26 August 2021

Attn Reinhard Biebel
DG TAXUD
European Commission
1049 Bruxelles
Belgium

Dear Mr Biebel,

Subject: PwC response to the European Commission's public consultation 'Fighting the use of shell entities and arrangements for tax purposes'

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to respond to the consultation 'Fighting the use of shell entities and arrangements for tax purposes'. We believe that we are better able to express our views with this short letter than by completing the questionnaire.

Introduction

Our comments centre around the following themes:

1. The number and variety of entities and arrangements, contractual or corporate, with or without legal personality, is significant. Generally, the various types cater for a specific personal, societal, investment or business need. If a particular use of an entity or arrangement has tax consequences, the aim should be that these are aligned with relevant tax policy objectives, including those pertaining to tax avoidance;
2. In light of the above we suggest that the European Commission should take stock of the variety of entities and arrangements currently in use, to then determine whether the particular use of those entities and arrangements would violate existing tax policy objectives, and if so, then determine whether the existing anti-avoidance rules would be

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robust enough to address the particular use. If and to the extent that would not be the case, the introduction of further specific anti-avoidance rules should be considered.

1. The role of entities and arrangements in society

Individuals, governments, investors and businesses use different types of entities and arrangements to arrange their affairs, to organise cooperation, to invest, to operate business. The legal forms that exist for businesses have a long history dating back long before tax avoidance became an issue. Many of these "fictions of law" can be traced back centuries. As modern business practices have developed, so too have the range of legal entities that are used to partake in modern business activities. In the investment and business community, we see frequent use of entities and arrangements, such as joint venture contracts, limited and general partnerships, trusts, corporate entities (with both limited and unlimited liability), collective investment vehicles, special purpose vehicles, special purpose acquisition companies, etc. The choice of legal form is, amongst others, determined by exposure to risk and/or liability, the level of regulation, including tax, that the entity or arrangement will be subject to, industry norms and ability to extract returns from an investment. Sometimes the entity or arrangement provides for the legal structure and governance only, in other cases the entity or arrangement operates a business, has premises, employs people, etc. In our experience, while taxes are an important consideration in the choice of an entity or arrangement, and frequently drive that choice, the need for an entity or arrangement is often driven by non-tax considerations, such as the wish to cooperate or jointly invest.

We mention a few examples of entities or arrangements that are used for common business practices. Joint ventures are used by enterprises to combine forces and to realise economies of scale, without losing their own identity. Sometimes these joint ventures take the form of a mere contract, sometimes legal entities are used, and their 'substance' could vary from providing mere governance to fully-fledged businesses. Special purpose vehicles are set up to isolate risks and exposure to liability while protecting the parent company's assets and liabilities. They provide protection against bankruptcy and insolvency. Special purpose vehicles are also set up to raise capital in an efficient way, e.g. for the securitisation of debt. Collective investment funds are used to pool money from retail and other investors In all of these examples, the entities are set up for economic and / or commercial reasons. They often sit alongside associated entities that will carry out the operational activities for the overall enterprise and this may limit the need for the

entity or arrangement to employ staff or acquire office space itself. Many other examples exist apart from the ones we mention above.

2. Positioning Anti-avoidance rules

Entities and arrangements as referred to above do have tax consequences. They may be classified as separate taxable entities, they may be treated as resident in a country, they may be entitled to special privileges, they may be entitled to tax treaty benefits, they may be treated differently in different EU member states, etc. Whether a particular use of an entity or arrangement and in particular the tax consequences following from that use are aligned with relevant tax policy objectives does not depend on the entity or arrangement as such, but on the totality of relevant facts and circumstances. For example, the use of an intermediate holding company to own shares in a subsidiary will be neutral from a tax policy perspective, but if the entity was organised in a jurisdiction only with a view to obtain tax treaty benefits under tax treaties concluded by that jurisdiction, that use may violate an anti-treaty shopping and/or directive shopping policy if there was no relevant nexus in the chosen jurisdiction. Equally, if an entity that would be regarded as a separate entity by one jurisdiction but treated as transparent by another jurisdiction, with the view to create a situation of double non-taxation, the policy objectives of ATAD II and/or BEPS Action 2 would be violated. However, if a collective investment vehicle were created with a view to having a vehicle through which collective investments could be managed, it could be fully justified to grant this vehicle tax treaty benefits if the tax policy objective would be that collective investment vehicles should be able to operate in a tax neutral environment and be regarded as the extension of individual investors that collectively would be entitled to tax treaty benefits.

Our suggestion to the European Commission would be that it should take stock of the variety of entities and arrangements currently in use, to then determine whether the particular use of those entities and arrangements would violate existing tax policy objectives, and if so, then determine whether the existing anti-avoidance rules, including ATAD I and ATAD II, BEPS and the MLI (notably the principal purposes test and the limitation on benefits test), and judicially developed anti-avoidance doctrines, would be robust enough to address the particular use. If and to the extent that would not be the case, the introduction of further specific anti-avoidance rules should be considered.

Conclusion

In short, our recommended approach would be not to assume that an entity or arrangement "without substance" is abusive per se, but rather identify which use of entities and arrangements violates prevailing tax policy objectives in order to then determine whether the existing instruments suffice to curtail that use, and if that is not the case, to consider further rulemaking.

Closing remarks

For any clarification on this response, please contact me or any of the contacts below. We look forward to discussing any questions you have on the points we raise above. We would welcome the opportunity to contribute to the discussion.

Yours faithfully

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