



October 19, 2017

VIA EMAIL

The Platform for Collaboration on Tax
taxcollaborationplatform@worldbank.org

Re: USCIB Comment Letter on the Platform for Collaboration on Tax's draft toolkit on the taxation of offshore indirect transfers of assets

For the attention of the members of the Platform for Collaboration on Tax,

USCIB¹ is writing to comment on the discussion draft on offshore indirect transfers. In our view, the taxation of offshore indirect transfers should not be considered in the context of a "toolkit". The discussion draft proposes potentially significant shifts in taxing rights for "source" and "residence" countries. Decisions on significant shifts in taxing rights ought to be debated among countries at the appropriate multilateral fora and not resolved by guidance provided by the staff of international organizations without debate among the countries. Therefore, this discussion draft should be withdrawn.

This toolkit raises most starkly an issue that has been raised by other toolkits issued by the Platform for Collaboration on Tax. What is the legal status of these "toolkits"? USCIB raised this issue in commenting on other toolkits, but the issue has not been adequately addressed. Because "neither this draft nor the final report should be regarded as officially endorsed views of those organizations or of their member countries", the status would seem to be no more than an academic article; if well-researched and argued, it may be persuasive, but should not be a source of authority on its own. USCIB is concerned, however, that tax authorities may treat the toolkits as authoritative guidance. Each toolkit should make clear that they are not authoritative and cannot override contrary guidance that is authoritative.

Our primary position is that the toolkit should be withdrawn, nevertheless, we address some of the questions raised in the discussion draft below.

1. Does this draft toolkit effectively address the rationale(s) for taxing offshore indirect transfers of assets? No. The discussion draft assumes that the so-called "source" country has the primary right to tax the gain on the underlying property and does not discuss the rationale for residence based taxation of that property. It misstates the current treaty rule. The country of residence has the right to tax capital gains other than those explicitly enumerated by the treaty. The political economy argument focuses on a few high-profile cases that are not representative of

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

the vast majority of asset transfers, whether direct or indirect. Those cases might be more appropriately dealt with narrower targeted rules.

2. Does it lay out a clear principle for taxing offshore indirect transfers of assets? The two proposals are clear in their general outlines, but as noted below in our response to question 9 many difficult issues are ignored or treated cursorily.
3. Is the definition of an offshore indirect transfer of assets satisfactory? No. The example deals with the simplest of cases and the rules would need to adopt and define many thresholds if these rules are to be practical in application.
4. Is the discussion regarding source and residence taxation in this context balanced and robustly argued? No. See response to question 1 above.
5. Is the suggested possible expansion of the definition of immovable property for the purposes of the taxation of offshore indirect transfers reasonable? No. The discussion draft abandons the treaty definition of immovable property and advocates an expansive definition of immovable property, which the draft itself acknowledges would be difficult to capture in legislative language. This is a prescription for uncertainty and double taxation.
6. Is the concept of location-specific rents helpful in addressing these issues? If so, how is it best formulated in practical terms? This is not helpful. As the draft acknowledges, access to a local market could be considered to generate location specific rents. A concept that is intended to be interpreted expansively and that is poorly defined will be interpreted in ways that will reduce certainty and deter investment.
7. Are there other implementation approaches that should be considered?
8. Is the draft toolkit's preference for the 'deemed disposal' method appropriate?
9. Are the complexities in the taxation of these international transactions adequately represented? No. The simplified example that forms the basis of the analysis contained in the discussion draft ignores the complexities involved in determining whether the transaction should be subject to tax. The discussion draft also ignores or skates over: the difficulties dealing with minority shareholders, valuation issues, the treatment of losses, and how economic double-taxation would be avoided. The discussion draft makes no mention of internal reorganizations, which in our view should be exempt from any taxes on indirect transfers, as there is no change in underlying ownership, so tax liabilities would constitute a leakage as there is no genuine economic gain. This is especially the case if the reorganization is driven by regulatory requirements.

Sincerely,

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