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A.149/JBR

Public Discussion Draft – BEPS Action 7: Preventing The Artificial Avoidance Of PE Status

Dear Ms. De Ruyter,

The Swiss Bankers Association (SBA) is the leading professional organisation of the Swiss financial centre. Its main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both at home and abroad. The SBA was founded in 1912 in Basel as a trade association and today has 317 institutional members and approximately 18'500 individual members.

The SBA would like to thank the OECD for the opportunity to comment on the discussion draft on Action 7: preventing the artificial avoidance of PE status. The SBA has been in close cooperation with BIAC, while it was preparing its comments and can therefore basically support them.

In addition to the points raised by BIAC the SBA would like to mention issues which are particularly relevant for the banking industry.

1. Particular Features of the Financial Sector

The financial sector is highly regulated. Parts of the regulations are dealing with restrictions, which directly affect the chain of distribution of services and products cross border. Active distribution (soliciting) of products and services is in most countries only possible with an authorisation from the competent authority at the place of distribution. This refers in particular to the financial products that are not traded on a stock exchange, to mutual funds and to insurance policies. Therefore most of the activities performed are based on a concept of passive solicitation i.e. customers seek contact with a bank and ask for services. Such remote solicitation does not and should not fall under the concept of a PE.

Distribution channels for services have developed: in addition to so called traditional channels like telephone, facsimile or direct visits new channels enhanced by modern technology like Internet, smart tools like smart phones, tablets and most recently smart television are nowadays also in use. These new communication technologies are substitutes to existing channels. In this regard there is no ground for considering these new communication tools as creating a PE, these are rather to be associated with activities traditionally considered as preparatory and auxiliary.

2. Artificial Avoidance of PE Status Through Commissionaire Arrangements

As a matter of principle, the SBA would strongly recommend not to widen the wording of the OECD model tax convention by adopting formulations such as: "engages with specific persons in a way that results in the conclusion of contracts". Doing so would create great uncertainty and as consequence may lead to a massive increase in the number of disputes between States, which would imply additional costs. In this respect it is worth noting, that the recently published Public Discussion Draft on Action 14 – Make dispute resolution mechanisms more effective – highlights the difficulties encountered with respect to dispute resolution mechanisms. As a consequence, and even if we consider that there is some room for improvement, one should be very careful before adopting measures that would lead to more disputes, because of the actual remote chances of finding fast and cost effective solutions through dispute resolution mechanisms.

In this context, the SBA would further underline that the offering over Internet should not be considered as an activity that results in the conclusion of contracts.

Furthermore, the activities of intermediaries typically remunerated through finder's fees should not lead to the creation of a PE.

3. Service PE

The SBA strongly recommends not to include any rules or proposals regarding Service PE in the BEPS project. The Service PE concept is not covered by article 5 of the OECD model tax convention and should not be introduced via (respectively covered by) the BEPS project.

For example, rules applying for constructions sites (which are fixed places) cannot be compared and simply adapted to the offering of services made without any fixed presence in a country.

The SBA is of the opinion that the OECD should abstain from defining rules on Service PE because such rules would trigger a need for additional clarification and definitions of issues associated with it. This cannot be properly addressed without a comprehensive reshuffle of the PE concept. It is our understanding however, that this is not the aim of BEPS¹.

¹ See Public Discussion Draft – BEPS Action 7: Preventing The Artificial Avoidance Of PE Status, page 10: "[...] these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income."

