By PwC Deutschland | 18. April 2013

Treaty policy

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The finance ministry has published its model double tax treaty serving as a guideline to negotiators. This guideline follows the OECD model treaty in form and – largely – content, although it contains a few additional provisions to take account of recent statutory developments, particularly in respect of securing tax revenue through curbing avoidance and evasion. Specific points worthy of note are:

- A building or assembly site is a permanent establishment if it lasts for longer than 12 months.
- The business profits clause follows the “authorised OECD approach” of attributing profits to a permanent establishment as though they had been earned through a separate entity. If there is a subsequent income adjustment that the other state does not wish to follow, the two competent authorities are expected to strive for a uniform approach to ensure that the full profit is taxed only once.
- The related-parties (associated enterprises) clause also calls for direct negotiations between the two competent authorities if a proposed income adjustment seems likely to lead to double taxation through taxing the same profit in the hands of two different taxpayers.
- The dividend withholding tax on distributions to a corporation with at least 10% of the share capital is set at 5%. However a footnote suggests that a zero rate could be acceptable in justified circumstances. The withholding tax on all other dividends is given as 15%.
- There are no withholding taxes on interest or royalties.
- A capital gain on the sale of shares in a company owning property in the other state is taxable there if that property accounts for more than 50% of the value of the shares.
- If a natural person moves to the other state after having been resident for at least five years, the first state may tax a deemed sale of shares at market value on the date of the move. If the first state takes advantage of this opportunity, the second state must accept the deemed sale value as the base cost of the shares in the event of a future disposal.
- The dependent personal services (employment income) clause provides that contributions to a recognised pension fund or similar in the other state rank for the same tax privileges that would follow from similar contributions in the employee’s state of residence, provided that he only became resident at the start of his employment and contributions had already been made under the same plan.
- Old-age (retirement) pensions are taxable in the country of residence unless paid by the state social security body, or unless they were funded from contributions tax-privileged in the country of source for longer than 15 years. If either of these two exceptions applies, both countries are entitled to tax – the country of residence granting a credit for the tax charged in the country of source.
- Double taxation of business profits, dividends in the hands of companies holding at least 10% of the share capital, and employment income is avoided by exemption in the country of residence. However, the exempt income will be taken into account in setting the rate to be applied to the remaining, taxable income. Double taxation on other forms of income is avoided in the country of

residence by crediting the tax borne in the country of source. There is a “switch-over” clause substituting the credit for the exemption where a qualification conflict (difference in income definition) leads to non- or partial taxation in the country of source, or where the country of source does not – for any reason – exercise its right to taxation (note: an explicit statutory exemption is not an “exercise” of a taxing right).

- Either country may switch from the exemption to the credit method of avoiding double taxation on specific forms or sources of income by notification to the treaty partner. This switch is effective from the following 1st January.
- Extensive clauses govern mutual agreement and arbitration proceedings, information exchange and mutual assistance between the authorities of the two states. The mutual assistance provision applies to all taxes, not just to the income and capital tax subjects of the treaty.

This negotiating model does not, of itself, have legal force. However, it is a clear statement of German objectives and hence of treaty policy.

Schlagwörter

double tax treaty, treaty policy