

Tax Analysts Quotes David Rosenbloom: OECD's LOB Approach Needs Refinement, Practitioners Say

04.15.2014

Worldwide Tax Daily

Tax Analysts' Worldwide Tax Daily spoke with H. David Rosenbloom concerning the OECD's proposal to introduce a comprehensive limitation on benefits (LOB) provision in tax treaties. The proposal has received criticism from practitioners who believe the LOB article is too intricate and needs revisions to reflect multinational business practices that are not motivated by treaty shopping. For the complete article, please visit *Worldwide Tax Daily's* website (subscription required).

Excerpt taken from the article "OECD's LOB Approach Needs Refinement, Practitioners Say" by David D. Stewart and Kristen A. Parillo for Worldwide Tax Daily.

H. David Rosenbloom of Caplin & Drysdale thinks a U.S.-style LOB is the wrong approach to combat treaty abuse. "I'm not a big fan of LOBs generally," he said. "I'm not against the concept, but I don't think the version chosen by the OECD is the right one." (Prior analysis.)

He said the discussion draft's proposed LOB article appears to be modeled after the LOB contained in the pending Hungary-U.S. treaty that was signed in February 2010 but has not yet been ratified by the U.S. Senate. The Hungary-U.S. treaty's LOB "is a pretty sophisticated one," Rosenbloom said. "The problem is that it's very intricate, with thousands of rules, zigs and zags, and exceptions that take you to a never-ending hole where you don't know how they apply."

A better model would have been the LOB article in the 1984 Cyprus-U.S. treaty, said Rosenbloom. "That's an LOB provision that actually works," he said. "It's very tight, and the looseness is at the option of the source country. Some people would say it's uncertain and would be difficult to apply in practice. And all of that is true, but the fact is it prevents treaty shopping."

However, Rosenbloom said it's not clear whether that type of LOB article would effectively deter treaty shopping in a conduit country through which significant investment activity is channeled.

Another drawback to an LOB approach, he said, is that it would likely take decades for countries to update their treaties through renegotiations. "That just doesn't seem practical to me," he said.

Rosenbloom also questioned whether other countries would be willing to accept including LOB articles in their tax treaties. "It's very U.S.-centric," he said, adding that the U.S. Treasury Department has been developing its LOB article since 1975.

"We've had 39 years to tinker with this," he said. "I don't think there are any two LOBs that are precisely the same. To expect the rest of the world to buy into this is, I think, fanciful."

Moreover, not every country has the kind of leverage that the United States does to insist that a treaty partner include an LOB article in the parties' treaty. "Countries want to have tax treaties with the U.S.," Rosenbloom

said. "But that's not going to be true universally. There are some countries that will refuse and say, 'If you don't want to have a treaty with us, fine.'"

A better approach would be to address treaty abuse through domestic law, said Rosenbloom. He pointed to the section 884 branch profits tax rules that were enacted by Congress in 1986 and contain an anti-treaty-shopping provision. "If you want to stop treaty shopping, you're better off doing it under domestic law," he said. "Taxpayers would hate that because the law could be changed from one day to the next, and it could be viewed as a treaty override. Of course, the U.S. government can override a tax treaty, but other countries may be more constrained by their laws."

Rosenbloom also questioned the fast pace with which the OECD is managing the BEPS project. "With a lot of these BEPS concerns, and not just treaty abuse, it's one thing to express urgency and want people to do things quickly," he said. "But if you look at the history, these are not easy problems to resolve. If they could be resolved in a couple of months or years, they would've been resolved a long time ago."

"I think a more thoughtful, considered approach is what is really needed," he added.

Attorneys

H. David Rosenbloom

Related Practices/Industries

International Tax

Tax Disputes & Tax Litigation