



International Chamber of Commerce

The world business organization

**Policy
statement**



Prepared by the ICC Commission on
Taxation

Application of Anti-Avoidance Rules in the field of taxation

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ICC is the world business organization, a representative body which speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC's purpose is to promote international trade, investment, and to facilitate the market economy system. In the field of international taxation, ICC seeks the elimination of double taxation and other obstacles which impede international business transactions by imposing unnecessary tax burdens on business or creating business uncertainty.

Issue

1. There is a growing tendency for the tax authorities in many countries to re-characterize or disregard transactions in tax assessments based on interpretations of their Anti-Avoidance Rules which are, at times, particularly extensive. These re-characterizations are also increasingly accompanied by penalties provided for in cases of bad faith or tax evasion.
2. ICC considers that it is essential for tax authorities to understand the need for companies, in order to be competitive, to seek out the most efficient means of carrying out legitimate business transactions. This is more critical than ever because of the globalisation of business and economies. Consequently, ICC considers that the use of anti-avoidance rules of taxation that establishes barriers to cross-border business is counterproductive and should be stopped.
3. Although tax avoidance (unlike tax evasion) is within the law, ICC recognises that tax authorities are entitled to curtail the deliberate avoidance of tax and to take the measures they consider appropriate within the applicable legal systems. However, the enforcement of these specific and/or general rules with respect to abuse of law or its equivalent must be reasonable and equitable. Such rules should also respect, at all times, the fundamental dogma of legal certainty essential for businesses.

Recommendations

Accordingly, ICC urges governments to respect the following principles:

- a) Tax authorities should respect the form of a legitimate business transaction even when such a form allows a reduction of overall tax costs. What qualifies as a legitimate business decision should be broadly defined in this rapidly changing and technologically driven global market place.
- b) Specific Anti-Avoidance Rules must be sufficiently clear and precise, so that the taxpayer may be certain that a transaction which is in strict accordance with the law will not be put into question. Tax law must be fully respected with no exceptions. It is unacceptable that tax authorities, or the services responsible for tax investigations, take it upon themselves to interpret and/or to apply a clear law according to their expectations. This is particularly evident when the administrative interpretation of the law is not published.

c) To the extent that General Anti-Avoidance Rules are adapted (to deal with abuse of law or its equivalent), the same need for legal certainty requires the observance of a number of principles:

- i.** The application of such rules should be limited to exceptional cases in which there is no economic substance and no fundamental business reason for a transaction. Economic substance is a business test based on all facts, and circumstances of a transaction and mechanical tests should be avoided. As long as a transaction is not artificial, reorganizations based on the goal of saving taxes or obtaining tax benefits should not be challenged by the Tax Authorities.¹
- ii.** Tax procedure rules should be equitably and consistently applied and arbitrary shifting of the burden of proof must not be allowed. In any case in which tax avoidance is alleged, the Tax Authorities must, *before* issuing the reassessment notice, call a meeting with the taxpayer and ask for a justification of the transaction. Should such a justification not be considered satisfactory by the Tax Authorities, the reassessment notice must specify the reasons why it was not deemed satisfactory.
- iii.** It is unacceptable that specifically legislated or regulated tax incentive measures be questioned by means of "anti-abuse" rules. While the legislator clearly has the right to withdraw such measures, this should never be done retroactively.
- iv.** A transaction which is specifically excluded from a Specific Anti-Avoidance Rule should not be punished by any general rules, otherwise, the principle of legal certainty would be seriously jeopardized (example: "thin capitalization rules").
- v.** Countries having adopted General Anti-Avoidance Rules should also provide a system allowing the taxpayer to verify in advance, within a reasonable period, that a proposed transaction will not be subject to such rules (referred to as "advance rulings"). However, tax regulations should be sufficiently clear so that cost and time constraints of advance rulings are only necessary in exceptional cases.
- vi.** In the event that States, which are parties to tax treaties, authorize each other to apply their Anti-Avoidance Rules, these standards should be clearly set out, and should respect the principle of equal treatment.
- vii.** Tax avoidance is not tax evasion. Tax avoidance should not result in any criminal punishment, or in any excessive administrative and/or civil penalties. Tax avoidance should simply lead to the reassessment of the taxes due, according to the correct and ordinary provisions that were circumvented by the taxpayer for the sole purpose of reducing its tax burden.²

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¹ See the European Court of Justice decision in *Cadbury Schweppes*, C-196/04, and chapter IX on *Business Restructurings* of the newly issued OECD, *Transfer Pricing Guidelines*, Paris, 2010, paragraph C.5.

²As also confirmed by the European Court of Justice decision in *Halifax*, C-255/02, paragraph 93.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



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Policy and Business Practices

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