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Via email: *taxtreaty.team@hmrc.gov.uk*

Dear David

Stakeholder Consultation: Review of Double Taxation Treaties 2019/20

We refer to your letter dated 31 October 2019 and welcome the opportunity to input into your review of the priorities for the UK's network of double taxation agreements (DTAs) for the coming year.

As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

Our stated objectives are for a tax system which includes greater simplicity and clarity, so people can understand how much tax they should be paying and why, and greater certainty, so businesses and individuals can plan ahead with confidence.

Q1: How could our existing DTAs be improved?

We would like to take this opportunity to focus in particular on how the mutual agreement procedure (MAP) provisions in the UK's treaty network are being managed and how they can be improved.

The DTA landscape has changed significantly as a result of the OECD Multilateral Instrument (MLI). In the light of the MLI and the UK's support for mandatory binding arbitration provisions, we would like to encourage the government to also step up the UK's policy for seeking to negotiate such provisions in its treaty network.

In addition, we would be interested to know what policy decisions have been taken on how to improve the MAP process; not just once MAP has been formally engaged, but also in the pre-MAP period leading up to it.

One particular issue is what form arbitration should take. Is it the UK position that all arbitrations should be based on the default 'final offer' model? Have other countries confirmed their preference for this method? Where another country prefers 'reasoned opinion' arbitration will the UK accept that alternative method? We recommend the UK takes the lead in stating its order of preferred methods to avoid a situation where the method is left to be agreed (as is possible under the MLI), leading to unnecessary delay and uncertainty.

It would be helpful for the UK government to publish the status and outcome of negotiations with other countries on this point.

In addition, does the UK seek to negotiate Protocols dealing with the way MAP and arbitration in the treaty is to be managed?

We would like to encourage the UK government to lead the OECD community in supporting the use of supplementary dispute resolution processes first recommended in 2007 in the OECD's MEMAP Report and supported in the DTA Commentary.

We also take this opportunity to note that the work currently being undertaken by the Inclusive Framework in Addressing the Tax Challenges of the Digitalisation of the Economy, under Pillars One and Two is going to require enhanced dispute prevention and resolution mechanisms including, in our view, mandatory, multilateral, binding arbitration. Any changes to the international tax system as a result of the outcome of this work will undoubtedly have a significant impact on the resources of HMRC around DTAs and dispute resolution. Our responses to the OECD consultations can be found at:

Response to *Secretariat's Proposal for a 'Unified Approach' to Pillar One*: www.tax.org.uk/ref609

Response to *Global Anti-Base Erosion Proposal ('GloBE') – Pillar Two*: www.tax.org.uk/ref617

Q2: Are there any changes you would want the UK government to seek to negotiate in any specific DTAs as a result of Brexit?

As we said in response to last year's review, we suggest that after Brexit UK companies may want to see some existing treaties renegotiated because they:

- may suffer in relation to withholding tax, albeit at a reduced rate – for example on dividends paid from Germany/ Italy and royalties involving Luxembourg - compared to the current protection under the Parent/ Subsidiary and Royalties/ Interest Directives and in comparison to comparable payments within the EU in future.
- will lose the benefit of the Merger Directive and would, therefore, benefit from a new addition to Article 13 of the OECD Model for treaties with EU/EEA members that would extend the Merger Directive bilaterally.

We suggest that renegotiation of the UK's treaties with EU countries should be prioritised (and a strategy developed to demonstrate that, while the UK does not levy withholding taxes, it would still be in these countries' interest to seek to restore the 'pre-Brexit' fiscal outcomes).

We would also be interested to know whether additional resource will be available within the double tax treaty team after Brexit. We would expect that, pending renegotiation of treaties, treaty rulings will be required in respect of payments from member states as a result of the Directive no longer applying.

In addition, the US Limitation of Benefits tests includes tests for 'derivative benefits' and 'equivalent beneficiaries', which in some cases require investors to be located in the European Union (or EEA). We would be interested to understand what (if anything) HMRC is able to do to ensure continuation of benefits under the treaties between the US and other EU Member States with UK investors.

Q3: Are there any aspects of recently signed DTAs that could be improved?

We do not have any comments on any aspects of recently signed DTAs. However, we note that additional guidance in respect of the MLI's new articles (and in particular the PPT and anti-fragmentation provisions) from the UK's treaty partners would be useful, and we would welcome anything the UK can do to encourage this.

Q4: Are aspects of our existing DTAs un-competitive compared with agreements those treaty partners have made with other countries?

As mentioned above, following Brexit the UK's DTAs with EU member states may become less competitive when compared to the Directives operating between EU countries.

We would like to reiterate what we have said previously, that other issues should be considered when assessing the UK's competitiveness. In recent years the UK has introduced measures into domestic law which (arguably) are outside of the scope of its treaties but which impact on the UK's international position. In addition to diverted profits tax (DPT) and tax on offshore receipts in respect of intangible property (ORIP), so far as we are aware, the intention is that a UK digital services tax (DST) will be introduced, which would apply to residents of treaty partners. Together, these measures contribute to the actual and perceived competitiveness of the UK.

These unilateral measures could be more harmful than negotiating a less competitive treaty.

We would also urge caution around the Platform for Collaboration on Tax's *Offshore indirect asset transfer toolkit*. Even though this is not yet final, it is encouraging some countries to seek to broaden their capital gains taxing rights (whether on definition/ interpretation of 'immovable assets' or the UN substantive shareholding option).

Q5: Are there any gaps in the DTA network?

We understand that businesses would welcome DTAs with Peru and Brazil in particular.

A treaty with countries like Tanzania would have made a significant difference to disputes such as that reflected in *African Barrick v TRA* 16/2015 https://www.tra.go.tz/images/uploads/decidedcases/african%20barick.pdf
In this regard, we note that while the traditional article 4(3) would have resolved the dispute, the post 2017 OECD model, which, we understand is favoured by HMRC, would not, and its position should be reviewed in light of that. In our view, the principal purpose test counters the argument that the new article 4(3) is needed to combat abuse.

Yours sincerely

David Murray
Chair, International Taxes Committee

The Chartered Institute of Taxation

The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.