Moore Global Network Limited
5 Market Street Mews
194-204 Bermondsey Street
London
SE1 3TQ
www.moore-global.com

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue André Pascal
75016 Paris
France

Sent by e-mail to: taxtreaties@oecd.org

27 May 2021

Dear Sir or Madam

RESPONSE FROM MOORE GLOBAL NETWORK LIMITED ('MGNL', 'WE') TO THE OECD CONSULTATION DOCUMENT 'PROPOSED CHANGES TO COMMENTARIES IN THE OECD MODEL TAX CONVENTION ON ARTICLE 9 AND ON RELATED ARTICLES'

MGNL appreciates the work that has been carried out by the OECD in this area to date and welcomes the opportunity to provide its comments and views on the complex area presented.

Detailed response

In the following pages (2 to 11) we illustrate in tables the OECD's proposed changes to the commentary, our suggested amendments to those changes (if any) and our comments and observations on the proposed changes.

MOORE

Proposed change to the Commentary on Article 9

OECD proposal	Our proposed version	Our comments/observations
1. Replace paragraphs 2 to 4 of the Commentary on Article 9 with the following:		
2. This paragraph provides that the taxation authorities of a Contracting State may, for the purpose of calculating tax liabilities of associated enterprises, re-write the accounts of the enterprises if, as a result of the special relations between the enterprises, the accounts do not show the true taxable profits arising in that State. It is evidently appropriate that adjustment should be sanctioned in such circumstances. The provisions of this paragraph apply only if special conditions have been made or imposed between the two enterprises~~.~~ ***and, therefore, the provisions would not apply to the*** ~~No~~ re-writing of the accounts of associated enterprises ~~is authorised~~ if the transactions between such enterprises have taken place on normal open market commercial terms (on an arm's length basis). ***In order to ensure the elimination of double taxation, the arm's length principle and the guidance on its interpretation in the OECD Transfer Pricing Guidelines should be followed in any re-writing of accounts[1]. [footnote: 1 See Recommendation of the Council on the Determination of Transfer Pricing between Associated Enterprises [C(95)126/FINAL, as amended]. The Recommendation is***	No change proposed	This is a clearer drafting, aiming to confirm that the tax treaties are limited to ensuring that transactions have been carried out in accordance with the arm's length principle, without entering into the debate on local taxation of income and expenses (notably 'thin-cap' rules, which remain the responsibility of the Contracting States). Nevertheless, this raises a relevant question in connection with the reversal of the burden of proof, which often leads to a quasi-systematic rejection of the proof brought forward by the taxpayer and considered as non-probative by the administration in an often relatively intransigent approach. This is therefore often a difficulty faced by the taxpayer where there is a reversal of the burden of proof.

OECD proposal	Our proposed version	Our comments/observations
reproduced in the Appendix to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.]		
3. In considering whether an interest payment can be regarded as an arm's length amount, a State will typically examine the terms and conditions of the loan such as the rate of interest. It may also need to examine, based on the facts and circumstances, whether a purported loan should be regarded as a loan or as another kind of transaction, in particular a contribution to equity capital. The State making a determination as to the extent to which the purported loan is regarded as a loan will do so taking into account factors discussed in its domestic laws (including judicial doctrine), or in the OECD Transfer Pricing Guidelines. ~~As discussed in the Committee on Fiscal Affairs' Report on "Thin Capitalisation", [footnote: Adopted by the Council of the OECD on 26 November 1986 and reproduced in Volume II of the full version of the OECD Model Tax Convention at page R(4)1.] there is an interplay between tax treaties and domestic rules on thin capitalisation relevant to the scope of the Article. The Committee considers that: a) the Article does not prevent the application of national rules on thin capitalisation insofar as their effect is to assimilate the profits of the borrower to an amount corresponding to the profits which would have accrued in an arm's length~~	No change proposed	

OECD proposal	Our proposed version	Our comments/observations
~~situation; b) the Article is relevant not only in determining whether the rate of~~		
~~interest provided for in a loan contract is an arm's length rate, but also whether a prima facie loan can be regarded as a loan or should be regarded as some other kind of payment, in particular a contribution to equity capital.; c) the application of rules designed to deal with thin capitalisation should normally not have the effect of increasing the taxable profits of the relevant domestic enterprise to more than the arm's length profit, and that this principle should be followed in applying existing tax treaties.~~ ***3.1 Once the profits of the two enterprises have been allocated in accordance with the arm's length principle, it is for the domestic law of each Contracting State to determine whether and how such profits should be taxed, as long as there is conformity with the requirements of other provisions of the Convention. Article 9 does not deal with the issue of whether expenses are deductible when computing the taxable income of either enterprise. The conditions for the deductibility of expenses are a matter to be determined by domestic law, subject to the provisions of the Convention and, in particular, paragraph 4 of Article 24. Paragraph 30 of the Commentary on Article 7 makes an equivalent statement for the application of Article 7. Examples of domestic rules that can deny a deduction for expenses include certain rules on entertainment***	No change proposed	

OECD proposal	Our proposed version	Our comments/observations
expenses and on interest such as those recommended in the final report on Action 4 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.[1] [footnote: 1 OECD (2015), Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241176-en.]		
4. The question **may** arise~~s as to~~ whether special procedural rules which some countries have adopted for dealing with transactions between related parties are consistent with the Convention. For instance, **is** ~~it may be asked whether~~ the reversal of the burden of proof or presumptions of any kind which are sometimes found in domestic laws ~~are~~ consistent with the arm's length principle~~.~~**? These questions are not answered in Article 9, but should be considered under Article 24 (see paragraphs 75 and 80 of the Commentary on Article 24).** ~~A number of countries interpret the Article in such a way that it by no means bars the adjustment of profits under national law under conditions that differ from those of the Article and that it has the function of raising the arm's length principle at treaty level. Also, almost all member countries consider that additional information requirements which would be more stringent than the normal requirements, or even a reversal of the burden of proof, would not constitute discrimination within the meaning of~~	No change proposed	Paragraph 75 of the Commentary on Article 24 suggests that the reversal of the burden of proof would only be to rebalance the level of information, viz: '… ensure similar levels of compliance and verification ...' In practice, the reversal of the burden of proof requires the taxpayer to demonstrate that its position is justified but one which the tax administration can reject in a simple and often rather arbitrary way. So, it in fact goes far beyond merely balancing the level of information. The new paragraph seems to make this reversal of the burden of proof fair, but it in fact may not do so.

OECD proposal	Our proposed version	Our comments/observations
~~Article 24. However, in some cases the application of the national law of some countries may result in adjustments to profits at variance with the principles of the Article. Contracting States are enabled by the Article to deal with such situations by means of corresponding adjustments (see below) and under mutual agreement procedures.~~		
2. The following change to paragraph 6 of the Commentary on Article 9 and the next additional paragraph (which derives from a parallel statement in paragraph 66 of the Commentary on paragraph 3 of Article 7) are proposed to clarify the obligations of the State making a corresponding adjustment.		
6. It should be noted, however, that an adjustment is not automatically to be made in State B simply because the profits in State A have been increased; the adjustment is due only ~~if~~ **to the extent that** State B considers that the figure of adjusted profits correctly reflects what the profits would have been if the transactions had been at arm's length. In other words, ~~the paragraph may not be invoked and should not be applied~~ where the profits of one associated enterprise are increased to a level which exceeds what they would have been if they had been correctly computed on an arm's length basis**,**~~.~~ State B is ~~therefore~~ committed to make an adjustment of the	6. It should be noted, however, that an adjustment is not automatically to be made in State B simply because the profits in State A have been increased; the adjustment is due only ~~if~~ **to the extent that** State B considers that the figure of adjusted profits correctly reflects what the profits would have been if the transactions had been at arm's length. In other words, ~~the paragraph may not be invoked and should not be applied~~ where the profits of one associated enterprise are increased to a level which exceeds what they would have been if they had been correctly computed on an arm's length basis**,**~~.~~ State B is ~~therefore~~ committed to	Paragraph 6 suggests that State B can deny the adjustment of the profits of the affiliated company if it considers that the adjustment made in State A exceeds the arm's length basis. Residual double taxation would therefore occur if State B considers that the adjustment made in State A exceeds the arm's length basis. A possible way to eliminate such double taxation would be to provide that in such a case, State A must reduce the adjustment accordingly, or State B must agree with State A on what is to be

OECD proposal	Our proposed version	Our comments/observations
profits of the affiliated company if it considers that the adjustment made in State A is justified ~~both~~ in principle **but only to the extent of the amount that reflects profits computed on an arm's length basis.** ~~and as regards the amount.~~ **6.1 As noted in paragraph 3.1 above, Article 9 applies only for the purposes of allocating profits to the two enterprises in accordance with the arm's length principle. It does not deal with the subsequent computation of taxable income, which is a question of domestic law. Any mismatch in this domestic law treatment does not in itself result in economic double taxation for the purposes of paragraph 2 and there is thus no obligation on State B to make a corresponding adjustment in these circumstances.** [Current paragraph 6.1 of the Commentary on Article 9 would be renumbered as paragraph 6.2.]	make an adjustment of the profits of the affiliated company if it considers that the adjustment made in State A is justified ~~both~~ in principle **but only to the extent of the amount that reflects profits computed on an arm's length basis.** ~~and as regards the amount.~~ **If the adjustment made in State A exceeds the level of profits computed on an arm's length basis, State A must reduce the adjustment accordingly, or State B must agree, with State A, under the Article 25 procedure, on the amount to be considered as reflecting the arm's length basis.** **6.1 As noted in paragraph 3.1 above, Article 9 applies only for the purposes of allocating profits to the two enterprises in accordance with the arm's length principle. It does not deal with the subsequent computation of taxable income, which is a question of domestic law. Any mismatch in this domestic law treatment does not in itself result in economic double taxation for the purposes of paragraph 2 and there is thus no obligation on State B to make a corresponding adjustment in these circumstances. However, in that situation, the competent authorities of the Contracting States should resort to the Article 25 procedure to agree to eliminate any double taxation.**	considered as an arm's length basis to make the corresponding adjustment. We would propose an amendment – reproduced **in cyan** in the middle column – to address this situation. In practice, the mismatch in the domestic-law treatment to which the proposed new paragraph 6.1 refers would result in economic double taxation. In that situation, if our suggested amendments **in cyan** were to be adopted, the competent authorities of the Contracting States should use the Article 25 mutual agreement procedure and agree to eliminate any resulting double taxation.

OECD proposal	Our proposed version	Our comments/observations
	[Current paragraph 6.1 of the Commentary on Article 9 would be renumbered as paragraph 6.2.]	

Proposed change to the Commentary on Article 7 (business profits)

OECD proposal	Our proposed version	Our comments/observations
3. The following proposed changes to paragraph 59 of the Commentary on Article 7 reflect the proposed changes in paragraph 6 of the Commentary on Article 9, set out in paragraph 2 above.		
59. As is the case for paragraph 2 of Article 9, a corresponding adjustment is not automatically to be made under paragraph 3 simply because the profits attributed to the permanent establishment have been adjusted by one of the Contracting States. The corresponding adjustment is required only ~~if~~ ***to the extent that*** the other State considers that the adjusted profits conform with paragraph 2. In other words, ***regardless of which State makes the initial adjustment***, ~~paragraph 3 may not be invoked and should not be applied~~ where ***that State adjusts*** the profits attributable to the permanent establishment ~~are adjusted~~ to a level that is different from what they would have been if they had been correctly computed in accordance with the principles of paragraph 2.	59. As is the case for paragraph 2 of Article 9, a corresponding adjustment is not automatically to be made under paragraph 3 simply because the profits attributed to the permanent establishment have been adjusted by one of the Contracting States. The corresponding adjustment is required only ~~if~~ ***to the extent that*** the other State considers that the adjusted profits conform with paragraph 2. In other words, ***regardless of which State makes the initial adjustment***, ~~paragraph 3 may not be invoked and should not be applied~~ where ***that State adjusts*** the profits attributable to the permanent establishment ~~are adjusted~~ to a level that is different from what they would have been if they had been correctly computed in accordance with the principles of paragraph 2~~. Regardless of~~	The proposed new version of paragraph 59 does not say that the purpose of the adjustments is to eliminate double taxation. It may appear that it gives the Contracting States the right to make adjustments only to the extent they believe the adjusted calculation is in line with the arm's length principle. It addresses double taxation only where this arises due to the adjustment of profits when filing amended tax returns. If there were to be an explicit reference to the mutual agreement procedure under Article 25, as we propose, it would encourage the competent authorities to make adjustments that would not give rise to future disputes when the Contracting States may have different views on the amount of the adjustment and the allocation of taxing rights.

MOORE

OECD proposal	Our proposed version	Our comments/observations
~~Regardless of which State makes the initial adjustment~~, the other State is obliged to make an appropriate corresponding adjustment ***but only to the extent that*** if it considers that the adjusted profits correctly reflect what the profits would have been ***if they had been correctly computed in accordance with these principles*** ~~if the permanent establishment's dealings had been transactions at arm's length. The other State is therefore committed to make such a corresponding adjustment only if it considers that the initial adjustment is justified both in principle and as regards the amount~~.	~~which State makes the initial adjustment~~, the other State is obliged to make an appropriate corresponding adjustment ***but only to the extent that*** ~~if~~ it considers that the adjusted profits correctly reflect what the profits would have been ***if they had been correctly computed in accordance with these principles*** ~~if the permanent establishment's dealings had been transactions at arm's length~~. ~~The other State is therefore committed to make such a corresponding adjustment only if it considers that the initial adjustment is justified both in principle and as regards the amount~~. ***In these circumstances, the competent authorities of the Contracting States should invoke Article 25 and consult together to eliminate double taxation.***	Our proposed amendments – ***in cyan*** as before – are intended to provide for this.

Proposed change to the Commentary on Article 24 (non-discrimination)

OECD proposal	Our proposed version	Our comments/observations
4. The following changes to the Commentary on Article 24 arise as a consequence of the proposed changes to paragraph 4 of the Commentary on Article 9.		
75. Also, paragraph 4 does not prohibit additional information requirements with respect to payments made to non-residents since these requirements***, including the reversal of the burden of proof,*** are intended to ensure similar levels of compliance and verification in the case of payments to residents and non-residents.	No proposed change	No comment

Proposed change to the Commentary on Article 25 (mutual agreement procedure)

OECD proposal	Our proposed version	Our comments/observations
5. The following proposed new paragraph in the Commentary on Article 25 is designed to confirm the practices of OECD member States in admitting cases into the mutual agreement procedure and to reinforce one of the conclusions of the BEPS Action 14 Final Report.		
12.1 More generally, the economic double taxation that may result from a primary adjustment consisting of the inclusion of profits of associated enterprises in an amount not justified by reference to the arm's length standard would result in taxation not in accordance with one of the objects and purposes of the Convention to eliminate double taxation. A denial of access to the mutual agreement procedure in these circumstances, with a view to eliminating the economic double taxation that could follow from such an adjustment, would likely frustrate an objective of the Convention. States should therefore provide access to the mutual agreement procedure in transfer pricing cases.	***12.1 More generally, the economic double taxation that may result from a primary adjustment consisting of the inclusion of profits of associated enterprises in an amount not justified by reference to the arm's length standard would result in taxation not in accordance with one of the objects and purposes of the Convention to eliminate double taxation*. *Contracting States should consider implementing internal regulations aimed at avoiding adjustments that would need to be reversed over the course of a mutual agreement procedure. These internal regulations should also contain provisions to make such cases eligible for the mutual agreement procedure*. *A denial of access to the mutual agreement procedure in these circumstances, with a view to eliminating the economic double taxation that could follow from such an adjustment, would likely frustrate an objective of the Convention. States should therefore provide access to the mutual agreement procedure in transfer pricing cases.***	We agree that the proposed new paragraph 12.1 is a useful addition in order to reinforce the right of taxpayers to ask for invocation of the mutual agreement procedure in cases of profit adjustments related to transfer pricing. At the same time, the importance of encouraging an internal culture in tax authorities aimed at making adjustments that do not require further dispute resolution is nowhere addressed. In order to remedy this deficiency, our proposed amendment – in cyan – would reinforce the necessity of making thoughtful adjustments.

That concludes our comments and suggestions.

Yours faithfully

On behalf of MGNL

Marco Mosconi
Leader, International Tax School
Moore Global

Sven Helm
Leader, Transfer Pricing
Group, Moore Global

Contact details for Marco Mosconi and Sven Helm

	e-mail address	Telephone number
Marco Mosconi	mmosconi@moorepa.it	+39 328 648 8374
Sven Helm	sven.helm@moore-tk.de	+49 621 42508-25

We should also like to acknowledge the work of the following persons who contributed their answers, views and comments to the above:

- Tatiana Gorbacheva (tatiana.gorbacheva@moore.kz)
- Thierry Louzier (tlouzier@coffra.fr)
- Nikolaj Milbradt (nmilbradt@soffal.fr)