International Chamber of Commerce
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**Policy and Business Practices**

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**Re: Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention**

Dear Grace,

We are deeply grateful to have the opportunity to comment on the discussion draft "Interpretation and application of article 5 (Permanent Establishment) of the OECD Model Tax Convention". We thank the authors for the work they have done, and also we would like to thank the OECD for having made this important work possible. We very much welcome more detailed guidance regarding the application article 5 of the OECD Model Tax Convention. We commend especially the clarifications made under Item 12, 16, 18, and 20.

We would like to emphasize some aspects we consider of special importance with respect to elimination of tax barriers to international business activities globally.

## Item 2: Meaning of "at the disposal of" (paragraph 4.2 of the Commentary)

Item 2 is supposed to clarify the meaning of "at the disposal of", while the expression "at the disposal of" is only mentioned in the Commentary of the Model Tax Convention, not in the Convention itself. According to the proposal paragraph 4.2 of the Commentary would not only receive a largely extended new wording. It would also change its meaning considerably.

With the new wording the expression "at the disposal" would to a large extent be watered-down to a criterion, which is finally based on the mere presence of an enterprise in another country. It is one more step on the way to widening the scope of article 5 paragraph 1 of the Model Tax Convention without changing the wording of that paragraph.

After creating additional interpretation problems by defining that "through" (article 5, paragraph 1 of the Convention) can be read as "at", the fixed place concept seems to be more and more abandoned. There is an important risk of a dwindling foreseeability of when a permanent establishment is created.

With regard to the implications for payroll taxes and other (national/regional) administrative requirements the widening of the notion of permanent establishment is likely to hinder international economic cooperation and thus to compromise employment and welfare. It should for these reasons be deleted.

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Regarding the **example** given in paragraph 13 of the discussion draft it has to be noted that the contract with CLIENTCO prevents Peter from using CLIENTCO's facilities for other purposes than those of the contract with CLIENTCO. But as long as Peter may not use these premises to work for other clients a crucial part of his business is excluded. This should entail that CLIENTCO's facilities under these circumstances do not constitute a permanent establishment for Peter.

## Item 4: Home office as a PE (proposed new paragraphs 4.8 and 4.9)

We welcome the clarification on the conditions that make a home office a permanent establishment. The proposed language of the new paragraphs 4.8 and 4.9 emphasizes the extraordinariness of the qualification of a home office as a permanent establishment. In fact in very rare cases it might appear that qualifying a home office a permanent establishment is appropriate. Nevertheless, expressions like "present for an extended period" (proposed new paragraph 4.9 of the Commentary) create uncertainty. It is therefore even more necessary to restrict the possible application of this extraordinary qualification.

## Item 6: Time requirement for the existence of a permanent establishment (paragraph 6 of the Commentary)

Item 6 is likely to cause future problems by allowing to see short term activities under (un)certain conditions as a permanent establishment. The requirement of a certain minimum term is a question of practicability for both, taxpayers and administrations. Having to comply with the tax law of another country (including filing tax returns etc.) will in many cases be disproportionally burdensome for taxpayers and financially unrewarding for administrations.

At first sight the proposed paragraphs seem plausible. Paragraph 6 refers to a practice of a minimum duration of six months, while paragraph 6.1 mentions a period of 15 consecutive years. We welcome the extension to 15 years, instead of a period of 11 years as in the IFA-example. But nevertheless it is not clear, if the sculpturer will have to file tax returns in State S in his 16$^{th}$, 15$^{th}$, 10$^{th}$, or 1$^{st}$ year of his five week activity. Would a five day activity be sufficient? Is the intention to come back next year/another year important? And if so, in which cases?

The proposal should not be adopted. A clear criterion, e.g. a minimum period of six months or more, would be preferable.

## Item 7: Presence of foreign enterprise's personnel in the host country (paragraph 10 of the Commentary)

We underline the difficulties mentioned in paragraph 44 of the draft. For practicality reasons it should be considered to introduce a minimum term for short term assignments. Short term assignments of less than the minimum term should not give rise to tax obligations in the receiving country.

## Item 8: Main contractor who subcontracts all aspects of a contract (paragraphs 10 an 19 of the Commentary)

According to paragraphs 10.1 and 19 of the draft activities of subcontractors shall be allocated to the main contractor. The new aspect in this is the application of this principle to a main contractor who is not on site at all. As a general principle this would mean that the source country is entitled to raise taxes on income that has not been generated by a locally present foreign enterprise, but by work performed and risks carried outside of the source country.

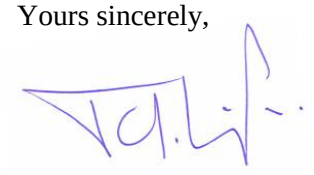
We urge the drafting group to rethink this issue and to exclude the source country from taxing revenue being generated in another country.

## Item 14: Does a development property constitute a PE? Paragraph 22 of the Commentary)

Immoveable property is dealt with in Article 13 of the model tax convention. As the drafting group states in paragraph 86 of the draft Article 13 clarifies the "developer example" mentioned in that paragraph. The same should be true for the example mentioned in paragraph 87. There is no reason to be found, why Articles 5 and 7 should be applied in such cases. In addition to this it is hard to see, how a critical amount of interest in the meaning of Article 11 should arise from a stock of recently built houses for sale.

The Taxation Commission of the International Chamber of Commerce is available to provide clarification with respect to comments made above. Moreover, we would like to be invited in case you are going to arrange a public consultation on this topic.

Yours sincerely,



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