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Assignments abroad

Determining when they constitute a permanent establishment for a foreign enterprise in the host country

Master Thesis in Commercial and Tax Law (Tax law)

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Abstract

Article 5 of the OECD (Organisation for Economic Co-operation and Development) MTC (Model Tax Convention) provides a definition of what constitutes a permanent establishment (PE). A globalising business world brings forth situations that weren't necessarily anticipated to be covered by existing regulation, thus the definition of a PE is growing harder to identify in practice. In an effort to harmonise the existing regulation with the globalised world the OECD has proposed amendments to article 5 of the OECD MTC and the commentary related thereto. One of these changes is related to when the presence in a country of a foreign enterprise's personnel can constitute a PE for the foreign enterprise in the host country.

Though the OECD MTC and the commentary related thereto have questionable legal value, they in many cases constitute valuable preamble status and guidelines for the application of a tax treaty between contracting states. This is further proven by case law where in many cases the courts seek guidance from the commentary in their rulings and by the fact that many tax treaties are based on the text of the MTC.

Case law provides that the main rule provided in article 5.1 of the OECD MTC, that a PE is "...a fixed place of business through which the business of an enterprise is wholly or partly carried on.", holds the answer as to when seconded employees can constitute a PE for the foreign enterprise in the host state. In determining whether such business is carried on courts seek the context of the activities performed by the seconded employee. Factors

such as which enterprise pays the remuneration, bears the risk or responsibility, and maintains power to instruct and terminate the employment contract are decisive.

This existing method is in line with the proposed amendment to article 5's commentary. The amendment provides a reference to a list of objective factors to be tested in order to determine whether the seconded employee performs services for the foreign enterprise or the host enterprise. If the employee performs services for the foreign enterprise the foreign enterprise is deemed to carry on business in the host country and thus meets the definition of constituting a PE in accordance with article 5.1 of the OECD MTC.

List of Abbreviations

BEPS	Base Erosion and Profit Shifting
CFA	Committee of fiscal affairs
CTPA	The Centre for Tax Policy and Administration
EBIT	The European Business Initiative on Taxation
EU	European Union
IL	Inkomstskattelag (Swedish income tax law)
IP	Intellectual property
ITAT	Income Tax Appellate Tribunal
JFTC	Japan Foreign Trade Council
MSAS	Morgan Stanley Advantage Services Private Limited
MSCo	Morgan Stanley and Co. Inc.
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Cooperation
PE	Permanent establishment
TEI	Tax Executives institute
TP	Transfer pricing
VCLT	Vienna Convention of the Law of Treaties

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I Introduction

I.1 Background

Article 5 of the OECD (Organisation for Economic Co-operation and Development) Model Tax Convention (MTC) provides a definition for what constitutes the concept of a permanent establishment (PE).¹ The history of the concept of a PE is as old as the MTC itself, and dates as far back in time as to 1927 where it evolved from draft conventions from the League of Nations.² The description of the concept is important, as the purpose of the term is to determine the right of a contracting state to tax the profits of an enterprise in another contracting state.³

Despite the importance of article 5 and the long history of the concept of a PE, issues have emerged when it comes to relating it in practice. Companies are spending an extensive amount of time and money on determining - and allocating profits to - PE's. In fact surveys indicate that 89 percent of multinational companies are focusing their attention to concerns regarding PE's and a whole new employee stock is needed just to handle the potential exposures or opportunities that arise when PE:s are created abroad. This is partly due to the fact that in today's economy companies operate on a more global level, taking advantage of the possibilities of structuring their organisations worldwide and partly due to that these complex organisational structures raise new tax questions, which weren't necessarily anticipated to be covered by the existing international law regarding PE:s when created. With the expansion of companies across country borders, tax authorities around the globe are taking more aggressive standpoints and approaches to prohibit tax losses and evasions.⁴

¹ OECD Model Convention on Income and Capital 2010 Article 5.

² League of Nations Double Taxation and Tax Evasion Report, 1928 Chapter I Impersonal taxes, Article 5.

³ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 1.

⁴ PWC, Permanent Establishments 2.0, At the heart of the matter, 2013.
http://www.pwc.com/en_GX/gx/tax/publications/assets/pwc-permanent-establishments-at-the-heart-of-the-matter-final.pdf.

These changes have been recognised as a pressing concern and resulted in governmental and private sector discussions on what measures should be taken.⁵ After identifying issues with the interpretation of article 5 of the OECD MTC regarding the existence of a PE, a project has started to rewrite and clarify the article.⁶

In the drafts and revised drafts that have followed in recent years proposing changes to article 5 of the OECD MTC, 25 issues have been brought up.⁷ One of these issues regards when the presence in a country of a foreign enterprise's personnel can constitute a PE for the foreign enterprise in the host country.⁸ This is an issue increasing with organisations globalised structures, as it is common that multinational enterprises send key employees on assignments to work at affiliated companies abroad.

The consequences of an employee on assignment creating a PE in the host country has an impact on the company in the form of costly and time consuming allocations of profits that must be made to the PE in the host country in accordance with article 7 OECD MTC. Furthermore there are consequences for both the employee and employer regarding payments of social security, which differ depending on the existence of a PE.⁹

Cases regarding the determination of when the presence in a host country of a foreign enterprise's personnel can constitute a PE have emerged worldwide, with many cases originating from India.¹⁰ Also in Sweden this issue has received an increased amount of attention, somewhat due to the requirements within Swedish law to register a foreign company for social security payments when that company has personnel in Sweden. This registration can be used as a base for the Swedish Tax authority to make further investigations into the

⁵ 2nd Annual Centre for Tax Policy and Administration Roundtable: Business Restructuring January 26-27, 2005 <http://www.oecd.org/tax/transferpricing/2ndannualcentrefortaxpolicyandadministrationroundtablebusinessrestructuring.htm>.

⁶ Approval of the mandate - Background Information OECD. <http://www.oecd.org/tax/transferpricing/approvalofthemandate-backgroundinformation.htm>.

⁷ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 and OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012.

⁸ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 chapter 7, p. 18.

⁹ 2 kap. 1 § och 4 § socialavgiftslagen (2000:980). Swedish tax law.

¹⁰ For example: Morgan Stanley and Co., United States v. Commissioner of Income Tax. Civil Appeal No. 2914 of 2007. 9 July 2007. Supreme Court of India, Tekmark Global Solutions LLC v the Deputy Director of Income Tax. Case No. ITA No. 671/Mum/2007. 23 February 2010. Income Tax Appellate Tribunal.

potential existence of a PE.¹¹ Though evidently a worldwide issue, there is however today no clear description of when a foreign enterprise's personnel can constitute a PE in the host country.

1.2 Purpose

The purpose of this thesis is to determine in which circumstances the presence in a country of a foreign enterprise's personnel can constitute a permanent establishment for the foreign enterprise in the host country.

1.3 Delimitation

The proposed draft of amendments to article 5 of the OECD MTC drafts carry 25 issues in determining the existence of a PE in accordance with article 5 of the OECD MTC.¹² Each issue is not related to the purpose of this thesis, why only issue number 7 regarding a foreign enterprise's personnel in the host country is brought up in depth.¹³

A short account of the process of allocation of profits to a PE is accounted for. However, the purpose of reviewing the consequences of personnel constituting a PE is to strengthen the need for an answer to the main purpose of this thesis which is, *when* a foreign enterprise's personnel can constitute a PE for the foreign enterprise in the host country. Therefore the account of profit attribution PE:s is kept short. Furthermore the process of allocation of profits has many issues in itself and could constitute a Transfer Pricing (TP) investigation taking up an entire thesis of its own.¹⁴

In regard of determining whether a PE exists and when reviewing the consequence of taxation and employee benefits of the individual on assignment, the topic of economic employer verses legal employer is an underlying issue. However this too is a subject that in itself constitutes a broad spectrum of issues within tax law and therefor it cannot be examined in

¹¹ 7 kap 1 § Skatteförfarandelagen (2011:1244). Swedish tax law.

¹² Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 and OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012.

¹³ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 chapter 7, p. 18.

¹⁴ Issues with the allocation of profits have led to amendments to article 7 OEC MTC. See 2010 Report on the attribution of profits to permanent establishments 22 July 2010.

any depth within this thesis why no analysis of the term is made during the analysis of the suggested amendments to article 5 of the OECD MTC.

A subject not far off from this thesis topic relates to the OECD presented Action Plan on Base Erosion and Profit Shifting (BEPS) presented in July 2013.¹⁵ It identifies 15 tax issues to be addressed in a timeframe of 2 to 2.5 years. Several actions within this action plan could constitute interest to, or affect this thesis's outcome. For example action 6 revolves around preventing treaty abuse of article 5.5 of the OECD MTC on agency PE:s. Furthermore action 7 includes plans on changing the definition of a PE in the OECD MTC to prevent artificial avoidance of PE.s. If the definition of a PE changes, it could have an effect on the outcome on when seconded employees can constitute a PE. Action 1 is to address the challenges emerging due to a digital economy. Though it may seem far-fetched to say that it could have consequences for the secondment of employees, an unfavourable comparison can be made with the hiring out of servers and the secondment (hiring out) of employees. The question could be asked whether they are so very different, and if regulation is changed on one, it is not impossible that it will affect the other. However, though important to mention this action plan, it is also not possible to address it in this thesis. Each action of the OECD BEPS plan is a topic large enough to cover a thesis of its own and furthermore though actions are identified it does, today, not suggest any clear amendments to the OECD MTC.

1.4 Method and materials

In order to give an account of the background and current legislation determining the existence of a PE a descriptive method is used.¹⁶ This involves collecting factual information in order to grant the reader a comprehensive, unbiased perception of the existing regulation. Due to the fact that the largest economic consequences of personnel of a foreign enterprise constituting a PE in a host country are for the enterprise, the thesis is written mainly through a business perspective.

In order to reach clarity in the in the practical application and interpretation of the laws governing PE:s, the OECD commentary on article 5 is used simultaneously when present-

¹⁵ OECD Action Plan on Base Erosion and Profit Shifting, OECD(2013).

¹⁶ Sandgren, C, (2007), Rättsvetenskap för uppsatsförfattare, Författaren och Nordstedts Juridik AB, Stockholm, uppl. 2:4, s. 66.

ing article 5 of the OECD MTC.¹⁷ In this respect it is necessary to examine the application, interpretation and legal value of the OECD MTC and the OECD MTC's commentary through the Vienna Convention of the Law of Treaties¹⁸ (VCLT), why a chapter on this subject is included early in the thesis.

In order to reach insight to the practical issues regarding the determination of a PE during assignments abroad, cases and suggested amendments are used. Six cases are accounted for, of them two are Swedish, three are Indian and one is Dutch. The first Swedish case, *X AS*, is from the highest court of law in Sweden (Högsta Förvaltningsdomstolen)¹⁹, and the second case *Webbase international*²⁰, from the second highest court of law (Kammarrätten i Göteborg) was never brought on to Högsta Förvaltningsdomstolen. They are both valuable due to the fact that they reflect a set of cases where the issue of seconded employees creating a PE in a host country is baked into other factors that can constitute a PE. Furthermore the ruling of the court grants an interesting insight as in both cases the court has granted high value to the OECD MTC and its related comments. Three Indian cases are chosen due to the fact that the Indian courts are some of the leading courts in the amount of judgments produced in this field.). In the *JC Bamford Excavators Ltd*²¹ case from April 2014 from the Indian Income Tax Appellate Tribunal (ITAT), government body of international law and justice.²² It holds value due to the fact that it is one of the most recent cases in the field. The *Morgan Stanley*²³ case from highest court of law in India, The Supreme Court of India, is one of the few cases that revolves around the exact situation where seconded employees have been deemed to constitute a PE in the host country. It is a leading case in the field of this subject and has been exemplified when the public was granted time to issue comments of the suggested amendments to the comments of article 5 of the

¹⁷ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment.

¹⁸ Vienna Convention on the Law of Treaties, Vienna 23 May 1969, United Nations.

¹⁹ Högsta Förvaltningsdomstolen was earlier called Regeringrätten.

²⁰ Case 6479-12 Webbase Enterprises Limited, Kammarrätten i Göteborg 2013-09-16.

²¹ Delhi in DDIT v. JC Bamford Excavators Ltd (Order dates 12-3-2014).

²² <http://itat.nic.in>. Page visited 2014-04-20.

²³ Morgan Stanley and Co., United States v. Commissioner of Income Tax. Civil Appeal No. 2914 of 2007. 9 July 2007. Supreme Court of India.

OECD MTC.²⁴ The *USA vs. India* from the ITAT court case in turn rules on a situation where seconded employees were not deemed to constitute a PE for the foreign enterprise. These cases are chosen as comparison on the rulings and may grant insight on what prerequisites need to be fulfilled in order for seconded employees to constitute a PE. The remaining case from The Netherlands, *X Ltd.*²⁵, is ruled in the court of Appeal of the Hague and revolves a situation where seconded employees became a question of a depend agency. The cases are accounted for in Chapter four in order by date of ruling as to follow the legislative development.

An empirical method²⁶ is used in presenting the suggested amendments and public discussion drafts to suggested amendments relating to article 5 of the OECD MTC. These are presented in order to grant insight to issues in determining a PE experienced by the OECD, public bodies of Contracting States and private enterprises. Though these suggestions and discussion drafts cannot be deemed to fall in under anything but doctrine in the law-hierarchy today, they are empirical material; material that has been collected through experience, studies and surveys. This material may well become the foundation for the future changes to the article and thereby grow to a preamble status within the law-hierarchy. With regard to reaching an answer to this thesis topic, these drafts and discussions are deemed to hold a certain degree of value and are used to find practical issues arising today and determining what the future legislation will hold when it comes to determining when assignments abroad can constitute a PE. Furthermore, comments on the discussion drafts made by the public are used in order to shed light on the practical difficulties in the application of article 5 of the OECD MTC. A few public comments have been selected to each discussion draft, the comments provided in this thesis are from a mixture of companies in order to create diversification in opinion, furthermore not all companies had opinions on issue 7 regarding assignments abroad, why these comments are not accounted for as they have no relevance to this thesis topic.

It is stated in the delimitation above that the process of allocation of profits is not dealt in any depth with in this thesis. The consequence however, of reaching an answer to the pur-

²⁴ Hans Pijl, Deloitte, Belastingadviseurs B.V., 30th January 2012, page 8-9. Accessible at: <http://www.oecd.org/ctp/treaties/49668097.pdf>.

²⁵ *X Ltd. v Belastinginspecteur*. Case No. BK 07/00604 July 15 2008. The Court of Appeal of The Hague.

²⁶ Sandgren, C, (2007), *Rättsvetenskap för uppsatsförfattare*, Författaren och Nordstedts Juridik AB, uppl. 2:4, s. 40-43.

pose of this thesis, is that the answer as to which Contracting State will have a right to tax the profits made by the activity of a foreign enterprises personnel in the host country is somewhat reached. It is therefore essential to maintain a neutral perspective in the investigation of when a PE can be deemed to exist under mentioned circumstances. This neutrality entails comparing the existing law and suggested amendments to the law through both a state and enterprise perspective.

1.5 Terminology

The process of a foreign enterprise sending its personnel to work in a host country is referred to in different manners. The OECD in its public discussion drafts uses the term secondment.²⁷ Companies however frequently use the term *assignments abroad*.²⁸ This thesis will attempt to maintain a consistency in the terminological usage by referring to the term secondments, however it is necessary at times recite the different terms used by different sources, why the terminology will differ to a certain extent.

The term *Contracting State* is used through out the thesis. This refers to the states that are party to an international tax treaty.

1.6 Outline

The second chapter of this thesis grants an account for the OECD, its history, functions and the application, interpretation and legal value of the OECD MTC.

In the third chapter of this thesis, current regulation in determining the existence of a PE is presented. This involves breaking down article 5 of the OECD MTC in the purpose of presenting the reader with thorough understanding of the different situations in which a PE can legally be deemed to exist today as well as an understanding as to where there may exist holes in the current regulation. In addition, a short account is given of the legal consequences, of constituting a PE.

²⁷ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 and OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012.

²⁸ For example: <http://www.assignmentsabroadtimes.com/global-jobs/index.php?ct=engineer>.

Following in the fourth chapter is an account of current case-law where the question of when the presence in a country of a foreign enterprise's personnel can constitute a permanent establishment for the foreign enterprise in the host country has been tried.

In the fifth chapter an account is given of the current suggested amendments and discussion drafts of article 5 of the OECD MTC along with the public opinion of said suggestions.

An analysis, with background to the collected and presented information, as to when secondments de facto can lead to constituting a PE in the host country is conducted in the sixth chapter. Finally, the purpose of the essay will be answered in the conclusion in the seventh chapter.

2 The OECD

2.1 Introduction

The OECD and its published works play a significant role in this thesis. It is therefore important to first understand the OECD as an organisation. In order to do so, the history behind its origination and how it functions is described. Further this chapter introduces the OECD MTC, why a thorough description of the MTC's purpose, applicability and interpretation is accounted for.

Because of its nature as an international guidance and role model for bilateral tax treaties the legal value of the OECD MTC is important to unravel. Therefore this chapter additionally strives to ascertain the legal value of both the articles themselves in the OECD MTC and the commentary to the OECD MTC.

2.2 An introduction to the OECD

2.2.1 History

The OECD originates from 1948. Then, the Organisation for European Economic Cooperation (OEEC) was established by a number of states to implement the Marshall Plan, a reconstruction of the European continent withered with war. Governments acknowledging the interdependence of the economies was that led the way to change. The OECD was later born in 1960 when the USA and Canada joined the organisation and the members signed the OECD convention.²⁹

Today the OECD consists of 34 members who together strive to identify international problems and plans to resolve them. Non-member countries are known to adopt OECD principles and certain countries are on the verge of entering the OECD. Hence, the OECD in total brings in around 40 members together counting for around 80 percent of world trade.³⁰

²⁹ Convention on the Organisation for Economic Co-operation and Development - Paris 14th December 1960.

³⁰ OECD, *History*, OECD publishing. Date visited 2014-03-12. Accessible at: www.oecd.org/history.

2.2.2 Functions of the OECD

The OECD uses its immense information on an extensive spectrum of subjects to assist governments in nurturing prosperity and preventing poverty by using economic growth and financial stability. The OECD works by measuring worldwide productivity and flows of investments, they work closely with governments to comprehend which causes drive social, economic and environmental changes. By analysing results they envisage impending trends and set global standards on broad variety of subjects, amongst them tax.³¹

By drawing on collected facts and experience from around the globe, the OECD recommends strategies intended to make the lives of the ordinary citizen better. They work closely with international businesses through both the Trade Union Advisory Committee and the Business and Industry Advisory Committee. Their mutual interest of preventing terrorism, tax avoiders and other people or organisations whose actions set out to weaken a fair and open society often lead to OECD held discussions. These discussions in turn often emerge into compromises where the OECD member countries agree on regulations on international co-operation. Sometimes the end result is formal agreements, standards or models. Such an example is the OECD MTC.³²

2.3 The OECD MTC

In today's world people and companies are operating on a global basis. This situation can lead to the issue of international juridical double taxation, generally described as the burden of equivalent taxes in two or more states on one taxpayer due to the same subject matter during the same period of time.³³ Often double taxation arises due to the fact that states tax not only a taxpayer's domestic assets but also their foreign assets.³⁴

The need for a common solution to juridical double taxation was recognised by the OECD member states. The desire was to clarify, standardise and confirm the economic condition for taxpayer who is engrossed in activities in other countries through the application of

³¹ OECD, *About*, OECD publishing. Date visited 2014-03-12. Accessible at: <http://www.oecd.org/about/>.

³² OECD, *What we do and how*, OECD publishing. Date visited 2014-03-12. Accessible at: <http://www.oecd.org/about/whatwedoandhow/>.

³³ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 1.

³⁴ Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 Int'l Tax & Bus. Law. 1 (1986). p. 4.

common solutions by all countries.³⁵ The purpose of the MTC and the bilateral treaties is to provide a way of settling on a set of uniform rules for the most common issues arising in the area of international taxation in an effort to reduce double taxation.³⁶

The first published version of the OECD MTC came in 1977 and was accompanied by the Committee on Fiscal Affairs's (CFA) commentary.³⁷ Case law grants the OECD MTC high legal basis³⁸ and tax treaties between member states are known to constitute a source primary to internal legislation.³⁹

2.3.1 The OECD MTC's applicability and interpretation

Though the OECD MTC due to its birth through international commitments and discussions by OECD member states serves as beneficial help in a double tax situation and is widely used, it is important to analyse its actual applicability and place in a law hierarchy and to what extent it constitutes applicable material. Here one must seek guidance in the VCLT. It is a convention regarding international law in treaties between states. It developed due to the fact that by the middle of the 20th century international law made up of treaties had become common and extensive but no regulation existed on how to apply or treat these treaties. The International Law Commission of the United Nations oriented work of creating an international convention that would serve as a basis for all treaties between states. It was adopted in Vienna in 1969 and is today ratified by 114 countries.

The convention defines a treaty as “...an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”⁴⁰ It further provides a regulation on the interpretation of treaties. As a general rule a “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.”⁴¹ It also states that in addition to the text of a treaty, its preambles and annex-

³⁵ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 2.

³⁶ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 3.

³⁷ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 6.

³⁸ RÅ 1996 ref. 84 1996-10-02 and United States v. A.L Burbank § Co., Ltd. 1975.

³⁹ RÅ 2008 ref. 24, 2008-04-05.

⁴⁰ Vienna Convention on the law of treaties signed at Vienna 23 May 1969 Art 2.1 A.

⁴¹ Vienna Convention on the law of treaties signed at Vienna 23 May 1969. Art 31. 1.

es, a treaty between states also includes any other agreements relating to the treaty made by the parties, any instruments relating to treaty and any subsequent interpretations and application agreements relating to the treaty. Moreover following case law can guide in application.⁴² Together with the context of the objectives and purposes of the treaty, any subsequent agreements relating to the interpretation, practices in application, relevant rules of international law and special meaning given to a term of the treaty that is made between parties shall also be taken into account.⁴³

Article 32 of the VCLT grants a supplementary regulation on the interpretation of treaties. It states that in order to interpret a treaty there lays a certain choice in supplementary ways of interpretation. Such means can be to seek guidance in a treaty's preparatory work and circumstances during the treaties implementation.⁴⁴ In the case of the application and interpretation of a tax treaty between two states it can, with reference to the VCLT, be suggested that the OECD MTC and it's preparatory works consisting of the OECD MTC commentaries may serve as a meaningful guideline.

The principle of common interpretation is fundamental to a tax treaty between states, meaning in order for the tax treaties to function it is vital that the courts interpret and apply the treaty in similar manners and do so consistently.⁴⁵

2.4 Legal value

2.4.1 The legal value of the OECD MTC

In consideration of above, tax treaties signed between Contracting States constitute legally binding instruments, however the legal value of the OECD MTC is not as clear. The OECD MTC and its commentary in relation to the various tax treaties are important sources where the courts can seek a common interpretation.⁴⁶ This is proven by the fact

⁴² Vienna Convention on the law of treaties signed at Vienna 23 May 1969 Art 31. 2.

⁴³ Vienna Convention on the law of treaties signed at Vienna 23 May 1969 Art 31. 3 and 31.4.

⁴⁴ Vienna Convention on the law of treaties signed at Vienna 23 May 1969. Art 32.

⁴⁵ Klaus Vogel, Double Tax Treaties and Their Interpretation, 4 Int'l Tax & Bus. Law. 1 (1986) p. 37.

⁴⁶ Klaus Vogel, Double Tax Treaties and Their Interpretation, 4 Int'l Tax & Bus. Law. 1 (1986) p. 40.

that various courts around the world that have turned to the MTC to seek a common interpretation of the treaty in question.⁴⁷ The value of the MTC is further proven by the fact that in certain cases, courts seek guidance in common interpretation in the MTC, which was published after the treaty at hand was entered into.⁴⁸

In relation to the VCLT such methods, where the court seeks guidance in the MTC, could be seen as consistent with article 32's preparatory work. However though the MTC does not in fact make out preparatory work for a specific tax treaty in the meaning of article 32 VCLT, as appose to the preparatory work of a specific tax treaty the MTC is known and easily accessible. Hence, there is no reason to grant the MTC a lower status than preparatory work in connection to a specific tax treaty.⁴⁹

International law expert Klaus Vogel means that a general point can be made regarding the interpretation of tax treaties between the members of the OECD. First, as far as an adopted tax treaty is made up of unchanged text from the MTC it should be assumed that the states had the intent to follow it's recommendation. Vogel's point is strengthen by the *Lamesa judgement*⁵⁰ which states that as long the wording of a treaty closely follows the OECD MTC it is reasonable that the states intended the treaty to follow the MTC, thus allowing the MTC to constitute preparatory work.⁵¹ Vogel however indicates that the OECD MTC and commentary are less important in interpretation of treaties non-OECD members.⁵²

2.4.2 The legal value of the OECD MTC commentary

The value of comments is defined in the introduction in OECD commentary as a great assistance to the treaties interpretation due to the fact that the commentaries have been agreed upon by the CFA, where government experts are appointed. However it is also stat-

⁴⁷ For example: *United States v. A.L. Burbank § Co., Ltd.* 1975.

⁴⁸ Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 *Int'l Tax & Bus. Law.* 1 (1986) p. 40.

⁴⁹ Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 *Int'l Tax & Bus. Law.* 1 (1986) p. 40.

⁵⁰ *Lamesa Holdings BV v Commissioner of Taxation* (1997), 35 *ATR* 239 at 247.

⁵¹ Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 *Int'l Tax & Bus. Law.* 1 (1986) p. 41.

⁵² Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 *Int'l Tax & Bus. Law.* 1 (1986) p. 42.

ed that the commentary is not meant to be annexed to the treaties signed by member states, and are unlike the treaties themselves, not legally binding.⁵³

The commentaries are a widely accepted assistance in interpretation of the tax treaties based on the MTC. However, if the commentary fits in with the interpretation rules in the VCLT is debatable.⁵⁴ The Australian Taxation office (ATO) has taken the position that the OECD commentaries provide significant assistance on the interpretation and application of tax treaties and should in fact be considered. This especially considering the ambiguous nature of the wording of treaties.⁵⁵ However the wording in article 31 of the VCLT states that a treaty should be interpreted in *context* of its objective and purpose. Should the definition of context in the VCLT include only documents and agreements in existence during the time of the convention it may produce some difficulty in including the commentary on the scope of the VCLT.

During the IFA congress in 1993, Vogel and Prokisch were of the view that when the member states have conformed to the OECD Council's recommendation to follow the wording of the OECD MTC the commentaries could be considered as part of the context of the treaty instead of merely being considered as supplementary interpretation assistance. However Vogel has later stated that due to the increasing changes to the commentary the commentaries have lost their accuracy.⁵⁶

However opinions do vary, others are of the opinion that the commentaries provide valuable confirmation of an intention to grant special meaning to phrases used in a tax treaty and could therefore fall under article 31.3.c of the VCLT, namely that “...*any relevant rules of international law applicable in the relations between the parties.*” They could also be seen to fall in under article 31.2.a of the VCLT, as “...*any subsequent agreement...*”, but should in any case not be seen as holding the status of mere supplementary methods of interpretation.⁵⁷

⁵³ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 29.

⁵⁴ Brugger Florian and Lang, Michael, The role of the OECD Commentary in tax treaty interpretation, The Australian Tax Forum, (2008) p 96.

⁵⁵ ATO TR 2001/13, Para 104. 2001-12-19.

⁵⁶ Engelen Frank, Interpretation of Tax Treaties under international Law, doctoral series 7, (2004), IBFD publication, Amsterdam, p. 443-444.

⁵⁷ Engelen Frank, Interpretation of Tax Treaties under international Law, doctoral series 7, (2004), IBFD publication, Amsterdam, p. 445-446.

Though there is no information directly stating that the comments are binding, they have been granted high value by courts stating that if a tax treaty is created in accordance with the OECD MTC there is an assumption that the Contracting States have aimed to accomplish what the OECD recommends.⁵⁸

2.4.3 The legal value of future changes to the commentary

Since 1992 The OECD MTC commentary has seen its fair share of amendments. The custom of continuously amending the comments raises the question whether they affect how treaties entered into force before the changes should be interpreted. The CFA states that amendments to the commentary if the MTC which is a direct result of changes to the MTC should not be deemed relevant to the interpretation or application of treaties entered into force prior to those amendments. However, the CFA states that other changes and additions to the commentaries should be deemed applicable to the application or interpretation of treaties entered into prior to the amendments. This is due to the fact that those changes are such that reflect the consensus of the member states of the OECD's opinion of the correct interpretation and application of treaties.⁵⁹

However, as Brugger and Lang wittily put it, what relevance can be made to the CFA's statement regarding the interpretive value of the commentary, given that the statement itself is a part of the commentary. Further, in the committee states in the commentary that tax agencies of the member states frequently check the commentary to interpret tax treaties. This could in itself indicate that the commentary in fact could fall under article 31.3.b in the VCLT, as it could constitute "... *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*". Nevertheless, even if the commentaries should fall in under article 31.3.b, the outcome provides limited results. The application of tax treaties takes place in tax authorities and tax courts, possibly making it difficult to establish a satisfactory degree of consistency in the application of the commentaries seeing as different agencies and courts possible will interpret the commentary in a dissimilar manner.⁶⁰

⁵⁸ RÅ 1996 ref. 84. 1996-10-02.

⁵⁹ OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 36.

⁶⁰ Brugger Florian and Lang, Michael, The role of the OECD Commentary in tax treaty interpretation, The Australian Tax Forum, (2008) p. 102.

Another approach is to see the commentary as falling in under article 31.3.a of the VCLT, *“There shall be taken into account, together with the context...any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;”*. The commentary may fall in under the scope of such agreements. However such agreements must constitute binding international law, which the neither MTC or it’s commentary does.⁶¹

2.5 Summary

The OECD strives to identify international problems and plans to resolve them The OECD uses its immense information on an extensive spectrum of subjects to assist governments in nurturing prosperity and preventing poverty by using economic growth and financial stability. In today’s globalised world people and companies are operating on a global basis. This situation can lead to the issue of International juridical double taxation. The need for a common solution to juridical double taxation was recognised by the OECD member states. The OECD MTC was created in the purpose solving these issues and is meant to provide a way of settling on a set of uniform rules for the most common issues arising in the area of international taxation in an effort to reduce double taxation.

The legal value of the OECD MTC and its commentary is debatable. However they both carry substantial weight in interpretation of a tax treaty. Conclusions could carefully be drawn that if a tax treaty is based on the MTC it is realistic to assume that the contracting states intended the provision in the treaty to have the same meaning as in the MTC and thereby how the provisions are outlined in the OECD MTC commentary. However, commentary added to the MTC after a tax treaty entered into force has a more limited role in the interpretation and application of a tax treaty between contracting states.

⁶¹ Brugger Florian and Lang, Michael, The role of the OECD Commentary in tax treaty interpretation, The Australian Tax Forum, (2008) p. 103-105.

3 Current legislation on the definition of a Permanent establishment

3.1 Introduction

The purpose of the MTC is to provide a way of settling on a set of uniform rules for the most common tax issues.⁶² As the OECD MTC serves as a guideline to the bilateral treaties and case law grants the OECD MTC high legal basis it is important to understand the lay out of the article 5 regarding PE:s.⁶³ Further tax treaties between member states have been known to constitute a source primary to internal legislation.⁶⁴ This entails that a thorough understanding of OECD MTC article 5 may grant high value in a legal dispute with between any two Contracting States.

For the pending analysis and below⁶⁵ it is vital to possess knowledge of OECD MTC article 5 and the commentary thereto. Further it is the text of the commentary to article 5 of the OECD MTC that currently is up for debate as to possible amendments thereto.⁶⁶ In this chapter an account is given of all the paragraphs in article 5. Along with the description of the paragraphs references are made to the OECD MTC commentary of article 5 as these commentaries grant insight on the meaning of each article.

3.2 Article 5 of the OECD Model tax Convention

3.2.1 Paragraph I

The regulation of what constitutes a PE is found in article 5 of the OECD MTC. The article is divided into seven paragraphs where the first paragraph provides the main rule of what constitutes a PE as a “...a *fixed place of business through which the business of an enterprise is wholly or partly carried on.*”⁶⁷ This general description of a PE contains three conditions, first

⁶² OECD Model Convention on Income and Capital 2010, Introduction Commentary paragraph 3.

⁶³ RÅ 1996 ref. 84 and United States v. A.L Burbank § Co., Ltd. 1975.

⁶⁴ RÅ 2008 ref. 24, 2008-04-05.

⁶⁵ See chapter 6.

⁶⁶ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 and OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012.

⁶⁷ OECD Model Convention on Income and Capital 2010 Article 5:1.

there should be activity of a business. Secondly the place of business should be fixed, which establishes that the place of business has an amount of permanence and is located in a distinct place. The third condition entails that the business of the foreign enterprise shall be wholly or partly carried on through this fixed place of business.⁶⁸

In the commentary for paragraph 1 of the OECD MTC article 5, a number of specific examples are brought to attention; of importance for this thesis is the example in paragraph 10 regarding automatic equipment. Though the reader may initially be at loss as to why automatic equipment is brought up at this point in the thesis, the paragraph describes an event where a foreign enterprise's personnel can constitute a PE in the host country. It is necessary to site the entire text of this commentary paragraph as it's written formulation is up for discussion and suggested changes to it are ground for the analysis below.⁶⁹

“The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business (cf. paragraph 35 below). But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the machines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent depend on the enterprise.”⁷⁰

⁶⁸ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 2.

⁶⁹ See chapter 6.

⁷⁰ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 10.

For this thesis, the first three sentences of the commentary are of special interest as it revolves around the situation when a foreign enterprise's personnel are on assignment abroad.

3.2.2 Paragraphs 2-4

The second paragraph of article 5 of the OECD MTC provides a non-exhaustive list of examples as to what constitutes a PE, including a place of management, a branch, an office, a factory, workshops, and mine, oil or gas wells. These examples should be seen in combination to the first paragraphs conditions of “...a fixed place of business through which the business of an enterprise is wholly or partly carried on.” in order to constitute a PE.⁷¹ The third paragraph of article 5 of the OECD MTC provides specifically that building sites, constructions and installations constitute a PE only if they last longer than 12 months. Which situations specifically should not be included in the term PE even if the general conditions in paragraph 1 are fulfilled are provided for in paragraph 4. A general common factor that these exemptions share is that their activities are of a preparatory or auxiliary nature.⁷² Creating situations which fall under preparatory or auxiliary nature, known as creating an artificial PE, a situation which the OECD is trying to prevent and is included in the OECD Base Erosion and Profit Shifting (BEPS) Action plan, action 7.⁷³

3.2.3 Paragraph 5

Paragraph 5 regulates that, “Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to who paragraph 6 applies- is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise should be deemed to have a permanent establishment in that state in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provision of that paragraph.”⁷⁴

⁷¹ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 12.

⁷² OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 21.

⁷³ OECD Action Plan on Base Erosion and Profit Shifting, OECD(2013), p. 23.

⁷⁴ OECD Model Convention on Income and Capital 2010 Article 5:5.

The paragraph entails that when an enterprise from a contracting state has a person acting for it in another contracting state, a PE can, in certain circumstances, be deemed to exist even if that enterprise has no fixed place of business in that other contracting state. The purpose of this paragraph is to grant the other contracting state the right to tax profits from the enterprise.⁷⁵ The paragraph stipulates certain conditions for when a PE can be deemed to exist in this circumstance. Firstly it only applies for dependent agents. A dependent agent is one who conducts activity that can create a PE for an enterprise in another contracting state. The concept of a dependent agent can apply to any individual be it a person or a company whether employed or not by the enterprise who does not fall in under the concept of an independent in paragraph 6 of article 5.

However, in order to prevent maintenance of any single dependent person in another contracting state from establishing a PE for an enterprise, the scope of a dependent agent is limited to persons who to the nature of their activities or in view of their authority engage the enterprise to a certain degree in the other contracting state. The authority is measured through the persons right to on a repeated basis, on behalf of the enterprise, conclude contracts that can bind the enterprise's business activity in the other contracting state.⁷⁶ Contracts need not be made directly in the name of the enterprise by the person in order to be considered a dependent agent; it is sufficient that the contracts entered by the agent bind the enterprise.⁷⁷ The contracts entered must however be such that they relate to the tasks that compose the proper business of the enterprise and they must be habitually conducted in the other contracting state. Determining if the contract is habitually conducted in that other contracting state must reflect the purpose of article 5, which is determining the taxable right of the other contracting state if the activities conducted with said state of the enterprise from contracting state are more than merely transitory. This entails that determining where contracts are habitually conducted shall not be based merely on facts relating attendance or participation of negotiations in that other contracting state, nor can the

⁷⁵ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 31.

⁷⁶ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 32.

⁷⁷ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 32.1.

maintenance of personal at locations which by virtue of paragraph 4 cannot constitute a PE lead to the activities of such person create a PE for the enterprise.⁷⁸

It is important to keep in mind that paragraph 5 stipulates a PE only when a person meets the specific requirements of the paragraph; any other persons are not included in the scope of the paragraph. Furthermore paragraph 5 works as an alternative test to determining whether or not a PE is created since if the conditions in paragraphs 1 and 2 (with consideration to paragraph 4's exceptions) are fulfilled, there is no need to conduct a test in accordance with paragraph 5.⁷⁹

3.2.4 Paragraph 6 and 7

Finally paragraph 6 stipulates that when enterprises conduct business in another contracting state through agents of independent nature such as brokers and commission agents no PE is deemed to exist and profits cannot be taxed in that other contracting state, provided that such agents are acting in their ordinary course of business.⁸⁰ Such agents must be both legally and economically separated from the enterprise, thus they cannot be subject to comprehensive control or exhaustive instructions and they must bare the entrepreneurial risk themselves.⁸¹ Furthermore, an agent cannot be seen as independent if they conduct activities that belong to the principal's economic sphere.⁸² Paragraph 7 stipulates that the mere existence of a company controlling another company does not create a PE.

3.3 Consequences of constituting a PE according to the OECD MTC

The process of allocating the taxing rights of profits of a PE is regulated in article 7 of the OECD MTC. The profits of an enterprise of a Contracting State are as a main rule only al-

⁷⁸ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 33-33.1.

⁷⁹ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 35.

⁸⁰ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 36.

⁸¹ OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 38.1 and 38.3.

⁸² OECD Model Convention on Income and Capital 2010, Commentary on Article 5 concerning the definition of permanent establishment, paragraph 38.7.

lowed to be taxed in said state, unless the enterprise carries out business in another Contracting state through a PE situated therein. In the case that business is carried out through a PE, the profits that are attributable to the PE may be taxed in the other Contracting State. In the process of deciding which profits are attributable to the PE, one sees to the profits the PE would be expected to make if it were seen as a separate and legal entity performing similar or same activities under similar or same conditions when taking into account the functions performed and risks assumed by the PE and other parts of the enterprise.⁸³ This is known as the authorised OECD approach, and has adopted the name *functionally separate entity approach*. It is based on the arm's length principle, a principle regulated in article 9 of the OECD MTC and involves seeing the terms of a corporate group's transactions in comparison to terms of two independent enterprise's transactions. Adjustments must be made in order to allow for differences in a comparable transaction that has considerable effects on price or returns that would be demanded by an independent enterprise. The more adjustments that are necessary the more the comparison loses value. A two-step analysis is necessary; first a function and fact analysis is performed where economically significant activities and responsibilities undertaken by the PE are identified.⁸⁴ In the second step article 9 of the OECD MTC is used in determining the remuneration of dealings between hypothesised enterprises. The arm's length price can be found by using a number of different methods stated in the OECD's Transfer Pricing (TP) Guidelines. The result of these combined steps will be to allow the calculation of the profits of a PE.⁸⁵

The functional separate entity approach does not command domestic law, however it sets limits of the amount of profits that are attributable to the PE and thereby may be taxable in the host country.⁸⁶ The authorised approach is in line with concept of a PE in article 7 of the OECD MTC, which is to within limits allow Contracting States to tax non-resident enterprises.

⁸³ Art. 7 OECD MTC 2nd paragraph.

⁸⁴ OECD TP Guidelines 2010. D.1.2.2.

⁸⁵ OECD, 2010 Report on the attribution of profits to permanent establishments, 22 July 2010, p. 13.

⁸⁶ OECD, 2010 Report on the attribution of profits to permanent establishments, 22 July 2010, p. 13.p. 12.

3.4 Summary

The regulation of what constitutes a PE is found in article 5 of the OECD MTC. The article is built up by seven paragraphs. The main rule, provided in paragraph 1 is that a PE *"...means a fixed place of business through which the business of an enterprise is wholly or partially carried on."* Paragraph two states examples of what constitutes a PE and paragraphs 3 and 4 state examples of what does not constitute a PE. Paragraph 5 regulates what constitutes a dependant agent PE and paragraph 6 regulates the independent agency exception. Finally paragraph 7 stipulates that the mere existence of a company controlling another company does not create a PE.

The profits of an enterprise of a Contracting State are as a main rule only allowed to be taxed in said state, unless the enterprise carries out business in another Contracting state through a PE situated therein. In the case that business is carried out through a PE, the profits that are attributable to the PE may be taxed in the other Contracting State. This is known as the allocation of profits to a PE.

4 Case law on when the activity of a foreign enterprise's personnel can constitute a PE in the host country

4.1 Introduction

This chapter includes an account of six different cases in the field of seconded employees constituting PE:s in the host country. The cases are accounted for in order by date of ruling as to follow the legislative development.

The objective of this chapter is to account for the circumstances in each case and to establish the reasons behind the courts ruling. By doing so the hope is to reach an understanding of whether there can be a general conclusion drawn as to which factors determine when the secondment of employees can constitute a PE in a host country. Furthermore this chapter seeks to determine what kind of legal value the courts place in the OECD MTC and it's commentary.

4.2 Cases

4.2.1 JC Bamford Excavators Ltd.⁸⁷

JC Bamford Excavators Ltd (JC) is a UK resident company, flagship to the wholly owned JCB India Ltd (JCB) in India. JC entered into two agreements with JCB. One was to grant a license to JCB for transfer of intellectual property (IP) rights and the other revolved a personnel agreement where JC deputed eight employees to India on secondment basis. JC received remuneration in the form of royalties/fees, taxed in the UK at a rate of 15 percent in accordance with the UK-India tax treaty. The Assessing Officer (AO) perceived that JC had sent personnel to JCB in India in order to solve problems relating to products licensed to JCB by JC. The AO therefor held that the personnel seconded to India had created a service PE. The AO further held that the profits arising from the IP rights were effectively connected to the service PE and thereby JC conducted business in India and the profits from the royalties received by JCB were to be taxed as business profits.

The ITAT analysed service PE article 5.2.k of the India - UK tax treaty (here on the treaty),

⁸⁷ Delhi in DDIT v. JC Bamford Excavators Ltd (12-3-2014).

which states that:

“...the furnishing of services including managerial services, other than those taxable under Article 13 (Royalties and fees for technical services), within a Contracting State by an enterprise through employees or other personnel, but only if:

- (i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or*
- (ii) services are performed within that State for an enterprise within the meaning of paragraph 1 of Article 10 (Association enterprises) and continue for a period or periods aggregating more than 30 days within any twelve-month periods’⁸⁸*

In the case the conditions for constituting a service PE, rendering managerial services in India for over 90 days was fulfilled. However, also the question of whether seconded employees continued to remain employed by JC or where employed by JCB was examined in order to determine who the seconded employees performed services to.

In deciding whether or not the seconded employees remained as employed by JC the ITAT factored in the point that the service agreement (seconding employees to India) was not an independent agreement in itself, but a supplement to the IP agreement. The employment agreement stated that JCB wanted to use services of JC on secondment basis. The ITAT stated that expression of a secondment in itself entails that the employee is still employed by it's existing employer but due to an agreement the employer performs duties that benefit a third party, but the seconded employees performed work that benefited JC. Further, JC had no to appointment letters of the seconded employees. The seconded employees in this case remained on JC's payroll and the agreement between JC and JCB clearly stated that the seconded employees were not to be considered employed by JCB.

The ITAT ruled that the secondment of employees to India by JC constituted a service PE for JC in India and that the service PE established was effectively connected to the profits arising from the IP rights thereby JC conducted business in India and the profits from the royalties received by JCB India were to be taxed as business profits.

⁸⁸ India – United Kingdom Income Tax Treaty (as amended through 2012), article 5.2.k.

4.2.2 Webbase Enterprises Limited⁸⁹

The company Webbase Enterprises Limited (Webbase) is a Hong Kong based company involved in the sales of contact lenses and cosmetics in Sweden through the Internet. By way of entering the northern markets the Webbase purchased services of third party company Fortus International AB (Fortus), which handles sourcing, personnel resources, storage etc. All products were purchased from Fortus's storage. Fortus's representative, was granted power of attorney to represent Webbase in Sweden. Webbase did not maintain any of its own personnel or storage units in Sweden. Webbase solely focused on the marketing and development of products, which was done from Hong Kong. Webbase did register itself for tax purposes in Sweden stating that they conducted business in Sweden, a matter which they later in trial maintained was an error, insisting that the case should be tried on factual matters instead of an error of registration.

The Swedish Tax Agency was of the opinion that, Webbase's registration in Sweden for tax purposes spoke for Webbase conducting business in a manner which would constitute a PE in Sweden. Furthermore, the Swedish Tax agency maintained that the factual circumstances were that Webbase did conduct business in Sweden from a place in Sweden as it does not matter whether the place is owned, rented or at Webbase's disposal in any way. Furthermore the place can be constituted by a storage unit, an Internet sever or other spaces. In the Swedish Tax Agency's opinion Webbase has a place of business at Fortus's premises and Fortus enables Webbase to conduct business in Sweden. The Swedish Tax Agency points out that Fortus's representative, also represents Webbase in Sweden, he is also the person who registered Webbase for tax purposes where it was stated that he was the agent/representative of Webbase in Sweden. Fortus belongs to a corporate group that offers a concept of full services outsourcing for companies, including contact centre, IT and e-commerce, human resources and economy assistance. Due to this fact the Swedish Tax Agency states that with such a relationship between Webbase, the Fortus corporate group and Fortus's representative it must question whether an independent service exists or if companies are affiliated. Due to the fact that they have not filed a tax return for the disputed income year, the Swedish Tax Agency decided to tax Webbase as with SEK 100 000 and levy a fee of SEK 15 000 due to the lack of registering a tax return in time.

The court (Kammarrätten i Göteborg), initiated their ruling with a statement of Swedish

⁸⁹ Case no. 6479-12, 2013-09-16.

law on when PE:s are deemed to exist and focused on the exception in chapter 2 paragraph 29:5 of the Swedish income tax law (Inkomstskattelagen 1999:1229), that a PE does not exist solely due to the fact a Company conducts business in Sweden through an agent, commissary or any independent representative as long as their work is part of their regular business operations. The court states that the exception in Swedish law is based on the same principles as in article 5 of the OECD MTC, why guidance on the application of the exception can be drawn upon from the OECD comments. In paragraph 4 and 4.1 of the comments to article 5, it is indicated that it is sufficient that a company has space at their disposal to constitute a place of business and the company need not own, rent or have any legal right to the space. In paragraph 42.1 in the comments to article 5 it is stated that merely a website is not sufficient to fulfil the prerequisite of a place of business.

The court finds that the fact that Fortus's representative registered the company for tax purposes should be left without consideration. Consumers enter into agreement with Webbase directly through the websites and payment is made straight to Webbase. Webbase has no personnel in Sweden and is depended on Fortus for sales as the products they sell are bought from Fortus's storage and Fortus conducts all delivery and accounting. Webbase has no physical access to the Internet servers and they do not dispose of the Fortus's space. Even though Webbases business activity, sales of lenses and cosmetic through the internet, is made possible through Fortus, the court finds no reason that Webbase has a PE in Fortus's space. The court does not judge the relationship between Fortus's representative, Webbase and the Fortus corporate group to cause reason for any other opinion. The court rules that Webbase is not deemed to conduct business that in any way can conduct a PE in Sweden.

4.2.3 Tekmark Global Solutions LLC v The Deputy Director of Income Tax.⁹⁰

American company Tekmark Global Solutions LLC (Tekmark) seconded personnel, on a hire out basis, to Indian company, Lucent Technologies Hindustan PLC (Lucent). The seconded individuals were paid by Tekmark but worked under the control of Lucent.

Tekmark in turn invoiced Lucent for salary costs paid to the seconded individuals. The Indian tax authorities deemed Tekmarks secondment of personnel led to a PE in India in ac-

⁹⁰ Tekmark Global Solutions LLC v the Deputy Director of Income Tax. Case No. ITA No. 671/Mum/2007. 23 February 2010. Income Tax Appellate Tribunal.

cordance with the tax treaty between the USA and India, and thereby Tekmark was liable to pay tax in India on income accumulated to them through the seconded employees work in India.

The ITAT Court tried the question of a PE in accordance with article 5.1 of the treaty between the USA and India. The ITAT made the observations that the seconded employees worked under supervision and control of the Indian company whom also reimbursed Tekmark for paying the seconded employees salaries. Furthermore the ITAT found that the seconded employees for all intent and purposes were employed by Lucent as the Tekmark could not suspend them from, or regulate their services.

The ITAT's verdict was that the secondment of Tekmark's personnel to Lucent in India could not constitute a PE for Tekmark in India due to the fact that, no income arose for Tekmark and the services rendered at Lucent were independent and not controlled by Tekmark. In addition the court stated that even if the seconded employees had constituted a PE in India, no profits arose for Tekmark, whom in any case had not been liable to tax profits in India.

4.2.4 X AS⁹¹

An owner and representative who held the right to make investment decisions for a Norwegian investment company lived in Sweden. The company applied with the Council for Advanced Tax Rulings (Skatterättsnämnden), hereon the Council, for a preliminary decision on, amongst other things, whether the company was deemed to have a PE in Sweden. The Council ruled to the Norwegian company's disadvantage that a PE was deemed to exist. The Norwegian company took the decision to court, and asked the same question, they meant that the company possesses no such fixed place of business that could constitute a PE. Furthermore they meant that the owner of the company could not be deemed a dependant agent.

The court (Högsta Förvaltningsdomstolen) noted that the Swedish regulation of PE:s is based on the OECD MTC. In order for a PE to exist there needs to be a fixed place of business through which the business of a company is carried on, either wholly or partly. The court held a slight discussion as to whether the activity of the Norwegian company is

⁹¹ RÅ 2009 ref. 91, 2009-11-25.

deemed as business activity in accordance with Swedish law and the OECD MTC, and concludes that it does. The court then moved on to determine whether the Norwegian company had a fixed place of business. According to paragraphs 4 and 4.1 of the comments to the OECD MTC, it is sufficient that the Norwegian company has a certain space at their disposal. The court points out that investment management does not crave any specific premises. The Norwegian company is owned by an individual who lives in Sweden. Due to the fact that the owner can remain in his home when giving purchase/sale orders to the bank there is no reason to believe that business will not be conducted, at least partly from his home in Sweden. For this reason, the court rules that a PE does exist in Sweden for the Norwegian company.

4.2.5 X Ltd v Belastngsinspecteur.⁹²

The Court of Appeal of The Hague ruled in a case regarding a UK based company (X Ltd.) that was involved in hiring out personnel to companies in Germany and the Netherlands. X Ltd. drew upon the services of the Dutch company A CV, who carried out secondment services, for its activity in the Netherlands. X Ltd. was registered in the Netherlands at A CV's address, and had previously signed contracts stating A CV as their agent. A CV took care of the housing and transport of seconded employees from the UK and in turn invoiced X Ltd. for their services. If the seconded employees would spend more than 183 days in the Netherlands A CV also withheld preliminary taxes.

The tax inspector in the Netherlands stated, upon audit of the relationship of the involved parties, that A CV was acting on behalf X Ltd. According to article 5.5 (dependent agent) of the tax treaty between the Netherlands and the UK. As a consequence, X Ltd was levied wage tax assessments for the seconded employees who worked in the Netherlands under 183 days.

The court held that that A CV did not have a dependent agent relationship to X Ltd. Instead the court found that A CV was an independent agent due to the fact that A CV negotiated no contracts with the seconded personnel with detailed instructions from X Ltd. Furthermore A CV acted independently regarding the housing and transport of individuals. The turn over A CV acquired from their services to X Ltd. amounted to such a small part of their annual turn over that they were also seen as economically independent.

⁹² X Ltd. v Belastinginspecteur. Case No. BK 07/00604 July 15 2008. The Court of Appeal of the Hague.

4.2.6 Morgan Stanley and Co. v the Commissioner of Income Tax⁹³

The case revolved Morgan Stanley and Co. Inc. (MSCo), a company residing in the United States of America, and one of its corporate group companies, Morgan Stanley Advantage Services Private Limited (MSAS), residing in India. MSAS provided support services to MSCo on a contractual basis. MSCo gave the instructions on which tasks MSAS should perform as well as the standard of those services. MSCo had staff from its company in the USA hired out and seconded to MSAS in India for periods ranging from a couple of weeks to years. MSCo legally employed the staff, MSCo paid their remuneration while MSAS in its turn would reimburse MSCo for paying the staffs salaries with a mark-up of 29 percent.

Two questions were dealt with in this case, first, the question was whether the activities of MSCo at MSAS in India triggered a PE and second, whether the 29 percent mark-up extinguished any tax liability in India for MSCo. An account follows of only the answer to the first question due to the fact it is the only question directly related to the thesis topic.

In determining the potential PE risk the Supreme Court performed a factual and functional analysis of the activities performed at MSAS. The court began by observing the main rule in article 5.1 of the tax treaty between India and the USA (hereon the treaty), that a PE would exist in there was a fixed place, through which the business of the MSCo is wholly or partly carried on. In relation to article 5.1 the Supreme Court found that MSAS was performing only back-office operations for MSCo that could not be seen as satisfying the criteria that the MSCo carried on business through MSAS India, but instead falls in under the exception of a PE in article 5.3.e, services of auxiliary nature, of the treaty.

During trial the Commissioner's counsel argued against the services being of auxiliary nature and also argued that MSAS should be seen as a dependant agent of MSCo. The Supreme Court did not agree, and stated that there was no agency relationship between the companies as MSAS had no right to enter into agreements or conclude contracts on behalf of MSCo.

The Supreme Court thus went on to try if article 5.2.l of the treaty – service PE - in the treaty were applicable to the situation. The paragraph is similar to that of the India – UK

⁹³ Morgan Stanley and Co., United States v. Commissioner of Income Tax. Civil Appeal No. 2914 of 2007. 9 July 2007. Supreme Court of India.

tax treaty mentioned above.⁹⁴ They looked into whether the service agreement between the two companies could lead to a PE. The Supreme Court observed that the seconded employees could not be seen as employed by MSAS as they had a lien on their employment with MSCo, which entailed that MSCo held the power of the terms of their employment. The Court found that when the activities of an enterprise, such as MSCo's, where they retain responsibilities for the work of the seconded employees and those employees remain on the enterprise's payroll or the employees continue to have lien on their employment with the enterprise, a service PE can develop.

4.3 Summary

In half of the above cases the courts ruled that a PE was constituted and it is of interest to highlight which factors in the different cases led to the rulings.

In the *JC Bamford Excavators Ltd* case, the *X AS* case and the *Morgan Stanley* case a PE was deemed to exist in the host country. In the *JC Bamford Excavators Ltd* case the facts that the secondment of employees was not an independent agreement but instead connected to the IP agreement, the employees work benefited the UK based JC and not Indian JCB, the employees remained on their pay roll of the JC and JCB gave no appointment to the work conducted by the employees led to the seconded employees constituting a Service PE. Similarly, in the *Morgan Stanley* case, the fact the MSCo retained responsibilities for the work of the seconded employees and those employees remained on the enterprise's payroll or the employees continued to have lien on their employment with the enterprise, led to a service PE's development. In both cases a service PE was deemed to exist in accordance with the service PE article of the treaty between the India and the US and India and the UK respectively. It is important for the pending analysis to note that this article is in fact not a part of the OECD MTC.

In the *X AS* case the court followed the three criteria for a PE to exist; there needs to be a fixed place of business through which the business of a company is carried on, either wholly or partly. The court took guidance in the OECD commentary and deemed that the work performed by the Norwegian company's employee in Sweden met all three criteria and therefor constituted a PE in Sweden.

⁹⁴ See chapter 4.2.1.

Amongst the cases that did not constitute a PE the following can be noted. In the *Webbase case* the court stated that the court tied the case in accordance with the main rule in article 5.1 of the applicable treaty and drew upon guidance in the commentary to article 5 of the OECD MTC. The court ruled that Webbase has no space that can be deemed a PE, nor can the relationship between Fortus's representative and Webbase consider Webbase having an employee in the host country that constitutes a PE. In the *Tekmark Global Solutions LLC* case the court ruled that no PE existed due to the facts that the seconded employees worked under supervision and control of the Indian company whom also reimbursed Tekmark for paying the seconded employees salaries and no income arose for Tekmark and the services rendered Lucent were independent and in no way controlled by Tekmark. The court ruled in *X Ltd.* that the relationship between X Ltd. and A CV was independent due to the fact that A CV ltd. performed their services independently without detailed instructions and received remuneration for their services. The remuneration amount to such a small part of their annual turn over that no dependant agency could be deemed to exist.

5 Suggested amendments to article 5 of the OECD model tax convention

5.1 Introduction

This chapter accounts for the suggested amendments to article 5 of the OECD brought forward by the Centre for Tax Policy and Administration (CTPA). Firstly a background as to why amendments have been suggested and who originated the process is presented.

Following is an account for the first published suggestion for amendments along with comments on the suggest amendments by the public. Next an account of the second published suggestion for amendments along with public comments is provided. This order is followed in order to be able to identify whether the publics comments succeed in providing changes in the second draft of amendments.

5.2 Background to the suggested amendments

The CPTA sponsored a program focusing on the tax implications arising due to cross-border business's restructurings. A round table meeting was held January 26-27 in 2005. It was attended by both government representatives from states all over the world, OECD members and non-members, as well as private sector members in hope of engaging in dialogue to appreciate the tax and economic issues arising in the new cross-border structures of enterprises. The discussion focused on the reoccurring situation where enterprises reorganised their structures in order to attain centralised functions regarding control, management, manufacturing and distribution. Many issues regarding the economical aspect of these changes were discussed, but one of the main questions brought up were the tax implications following these restructurings. Amongst these implications where questions relating to the transfer of intangible assets, distribution, value added tax and PE:s.⁹⁵

The question raised regarding PE:s was if and in which circumstances the activities of a limited function entity could result in the existence of a PE for the foreign enterprise it acts for. Questions especially arose regarding independent actors or agents and how to determine independence under article 5.5 of the OECD MTC. A problem discussed was regard-

⁹⁵ OECD, *2nd Annual Centre for Tax Policy and Administration Roundtable: Business R structuring*, OECD Publishing. Accessible at: <http://www.oecd.org/tax/transferpricing/2ndannualcentrefortaxpolicyandadministrationroundtablebusinessrestructuring.htm>.

ing the civil law custom of a commissionaire and if such should fall into article 5 of the OECD MTC. The general conclusion of the round table meeting was that further work in clarifying article 5 of the OECD MTC would be useful.⁹⁶

After the issues regarding article 5 of the OECD MTC had been recognised the committee of fiscal affairs started a project on clarifying both TP guidelines and thereby the definition of a PE with the joint working group including delegates from Working party No.1 and No.6 responsibly for the MTC and TP guidelines respectively.⁹⁷

The Working Group in its turn identified a couple of main areas to work on, one of which was when a foreign enterprise can be identified to having a PE due to a business restructuring. The mandate granted to the Working Group acknowledged that there would be two sides to these issues. One side is the governmental, striving to tackle restructurings as a way for enterprises to evade tax and the other the essential need for developing OECD the TP guidelines and MTC in order to treat bona die restructurings in a sufficient and harmonised manner. The goal is to ensure that restructurings don't lead to unintended double non-taxation while at the same preventing risk of double-taxation for the enterprises. The Working group identify the need to include both governments and the private business community in order to reach the best outcome of the project.

5.3 Discussion draft 12th October 2011

5.3.1 Suggested amendments to the comments to article 5

On the 12th of October in 2011 the Centre for Tax Policy and Administration presented their first public discussion draft on the interpretation and application of article 5 of the OECD MTC regarding PE:s. The Draft includes suggestions for changes and additions to the OECD commentary regarding article 5 of the OECD MTC made by the Working group. The discussion draft includes 25 issues related to the existence of a PE.⁹⁸ Issue number 7 is the presence of a foreign enterprise's personnel in the host country. The ques-

⁹⁶ OECD, *2nd Annual Centre for Tax Policy and Administration Roundtable: Business R structuring*, OECD Publishing. Accessible at: <http://www.oecd.org/tax/transferpricing/2ndannualcentrefortaxpolicyandadministrationroundtablebusinessrestructuring.htm>.

⁹⁷ OECD, *Transfer-pricing*, OECD publishing. Accessible at: <http://www.oecd.org/tax/transfer-pricing/41346644.pdf>.

⁹⁸ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 page 2 and 6.

tion of in which circumstances the presence in a country of personnel of a foreign enterprise can constitute a PE for the foreign enterprise was raised in the discussions of the Working Group who presented their suggested amendments to paragraph 10 in the OECD commentary for article 5 as follows:

*“10. There are different ways in which an enterprise may carry on its business. In most cases, The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business of the enterprise (see paragraph 35 below). [the rest of the existing paragraph 10 is moved to new paragraph 10.2] **As explained in paragraph 8.11 of the Commentary on Article 15, however, there may be cases where individuals who are formally employed by an enterprise will actually be carrying on the business of another enterprise and where, therefore, the first enterprise should not be considered to be carrying on its own business at the location where these individuals will perform that work. Within a multinational group, it is relatively frequent for employees of one company to be temporarily seconded to another company of the group and to perform business activities that clearly belong to the business of that other company. In such cases, administrative reasons (e.g. the need to preserve seniority or pension rights) often prevent a change in the employment contract. The analysis described in paragraph 8.13 to 8.15 of the Commentary on Article 15 will be relevant for the purposes of distinguishing these cases from other cases where employees of a foreign enterprise perform that enterprise’s own business activities.***

[10.1 See section 8 below]

10.2 Also, a permanent establishment may exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the ma-

*chines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent dependent on the enterprise.*⁹⁹

When a comparison is made with the earlier comment the first noticeable change is that the comment has been divided into two paragraphs. The addition in paragraph one brings up the situation where an individual on assignment abroad may constitute a PE in the host country for the foreign enterprise. Moreover it delegates an investigation through paragraphs 8.13-8.15 in the comments to article 15 of the OECD MTC. Perhaps not too strange as the mentioned paragraph 8.11 in the commentary to article 15 states that the test is in fact relevant for determining whether the foreign enterprise has a PE where an individual preforms his services.

In comment 8.13 to article 15 of the OECD MTC it is stated that it is the nature of the services provided by the individual that will be on consequence. The purpose is to seek out which enterprise bears the responsibility of risk for the services rendered by the individual. According to comment 8.14, when the services rendered point out an employment relationship that isn't the original employment with the foreign enterprise, one should look at additional factors to determine the employee relationship. Such factors for example include who is authorised to instruct the individual, who controls the individuals working environment and who has the right to impose sanctions against the individual. In comment 8.15 the OECD puts pressure on the relevance of financial arrangements by stating that when the foreign enterprise charges a host enterprise a fee which is directly equivalent to the remuneration paid to the seconded employee along with costs for providing such remuneration with no profit element other than such that is an allowed mark up, the fact that the seconded employee remains on the foreign enterprise's payroll entails a risk of the employees creating a PE. If however the charges instead not singularly relate to the employees remuneration but instead is considered a fee of contract of services rendered to the host country's enterprise, provided it is in compliance with the arm's length principle (only applies to associated companies), it bares no risk of the seconded employees constituting a PE.

The discussion draft further includes an example. SCO is small hotel business in state X, RCO is a manpower company in state Y. SCO turns to RCO to find a manager for the hotel. If said manager has a contract with SCO directly and RCO receives a management fee

⁹⁹ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 page 18.

the manager's employment in X will not constitute a PE for RCO. However, if RCO is the legal employer of the manager and RCO is considered to render SCO services the outcome could become different. If SCO was considered to be in employment contract with the manager, that manager would not constitute a PE for RCO in state X, however if state X treated the manager as an employee of RCO and RCO as a provider of services to SCO it would be unclear whether RCO would be deemed to have a PE in state X.¹⁰⁰ The working group states that it would be hard to consider RCO did not have a PE in state X if the manager were formally employed by RCO unless it was found that SCO was the economic employer of the manager.¹⁰¹

The working group concluded that this question was most likely to be similar to a situation where an individual employed by a multinational group is seconded to work at another company within the group. This due to the fact that these secondments are usually conducted without any contract between the two companies, but to avoid TP issues, a cost plus may be charged to the host country by the country sending the individual on secondment. This could entail that the services rendered by the individual may be considered provided by the company from which he is seconded and thereby create a PE in the host country for that company. The working group states that this question should be solved by analysing comments 8.13 and 8.15 to the comments on article 15.¹⁰²

5.3.2 Public comments on the discussion draft 12th October 2011

5.3.2.1 The European Business Initiative on Taxation (EBIT)

EBIT states in its comments to the discussion draft that the clarification to paragraph 10 in the comments to article 5 of the OECD MTC regarding seconded employees is helpful. However they are concerned regarding the comments about where no contract is drafted amongst the companies during a secondment. EBIT states that it is not uncommon for seconded employees to remain on the foreign enterprise's payroll due to human resource reasons, benefits or currency factors and a cost plus is normally paid by the host country.

¹⁰⁰ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 page 19, paragraph 40.

¹⁰¹ Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 page 20 paragraph 43.

¹⁰² Interpretation and application of article 5 (permanent establishment) of the OECD Model Tax Convention, 12th October 2011 page 20, paragraph 44.

EBIT means that the comments state that when a cost plus is charged, it indicates that what the individual on secondment is doing in the host country is never part of the host country's business activity but instead part of the foreign enterprise's activity, thereby signifying a PE exposure. Furthermore EBIT criticizes the references to paragraphs 8.13-8.15 on the comment to article 15 of the OECD MTC, as this may force foreign companies to accept a host company to be the economic employer and thereby allow taxation of employees in the host country even in cases where the secondment is less than 183 days¹⁰³ in order to avoid accepting a constitution of a PE in the host country.¹⁰⁴

5.3.2.2 The CMS legal tax law firm

The only statement provided by the CMS regarding issue 7 in the discussion draft is that they support the proposed amendments to paragraph 10 of the commentary to article 5 of the OECD MTC.¹⁰⁵

5.3.2.3 Tax Executives institute (TEI)

The TEI states an appreciation to the clarification to article 5 of the OECD MTC and that article 5 and 15 of the OECD MTC should be read in relevance to each other. They furthermore acknowledge that the discussion draft has understood that for administrative reasons there may be no change in employment contract during a secondment even though the individual carries on activity for the company in the host country. They however express concern that the proposed changes are ambiguous and possibly miss interpretable due to two reasons. First the wording of the comment suggests that activities of a dependant agent in a host country carried on at the agents premises could be considered to be at the disposal of the enterprise sending the agent on secondment. Secondly the wording also indicates that if an individual on secondment exercises activity for the enterprise from which he is sent on secondment and not that related to the host enterprise, he is automati-

¹⁰³ The 183-day rule is an exemption in Art. 15.2 a of the OECD MTC, where host states are not allowed to tax employees from foreign enterprises on their work income so long as their stay in the host country does not exceed 183 days.

¹⁰⁴ Van der Made, Bob, PwC, EBIT Secretariat, European Business Initiative on Taxation – EBIT, Brussels, February 2012, p. 3. Accessible at: <http://www.oecd.org/ctp/treaties/49673919.pdf>.

¹⁰⁵ GUTMANN Daniel and ROMANO Carlo, CMS, Neuilly-sur-Seine, 9 February 2012 p. 3-4 Accessible at: <http://www.oecd.org/ctp/treaties/49667984.pdf>.

cally considered to constitute a PE, regardless of the criteria of a fixed place of business in the host country. The TEI suggests that the language of the comment be revised.¹⁰⁶

5.3.2.4 Deloitte

Comments from Deloitte differ somewhat from the line of the above comments. They emphasise that the problem regarding secondments within multinational companies lies in the fact that different states apply different rules on what constitutes *carrying on business*. Some states consider that the criteria of carrying on business in the other state is met during secondments and some do not. Hence, Deloitte believes that the most effective way to solve the issue of if seconded employees can constitute a PE in the host country is to explain in the Commentary to the OECD MTC when an enterprise in fact can be found to be carrying out business in the other state. They mean that if paragraphs 8.13 to 8.15 of the comments to article 15 of the OECD MTC were clear enough, the question of whether or not an employee on secondment could constitute a PE in the host country for the foreign enterprise would be answered by using the objective criteria in said comments.¹⁰⁷

5.4 Discussion draft 19th October 2012

5.4.1 Suggested amendments to the comments of article 5

Following the public comments that were received after the publication of the discussion draft published in the 12th of October 2011 a revised version of the discussion draft was prepared based on the comments received. The Joint Working Party was asked to finalise the proposals of changes to comments relating Article 5 of the OECD MTC to be ready for inclusion in the next update of the OECD MTC, scheduled for 2014.¹⁰⁸

Only few changes are made to paragraph 10 of the comments to article 5 of the OECD MTC and they all related to minor changes of the wording. For example in the phrase *“Within a multinational group, it is relatively frequent for employees of one company to be temporarily se-*

¹⁰⁶ David M. Penney, Tax Executives Institute, Inc. Paris, 17th February 2012. Page 3. Accessible at: <http://www.oecd.org/ctp/treaties/49700919.pdf>.

¹⁰⁷ Hans Pijl, Deloitte, Belastingadviseurs B.V., 30th January 2012, page 8-9. Accessible at: <http://www.oecd.org/ctp/treaties/49668097.pdf>.

¹⁰⁸ OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012 p. 1.

conded to another company of the group...” *Frequent* is exchanged with *common*.¹⁰⁹ No large amendments or comments are granted by the Joint Working group.

5.4.2 Public comments on the discussion draft 19th October 2012

5.4.2.1 The European Business Initiative on Taxation (EBIT)

EBIT continues to stress concerns regarding that the wording of the comment indicates that when seconded employees remain on the foreign enterprise’s payroll and the host company is charged with a cost plus the outcome is that the seconded employee constitutes a PE for the foreign enterprise. Furthermore EBIT states though changes are indeed made to be helpful, using the criteria in paragraphs 8.13 to 8.15 to Article 15 of the OECD MTC, they are too many and too subjective to grant a certain outcome. They continue to point out that companies may be forced to accept a local economic employer thereby allowed the host country to tax individuals even when they are present in the host state less than 183 days.¹¹⁰

5.4.2.2 Japan Foreign Trade Council (JFTC)

The JFTC grants comments on the fact that though the suggested wording of paragraph 10 to article 5 of the OECD MTC refers to seeing seconded employees in relationship to paragraphs of the comment to art 15 of the OECD MTC, it does not include any explicit criteria for determining whether or not seconded employees can constitute a PE. They request that clearer provisions be added providing information on whether, regardless of contract, the economic employer is the actual employer. In that case, as long as the host company is the economic employer there should be no risk for a PE for the foreign enterprise. Further they wish for it to be clarified within the wording of the comment that the basis of economic employer should not be the sole criteria effecting whether or not there is a risk of constituting a PE. Finally the JFTC request that the wording *temporarily seconded* be clarified.¹¹¹

¹⁰⁹ OECD Model Tax Convention: Revised proposals concerning the interpretation and application of article 5 (permanent establishment), 19th October 2012 p. 18. Paragraph 37.

¹¹⁰ Bob van der Made, PwC, EBIT Secretariat, European Business Initiative on Taxation Brussels, 30 January 2013. Accessible at: http://www.oecd.org/ctp/treaties/PERMESTEuropean_Business_Initiative_on_Taxation.pdf.

¹¹¹ Japan Foreign Trade Council, Inc., Tokyo, February 9, 2012. Accessible at: <http://www.oecd.org/ctp/treaties/49638101.pdf>.

5.5 Summary

The question of in which circumstances the presence in a country of personnel of a foreign enterprise can constitute a PE for the foreign enterprise was raised in the discussions of the Working Group who presented their suggested amendments to paragraph 10 in the OECD commentary for article 5 to better provide an answer to this question.

The suggested amendment is an addition to paragraph 10 where the situation where an individual on assignment abroad may constitute a PE in the host country for the foreign enterprise is directly brought up. Moreover it delegates an investigation through paragraphs 8.13-8.15 in the comments to article 15 of the OECD MTC. In comment 8.13 to article 15 of the OECD MTC it is stated that it is the nature of the services provided by the individual that will be on consequence. The purpose is to seek out which enterprise bears the responsibility of risk for the services rendered by the individual.

The public comments on the suggested amendments include criticism of the new references to paragraphs 8.13-8.15 on the comment to article 15 of the OECD MTC as this may force foreign companies to accept a host company to be the economic employer. It is suggested that the most effective way to solve the issue of if seconded employees can constitute a PE in the host country is to explain in the Commentary to the OECD MTC when an enterprise in fact can be found to be carrying out business in the other state. Further, the wording of the comment is further criticised as it indicates that if an individual on secondment exercises activity for the enterprise from which is was sent on secondment and not that related to the host enterprise, he is automatically considered to constitute a PE.

The second published suggested amendments to article 5 of the OECD MTC's commentary in paragraph 10 shows little differentiation from the first. The public continues to stress the same worries and call for clarifications of the term *temporarily seconded* and if the economic employer is seen as the employer regardless of contract.

6 Analysis

6.1 The legal value of the OECD MTC and its commentary

In order to determine an answer to the purpose of this thesis it is firstly important to examine the existing legislation in the field. Though many states have internal legislation regulation the existence of a PE the OECD MTC article 5 plays an important role. This is due to the fact that the OECD MTC is brought forth by the OECD organisation, existing of numerous member states, in order to find a common solution to juridical double taxation by providing a manner of applying a set of uniform rules. Further article 5 of the OECD MTC on PE:s is knowingly used as a basis for states to implement internal legislation in the field of PE:s. Though the OECD MTC in itself does not constitute a legally binding international instrument, the tax treaties that Contracting States enter into with one another are, in accordance with the VCLT, legally binding. Further, similarly to the fact that the OECD MTC in certain cases constitutes a basis for many states internal legislation, it is also known to constitute guidelines for the tax treaties between Contracting States. This places the question of OECD MTC's legal value at its point.

The question may arise as to why the legal value of the OECD MTC is important if the tax treaties entered into by Contracting States in themselves constitute legally binding instruments. However, unlike internal legislation where preambles and internal case law can be used to seek guidance in application of the disputed regulation, the tax treaties in many cases lack thorough preambles available to the public. This may not be surprising in cases where the tax treaties in fact are based on the OECD MTC as they therefor could be seen to lack the need of creating preambles or guidelines of their own. However the lack of preambles to tax treaties that do not follow the OECD MTC wording in some cases may lead the courts no other choice but to seek guidance in the only available material – the OECD MTC. However this thought is daunting as it is built for miss interpretation and miss application of the tax treaty in question.

It is questionable whether or not the OECD MTC can at all be granted status of preamble for tax treaties and opinions do vary. Seen through the VCLT's article 32, the OECD MTC could very well constitute a supplementary way of seeking guidance through preparatory work. This is however most likely only true in the cases where the tax treaties are based on the unchanged text of the OECD MTC as in those cases it should be safe to assume that

the Contracting States intended to follow the meaning and recommendations of the OECD MTC. This opinion is strengthened by case law. In the *Lamensa judgment* the court settled on this exact fact, but also it could be deemed proved by the fact that in numerous cases courts have taken guidance in the OECD MTC when the wording of the applicable tax treaty is the same or closely related to the wording of the OECD MTC.¹¹² When the wording of a tax treaty however significantly is altered from the OECD MTC it in contrast should be seen as the Contracting States have a distinct purpose of accomplishing a different result than the OECD MTC delivers. In fact, why else would the contracting states wish to spend time and money needed to create different wording if not for the need to create a different outcome. In these cases it would be difficult to assume that the OECD MTC could constitute a preamble.

Regarding tax treaties entered into by non-OECD member states, as accounted for above.¹¹³ Vogel states that the OECD MTC and commentary thereto loses its value of interpretation. That statement is difficult to agree with if the non-OECD member Contracting States still choose to base their tax treaty on the OECD MTC. It is challenging to find an argument supporting that those Contracting States would have chosen the wording of the OECD MTC for any different reasons than members of the OECD would.

The next question to determine is whether the commentaries to the OECD MTC hold the same legal value as the OECD MTC itself. This question is of great importance as the suggested amendments to the commentary to article 5 of the OECD MTC may help reach a conclusion in the purpose of this thesis. Stated in the commentary itself, the OECD MTC commentary is not meant to be annexed to a tax treaty. However, they are still widely used as assistance in interpreting a tax treaty. Though regularly used, the legal value is debatable seen through the VCLT. They could be deemed to fall in under any number of sub paragraphs to article 31 of the VCLT. Considering the statement that the comments should not be annexed to a tax treaty it seems difficult to see the OECD MTC commentary fall in under article 31.2.a as “...*any agreement*...” between the parties. Further, the fact that the OECD MTC does not constitute a legally binding international instrument prevents the commentaries from falling in under article 31.3.c “...*any relevant rules of international law applicable between the parties*.” It is possible that the commentary could be granted legal value

¹¹² See above chapter 4.2 and 4.4 where the court has used OECD MTC in their rulings.

¹¹³ See above chapter 2.4.1.

through article 31 of the VCLT, namely that the treaty should be interpreted in *context* of its objective and purpose. As the commentary grants insight and explanations to the wording of the articles and which situations they intend to cover they could be deemed to assist in interpreting the *context* of the objective and purpose of a tax treaty based on the OECD MTC.

Future changes to the commentary of the OECD MTC are perhaps the most difficult to grant legal value. Practically it is difficult to see how changes to the OECD MTC commentary today could affect a tax treaty entered into force over 10 years ago. However, if one uses the same example as with the OECD MTC itself, it could be regarded that Contracting States who have based their tax treaty on the exact wording of the OECD MTC, intended to follow the meaning and recommendations of the OECD and thereby intend to follow any additions and changes made by the OECD. Furthermore as the CFA, who writes the commentary for the OECD, is made up of government experts of member states, it could possibly be considered that the member states agree on the commentary and they thus have legal value at least for the OECD members. However this is disputable in member states' tax treaties that do not follow the OECD MTC.

As the courts world wide are known to seek guidance in the OECD MTC commentary it may therefore be possible to grant the commentary legal value under article 31.3.b of the VCLT as “...*any subsequent practice in the application of the treaty...*”. However, it should be pointed out that this could only apply in cases where the commentaries are in fact used in the practice of interpreting a tax treaty and could thus extinguish the possibility of granting the commentary legal value in tax treaties whose wording largely differentiates from the OECD MTC. It should further be pointed out that certain tax treaties follow the exact wording of the OECD MTC in certain articles and largely differentiate in others. It could thus be necessary to grant certain parts of the OECD MTC commentary legal value and others not. Take the India -UK tax treaty as an example, article 5.1 follows the wording of article 5.1 in the OECD MTC, but differs by adding wording to article 5.2 which does not exist in the OECD MTC. One could regard that a case tried in accordance with article 5.1 in an India-UK case, thus could draw upon guidance of the related commentary to article 5.1 of the OECD MTC, while a case tried against article 5.2 lacks that possibility. The legal value of the OECD MTC and its commentary is thus a question that should be answered in the light of each separate tax treaty depending on whether the tax treaty is based on the OECD MTC or not.

6.2 Regulation that determines when seconded employees constitute a PE in the host country

With the previous conclusion carefully drawn regarding the legal value of the OECD MTC and the comments related thereto the focus must then shift to the content of article 5. Article 5 and the comments related to it can be said to hold legal value in numerous states and amongst numerous tax treaties and therefor it must be questioned whether the content therein can answer the purpose of this thesis. There is no part of the article or the comments related thereto which clearly states when a seconded employee can constitute a PE in the host country. However, except for in the listed exceptions of a PE in within the various paragraphs of the article, the main rule is that if three conditions are met a PE is deemed to exist, namely; "...a *fixed place of business* through which the business of an enterprise is *wholly or partly carried on*". A thorough reading of article 5 of the OECD MTC leaves few choices of paragraphs that could handle the situation of seconded employees. First, it could, and perhaps also should, fall in under article 5.1's main rule. Secondly it may, in certain circumstance, fall in under article 5.5's *agency PE*. The situation is not listed in article 5.2 and it cannot fall in under the list of exceptions in article 5.4. The exception of an independent agency PE in article 5.6 is not applicable so long as the employee works in their ordinary field of business. Even if article 5.6 could be applicable it could rarely be seen to fit a secondment situation, as employees are most often dependent on their employers. It could possibly in an individual case fall in under article 5.3 if the seconded employees are seconded to a business site, which lasts for over twelve months. This however is a specific situation and secondments are possibly also rare considering the nature of the field of work. This leads to the question of which paragraph within article 5 holds the answer in determining if a seconded employee constitutes a PE in the host country. In this question, one can seek guidance in how the courts have ruled.

In the both Swedish cases *Webbase* and *X AS* the courts tried the matter in accordance with the equivalent internal legislation to article 5.1 of the OECD MTC. Noted by the court that the internal legislation is based on article 5.1 of the OECD MTC it draws upon guidance from the commentary. Though neither case regards the secondment of employees to a different state, they can still provide valuable guidance. The *X AS* case similarly to a secondment situation, had an employee performing work in a host state. As the employee performed work in his house in the host state for his employer abroad the court deemed that the employer had "...a *fixed place of business* through which the business of an enterprise

was *wholly or partly carried on...*” and a PE was ruled to exist. In the *Webbase* case the same test was performed on the situation where an employee was hired to perform work in a country for a company of a different state. The three criteria of the main rule were not met, why a PE did not exist. In addition the court stretched to determine if a dependant agency could exist but this failed on the criteria of independence. From these two cases it is apparent that article 5.1 of the OECD MTC can be used to regulate the situation where employees in a state perform work for a foreign enterprise.

The Indian cases provide a different outcome. In both the *JC Bamford Excavators Ltd* case and the *Morgan Stanley* case the court ruled a PE existed due to the service PE paragraph in India’s tax treaties with the US and the UK respectively. Not a surprising outcome if one reads the referred to paragraph in the tax treaties as it clearly states that in the situation where employees of an enterprise are stationed to provide services for that company in a host country at an afflicted company for over 90 days, a service PE exists. However, it is interesting that an investigation is still left necessary for the respective courts in these cases as to determine by whom the employees were deemed to be employed because if the factual circumstance would indicate that the host country was the employer, the service PE paragraph could not be used as services would be deemed performed by the host enterprise itself. The factual circumstances in both cases revolved around on whose payroll the employee remained, who ruled over appointing the employees work, who had power of the contracts and if the work performed benefitted the foreign enterprise. Hence, those factors hold the power to perhaps not determine whether a PE directly exists, but indirectly as these factors can determine whether the foreign enterprise is the employer of the seconded individuals, which then is a criteria that must be met in order for a service PE to exist in the service PE paragraph.

In the *Tekmark Global Solutions LLC* case where the court ruled in accordance with article 5.1, which follows the wording the article 5.1 of the OECD MTC, the seconded employees performed work for the host country’s enterprise. The court did not consider there to be any service agreement between the two enterprises and did not use the service PE paragraph in the tax treaty. In the courts investigation in accordance with article 5.1, it found that the employees carried out no work for the foreign enterprise. Even though the salaries were paid by the foreign enterprise, they were reimbursed and held no other power of the seconded employees work or contract while seconded to the host country. This indicates that as long the work performed for the enterprise in the host country is controlled by that

enterprise and no profits arise for the foreign enterprise, the foreign enterprise is not deemed to conduct business in the host country.

Interestingly in the cases where the court ruled in accordance with the service PE article and where it ruled in accordance with the main rule the same factual circumstances of the employment contract were analysed. In all cases, on whose payroll the employee remained, who ruled over appointing the employees work, who had power of the contracts and if the work performed benefitted the foreign enterprise was essential to the ruling. In the service PE cases these factors together can determine the employer, or to whom the services are provided, which is a criteria necessary to be able to administer the paragraph. However, in the case ruled in accordance with the article 5.1, the factors were used to determine if the foreign enterprise carried out business at the host country's enterprise. The cases provide that without a specific paragraph in article 5 of the tax treaties relating to a contract of services between two enterprises, article 5.1, the main rule is used in determining when seconded employees can constitute a PE in the host country. After analysing these cases it is perhaps not surprising that Indian case law is so dominate in the field of secondments considering the addition of a service PE paragraph which is directly applicable to the situations of secondments.

In the Dutch case *XLtd.* the court tried the matter in accordance with the dependant PE agency and the situation in the did not meet the requirements. Again, there was no secondment, but employed individuals carried on work for a foreign enterprise. The facts that are of interest in this case are that part of the factors that caused the relationship to be independent were that all the work performed in the host country was performed without detailed instruction by the foreign enterprise, and the employees in the host country performed their core work independently from the foreign enterprise. This is not unlike the investigations made by the court in determining who is the employer of the seconded employees.

6.3 The proposed amendment to the OECD MTC Commentary as guidance

From the above analysis of which articles are used by the courts in cases, it is evident that there is no completely unanimous manner by which to rule cases regarding whether seconded employees can constitute a PE in the host country. However article 5.1 can be said to constitute the main method of solving this question, unless there is specific regulation in

place in the applicable tax treaty. Thus, a PE exists if there is a ...”*fixed place of business through which the business of an enterprise is wholly or partly carried on.*” The condition of *fixed place* ought to be the host country enterprise’s premises. However the condition of whether the foreign enterprise’s *business is wholly or partly carried on* at these premises is harder to determine.

It is therefore perhaps not surprising that many courts would turn to the commentary for guidance. Disregarding the legal value of the commentary for a moment, the fact that courts need to turn to the commentary for assistance grants the commentary at least a high need. This places a certain pressure on the commentary to grant guidance in the situations that can’t reasonably all be listed in the articles. Returning to the case at hand, it is evident that assistance is needed to determine when a seconded employee can constitute a PE in the host country. Therefor the lack of substance regarding seconded employees in today’s commentary paragraph 10 to article 5 of the OECD MTC is an issue as there is little guidance to gain. The lack of guidance leads to an un-unanimous application of article 5 of the OECD MTC in similar cases where tax treaties are based on said article. This fact goes against the purpose of the OECD MTC, which is to provide a way of settling on a uniform set of rules for common issues arising in the area of international double taxation. It is therefor pleasing that the CTPA has presented suggested amendments to the commentary. Though welcome, it is debatable whether the suggested amendments cover the gap in guidance.

The addition to paragraph 10 of the commentary to article 5 of the OECD MTC does in fact bring up the actual case of secondments and to a certain degree does shed some light on the issue. Firstly, it is stated that seconded employees who perform services for the host country’s enterprise during secondment do not entail that the foreign enterprise is carrying on business at the host country’s location. Secondly this should be the case regardless of which company holds the formal employment contract with the employee, the commentary quite rightly states that it is not uncommon for seconded employees to remain on the foreign enterprise’s contract for administrative reason. This is a welcome observation by the CTPA as this is usually how secondments practically work. However this implies that if the seconded employee provides services for the foreign enterprise during his secondment he can constitute a PE for the foreign enterprise in the host country.

It is in this stage that the commentary, determining when a seconded employee is in fact deemed to perform services for the foreign enterprise and not the host enterprise, that the amended commentary fails in clarity and has received most of the negative feedback from the public. Guidance in this vital analysis is instead referred to paragraphs 8.13 to 8.15 of the commentary to article 15 of the OECD MTC, regarding income from employment. This means that the question of to whom a seconded employee is considered to be performing services is determined by a list of factors. These are; which company holds the responsibility and risk for the services performed, has the power to instruct the employee, who controls the work environment, provides the remuneration, disposes of tools necessary for the employee to perform his work, can select the employee and terminate his contract and perform disciplinary sanctions against the employee amongst other things. The perhaps most controversial of these factors is the question of remuneration. As already stated, it is common that seconded employees remain of the foreign enterprise's contract and therefore also payroll. If the foreign enterprise charges a host enterprise a fee which is directly equivalent to the remuneration paid to the seconded employee along with costs for providing such remuneration with no profit element other than such that is an allowed mark up, the fact that the seconded employee remains on the foreign enterprise's payroll entails a risk of the employee creating a PE. If however the charges instead not singularly relate to the employees remuneration but instead is considered a fee of contract of services rendered to the host enterprise, provided it is in compliance with the arm's length principle (only applies to associated companies), it bears no risk of the seconded employee constituting a PE.

Two conclusions can be observed regarding the new commentary. First, the factors that should be used in determining whether the services a seconded employee perform should be seen as performed to the host country's or the foreign country's enterprise to a large extent matches those factors that the various courts took into consideration in the above rulings.¹¹⁴ The second conclusion is that the CTPA has placed the determination of when a PE can arise due to secondments of employees in the hands of commentary written for article 15 of the OECD MTC. Perhaps it is not far off considering that one of the criteria for the exemption from when an employee is liable to pay tax on his income earned by services performed abroad in article 15 is that the remuneration is not borne by a PE of the enterprise by which he is employed in the host state. It is in this matter that the commentary to

¹¹⁴ See chapter 4.

article 15 determines the difference between an employment relationship and a contract of services between two enterprises in order to ascertain whether the services provided by an employee are such that they constitute an employment contract, or considered to be a contract of services between the foreign enterprise and a PE to that enterprise in the host country. Notably however this commentary refers to a situation where a PE already is in existence, and is meant to determine whether article 7 of the OECD MTC, taxation of business profits, is applicable regarding deductions and exemptions from taxation for the enterprise.

The public's chance to comment on the proposed amendments to paragraph 10 to the commentary of article 5 of the OECD MTC met some negative feedback. EBIT reacted strongly on the conclusion drawn on the remuneration factor. Their observation is that the amendments entail that so long as the fee charged by the foreign enterprise to the host enterprise in accordance with the remuneration and a cost plus the seconded employee's activity in the host enterprise cannot be a part of the host enterprise's activity. Their concern is understandable and the question is of importance. However, EBIT has failed to note that the question of remuneration, though a strong factor, is not the only factor applicable to determine the nature of the services provided. However, the JFTC has also observed this and asks for a clarification in the commentary regarding that who is the economic employer is not the sole criteria. Hence, the question of what possibilities the factor of who is the economic employer of the seconded employees has in determining a PE is still not clear to the public. Quite rightly as EBIT points out, if this is the case, it will force foreign enterprises into accepting the host enterprise as the economic employer to avoid a PE risk, which in turn prevents the seconded individuals from being exempt from taxation abroad if their period of stay amounts to less than 183 days accordance with article 15 of the OECD MTC. This may hinder the globalised business world as it may prevent the exchange of knowledge by the secondment employees due to the employee's fear of double taxation, thus again going against the purpose of the OECD MTC.

TEI raises an interest point in their statement regarding that the wording suggests that if a seconded employee carries out services for the foreign enterprise while on secondment an employee automatically constitutes a PE in the host country regardless of their being a fixed place of business. However, it is hard to not deem the host country's enterprise constituting a fixed place of business in the meaning of article 5.1 of the OECD MTC. In that sense their statement seems irrelevant to the question at hand seeing as it is the nature of

the services and difference between service contracts and employment contracts which is disputable. In fact out of the three criteria of the main rule of when a PE is deemed to exist in the issue of secondments, fulfilling the first, *a fixed place*, must be regarded as the easiest while the questions of whether the *business of an enterprise is wholly or partly carried on* is harder to define.

The revised draft of amendments to paragraph 10 of the commentary to article 5 of the OECD MTC showed practically no difference to the first draft. It is surprising as nearly all public comments called for clarifications. It is evident that the public was not satisfied seeing as many of the initial comments on the draft again came forward during the chance for the public to comment on the amended version of the suggest amendments. However it may not be wholly unpredicted that the second draft contained few changes. Whatever may be said about the lack of clarity in the comment, it does to a certain extent provide guidance in the much-needed answer as to when seconded employees can constitute a PE in the host country. The core of the provided amendment is rather straightforward. The question must be asked whether the seconded employee performs work for the host enterprise to which they are seconded or whether they perform work for the foreign enterprise. If the answer is that they perform work for the host enterprise – there is no risk of constituting a PE. However if they perform work for the foreign enterprise – they will likely constitute a PE. It is unfortunately not quite as straightforward as one would perhaps wish as an analysis in turn should made in relation to paragraphs 8.13 to 8.15 in the commentary to article 15 to find the answer regarding to whom the employees perform their services during their secondment.

After much anticipated guidance as to when seconded employees can constitute a PE in the host country with an amended paragraph 10 to article 5 of the OECD MTC the question is whether paragraphs 8.13 to 8.15 of the commentary to article 15 provide the sufficient guidance. The essential question to ask in order to find the answer as to when a seconded employee can constitute a PE in the host country is to whom the employee performs his services. Though that answer possibly can be found in paragraphs 8.13 to 8.15, those paragraphs are meant to prevent the abuse of the exemption from taxation on employment income in the host country under the circumstances where an employee's remuneration for work performed at a host enterprise does not exceed 183 days. If the employee is considered to be in an employment relationship with the enterprise he works for in the host state, such deduction is allowed, granted that all the requirements in the paragraph

are fulfilled. If however, the services performed instead should be deemed as services concluded by two separate enterprises, such a deduction is not possible. The reason behind this is that tax on employment income should not be exempt to remuneration that is deductible in accordance with article 7 of the OECD MTC.

Though the outcome is of the test factors provided in paragraphs 8.13 to 8.14 is used to determine whether the tax exemption provided in article 15.2 is permitted, it is the same test used by courts to determine the nature of services performed by a seconded employee to determine the risk of a PE. Therefore it is no directly new method of determining the existence of a PE. Though perhaps mal-placed in the commentary, the test functions for both situations. This is further strengthened as it is stated in paragraph 8.11 in the commentary to article 15 that the test is in fact relevant for determining whether the foreign enterprise has a PE where the seconded individual performs his services. If the objective factors indicate that the seconded employee performs services to the foreign enterprise during his secondment the condition the *business* of a foreign enterprise being *wholly or partly carried on* is fulfilled. Thus in a secondment situation all conditions for constituting a PE in accordance with article 5.1 are fulfilled if the employee performs services for the foreign enterprise during his secondment at a host enterprise and he constitutes a PE risk in the host country for the foreign enterprise.

7 Conclusion

The purpose of this thesis has been to determine in which circumstances the presence in a country of a foreign enterprise's personnel, can constitute a PE for the foreign enterprise in the host country. In the circumstances where the secondment of employees is between two enterprises in states by which a tax treaty between those states has been based on the OECD MTC, the answer can be located in the OECD MTC's article 5 along with the commentaries related thereto and commentary related to article 15.

It is primarily the main rule in article 5.1 of the OECD MTC that is applicable to the situation of secondments of employees. Thus, a PE exists if there is a ..."*fixed place of business through which the business of an enterprise is wholly or partly carried on.*" The fixed place ought not be difficult to define as in a secondment situation it ought to, in most cases, be the premises of the host enterprise. In order to determine whether the business of the foreign enterprise is carried out on these premises one has to determine this by the objective criteria in article 15's commentary in paragraphs 8.13 to 8.15. This is a test to determine whether the services provided by the seconded employee constitutes services provided to the foreign enterprise or to the host country's enterprise. The objective factors in determining this are amongst others, which enterprise bears the risk or responsibility for the for the results of the employees work, has the power to instruct the employee, who controls the work environment, provides the remuneration, disposes of tools necessary for the employee to perform his work, can select the employee and terminate his contact and perform disciplinary sanctions against the employee amongst other things. Taking these objective factors into account, an answer to whether the services provided by the seconded employee constitute services provided to the foreign enterprise or to the host country's enterprise is reached. If the services performed by the seconded employee are for the foreign enterprise the remaining conditions of constituting a PE in according article 5.1, wholly or partly carrying on business, are met, thus the secondment can constitute a PE for the foreign enterprise in the host country.

Though the amendments are not yet in the proposed amendment is in line with how the courts worldwide have ruled in questions of seconded employees constituting PE:s for the host country. Thus no real change is made to when seconded employees can constitute a PE in the host state, it is more of a clarification in order to promote a unanimous application of article 5.1 of the OECD MTC.

In situations where the secondment of employees is between two enterprises in states by which a tax treaty is not based on the OECD MTC the specific tax treaty would have to be analysed to ascertain whether the difference in wording intended a different outcome than the OECD MTC and its commentary. Depending on the outcome of such an analysis the commentary may still provide useful guidance.

The provided a referral to paragraphs 8.13 to 8.15 of the commentary to article 15 of the OECD MTC provide a unanimous manner of determining whether the business carried on by the seconded employee is for the foreign enterprise or the host enterprise. It is objective factors that determine this question, entailing that primary domestic legislation can be disregarding. Hence, there is little room for misinterpretation of when seconded employees can constitute a PE for the foreign enterprise in the host country.

With regards to the negative public feedback as to the clarity of the suggested amendments to paragraph 10 in the commentary to article 5 of the OECD MTC, perhaps the objective factors listed in paragraphs 8.13 to 8.15 in the commentary to article 15 also should be implemented into paragraph 10.

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Appendix