



Tax Faculty

TAXREP 27/04

OECD PROPOSED CLARIFICATION OF THE PERMANENT ESTABLISHMENT DEFINITION

*Memorandum submitted on 1 July 2004 by the Tax Faculty of the Institute
of Chartered Accountants in England and Wales in response to the
public discussion draft issued by OECD on 12 April 2004*

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INTRODUCTION

1. We welcome the opportunity to comment on the OECD public discussion draft containing a proposed clarification of the Permanent Establishment definition published on the website on 12 April 2004
<http://www.oecd.org/dataoecd/34/9/31483903.pdf>

WHO WE ARE

2. The Institute of Chartered Accountants in England and Wales ('ICAEW') is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
3. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
4. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter 'TAXline' to more than 11,000 members of the ICAEW who pay an additional subscription.

COMMENTS

The permanent establishment definition is applicable to one specific enterprise

5. We welcome the clarification in paragraph 2 that 'when applying the permanent establishment definition, one must look at a specific enterprise and not a group of entities as a whole.' In other words there can be no aggregation of activities undertaken by the local affiliate on behalf of two or more non-resident group companies.

Management services provided to another company of the group

6. Again we welcome this clarification. It clarifies that the premises of the service provider should not ordinarily be capable of constituting a PE of the customer. We believe this will be of considerable assistance as regards entrepreneur or commissionaire structures in stipulating that the service providers or commissionaires are not ordinarily PEs of the entrepreneur or commissionaire principal.

Tax Representation

Participation in negotiation of contracts

7. We also welcome this change which as the discussion document notes ‘clarifies the fact that a person merely participates in meetings for the negotiation of contracts is not enough, in itself, to conclude that person has exercised authority to conclude contracts in the name of the foreign enterprise’.

Other issues not covered in the proposed clarification

8. The three changes effectively reverse the related principles set out in the Italian Supreme Court decision in the Philip Morris case.
9. There are two further aspects of the Philip Morris Supreme Court decision which are not dealt with the present discussion paper.
10. The first is the Court’s holding that supervision or control of the proper performance of a contract cannot be considered as auxiliary (and so not a PE).
11. The second is that a non resident company entrusting management or business transactions to a local company equates to a PE even if it is confined to only a particular area of business.
12. We would urge that these further two principles also require clarification by way of further amendment of the OECD Model Tax Treaty commentary.

IKY
1.7.04