



Mr. Jeffrey Owens
Director
OECD, Centre for Tax Policy and Administration
Paris

Subject: OECD Discussion Draft entitled “Application and Interpretation of Article 24 (Non-Discrimination)” dated 3 May 2007 (“Discussion Draft”).

Dear Jeffrey,

On behalf of BIAC, I am pleased to make the following comments on the Subject Discussion Draft dated 3 May 2007.

It has been noted by many that Article 24 has only rarely been invoked in tax discussions and treaty dispute resolutions. Yet the concepts and language of the Article are significant features of the context for the entirety of the Model Convention and for generally avoiding double taxation in international transactions.

Historically there has not been an effective mechanism for specifically carrying out the implications of this important concept. We wrote in 2005 of the need to take the concept more seriously and build means for carrying it out in practical ways.

The Discussion Draft notes the various issues and in the Annex lists items that are relevant to the subject and require further work. That feature of the Discussion Draft is commended. There are matters that ought be covered by Article 24 that are of great practicality - - for example, scenarios in which a company is subject to tax in the host country due the existence of a permanent establishment (PE), but a deduction of overhead costs, i.e. costs of general and administrative nature, which were incurred in the Headquarter but are attributable to the PE, is denied or only allowed under impossible to satisfy conditions. Local enterprises most of the time are not faced

with such restrictions. Several of our members report these experiences. This and various of the issues in the Annex particularly important to address under the concept of non-discrimination:

- changes to the Article itself to deal with cross-border reorganizations;
- possible impact of European Community Law on Article 24;
- group regime issues related to paragraph 5 of Article 24;
- dispute resolution of issues related to Article 24.

We look forward to the further engagement on these.

However, the overall tone and changes to the Discussion Draft are such as to minimise greatly any possible use of Article 24. The limitation to “very precise circumstances” in paragraph 1; the passing to tax authority of almost complete discretion in implementing the concept; and fully denying “indirect” discrimination as a basis for rectifying practices, taken together basically make Article 24 inoperative. We struggle to find principled basis for these exclusions, other than desire to avoid the impact and implications of the concept of non-discrimination.

Finally we note that non-discrimination is an important cornerstone to competitiveness and achieving economic efficiency. Thus, as OECD as an organisation is committed to contributing to creation of more competitive business environments, the Committee on Fiscal Affairs should be working towards expansion of the scope of the Article rather than the opposite.

The purpose of the Article 24 needs to be re-invigorated, not eliminated.

Very Truly Yours,

Patrick Ellingsworth
Chair, BIAC Committee on Taxation and Fiscal Affairs