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Comments submitted by Ernst & Young on the OECD Discussion Draft on Tax Treaty Treatment of Termination Payments

Ernst & Young (hereinafter, "EY" or "we) would like to thank the OECD for the opportunity to provide comments on the Discussion Draft on Tax Treaty Treatment of Termination Payments (hereinafter, the "Discussion Draft") dated 25 June 2013.

EY welcomes and supports the OECD's initiative to clarify the treatment of termination payments for tax treaty purposes in light of the risks arising from the inconsistent treaty characterization of such payments.

We agree with the majority of the proposals described in the Discussion Draft, which considers numerous types of payments made on and after termination of employment and provides useful guidelines for the determination of the State having the primary taxing rights based on the nature of the different types of payments.

We have reviewed the categories and nature of possible payments that can be made upon employment termination for completeness (i.e., whether the payments are required by law, by contract, by collective bargaining agreement or made voluntarily). We believe the thirteen categories of payments described in the Discussion Draft fully capture the common types of payments from an employment law perspective.

We appreciate the difficulties in establishing firm rules in many instances. Generally, a clear understanding of all the facts and circumstances would be necessary in order to carry out the treaty analysis and the Discussion Draft provides some useful guidelines regarding the approach to the analysis in the absence of conclusive facts.

We have the following specific comments regarding the Discussion Draft:

1. **The use of the term "reasonable" in item 3, payment in lieu of notice of termination, and item 13, partial retirement payments**

   The use of the term "reasonable" in items 3 and 13 could result in a degree of uncertainty due to differences in interpretation regarding what is reasonable. That said, we recognize the proposed wording may be necessary to address the many different situations that could arise. For typical mobility scenarios (e.g., an assignee sent temporarily from one state to another with one employer in the home country), it would be preferable to specify a clearer rule to determine the State of taxation (e.g., the State where the contract that has been terminated was signed). This would avoid the uncertainty associated with the "reasonable" concept in these relatively straight forward cases of internationally mobile employees.

2. **Sourcing rules related to item 4, severance payment**

   We agree with the proposal here, but we suggest that the wording should be changed to specify the source State of the severance based on career history as the general principle (such sourcing based on career history is currently the position adopted in practice by most States), with the default being taxation in the State where the employment was exercised at the time of termination in the absence of other conclusive information that would indicate otherwise.

3. **Item 7, payment related to pension rights**

   We believe that it may be difficult, from a practical point of view, to determine if a payment is a lump sum payment in lieu of periodic pension payments or is a reimbursement of pension contributions. In addition, we believe that taxation of the reimbursement of pension contributions should be allocated between the States where the employment was exercised during the time these contributions were made. We recommend that the default position should be taxation in the State where the employment was exercised at the time of termination in the absence of conclusive information that would indicate otherwise.

We appreciate the opportunity to submit these comments on the Discussion Draft on Tax Treaty Treatment of Termination Payments. If you have any questions regarding these comments or would like to discuss any of them in greater detail, please contact Alex Postma (alex.postma@uk.ey.com), Dina Pyron (dina.pyron@uk.ey.com) and Barbara Angus (barbara.angus@ey.com).