisdictions with unacceptable tax levels (“black jurisdictions”) and jurisdictions with potentially unacceptable tax levels (“grey jurisdictions”).

It is also possible that the CFC legislation applies in general without any references to territory.

#### c) Attributed income

Normally, it will be necessary for the CFC legislation to define the income attributed to the domestic taxpayer. It can be the entire income of the CFC or only certain types of income. Three types of income are important: (i) passive income (such as interest, portfolio dividends, royalties and rents), (ii) active business income, and (iii) base

company income. A pure transactional approach would mean that only “tainted income” of the CFC would be subject to CFC taxation in the hands of the domestic taxpayer. In contrast, a pure jurisdictional approach means that all income of a CFC will be taxed in the hands of the domestic taxpayer. In practice, CFC legislation tends to be a mixture of both approaches.

A related issue is how the attributed income is calculated. One method is to apply the normal rules for computation of taxable income in the state applying its CFC legislation, perhaps with some amendments. Another approach is to apply completely separate rules for calculating the income.

d) Domestic taxpayers to whom income of a CFC is attributed

CFC legislation would typically apply for residents but could also apply for non-residents, for example foreign companies established through a permanent establishment. There will normally be requirements that domestic taxpayer either directly or indirectly, by itself or through related parties, owns a minimum portion of the CFC. In some way, the domestic taxpayer will be subject to CFC taxation on behalf of that ownership. The minimum holding could for example be ten per cent of the capital or voting stock of the CFC.

e) Exemptions from CFC taxation

It is common that CFC legislation contains different forms of exemptions from CFC taxation. That could for example be where the CFC is involved in “genuine or sound business activities”, or where the CFC distributes a minimum amount of its annual profits. Within an EU context, exemptions are plausible in order to meet the requirements of the Cadbury Schweppes decision (see below), and its requirement that CFC legislation only targets “wholly artificial arrangements”.

f) Relief provisions (foreign taxes and losses)

An important issue is the relief for foreign taxes. If the CFC is subject to some taxation, will that be deductible or creditable in the state of the domestic taxpayer subject to CFC taxation? To what extent is a tax credit possible? A related issue deals with the taxation of losses of the CFC. On the one hand, the domestic taxpayer will be liable to CFC taxation on profits, but is there also a possibility to deduct losses of the CFC? Probably, there will be restrictions on the deduction of such losses. How are such restrictions justified?

## **D. Tax treaty issues**

The relation between domestic anti-avoidance measures in relation to tax treaty law will in general terms be addressed in the national reports. In 1992 the Commentary to Article 1 of the OECD Model Tax Convention (OECD MTC) was extended to cover the issue of national anti-avoidance measures in relation to treaty law. Over the years, it has been discussed whether and if so, to what extent, it is possible to apply national anti-avoidance legislation (or case-law based doctrines) in relation to situations that are covered by tax treaties. A closely related issue is whether it exists a general doctrine with the meaning that tax treaty benefits should be denied in cases of an improper use of the tax treaty.

The Commentary to Article 1 of the OECD Model Tax Convention addresses all of these issues. These fundamental issues are identified in para. 9.1 in the Commentary to Article 1 of the OECD MTC in the following way:

1) whether the benefits of tax conventions must be granted when transactions that constitute an abuse of the provisions of these conventions are entered into; and  
2) whether specific provisions and jurisprudential rules of the domestic law of a Contracting State that are intended to prevent tax abuse conflict with tax conventions.

It is not uncommon that tax treaties contain references to the applicability of national anti-avoidance legislation, for example CFC legislation. The US approach with the “savings clause” constitutes a special approach.

Another important issue is whether the national approaches are different in relation to tax treaties between Member States of the OECD, and third states. An objective of the Subject I is to discuss these issues, and to identify the academic debate and case law from different countries.

In 2003 update of the Commentary it was stated even more clearly that the OECD did not consider CFC taxation to be in breach of tax treaty obligations. However, a handful of Member states made observations to this statement and expressed that they with varying degree consider CFC taxation to be in breach of treaty obligations.

According to some case law, the application of CFC legislation may constitute treaty override, perhaps most notably in the French Schneider case concerning the Swiss-French tax treaty. There are several cases where CFC legislation has not been considered to constitute any breach, and such cases have been reported from for example Finland (treaty with Belgium) and Sweden (treaty with Switzerland).

One important issue is to what extent CFC legislation applies in relation to treaties concluded with states that are not members of the OECD, as well as to what extent CFC legislation applies in relation to treaties concluded before the inclusion of the previously related statements from 1992 and 2003 in the Commentary to Article 1 of the OECD MTC.

## **E. EU law issues**

The developments within the European Union have been interesting from the perspective of anti-avoidance legislation in the field of passive income within multinational groups of companies. There are several levels of EU law that is of interest in this regard. One level concerns the abuse of fundamental freedoms. The European Court of Justice (ECJ) has in both tax cases and other cases considered that the fundamental freedoms cannot be invoked in situations where they are abused. Another level concerns the few directives on direct taxation which affect groups of companies, namely the Merger directive, the Parent/Subsidiary directive and the Interest and Royalties directive. All of these directives contain provisions preventing various abusive practices. A third level concerns the rule-of-reason doctrine developed by the ECJ. One of the grounds of justification concerns the prevention of tax avoidance (or sometimes labelled “tax evasion”). The Savings directive concerns the taxation of interest income, but it targets the taxation of individuals and is therefore beyond the scope of this subject.

Article 49 Treaty on the Functioning of the European Union, EUF, contains the right of establishment. Any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. This prohibition is primarily aimed at restrictions in the host state. However, with respect to CFC-legislation, it is not the tax rules in the host state that constitutes the restriction. On the contrary one might say, as it is the low taxation in the host that trigger CFC-legislation in the home state, i.e. the state of the shareholder/parent company. But the Court of Justice of the European Union (ECJ) has in a number of cases de-

clared that also restrictions in the home state on establishments in the host state may be contrary to article 49. One of these cases, Cadbury Schweppes (C-196/04) concerned CFC-legislation in the United Kingdom. That CFC-legislation applied to i.a. subsidiaries in Ireland because of the lower tax rate, but it did not apply to subsidiaries in the UK. This difference in treatment constituted according to the Court a restriction. The UK CFC-legislation could be justified on the ground of prevention of abusive practices, but only if the specific objective of the restriction to prevent conduct involving the creation of wholly artificial arrangements that do not reflect economic reality, with a view to escape the tax normally due on the profits generated by activities on home state territory (C-196/04 par. 55). Even though the Court found that CFC-legislation makes it possible to counteract establishments that have no purposes than escaping tax, the CFC-rules must be proportionate to the objective. And when there is a genuine economic activity in the host state, applying CFC-rules may not be proportionate.

Cadbury Schweppes meant that a number of Member States of the European Union changed their domestic CFC-legislation. The National reporters from EU countries are asked to describe and analyse to what extent their domestic legislation conforms to EU law. It may also be useful if reporters from non-member states reflects over EU law, and analyses to what extent similar arguments on e.g. wholly artificial reasoning have been put forward in the design of CFC-rules. National reporters may also consider other EU documents, e.g. the Council Resolution on coordination of the Controlled Foreign Corporation (2010/C 156/01) and thin capitalization rules, and on communications from the EU Commission.

For those countries that are host states, whether EU Member States or not, an interesting issue may be if domestic preferential legislation (i.e. the rules that triggers applying the CFC-rules in the home state) have been altered following both the developments of EU law, the increased net of exchange of information agreements and of OECD and EU policy work on harmful tax competition.

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## Anlage 2

### IFA 2013 Copenhagen Congress

#### Outline Subject 2

#### **Exchange of information and the cross-border cooperation between tax authorities**

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#### **1) Introduction**

The ongoing globalization and electronification of trade, investments and economic transactions in general has increased the needs and the possibilities for exchange of information and cross border cooperation between tax authorities in different states.

From a political point of view it has been generally agreed that a more intense and specified cooperation is getting more and more relevant in order to optimize the tax assessment and to secure the national tax provenue.

Traditionally the topic has been dealt with in bilateral double taxation treaties with specific articles on the exchange of information and cooperation (cf. UN – MTC and OECD – MTC Art 26) and in general bilateral or multinational treaties reserved for this matter. Important examples of multilateral legal remedies are The OECD/ European Council - Convention on exchange of information, the EU-directives (dir 77/799), The Nordic Convention of 1989 etc.

A number of EU-directives have intensified the EU-cooperation and extended the remedies for exchange of information and cooperation to VAT, indirect taxes etc. There has also been significant attention on the automatically information of capital income from bank accounts etc.

As a result of the increased international political pressure a large number of double taxation treaties have been signed in recent years also including states that formerly have not been ready to sign such agreements.

#### **2) Scope and Objectives**

This session will consider the international and national legal framework on the exchange of information and the cross border cooperation between tax authorities. Special reference is given to the development in recent years with the increasing numbers of treaties, agreements and the more intensive international cooperation on the matter.

This international legislation has an important impact to the domestic legislation on tax control, banking, security of data and general principles in the administrative law.

A number of questions are to be answered:

How intensive is the participation in the general international multilateral conventions and to what extent is such participation supplemented by more specific – multilateral or bilateral – tax treaties?

What are the demands of the domestic legislation on tax control in order to facilitate the international legislation on exchange of information?

Does the underlying domestic legislation on tax control support the international possibilities and what are the demands for a successful cooperation?

To what extent does the international cooperation give rise to complications in relation to protection of tax payers' rights, protection of privacy, protection against self incrimination etc.

### **3) International law**

The session is intended neither to cover an analysis of the content of OECD MTC /UN MTC rt 26 and its implementation in specific tax treaties nor to cover an analysis of the content of the traditional OECD- European Council-Convention and the EU-directives on the subject. Instead the purpose of this subsection of the session is to produce an overview of the extension of the participation in these international rules.

More attention is to be concentrated on the recent development in the framework of international treaties on exchange of information and cooperation in the various states.

To what extent have the various states taken part in new treaties, agreements etc on the topic and to what extent are the exchange of information on the direct taxation supplemented with legislation on information and cooperation on VAT and indirect taxes and to what extent does the cooperation involves others matters?

This description can eventually deal with the challenges of a modern and effective exchange of information and cooperation and may give an overview of the most important problems to be addressed and the actual status of the international cooperation.

### **4) Domestic law**

An important part of the session is an analysis of the correlation between international and domestic law. Special emphasis is to be taken of the requirements in the domestic law on tax control in order to facilitate the international law.

A description of the domestic legislation on tax control with special references to international matters may be useful. This may answer the question whether the domestic regulation on the tax payers' duties to hand over documents and information is equally applicable, when this material is to be exchanged to a foreign tax authority.

### **5) Joint Audits and multinational audits**

The possibilities for joint audits and multinational audits and their legal fundamentals may be addressed.

This part of the session may also address regional cooperations between tax authorities in countries with comparable tax legislation, same language, same administrative system etc.

The description may include the practical experiences on the matters with special references to the legal and administrative needs for a successful result.

## **6) Taxpayers rights**

The domestic legislation on tax payers' rights, right to privacy, right to be involved in an ongoing investigation and his right to remain "silence" if the tax control includes criminal charges etc may be described with a special reference to the impact on the international legislation on exchange of information and cooperation. This may include the rights for the tax payer to be informed of an ongoing exchange of information, the rights to make a statement, the remedies for the tax payer to appeal etc.

To what extent are general principles in the administrative law on the rights of the citizen applicable to tax audits and tax controls involving foreign matters and authorities?

How is the principle on protection against self incrimination if the tax control matter involves criminal charges implemented in the domestic legislation and how is this question dealt with in an international context?

An eventual domestic legislation on the protection of electronic data, bank- and business security may also be addressed in an international context. Especially the context between national legislation on bank security and international exchange of tax informations may be relevant

Special references may also be given to the - actual - problem, whether the information to be exchanged to the tax authorities in another state has to be obtained in a legal way. The problem is whether information obtained in an illegal way - by an illoyal bank officer etc. - can be used as a procedural evidence in a later tax case. Some countries have special legislation on the subject others have not.

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