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INDEPENDENT TAX CONSULTING



A DECADE OF RENEWED DISCUSSIONS AND AMENDMENTS



2022 CORIT

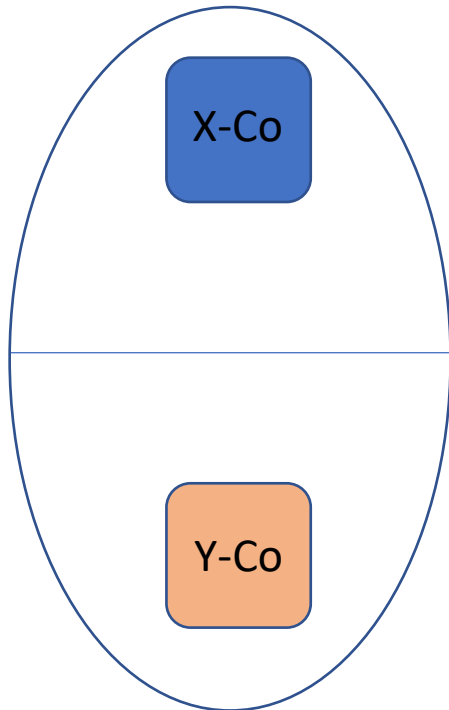
Agenda

- Amendments – an overview
- Commissionnaire arrangements
- A place of business
 - When is a place of business at the disposal of an enterprise?
- Flexible workplace – COVID-19 and beyond

A decade of amendments – an overview

- 2012: OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)
- 2015: BEPS Action 7: Prevent the Artificial Avoidance of Permanent Establishment Status
- 2017: OECD Model Tax Convention update
 - BEPS Action 7
 - 2012 Report
- 2018/2019: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)
 - BEPS Action 7

Commissionnaire arrangements



X-Co and Y-Co

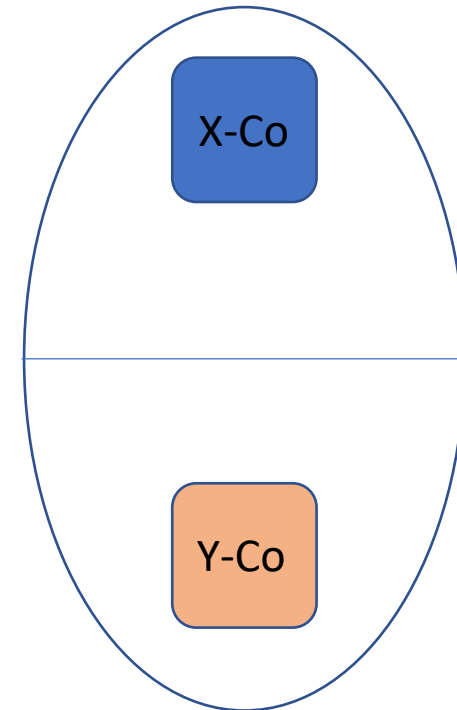
- Belong to the same group
- Y-Co sells products in its residence state, State S

Business restructuring:

Y-Co is converted to a commissionnaire, i.e. it sells products in State S that belong to X-Co but in its own name

Prior to entering into the Commissionnaire contract with X-Co, Y-Co sold fixed assets, stock, and customer base to X-Co

Result – a substantial reduction of taxable income of Y-Co



Commissionnaire arrangements

- Would the commissionnaire agreement result in Y-Co being a PE of X-Co?
- Article 5(5) of the OECD Model **pre-BEPS** – requires that the Agent
 - ... has [...] an authority to conclude contracts in the name of the enterprise ...”
- Y-Co – due to the commissionnaire agreement
 - Concludes contracts in its **own name**, i.e. not binding on X-Co
 - Hence no apparent Agency PE
- The debate
 - Is Article 5(5) to be understood in a legal or economic sense?
 - What does the mentioning of a “general commission agent” / “commissionnaire” in Article 5(6) mean for the application of Article 5(5)?

Commissionnaire arrangements

- Is Article 5(5) to be understood in a legal or economic sense?
 - Settled case law in many jurisdictions – must be binding in a **legal sense**
 - The fact that the actions of the commissionnaire (Y-Co) do **in fact** or **economically** bind the principal (X-Co) does not create a PE
 - E.g. Dell (Norway) and Zimmer (France)

- What does the mentioning of a “general commission agent” / “commissionnaire” in Article 5(6) mean for the application of Article 5(5)?
 - Article 5(5) requires that the intermediary is not an **independent agent** to whom Article 5(6) applies

 - Article 5(6) (pre-BEPS) applies to (inter alia): “... a broker, general commission agent ...”
 - French: *Courtier, Commissionnaire*

Commissionnaire arrangements

- What does the mentioning of a “general commission agent” / “commissionnaire” in Article 5(6) mean for the application of Article 5(5)?
 - Is a “General Commission Agent”/“Commissionnaire” exempt under Article 5(6) because it did not meet the requirements under Article 5(5) (does not conclude contracts in its own name)?
 - I.e. the function of Article 5(6) is **only** to clarify the meaning of Article 5(5) (para. 36 in the Commentary on Article 5 (2014))
 - Or is a “General Commission Agent”/“Commissionnaire” exempt under Article 5(6) only to the extent that it is **independent** from the principal
 - Para. 37 et seq. in the Commentary on Article 5 (2014)
 - From a Civil Law point of view – the mentioning of “General Commission Agent”/“Commissionnaire” in Article 5(6) superfluous
 - A **commissionnaire** does not meet the requirements under Article 5(5) hence no PE exists
 - From a Common Law point of view – the mentioning of “General Commission Agent”/“Commissionnaire” in Article 5(6) is decisive
 - All “agents” – including **general commission agents** – meet the requirements under Article 5(5) **per se** hence a PE exists unless expressly exempt

Commissionnaire arrangements

- The amendments – the 2017 update to the OECD Model / the MLI

A. Widen the scope of Article 5(5)

- BEPS Action 7
- A PE is deemed to exist if the commissionnaire
 - ... concludes contracts ... (in the name of the principal **or** in the commissionnaire's own name), or
 - ... habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise ...
 - e.g. by substantially (but not formally) concluding a contract or by presenting offers to customers that are shipped automatically by the enterprise upon reception of an order

B. Specify and widen the scope of Article 5(6)

- The 2012 PE Report / BEPS Action 7
 - Remove the confusing mentioning of specific types of intermediaries in Article 5(6)
 - Add a **deemed dependency** clause
 - i.e. a person who acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related is **deemed dependent on those enterprises**

At the disposal of?

- Basic rule PE – requires a “place of business”
- Para 11 in the Commentary on Article 5 of the OECD Model
 - It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise
 - Before 2017: para 4 in the Commentary on Article 5 of the OECD Model
- 2002 Reports Related to the OECD Model Tax Convention (Part III)
 - “It has been suggested that [a basic rule PE] requires that the enterprise have a certain legal right to use the use the place of business”
 - Suggest clarification of the concept in the Commentary on Article 5 of the OECD Model
 - Paras 4.1-4.6
- Adopted with the 2003 update of the OECD Model

At the disposal of?

- From 2003
 - Para 4: **It is immaterial** whether the premises, facilities or installations are owned or rented by or are **otherwise at the disposal** of the enterprise
 - Para 4.1: No **formal legal rights** required / a PE could exist where an enterprise **illegally occupied** a certain location where it carried on its business
 - Para 4.2: The **mere presence** of an enterprise at a particular location – insufficient
- 2012: OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)
 - Reconsiders once again the concept of disposal
 - Suggest adding new guidance in the Commentary on Article 5
 - Paras 4.2-4.4

At the disposal of?

- The 2017 update
 - Adopts the suggestions from 2012
 - Disposal depends on:
 1. An enterprise's **effective power to use** a place of business
 2. The **extent of the presence** of the enterprise at that location
 3. The **activities** that it performs at that location
 - “Intermittent or incidental” use of a place of business = no disposal
 - No general guidance, only examples
 - Example 1: “Exclusive legal right” to use a place of business = disposal
 - Example 2: “Allowed to use” a place of business belonging to another enterprise = disposal
 - Example 3: “Has access to a place of business” belonging to another enterprise, but the employees do not work from that place = no disposal
 - Example 4: “Has no legal right to be present at a location **and** does in fact not use the place of business” = no disposal

At the disposal of?

- When does an enterprise have a place of business at its disposal?

Actual use is sufficient



Formal legal right required



- The OECD Commentary – disposal depends on
 - “effective power to use” – if the enterprise actually use the place of business = effective power?
 - “the extent of the presence” – a basic rule PE requires in general a six months presence = sufficient extent of presence?
 - “the activities performed” – a basic rule PE requires that business are carried on at the place of business **and** that the activities are not preparatory or auxiliary = relevant activities?
 - If so – the requirements are coinciding with the general requirements for a basic rule PE

Flexible workplace

- Flexible workplace
 - Global workforce – employees resident in other countries than the employer
 - Are offered (and demands) flexibility, including the possibility to work from home
 - COVID-19 accelerated the trend
 - Proved it could be done
 - Provided tech. solutions
- The PE issue when an employee works from home
 - Is the home a place of business **at the disposal** for the employer?

Flexible workplace

- 2012: OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)
 - Considers if a home office may constitute a PE
 - Suggest amendments to the Commentary on Article 5 of the OECD Model

- The 2017 update
 - Adopts the suggestions from 2012 (paras 18-19)
 - The home office of an employee working from home is not **automatically** a place of business for the employer
 - Depends on facts and circumstance
 - “Intermittent or incidental” carrying on of business activities from a home office = no disposal
 - “If home office is **used on a continuous basis for carrying on business activities for an enterprise** and [...] **the enterprise has required the individual** to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office)” = disposal

Flexible workplace

- 2 examples (para 19 in the Commentary on Article 5 of the OECD Model)
- Non-resident consultant (has her own enterprise)
 - Works from a home office in the non-residence state
 - Carries out most of the business activities there
 - **Disposal**
- Employee performs most of his work from his home
 - ... rather than from the office made available to him in the other State [e.g. the office of the employer]
 - "... that the home is [not] at the disposal of the enterprise because the enterprise **did not require** that the home be used for its business activities."
 - **No disposal** – but fails to explain when the "requirement test" is met?!
 - Perhaps: who benefits from the employee working from home?
 - Is having the employee working from home an alternative for the employer to e.g. opening an office in that state?

Flexible workplace

- Some examples (from Danish administrative case law)
- Employee resident of the same state as the employer
 - Moves to another state (e.g. back to the country of which he is a national)
 - Personal reasons (family, health etc.)
 - Performs same tasks as prior to moving
 - Works at home for his own benefit – not the benefit of the employer, i.e. working from home is not required by the employer
 - **No disposal**
- Employee (e.g. sales manager) resident of another state than the employer
 - Works from home and visits customers in the employee’s state of residence
 - Works at home for the benefit of the employer, i.e. required by the employer
 - **Disposal** (unless seen as preparatory / auxiliary work)

Flexible workplace

- Employee (e.g. sales manager) resident of another state than the employer
 - Works from a home office
 - Performs only administrative tasks from his home (preparatory / auxiliary work)
 - Sales work performed **outside** the country of residence of the employee
 - No benefit for the employer that the employee works from home, i.e. not required by the employer
 - **As a general rule: no disposal**
 - **Exceptions**
 1. The state of residence of the employee has importance in and of itself for the employer = disposal
 - E.g. the employee is a resident of a Nordic country and services other countries in the Nordic region
 2. The person working from home is a part for the top management of the employer = disposal