

## Informal consultation – review of treaty policy positions

### Response by the Chartered Institute of Taxation

#### 1 Introduction

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 We refer to the letter dated 29 July from HMRC's Tax Treaty Team seeking 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.
- 1.3 With regard to Article 5, HMRC's letter refers to the changes to Article 5 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. More time should be allowed for these changes to bed in. However, we also recognise that flexibility in negotiating treaties is important.
- 1.4 With regard to remote working, our members are reporting increasing demand on businesses from employees to perform work remotely across a border for short term and more permanent periods of time and 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.

#### 2 About us

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

### **3 Article 5 – BEPS changes to MTC**

- 3.1 As mentioned above, in our view, the view that the new provisions in Article 5 and, in particular, the new 'preparatory or auxiliary' activities listed in the MTC have not given rise to the problems foreseen is premature, since the treaties that include them have not had much time to bed in. 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.
- 3.2 However, we also recognise the point around flexibility when negotiating treaties and 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 what else is potentially on the table for negotiation. For example, we recognise it may be of value for HMRC to concede the PE point when negotiating a new treaty if it facilitates lower withholding tax rates on items like dividends, interest and royalties. Overall, whether it is a benefit to have a treaty, rather than no treaty as a result of holding firm on the changes to Article 5, depends on its finally agreed terms. The risk of undermining stability and predictability, in particular, the risk of creating a proliferation of very small PEs where the administrative burden and cost would outweigh the tax potentially at stake (the key concerns raised by businesses and other stakeholders in 2016) as a result of the new OECD provisions in Article 5, should therefore be weighed against the benefits that would be provided by the treaty in question.

### **4 Remote working – PE implications**

- 4.1 As mentioned in HMRC's letter, remote working has increased in recent years 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. We understand that many businesses now actively recruit new employees (at both a junior and senior level) in a location agnostic way, and this has led to an increase in the number of employees working remotely from abroad for all or part of their time. There are, of course, many

tax and social security implications with these arrangements, but the risk of inadvertently creating a PE is often a key concern.

- 4.2 Insofar as possible we believe it would be extremely useful to have content dealing specifically with remote workers to help clarify the position. HMRC guidance would be useful, but it would also be very helpful to have an agreed position through the OECD that applies internationally. We recognise that this may be practical only in respect to the fixed place of business type of PE.
- 4.3 With traditional mobility (formal assignments) and business travel it is, generally, clearer that the individual would be working for the benefit of an entity in the destination country, including time physically in an office location there, working on projects with local staff or meeting local customers. In turn, these arrangements are more clear-cut and managed through secondment agreements clarifying the individuals are working for the benefit of the local entity, transfer pricing arrangements, payroll withholdings in the destination and so on. In remote work situations, these hallmarks tend not to be present, as individuals work from a home or holiday accommodation in the destination country and often have no interaction with the local entity, local teams or local customers.
- 4.4 A particular area of remote working that we understand businesses find challenging is global, regional or dual roles that involve time spent working across two or more countries. Articulating and in turn managing the split of activities across jurisdictions to mitigate creating multiple PEs can be complex. Therefore, increased clarity on the PE and income tax/payroll requirements specific to remote work examples, reflecting these newer ways of working, in the regulations and/or guidance would be welcomed. This is particularly relevant as there is such a strong connection between the PE outcome and the requirement to manage any income tax through a payroll.
- 4.5 Difficulties also 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<sup>1</sup>. This inconsistency can make it very difficult for UK businesses operating with international remote workers to understand their PE risk globally. In our view the OECD commentary stating: '*... Where, however, a home office is used on a 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 use that location to carry on the enterprise's business (eg by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise*' is not particularly helpful in the vast majority of situations that have arisen following the pandemic. This is because in these cases the choice to work remotely is the employee's, not the employer's, and it may only be for limited periods of time and not continuously, although many employees are now opting to work from home on a permanent basis.
- 4.6 Issues on a practical level that must be considered include, inter alia, what activities the individual will be undertaking/how long for/whether other staff will be doing similarly in the same location/where the individual will be based. Where individuals are more senior and/or are front office staff then clearly the potential PE issue is accentuated. We recognise that the reality is that all the circumstances need to be worked through to determine the degree of risk in triggering a PE in the country concerned (and indeed in

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<sup>1</sup> For example, we understand that local advice received by a member in relation to Germany and Spain is that in general, the tax authorities would not consider a home office to be at the disposal of the business, and therefore the risk of triggering a fixed place PE is low; whereas local advice received in relation to Switzerland is that whenever a home office significantly replaces a permanent workplace in an office for a longer period, it is generally assumed, for Swiss tax purposes, that the home office is at the disposal of the employer.

the UK when things are the other way round). It is difficult to know what can be done to avoid the need for this sort of in-depth analysis, time-consuming and potentially costly as it is.

- 4.7 The existing OECD guidance on PEs is potentially contradictory in places and more detail/clarification would be welcome. On the one hand, the guidance currently suggests that if there are relatively senior people in a territory making a significant contribution to the business, this activity cannot be preparatory or auxiliary in nature. Nevertheless, if they are working from home in that country including on a permanent basis, instead of being based in an office there, the guidance separately implies that cannot usually be a fixed place of business.
- 4.8 What would assist businesses would be a 'safe harbour' within the OECD commentary. Therefore, we would suggest that the UK government works through the OECD to seek to achieve a revision to the commentary that makes it clear that if, say, conditions (a), (b) and (c) apply then a PE will not arise. A collective simplification measure would be particularly helpful where the tax at stake is not material and would relieve companies and tax authorities of a significant compliance burden, reduce uncertainty, and manage costs.
- 4.9 HMRC have been prepared to offer a safe-harbour for many years on the related matter of 'economic employer', Article 15 (the Employment Article) and the 60 day rule. If all OECD countries could be persuaded to do something along these lines for PE/remote working that would certainly be very helpful.

## **5 Acknowledgement of submission**

- 5.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

5 September 2022