

## TAXREP 4/04

### OECD DISCUSSION DRAFT ARE THE CURRENT TREATY RULES FOR TAXING BUSINESS PROFITS APPROPRIATE FOR E-COMMERCE?

*Text of an email sent in February 2004 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to the OECD, Centre for Tax Policy and Administration, in response to the Discussion Draft issued on 26 November 2003*

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# **Tax Representation**

## **OECD DISCUSSION DRAFT ARE THE CURRENT TREATY RULES FOR TAXING BUSINESS PROFITS APPROPRIATE FOR E-COMMERCE?**

### **INTRODUCTION**

1. We welcome the opportunity to respond to the public discussion draft issued by OECD on 26 November 2003.

### **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 (DTI) 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 (which includes taxation).
4. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions 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 Institute who pay an additional subscription.

### **COMMENTS**

5. The discussion draft concludes that it would not be appropriate to proceed with the alternatives which would require a fundamental modification to the existing rules in the OECD Model Convention. These alternatives are set out in section 4-B in the discussion draft. We agreed with the conclusion that there should be no change to the OECD Model Convention in respect of these alternatives.
6. Section 4-A deals with other alternatives that would not require a fundamental modification of the existing rules. In the conclusions, paragraph 349, the draft indicates that the Technical Advisory Group (TAG) is particularly interested in comments on alternatives 4-Ag, the suggestion to adopt supplementary nexus rules for the purposes of taxing profits arising from the provision of services, and alternative 4-Ad which would make all the exceptions in paragraph 4 of Article 5 subject to the overall condition that they be preparatory or auxiliary. We shall deal with these two alternatives first.

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*Section 4-Ag Adopting supplementary nexus rules for purposes of taxing profits arising from the provision of services*

7. We are not in favour of any change. We believe that providers of services should be treated in the same way as providers of goods (paragraph 241).
8. For example, suppose a consultancy has its personnel working on a fly-in basis on a project in another country and living in hotels while they do so. We do not see that that should represent a taxable presence in that other country as, for instance, anyone who wanted to conduct business with that consultancy would almost certainly be unaware of the presence of the consultants and would make contact with its operatives in its home country. We believe there is a distinction between fly-in consultants executing a single contract and staffing the same job with personnel based at a local subsidiary, branch or fixed base of the consultancy group.

*Section 4-Ad Elimination of the existing exceptions in paragraph 4 of Article 5 or making those exceptions subject to the overall condition that they be preparatory or auxiliary*

9. We believe the current formulation has worked well in practice and produces sensible results in individual cases. For that reason we can see little justification for contemplating a change to these provisions which have now been in place for more than 40 years.

*Section 4-Aa Modification of the permanent establishment definition to exclude activities that do not involve human intervention by personnel, including dependent agents*

10. Overall we are in support of this proposal provided it does not lead to anomalies with 'manned' situations. We would imagine unmanned situations will be relatively rare, the likely exceptions being servers, oil pipelines and some automated warehouses whereas even if there is a fully automated factory it will almost certainly be a permanent establishment.

*Section 4-Ab Modification of the permanent establishment definition to provide that a server cannot, in itself, constitute a permanent establishment*

11. We are very much in favour of this clarification.

*Section 4-Ac Modification of the permanent establishment definition/interpretation to exclude functions attributable to software when applying the preparatory or auxiliary exception*

12. We do not see the logic in this proposed modification.

*Section 4-Ae Elimination of the exceptions for storage, display or delivery in paragraph 4 of Article 5*

13. Again we cannot see the logic for this proposed modification.

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*Section 4-Af      Modification of the existing rules to add a force-of-attraction rule dealing with e-commerce*

14. We believe that such a change would be a very retrograde move. We would only support such a move if there was clear evidence of 'leakage' of tax in respect of, say, automatic servers in tax haven countries.

IKY

6 February 2004