

January 2013

CBI COMMENTS ON THE OECD REVISED DISCUSSION DRAFT ON THE DEFINITION OF “PERMANENT ESTABLISHMENT” IN THE OECD MODEL TAX CONVENTION

- 1 The CBI welcomes the opportunity to comment on the revised proposals concerning the interpretation and application of Article 5 (permanent establishment) in the OECD Model Tax Convention (“Revised Proposals”).
- 2 As the UK’s leading business organisation, the CBI speaks for some 240,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

GENERAL COMMENT

- 3 The CBI is aware of a general concern that the input of commentators has not been adequately addressed in the WP1 recommendations in the revised proposals. The CBI is particularly concerned that there is now more ambiguity and lack of clarity of intent in the identification of when a permanent establishment (PE) has come into existence than previously.
- 4 The CBI is also aware of the comments from BIAC, and generally endorses the observations made in that document. A point of particular concern to our members has been set out below.

GENERAL COMMENT ON “TIME REQUIREMENT FOR THE EXISTANCE OF A PERMANENT ESTABLISHMENT (PARAGRAPH 6 OF THE COMMENTARY)”

- 5 Although the Committee on Fiscal Affairs requested comments on the drafting of the Revised Proposals, the CBI would still like to raise its strong concerns regarding lowering of the timing threshold for a PE from six months to effectively four weeks.
- 6 A number of commentators raised their concerns at the OECD Paris meeting on 7 September 2012 regarding lowering of the six months threshold to four months. It is disappointing to see that the OECD further lowered the threshold to three months (paragraph 6.1 of the Revised Proposals) and, furthermore, added that the threshold could be as low as four weeks (paragraph 6.2 of the Revised Proposals).
- 7 The CBI is concerned that this will give encouragement to countries – whether they are or not OECD Members – to tax on the basis of a few weeks’ presence. This could lead to



increased double taxation, as well as tax revenue reduction for many OECD Members. The CBI would strongly recommend that rather than changing the general PE rule – especially through the Commentary – that has worked so well for so many years, the specific issues that concern the Working Party are dealt with in the Base Erosion and Profit Shifting Project instead. That would allow the general rule to remain intact while effectively dealing with specific problems through targeted measures.

DRAFTING COMMENT ON “TIME REQUIREMENT FOR THE EXISTENCE OF A PERMANENT ESTABLISHMENT (PARAGRAPH 6 OF THE COMMENTARY)”

8 Based on the above, the CBI suggests below wording changes to be included in the Revised Proposals.

9 The CBI believes that "very short period" referred to in paragraph 6 on page 14 will only be an issue in exceptional cases. Hence, the following sentence in paragraph 6 on page 14 should be removed:

~~“A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time.”~~

10 In addition, in the first sentence of paragraph 6.1 on page 14, the phrase "has been" should be replaced with "might be", as follows:

*“One exception to this general practice ~~has been~~ **might be** where the activities were of a recurrent nature; in such cases, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years)”.*

11 Similarly, in the first sentence of paragraph 6.2 on page 14, the phrase "has been" should also be replaced with "might be", as follows:

*“Another exception to this general practice ~~has been~~ **might be** where activities constituted a business that was carried on exclusively in that country; in this situation, the business may have short duration because of its nature but since it is wholly carried on in that country, its connection with that country is stronger.”*

12 The CBI also proposes that a sentence is inserted at the end of paragraph 6.1 on page 14 underlining the exceptional circumstances being illustrated:

*“In that case, given the nature of the business operations at that location, it could be considered that the time requirement for a permanent establishment is met due to the recurring nature of the activity regardless of the fact that any continuous presence lasts less than 6 months; the time requirement could similarly be met in the case of shorter recurring periods of time that would be dictated by the specific nature of the relevant business. **However, these illustrations define exceptional circumstances only and should not be regarded as a general practice.**”*

13 Similarly, a sentence should be inserted at the end of paragraph 6.2 on page 14 underlining the exceptional circumstances being illustrated:

*“In that case, the company’s business, which is permanently carried on in State R, is only temporarily carried on in State S. **However, these illustrations define exceptional circumstances only and should not be regarded as a general practice.**”*