



Tel: +32 2 778 01 30  
Fax: +32 2 778 01 43  
@: bdo@bdointernational.com  
www.bdo.global

BDO International Limited  
Contact address:  
Brussels Airport  
The Corporate Village, Elsinore Building  
Leonardo Da Vincilaan 9 - 5/F  
1930 Zaventem, Belgium

Via e-mail: [TransferPricing@oecd.org](mailto:TransferPricing@oecd.org)

Tax Treaties, Transfer Pricing and Financial Transactions Division  
OECD/CTPA  
2, rue Andre Pascal  
75775 Paris Cedex 16  
France

15 September 2017

Dear Sirs

## **DISCUSSION DRAFT ON ADDITIONAL GUIDANCE ON ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS**

BDO welcomes the opportunity to comment on the OECD's Public Discussion Draft providing Additional Guidance on Attribution of Profits to Permanent Establishments, issued on June 22, 2017 (the "Discussion Draft").

We support the OECD's efforts to provide additional guidance on the attribution of profits to Permanent Establishments ("PE"s). We believe this will be helpful for multinational enterprises as they require more certainty with respect to the taxation of PEs.

We present below our comments with respect to the Discussion Draft. Our comments follow the same general flow as the points covered in the Discussion Draft.

### **Dependent Agent versus Independent Agent - Changes to Articles 5(5) and 5(6)**

We appreciate the additional clarification that the changes to Article 5(5) and Article 5(6) act to modify the threshold for the existence of a deemed PE without modifying the nature of the deemed PE. Following that principle, you have clarified that the approach to attribute profits to the deemed PE should not vary, at all, with whether the PE was deemed to be a PE under the pre-BEPS version, or the post-BEPS version of Article 5(5).

### **Attribution of Profits to PEs Resulting from Changes to Articles 5(5) and 5(6)**

We appreciate the confirmation that, once a PE is deemed to exist under Article 5(5), the profits attributable to that PE should be determined under Article 7. The underlying principle has not changed, in that the profits attributable to the PE "are only those that ... would have been derived if it were a separate and independent enterprise performing the activities that the dependent agent performs on behalf of the non-resident enterprise."

In paragraph 10 in the Discussion Draft, concerning an intermediary and a PE existing in a host country such that Article 7 may be more relevant, and in paragraph 11 in the Discussion Draft, concerning an intermediary and an associated non-resident entity, such that Article 9 may be more relevant, we question whether the additional guidance being provided by the OECD would be clearer to jurisdictions / tax administrators if the Articles in the OECD Model Tax Convention ("MTC") specifically stated that the profits attributable to the PE should always be determined using the OECD Transfer Pricing Guidelines ("TPG") even in situations where

the intermediary and the PE are not associated enterprises. In determining the profits attributable to a PE, as if it were a separate and independent enterprise, those profits should be based on a full analysis of the functions performed by the parties, the bona fide risks assumed and borne by the parties, and the assets owned, maintained and/or otherwise employed by the parties in the host country. This would require an in-depth analysis, in accordance with the TPG of the profit-related activities both in the host country and other countries.

### **OECD Examples of the Attribution of Profits to Deemed PEs under Article 5(5)**

#### *Example 1: Commissionaire Structure (Related Intermediary)*

We appreciate the analysis provided by the OECD for Example 1, including the point made in paragraph 27. Would the OECD's conclusion differ if the Services Agreement provides that the fee payable by TradeCo to SellCo is based solely on the costs incurred to provide the services to TradeCo plus an arm's length mark-up? In other words, is it the fact that the services fee is calculated based on sales in Country S that leads to the conclusion set out in paragraph 27?

Following the general principles of international tax law, a sale is made by a party if that party "negotiates" and "concludes" the sale, and the sale is properly reported in the jurisdiction within which the sale is negotiated and concluded. Is the mere absence of "material modification of the terms and conditions" of the sale by SellCo's efforts sufficient to lead to the conclusion outlined in paragraph 25 for the profits attributable to the TradeCo PE in Country S? Or, if TradeCo can support a conclusion that the sales are, in fact, negotiated and concluded outside of Country S, would the profits related to the sale then be taxable outside of Country S, despite the sales-related services being provided by SellCo?

#### *Example 2: Sale of Advertising on a Website (Related Intermediary)*

We appreciate the OECD's analysis on Example 2, as it draws out several questions that should be addressed in the additional guidance provided by the OECD, being:

1. Will the performance of "marketing activities" by an entity such as SellCo always be characterised as a "principal role" leading to the conclusion of sales?
2. What elements would distinguish "the routine conclusion of sales"?
3. The sale of some products and services do not involve a "material modification of the terms and conditions on which the customers offer to purchase". We would recommend that clearer guidance be provided with respect to the use of the words "without material modification". Would the jurisdictions / tax administrators be required to look factually at the place where the sale is negotiated and concluded?

#### *Example 3: Procurement of Goods (Related Intermediary)*

The analysis for this example falls in line with the changes to Articles 5(5) and 5(6). Can the OECD confirm that the profits attributable to the PE in this example should be determined using the most appropriate method, and that a CUP is not implied by default? This is particularly so given the potential limitations of available data for the identification of such a CUP.

We would recommend that the OECD make it clear that the profits attributable to the PE in this example may be determined using the most appropriate method in the TPG.

#### **Attribution of Profits to PEs Resulting from Changes to Article 5(4)**

We appreciate the additional guidance provided with respect to the anti-fragmentation rule outlined in new paragraph 4.1 of Article 5 to the MTC. The discussion concerning the two types of cases provides greater clarity.

#### **OECD Examples of the Attribution of Profits to Deemed PEs under Article 5(4)**

##### *Example 4: Warehousing, Delivery, Merchandising and Information Collection Activities*

As with Example 3, the analysis for this example falls in line with the changes to Article 5(4). Can the OECD confirm that the profits attributable to the PE in this example should be determined using the most appropriate method, and that a CUP is not implied by default? This is particularly so given the potential limitations of available data for the identification of such a CUP.

We would recommend that the OECD make it clear that the profits attributable to the two PEs in this example may be determined using the most appropriate method in the TPG.

#### **Concluding remarks**

The Discussion Draft provides helpful guidance with respect to the profits attributable to PEs. We appreciate the examples provided by the OECD. We have asked questions, where appropriate, to indicate areas / concepts / phrases requiring additional clarification and guidance.

We fully support the OECD's efforts to provide clear guidance on the attribution of profits to PEs, particularly deemed PEs under Articles 5(5) and 5(6).

We would like to thank the OECD again for this opportunity to comment and would be happy to expand on our responses and contribute to further stages of this Discussion Draft if required.

Please note that the responses presented above reflect the opinions of the authors and not necessarily the opinions of BDO as a whole. For clarification of any aspect of our responses presented above please contact:

**Zara Ritchie**  
Partner, BDO Australia  
Head of Global Transfer Pricing Services  
[zara.ritchie@bdo.com.au](mailto:zara.ritchie@bdo.com.au)  
+61 3 9605 8019

**Dan McGeown**  
Leader, Transfer Pricing Services, BDO Canada  
[dmcgeown@bdo.ca](mailto:dmcgeown@bdo.ca)  
+1 416 369 3127