

Siemens Aktiengesellschaft Oesterreich, T, P.O. Box 83, 1211 Vienna, AUSTRIA

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Jeffrey Owens  
Director, CTPA  
OECD  
2, rue André Pascal  
75775 Paris

Name	Lucia Baginova
Department	T
Telephone	+43 51707-24147
Fax	+43 51707-54480
E-mail	lucia.baginova@siemens.com
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— FRANCE

## Comments on the 2008 update to the Model Tax Convention

Dear Mr. Owens,

Referring to the Draft contents of the 2008 update to the model tax convention and the number of changes proposed in this draft we would like to comment on some points which appear to be most relevant for our company.

Our utmost concern is the proposed change to Article 5 dealing with the tax treaty treatment of services. Being an international group we are hardly hit by the planned extension of the concept of permanent establishment. Siemens is active in many different business fields which vary from the provision of turn key plants to the provision of services. In the latter case Siemens provides services, like technical support, software configuration, customization, trainings to mention at least some of them, which may partly be performed in the country of residence and partly in the source country. In these cases there is no fixed place of business which is at the permanent disposal of Siemens. The employees are often present in the particular State for several days on a recurrent basis dispersed through a longer period of time. It's not unusual that the activity is wholly or partially subcontracted to another company. Would the presence of the subcontractors be added to the presence of Siemens employees it could happen that the period of 183 days (as proposed in the draft) will be exceeded and therefore Siemens would constitute a permanent establishment. Such an effect would have far reaching consequences for the company and cannot be desired by the international community. In the extreme case when Siemens has never been present in the State it would be anyway taxed on profits deriving from these services as a consequence of permanent establishment taxation. The fundamental idea of the concept of permanent establishment is to allow a particular State to tax a company carrying on business on its territory only when it has a sufficient nexus, participates in and considerably influences the economic life of that State. The nexus can be a fixed place of business, an exceeding

**Siemens Aktiengesellschaft Oesterreich**  
Taxes  
Head: Thomas Thomasberger

Postal address:  
Siemens Aktiengesellschaft  
Oesterreich  
T  
P.O. Box 83  
1211 Vienna  
AUSTRIA

Office address:  
Siemensstrasse 92  
1210 Vienna  
Tel: +43 51707 0  
Fax: +43 51707 52800

Siemens Aktiengesellschaft Oesterreich  
DVR 0001708 FN 60562m Commercial Court Vienna Company Seat Vienna

of a certain period in case of building sites or construction projects or in the case of the provision of services. However to consider a specified period as the sole criterion for the constitution of a permanent establishment in case a company provides services appears not satisfactory. Regarding the above mentioned case of a subcontract we would achieve a not supportable situation. A minimum level of actual presence in the State must be required. For that reason it should be explicitly included in the commentary that in both cases, subcontracting the whole and parts of the responsibilities, no permanent establishment will be constituted for the general contractor. The presence of the subcontractors should in both cases not be attributed to the own presence of the main contractor as this would be the case according to the Commentary to Article 5 paragraph 3 OECD Model Tax Convention.

In the public discussion draft from 8 December 2006 Tax Treaty Treatment of services: Proposed Commentary – Changes they say under point 42.30: *Similarly, if the employees of a separate enterprise (e.g. an enterprise providing outsourced services) provide services to third parties pursuant to a contract that the enterprise has concluded with another enterprise, the services performed through these employees are not performed by the latter enterprise even if they may provide an economic benefit to the business of that other enterprise.*

Unfortunately in the new Draft Contents of the 2008 update to the Model Tax Convention the provision 42.30 has been changed in a following way: (...) *Another example would be where the employees of one enterprise provide services in one country to an associated enterprise under detailed instructions and close supervision of the latter enterprise; in that case, assuming the services in question are not for the benefit of any third party, the latter enterprise does not itself perform any services to which the provision could apply.* Point 42.23 sounds similar: (...) *For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.* These provisions address the above mentioned problem of a subcontract, but constraint it to the case of an independent third parties according to my understanding. Is a subcontract to an affiliated company not compassed by this provision? There is no reason to treat an affiliated company differently from an independent company if in both cases the main contractor hasn't any sufficient nexus to the source state and he doesn't exceed the period required to constitute a permanent establishment. This inequality should therefore be eliminated from the commentary and we should go back to the proposal from December 8, 2006 already mentioned. Moreover, following the comments above we plead for a general independent calculation of the presence of the subcontractors and that of the main contractor irrespective of other circumstances as supervision or control of the subcontractor. However if these additional conditions are absolutely necessary from your point of view, it should be at least explicitly defined in the commentary which situations, under which conditions are comprised by this provision to avoid any misinterpretations in the practice . Finally it should be irrelevant for the attribution of the services performed by one company to another company if these services are for a benefit of any third party or only for its own benefit. Therefore the additional expression under point 42.30 "not for the benefit of any third party" should be eliminated.

From our point of view it's especially important to highlight the fact that a provision enabling taxation in the other State, due to exertion of services over a certain period of time, can be optionally included in the respective bilateral tax treaty by the contracting States. However the new commentary on the taxation of services should not be

utilized by the countries to extend their taxation rights randomly and interpret the existing bilateral tax treaties in a way that would enable the taxation of services when such a provision was not explicitly stipulated in the tax treaty at the time it was concluded. Therefore the taxation of services can only be an issue for tax treaties which are not concluded yet or which are going to be renegotiated.

Sincerely yours,

Siemens Aktiengesellschaft Oesterreich

Thomas Thomasberger  
Manager Taxes

Andreas Wipfler  
Expert Taxes

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