O.E.C.D. ISSUES PROPOSED CHANGES TO PERMANENT ESTABLISHMENT PROVISIONS UNDER MODEL TAX CONVENTION

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On July 11, 2017, the O.E.C.D. Committee on Fiscal Affairs released the draft contents of the 2017 update to the O.E.C.D. Model Tax Convention (the "O.E.C.D. M.C.") and the Commentary prepared by the Committee's Working Party 1 (the "Draft Contents"). This article discusses, in detail, the proposed amendments to Article 5 (Permanent Establishment)[1] in the 2017 update to the O.E.C.D. M.C. and Commentary, as well as the background and reasoning for the amendments in light of the Final Report on Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 ("Action 7 Final Report").

The update has not yet been approved by the Committee on Fiscal Affairs or by the O.E.C.D. Council, although significant parts of the 2017 update were previously approved as part of the B.E.P.S. package. The update will be submitted for approval by the Committee on Fiscal Affairs and the O.E.C.D. Council later this year.

The majority of the changes proposed to Article 5 are the result of the Action 7 Final Report under the B.E.P.S. Action Plan. While these amendments have been approved under the B.E.P.S. consultation process, the Draft Contents include additional changes to the O.E.C.D. M.C. and the Commentary that were open for public comment. The latter will be the subject of a separate article in the next edition of Insights.

THE "*COMMISSIONAIRE* ARRANGEMENTS" LOOPHOLE

The concept of "*commissionaire*" is recognized in civil law countries and is generally defined as one who buys and sells goods in his or her own name but on behalf of the principal. *Commissionaire* arrangements are the result of tax planning arising from a distinction recognized by civil law countries between contracts entered on behalf of and contracts entered in the name of.

Contracts made in the name of and on behalf of the principal do not give rise to *commissionaire* arrangements since the principal is disclosed to the buyer, and therefore, the contract is legally binding on the principal. However, as mentioned above, contracts made in the name of the agent but on behalf of the principal (*i.e.*, an undisclosed principal) result in *commissionaire* arrangements, where the principal is not legally bound by the terms of the contract.

In an international tax context, a *commissionaire* arrangement may be defined as an arrangement through which the agent (*i.e.*, *commissionaire*) sells products in

[1] All Article references are to the O.E.C.D. Model Tax Convention on Income and on Capital, 2014, as amended, unless otherwise specified.

a country in its own name but on behalf of a foreign enterprise that is the owner of these products. Since the *commissionaire* who sells these products is not the owner, the *commissionaire* is not taxed on the profits arising from the sale and is only taxed on the remuneration received by the foreign enterprise for its services (*i.e.*, commission). At the same time, the *commissionaire* may not be treated as a permanent establishment ("P.E.") of the foreign enterprise under the present terms of paragraph 5 of Article 5 since the sale does not occur "in the name of the foreign enterprise."[2] The interpretation of this phrase has been the subject of litigation in various countries in recent years. Based on the civil law principles governing *commissionaire* arrangements, several courts have decided that because a *commissionaire* does not legally bind the foreign enterprise, the *commissionaire* does not conclude contracts in the name of the enterprise.

Taxpayers have exploited this loophole and introduced *commissionaire* arrangements to replace subsidiaries that traditionally acted as distributors, thus shifting profits out of the source country (*i.e.*, the country of sale) without a substantive change in the functions performed in that country.

The O.E.C.D. discussed such abusive arrangements in its Action 7 Final Report and addressed this issue by proposing amendments to of paragraph 5 of Article 5.

The proposed amendment to paragraph 5 of Article 5 provides that where the activities exercised by an intermediary in a country are intended to result in the regular conclusion of contracts to be performed by the foreign enterprise (regardless of whether the contract is in the name of the foreign enterprise), that enterprise will be considered to have a taxable presence in that country (*i.e.*, a P.E.) unless the intermediary is performing these activities in the course of an independent business. The proposed amendment to paragraph 5 of Article 5 is as follows:

> 5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person − other than an agent of an independent status to whom paragraph 6 applies − is acting in a Contracting State on behalf of an enterprise and has, and habitually exercises, in a Contracting State, an authority to conclude contracts, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are
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> a) in the name of the enterprise, or
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> b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
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> c) for the provision of services by that enterprise,
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> that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that

[2] As of the date of this article, paragraph 5 of Article 5 requires, inter-alia, the sale of goods to be on behalf of and in the name of the principal foreign enterprise for the creation of P.E. in the source country.

person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

The Commentary on Article 5 concerning the definition of a P.E., has been amended to provide that paragraph 5 of Article 5 will apply if all the following conditions are met:

a) a person acts in a Contracting State on behalf of an enterprise;

b) in doing so, that person habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and

c) these contracts are either in the name of the enterprise or; for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or for the provision of services by that enterprise.[3]

"A person is acting in a contracting state on behalf of an enterprise when that person involves the enterprise to a particular extent in business activities in the state concerned."

However, the Commentary carves out an exception for legitimate business activities by an independent agent and provides that even if the paragraph 5 of Article 5 conditions are met, a foreign enterprise will not be deemed to have a P.E. if the activities performed by the agent on behalf of the enterprise are (i) covered by the independent agent exception of paragraph 6 of Article 5 or (ii) limited to activities mentioned in paragraph 4 of Article 5, which if exercised through a fixed place of business, would be deemed not to create a P.E.[4]

The Commentary clarifies that neither the maintenance of a fixed place of business solely for the purposes of preparatory or auxiliary activities nor a person whose activities are restricted to such purposes will cause the creation of a P.E. By way of an example, the Commentary explains that where a person acts solely as a buying agent for an enterprise and, in doing so, habitually concludes purchase contracts in the name of that enterprise, the person shall not be treated as the P.E., even if that person is not independent of the enterprise, as long as such activities are preparatory or auxiliary.[5]

Although also used in prior versions of paragraph 5 of Article 5, the Draft Contents provide the first explanation of the phrase "a person acting on behalf of an enterprise." According to the Draft Contents, a person is acting in a contracting state on behalf of an enterprise when that person involves the enterprise to a particular extent in business activities in the state concerned. However, a person cannot be said to be acting on behalf of an enterprise if the enterprise is not directly or indirectly affected by the action performed by that person.[6]

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[3] Draft Contents, Commentary on Article 5, paragraph 84.

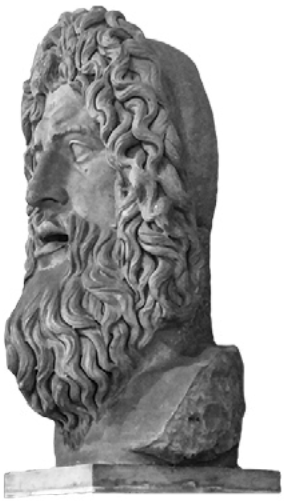
[4] Draft Contents, Commentary on Article 5, paragraph 85.

[5] *Id.*

[6] Draft Contents, Commentary on Article 5, paragraph 86.

In addition, proposed paragraph 5 of Article 5 requires the agent to either conclude contracts or habitually play the principal role leading to the conclusion of the contracts in order to avoid P.E. status. Under the current version of this article, a P.E. is created if a person (other than an independent agent) acting on behalf of a foreign enterprise has the "authority to conclude contracts in the name of the enterprise." A prior draft of the report on B.E.P.S. Action 7, referred to "persons that habitually conclude contracts or negotiate the material elements of contracts." However, the Draft Contents – in line with the Action 7 Final Report – refers to persons that habitually conclude contracts or "habitually play the role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise."

The Commentary in the Draft Contents explains that the relevant law of the contracting state governing contracts shall determine where a contract is considered to have been concluded. Further, a contract may, under the relevant law, be concluded in a state even if that contract is signed outside that state. In addition, a person who negotiates in a state all elements and details of a contract in a way binding on the enterprise can be said to conclude the contract in that state even if that contract is signed by another person outside that state.[7]



Even if the contract is not concluded by the agent, paragraph 5 of Article 5 may still apply if the agent plays the principal role leading to the conclusion of the contracts that are routinely concluded without material modification by the enterprise. This definition aims to cover situations where the conclusion of a contract directly results from the actions performed by agent in a contracting state on behalf of the enterprise, even though, under the relevant law governing contracts, the contract is not said to be concluded by that agent in that contracting state. Thus, the guiding principle to determine who concluded the contract is to examine whose actions convinced the third party to enter into the contract.[8]

The amendment results in the application of paragraph 5 of Article 5 to contracts involving disclosed principal that create rights and obligations that are legally enforceable between the foreign enterprise – on whose behalf the agent is acting – and the third parties. The amendment also is applicable to contracts involving undisclosed principal, if those contracts create obligations that will effectively be performed by the enterprise rather than by the agent.[9] As discussed above, a typical example involves contracts that a *commissionaire* concludes with third parties under a *commissionaire* arrangement with a foreign enterprise. Although the *commissionaire* acts on behalf of the enterprise, in doing so it concludes contracts in its own name that do not create rights and obligations that are legally enforceable between the foreign enterprise and the third parties. However, the *commissionaire* arrangement results in a direct transfer to the third parties of the ownership or use of property that the enterprise owns or has the right to use.[10]

While a P.E. will result if proposed paragraph 5 of Article 5 applies to the foreign enterprise, the O.E.C.D. cautions that it does not mean that the entire profit resulting from the performance of the contract should be attributed to the P.E. The determination of the profits attributable to a P.E. resulting from the application of paragraph

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7 Draft Contents, Commentary on Article 5, paragraph 87.

8 Draft Contents, Commentary on Article 5, paragraph 88.

9 Draft Contents, Commentary on Article 5, paragraph 91.

10 Draft Contents, Commentary on Article 5, paragraph 92.

5 of Article 5 will be governed by the rules of Article 7 (Business Profits) such that the profits to be attributed to the P.E. are only those that the P.E. would have derived if it were a separate and independent enterprise performing the activities that paragraph 5 of Article 5 attributes to that P.E.[11] The actual meaning of this clarification is somewhat obscure because the *commissionaire* is performing the service of selling and, for that service, receives arm's length compensation. It is not clear whether any profit for services performed in the country is left after payment of the fee to the *commissionaire*.

ARTIFICIAL AVOIDANCE OF P.E. STATUS THROUGH EXCEPTIONS IN PARAGRAPH 4 OF ARTICLE 5

Paragraph 4 of Article 5 contains the list of preparatory and auxiliary activities that do not result in the creation of a P.E. However, since the introduction of these exceptions, there have been dramatic changes in the way businesses are looked at by tax examiners. In the current environment, activities previously regarded as preparatory or auxiliary in nature may now be treated as core business activities, and the P.E. exemption may no longer be justified.

Each Activity Listed in Paragraph 4 of Article 5 Must Be "Preparatory or Auxiliary" in Nature

To ensure that profits derived from a core business activity are taxed in the source country, the O.E.C.D. proposes to amend paragraph 4 of Article 5 to ensure it is in line with its original purpose. To accomplish this goal, the Draft Contents require that each exempt activity be preparatory or auxiliary in nature in order to qualify for the exemption.

The revised paragraph 4 of Article 5 would read as follows:

> 4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include:
>
> a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
>
> b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery
>
> d) he maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
>
> e) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

[11] Draft Contents, Commentary on Article 5, paragraph 101.

f) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity ~~of a preparatory or auxiliary character~~;

g) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character~~,

provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

The O.E.C.D. has also provided additional guidance in the Commentary relating to paragraph 4 of Article 5 to clarify the meaning of the phrase "preparatory or auxiliary" with the help of a number of examples.

"Businesses have attempted to take advantage of the benefit under paragraph 4(f) of Article 5 by setting up several subsidiaries, each performing only one function listed in paragraph 4 of Article 5."

Fragmentation of Activities Between Closely Related Parties

Under the current O.E.C.D. M.C., a fixed place of business maintained solely for any combination of the activities mentioned in subparagraphs (a) to (e) of paragraph 4 of Article 5 does not result in the creation of a P.E., provided that the overall activity of such fixed place of business is of a preparatory or auxiliary nature.[12] Further, paragraph 27.1 of the Commentary on Article 5 provides that a single enterprise that divides a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity will not be eligible to avail the exemption under paragraph 4(f) of Article 5.

It is noteworthy that, as it stands, paragraph 27.1 limits its application to single enterprises and does not apply in cases where such operations are carried on by related parties. Thus, businesses have attempted to take advantage of the benefit under paragraph 4(f) of Article 5 by setting up several subsidiaries, each performing only one function listed in paragraph 4 of Article 5. These groups have argued that each subsidiary is merely engaged in a preparatory or auxiliary activity.

The O.E.C.D. proposes to disallow the P.E. exemption in the case of activities carried on by closely related enterprises at different places or at the same place. The O.E.C.D. proposes to insert a new paragraph 4.1 to Article 5 to address the tax abuse, and it reads as follows:

> Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and
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> d) that place or other place constitutes a P.E. for the enterprise or the closely related enterprise under the provisions of this Article, or
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> e) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by

[12] O.E.C.D. M.C., paragraph 4(f) of Article 5.

> the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,
>
> provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

This draft anti-fragmentation rule intends to deny the application of the exceptions of paragraph 4 of Article 5 where complementary business activities are carried on by closely related enterprises at the same location or by the same enterprise or closely related enterprises at different locations.

For those advisers having experienced the nuances of unitary taxation under state law in the U.S., this approach should sound familiar. Various units of an integrated operation are treated as part of a common tax base for state apportionment purposes, even if the units are placed in separate corporations.

The Commentary contains examples that explain the proposed paragraph 4.1 of Article 5.[13]

ARTIFICIAL AVOIDANCE OF P.E. STATUS THROUGH CONTRACT SPLITTING

A building site or construction or installation project only constitutes a P.E. if it lasts more than 12 months.[14] In order to circumvent this provision, contractors or subcontractors will divide contracts into several parts, each covering a period of less than 12 months and attributed to a different company within the same group.[15]

The O.E.C.D. proposes to address this abuse through the application of a new "principal purpose test," which aims at disallowing a benefit under the O.E.C.D. M.C. if obtaining that benefit is one of the principal purposes of a transaction.[16] However, the benefit may still be available if the person is able to establish that obtaining the benefit would be in accordance with the object and purpose of the relevant provisions of the O.E.C.D. M.C. The O.E.C.D. provides the following example to explain the application of the principal purpose test with respect to contract splitting:

> RCO is a company resident of State R. It has successfully submitted a bid for the construction of a power plant for SCO, an independent company resident of State S. That construction project is expected to last 22 months. During the negotiation of the contract, the project is divided into two different contracts, each lasting 11 months. The first contract is concluded with RCO and the second contract is concluded with SUBCO, a recently incorporated wholly-owned subsidiary of RCO resident of State R. At the request of SCO, which wanted to ensure that RCO would be contractually liable for the performance of the two contracts, the contractual arrangements are such that RCO

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13 Draft Contents, Commentary on Article 5, paragraph 81.

14 Paragraph 3 of Article 5.

15 Commentary on Article 5, paragraph 18.

16 Draft Contents, paragraph 9 of Article 29.

is jointly and severally liable with SUBCO for the performance of SUBCO's contractual obligations under the SUBCO-SCO contract.[17]

In this example, in the absence of facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the conclusion of the separate contract for SUBCO is for each to obtain the benefit of the rule in paragraph 3 of Article 5 of the State R-State S tax convention. Granting the benefit of that rule in these circumstances would be contrary to the object and purpose of that paragraph, as the time limitation of that paragraph would otherwise be meaningless.[18]

The example is silent on what other circumstances might lead to a different conclusion. For example, if SUBCO has a separate business history and the industry views the functions of SUBCO to be functionally independent, might that be a sufficient factor to lead to a different result? Alternatively, is the overall guarantee by RCO of SUBCO's performance sufficient to overcome business history? If only SUBCO won the bid but the performance was guaranteed by RCO, would RCO have a P.E. such that any guarantee fee received for the guarantee of performance would be considered to be business profits attributable to a P.E. in State S?

Further, the O.E.C.D. has advised that states that do not include the principal purpose test in their tax treaties should include an additional provision to address contract splitting. In order to determine the 12-month period under paragraph 3 of Article 5, the O.E.C.D. suggests that the provision may provide as follows:

a. Where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding twelve months, and

b. Connected activities are carried on at the same site or project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

then these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that site or project.[19]

To determine whether the activities of the first and second enterprise are connected, the following factors may be relevant:

- Whether the contracts covering the different activities were concluded with the same person or related persons
- Whether the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons

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17 Draft Contents, Commentary on Article 29, paragraph 182 of Article 5, ex. J.

18 *Id.*

19 Commentary on Article 5, paragraph 52.

- Whether the activities would have been covered by a single contract absent tax planning considerations
- Whether the nature of the work involved under the different contracts is the same or similar
- Whether the same employees are performing the activities under the different contracts[20]

These factors provide conflicting guidance where RCO wins the contract but brings in related subsidiaries to perform separate and distinct portions of the project as subcontractors in accordance with industry standards. Some suggest this fact pattern is subject to the principal purpose test and others suggest the opposite.

OTHER CHANGES PROPOSED TO ARTICLE 5

No P.E. Where the Agent Acts Independently in the Ordinary Course of Business

In the Draft Contents, the O.E.C.D. has retained the essence of paragraph 6 of Article 5 (*i.e.*, that a foreign enterprise shall not be deemed to have a P.E. if it carries on business in a contracting state through an independent agent); however, the paragraph has been redrafted to provide greater clarity. The reworded paragraph 6 of Article 5 reads as follows:

> 6. ~~An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.~~ ***Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.***

The current version of the independent agent exemption under paragraph 6 of Article 5 uses the concept of "associated parties." However, the revised Action 7 discussion draft referred to "connected parties," and in the Action 7 Final Report, the tightened definition of independent agent uses the concept of "closely related enterprises."

The Commentary explains that a person is not considered to be an independent agent where the person acts exclusively or almost exclusively for one or more enterprises to which it is closely related. However, paragraph 6 of Article 5 will not apply automatically where a person acts for one or more enterprises that are related to each other but not the general commission agent.

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[20] Draft Contents, Commentary on paragraph 3 of Article 5, paragraph 53.

Determining independent status of an agent requires a facts and circumstances test. If the facts demonstrate that the agent carries on a business as an independent agent and acts in the ordinary course of that business, the exemption under paragraph 6 of Article 5 will be available. However, independent status is less likely if the activities of the person are performed wholly, or almost wholly, on behalf of only one enterprise, or a group of enterprises that are closely related to each other, over the lifetime of that person's business or over a long period of time.

The O.E.C.D., however, acknowledges that small and newly setup businesses may financially rely on few customers at the beginning of their operations. In that fact pattern, independent status may still be available to a person acting exclusively for one enterprise (to which it is not closely related), but only if that exclusivity lasts for a short period of time. Again, no bright-line guidance is provided to identify appropriate time periods.[21]

"A person or enterprise is said to be closely related to an enterprise if one has control of the other or both are under the control of the same person(s) or enterprise(s)."

The phrase "exclusively or almost exclusively" employed in paragraph 6 of Article 5 means that where the person's activities on behalf of enterprises to which it is not closely related do not represent a significant part of that person's business, that person will not qualify as an independent agent. For example, where the sales that an agent concludes for enterprises to which it is not closely related represent less than 10% of all the sales that it concludes as an agent acting for other enterprises, that agent should be viewed as acting "exclusively or almost exclusively" on behalf of closely related enterprises, and therefore, the P.E. status exemption will be unavailable.[22]

The Commentary is silent regarding the effect of a large contract that absorbs all of an established company's resources for a six-month period, resulting in devoting 50% of the company's revenue for a full year. It is not known how this scenario will be treated and whether the view will be consistent among taxpayers and tax authorities.

A person or enterprise is said to be closely related to an enterprise if one has control of the other or both are under the control of the same person(s) or enterprise(s). A person or enterprise will be considered to be closely related to an enterprise in any of the following circumstances:

- One directly or indirectly possesses any of the following:[23]
    - More than 50% of the beneficial interests in the other
    - More than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company
    - More than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the two enterprises
- Another person or enterprise directly or indirectly possesses more than 50% of the beneficial interest in the person and the enterprise or in the two enterprises.

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21 Draft Contents, Commentary on Article 5, paragraph 111.

22 Draft Contents, Commentary on Article 5, paragraph 112.

23 Draft Contents, paragraph 8 of Article 5.

A Place of Business at the Disposal of the Enterprise to Constitute a P.E.

The Commentary on Article 5 contains several other illustrative examples of the revised rules. One of such explanation is found in definition of the phrase "at the disposal of the enterprise."[24]

The Commentary, in general, provides that the place of business may exist even when no premises are available but the enterprise has a certain space at its disposal. In the draft contents, the O.E.C.D. explains whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a "place of business" will depend on that enterprise having the effective power to use that location as well as the extent of the presence of the enterprise at that location and the activities that it performs there.[25]

Registration Under Value Added Tax or Goods and Service Tax is Irrelevant for Determining P.E. Status

The O.E.C.D. is of the view that by itself, registration under Value Added Tax ("V.A.T.") or Goods and Service Tax ("G.S.T.") by the foreign enterprise is irrelevant when determining whether a P.E. exists.[26] A comment received from the public drew attention to the fact that a foreign enterprise may appoint a third party (*e.g.*, a tax professional) or a related party (*e.g.*, a local subsidiary) for carrying out the registration and representation before the relevant authorities, and therefore, clarification was required that the appointment of the V.A.T./G.S.T. representative does not, by itself, control the issue.[27]

CONCLUSION

As previously stated, the Draft Contents have not yet been approved by the Committee on Fiscal Affairs or by the O.E.C.D. Council. As a result, they do not reflect a final opinion of the O.E.C.D. However, the proposed changes to the O.E.C.D. M.C. are in line with the Action 7 Final Report, and therefore, it is likely that they will become part of the O.E.C.D. M.C. in the ordinary course of events. When this happens, it will constitute a significant step in implementing B.E.P.S. policies and a major overhaul of the international tax landscape. Taxpayers will face challenges where current business models create new P.E.'s under the new rules, as new P.E.'s mean additional tax filing obligations and increased potential for controversy. Moreover, the B.E.P.S. recommendations relating to profit attribution to these new P.E.'s has not yet been finalized and will be an important matter for businesses in this context.[28]

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[24] Commentary on Article 5, paragraph 12.

[25] *Id.*

[26] Commentary on Article 5, paragraph 5.

[27] O.E.C.D., *Draft Contents of the 2017 Update to the O.E.C.D. Model Tax Convention, Comments Received on the 11 July Public Release*, August 11, 2017.

[28] A public consultation on the additional guidance on the attribution of profits to P.E.'s and on the revised guidance on the transactional profit split method is planned for November 2017 by the O.E.C.D.