

## Revised Commentary on Article 5 (Permanent Establishment)

03 November 2011

Dear Ms. Grace Perez-Navarro,

I am a tax partner with the Canadian law firm of Fraser Milner Casgrain LLP. I am writing to offer a comment on the OECD's proposed amendments to the Commentary on Article 5, as set out in the 12 October 2011 release of Proposed changes to the Commentary on Article 5 (Permanent Establishment) of the OECD Model Tax Convention.

In particular, I wish to comment on paragraphs 10 and following of the Proposed Changes, which deal with the concept of "at the disposal of" in the Commentary.

By way of background, I am the author of a long article on this specific topic (see Joel Nitikman, "The Painter and the PE," (2009), vol. 57, no. 2 Canadian Tax Journal, 213-258). Accordingly, I do not need to describe in this email the background to the "disposal" concept and all of the law surrounding that concept. I commend the article to you for your reading.

The new proposed paragraph 4.2 of the Commentary states:

4.2 Whilst no formal legal right to use a particular place is required for that place to constitute a permanent establishment, the mere presence of an enterprise at a particular location does not necessarily mean that that location is at the disposal of that enterprise. *Whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a "place of business through which the business of [that] enterprise is wholly or partly carried on" will depend on the extent of the presence of an enterprise at that location and the activities that it performs there. Where an enterprise has an exclusive legal right to use a particular location which is used only for carrying on that enterprise's own business activities, that location is clearly at the disposal of the enterprise. This will also be the case where an enterprise performs business activities on a continuous and regular basis during an extended period of time at a location that belongs to another enterprise or that is used by a number of enterprises. This will not be the case, however, where the enterprise's presence at a location is so intermittent or incidental that the location cannot be considered a place of business of the enterprise. Where an enterprise does not have a right to be present at a location and, in fact, does not use that location itself, that location is clearly not at the disposal of the enterprise; thus, for instance, it cannot be considered that a plant that is owned and used exclusively by a supplier or contract-manufacturer is at the disposal of an enterprise that will receive the goods produced at that plant merely because all these goods will be used in the business of that enterprise (see also paragraph 42 below). It is also important to remember that even if a place is a place of business through which the activities of an enterprise are partly carried on, that place will be deemed not to be a permanent establishment if the only business activities carried on at that place are those listed in paragraph 4. [the rest of existing paragraph 4.2 is moved to new paragraphs 4.3 and 4.4]*

This paragraph, when you read it carefully, merely says that there is a right of disposal if the entity happens to use the foreign premises on a regular enough basis. That is simply incorrect. That is not what the concept was intended to mean, nor is it the meaning that has been given to the concept under various case-law (as set out in my article).

I strongly urge the Committee to revisit this paragraph and to adopt the test of "disposal" as set forth in the conclusion of my article, which is as follows:

These cases confirm that the fixed place of business need not be owned or leased by the foreign enterprise provided that it is at the disposal of the enterprise *in the sense of having some right to use the premises for the purposes of its business* and not solely for the purposes of the project undertaken on behalf of the owner of the premises.

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