

# Cross-Border Short-Term Employment

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# Cross-Border Short-Term Employment

**Seminar B of the 2013 International Fiscal Association Congress in Copenhagen examined the tax treatment of income from employment under article 15 of the OECD Model where an employee is present in the work state for not more than 183 days. This article summarizes some issues discussed in the Seminar.**

## 1. Introduction

Article 15(1) of the OECD Model<sup>1</sup> establishes the general rule as to the taxation of income from employment, i.e. the place-of-work principle. Such income is primarily taxable in the contracting state in which the employment is exercised.<sup>2</sup> However, article 15(2), the 183-day rule, provides an exception to the place-of-work principle. Remuneration derived in respect of an employment exercised in the other contracting state (the work state) is taxable only in the employee's residence state if:

- the employee is present in the work state for a period or periods not exceeding in the aggregate 183 days in a given 12-month period; and
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the work state; and
- the remuneration is not borne by a permanent establishment (PE) that the employer has in the work state.

At the 2008 International Fiscal Association (IFA) Congress in Brussels, the panel of the joint IFA/OECD Seminar examined the tax treatment of short-term assignments of employees under article 15 of the OECD Model. Avery Jones (2009) summarized the discussion in an article which was published in this journal.<sup>3</sup> In 2010, the Commentary on Article 15 of the OECD Model was updated and now includes detailed explanations of the meaning of the terms "employment" and "employer".<sup>4</sup> At the 2013 IFA Congress in Copenhagen, the Seminar B panel, chaired by Frederik Zimmer (Norway) and consisting of Kasper Dziurdz (Austria), Martha Klasing (the United States),

Frank Pötgens (the Netherlands) and Anders Nørgaard Laursen (Denmark), secretary, discussed the recent developments regarding the tax treatment of cross-border short-term employment. Himanshu Shekhar Sinha (India), as a guest speaker, provided interesting insights regarding developments in Indian case law on employer status and the establishment of a PE with regard to intra-group secondments. This article summarizes some parts of the discussion, in particular, by focusing on the object and purpose of the 183-day rule (*see* section 2.), the meaning of the term "employer" based on the revised OECD Commentary on Article 15 (2010) (*see* section 3.), whether the OECD Commentary on Article 15 (2010) is merely a clarification (*see* section 4.), the risk of establishing a PE in the work state as a result of a seconded employee (*see* section 5.), and the meaning of the phrase "borne by a permanent establishment" (*see* section 6.). The summary does not attribute remarks to the panellists as they did not necessarily state their own views. It should also not be assumed that all panellists agree with all the views expressed in this article.

## 2. Object and Purpose of the 183-Day Rule

According to the Commentary on Article 15 of the OECD Model, the object and purpose of article 15(2)(b) and (c) of the OECD Model:

... are to avoid the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as he neither is a resident nor has a permanent establishment therein.<sup>5</sup>

In the literature, it is widely recognized that article 15(2)(b) and (c) of the OECD Model serves the common purpose of ensuring that the work state retains its taxation right if the remuneration is recognized as a deduction from profits taxable in the work state and, therefore, that article 15(2)(b) and (c) represents compensation for the work state for its reduced tax revenue.<sup>6</sup> Case law has emphasized the rel-

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1. *OECD Draft Convention on Income and on Capital* (30 July 1963), Models IBFD and *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977-22 July 2010), Models IBFD.
2. *OECD Draft Convention on Income and on Capital: Commentary on Article 15 para. 1* (30 July 1963), Models IBFD and *OECD Model Tax Convention on Income and on Capital: Commentary on Article 15 para. 1* (11 Apr. 1977-22 July 2010), Models IBFD.
3. J.F. Avery Jones, *Short-Term Employment Assignments under Article 15(2) of the OECD Model*, 63 Bull. Intl. Taxn. 1 (2009), Journals IBFD.
4. OECD, *The 2010 Update to the Model Tax Convention* (OECD 2010), International Organizations' Documentation IBFD.

5. Para. 6.2 *OECD Model: Commentary on Article 15* (2000-2010).

6. *See, for example, K. Vogel, Klaus Vogel on Double Taxation Conventions* 3rd ed., Art. 15, m.nos. 30 and 32 (Kluwer L. Intl. 1997); R. Prokisch, in *Doppelbesteuerungsabkommen [Tax Treaties]* 5th ed., Art. 15, m.nos. 53a and 67 (K. Vogel & M. Lehner eds., C.H. Beck 2008); L.E. Schoueri, *The Residence of the Employer in the "183-Day Clause" (Article 15 of the OECD's Model Double Taxation Convention)*, 21 Intertax 1, p. 27 et seq. (1993); L. De Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State"*, 54 Bull. Intl. Fiscal Docn. 10, sec. II.B. (2000), Journals IBFD; F. Pötgens, *Income from International Private Employment*, ch. II, sec. 6., ch. VII, sec. 1.2.3., and ch. IX, sec. 5.3.2. (IBFD 2007) and *Article 15(2)(b) of the OECD Model: Problems Arising from the Residence Requirement for Certain Types of Employers*, 42 Eur. Taxn. 6, at sec. 1. (2002), Journals IBFD; E. Burgstaller, *"Employer" Issues in Article 15(2) of the OECD Model Convention – Proposals to Amend the OECD Commentary*, 33 Intertax 3, pp. 123-133, at p. 128 (2005); K. Vogel et al., *United States Income Tax Treaties* 3rd ed., Art. 15, p. 51 et seq. (Kluwer L. & Taxn.

evance of this principle. For instance, the German *Bundesfinanzhof* (Federal Tax Court, BFH)<sup>7</sup> has affirmed that the coherence between the deductibility of the salary costs and the allocation of the taxation right on these salaries to the work state allowing those deductions is a major object of article 15(2)(b) of the German tax treaties based on the OECD Model. Recently, the Austrian *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH),<sup>8</sup> inspired by the BFH,<sup>9</sup> interpreted the term “employer” in article 15(2)(b) of the OECD Model on the basis of the object and purpose of ensuring that the work state retains its taxation right if the salary is recognized as a deduction from profits taxable in the work state. According to the VwGH, the employer for treaty purposes is the person who economically bears the remuneration for the employment services. In addition, the Netherlands *Hoge Raad* (Supreme Court, HR)<sup>10</sup> has strongly relied on the purport of article 15(2)(c) of the OECD Model in assigning the taxation right to the work state. According to the HR, the purport of the provision is to compensate the work state for having allowed a reduction in the salary costs on the taxable base of the PE situated there by assigning the taxation right on the employee’s salary to that state.

During the discussion at the Seminar, the panel also emphasized the overall object and purpose of article 15(2) of the OECD Model, i.e. to facilitate the international movement of personnel and the operations of enterprises engaged in international trade.<sup>11</sup> If income in respect of an employment exercised in the work state is taxable only in the residence state, an excessive administrative burden for employees and employers, which could result from (withholding) tax obligations in the work state, could be avoided. An administrative burden is regarded as excessive if neither the employee, as the employee is temporarily present in the work state under article 15(2)(a) of the OECD Model, nor the employer, under article 15(2)(b) and (c), has a sufficient level of presence in the work state. If, however, the employer is a resident of the work state or has a PE in the work state for which the employee works, there is a sufficient level of presence, which makes withholding tax obligations reasonable. This object and

purpose is stated in the OECD Commentary on Article 15 of the OECD Model:

These subparagraphs [b) and c) of paragraph 2] can also be justified by the fact that imposing source deduction requirements with respect to short-term employments in a given State may be considered to constitute an excessive administrative burden where the employer neither resides nor has a permanent establishment in that State.<sup>12</sup>

It is unclear as to which of these objects and purposes could be regarded as being more important, for example, where the employer has a PE in the work state for which the employee works although the remuneration is not deductible at the level of the PE.<sup>13</sup> In this context, it was argued at the Seminar that the weight of the administrative burden in the work state, which the 183-day rule intends to eliminate to facilitate the international movement of personnel and the operations of enterprises engaged in international trade, does not necessarily depend on the deductibility of the remuneration. It is, rather, the presence of the employer in the work state and the connection between that presence and the employee’s services that make the administrative burden arising from the levying of withholding tax excessive or not. In addition, residence in the work state does not necessarily imply deductibility in the work state, for example, where the remuneration is borne by a PE that the employer has in the residence state or a third state.<sup>14</sup> A historical analysis of article 15 of the OECD Model does not indicate that there was an intention to link taxation to deductions. Only in its initial 1957 report, did Working Party No. 10 of the Organisation for European Economic Co-operation (OEEC) Fiscal Committee explain the reasons for article 15(1) and (2), but the explanation focused on practical aspects and the pay-as-you-earn system.<sup>15</sup> In that context, from the perspective

Publishers 1989-1996); F. Wassermeyer, in *Doppelbesteuerung: DBA* [Tax Treaties] 86th suppl., Art. 15 MA, m.no. 40 (H. Debatin & F. Wassermeyer eds., C.H. Beck 2002); M. Kempermann, in *Doppelbesteuerungsabkommen Deutschland – Schweiz* [Tax Treaties Germany-Switzerland] Art. 15, m.no. 65 (H. Flick, F. Wassermeyer & M. Kempermann eds., Dr. Otto Schmidt 2011); V. Kluge, *Das Internationale Steuerrecht* [International Tax Law] 4th ed., p. 889 (S 280) (C.H. Beck 2000); O.H. Jacobs et al., *Internationale Unternehmensbesteuerung* [International Taxation of Companies] 7th ed., pp. 1344 and 1347 (C.H. Beck 2011); and H. Schaumburg, *Internationales Steuerrecht* [International Tax Law] 3rd ed., m.no. 16.437 et seq. (Dr. Otto Schmidt 2011).

7. DE: BFH, 21 Aug. 1985, I R 63/80, Bundessteuerblatt (BStBl.) II 1986, p. 6, Tax Treaty Case Law IBFD and DE: BFH, 8 Feb. 1995, I R 42/94, BStBl. II 1995, p. 407, Tax Treaty Case Law IBFD.
8. AT: VwGH, 22 May 2013, 2009/13/0031, Tax Treaty Case Law IBFD. See also K. Dziurdz, *Austria: Meaning of the Term “Employer” under Article 15(2) in Tax Treaty Case Law around the Globe 2014*, forthcoming (E. Kemmeren & D. Smit eds., IBFD 2014).
9. See especially DE: BFH, 13 Feb. 2005, I R 46/03, BStBl. II 2005, pp. 547-550, Tax Treaty Case Law IBFD, to which the VwGH referred.
10. NL: HR, 12 Oct. 2001, Decision No. 35 749, *Beslissingen in Belastingzaken* (BNB) 2002/125, Tax Treaty Case Law IBFD.
11. See, to that effect, for example, paragraph 3 of the *OECD Draft/Model: Commentary on Article 15* (1963-1977).

12. Para. 6.2 *OECD Model: Commentary on Article 15* (2000-2010).
13. See, for example, K. Dziurdz, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of “Borne by a Permanent Establishment”*, 67 Bull. Intl. Taxn. 3 (2013), Journals IBFD and Pötgens, *Income from International Private Employment*, supra n. 6, at ch. VII, sec. 1.2.4.2. and sec. 3.5.
14. See, for example, Pötgens, *Income from International Private Employment*, supra n. 6 (2007), at ch. VII, sec. 4.3.3. and K. Dziurdz, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht* [Short-Term Employee Assignment in International Tax Law] sec. 5.2. (Linde 2013).
15. OEEC, *Working Party No. 10 of the Fiscal Committee (Sweden) – Report on the Taxation of Profits or Remuneration in Respect of Dependent and Independent Personal Services*, FC/WP10(57)1 p. 11 (11 Sept. 1957). The historical OEEC and OECD materials are available at [www.taxtreaties-history.org](http://www.taxtreaties-history.org). It is notable that, even article 15(3) of the *OECD Model* was never intended to make the remuneration taxable in the state in which it is deductible, i.e. the state in which the place of effective management of the transport enterprise is situated. Rather, the rule in article 15(3) of the *OECD Model* appears “to be the correct choice for many countries which have already introduced, or which propose to introduce, taxation at the source on salaries and wages. It is normal to make the employer responsible for the formalities of taxing remuneration paid to members of crews: such a procedure ensures simple and speedy collection and permits of satisfactory control”. See OEEC, *Working Party No. 5 of the Fiscal Committee (Belgium-Sweden) – Report on the Taxation of Income and Capital of Shipping and Air Transport Enterprises and of their Crews*, FC/WP5(56)1, p. 11 (2 Oct. 1956) and FC/WP5(57)2 p. 17 (6 May 1957). See also OEEC, *Fiscal Committee – Draft Report by the Fiscal Committee on its Activities*, FC(58)2 p. 14 (13 Feb. 1958); OEEC, *Fiscal Committee – Minutes of the 7th Session held at the Château de la Muette, Paris, on Tuesday 25th, Wednesday 26th and Thursday 27th February, 1958*, FC/M(58)2 p. 7 (29 Mar. 1958); OEEC, *Fiscal Committee – Draft Report by the Fiscal Committee on its Activities*, FC(58)2 (Rev. 1) Pt. 1, p. 12 (19 Apr. 1958); OEEC, *Drafting Group of the Fiscal Committee – Draft Report by the Fiscal Committee to the Council*,

of the tax authorities, it could be argued that, only if the employee or the employer has a sufficient level of presence in the work state, can the tax authorities adequately secure the collection of tax in the work state. Again, the background to article 15(2) would not necessarily depend on the deductibility of the remuneration. Nevertheless, the idea that article 15(2)(b) and (c) of the OECD Model serves the common purpose of ensuring that the work state retains its taxation right if the remuneration is recognized as a deduction from profits taxable in the work state has gained popularity in the recent decades, as it is now referred to in the Commentary on Article 15 of the OECD Model, widely recognized in the literature and emphasized by case law.

### 3. Meaning of the Term “Employer” – The “Slaughterhouse Case”

In cases of short-term assignments of employees and hiring-out of labour, where the formal employer is a resident of the residence state or a third state and the economic employer (user) is a resident of the work state, it is essential to establish who an employer is, i.e. the formal employer or the economic employer. If the economic employer is regarded as the employer for tax treaty purposes that pays the remuneration or on whose behalf the remuneration is paid, the conditions of article 15(2)(b) of the OECD Model are not met, i.e. the economic employer is a resident of the work state, and, therefore, the income is taxable under article 15(1) in the work state.

Article 15(2) uses the term “employer”, which is not defined in the OECD Model. With regard to such terms, article 3(2) of the OECD Model states that:

... [a]s regards the application of the Convention... by a Contracting State, any term not defined therein [must], unless the context otherwise requires, have the meaning that it has... under the law of that State.

It is unclear as to whether article 3(2) of the OECD Model refers to a domestic law meaning of “employer” or whether the context otherwise requires. Some states apply article 3(2) of the OECD Model and refer to a meaning under domestic law that generally does not question the formal contractual relationship. Some states apply article 3(2) of the OECD Model and refer to a meaning under domestic law that may ignore the formal contractual relationship and may, therefore, recharacterize the relationship from self-employment to employment or vice versa, or from an employment with one employer to an employment with another employer. Finally, some states interpret the term “employer” according to the object and purpose of article 15(2) of the OECD Model as an economic concept regardless of any domestic law meaning, thereby emphasizing that, under article 3(2), the context may require an autonomous treaty meaning of “employer”.<sup>16</sup> In other words: states have different views on the interpretation of article 15 of

TFD/FC/64 p. 15 et seq. (11 Apr. 1959); TFD/FC/64 (Rev. 1) p. 19 (5 May 1959); OEEC, *Fiscal Committee – Draft Report to the Council*, FC(59)2 p. 19 (21 May 1959); and OEEC, *Council – Second Report by the Fiscal Committee to the Council*, C(59)147 p. 16 (18 June 1959).

16. Avery Jones, *supra* n. 3, at sec. 1. and Burgstaller, *supra* n. 6, at pp. 124-130.

the OECD Model and derive the meaning of the term “employer” for the purposes of the 183-day rule either by reference to domestic law, which may focus more on the form or on the substance, or autonomously from the tax treaty.

Where the formal employer is a resident of the residence state or a third state and the economic employer is a resident of the work state, these different views on the interpretation of the term “employer” may result in double taxation or double non-taxation. In order to illustrate this, the panel considered the “slaughterhouse case”, which was inspired by a decision of the Danish *Højesteret* (Supreme Court, Ht):<sup>17</sup>

#### Case 1

Company W runs a slaughterhouse in State W. It enters into a hiring-out of labour contract with Company R, which carries on the business of filling temporary business needs for butchers. Under this contract, Company R provides Company W with butchers appropriately trained in cutting meat.

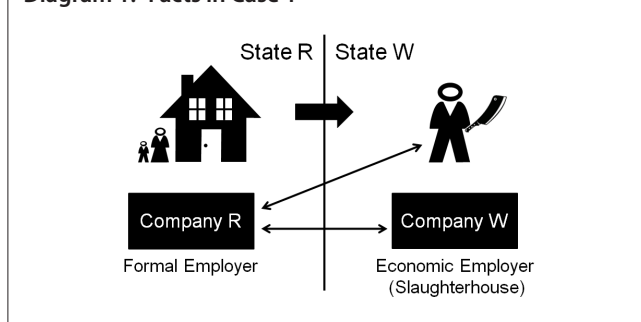
Company R (the formal employer):

- recruits the butchers;
- enters and terminates the contractual arrangements;
- pays the remuneration, social contributions and travel expenses;
- charges Company W an hourly fee:
  - calculated on the basis of the average remuneration of the butchers, other employment costs and the various costs of the enterprise; and
  - containing a profit element;
- provides a substitute worker if a butcher is duly rejected or if a butcher, for whatever reason, for example, sickness, does not arrive at work; and
- has the right to impose disciplinary sanctions.

Company W (the economic employer):

- has the right to reject a butcher due to insufficient qualification;
- provides most of the tools necessary for the work;
- has the authority to instruct the butchers regarding the manner in which the work has to be performed;
- bears the responsibility and risk for the results produced; and
- determines the scope of daily work and the work schedule (although it has to reach consensus with Company R before granting holiday).

Diagram 1: Facts in Case 1



Under the domestic tax law of State R, the meaning of the term “employer” generally refers to the formal civil law relationship. Under the domestic tax law of State W, the meaning of the term “employer” refers to an economic

17. DK: Ht ,17 Apr. 2012, 257/2010/SKM 2012.462.HR, *Parter H1 K/S vs. Skatteministeriet*, Tax Treaty Case Law IBFD.

meaning of employment, i.e. an employee works for a person under its instructions and orders and is mainly integrated into that person's business.

If State R interprets the term "employer" by referring to its domestic tax law, it could regard the formal employer, Company R, as being the employer for treaty purposes. As a consequence, State R applies the 183-day rule, as under article 15(2)(b) the employer is not a resident of State W, and regards the income from employment as taxable only in State R. However, if State W also interprets "employer" by reference to its domestic tax law, it could regard the economic employer, Company W, as the employer for treaty purposes. In this case, State W does not apply the 183-day rule, as under article 15(2)(b) the employer is a resident of State W, and regards the income as taxable in State W under article 15(1). Such a mismatch, also referred to as a qualification conflict, can result in double taxation.

The OECD report "Taxation Issues Relating to International Hiring-Out of Labour" of 1984<sup>18</sup> examined the problems regarding the interpretation of the term "employer" under article 15(2) of the OECD Model. Following this report, the OECD updated the Commentary on Article 15 of the OECD Model (1992) and included explanations of the term "employer" to counter cases of abuse.<sup>19</sup> The exact scope of article 15(2) of the OECD Model, was, however, still unclear. Inter alia, it was unclear in which cases article 3(2) of the OECD Model referred to a domestic law meaning of "employer", especially as there might be no employer definitions under domestic law or such definitions might be based on a withholding agent concept. It was also unclear as to whether the economic meaning of employer provided for in the Commentary on Article 15 of the OECD Model (1992) based on autonomous criteria was relevant only in cases of abuse and what such cases would be or whether it could be applied generally, i.e. in bona fide cases as well.<sup>20</sup>

Following two draft reports from 2004<sup>21</sup> and 2007,<sup>22</sup> the OECD revised the explanations of the term "employer" in the Commentary on Article 15 of the OECD Model (2010). The panel discussed the "slaughterhouse case" based on the revised OECD Commentary on Article 15 (2010), i.e. whether Company R, the formal employer, or Company W, the economic employer, should be regarded as the employer for treaty purposes if the views expressed in the OECD Commentary on Article 15 (2010) are adhered to.

18. OECD, *Taxation Issues Relating to International Hiring-Out of Labour*, in *Trends in International Taxation*, p. 29 et seq. (OECD 1985).  
 19. Para. 8 *OECD Model: Commentary on Article 15* (1992-2008).  
 20. See, for example, De Broe et al., *supra* n. 6, at sec. I; F. Pötgens, *Some Selected Interpretation and Qualification Issues with Respect to Article 15(2) (b) and (c) of the OECD Model*, in *The 2010 OECD Updates: Model Tax Convention & Transfer Pricing Guidelines – A Critical Review*, p. 126 (D. Weber & S. van Weeghel eds., Kluwer L. Intl. 2011); and Pötgens, *Income from International Private Employment*, *supra* n. 6, at ch. VII, sec. 3.2.3.2., sub. E.  
 21. OECD, *Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the Model Tax Convention* (OECD 2004), International Organizations' Documentation IBFD.  
 22. OECD, *Revised Draft Changes to the Commentary on Paragraph 2 of Article 15* (OECD 2007), International Organizations' Documentation IBFD.

According to the OECD Commentary on Article 15 (2010), it is the concept of employment under the domestic law of the work state that is decisive as far as the meaning of the undefined term "employer" in article 15(2)(b) and (c) of the OECD Model is concerned.<sup>23</sup> If the work state considers services to be employment services

[i]t will, therefore, logically conclude that the enterprise to which the services are rendered is in an employment relationship with the individual so as to constitute his employer.<sup>24</sup>

As long as the residence state acknowledges that the concept of "employment" in the domestic tax law of the work state allows that state to tax the employment income in accordance with the provisions of the tax treaty, it must grant relief for double taxation under article 23 of the OECD Model and in doing so it prevents qualification conflicts.<sup>25</sup> However, "the conclusion that, under domestic law, a formal contractual relationship should be disregarded must... be arrived at on the basis of objective criteria"<sup>26</sup> that are further described in the Commentary on Article 15 of the OECD Model as follows:<sup>27</sup>

[t]he nature of the services rendered by the individual will be an important factor since it is logical to assume that an employee provides services which are an integral part of the business activities carried on by his employer. It will therefore be important to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided. For that purpose, a key consideration will be which enterprise bears the responsibility or risk for the results produced by the individual's work.

With regard to the "slaughterhouse case", this means that State W can interpret the undefined term "employer" based on its domestic law concept of employment and can, therefore, regard Company W, the economic employer, as the employer for treaty purposes. Even though the formal contractual relationship is with Company R, State W is allowed to disregard that relationship and to regard Company W as the employer under article 15 of the OECD Model. However, it is allowed to do so only if it arrives to that result on the basis of objective criteria. According to the Commentary on Article 15 of the OECD Model (2010), who bears the responsibility or risk for the results produced by the work of the butchers is a key consideration for concluding that the services provided by the butchers constitute an integral part of the business of Company W. Company W bears the responsibility and risk for the results produced. State W can, therefore, regard, on the basis of objective criteria, Company W as the employer under article 15 of the OECD Model by following its domestic law concept of employment. As a result, article 15(2)(b) of the OECD Model prevents the application of the 183-day rule and State W is allowed, according to the place-of-work-principle, to tax the income from employment in accordance with the provisions of the tax treaty. Consequently, State R must grant relief from double taxation under article 23 of the OECD Model, even though,

23. Para. 8.4 *OECD Model: Commentary on Article 15* (2010).  
 24. *Id.*, at para. 8.7.  
 25. *Id.*, at para. 8.10.  
 26. *Id.*, at para. 8.11.  
 27. *Id.*, at para. 8.13.

under its domestic law concept of employment, Company W is not the employer. This conclusion is supported by the following example provided for in the OECD Commentary on Article 15 (2010), which, to a certain extent, is similar to the “slaughterhouse case”:

Gco is a company resident of State G. It carries on the business of filling temporary business needs for highly specialised personnel. Hco is a company resident of State H which provides engineering services on building sites. In order to complete one of its contracts in State H, Hco needs an engineer for a period of 5 months. It contacts Gco for that purpose. Gco recruits X, an engineer resident of State X, and hires him under a 5 month employment contract. Under a separate contract between Gco and Hco, Gco agrees to provide the services of X to Hco during that period. Under these contracts, Gco will pay X’s remuneration, social contributions, travel expenses and other employment benefits and charges.

In that case, X provides engineering services while Gco is in the business of filling short-term business needs. By their nature the services rendered by X are not an integral part of the business activities of his formal employer. These services are, however, an integral part of the business activities of Hco, an engineering firm. In light of the... [objective criteria], State H could therefore consider that, under the approach described above, the exception of paragraph 2 of Article 15 would not apply with respect to the remuneration for the services of the engineer that will be rendered in that State.<sup>28</sup>

Based on these considerations, the panel concluded that, in the “slaughterhouse case”, there are strong arguments in favour of regarding Company W as the employer for treaty purposes. As State W, under its domestic law, follows an economic meaning of employment and regards Company W as the employer and as that concept appears to confirm the objective criteria referred to in the Commentary on Article 15 of the OECD Model (2010), the domestic law meaning of State W is relevant for treaty purposes if the views expressed in the OECD Commentary on Article 15 (2010) are taken for granted.

However, it could also be argued that the objective criteria do not allow State W, under its domestic law, to disregard the formal contractual relationship with Company R. Accordingly, Company W, the economic employer, could not be considered to be the employer. As, in such a case, the employment relationship for treaty purposes would remain with Company R, the exception of article 15(2) of the OECD Model would apply and State R would be allowed to tax the remuneration. This conclusion could be reached if the following additional factors (objective criteria), noted in the Commentary on Article 15 of the OECD Model (2010), are considered, which may be relevant in determining whether or not there is an employment relationship that is different from the formal contractual relationship.<sup>29</sup>

- who has the authority to instruct the individual regarding the way in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;

- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;<sup>30</sup>
- who puts the tools and materials necessary for the work at the individual’s disposal;
- who determines the number and qualifications of the individuals performing the work;
- who has the right to select the individual who performs the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- who has the right to impose disciplinary sanctions related to the work of that individual; and
- who determines the holidays and work schedule of that individual.

It appears that the question “to which person does the employee’s services form an integral part of the business activities” is only an initial question<sup>31</sup> or a pre-selection test<sup>32</sup> for the purposes of determining who the employer under article 15(2) of the OECD Model could be. If all the objective criteria noted in the Commentary on Article 15 of the OECD Model (2010) are considered, the “slaughterhouse case” might no longer be a clear-cut case anymore. As the fee charged by Company R to Company W is an hourly fee calculated on the basis of all the butchers’ average remuneration, other employment costs and the various costs of the enterprise together with a profit element, it appears to be an indirect charge where the individual’s remuneration is only one of many factors taken into account. Company R also provides a substitute worker if a butcher is duly rejected or if a butcher, for whatever reason, for example, sickness, does not arrive at work. This also means that Company R must continue to pay the remuneration if, for example, a butcher gets sick, while, at the same time, it does not receive any fee from Company W. If Company R recruits a butcher who turns out to have insufficient qualification when starting to work at Company W’s slaughterhouse, Company R must incur the costs of recruiting that butcher or the additional costs for providing a substitute worker, again without receiving any additional fee from Company W. This indicates that Company R bears important risks regarding the failure to perform and, therefore, to a certain extent, the risk that no results are produced by a butcher at all. Even if Company R hired the butchers for the same period as that for which they are hired out, this only indicates that neither Company R nor Company W bears the risk of having unnecessary employment costs when the services of the butchers are no longer required. Only the butchers bear the risk of unemployment. Although Company W, to some extent, determines and controls the qualification required for the work at its slaughterhouse, Company R recruits and selects each individual butcher. In doing so, Company R assesses and ensures sufficient qualification

28. Id., at paras. 8.22-8.23.  
 29. Id., at para. 8.14.

30. For an explanation of this criterion, see paragraph 8.15 of the *OECD Model: Commentary on Article 15* (2010).  
 31. Avery Jones, *supra* n. 3, at sec. 2.  
 32. F. Pötgens, *Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of “Employer” for Treaty Purposes*, 61 Bull. Intl. Fiscal Docn. 11 sec. 4.2. (2007), Journals IBFD.



to minimize its risks and determines the qualifications of the butchers. Another relevant factor could be whether or not, or to what extent, Company R has not only the obligation, in certain circumstances, but also the right to substitute a butcher with another butcher, for example, if a butcher is to be assigned to another client. Thus, Company R determines the work place and schedule of the butchers. Company R must also approve the holidays that are taken by the butchers. If, therefore, all the objective criteria provided for in the OECD Commentary on Article 15 (2010) are considered without a predetermined weighting of their importance, State R could argue that the formal contractual relationship with Company R cannot be disregarded, that Company R must be the employer for treaty purposes and, therefore, that the exception of article 15(2) of the OECD Model can apply.

Table: Employer status based on objective criteria in case 1		
Objective criteria	Company R (formal employer)	Company W (economic employer)
Services an integral part of the business activities <sup>a</sup>		X
Key consideration: responsibility or risk for the results produced		X
<i>Additional factors<sup>b</sup></i>		
Authority to instruct regarding the manner in which the work has to be performed		X
Control and responsibility for the place at which the work is performed		X
Charge of the remuneration (direct or indirect) – only a subsidiary factor <sup>c</sup>	X	
Putting the tools and materials for the work at the individual's disposal		X
Determining the number and qualifications of the individuals	X	X
Right to select the individual and to terminate the contractual arrangements	X	
Right to impose disciplinary sanctions related to the work	X	
Determining the holidays and work schedule	X	X
<i>Other factors?</i>		
Risks regarding the failure to perform, for example, due to sickness or insufficient qualification	X	
Social security obligations	X	
Labour law obligations, for example, break entitlements, parental leave <sup>d</sup>	X	X
a. Para. 8.13 <i>OECD Model: Commentary on Article 15</i> (2010). b. Id., at para. 8.14 c. Id., at para. 8.15. d. The factors not stated in the facts of the case also depend on the labour law in State W.		

#### 4. Commentary on Article 15 of the OECD Model: Clarification?

Prior to the Commentary on Article 15 of the OECD Model (1992), the OECD Model and the OECD Commentary on Article 15 did not include explanations of the meaning of “employer”. However, even after the OECD Commentary on Article 15 (1992), the meaning of “employer” remained unclear. States continued to have different views on the interpretation of article 15 of the OECD Model and continued to derive the meaning of “employer” either by reference to domestic law, which may focus more on the form or on the substance, or autonomously from the tax treaty, and either only in “abusive” cases of international hiring-out of labour or also in bona fide cases.<sup>33</sup> If that lack of clarity is taken into account, the OECD Commentary on Article 15 (2010) provides most welcome clarification on how to interpret and understand the term “employer” for treaty purposes. In addition, all OECD member countries have agreed to this meaning of the term “employer”. With the exception of France with regard to the relevance of the criterion “integral part of the business”,<sup>34</sup> no observations have been made on the OECD Commentary on Article 15 (2010). Accordingly, the OECD Commentary on Article 15 (2010) is a sound solution for resolving interpretation and qualification conflicts and, therefore, for preventing both double taxation and double non-taxation in cases of cross-border short-term employment. As a result, it was argued at the Seminar that the OECD Commentary on Article 15 (2010) should be consulted and taken into account in interpreting tax treaties, and even those that were concluded prior to 2010. In this respect, the Introduction to the OECD Model states that:

... changes or additions to the Commentaries [which are not a direct result of amendments to the Articles of the Model Convention] are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.... [C]hanges to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes.... Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries.... Accordingly,... taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.<sup>35</sup>

However, during the discussion, it was also argued that the changes in the Commentary on Article 15 of the OECD Model (2010) should not be used in relation to tax treaties concluded before 2010. Even the Introduction to the OECD Model states that changes are only relevant when they “are intended to *simply clarify, not change, the meaning of the Articles or the Commentaries*” (emphasis added).<sup>36</sup> It, therefore, has to be assessed whether or not the OECD Commentary on Article 15 (2010) simply clarifies the meaning of “employer”. For this purposes, it is first necessary to interpret the term “employer” disregarding the

33. See *supra* n. 20.

34. Para. 13 *OECD Model: Commentary on Article 15* (2010).

35. Paras. 35-36.1 *Introduction to the OECD Model* (2000-2010). See also paras. 35-36 *Introduction to the OECD Model* (1992-1997).

36. Para. 36 *Introduction to the OECD Model* (1992-2010).

OECD Commentary on Article 15 (2010) and then to interpret the term by taking the OECD Commentary on Article 15 (2010) into account. If the results are the same, the OECD Commentary on Article 15 (2010) simply clarifies the meaning. If the results are different, the OECD Commentary on Article 15 (2010) changes the meaning. Consequently, the term “employer” must first be interpreted without using the OECD Commentary on Article 15 (2010) to determine whether or not the OECD Commentary on Article 15 (2010) simply clarifies, not changes, the meaning of the term “employer”. Considering the OECD Commentary on Article 15 (2010) would, therefore, from a legal perspective, only be an additional but unnecessary exercise when tax treaties concluded before 2010 are in question.

At least with regard to the international hiring-out of labour, the Commentary on Article 15 of the OECD Model (2010) appears to provide for a different meaning of the term “employer” than previously and, therefore, appears not to merely clarify an interpretation suggested by the OECD Commentary on Article 15 (1992). In the OECD Commentary on Article 15 (1992), cases of the international hiring-out of labour were considered to be:

... cases of abuse.... To prevent such abuse... , the term “employer” should be interpreted in the context of paragraph 2. In this respect,... it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks.<sup>37</sup>

Accordingly, the Commentary on Article 15 of the OECD Model (1992) favoured an autonomous economic meaning of the term “employer” based on the context of article 15(2) of the OECD Model to prevent unintended results in cases of the international hiring-out of labour. In contrast, in the OECD Commentary on Article 15 (2010), cases of the international hiring-out of labour are explicitly distinguished from cases of abuse. Where a formal contractual relationship would generally not be questioned for tax purposes under domestic law and, therefore, the exception provided for in article 15(2) of the OECD Model could apply “in unintended situations (e.g. in so-called ‘hiring-out of labour’ cases)”, the OECD Commentary on Article 15 (2010) suggests adopting, bilaterally, a special provision.<sup>38</sup> Where again the domestic law does not offer the possibility of questioning a formal contractual relationship, the OECD Commentary on Article 15 (2010) further argues that it is possible to deny the application of the exception of article 15(2) of the OECD Model in abusive cases and refers to the OECD Commentary on Article 1 (2010).<sup>39</sup> This means that the OECD Commentary on Article 15 (2010) no longer equates cases of the international hiring-out labour with cases of abuse and provides for different solutions compared to the OECD Commentary on Article 15 (1992). Accordingly, in cases of the international hiring-out of labour, the OECD Commentary on Article 15 (2010) provides for a different meaning of the term “employer” than that provided for

37. Para. 8 *OECD Model: Commentary on Article 15* (1992-2008).

38. Paras. 8.2-8.3 *OECD Model: Commentary on Article 15* (2010).

39. *Id.*, at paras. 8.8-8.9.

by the OECD Commentary on Article 15 (1992). Under the OECD Commentary on Article 15 (2010), a formal domestic law meaning in cases of the hiring-out of labour may be relevant for treaty purposes and the exception in article 15(2) of the OECD Model generally applies, unless, bilaterally, a special provision for cases of the international hiring-out labour is adopted. In contrast, under the OECD Commentary on Article 15 (1992), an autonomous economic meaning was to be applied to prevent the application of the exception of article 15(2) of the OECD Model in such cases.

Finally, even when interpreting and applying tax treaties concluded after the adoption of the changes made in the Commentary on Article 15 of the OECD Model (2010), the OECD Commentary on Article 15, by itself, does not predetermine the meaning of the term “employer”. Other means of interpretation, as provided for in articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969)<sup>40</sup> must also be taken into account. In this respect, the object and purpose of the 183-day rule, the context and its relationship to the other provisions of a tax treaty, as well as the history of the changes to the OECD Commentary on Article 15 must be taken into account, and, in that respect, the OECD Commentary on Article 15 (1992) and the OECD Commentary on Article 15 (2010) are not necessarily coherent and conclusive. As the wording of article 15 of the OECD Model has substantially remained unchanged, it is not clear why the term “employer” in article 15(2)(b) and (c) should have different meanings depending on which version of the OECD Commentary on Article 15 was current when the tax treaty in question was concluded.

## 5. PE Risk and Seconded Employees

In cases of short-term international hiring-out of labour, it is often desirable to prevent the source taxation of the employee’s remuneration in the work state by applying the exception in article 15(2) of the OECD Model and, therefore, to regard the formal employer as the employer for treaty purposes. In cases of intra-group secondments, it could, however, be the other way round. It was stated during the discussion that it could be preferable, from the perspective of the enterprises involved, to adopt an economic meaning of the term “employer” and, therefore, not to apply the exception of article 15(2) of the OECD Model. If the economic employer, who is a resident of the work state, is regarded as the employer for treaty purposes, there is less risk that the seconded employee would establish a PE in the work state for the formal employer. As the employee is carrying on the business of the economic employer, the formal employer should not be considered to be carrying on its own business where the employee performs that work and, insofar, the requirements of article 5(1) of the OECD Model, i.e. “a fixed place of business through which the business of an enterprise [the formal employer] is wholly or partly carried on”, could not be fulfilled. In addition, if the employee is present in the work

40. *UN Vienna Convention on the Law of Treaties* (1969), *Treaties* IBFD.

state for more than 183 days, the exception of article 15(2) of the OECD Model is not available, regardless of who is the employer for treaty purposes. From the perspective of article 15(2) of the OECD Model, the meaning of the term “employer” is not relevant, as the place-of-work principle applies. For purposes of establishing a PE in the work state under article 5 of the OECD Model, however, the meaning of the term “employer” may still be important. This is also acknowledged in the Commentary on Article 15 of the OECD Model (2010):

[W]here services rendered by an individual may properly be regarded by a State as rendered in an employment relationship... [with the economic employer who is a resident of the work state], that State should logically also consider that the individual is not carrying on the business of the enterprise that constitutes that individual’s formal employer; this could be relevant, for example, for purposes of determining whether that enterprise [the formal employer] has a permanent establishment at the place where the individual performs his activities.<sup>41</sup>

Interestingly, in its discussion draft “Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention” of 2011<sup>42</sup> and its revised discussion draft of 2012, “OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment),”<sup>43</sup> the OECD suggests that, in the context of a PE risk created by a seconded employee, only an autonomous economic meaning of employer based on objective criteria should be adopted,<sup>44</sup> thereby contrasting to article 15(2)(b) and (c) of the OECD Model without the need to refer to the domestic tax law of the work state.

**6. Meaning of “Borne by a Permanent Establishment”**

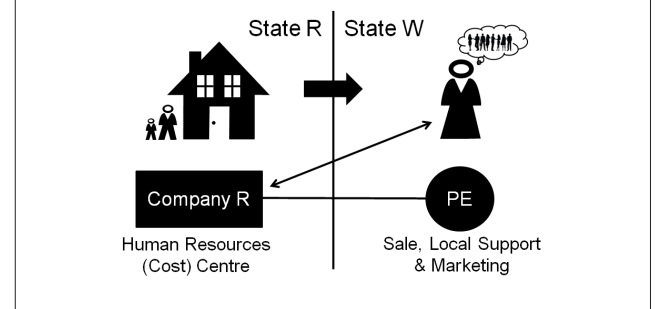
If the remuneration is paid by, or on behalf of, an employer who is not a resident of the work state, the exception of article 15(2) can apply only if the remuneration is not borne by a PE which the employer has in the work state. Therefore, the meaning of the term “borne by a permanent establishment” is important, which was dealt with by the panel on the basis of the following case study:

**Case 2**

Company R, a resident of State R, has structured a large part of its activities along function lines. Inter alia, Company R’s supervision of human resources functions is centralized in State R. In State W, Company R carries on its business through a PE, which is responsible for the sale, local support and marketing of Company R’s products. X is a resident of State R employed by Company R. She is a senior manager in charge of supervising human resources functions within the company. Company R’s head office in State R acts as a cost centre for the human resource costs of the company; periodically, these costs are charged out to each of the PEs of the company, including the PE in State W, on the basis of a

formula that takes account of various factors such as the number of employees functionally belonging to each PE. During the last year, X spent 3 months in State W dealing with human resources issues at the PE located in State W.

**Diagram 2: Facts in Case 2**



In the first solution to this case study presented by the panel, the remuneration would be borne by the PE in the work state if the work exercised by the employee functionally belongs to the PE. This reasoning is based on the Commentary on Article 15 of the OECD Model and case law. As a result of the changes made then, the OECD Commentary on Article 15 (2000) takes the view that the attribution under article 7 of the OECD Model is decisive in the interpretation of the concept “borne by”:

The phrase “borne by” must be interpreted in the light of the underlying purpose of subparagraph c) of the Article, which is to ensure that the exception provided for in paragraph 2 does not apply to remuneration that could give rise to a deduction,<sup>45</sup> having regard to the principles of Article 7 and the nature of the remuneration,<sup>46</sup> in computing the profits of a permanent establishment situated in the State in which the employment is exercised.<sup>47</sup>

The Commentary on Article 15 of the OECD Model, therefore, considers such an attribution against the background of the object and purpose of article 15(2)(c) of the OECD Model. This object and purpose is such that, if the deduction of remuneration is allowed under article 7 of the OECD Model in calculating the profits of the PE in the work state, that state has the taxation rights on this remuneration as compensation for this deduction.<sup>48</sup> The OECD Commentary on Article 15 does not, however, require that the remuneration in the work state to be deducted from the profits. Ultimately, such a deduction is also not decisive under the rules of article 7 of the OECD Model.<sup>49</sup> According to the OECD Commentary on Article 15, what is important is that the costs are deductible as such and for tax purposes, having regard to article 7 of the OECD Model. Again, according to the OECD Commentary on Article 15, this may also be said to be the case if the PE is exempt from taxation in the state of activity, the employer chooses not to take a deduction to which it would normally be entitled or the remuneration is not deductible because

41. Para. 8.11 *OECD Model: Commentary on Article 15* (2010).  
 42. OECD, *Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention* paras. 36-44 (issue 7) (OECD 2011), International Organizations’ Documentation IBFD.  
 43. OECD, *OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)* paras. 35-43 (issue 7) (OECD 2012), International Organizations’ Documentation IBFD.  
 44. Paras. 8.13-8.15 *OECD Model: Commentary on Article 15* (2010).

45. Before the *OECD Model: Commentary on Article 15* (2005), the phrase “is deductible” was used instead of “could give rise to a deduction.”  
 46. Before the *OECD Model: Commentary on Article 15* (2005), the phrase “and the nature of the remuneration” was omitted.  
 47. Para. 7 *OECD Model: Commentary on Article 15* (2000-2010).  
 48. Id., at para. 6.2.  
 49. Id., at para. 7.

of its nature, as might be the case, for example, with regard to employee stock options.<sup>50</sup>

In this respect, it is important to note the decisions of the Netherlands HR of 2007<sup>51</sup> regarding the explanation of “borne by” in article 15(2)(c) of the former Netherlands-United Kingdom Income Tax Treaty (1980).<sup>52,53</sup> In the view of the HR, it was decisive only whether the remuneration under article 7 of the tax treaty (business profits) had to be attributed to the PE, i.e. whether the employment activities were carried out for purposes of the PE. According to the HR, this is in accordance with the purport (*strekking*) of article 15(2)(c) of the OECD Draft (1963), which served as the basis for article 15(2)(c) of the tax treaty in question, i.e. that the work state must deal with the fact that the salary reduces the profits of the PE and that the related reduction in the tax base in the work state should be compensated for by taxation in the hands of the employee. Consequently, the HR held that, in interpreting this concept, the only relevant factor was the attribution under article 7 of the OECD Model. The HR made this clear by holding that:

... it is decisive exclusively whether the remuneration under article 7 of the treaty should be attributed to the PE, i.e. to the work that is performed on behalf of the PE. (Authors' unofficial translation).

In this regard, the relevant criterion is that the work must have been carried out for purposes of the PE. The work must, therefore, functionally be to the benefit of the PE.<sup>54</sup> For this to be the case, there must be a link between the employee's activities and those of the PE in the work state.

It can be argued that, under article 7 of both the OECD Model (2008) and (2010), it is relevant and decisive as to whether the salary costs are attributable to the PE on an arm's length basis by virtue of article 7, i.e. the criterion was and continues to be whether the work has been carried out for purposes of the PE.<sup>55</sup> According to the Authorised OECD Approach (AOA), a dealing must be identified between the head office and the PE, thereby entailing that the salary costs must be allocated to the PE.<sup>56</sup> This view is in line with the decisions of the Netherlands HR<sup>57</sup> and the

German BFH,<sup>58</sup> and the view of the Belgian tax authorities<sup>59</sup> and the US Internal Revenue Service (IRS).<sup>60</sup>

With regard to the case study in question, this could mean that it only has to be established whether or not X carried out her work for the purposes of the PE in State W. This would be the case if there was a functional link between X's activities and the activities of the PE. In this case, such a functional link may be absent, as X is involved in human resources and the PE in sales, local support and marketing, and, therefore, the services provided by X do not relate to the activities of the PE, but, rather, to those of the head office. As a result, it could be concluded that X performed her activities on behalf of the head office in State R. The recharge of the costs to the PE in State W is irrelevant under this approach.

However, the Seminar also discussed whether or not the recharge of the costs to the PE could in all cases result in the PE bearing the remuneration, regardless of any specific functional link. This reasoning is based on the following explanation in the Commentary on Article 15 of the OECD Model (2010):

For the purpose of determining the profits attributable to a permanent establishment pursuant to paragraph 2 of Article 7, the remuneration paid to an employee of an enterprise of a Contracting State for employment services rendered in the other State for the benefit of a permanent establishment of the enterprise situated in that other State may, given the circumstances, either give rise to a direct deduction or give rise to the deduction of a notional charge, e.g. for services rendered to the permanent establishment by another part of the enterprise. In the latter case, since the notional charge required by the legal fiction of the separate and independent enterprise that is applicable under paragraph 2 of Article 7 is merely a mechanism provided for by that paragraph for the sole purpose of determining the profits attributable to the permanent establishment, this fiction does not affect the determination of whether or not the remuneration is borne by the permanent establishment.<sup>61</sup>

If it is understood that article 15(2)(c) of the OECD Model represents compensation for the work state in respect of its reduced tax revenue, there are good reasons, in interpreting the term “borne by”, to focus on the deductibility of the remuneration under article 7(2), i.e. whether or not the remuneration could give rise to a deduction in the work state. Based on the Commentary on Article 15 of the OECD Model (2010), it should not matter of whether there

50. Id., at para. 7.1.

51. NL: HR, 23 Nov. 2007, Decision No. 42 743, BNB 2008/29, Tax Treaty Case Law IBFD.

52. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (7 Nov. 1980) (as amended through 1989), Treaties IBFD.

53. See also F. Pötgens, *The Netherlands Supreme Court and Remuneration Borne by a Permanent Establishment – Third Time Lucky!*, 48 Eur. Taxn. 12 (2008), Journals IBFD.

54. OECD, *Cross-border Tax Issues Arising from Employee Stock Option Plans*, para. 61 (OECD 2004).

55. Arguably, this is not altered by the introduction of paragraph 7.2 of the *OECD Model: Commentary on Article 15* (2010) in anticipation on the AOA under article 7 of the *OECD Model*.

56. Compare paragraphs 28 and 31 of the *OECD Model: Commentary on Article 7* (2010). See also L. Nouel, *The New Article 7 of the OECD Model Tax Convention: The End of the Road?*, 65 Bull. Intl. Taxn. 1, sec. 4.9.2. (2011), Journals IBFD.

57. NL: HR, 9 Dec. 1998, Decision No. 32 709, BNB 1999/267, Tax Treaty Case Law IBFD; NL: HR, 12 Oct. 2001, Decision No. 35 749, BNB 2002/125, Tax Treaty Case Law IBFD; and NL: HR, 23 Nov. 2007, Decision No. 42 743, BNB 2008/29, Tax Treaty Case Law IBFD.

58. DE: BFH, 24 Feb. 1988, I R 143/84, BStBl. II 1988, pp. 819-822, at p. 821, Tax Treaty Case Law IBFD.

59. BE: Circular, 25 May 2005, No. AFZ 2005/0652 (AFZ 08/2005).

60. *US Model Tax Convention on Income: Technical Explanation* p. 49 (15 Nov. 2006), Models IBFD.

61. Para. 7.2 *OECD Model: Commentary on Article 15* (2010). See also OECD, *Discussion Draft on a New Article 7 (Business Profits) of the OECD Model Tax Convention*, pp. 30-31, paras. 18-22 (article 15) (OECD 2008): “[f]or the purpose of determining the profits attributable to a permanent establishment pursuant to paragraph 2 of Article 7, the remuneration paid to an employee of an enterprise of a Contracting State for employment services rendered in the other State for the benefit of a permanent establishment of the enterprise situated in that other State may, given the circumstances, either give rise to a direct deduction or give rise to the deduction of a notional charge, e.g. for notional services rendered to the permanent establishment by another part of the enterprise. In both cases, the remuneration of the employee is borne by the permanent establishment: ...”; and M. Bennett & R. Russo, *Discussion Draft on a New Art. 7 of the OECD Model Convention*, 16 Intl. Transfer Pricing J. 2, sec. 4. (2009), Journals IBFD.

is a direct or indirect deduction, for example, whether the remuneration is deductible as part of a notional fee for services provided to the PE by another part of the enterprise. This issue, although relevant under article 7(2) of the OECD Model in respect of whether or which arm's length mark-up could be applied, "does not affect the determination of whether or not the remuneration is borne by the permanent establishment".<sup>62</sup> In both cases, the employment services provided in the work state are "for the benefit of [the PE]".<sup>63</sup> By this statement, the OECD Commentary on Article 15 (2010) implies that, even if the remuneration is borne by the PE in the work state as part of a fee for services rendered to the PE, the remuneration could be borne by the PE under article 15(2)(c) of the OECD Model. In the case study in question, it may be concluded that, insofar as the remuneration of X is derived in respect of the work exercised in State W and the respective costs are, or should be, charged out to the PE in State W in accordance with the arm's length principle of article 7(2) of the OECD Model, the remuneration is deductible at the level of the PE in State W and is, therefore, borne by the PE under article 15(2)(c). This would mean that the exception of article 15(2) could not apply and the remuneration would be taxable in the work state. A specific or close functional link between the employee's activities and those of the PE would not be required under this approach. Rather, any dealing for which the fee includes remuneration for employment would be relevant under article 15(2)(c) of the OECD Model, even if such a dealing only relates to goods delivered or services provided to the PE.

Another solution proposed in the Seminar focused on the treatment of the employee's remuneration where separate and independent enterprises are involved. The Commentary on Article 15 of the OECD Model (2010) provides the following example, which the case study discussed by the panel was based on:

Kco, a company resident of State K, and Lco, a company resident of State L, are part of the same multinational group of companies. A large part of the activities of that group are structured along function lines, which requires employees of different companies of the group to work together under the supervision of managers who are located in different States and employed by other companies of the group. X is a resident of State K employed by Kco; she is a senior manager in charge of supervising human resources functions within the multinational group. Since X is employed by Kco, Kco acts as a cost centre for the human resource costs of the group; periodically, these costs are charged out to each of the companies of the group on the basis of a formula that takes account of various factors such as the number of employees of each company. X is required to travel frequently to other States where other companies of the group have their offices. During the last year, X spent 3 months in State L in order to deal with human resources issues at Lco.

In that case, the work performed by X is part of the activities that Kco performs for its multinational group. These activities, like other activities such as corporate communication, strategy, finance and tax, treasury, information management and legal support, are often centralised within a large group of companies. The work that X performs is thus an integral part of the business of Kco. The exception of paragraph 2 of Article 15 should

therefore apply to the remuneration derived by X for her work in State L provided that the other conditions for that exception are satisfied.<sup>64</sup>

If an employer provides products or services to customers from many different states and, therefore, an employee is active in all those states for a short period of time, the 183-day rule prevents taxation in all of the states. Accordingly, this prevents an excessive administrative burden and facilitates the international movement of personnel and the operations of enterprises engaged in international trade. Even if the employee's remuneration is deductible in all the states as part of a fee for goods delivered or services provided, article 15(2)(b) of the OECD Model should not preclude the application of the exception to the place-of-work principle. In the example in the OECD Commentary on Article 15 (2010), it is assumed that Kco is the employer for treaty purposes and that Kco provides services to Lco. As a consequence, the exception of article 15(2) of the OECD Model should apply to prevent an excessive administrative burden in State L.

Why should these principles also not apply in a PE context? If an enterprise is structured along functional lines, the employer's head office provides products or services to PEs in many different states and an employee is active in all those states for a short period of time, the 183-day rule should still prevent taxation in all of the states to facilitate the international movement of personnel and the operations of enterprises engaged in international trade. Even if, under the arm's length principle of article 7(2) of the OECD Model, the employee's remuneration is deductible in all the states as part of a fee for goods delivered or services provided, article 15(2)(c) should not preclude the application of the exception to the place-of-work principle, as the remuneration is not borne by the PEs. Only if the employee works for a PE in a similar manner as he would work for an employer, provided that the PE is a separate and independent enterprise, could the employer's presence in the work state and the connection between the employee's services and the PE be regarded as being strong enough to adopt the place-of-work principle.

With regard to article 15(2)(c) of the OECD Model, it is important as to whether the remuneration is attributable to the PE as part of a fee for goods delivered or services provided. If it is attributable as such a fee, no remuneration in respect of an employment is borne by the PE. However, whether the remuneration is charged as part of a fee for goods delivered or services provided between separate and independent enterprises depends on the functions exercised by the enterprises and, therefore, also on who is the employer. In applying these principles in a PE context and to the case study discussed by the panel, the remuneration would not be borne by the PE in the work state if it is concluded that the head office, as a separate and independent enterprise, would be the employer within the meaning of article 15(2)(b) of the OECD Model and, therefore, based on, inter alia, the objective criteria provided for in OECD Commentary on Article 15 (2010). For instance, the costs

62. Id.  
63. Id.

64. Paras. 8.26-8.27 *OECD Model: Commentary on Article 15* (2010).

charged out to the PE in State W bear no direct relationship to the remuneration of X, as the formula takes account of various factors, such as the number of employees functionally belonging to the PE. This would speak, as an objective factor referred to in the OECD Commentary on Article 15 (2010),<sup>65</sup> for the head office in State R providing separate services to the PE, although the charge must be at arm's length under article 7(2), which especially depends on the functions exercised. Consequently, a closer functional analysis could reveal that article 15(2)(c) of the OECD Model should not preclude the application of the exception to the place-of-work principle. Accordingly, the remuneration in respect of the work exercised in the work state would not be borne by the PE. The recharge of the costs to the PE in State W is irrelevant under this approach insofar as the remuneration is only part of a fee for goods delivered or services provided to the PE. This is the case if the PE, as a separate and independent enterprise, would not be the employer within the meaning of article 15(2)(b) of the OECD Model, which must be determined on the basis of a functional analysis.

## 7. Conclusions

The Commentary on Article 15 of the OECD Model (2010) was updated to clarify the concept of employment and employer for treaty purposes. Nevertheless, open questions regarding the conditions of the 183-day rule remain, some of which have been discussed at the 2013 IFA Congress in Copenhagen and outlined in this article. From a policy perspective, it is important to find a balance in the work state between a loss of tax revenue and the compliance costs to the employees, employers and tax authorities, and to assure legal certainty to facilitate the international movement of personnel and the operations of enterprises engaged in international trade. For very short-term assignments, such a balance could be found in presumptions stating that the economic employer in the work state is not the employer for treaty purposes and that the remuneration is not borne by a PE of the formal employer in the work state if, for

example, the employee is physically present in the work state for not more than 60<sup>66</sup> or even 90 days.<sup>67</sup>

65. Id., at paras. 8.14-8.15.

66. In the United Kingdom, Her Majesty's Revenue & Customs (HMRC) take the view that a business visitor spending less than 60 days in the United Kingdom in a tax year, where that period was not part of a longer presence in the United Kingdom, is insufficiently integrated into the business of a UK company to regard the company as the visitor's employer. The 60-day rule only applies to employees who were paid via a non-resident employer's payroll, but whose economic employer may be in the United Kingdom. However, the 60-day rule is also available where the earnings have been recharged to a UK PE rather than a UK resident company. See *Tax Bulletin* 68, pp. 1069-1071, at p. 1070 (2003). This 60-day threshold inspired the Dutch tax authorities. In NL: Resolution, 12 Jan. 2010, No. DGB2010/267M, BNB 2010/110, the Dutch tax authorities also formulate a 60-day threshold for inbound situations, i.e. non-Dutch employees who are assigned to provide services on behalf of a Dutch resident company forming part of the same group of companies (in this respect, a group of companies exists if: (1) a company has an interest of at least one third in the Dutch company; (2) the Dutch company has an interest of at least one third in a company; or (3) a company in which a third party has an interest of at least one third while the third party also has an interest in the Dutch company of at least one third). If the non-Dutch employees provide services in the Netherlands on behalf of a Dutch resident company (and the assignment occurred within a group of companies as defined previously) not exceeding 60 working days within a period of 12 months, the Dutch company is not regarded as being the employer within the meaning of article 15(2)(b) of Dutch tax treaties based on the *OECD Model*. It should be noted that this 60-day threshold rule does not apply: (1) when Dutch resident employees are assigned by a Dutch company to provide services on behalf of non-Dutch companies, i.e. in outbound situations; or (2) in inbound situations if the assignment takes place without a group of companies. In addition, the 60-day threshold takes the working days into account, which differs from the days that are used for calculating the 183-day threshold of article 15(2)(a) of the *OECD Model* (days of physical presence). The resolution seemed to restrict the 60-day threshold to cases of job rotation, but NL: *Memorandum of the Dutch treaty policy* p. 53 (2011) extended this to other situations of secondments within group of companies.
67. The German tax authorities have stated that, from an at arm's length perspective, the costs of a seconded employee are to be allocated to the German receiving company if the employee has worked for more than three months on behalf of that company in Germany, or if the employee worked for less than three months but the activities were repeated several times. The three-month threshold determines whether or not the employee's activities are sufficiently integrated into the business of the German company. As a result, it is used by the German tax authorities to determine whether or not the costs of a seconded employee are to be allocated to a German receiving company from an arm's length perspective. See DE: *Grundsätze für die Prüfung der Einkunftsabgrenzung zwischen international verbundenen Unternehmen in Fällen der Arbeitnehmerentsendung (Verwaltungsgrundsätze – Arbeitnehmerentsendung)* (IV B 4 – S 1341 – 20/01, BStBl. I 2001, pp. 796-800, at p. 797, sec. 2.2 (9 Nov. 2001). The German tax authorities also provide for a rebuttable assumption that the employee's activities are not sufficiently integrated into the business of the German receiving company and, therefore, that the German company is not the economic employer for treaty purposes if the employee worked for less than three months for that company (in all relevant years related to objectively connected activities). See DE: *Steuerliche Behandlung des Arbeitslohns nach den Doppelbesteuerungsabkommen* IV B 6 – S 1300 – 367/06, sec. 4.3.3.2 (14 Sept. 2006).