

Recent OECD Developments

- Key OECD tax projects
- Main tax treaty issues under consideration
- 2002 Update of the OECD Model T C
- Permanent establishment clarifications

Key OECD Projects Update

- Harmful tax practices
- Bank secrecy
- E-Commerce
- Transfer pricing
- Tax treaties

Tax Treaties - new releases

- 2002 Update - release next week?
- 3 related reports (January?):
 - Restricting the entitlement to treaty benefits
 - Treaty characterisation issues arising from e-commerce - report adopted by CFA
 - Issues arising under Article 5

Main issues under study

- Pensions
- Employee Stock Option Plans
- Treatment of trusts and other non-corporate entities
- Issues related to the application of Article 8 (on international shipping and air transport)
- Permanent establishments
- Dispute resolution
- On-going technical amendments from the catalogue of issues

2002 Update of the OECD Model

- Early draft on OECD Web in October 2001
- Delayed until after September 2002 WP 1 meeting
- Main changes from October draft:
 - changes and additions of reservations, observations, positions
 - a few recent additions to the Articles and Commentary
 - clarification of anti-abuse rules

2002 Update - Main Items

- Clarification of the treatment of E-Commerce:
 - application of the permanent establishment definition
 - treaty characterization of e-commerce payments
- Permanent establishment interpretation issues
- New Article on Assistance in the Collection of Taxes (Article 27)
- Restriction of entitlement to treaty benefits
- Clarification of domestic anti-avoidance rules ⁶

2002 Update - Main Items (2)

- A number of technical changes to the Commentary
- Changes and additions to reservations and observations of OECD members, and positions of 24 Non-OECD economies

Changes to Oct 2001 Draft (Model)

- Revised definition of “national” (sub-paragraph 3(1)g))
 - now refers to nationality and citizenship for individuals (purely drafting; no substantive consequences intended)
- Addition of new paragraph 4 to Article 13 (and consequential drafting changes)
- Minor drafting changes to paragraph 6 of the new Article on Assistance in the Collection of Taxes

New paragraph 4 of Article 13

- Deals with indirect holdings in immovable property companies
- Reads as follows:

“4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.”

Changes to Oct 2001 Draft (Commentaries)

- Restriction of entitlement to treaty benefits (Art 1)
 - suggested approaches including LOB provision
 - foundation report to be issued in January 2003?
- Clarification of domestic anti-avoidance rules
 - treaties are subject domestic anti-abuse rules
 - Tax is imposed under domestic law, not under the treaty
 - Abuse of a tax treaty provision results in an abuse of domestic law
 - treaties do not affect CFC provisions

Changes to Oct 2001 Draft (Commentaries)

- Article 13 - new paragraphs 28.4 to 28.8
 - provide the justification for the new provision
 - explain that the rules requires looking at the value of the immovable property without taking debts into account
 - caution exemption countries about double exemption risks
 - allow broadening or narrowing the scope of the provision

Changes to Oct 2001 Draft (Commentaries)

- Article 12 - distinction between royalties and payment for services in the case of music recording
 - paragraph 8 of the Commentary on Article 12 amended to clarify that the definition of royalties “does not [...] apply to payments that, while based on the number of times a right belonging to someone is used, are made to someone else who does not himself own the right or the right to use it”

Changes to Oct 2001 Draft (Commentaries)

- Leasing of ships and aircraft operated in international traffic
 - changes to Commentary on Articles 13(3) and 22(3) to clarify that these paragraphs only apply where the alienator (Art. 13) or owner (Article 22) is the operator of the ship or aircraft (or related property)
- Art 27 - Assistance in the collection of taxes
 - the application of the Article to revenue claims that arise before the Convention enters into force
 - other minor drafting changes

Technical Issues Under Article 5

- Looked at technical issues relating to the current PE definition
- Recognition that current PE concept was still adapted to modern ways of doing business
- Fundamental principles to be studied separately

Article 5 - “fixed place of business”

- Geographical link requirement
 - one or two places?
 - Need to be a “coherent whole commercially and geographically” for it to be one place
 - examples: a mine, a hotel v a room, a market v a stall
 - a painter with separate clients in same building - no commercial coherence
 - work at separate offices for same client in a city lacks geographic coherence

Article 5 - “fixed place of business”

- Time requirement
 - 6 -12 months guide
 - temporary interruptions recognised
 - unforeseen closure - special circumstances - still a PE

Article 5 - “fixed place of business”

- Relationship between place and enterprise
 - space available is sufficient, but mere presence is not sufficient (salesman and loading bay examples)
 - painter at a single place for a single client - PE

Article 5 - Paragraph 3

- Supervisory projects
 - concluded these are covered by paragraph 3
- Assembly of parts at different locations are still a single project
- Clarification of installation project

Article 5 - Preparatory and Auxiliary

- Some clarifications (delivery/repairs)
- sub-paragraph (f) - concern over fragmentation - look at all activities
- clarification of delivery by pipeline
 - for self: 4(a) or 4(f) would apply
 - for others: 4(a) or 4(f) cannot apply

Article 5 - Agents

- Agents with implied contractual authority
 - provides support for implied authority (lack of active involvement of HO)
- Clarification of habitually exercising and authority to conclude contracts
 - depends on the nature of the contracts and the business of the principle
 - paragraph 6 factors relevant
- Meaning of independence
 - a number of considerations added

Article 5 - E-Commerce

- New paragraphs 42.1 to 42.10 provides to conclusions on the web site and server PE issues
- Approved by CFA in December 2000 and made public in February 2001