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OECD/G20 Base Erosion and Profit Shifting Project

OECD/G20 税基侵蚀和利润转移 (BEPS) 项目



2015年成果最终报告 (IV)

经济合作与发展组织 著
国家税务总局国际税务司 译

▶ 防止税收协定优惠的不当授予

Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

第6项行动计划

Action 6: 2015 Final Report

▶ 防止人为规避构成常设机构

Preventing the Artificial Avoidance of Permanent Establishment Status

第7项行动计划

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▶ 使争议解决机制更有效

Making Dispute Resolution Mechanisms More Effective

第14项行动计划

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▶ 制定用于修订双边税收协定的多边协议

Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

第15项行动计划

Action 15: 2015 Final Report

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作 者: 经济合作与发展组织 著
国家税务总局国际税务司 译

责任编辑: 刘淑民 刘 菲 孙晓萍

责任校对: 于 玲

技术设计: 盛世华光

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北京市丰台区广安路 9 号国投财富广场 1 号楼 11 层

邮政编码: 100055

http: //www. taxation. cn

E-mail: swcb@taxation. cn

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前 言

国际税收事务在政治议程上被提升到了前所未有的高度。近年来，随着各国经济和市场进一步加大融合，使得一个世纪以前设计的国际税收规则亟待随之修整。现有国际税收规则的缺陷，使税基侵蚀与利润转移（BEPS）有了可乘之机。这就要求政策制定者大胆改革，重拾公众对税收体制的信心，并确保利润在经济活动发生地和价值创造地纳税。

紧随2013年2月发布的《应对税基侵蚀与利润转移报告》，经济合作与发展组织（OECD）与二十国集团（G20）成员国在2013年9月通过了15项行动计划以应对BEPS。这15项行动计划围绕三大支柱开展：保持跨境交易相关国内法规的协调一致，强化已有国际税收规则中的实质性要求，提高税收透明度和确定性。

自此，G20和OECD所有成员国平等地致力于BEPS项目，欧盟也在BEPS项目全过程中提供观点和意见。同时，发展中国家也通过不同形式广泛参与，包括直接参与财政事务委员会。除此之外，区域性税收组织如非洲税收论坛、（法语区国家）税务管理当局中心、美洲税收管理组织与国际组织如国际货币基金组织、世界银行以及联合国共同参与国际税改。BEPS项目还广泛征集了利益相关者的意见：收集了来自业界、咨询机构、非政府组织和学术机构超过1400份相关报告；召开了14次公共咨询会，会议在媒体和网络上直播；OECD秘书处定期向公众更新并答疑解惑。

历时两年，国际税改15项行动大功毕成。包括2014年中期报告在内，所有成果都凝聚在这套丛书中。BEPS系列行动措施是近一个世纪来第一次国际税制的实质性改革。新措施一旦付诸实践，我们可以期待利润将在经济活动发生地和价值创造地申报。但如果BEPS策略应用于过时或不协调的国内税制，将会劳而少功。

因此，BEPS实施成为现阶段的重点。BEPS行动的推进，将依靠国内法律和实践的改进、税收协定条款，及目前正在讨论并计划于2016年完成的多边工具。OECD及G20成员国还达成一致意见：将继续致力于BEPS措施能够一致并协调地实施。全球一体化必然要求解决方案和各国对话超越OECD及G20成员国界限。为推动这一目标的实现，2016年，OECD和G20成员国还将创设一个包容性框架监督项目，使所有感兴趣的国家能平等参加。

加深对BEPS成果实施的理解，将有效减少政府间的误解和纷争。对税改措施和税收征管的更多关注，将实现政府与企业的互利互惠。对数据和分析的改进建议，将扶助正在开展的BEPS定量评估工作，也有助于评估反对BEPS的新方法。

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防止税收协定优惠的不当授予

第 6 项行动计划

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第6项行动计划

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本文件由张博、陈莹、仲婧颖、马怡如翻译，刘小萌审校。

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Abbreviations and acronyms

BEPS	Base erosion and profit shifting
CIV	Collective investment vehicles
LOB	Limitation-on-benefits
OECD	Organisation for Economic Co-operation and Development
PPT	Principal purposes test
REIT	Real Estate Investment Trust
RIC	Regulated Investment Company
VCLT	Vienna Convention on the Law of Treaties

缩 略 词 表

BEPS	税基侵蚀和利润转移
CIV	集合投资工具
LOB	利益限制
OECD	经济合作与发展组织
PPT	主要目的测试
REIT	房地产行业投资信托
RIC	受监管投资公司
VCLT	维也纳条约法公约

Executive summary

Action 6 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns.

Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues. Countries have therefore agreed to include anti-abuse provisions in their tax treaties, including a minimum standard to counter treaty shopping. They also agree that some flexibility in the implementation of the minimum standard is required as these provisions need to be adapted to each country's specificities and to the circumstances of the negotiation of bilateral conventions.

Section A of this report includes new treaty anti-abuse rules that provide safeguards against the abuse of treaty provisions and offer a certain degree of flexibility regarding how to do so.

These new treaty anti-abuse rules first address treaty shopping, which involves strategies through which a person who is not a resident of a State attempts to obtain benefits that a tax treaty concluded by that State grants to residents of that State, for example by establishing a letterbox company in that State. The following approach is recommended to deal with these strategies:

- First, a clear statement that the States that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements will be included in tax treaties (this recommendation is included in Section B of the report).
- Second, a specific anti-abuse rule, the limitation-on-benefits (LOB) rule, that limits the availability of treaty benefits to entities that meet certain conditions will be included in the OECD Model Tax Convention. These conditions, which are based on the legal nature, ownership in, and general activities of the entity, seek to ensure that there is a sufficient link between the entity and its State of residence. Such limitation-on-benefits provisions are currently found in treaties concluded by a few countries and have proven to be effective in preventing many forms of treaty shopping strategies.
- Third, in order to address other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule described above, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purposes test or "PPT" rule) will be included in the OECD Model Tax Convention. Under that rule, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty.

执行概要

OECD/G20的税基侵蚀和利润转移（BEPS）项目的第6项行动计划认为协定滥用，尤其是择协避税是产生税基侵蚀和利润转移问题最重要的原因之一。

采取择协避税或其他滥用协定策略的纳税人，利用这些策略获取正常情况下无法获取的税收优惠，削弱了税收主权从而剥夺了国家税收收入。因此各国同意在其税收协定中纳入反滥用条款，包括应对择协避税的最低标准。同时各国也同意，考虑到这些条款需要适应各国的特殊性 & 双边协定的协商情况，需要在执行最低标准时给予一定的灵活性。

本报告第1章包括新的协定反滥用规则，此规则可以防止对协定条款的滥用，并对具体操作给予一定的灵活性。

这些新的协定反滥用规则首先将应对择协避税，包括非某国居民尝试利用各种策略安排来谋取该国居民才有权利获取的税收优惠，例如在该国设立一个邮箱公司（a letterbox company）。建议采用下列方法应对该种策略：

第一，缔约国双方在签订税收协定时，应在协定中明确阐明：双方意在防止为通过逃避税所造成的不征税或少征税行为创造条件，包括择协避税安排（该建议在本报告第2章有所阐述）。

第二，在OECD税收协定范本中纳入一项特别反滥用规则——利益限制（LOB）规则，这将协定优惠限定在满足特定条件的实体中。依据缔约国居民实体的法律性质、所有权及日常活动而制定的这些条件，旨在确保该实体与其居民国有足够的关联。目前上述LOB条款已被纳入少数国家的税收协定中，且已证明该规则能够有效应对多种择协避税情形。

第三，为了应对其他形式的协定滥用，包括上文所述LOB规则无法应对的择协避税情形，基于交易或者安排的主要目的的更为概括性的反滥用规则（主要目的测试，即“PPT”规则）将会被纳入到OECD税收协定范本中。在此规则下，若交易或安排的主要目的之一是获取税收协定优惠，则该优惠将不会被授予，除非能够证明授予该优惠符合协定条款的目的。

The report recognises that each of the LOB and PPT rules has strengths and weaknesses and may not be appropriate for, or accord with the treaty policy of, all countries. Also, the domestic law of some countries may include provisions that make it unnecessary to combine these two rules to prevent treaty shopping.

Given the risk to revenues posed by treaty shopping, countries have committed to ensure a minimum level of protection against treaty shopping (the “minimum standard”). That commitment will require countries to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Countries will implement this common intention by including in their treaties: (i) the combined approach of an LOB and PPT rule described above, (ii) the PPT rule alone, or (iii) the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties.

Section A also includes new rules to be included in tax treaties in order to address other forms of treaty abuse. These targeted rules address (1) certain dividend transfer transactions that are intended to lower artificially withholding taxes payable on dividends; (2) transactions that circumvent the application of the treaty rule that allows source taxation of shares of companies that derive their value primarily from immovable property; (3) situations where an entity is resident of two Contracting States, and (4) situations where the State of residence exempts the income of permanent establishments situated in third States and where shares, debt-claims, rights or property are transferred to permanent establishments set up in countries that do not tax such income or offer preferential treatment to that income.

The report recognises that the adoption of anti-abuse rules in tax treaties is not sufficient to address tax avoidance strategies that seek to circumvent provisions of domestic tax laws; these must be addressed through domestic anti-abuse rules, including through rules that will result from the work on other parts of the Action Plan. The report includes changes to the OECD Model Tax Convention aimed at ensuring that treaties do not inadvertently prevent the application of such domestic anti-abuse rules. This is done by expanding the parts of the Commentary of the OECD Model Tax Convention that already deal with this issue and by explaining that the inclusion of the PPT rule in treaties, which will incorporate the principle already included in the Commentary of the OECD Model Tax Convention, will provide a clear statement that the Contracting States intend to deny the application of the provisions of their treaties when transactions or arrangements are entered into in order to obtain the benefits of these provisions in inappropriate circumstances.

The report also addresses two specific issues related to the interaction between treaties and domestic anti-abuse rules. The first issue relates to the application of tax treaties to restrict a Contracting State’s right to tax its own residents. A new rule will codify the principle that treaties do not restrict a State’s right to tax its own residents (subject to certain exceptions). The second issue deals with so-called “departure” or “exit” taxes, under which liability to tax on some types of income that has accrued for the benefit of a resident (whether an individual or a legal person) is triggered in the event that the resident ceases to be a resident of that State. Changes to the Commentary of the OECD Model Tax Convention will clarify that treaties do not prevent the application of these taxes.

Section B of the report addresses the part of Action 6 that asked for clarification “that tax treaties are not intended to be used to generate double non-taxation”. This clarification is provided through a reformulation of the title and preamble of the Model Tax Convention that will clearly state that the joint intention of the parties to a tax treaty is to eliminate double taxation without creating opportunities for tax evasion and avoidance, in particular through treaty shopping arrangements.

本报告承认LOB以及PPT规则有各自的优势和劣势，且可能不适合所有国家，或不符合所有国家的协定政策。另外，某些国家的国内法可能已经包含特定条款，使得无须再加入上述两项规则来防止择协避税。

鉴于择协避税对收入造成的风险，各国承诺将确保采用防止择协避税的最低限度措施（“最低标准”）。该承诺要求各国在税收协定中明确阐述各国共同的愿景是在不为逃避税创造机会的前提下消除双重征税。各国为实现这一愿景，将在税收协定中包含（1）上述LOB及PPT规则；（2）仅PPT规则；（3）LOB规则，辅以能够应对协定尚无法解决的导管融资安排的机制。

第1章中还包含有应对其他协定滥用形式的规则。这些规则旨在应对下述几种情形：（1）意在人为降低股息预提税额的部分股息转让交易，（2）规避根据协定来源国可对主要价值来源于不动产的公司的股权交易征税的交易，（3）一个实体同时为两个缔约国居民的情况，以及（4）在居民国对设在第三国的常设机构的所得免税的情形下，将股权、债权、权利或财产转移到在不对该项所得征税或提供优惠待遇的国家设立的常设机构中。

本报告同意税收协定中的反滥用规则不足以应对试图规避国内法规定的避税策略，必须通过包括其他行动计划所制定的规则在内的国内法反滥用规则来应对。报告中亦包含了对OECD税收协定范本的修改，旨在确保协定不会无意间妨碍国内反滥用规则的应用。具体的做法为增加OECD税收协定范本中已有的针对这一问题的注释，阐明在税收协定中纳入的PPT规则（此规则将包含已在OECD税收协定范本注释中体现的原则）会明确，当达成交易或安排的目的是在不当情况下获取协定条款的优惠时，缔约国将否定该条款的应用。

本报告也阐述了关于协定和国内反滥用规则相互作用的两个问题。第一个问题是关于运用税收协定限制缔约国一方对其居民征税问题。新的规则将被用于明确协定不应限制缔约国对其居民的征税权的这一原则（某些情况例外）。第二个问题涉及所谓的“离境税”或是“退出税”（departure or exit taxes），即该居民（个人或法人）停止是此国居民的情况下将会引发其纳税义务，对其积累的某类所得纳税。税收协定范本注释的修改将明确协定并不会妨碍此类税种的应用。

本报告第2章阐明了第6项行动计划中“明确导致双重不征税并非税收协定的意图”的部分。通过修改税收协定范本的标题和序言，明确声明税收协定双方的共同目标是消除双重征税，同时防止逃避税（特别是择协避税）。