

Effects of BEPS Action 7 on domestic and conventional PE concept

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- General PE concept:
“A fixed place of business through which the activities of the non-resident enterprise are carried out”
- Role of PE as threshold for levying source State taxing rights on business profits.
- Action 7: Preventing artificial avoidance of PE status

- Article 5 of the OECD MNC
 - General definition
 - List of examples
 - Construction sites
 - Exempted activities
 - Dependent agent
 - Independent agent exemption
 - Subsidiary exemption

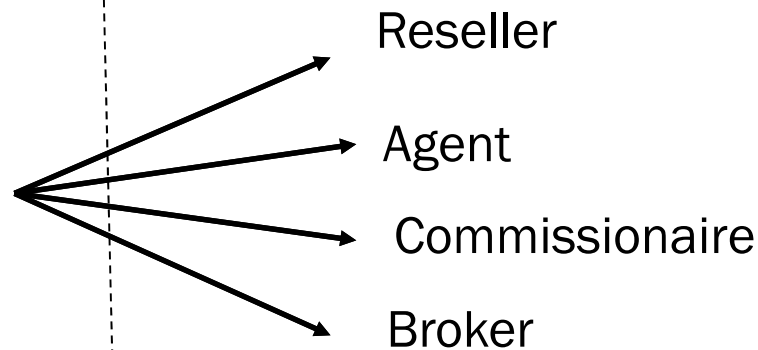
Domestic concept

- Role of domestic PE concept → Net taxation
- Domestic OITI MS concept of PE
 - From inexistent (Bolivia) to complex definition (Mexico)
 - Main deviations from OECDMC
 - Rural real state not used for economic activities (Argentina)
 - Independent agent under non-AL relation (Colombia, Mexico)
 - Preparatory activities (Spain, Argentina)

Outcome of BEPS Action 7

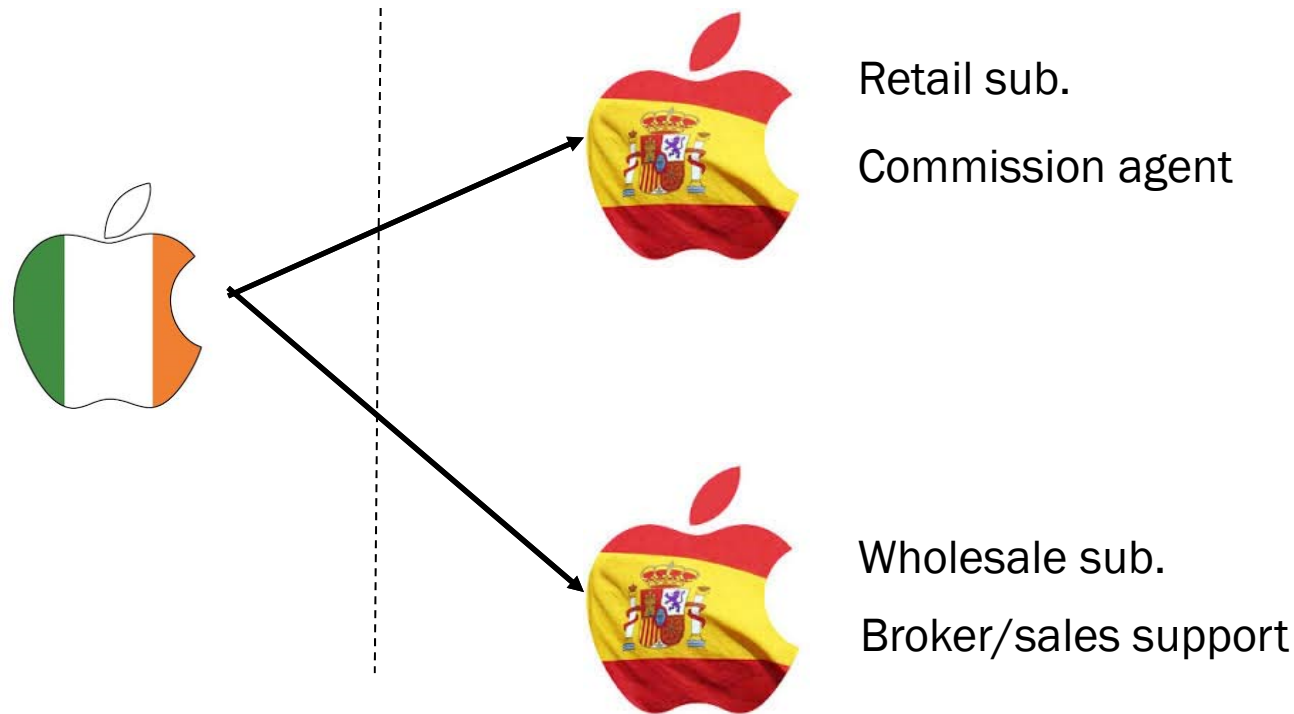
Dependent agent: a person who acts on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise

thermomix



Outcome of BEPS Action 7

- PE status erosion: Modification of the distribution chain (from reseller to commissionaires), without actually modifying the attribution of risks.



Outcome of BEPS Action 7

New dependent agent threshold:

- where a person is acting in a Contracting State on behalf of an enterprise and has, and habitually exercises, in a Contracting State, an authority to conclude contracts, in doing so, **habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts** that are routinely concluded without material modification by the enterprise, and these contracts are
 - a) in the name of the enterprise, or
 - b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
 - c) for the provision of services by that enterprise,

Outcome of BEPS Action 7

Independent agent exception

- An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
 - Clarification? Negative restatement?
 - One or two prongs?
 - Relations between dependent agent and independent agent?
 - Definition of independent status

Outcome of BEPS Action 7

Action 7 independent agent exception

- a) Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an **independent agent** and acts for the enterprise in the **ordinary course** of that business. Where, however, a **person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related**, that person shall **not be considered to be an independent agent** within the meaning of this paragraph with respect to any such enterprise.
 - Independence → Economic independence
 - Acts exclusively (> 90% of sales)

Outcome of BEPS Action 7

Action 7 independent agent exception (cont'd)

- b) For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Outcome of BEPS Action 7

Reaction of OITI MS

- Chile: Local intermediary habitually concluding contracts in her own name but for the transfer of goods owned by Spanish principal. Also requirements for dependent agent under Oficio 986.
- Mexico Formal approach, but there is no independence when arm's length is not met.
- Brazil: substantial approach (France/Spain)
- Spain: Irrelevance of formal aspects. Relevance of economic independence (Dell). Other creative approaches: The industrial dependent agent (manufacturer on behalf of non-resident principal, Roche), but CICA...

Outcome of BEPS Action 7

Preparatory/auxiliary activities exemption

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

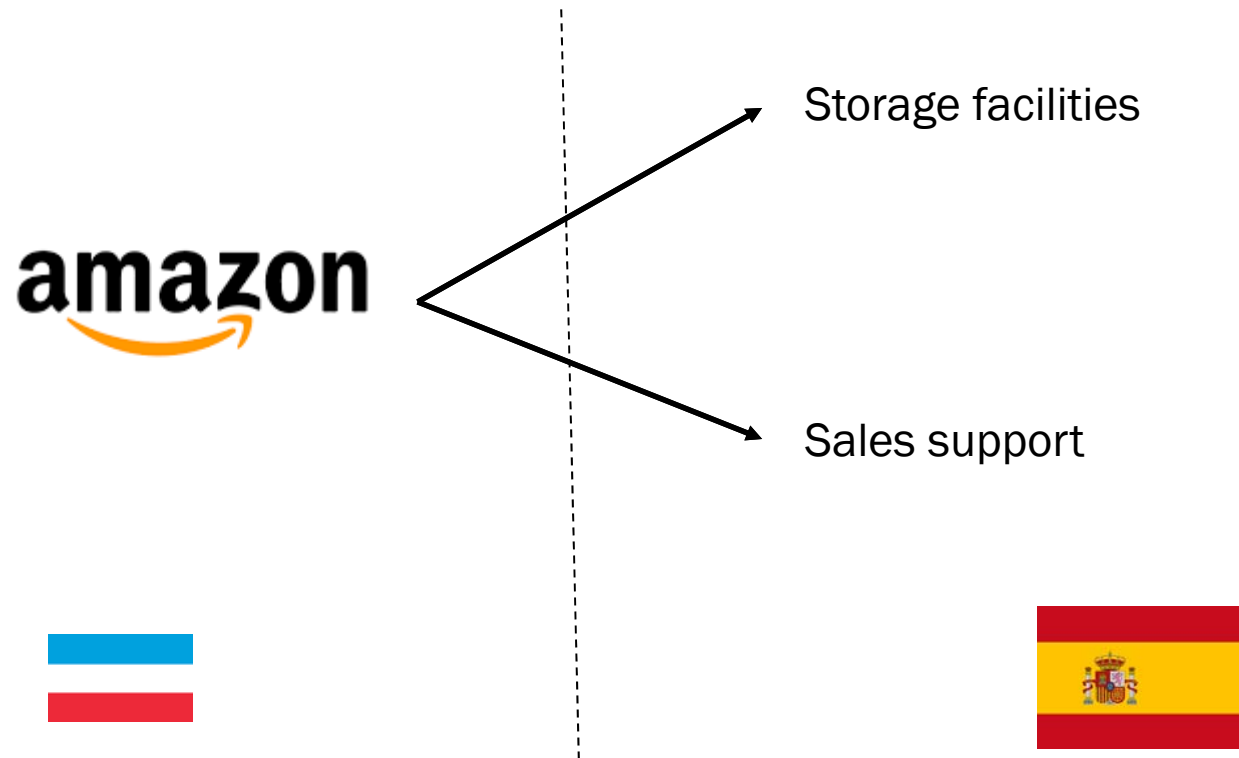
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Outcome of BEPS Action 7

Preparatory/auxiliary activities abuse



Outcome of BEPS Action 7

BEPS Action 7 preparatory/auxiliary activities exemption

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

...

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity ~~of a preparatory or auxiliary character~~;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.~~

provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

Reaction of OITI MS

- Spain: Spanish PE approach (Roche, M-Real...)
- Mexico: Inclusion of anti-fragmentation rule

Outcome of BEPS Action 7

Other issues: construction sites and contract split

Procurement,
engineering, etc.

ABENGOA



Local Sub.
Execution supervision

Local subcontractor
Execution

Outcome of BEPS Action 7

Other issues: construction sites and contract split

- A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
 - Time fragmentation
 - Activities fragmentation
- Reactions:
 - BEPS Action 7: Recourse to PPT
 - Mexico: Specific domestic provision
 - Spain: Substantial approach
 - US: Art. 5.3 2016 USMC

Outcome of BEPS Action 7

Is it necessary to lower the PE threshold?

Reaction to business restructuring... Formal aspects change, but substance remains the same...

- Attribution of risks to local subsidiaries → GAAR?
- Demmed compensations?
- A matter of transfer pricing?

Outcome of BEPS Action 7

Follow-up on Action 7

Consequences of having a PE → Attribution of profits

- The Agency PE case -

