



## PREVENTING THE ARTIFICIAL AVOIDANCE OF PE STATUS: OECD PUBLIC DISCUSSION DRAFT

ICAEW welcomes the opportunity to comment on the public discussion draft [Preventing the artificial avoidance of PE status](#) published by OECD on 15 May 2015.

This response of 12 June 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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## INTRODUCTION

1. We welcome the opportunity to comment on the public discussion draft [Preventing the artificial avoidance of PE status](#) published by OECD on 15 May 2015.
2. We submitted a response, TAXREP 4/15, to the 31 October 2014, discussion draft on this same topic.

## GENERAL COMMENTS

### **Artificial avoidance of PE status through *commissionaire arrangements and similar strategies***

3. In our earlier response we set out our concerns about the various proposals in section A re artificial avoidance of PE status through commissionaire arrangements and similar strategies and expressed our opinion that Proposal A was the least objectionable of the various proposals.
4. We have copied in immediately below our general remarks from that earlier Representation:

“We are concerned that the proposals start from the premise, which we do not believe is always true, that commissionaires are inevitably used as part of an avoidance strategy.

Whether that is the case, or not, has been thoroughly examined by the highest courts of a number of European countries whose legal systems contain the commissionaire concept (French Conseil d'Etat (Supreme Administrative Court) in *Société Zimmer Ltd v Ministre de l'Économie, des Finances et de l'Industrie*; Norwegian Supreme Administrative Court in *Dell Products(Europe) BV v Skatt Øst*;) All these courts have systematically rejected the argument that this is an abuse.

Similarly, in cases where abuse has not been argued, supreme courts have concluded that a commissionaire in itself does not give rise to a permanent establishment (Italian Supreme Court in *Boston Scientific v Italian Revenue Agency*).

The example set out at paragraph 7, is the Zimmer case.

The statement in paragraph 10 is that in many cases commissionaire structures and similar arrangements are put in place primarily in order to erode the taxable base of the State where sales take place. The assumption is that such arrangements are always for tax avoidance purposes so that some change is necessary to paragraphs 5 and 6 of Article 5 of the OECD Model Convention. There are then four separate proposals for such change, examples A to D.

Notwithstanding what we have said above, if there is to be a change in Article 5 (4), then of the proposals put forward we have less objections to proposal A.”

5. In practice OECD has preferred Option B of the four options put forward and in the Executive Summary to the current discussion draft states:

“When Working Party 1 discussed these comments, it concluded that Option B was preferable to Options A, C and D and there was general support for the changes proposed, under all options, to the independent agent exception of Art. 5(6). It was agreed, however, that the concept of “associated enterprises” used in Art. 5(6) should be replaced by a narrower concept and that Art. 5(6) should not automatically exclude an unrelated agent acting exclusively for one enterprise.”

**Artificial avoidance of PE status through the specific activity exemptions**

**List of activities include in Art 5(4)**

6. In our earlier response we supported Proposal E to introduce a general test as to whether activities are of a preparatory or auxiliary character as being the best of the options put forward, and as the latest discussion draft makes clear "Option E was considered to be preferable to the other options".

**Proposal 1: Changes to paragraphs 5 and 6 of Article 5**

7. The revised paragraph 6 a) wording will result in a more or less blanket prohibition on an connected person ever being capable of being an independent agent and this is in our view unreasonable and will unduly constrain business. The existence of a PE should be evaluated by reference to what is done and not pre-judged on the basis of the legal relationship between 2 or more parties.

**Proposal 3: new anti-fragmentation rule**

8. We think that such activities should only be aggregated if they are caught by a motive test and the fragmentation is designed to avoid a PE which would otherwise exist.
9. We are also concerned that the "nexus" test in the proposed anti-fragmentation rule viz that the operations to be aggregated "constitute complementary functions that are part of a cohesive business operation" remains imprecise despite the added example

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).