

PROFITS THAT ARE ATTRIBUTABLE TO PERMANENT ESTABLISHMENT.

ANALYSIS OF TAXING RIGHTS WITH RESPECT TO THE REMUNERATION DERIVED FROM EMPLOYMENT WHEN BORNE BY A CONSTRUCTION SIDE (PERMANENT ESTABLISHMENT).

ABSTRACT: Article 7 of Model Tax Convention on Income and on Capital incorporates the basic principle that unless an enterprise of Contracting States has a permanent establishment („PE”) situated in the other state the business profits of that enterprise may not be taxed by the other state.

Article 7 determinates that **the other States may tax the profits that are attributable to the PE.**

Paragraph 2 of Article 7 provides that the profits to be attributed to a PE are, *“the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise”.*

Hypothesising the PE as a separate and independent enterprise

The authorised OECD approach is that the profits to be attributed to a PE are the profits that the PE would have earned at arm’s length

- 1) Functional and factual analysis;
- 2) Attribution of assets;
- 3) Attribution of risks;
- 4) Attribution of free capital.

In order to address the issues created by the fact that legally the assets, risks, capital, and rights and obligations arising out of transactions with separate enterprises belong to the enterprise as a whole rather than to any one part of the enterprise and that there is no legal transaction between different parts of a single entity, it proved necessary to supplement the functional analysis.

BEPS Action 7 (Prevent the Artificial Avoidance of PE Status): The definition of PE included in tax treaties is therefore crucial determining whether a non-resident enterprise must pay income tax in another State. The Action Plan on Base Erosion and Profit Shifting called for review of that definition. **Work on these issues will also address related profit attribution.**

THE MAIN AIM OF THE DISSERTATION IS TO:

- focus on whether the existing rules of Article 7 of OECD Model Tax Convention are appropriate for determining the profits that is allocated to PEs
- focus on consequences on taxation of income derived from employment if the employment is exercised in the State where PE is situated and remuneration is borne by PE.

The Principle Purposes Test (PPT) applies in case of construction site in relations to the abusive splitting-up of contracts. A construction site should be regarded as a PE even if it is based on several contracts provided it forms a coherent whole commercially and geographically.

Commentary to Article 15 point 7.1. *„The fact that the employer has, or has not, actually claimed a deduction for the remuneration in computing the profits attributable to the permanent establishment is not necessarily conclusive since the proper test is whether any deduction otherwise available with respect to that remuneration should be taken into account in determining the profits attributable to the permanent establishment.” e.g.*

SECONDMENT TO CONSTRUCTION (PE)