STUDIO
BISCOZZI NOBILI
legale - tributario

September 5, 2016

Sent via email to: TransferPricing@oecd.org

To Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA

Re: Comments on "BEPS ACTION 7: ADDITIONAL GUIDANCE ON THE ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS"

Studio Biscozzi Nobili (SBN) is pleased to provide comments on the public discussion draft "*BEPS ACTION 7: ADDITIONAL GUIDANCE ON THE ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS*".

SBN commends the work that the OECD has undertaken to date in relation to the BEPS Project and offers its assistance in support of its further efforts.

Preliminary remarks

The Public Discussion Draft (the "*Draft*") addresses the issues deriving from the application of the Dependant Agent PEs under article 5(5) applies and Warehouses as fixed place of business to which exemptions under article 5(4) do not apply.

The first scenario is particularly of interest for commissionaire arrangements (and similar contracts) given the changes to the wording of article 5(5) by the post BEPS version, which now no more refers to the "*authority to conclude the contracts in the name of the enterprise*", but rather it is now focused on the facts that the DAPE "*concludes contracts or plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise*".

ASSOCIAZIONE PROFESSIONALE
Corso Europa n. 2 - 20122 Milano
Tel. 02 76 36 931 - Fax 02 78 01 46 / 02 76 36 93 45 / 02 76 01 51 78
nome.cognome@ slta.it - www.biscozzinobili.it
C.F. e P. IVA 12607090151

Given the foregoing, we think that the examples exposed, although adopted for the mere clarification of the principles discussed, are of great utility to the discussion about the AOA and the deductibility of internal dealings by the permanent establishments with the related head offices.

More in general, and in line with the 2010 Attribution of Profits Report), both the Authorities and the taxpayers are required to:

- provide a functional and factual analysis of the (not only people) functions (and thus risks and assets consequent) ascribed to the (DA)PE;

- analysis of how much profit is attributable to the (DA)PE.

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Answers and Comments

For your easy reference, please find hereunder answers and comments numbered in accordance to the Draft.

- DAPE Subject

1. In our opinion, the order of application between art. 7 and art. 9 should follow the hierarchy stated in the Model. The existence of a DAPE and the assessment of an AOA approach by the domestic legislation and practice entail the determination of a proper remuneration of each risk and function borne by the DAPE and not by the head office. Art. 9 will be then useful to clarify that any measurement of such remuneration (and the degree of which becomes "proper") shall be dealt at arm's length.

2. Yes, we do agree with the analysis.

3. Yes, we do agree with P&L of DAPE under Example no. 1.

4. The conclusion should in principle be the same, since the "relevant business activity" approach (RBA) is in any case based on functions served by the (DA)PE. However, differences can arise since AOA allows the (DA)PE to gain a taxable income in Country B even if the Enterprise has incurred in a loss in its business lines (see for reference "*Report for attribution of Profits to Permanent Establishments*", Part I, II, III – para. 70, page 25).

5. Our answer is negative. The people functions are required to establish how the (DA)PE is construed. On the other hand, the commission fee paid to SellCo may vary significantly, and people hired by DAPE could be served to functions other than the ones utilized by SellCo. In other words, it does not appear that there is an absolute connection between the people functions and the commission fee function.

6. Yes, we do agree with the P&L of DAPE under Example no. 2.

7. See under no. 4 above.

8. In our opinion, DAPE should bear such risks (inventory and credit risks) under art. 7 analysis: however, such risk would need to be adequately remunerated by Prima by paying part of the commission (paid in the example to SellCo) to DAPE. Additional "free" capital to the DAPE could also be required.

9. We think that the views of the fact under Example 2 are in line with the 2010 Guidance (see paragraph 235, where it states that "*The functional and factual analysis may show that certain risks, for example, inventory and credit risks under a sales agency arrangement, belong not to the DAPE but to the non resident enterprise which is the principal*"). The separation of the risks between "legal" and "functional" ownership of a risk (and the hierarchy between art. 7 and art.9 stated under our answer no. 1 above) is thus a mere consequence of the application of AOA approach, whereby the DAPE profit does not depend necessarily by the head office global profit.

10. Yes, we do agree with the P&L of DAPE under Example no. 3.

11. See under no. 4 above.

12. Yes, we do agree with the P&L of DAPE under Example no. 4.

13. Again, the risk attributed to DAPE is a tax qualification under AOA approach (which would not apply under RBA approach), and this is a consequence not of a "juridical allocation" – whereby SellCo does not take over this risk – but rather of an "economic attribution" functional to the need to share the taxing right between source and residence country.

- PE definition and "preparatory and auxiliary" nature of art. 5(4) exceptions

14. Yes, we do agree with the P&L of WR PE under Example no. 5.

15. Yes, we do agree with both Scenarios B and C of Example no. 5.

16. Yes, because the PE should allocate the asset in its (tax-wise) statement, and should also deduct the depreciation provided for under applicable tax law. The presence of personnel is not in our view connected with the investment return on an asset.

17. Yes, we think this approach is proper and correct. The investment return should be based on an arm's length principle, thus comparing similar investment returns as existing on the applicable markets.

18. In our opinion, the answer depends on whether the "significant people functions" (performed by other parties) are working for the benefit of the PE or not. In positive case, it would be reasonable that these people functions are remunerated by the PE, and the PE should take the responsibility to be remunerated as well (by the WRU's Head Office) for this activity.

19. In our opinion there would be no difference.

20. See our answer under no. 4 above. We note, however, that an RBA approach would lead – especially under Scenario B – to an higher taxable income of PE in the source country.

21. We think that the major concern deriving from the AOA approach derives from (i) the recognition of internal dealings by both the countries involved (Head office country and PE country); (ii) adoption of credit method for PE incomes by Head Office countries; and (iii) consequent to (ii), income qualification by the two different tax jurisdictions and foreign tax credit recognition in the residence country of the Head office.

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Truly yours,

Marco Abramo Lanza