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General Report
Subject A: Group Approach and Separate Entity Approach in Domestic and International Tax Law

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Subject A

- The term “separate entity approach” describes the treatment of a legal entity as an independent tax subject.
  - In principle, the same rules apply to transactions between the company and its shareholders as to third parties.
- The term “group approach” stands for all deviations from the separate entity approach and means that tax consequences for the taxed entity depend on other taxable entities;
  - it is not meant in any formal way
  - While group taxation rules in the narrower sense are concerned with avoiding tax disadvantages of a multi-entity company organization, special rules, applying under the condition of control or significant participation, are intended to exclude the tax planning opportunities which the separate entity principle entails.

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Subject A

- An assessment as to whether and to what extent the tax systems internationally are moving away from the separate entity principle.
  - Special rules for groups reflect the economic reality of a unitary business
  - Rules reflect group membership and/or control as an indicator of tax planning opportunities and the absence of conflicting interests
  - The application of certain rules only to groups can reflect considerations of feasibility and enforceability because information is available only to group members or can be made available but cannot be derived from third parties.
  - The size of groups is used as an approximative indicator for tax planning capacities achieved through economies of scale. However, such special tax regimes for (international) groups, especially if conditioned by certain revenue thresholds, at the same time deviate from the ideal of tax neutrality and create different classes of taxpayers.

Argentina	Chile	France	Japan	New Zealand	South Africa	United Kingdom
Australia	Chinese Taipei	Germany	Korea (South)	Norway	Spain	United States
Austria	Colombia	Hong Kong	Luxembourg	Peru	Sweden	Uruguay
Belgium	Czech Republic	Hungary	Mauritius	Poland	Switzerland	EU report
Brazil	Denmark	India	Mexico	Portugal	Turkey	
Canada	Finland	Italy	Netherlands	Singapore	Ukraine	

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Separate entity approach and tax liability

- Why CIT and separate entity principle?
- When a separate entity subject to CIT?
  - Starting point: Legal personality
  - Partnerships: In many juricdictions an autonomous decision of the corporate tax legislator
  - Case by case re. foreign entities
- Size related provisions (thresholds)
  - Test on group level (Denmark and Spain)
  - GAAR test (Germany, Korea, Poland and Switzerland)
  - SAARs (Argentina, Belgium, Chile, France and Japan)
- Change of control and loss forfeitures rules
  - Transfer of losses/business activities to utilize losses
- Transfer pricing and HQ/PE (AOA)

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Allocation of income for (tax) groups

- The use of group tax regimes
  - Since IFA 2004 a number of countries have introduced group tax regimes. Mexico has abolished their regime. Only compulsory in Danmark.
  - Some still do not provide for group taxation, e.g., Canada, Czech Republic, India, Switzerland, Turkey, South Africa
    - Main reason: the negative tax effects on tax revenue, but also systematic reservation when strong separate entity approach is applied.
  - Main purpose of all regimes is the immediate offsetting of losses
- Different concepts
  - The group can choose the group member that makes loss compensating payments to or "receives" losses in each case vs. based solely on a particular financial link between the group members (Denmark)
  - The degree of consolidation
    - Full consolidation (e.g. Australia, Netherlands, US)
    - Profit and loss attribution and elimination of inter-company results (France and Spain)
    - Profit and loss attribution (e.g. Austria, Denmark, Germany, Hungary, Italy, Japan, Luxembourg, Poland, Portugal)
    - Group contribution/group (e.g. Belgium, Finland, Norway, Sweden, Singapore, UK)
  - The single group member remains subject when determining the income
    - Full consolidation, where the group is treated as one single taxpayer is found only in Australia, the Netherlands and New Zealand.
- Requirements to form a group
  - Only Denmark applies same definition of control for tax and accounting purposes. The participation threshold vary from 50 % to 100 %)

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Allocation of income for (tax) groups – cont.

- Cross border tax groups
  - All-in-all-out
  - Avoidance of double dip
  - Hardly any allows cross-border group taxation
    - Mainly due to EU-law, non-resident entities with domestic PEs can be part of the group
    - Only in very few jurisdictions (Austria, Denmark and Italy) a foreign subsidiary can be included without having a domestic PE, but only under restrictive conditions
- Groups and local/regional business tax
  - In Canada the absence of special regional allocation rules is the primary reason for not having group taxation
  - Different approaches:
    - Includes state and local taxes: Germany, Japan and the US
    - Only group tax if activities are carried out in the same region: Spain
    - Local business tax is left out: Hungary, Portugal and Italy
- CFC
  - Most countries only inclue so-called passive or tainted income (only Denmark and Sweden include all)
  - This and the fact that all most all countries requires some kind of low-taxation of income speaks in favor of CFC-rules only balance negative effects stemming from the application of the separate entity approach.

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Base Erosion and Profit Shifting

- Provisions on BEPS
  - WHT/non-deductibility of outbound payments
    - General WHT is "out of fashion": Columbia, Mexico, New Zealand and Peru (Argentina restrict deductibility)
    - Intra-group WHT/denial of deductibility is more widely used.

- Hybrid Mismatch-rules
  - Established in the recent years in EU-countries

- CbCR
  - Introduced in all countries represented by branch reports (750 mEUR group level)

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Conclusion and Perspective

Perspective

- CCCTB – the closest to abandon the separate entity approach
- Pillar I
  - Includes elements of a group taxation when testing Amount A (allocation of residual profits)
  - Amount B is more classic transfer pricing
- Pillar II - GloBE
  - Stick to the separate entity approach as a starting point
  - GloBE rules foresee certain elements following a group approach

Overall conclusion

- All systems foresee to a certain degree different elements of the separate entity approach
- Will not abandon anti-avoidance rules even if tax measures following GloBE will be introduced
- From the 2004 IFA General Report on group taxation:

  "The Achilles heel of any worldwide consolidation system is how to agree on a common formula to divide the amount of revenue between the jurisdictions concerned."

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