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13. Februar 2012

**Public Discussion Draft**

Dear Ms. Perez-Navarro,

Please find enclosed our comments regarding the INTERPRETATION AND APPLICATION OF ARTICLE 5 (PERMANENT ESTABLISHMENT) OF THE OECD MODEL TAX CONVENTION.

The Federal Chamber of Tax Advisers represents the interests of more than 88.000 tax advisers in Germany vis-à-vis the Bundestag, the Bundesrat, the federal ministries, the top echelons of the civil service, the courts and the institutions of the EU and OECD.

The main duties of the Federal Chamber of Tax Advisers are to represent the entire profession at national and international level, to participate in the drafting of the laws of the profession and in consultations on tax laws and laws in all other legislative areas of the profession.

The Federal Chamber of Tax Advisers supports every measure to prevent double taxation and a just distribution of profits between the different countries.

Yours sincerely

Jörg Schwenker  
Geschäftsführer

Encl.



**Bundessteuerberaterkammer**  
KÖRPERSCHAFT DES ÖFFENTLICHEN RECHTS

**Enclosure**

**INTERPRETATION AND APPLICATION  
OF ARTICLE 5  
(PERMANENT ESTABLISHMENT)  
OF THE OECD MODEL TAX CONVENTION**

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### **1. Can a farm be a permanent establishment? (proposed paragraph 3.1 of the Commentary)**

We agree that the determination whether or not an enterprise has a permanent establishment (PE) in the other Contracting State must be made independently from the type of income.

**A clarification may be useful to explain the last sentence of paragraph 3.1 regarding the relevance for the purposes of other provisions such as paragraphs 4 and 5 of Article 11.**

### **2. Meaning of “at the disposal of” (paragraph 4.2 of the Commentary)**

The Working Group recommends some changes to be made to the Commentary, e. g. ... “Where an enterprise has an exclusively 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.”

**It can be difficult to decide whether the enterprise’s presence is intermittent or incidental.**

Many court judgements are existing regarding this topic under German tax law. This question may be decisive for an employer if and who has to withhold or to pay taxes for an employee working in another country.

Example: A tax adviser/auditor works on a regular basis in another state during a longer period of time. There he works in the same location (room) that belongs to the enterprise of the customer of the tax consulting/auditing enterprise.

**Therefore we suggest adding further clarifications to avoid double taxation, esp. concerning services at a client’s place of business.**

### **4. Home office as a PE (proposed new paragraphs 4.8 and 4.9)**

A new paragraph 4.8 will be added, saying at the end: “Where, however, a home office is used on a regular and continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to work from home (...), the home office may be considered to be at the disposal of the enterprise.”

**This interpretation seems very wide and the problem of double taxation may occur.**

**6. Time requirement for the existence of a permanent establishment (paragraph 6 of the Commentary)**

A prescribed time frame may allow businesses and tax authorities to assess, in advance, whether or not a PE will emerge.

But the examples in paragraphs 6.1 and 6.2 widen the existence of PE's, thus may lead to double taxation.

**In any case a retroactive supposition of a PE has to be avoided.**

**9. Application of paragraph 3 to joint venture and partnership activities (paragraphs 10 and 19 of the Commentary)**

Paragraph 10.3 will be added saying, that "Different enterprises may collaborate on the same project and the question of whether their collaboration constitutes a separate enterprise (...) is a question that depends on the facts and the domestic law of each State."

**Different interpretations in different countries may occur, resulting in double taxation.**

Partnerships and in some fields joint ventures find a widespread acceptance in Germany, therefore it is very important to find reasonable solutions for these entities.

**Therefore the clarification in paragraph 10.4 may be useful.**