Double tax treaties: review of treaty policy positions

Employment Tax | International Tax

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CIOT has responded to an informal consultation by HMRC in relation to the UK's policy position in negotiating treaties around permanent establishments and changes to the Model Treaty introduced by the Multilateral Instrument entered into following the OECD/G20 BEPS project. The informal consultation also asked about remote working across borders, and the potential impact for permanent establishments.

In July 2022, HMRC's Tax Treaty Team sought input in relation to the changes to Article 5 of the OECD Model Tax Convention (MTC) as a result of the BEPS action reports and also in relation to the permanent establishment (PE) implications of remote working.

With regard to Article 5, HMRC's letter refers to the changes to Article 5 and, in particular, the new 'preparatory or auxiliary' activities listed in the MTC that businesses were concerned would cause less certainty and, potentially, to a proliferation of PEs. We suggest that it is too early to conclude that the changes are not causing difficulties in practice. In our view, the concerns expressed by businesses in 2016 remain valid. It is also important to put these rules into context. The rules set out in the MTC apply to all business, and not just the largest multinationals for whom the new rules were designed.

More time should be allowed for these changes to bed in. However, we also recognise that flexibility in negotiating treaties is important. We said that generally treaties are to be welcomed. It is probably not always the case that PE will be the critical point for multinationals, including smaller ones, when considering a double tax treaty as a whole. It will depend on the treaty and its finally agreed terms.

With regard to remote working, our members are reporting increasing demands on businesses from employees to perform work remotely across a border for short term and more permanent periods of time. This is due to the pandemic and, subsequently/more generally by some employers wanting to give employees greater flexibility in being able to work in a country outside the UK for a limited period (particularly where they are nationals of that country). This is not least in light of the continuing war for talent and businesses wanting to be competitive in the global jobs market. The rise of remote working (both UK individuals working overseas and non-UK individuals working in the UK) has allowed businesses to realise they can often operate effectively with people working remotely, including at senior positions.

Businesses can find it challenging to apply the PE regulations in the context of remote work. Guidance from HMRC (and the OECD) around this would be welcomed by businesses and advisers. Our response to HMRC said that it would be extremely useful to have content dealing specifically with remote workers to help clarify the position,

We noted that difficulties arise as our members' experience is that different countries take different interpretations of remote worker situations (and of the OECD guidance contained at paragraph 18 of the commentary). Some countries appear to have a default position that a home office cannot be at the disposal of the individual's employer, whilst other countries take the opposite view. Thus, our letter said that HMRC guidance would be useful, but that it would also be very helpful to have an agreed position through the OECD that applies internationally.

Our full response can be found at: www.tax.org.uk/ref1016

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