

# KIM & CHANG

Seyang Building, 223 Naeja-dong, Jongno-gu, Seoul 110-720, Korea  
Website: www.kimchang.com E-mail: lawkim@kimchang.com  
Tel: +82-2-3703-1114 Fax: +82-2-737-9091~3

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By email: [grace.perez-navarro@oecd.org](mailto:grace.perez-navarro@oecd.org)

Ms. Grace Perez-Navarro  
Deputy Director, CTPA  
OECD  
2, rue André Pascal  
75775 Paris  
FRANCE

**Re: Comments on Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention – Discussion Draft**

Dear Ms. Perez-Navarro:

Kim & Chang is grateful for the opportunity to comment on the OECD's Discussion Draft on the interpretation and application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention ("MTC") as it relates to the activities of fund managers.

As you may be aware, Kim & Chang is widely recognized as Korea's premier law firm with over 800 professionals advising large domestic and international clients across a wide range of disciplines including tax.

We support the initiative to clarify Article 5 of the MTC as it relates to the activities of fund managers; however, we believe that the Working Group's statement in the Discussion Draft that "the independent status of a local fund manager should therefore be determined in relation to the limited partnership itself rather than by reference to each investor in that partnership" is likely to impair the local fund manager's ability to argue it qualifies as an independent agent under Article 5(6) of the MTC. Due to the tremendous growth of the fund industries in recent years,<sup>1</sup> taxing authorities, particularly in Asia, have become more aggressive in scrutinizing the activities performed by local fund managers and contending that such activities constitute an agency permanent establishment with respect to the fund and/or fund investors. As paragraph 38.6 of the Article 5 Commentary provides, the number of

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<sup>1</sup> In 2011, venture capital investment was approximately \$28.4 billion (See PricewaterhouseCoopers/National Venture Capital Association MoneyTree Report, Data: Thomson Reuters) and in 2010, private equity investment was approximately \$180 billion (See Bain & Company, *Global Private Equity Report 2011*).

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principals represented by the agent is one of the factors for determining independent status, we believe taxing authorities may misinterpret the Working Group's statement to mean that a local fund manager cannot be an independent agent as it represents only one principal (i.e., the fund), which we do not believe is the Working Group's intent. A fund is merely a vehicle for consolidating investors' investment capital through which the fund manager make investments on their behalf.. As such, we believe the independent status of a local fund manager should be determined with respect to the relationship between the fund manager and each respective investor in the fund.

In addition to a fund manager generally representing multiple principals (i.e., the fund investors), we echo the independence arguments put forth in the report issued by the European Venture Capital Association and referenced in the Discussion Draft. Limited partners in fund vehicles are generally passive investors in a "blind pool" whereby their capital commitment is separately negotiated with the fund managers under certain fund terms as independent parties to a contract. Furthermore, limited partners are also independent in that they may decide to opt-out of investing their committed capital if they believe that the fund managers do not comply with the terms of the fund agreement. As such, we humbly request that you reconsider the aforementioned statement in the Discussion Draft or at least clarify that the intent of the Working Group's statement was not to limit the potential for a local fund manager to be treated as an independent agent under Article 5(6) of the MTC.

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We are available to further discuss any of our comments with you if any clarification is needed. Kim & Chang thanks you for the opportunity to assist in this important topic.

Very truly yours,

Kim & Chang