

### **Changes to the commentary on Article 5**

I have two points to make :-

1) *clarification in paragraph 42.21 that any changes would be made within the wording of the bilateral agreements of States*

I agree with the OECD commentary in paragraph 42.11 that it is consistent with the principle of Article 7 that until an enterprise sets up a permanent establishment in another State it should not be regarded as participating in the economic life of that State to such an extent that it should be subject to tax in that State. So, as the commentary continues, services should be treated in the same way as other business activities, by applying the same threshold of permanent establishment to them as to other business activities.

If certain States choose to disagree with the OECD on this point and tax services performed in their territory by an enterprise resident in another State, then I consider that such a fundamental change should be undertaken solely by way of changes made by the States to the relevant Articles in their bilateral double tax treaties. The OECD treaty makes a reference in paragraph 42.14 to States proposing changes to the Article (presumably, in their treaties). I recommend that in paragraph 42.21 this reference is reinforced by including the following wording in line 3, after the phrase “if they wished to” :-

“and only by inserting an Article in their bilateral tax treaties”

2) *setting a de minimis level for the purposes of paragraph 42.23 (b)*

I agree with the OECD comments in paragraph 42.12 and share its concern that the extension of cases where source taxation of profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State would be allowed, would increase the compliance and administrative burden of enterprises and tax administrations.

In recognition of the potential burden I appreciate that the OECD has considered in paragraph 42.23 the application of minimum requirements before such services can be subject to taxation in the other Contracting State. Paragraph 42.23(a) deals with individuals and applies a time limit as well as a gross revenue materiality level.

Paragraph 42.23(b), which would be relevant to corporations, refers to a time limit, but not to a level of materiality or a de minimis amount. The application of such a second requirement should also be considered for the purposes of this subparagraph, again, to avoid undue administrative burden both for the corporate taxpayer and tax administrations.

I therefore propose the following change to paragraph 42.23(b). At the end of line 1 of paragraph 42.23(b) insert the phrase :-

“ and more than 10% ( ten ) of the gross revenues attributable to services performed by the enterprise during this period or periods are derived from the services performed in that other State,”