CONFEDERATION FISCALE EUROPEENNE

AOTCA Asia Oceania Tax Consultants´ Association

Joint Opinion Statement FC 1/2015 on the OECD 2014 Public Discussion Draft on Preventing the Artificial Avoidance of PE Status (BEPS Action 7)

Prepared by the CFE Fiscal Committee, agreed with AOTCA and submitted to the OECD in January 2015

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD members) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. CFE is registered in the EU Transparency Register (No. 3543183647-05).

AOTCA (Asia-Oceania Tax Consultants´ Association) was founded in 1992 by 10 tax professionals' bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.

Introduction

The following comments relate to the OECD's Public Discussion Draft "*Preventing the Artificial Avoidance of PE Status*[1]" (hereinafter: Discussion Draft), published on 31 October 2014, relating to Action 7 of the OECD/G20 BEPS (base erosion and profit shifting) Action Plan.
We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

1. General comments

Although being perfectly aware that the PE (permanent establishment) framework leaves some room for improvement, we are concerned that by means of the suggested broadening of the PE concept, we risk creating unnecessary burdens, further complexity for both taxpayers and tax authorities, with the further risk of creating more double-taxation.

Any review of the PE definition should ensure that no additional uncertainty nor any unnecessary burden be generated on taxpayers. Further guidance on the issue should be designed to provide greater certainty and to reduce the possibility of disputes (between taxpayers and tax authorities). In our opinion, the suggested changes might end up producing an increase of PEs, which would necessarily generate further compliance burden on businesses, and which would hamper the desired level playing field and negatively affect foreign investment. Moreover, the issue concerning the case where a tax authority argues that the subsidiary is itself a PE of the parent company should be properly addressed and further guidance should be provided.

Moreover, we are particularly concerned with a possible increase in the use of subjective tests (included in all of the options suggested within the Discussion Draft), which would not contribute to the above-mentioned desired certainty Instead, the use of agreed legal terms and objective criteria should be favoured.

Finally, effective dispute resolution mechanisms should be ensured. We support the use of mandatory binding arbitration.

2. Specific Comments to the issues proposed in the October 2014 Discussion Draft

A. Artificial avoidance of PE status through commissionaire agreements and similar strategies

With regard the suggested amendments to improve the PE framework, for the sake of consistency and clarity, and in order to avoid penalizing perfectly legitimate business practices, we support the use of objective criteria rather than the use of subjective tests (as suggested in the Discussion Draft), and favours the use of agreed legal terms. In our view, all of the options could be improved.

[1] http://www.oecd.org/ctp/treaties/action-7-pe-status-public-discussion-draft.pdf

We are concerned that, due to the vagueness of the wording, these options will target more than just commissionaire agreements.

From the various alternative formulations of paragraphs 5 and 6 of Article 5 of the OECD Model Tax Convention, we prefer Option B, as Options A and its variation of Option C seem incompatible with the desired legal certainty. The suggested wording ("*with specific persons in a way that results in the conclusion of contracts* …") is extremely vague, making use of notions that are not legally clear – clarity is crucial for taxpayers. Option B seems the most balanced one, so as to allow the clarity that business, taxpayers and tax administrations require.

Nevertheless, we believe that more guidance is needed (and, if possible, some examples should be provided), especially as to the significance of "*material*" elements of contracts (page 13), in order to avoid uncertainty and further disputes.

In addition, and for the sake of clarity, specific examples on what is deemed "*similar arrangements*" should be provided (all the options seem to affect more than commissionaire arrangements, exceeding the scope of the Discussion Draft).

Finally, we do not support the suggested amendment with regard to "*independence*" of the agent (whenever an agent works exclusively/almost exclusively for associated enterprises), since it seems to go beyond the concept of independence of legal entities (especially when the agent is correctly remunerated at arm's length and there is evidence of its economic and legal independence). This is particularly so when the whole BEPS project is meant to be based upon the arm's length principle.

B. Artificial avoidance of PE status through specific activity exemptions

We have some concerns with regard to the possibility of an effective and consistent implementation of such rules by different countries.

B.1. The exceptions are not restricted to preparatory or auxiliary activities

Option E, "*amends Art. 5(4) so that all its subparagraphs are subject to a "preparatory or auxiliary" condition"* would subject all of the activities currently listed in paragraph 4 of Article 5 to the condition of being either preparatory or auxiliary (which might be regarded as a potential advantage), excluding e.g., delivery, purchasing and data collection. Further practical guidance (and further examples) will still be needed so as to ensure an effective implementation by both, taxpayers and Tax Administrations. This option presents the disadvantage of exposing all of the listed activities to a possible challenge.

Although we agree with the purpose of the amendment, it is of the view that the proposal has been formulated in a manner that is far too complicated. We suggest the following wording (changes below in bold letters):

"4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include ***the following activities as long as they have a preparatory or auxiliary nature****:*

a)…[unchanged]

b)… [unchanged]

c)… [unchanged]

d)… [unchanged]

e) [**To be deleted**. Reasoning: *"The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity"* adds nothing once the phrase *"of a preparatory or auxiliary character"* is moved to the beginning of Article 5 (4), as proposed"]

f) [**To be deleted**. Reasoning: Again, if the reference to the preparatory or auxiliary nature is included at the beginning of Article 5 (4), there is no need to repeat it in f]".

B.2. The word "delivery" in subparagraphs a) and b) of paragraph 4

We believe that it is preferable to add the overall condition of "*preparatory or auxiliary*" to Article 5(4) (Option E previously addressed) than simply deleting the reference to "*delivery*". Addressing the concern raised by some specific cases does not justify removing the reference to "*delivery*" especially when such activity is not the core activity of the company.

B.3. The exception for purchasing goods or merchandise or collecting information

Again we believe that the general inclusion of the reference to "*preparatory or auxiliary*" character suffices to overcome the problem posed by the purchase of goods, and that the exception for purchasing should be retained. We do not support Options G and H, since by eliminating such activities would result in increasing the number of PEs. The possibility granted to "*test the market*" without having a PE in the market is an aspect that is rather important for business purposes, as it significantly impacts on investment. The reasoning inserted in the Discussion Draft is in our opinion insufficient and should be subject to further assessment and study. The exception for data collection should be kept.

On the other hand, the problem of how profits should be calculated in the case of a permanent establishment which merely purchases goods for its group cannot be overlooked.

B.4. Fragmentation of activities between related parties

Although we believe that the abusive use of fragmentation activities between related parties should be limited, the options proposed to address such issue (I and J) are in our opinion not suitable given that both seem to challenge the concept of separate entity reporting. In any case, Option I would be preferable to Option J (it seems less extensive than Option J).

C. Splitting-up of contracts

We believe that in those cases where the general anti-abuse rule proposed as part of the work on Action 6 can apply, there is no need to include specific clauses.

It is our opinion that Options suggested in the Discussion Draft do not seem fit for purpose, in view of their intrinsic difficulties with regard to implementation and monitoring ("*automatic rule*") and the potential legal uncertainty that they might engender ("*principal purpose test*").

E. Profit attribution to PEs and interaction with Action Points on Transfer Pricing

It is quite clear that the allocation of profits to the PE is a fundamental issue and we are of the view that it is absolutely necessary, in order to properly address the changes to the PE definition, to identify the few areas were additions/clarifications are needed, and to coordinate those suggested changes also with the work carried out within Action 9 of the BEPS Action Plan (risks and capital).

Although the Discussion Draft specifically ensures under paragraph 3, page 10 that "*these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income*", we are concerned that the proposed changes to the PE framework, taken without proper coordination/guidance on profit attribution, may give rise to uncertainty and double taxation among countries.

In our view, further clarification and guidance are necessary, along with some due consideration on other BEPS Actions addressing transfer pricing issues.