



RELEASE OF BEPS DISCUSSION DRAFTS ON ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS AND REVISED GUIDANCE ON PROFIT SPLITS (OECD)

Background

The OECD released two discussion drafts on 4th of July 2016 for public comments by September 5, 2016, pertaining to the following:

- Attribution of profits to permanent establishments concerning work in relation to BEPS Action 7 (Preventing the artificial avoidance of permanent establishment status); and
- Revised guidance on profit splits concerning work in relation to BEPS Action 8 – 10 (Aligning transfer pricing outcomes in line with value creation).

Detailed discussion

Discussion draft on the attribution of profits to permanent establishments

The final report on BEPS Action 7 mandated follow-up work to develop additional guidance on the issue of attribution of profits to permanent establishments. This work was intended to provide guidance on how the rules of Article 7 would apply to permanent establishments resulting from the changes in the report on BEPS Action 7 as well as taking into account the results of the work on other parts of the BEPS project dealing with transfer pricing, in particular the work related to intangibles, risk, and capital.

The BEPS Action 7 discussion presents the two fact-patterns that would particularly benefit from additional guidance concerning attributions of profits to permanent establishments:

- Dependent agent permanent establishments, including those created through commissionaire and similar arrangements; and
- Warehouses as fixed place of business permanent establishments.

For each fact-pattern, and through the use of examples, a number of questions are identified on which comments are sought from commentators. This discussion draft also includes a final section exploring whether there are mechanisms that could allow for additional co-ordination of the application of Article 7 and Article 9 to determine the profits of a permanent establishment without providing opportunities for the re-emergence of BEPS risks that the changes under BEPS Actions 7 and 8 – 10 were designed to reduce.

An OECD release states that comments are not sought on the changes to the permanent establishment definitions that have been agreed under BEPS Action 7 and that were published in the 2015 final report; rather, the OECD urges commentators to concentrate solely on the application of Article 7 to determine the attribution of profits to permanent establishments.

Discussion draft on profit splits

The final report on BEPS Actions 8 – 10 of the BEPS project sets out the scope of the work mandated under Action 10 of the BEPS project in relation to the application of transfer pricing methods. The discussion draft aims at clarifying and strengthening the guidance on the transactional profits split method in the context of global value chains. In particular, it elaborates on two different approaches to splitting profits: (1) transactional profit splits of actual profits; and (2) transactional profit splits of anticipated profits. It also proposes further draft guidance on the appropriate application of transactional profit split methods.