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Committee of Experts in a Contracting State through personnel in relation to “the same or a connected project”. There is no guidance in the Commentary on Article 5(3)(b) with respect to the meaning of the terms “the same or a connected project” and Contracting States may interpret these terms in different ways. Some rules and some examples could be included in the UN Commentary in order to clarify this issue.

2. Besides, Article 5(3)(b) refers to “[t]he furnishing of services ... by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days ...”. Taking into consideration that Article 5(3)(b) uses the term “furnishing” and not the term “performing”, a minority view was expressed during the eighth and ninth sessions of the Committee that services furnished within the source country without the physical presence of personnel or employees in that country are covered by that provision if the furnishing of services within the country lasts more than 183 days. During the discussion, a large majority of those speaking considered, however, that a physical presence is required by Article 5(3)(b). The UN Commentary should clarify this issue.

3. Finally, many most countries ~~that share the view that a physical presence is required in the source country consider that only the performance of services through employees or other personnel within a Contracting State during the specified time period constitutes a permanent establishment. Consequently, consider that~~ only the profits attributable to the ~~said~~ performance of services through employees or other personnel within a Contracting State during the specified time period are taxable in the source country in accordance with

Article 5(3)(b) ~~implies~~ may imply that, where employees or other personnel are present in the source country during the specified time-period, ~~the furnishing of services constitute a permanent establishment. Consequently,~~ all the profits attributable to the services furnished in

the framework of a same project or connected projects, including profits attributable to activities performed outside the source country, are taxable in the source country in accordance with Article 7. The Committee has agreed during its ninth session that the UN Commentary should ~~also discuss this issue~~ incorporate the interpretation shared by a large majority.

4. The following paragraphs 12.1 to 12.8 could be added immediately after paragraph 12 of the Commentary on Article 5(3).

12.1 The Committee has agreed that the traditional interpretation of the current provision of subparagraph b) requires the physical presence in the source State of individuals, being an employee or personnel of the enterprise furnishing services, in order for a permanent establishment to exist in that State. A large majority of countries consider that, under subparagraph b), the term “permanent establishment”, only encompasses service activities if they are performed (for the same or connected project) by employees or personnel which are physically present within a Contracting State during a specified period or periods. As subparagraph (b) refers to “[t]he furnishing of services” and not to the performance of services, a minority view is, however, sometimes expressed that services furnished within a Contracting State without the physical presence of personnel or employees in that State are covered by that provision if the furnishing of services within that State lasts more than 183 days (e.g. the furnishing of remote services by electronic means during the specified time threshold to a person established in a Contracting State). Such extended~~This~~ interpretation is in contradiction~~accordance~~ with the intention of the Group of experts that has decided to include subparagraph b) in the UN Model (1980). The Manual for the negotiation of bilateral tax treaties between developed and developing countries (1979) refers, indeed, to the discussions held within the Group and ~~makes it clear that the majority view must prevail.~~ The following comments indicate that members from developing countries and from developed countries understood that the text retained was requiring a physical presence in the State of source:

“Concerning the time-limit established in paragraph 3, subparagraphs (a) and (b), of guidelines 5, some members of the Group from developing countries said that they would have preferred to remove the time-limit altogether for two main reasons: first, because construction, assembly and similar activities could as a result of modern technology be of very short duration and still result in a considerable profit for the enterprise carrying on those activities; and, secondly, because the period during which the foreign personnel involved in the activities remained in the source country was irrelevant to the definition of the right of developing countries to tax the corresponding income. nt5 0.14 Tw -26.3m

the same or a connected project” from the perspective of the enterprise that furnishes the services and not from the perspective of the customer. Some members of the Committee stress, however, the fact that the condition “

~~would follow the guidelines provided under paragraph 12.4 hereafter, it seems that the result of the proposed approach would, in most cases, be similar to the result of the OECD approach. It is only if a country would consider that projects are connected simply because services activities are performed for a single customer that the proposed approach would enlarge more significantly the scope of subparagraph b).~~

12.5. The 183-day threshold provided for in Article 5(3)(b)

paragraph 3(b) to LAMBDA and DELTA, so that the 183-day threshold is met. Under the alternative provision suggested in the preceding paragraph, the profits attributable to the activities performed by LAMBDA through its own employees are thus profits of LAMBDA attributable to a permanent establishment in State Y while the profits attributable to the activities performed by DELTA through its own employees are profits of DELTA attributable to a permanent establishment in State Y.

Example 7:

another contract between FIR and Company DELTA, a member of the same Group as LAMBDA and a resident of State X, covers the maintenance of equipment situated on a third site from 15 January to 31 May (i.e. 100 days of activity) for a fee of 200.000 euros.

Even though the services performed through employees or other personnel of DELTA may be deemed to be performed by LAMBDA (and vice versa), all the services are performed by LAMBDA.

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