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Grace Perez-Navarro
Deputy Director, CTPA
OECD
2, Rue Andrè Pascal
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Your ref:

Our ref.

Date 30.1.2012

Dear Ms. Perez-Navarro

COMMENTS ON THE PERMANENT ESTABLISHMENT REPORT OF 12TH OCT. 2011

Please find our comments below to your discussion draft on proposed changes to the Commentary on Article 5 (Permanent Establishment) of the OECD Model Tax Convention.

OECD's effort to clarify the interpretation and application of Article 5 in the Model Tax Treaty and Commentaries are much appreciated – and necessary. The permanent establishment aspect establishes a significant risk for multinational corporations and a common interpretation and approach is more important than ever. Unfortunately, a common approach is not the situation today for all permanent establishment issues.

The writer of this letter has recently completed a PhD entitled *Characterisation and Taxation of Cross-Border Pipelines*, in which I have covered thoroughly the permanent establishment aspects for cross-border pipelines. After studying this subject for some time, it is clear to me that this needs cleaning up.

The research shows that the Model Tax Treaty and its Commentaries suggest that a pipeline might be characterised in several different ways, such as:

- i) PE, or
- ii) Of preparatory or auxiliary character, or
- iii) Immovable property

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Further, the income might also be considered as passive income.

The Commentaries seem to be self-contradictory, suggesting the different characterisations without expressing clear and consistent guidelines for the preferred characterisation. In particular, there does not seem to be a clear dividing line between situations where the pipeline is characterised as a permanent establishment – a part of the corporation's core business activities, or when it is characterised as of preparatory or auxiliary character – an insignificant part of the business. As it is today, the Guidelines are diffuse and unpredictable and it is more or less up to the parties to interpret whether a pipeline constitutes a permanent establishment according to Article 5 or not.

OECD has recently published special permanent establishment reports for the banking and insurance industry and it might be an idea to do the same for pipelines. A pipeline is probably one of the most complex assets that exist, which could cross several borders, boundaries or even be laid in transit States. I recommend, therefore, that OECD establishes a similar study for pipelines in order to establish a more common approach. The PhD, which will be published by IBFD in March / April 2012, gives several recommendations for changing both the OECD Model Tax Treaty and its Commentaries regarding cross-border pipelines. I am happy to provide OECD with these recommendations and an extract of the PhD, if requested.

The OECD's Report of 12th October 2011 also discusses the 'at the disposal of test' and gives an example of when Peter, the consultant, is working at CLIENTCO'S premises. The Members of the Group suggest that this is a permanent establishment, as Peter has the premises at his disposal.

It might be necessary to separate issues of when the consultant has 'limited or restricted' access to the premises and where he or she has access. Even if Peter is required to work for *this* client in *their* premises, there might be some significant restrictions for him, such as:

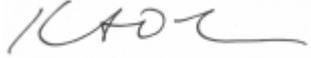
- i) he might not be allowed to operate his business for his other clients in this premises,
- ii) he might not be allowed to take customers, clients and other business relatives into the premises,
- iii) he might not be allowed to have his own employees in the premises,
- iv) he might not be allowed to use the premises outside the working hours, at the weekend or during holidays,
- v) he might not be allowed to refurbish or redecorate the premises or use his own equipment or furniture,
- vi) he might not be allowed to set up signs or adverts around the premises,
- vii) the premises might also be used by CLIENTCO when he is not using them,
- viii) he might not pay any rent for the premises.

His uses might be very limited and restricted and the key question is whether such limitation or restriction of use still satisfies the 'at the disposal test.' Or does the 'at the disposal test' mean that

he needs full and unrestricted disposal of the premises? It is a delicate dividing line and perhaps uncertain that all kinds of 'at the disposal of' scenarios will create a PE. Maybe there is a need for some more detailed guidelines in this regard?

I am happy to discuss these issues further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Knut Olsen', with a long horizontal flourish extending to the right.

Knut Olsen