SwissBanking

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A.149/JBR

Revised Discussion Draft – BEPS Action 7: Preventing the Artificial Avoidance of PE Status

Dear Ms. De Ruiter,

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 18'200 individual members.

The SBA would like to thank the OECD for the opportunity to comment on the revised discussion draft on Action 7: preventing the artificial avoidance of PE status.

We would like to build on the comments we made on 9 January 2015 and highlight the few following points that need in our opinion further consideration.

1. Coherence within the BEPS Project

We think that there should be an overall coherence within the BEPS project, which is missing at this stage according to us. To illustrate this, we would like to mention the three following examples:

- Deadline for the follow-up work on attribution of profits issues related to Action 7 should be aligned with the deadline set for Action 7: the deadline for the follow-up work has been set for the end of 2016, whereas the BEPS project should be completed by the end of 2015. We consider that the issue of attribution of profits related to Action 7 is crucial for Action 7 and should be handled within Action 7, with no time lag. Not treating attribution of profits related to Action 7 together with Action 7 itself does not make much sense according to us.
- Relation with Action 1 (Addressing the tax challenges of the Digital Economy) should be clarified: the revised draft on Action 7 does not contain any reference to

Action 1, whereas in “Action 1: 2014 Deliverable” the issues related to permanent establishments appeared to be crucial. For the sake of clarity, a reference to Action 1 in Action 7 would have been useful.

- There are neither common concepts nor clear delimitations with respect to connected vs. related persons: Action 7 foresees (see revised discussion draft p. 13) that “a person shall be ***connected*** to an enterprise if one possesses at least 50 per cent of the beneficial interests in the other”, whereas in the context of Action 2 “Neutralising the Effects of Hybrid Mismatch Arrangements” ***related*** persons are defined as follows: “Two persons are related if they are in the same control group or the first person has a 25% or greater investment in the second person or there is a third person that holds a 25% or greater investment in both.” (see “Action 2: 2014 Deliverable”, Definitions, p. 69). There is therefore no alignment of the concept(s) nor of the thresholds across the various actions. We think that a 50% investment, which corresponds to the threshold allowing full consolidation according to IFRS, would be the most appropriate.

2. Artificial avoidance of PE status through *commissionaire* arrangements and similar strategies

Paragraphs 32.5 and 32.6, page 15 of the revised discussion draft should be further clarified. It is very difficult to assess what the phrases "or negotiates the material elements of a contract" and "concludes contracts or negotiates the material elements of contracts" mean for the service industry and namely for the financial sector. In particular for the banking industry where employees are visiting clients outside the country of residence of the bank further guidance should clarify what kind of activities are regarded as material elements of a contract. In this case, an employee of a bank has typically no authority to conclude any contract with clients or to make any binding offer since such contracts/offers are subject to extensive checks and controls in the head office of the bank. However, an employee might present an investment proposal to a client but does not negotiate or add/remove anything to/from the proposal. Therefore such an activity cannot be regarded as a "material element of the contract". We would like to stress that such situations do not only occur in the banking sector but are an issue for all international groups in the whole service industry. As a consequence, the definitions contained in paragraphs 32.5 and 32.6 should be clarified in order to be able to assess whether an activity leads to the creation of a permanent establishment or not. For the sake of completeness we would also like to point out that a permanent establishment can only be established in case of a physical presence in a country (e.g. travelling employee in the example above). A permanent establishment can never result from an activity performed via remote means (i.e. by phone, e-mail or Internet).

3. Artificial avoidance of PE status through the specific activity exemptions

We strongly disagree with the content of the last sentence of paragraph 21.2, page 24 of the revised discussion draft, according to which the sole amount of assets or employees can lead to the conclusion that no preparatory or auxiliary activity is given. For example outsourcing activities can lead to situations where a large number of persons are employed in a country but only auxiliary activities are performed. Such activities typically do not add much to the value chain (e.g. production of reports for internal purposes). In addition, it should be made very clear, that in case an international group is

present in a country with a subsidiary and the subsidiary is providing services to the headquarter (e.g. providing the management of the headquarter with reports) no permanent establishment is assumed. Such situations should be handled by applying transfer pricing rules and not by assuming that there is a permanent establishment (in addition to the subsidiary) in a country.

4. Fragmentation of activities between related parties

Concerning paragraph 30.3, page 32 of the revised discussion draft, it should be made very clear that several types of preparatory and/or auxiliary activities in a country do not lead to the creation of a permanent establishment simply on the basis of the "fragmentation of activities between related parties" concept. The concept of fragmentation should only be applied in cases where activities are artificially split to avoid the creation of a permanent establishment that would have been clearly given without the fragmentation. This is not the case for example if a bank maintains a representation office in a country (i.e. performing only auxiliary activities such as socializing in the said country) and if an employee of the same bank (but employed in the country of the headquarter) is travelling to this country to meet clients and perform other types of auxiliary activities such as providing the clients with generic financial research reports. In our view, the concept of fragmentation should be refined.

The SBA thanks the OECD for taking due account of these comments.

Yours sincerely,
Swiss Bankers Association

Regula Häfelin Jean Brunisholz