International Chamber of Commerce
The world business organization

Policy statement

Application of Anti-Avoidance Rules in the field of taxation

Commission on Taxation, 27 June 2000

French version

ICC groups over seven thousand member companies and associations from over 130 countries. As the world business organization, it is the only representative body which speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC's purpose is to promote international trade, investment and the open market system. In the field of international taxation, ICC accordingly seeks the elimination of double taxation and other obstacles which impede and distort international trade and investment by imposing additional tax burdens or creating business uncertainty.

Issues

1. There is a growing tendency for the tax authorities in many countries to recharacterize or disregard transactions in tax assessments based on interpretations of their Anti-Avoidance Rules which are, at times, particularly extensive. These recharacterizations are also increasingly accompanied by penalties provided for in cases of bad faith or tax evasion.

2. ICC considers that it is essential that tax authorities understand the need of businesses, in order to be competitive, to seek out the most efficient means of carrying out legitimate business transactions. This is more critical than ever because of the globalisation of business and economies. We believe that the use of anti-avoidance rules of taxation that establish barriers to free cross-border business is counterproductive and should be stopped.

3. Although tax avoidance (unlike tax evasion) is within the law, ICC recognises that tax authorities are entitled to curtail the deliberate avoidance of tax and to take the measures they consider appropriate within the applicable legal systems (specific and/or general rules with respect to abuse of law or its equivalent). The application of such rules must, however, be reasonable and equitable, and respect at all times the fundamental principle of legal certainty essential for businesses.

Recommendations

4. Accordingly, ICC urges governments to respect the following principles:

   a) Tax authorities should respect the form of a legitimate business transaction even where such a form allows a reduction of overall tax costs. What qualifies as a legitimate business decision should be broadly defined in this rapidly changing technologically driven global market place.

   b) Specific A nti-Avoidance Rules must be sufficiently clear and precise, so that the taxpayer may be certain that a transaction which is in strict accordance with the law will not be put into question. Tax law must be fully respected to the letter. It is unacceptable that tax authorities, or the services responsible for tax investigations take it upon themselves to interpret and/or to

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apply a clear law according to what they consider to be its "spirit". This is particularly so when the administrative interpretation of the law is not published.

c) To the extent that General Anti-Avoidance Rules are adopted (abuse of law or its equivalent) the same need for legal certainty requires the observance of a number of principles:

i. The application of such rules should be limited to exceptional cases in which there is no economic substance and no substantive business reason for a transaction. Economic substance is a business test based on all facts and circumstances of a transaction and mechanical tests should be avoided.

ii. Tax procedure rules should be equitably and consistently applied and arbitrary shifting of the burden of proof must not be allowed.

iii. It is unacceptable that specifically legislated or regulated tax incentive measures be put into question by means of "anti-abuse" rules. Whilst the legislator clearly has the right to withdraw such measures, this should never be done retroactively.

iv. A transaction which is specifically excluded from a Specific Anti-Avoidance Rule should not be caught by any general rules. If this were not the case, the principle of legal certainty would be seriously jeopardised (example: "thin capitalization rules").

v. Countries having adopted General Anti-Avoidance Rules should also provide a system allowing the taxpayer to verify in advance, within a reasonable period, that a proposed transaction will not be subject to such rules ("advance rulings"). However, tax rules should be sufficiently clear so that the high cost and time constraints of advance rulings are necessary only in exceptional cases.

vi. In the event that States that are parties to tax treaties authorise each other to apply their Anti-Avoidance Rules, these rules should be clearly set out, and respect the principle of equal treatment.

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