

Deutsche Vereinigung für Internationales Steuerrecht

Deutsche Landesgruppe der International Fiscal Association (I.F.A.)

- Der Generalsekretär -



Deutsche Vereinigung für Internationales Steuerrecht 11053 Berlin

An die Mitglieder
der Deutschen Vereinigung für
Internationales Steuerrecht

Unser Zeichen:
MS/ms

Datum:
30. April 2010

Termin 30.Juni 2010 !

**Ausschreibung der Nationalberichte für den IFA-Kongress 2012
vom 30. September 2012 bis 05. Oktober 2012 in Boston (USA)**

Sehr geehrte Damen und Herren,

das Wissenschaftliche Komitee der IFA hat die Themen der Nationalberichte für den Kongress im Jahr 2012 in Boston festgelegt.

Folgende Themenkreise werden im Mittelpunkt der Erörterung stehen:

Main Subject 1

Enterprise Services

General Reporter:

Mrs. Ariane Pickering (Australia) – ariane.pickering@treasury.gov.au

Main Subject 2

The Debt-Equity Conundrum

General Reporter:

Mrs. Patricia Brown (USA) – patricia.brown@oecd.org

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Die ersten Projektskizzen der Generalberichterstatter zu beiden Themen sind als Anlagen beigefügt.

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Der Vorstand der Deutschen Vereinigung schreibt hiermit die beiden vorstehenden Themen zur Bearbeitung durch die Mitglieder der Deutschen Landesgruppe der IFA allgemein aus.

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 2011 erwartet.

Die Berichte müssen spätestens bis zum 15. Oktober 2011 fertig gestellt und den Generalberichterstattern übergeben werden. Sie werden zusammen mit den Generalberichten in den Cahiers zum Jahreskongress 2012 veröffentlicht.

Es wird erwartet, dass die Nationalberichterstatter sich an den vorgegebenen Zeitrahmen halten. Der ausgewählte Nationalberichterstatter sollte an den vorlaufenden IFA-Kongressen (Rom 2010 und Paris 2011) 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 informations) 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 30. Juni 2010 gegenüber der Geschäftsführung erfolgen.

Mit freundlichen Grüßen



H.-J. Müller-Seils
(Generalsekretär)

2 Anlagen

IFA – Boston Congress – 2012

Main Subject 1

Enterprise Services

General Reporter:

Mrs. Ariane Pickering (Australia) – ariane.pickering@treasury.gov.au

Introduction

Cross border trade in services now exceeds cross-border trade in goods, at least in some countries. Yet tax rules for trade in services are often less developed and uniform than the rules for trade in goods. This would be problematic even if services income implicated only a narrow set of tax rules, but services income raises issues relating to nexus, transfer pricing, indirect taxation, and other areas of international taxation. Among the unsettled issues are even the fundamental questions of whether certain activities properly constitute the provision of services, and the significance of the place of performance or consumption of services.

The growth of electronic commerce has greatly complicated the issues in this arena as in connection with the sale of goods, and permeates many of the subtopics below. Throughout the session, attention will be devoted to variations on traditional problems posed by e-commerce.

Scope and Objectives

This session will consider the policy and practical aspects of how countries in fact tax and should tax income from the provision of services by enterprises. Particular attention will be paid to activities raising classification issues, high value services (incorporating specialized knowledge or knowhow), and services requiring a certain duration in the servicee (host) country. To a limited extent, issues faced by partnerships of professionals may be covered. Services by employees will not be covered, nor, in general, will issues related to cash and equity-based compensation of employees.

Concept of Services

Services may be defined as activity of a person for or on behalf of another person not involving the transfer of property or cash from the servicer to the servicee. In its narrow traditional sense, the activity was activity of a physical person or instrument operated by a person, the physical location of which could be identified. Thus, services may include a broad

spectrum of business activity, a few examples of which are (i) provision of assistance or advice, (ii) construction of an object (e.g., a building or bridge) for delivery, (iii) acting as a broker, (iv) making a search engine available to a party (though this may instead be viewed as a license), (v) transmitting communications, (vi) providing air transportation, and (vii) providing a vessel and crew for hire. Certain service activities, such as oil-drilling or providing broadcast or web-based advertising services, involve a large capital investment, whereas others do not.

Activities falling into other identified categories of activity are excluded. For example, excluded are a transfer of ownership of tangible or intangible property, a lease or license of the right to use tangible or intangible property, a transfer or loan of cash, and acting as a counterparty to a financial contract as a principal for one's own purposes

In its broadest sense, the tax concept of services may include certain functions of a nonphysical nature, provided for or on behalf of another person, such as providing a loan commitment, providing a warranty of repair or replacement, providing a financial guarantee, or providing a financial hedge, though these activities may have independent rules for sourcing the income. The definitions and classifications are not entirely clear and are evolving. For example, providing a financial guarantee might not be considered a service but rather considered analogous to an insurance activity or engaging in derivative contracts as a principal.

Source and Nexus of Services Income

Source. Under the domestic laws of most developed countries, the source of income from services is generally the place in which the activity is performed. While the location of activity typically is determined by the location of the individuals performing it, the location of a device operated remotely may also be relevant. Other factors, such as the place where the contract for the services is made, or the place where the remuneration is payable, may also be relevant to determining the source of income from services in certain cases.

In the case of a non-physical function that is viewed as a service, the source rule may derive from a non-service analogy. For example, in countries where the provision of a guarantee is viewed as a service, the source of the guarantee fee may be the situs of the guaranteed activity, i.e., the situs of the risk (through that is analogous to sourcing services by reference to the location of the customer rather than the servicer). The source of income from providing a search engine may be determined by analogy to a royalty, in which case the place of use or right to use may be the source.

Nexus for Taxation on a Net Basis. Many countries provide for taxation of income from services on a net basis, eg where the services are rendered in the country by employees through a fixed place of business or by dependent agents. This generally is reflected in OECD Model-type treaties, as well as in the domestic laws of many countries.

Some countries have from time to time taken a different view with respect to income from services generally, or from certain types of services. These countries may tax such income on a gross basis, including in certain cases where the service is not physically provided in the country, eg. where the recipient of, or the payer for, the services is located in that country. The views of represented countries will be explored and analyzed.

Policy Issues Concerning Source and Nexus

General. From the standpoint of many countries, the nexus rules for services presumably should be consistent with those for goods. Accordingly, to the extent that the servicer or its agents does not have a physical presence in the servicee country, the income should be exempt from taxation based on nexus. Further, to the extent the service is an actual activity performed outside of the servicee country, it generally should be free of withholding tax.

Alternative View. From the standpoint of other countries, including many developing countries, however, the inability to tax payments for services, which generally would be deductible, could have a sizable base erosion effect, given the weighting towards outbound payments. Accordingly, such countries may take the position that physical nexus is not required. In the case of technical services, the considerations described in 3.4.3 will play a role.

Technical Services. To the extent the services are technical and nonroutine they may involve the application or supply of valuable know-how and accordingly may be analogous to royalties for the use of technology in the servicee's jurisdiction. So viewed, it could be argued that the payments should be sourced in the servicee country and potentially subject to withholding tax.

Financial Services. As noted, certain financial activities, such as physical activities or providing credit support, may be considered services and yet the income may be appropriately sourced, at least in part, where the risk is located or where the contracts are entered into rather than where the service provider is located or the hedging activity occurs.

Transfer Pricing Considerations

A leading concern of tax authorities is the ability of taxpayers of a country to restructure their business operations to relocate intangible assets and high value services to other (often low-tax) jurisdictions and seek to treat the residual income associated with those assets as having been removed from the country's taxing jurisdiction. Some countries have taken steps to subject relocations of intangible assets to taxation at a level sufficient to serve as a deterrent, but services are an even more elusive target.

Embedded Intangibles/High Value Services. As noted at 3.3.3, intangible assets can be embedded in service arrangements. In fact, by providing "services" or seconding employees to an offshore affiliate, technicians can impart to the affiliate technology in the form of know-how, potentially free of an exit tax or post-transfer adjustments based on actual post-transfer performance. Accordingly, some countries' transfer pricing regimes recognise and react to that fact.

Guidelines for Identifying and Unbundling Embedded Intangibles. The panelists will discuss what steps might be taken to address this issue.

Treatment of Services Income as Compared with Manufacturing/Sales Income under Special Regimes of Domestic Law

The country reports will identify any special regimes of domestic law that either distinguish between manufacturing activities and service activities or subject both to special treatment. Two examples are described below. Depending on how widespread regimes of this sort may be (as reflected in the country reports) and whether they pose general themes or queries, the session may address this area.

Domestic Production Incentives. Incentives may be provided for domestic production under a country's domestic law. (e.g., US Internal Revenue Code section 199). The treatment of services as compared with traditional manufacturing and the reasons therefor may be compared.

Limits on Deferral of Services Income Derived by Controlled Foreign Corporations. Under US Internal Revenue Code section 954(e), income from services provided by a CFC to or on behalf of a related party outside of the CFC's country of organization generally is subject to current inclusion by the US parent company. The theory has been that services income, while active, is mobile. (The IRS has reduced the scope of the rules by virtually eliminating application of the rules to assistance provided by a CFC to another CFC.) The panel

might consider the appropriateness of rules of this sort and whether similar “foreign base company” rules exist under the CFC regimes of any other countries.

Income Tax Treaties

OECD Approach. *Under the approach of the OECD Model income tax treaty, service income of enterprises generally is treated as business profits and hence taxable by the servicee’s country only to the extent attributable to a PE in that country. [NOTE: Session’s scope does not include service income of employees.] For certain types of services that require physical presence and generally equipment at a fixed site of a period of foreseeable duration (e.g., construction or installation), specified duration limits are contemplated to allocate jurisdiction and reduce controversies. The session will not go into detail concerning PE and “attributable” issues, but may address the special compliance problems arising in connection with the transparent nature of professional service partnerships.*

Expanded Concept of PE for Extended Services. *Certain income tax treaties include a provision treating the provision of services for an extended period of time as itself creating a PE, without requiring a fixed place of business. While such provisions are typically found in treaties to which a developing country is a party and has been reflected in the UN Model Treaty for many years, a similar but somewhat narrower provision is included in the 2008 revisions of the OECD Commentaries and in, e.g., the US-Canada treaty. The appropriateness of such provisions in view of the practical issues raised by them, as reported in the country reports, may be addressed.*

Developing Country Treatment of Technical Services. *Treaties with developing countries sometimes expand the definition of “royalties” to include technical services. The session could discuss the scope and incidence of these provisions, and their rationale and appropriateness.*

Secondment of Employees

Numerous issues arise in connection with the secondment of employees, generally involving the effectiveness and consequence of the arrangement from a nexus standpoint (e.g., employer status and PE issues) or the consequences of the arrangement for withholding and employee plans, but also may involve the transfer of knowhow. The session will consider only the last of these issues.

Indirect Taxation of Services Income

The panelists will address technical issues posed by indirect taxes on services income. These may include:

- 8.1 Achieving International Neutrality. Most countries consider that double taxation (and double non-taxation) on cross-border supplies is most effectively avoided in the context of indirect taxation by applying the destination principle. However, procedures for achieving this outcome are diverse, with particular problems arising in the context of services.
- 8.2 Application of the Destination Principle to Services. Difficulties in applying the destination principle include determining the place of consumption of services and ensuring that proxies used to determine where consumption should be regarded as taking place are as simple as possible and minimize administrative and compliance costs while limiting opportunities for fraud and other abuses. The role of specific rules applying to particular types of services, eg services related to immovable property, may be considered.

OECD and other initiatives in respect of such indirect taxes will be considered.

April 2010

IFA – Boston Congress – 2012

Main Subject 2

The Debt-Equity Conundrum

General Reporter:

Mrs. Patricia Brown (USA) – patricia.brown@oecd.org

Overview of Significance of Distinctions for Taxation and Capital Flows

The distinctions between debt and equity are critical to the tax and financial system of a country. Under the rules of many countries, the distinction has major ramifications, particularly if the traditional distinction between treating interest on debt as a deductible expense and distributions on equity as wholly nondeductible (setting aside an imputation system) is made. For example, domestically, taxpaying entities have a tax-driven incentive to issue debt, while the holders of the instruments tend to be persons enjoying a more favorable tax status. The fact that certain systems allow or require deductions and income inclusions such as for non-cash interest for accrual basis taxpayers or for all taxpayers in the case of instruments issued at a discount, amplifies the phenomenon. Internationally, a country may wish to attract investment capital from offshore; on the other hand, by attracting debt capital the country may be encouraging erosion of its tax base. In cases in which the lender is a related party, the economic significance of the debt-equity distinction is reduced while the incentive to lend is enhanced. The panel's themes will be introduced by reference to these phenomena.

Scope and Objectives

The panel will consider the history behind and issues arising under the phenomena noted in the Overview. The panel will draw on developments over the years to consider the substance of the debt-equity distinction, the appropriateness of existing tax incentives to leverage cross-border investments, and possible alternative regimes.

Historical Origins for Domestic Tax Law Distinctions and Definitional Scope of Debt

Historical origins. *The panel will recognize the historical basis for the distinction in the tax law. In many jurisdictions, the underpinnings of the distinction in the capitalization of enterprises follows from the fact that the statutory books of account or other financial accounts are the starting point for determining taxable income. These in turn may be significantly influenced by and draw upon the perceived legal distinctions in instruments. In [certain] common law jurisdictions, the distinction may have derived directly from a difference in legal rights.*

Legal rights. *The legal distinctions used directly or indirectly by the tax law to distinguish debt from equity for tax purposes, and any differences from the commercial law distinctions generally, will be addressed. Further, erosions of the distinction in the “fixed income” markets (e.g., covenant-lite bonds) and the theoretical significance for distinctions based on legal rights will be discussed.*

Nonrecourse debt. *The concept of nonrecourse debt and the extent to which nonrecourse debt is treated similarly to recourse debt may be discussed.*

Contingent interest. *The definitional stress resulting from profit-participatory and certain other types of contingent interest may be discussed.*

Electivity. *The electivity of whether to issue debt or equity and the tenor of the debt issued will be discussed briefly. The country reports will note any (nontax) legal constraints on this electivity.*

Related party distinctions. *Any classification distinctions based on the status of the lender as an equity owner or party related thereto will be noted.*

Complications Involving Passthrough and Branch Relationships

The vast majority of attention in the debt equity area has been devoted to issues involving entities taxed as corporations. Even assuming that, in general, the classification issue is dealt with similarly in the case of passthrough entities, the passthrough form raises other issues that must be dealt with to determine the consequence of interest expense.

Owner loan to pass-through entity. The treatment of a loan to a partnership by a partner will be discussed, noting the treatment of the interest as business profits under the domestic law of certain countries and the German Bundesfinanzhof treaty decision of 17 Oktober 2007 (overturned by statute). Similar issues in respect of a trust or other non-corporate form of business operation may be relevant.

Allocation of interest expense between branch or pass-through entity and owner. The tax deductibility permitted debt but not equity capital also can give rise to debt (and hence interest expense) allocation issues. For example, the circumstances in which a debt instrument between a branch and the home office of an enterprise will be recognized, as opposed to an apportionment of a portion of the total enterprise interest expense, may be noted. Distinctions between the treatment of a loan to a partner to finance a capital contribution to the partnership, as opposed to a loan directly to the partnership, also may be noted.

Ramifications of Debt-Equity Distinctions for Cross-Border Financing

The panel will pick up the introductory theme to explore the relevance of the parameters for cross-border capital flows, and the tension raised by the consequences for a domestic tax base of debt-equity distinctions in cross-border financing in an age of sensitivity to effective tax rates. Following some brief background, a number of interrelated themes will be discussed.

Background

- (a) Consequences of distinction under domestic law. The reports (not the session) will note by way of background the tax consequences of the debt-equity distinction at the entity level (deductible or not) and treatment at the recipient level (exclusion or dividend received deduction or special tax rate vs. fully taxable). The ability to repatriate principal amounts advanced as debt without withholding tax may also be contrasted in certain countries with a potential dividend tax on withdrawals of equity.
- (b) Consequences of distinction in cross-border context. The session will note by way of background how domestic law distinctions display themselves in a cross-border context, including under income tax treaties.

For example, while dividends may have a more favorable treatment for the recipient in a domestic context, they often incur a higher withholding tax in a cross-border context. The history and reasons for the distinction in withholding tax rates under Article 10 and Article 11 may be noted. The stress lines resulting in special treaty rules for profit-participatory and certain other types of contingent interest may be noted. Further relevant background facts are that, within the limits of commercially allowable payments, the more leverage the higher the interest rate, and the electivity of whether to issue debt or equity and the tenor of the debt issued.

Uneven effect on industries. The impact of financing deductions for capital intensive as opposed to noncapital intensive (generally, service) industries may be considered in the session (not by the country reporters), noting the deduction of compensation by services industries

Alternative financing payments (rents and royalties). The impact of rent or royalty payments versus interest payments and depreciation or amortization may be considered.

Tax arbitrage via exploitation of hybridity. The treatment of hybrid instruments and instruments involving hybrid entities (e.g., so-called "disregarded entities") will be discussed. The effect of hybridity is to further increase the incentives to leverage, based on the "double dip" phenomenon of a deduction without income inclusion by a related party lender. The appropriateness of the resulting ability to achieve tax arbitrage will be critiqued. The discussion will address measures taken in certain countries to limit the benefits of hybridity with respect to financings. The panelists may further discuss possible approaches that might appropriately address these issues in a cross-border context.

(The Tax Arbitrage panel will address these and similar issues more broadly and thus may serve as a companion seminar to this Main Topic.)

Special regimes that encourage foreign affiliate leverage. In connection with abritrage, the panel will note the phenomenon of special regimes designed to attract group financing activities, such as a "group interest box," under which interest received from members of a commonly controlled group might be taxed at, e.g., 5%. Other regimes, such as the US "check the box" entity classification rules, may be employed to similarly reduce

the residence country cost of related entity interest expense and so encourage leverage of host country affiliates; and their retention in that light may be viewed as a consciously employed special regime.

Guarantees. *The treatment of guarantees, keepwell agreements, comfort letters, etc. will be considered, including deductibility and pricing of guarantee fees. The issue of passive association may be considered.*

Related party instruments. *While the above discussion should apply both to unrelated and related party debt, the reasons that special rules may be needed for related party debt will be considered.*

Approaches to Address Issues

Existing systems will be touched upon briefly, and then the merits of proposals for alternative regimes will be addressed by the panel.

Restrictions on intragroup debt (earnings stripping rules, etc.). *Limitations applied by countries on the deductibility of interest, especially in a cross-border context, will be noted briefly only in passing (as they were discussed at the 2008 Congress). These limitations may be based on, for example:*

- (a) characterization of the instrument (in particular, in a related party context, which invokes the postulate of an equity owner enforcing creditor rights against the entity),
- (b) fixed ratio and/or arm's length thin cap rules,
- (c) percent of cash flow limits,
- (d) limits on deductibility of debt used in acquisitions, and
- (e) limits on debt with equity features such as convertible debt instruments and instruments that include interest referencing profits or asset appreciation.

Limitations also may be based on deferral rules, such as deferral of a deduction until amounts are paid. Which of these are applied only in related party situations and which are not, and issues such as the treatment of unrelated party loans with guarantees, will be discussed. The practice and efficacy of these rules, which may be viewed as efforts to reduce the binary effect of debt vs. equity, will be discussed, as will their appropriateness and treaty interaction

Uniform deduction on capital. *An alternative approach is the allowance of a uniform deduction on capital without regard to whether it is debt or equity. The discussion will focus on any developments subsequent to the introduction of such a regime in Belgium.*

Restrict interest deduction on debt funding in respect of certain shareholdings. *The panel will consider this approach generally, as well as by reference to the specific approach being considered in the Netherlands, which consists of a restriction in the deductibility of interest to fund investments in a qualifying participation together with a separate restriction on debt to fund the acquisition of a Dutch company. (An alternative is a generic earnings stripping restriction). The line-drawing reflected in definitions and exceptions will be considered.*

New approaches. *The session will focus on any new approaches that may have developed in this regard since 2008, or that the session panelists may identify.*

Treaty limitations on remedies. *Although unlikely to be part of the discussion, as backdrop in this regard the panel should consider if relevant the implications of recharacterization or deduction disallowance rules under the nondiscrimination provisions of income tax treaties and the EC Treaty, as well as the implications under Article 7 for limitations on the interest deductions allowed to a domestic branch of a foreign corporation. Country reporters may briefly note any developments in their countries in this regard.*