

TAXREP 41/08 – OECD Draft of the 2008 Update to the Model Tax Convention

**WRITTEN RESPONSE SUBMITTED ON 9 JUNE 2008 BY THE
ICAEW TAX FACULTY RELATING TO THE PUBLIC
DISCUSSION DRAFT ON THE 2008 UPDATE TO THE MODEL
CONVENTION ISSUED BY OECD ON 21 APRIL 2008.**

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INTRODUCTION

1. A public discussion draft was issued by OECD on 21 April 2008.
2. The present document represents the comments of the Tax Faculty of the Institute of Chartered Accountants in England & Wales (ICAEW) on the public discussion draft.
3. Paragraph references are to paragraphs of the discussion draft, or, where indicated, to cited paragraphs of the OECD Model Tax Treaty Commentary.

DETAILED COMMENTS

4. Part 1

A – Place of Effective Management

We welcome the clarification contained in the Commentary but regret that it has taken such a long time to reach a stated position. We presume that this reflects the time taken to reconcile the opposing views of the Member States.

5. **B – Dual-resident persons who are treaty non-residents under the tie-breaker rule**

We have a minor editorial point in relation to the revised wording of paragraph 8.3. At the beginning of the second sentence we suggest the word 'the' should be added between 'in' and 'light' so that this sentence begins: 'It has to be interpreted in the light of'.

6. **C – Clarification of certain aspects of the definition of royalties**

We have a similar drafting point in paragraph 8.2 in line 5 at the top of page 12 so that the phrase in that line reads '...will depend on its particular facts and will need to be examined in **the** light of ...' the added word 'the' is highlighted in bold.

7. **E – Days of residence and the 183 day rule**

This is a welcome clarification.

Part II

A – Articles

8. **Change to Article 25**

We welcome this very important proposed change which introduces the right to binding arbitration. Binding arbitration is not available in respect of issues on which a decision has already been rendered 'by a court or administrative tribunal of either State.' We would have concerns if the administrative tribunal which gave the decision was not independent of the tax authority of the relevant country and would suggest that this should be made explicit in the Article by adding 'independent' before administrative tribunal.

9. **Changes to the Commentary on Article 5**

The wording on the draft changes to the Commentary to Article 5 are in the main carefully and well worded and we commented on the earlier (2006) draft in our paper TAXREP 12/07 submitted to OECD in February 2007.

10. We are, however, concerned that if bilateral treaties between EU Member States include services 'deemed PE' provisions such as those put forward in paragraph 42.23 that these could be found to be contrary to the EC Treaty and so likely to be struck down by the European Court of Justice particularly to the extent that there is a requirement for a certain percentage of gross revenues to be attributable to active business activities as a criterion (paragraph a)).
11. A conflict may arise between the Services PE and Article 17 re Artistes and Sportsmen in the case of cultural etc services supported by public funds. Paragraph 14 of the existing Commentary on Article 17 suggests that in this case treaties may provide for tax exemption in the source State. In that situation there could be a conflict with a Services PE leading to tax exposure under an Article 5 deemed PE.

Changes to the Commentary on Article 12

12. We believe the revisions to the Commentary are perfectly sensible and acceptable.

Changes to the Commentary on Article 24 – Concerning Non-Discrimination

13. We submitted a paper, TAXREP 48/07, in July 2007 in response to the public discussion draft published by OECD in May 2007. We are disappointed to note in the Introductory remarks to the present discussion draft that 'no substantial changes – were made as a result of the comments received.'
14. Our main continuing concern with the draft commentary is in respect of the position of countries entering into bilateral agreements when those countries are also members of the European Union and subject to the provisions of the EC Treaty as interpreted by the European Court of Justice.
15. Thus in relation to the Commentary in paragraph 41 these proposals do not reflect a number of ECJ judgments, such as Halliburton C-1/93, which require EU Member States to extend the same treatment to permanent establishments in a Member State as is available to a separate legal entity.
16. We also believe that the statement in paragraph 47 which allows the restriction of special taxation privileges to non-profit organisations to activities performed in the home state is contrary to principles enunciated by the ECJ and should not be entered into by countries which are members of the European Union.
17. We believe that the general statement at the beginning of paragraph 77 is not necessarily correct for example in respect of transfer of losses where on the basis of the Boake Allen Ltd UK House of Lords judgment, the transfer of losses between two UK resident companies must be allowed before the relevant UK law change (1 April 2000) even where the parent company is non UK resident.
18. We remain of the view that the Commentary in paragraph 79 does not reflect the French Conseil d'Etat decision on Article 24(5) of the French/Austrian tax treaty in favour of the taxpayer in the Andritz case.

**ICAEW Tax Faculty
June 2008**

WHO WE ARE

1. 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.
2. 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.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute.