NovioTax

# Should webshops and MNEs that are using commissionaire and similar strategies worry about their tax position?

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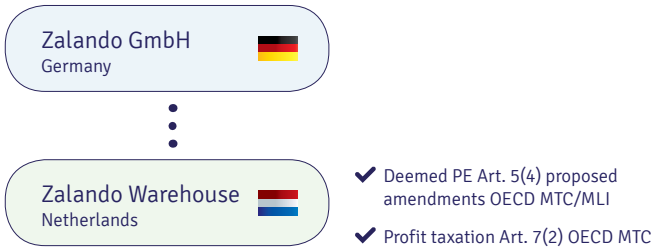
**Following questions received from clients we have decided to provide some more information regarding the Action 7 anti-BEPS measures in relation to agency and commissionaire structures, auxiliary PEs (for instance warehousing) and limited risk distributors.**

Action 7 aims to tackle tax avoidance strategies used to circumvent the PE-definition. This relates to the use of agency or commissionaire arrangements and the exploitation of the existing exceptions to the PE definition, in particular those relating to activities of a "preparatory and auxiliary" nature. Action 7 also proposes to amend the rules on independent agents to prevent the use of exclusive or almost exclusive (i.e. representing more than 90% of the sales conducted) agents, who factually may be dependent. Following the publication of the Action 7 report the PE definition has been revised. In the subsequent two blogs we will clarify the consequences for:

A. MNEs that are benefiting from the preparatory or auxiliary exemption of article 5(4) OECD Model Tax Convention; and
B. MNEs that are using commissionaire and similar strategies.

## Preparatory an auxiliary exemption of article 5(4) OECD Model Tax Convention

In this blog we will focus on item A which is currently clarified in Article 5(4) of the OECD Model Tax Convention ("MTC"). This provision is widely applied in Double Taxation Avoidance Agreements ("DTAAs") and lists a number of auxiliary and supplementary activities, such as warehousing and storage, which despite entailing the existence of a fixed place of business under article 5(1) OECD MTC, do not qualify as PE activities. If cross-border activities are considered a PE under article 5(1), article 5(4) automatically applies if one of the activities listed in article 5(4)(a)-(d) is the only activity carried out. Unfortunately the article 5(4)(a)-(d) does not explicitly mention that the activities carried out at these premises must be of a preparatory or auxiliary nature. It only explains a number of activities that are typically considered to be preparatory or auxiliary by nature such as for instance the use of storage facilities or delivery of goods or merchandise. This enabled large internet companies such as Amazon to prevent PE taxation in countries where warehouses were located by means of article 5(4)(a).




Following the OECD discussions in the context of base erosion and profit shifting the article 5(4)(a)-(d) will be subjected to the condition that the activities carried out are of a preparatory or auxiliary nature. In the example of Amazon, this means that Amazon would be deemed to have a PE in the country of location of its warehouses. The rationale is that for companies like Amazon, the supply chain function certainly can be regarded as a core function and core element of their business model. The supply chain function, however, is a core function not only for companies like Amazon, but for most retail companies and companies in the web-based industry.

The e-commerce market is currently huge (> USD 1.5 trillion), and is projected to grow at double-digit rates in the foreseeable future. In this respect this amendment will probably affect many web based companies. It should however be noted that some OECD member countries do not agree with this new "preparatory or auxiliary" condition. It should also be noted that OECD member countries may also insert an anti-fragmentation rule in DTAAs. Currently companies may want to fragment operations to avoid PE exposure. The proposed 'grouping' provision (article 5(6)(b)) will put an end to this. In order to recognize a PE the overall activities of a MNE (via different entities) in a source state should be assessed on an integrated basis if the activities are closely related. If these activities exceed a certain threshold this may justify taxation by the source state.

## Impact for MNEs on short notice

It should however be noted that on short notice the impact on these changes may be limited. Current DTAAs explicitly determine the definition of PEs. Although the OECD MTC and the corresponding OECD Commentary forms a source of inspiration and clarification, it does not necessarily trigger treaty override. The general attitude of the Dutch Supreme Court is that tax treaties should be applied in accordance with their wording, unless it is clear that the treaty parties (for instance on the basis of a mutual explanatory note) mutually aimed at a different meaning. We note that there is typically no such joint agreement in relation to the DTAAs in this respect.

Interestingly however the multilateral instrument ("MLI"), as concluded on 24 November 2016, may accelerate the implementation process. The MLI allows the relatively rapid inclusion in existing bilateral tax treaties of measures against treaty shopping and artificial avoidance of the PE definition, as clarified above. The MLI provisions will not be included in specific bilateral treaties through an amendment of the wording of treaties. Instead, the MLI provisions need to be read and applied alongside these treaties. In a recent positioning paper on the MLI, the Dutch Ministry of Finance has set out its preferences. The Netherlands intends to implement the MLI provisions in its tax treaties as broadly as possible. In this respect it has a preference for, among other elements, to implement the amended PE definition following the amendments to the OECD MTC as clarified above.

## Takeaways

Companies may have to review and reconsider their existing PEs and identify whether or not they align with the amended PE provisions. In particular companies that have fragmented their foreign activities and webshops that typically have warehousing and distributing activities should monitor their tax position. From a legal point of view the MLI provisions need to be analysed in close cooperation with the existing bilateral tax treaties (i.e. whether the MLI provisions overrule existing treaties). We would also like to refer to our blog on the Spanish (landmark) decision (Dell Computers) on the existence of PEs in foreign jurisdictions. This decision, if used by tax administrations in other countries, may be far-reaching and may affect many businesses engaged in cross-border activities (even before the Action 7 anti-BEPS measures are implemented).

ABOUT NOVIOTAX

NovioTax is a Dutch research-oriented tax consultancy firm with offices in Amsterdam and Nijmegen. Our employees are members of the Dutch Association of Tax Advisers (NOB) and the International Fiscal Association (IFA), have many years of experience and some are much sought-after guest speakers on tax policy and other topics that fall within their field of expertise. We typically serve midsized and large MNE clients, coordinate discussions with the DTA and closely cooperate with international law and tax law firms.

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**Patrick Schrievers**
+31(0) 6 10 24 61 40
patrick.schrievers@noviotax.com

**Gert-Jan Hop**
+31(0) 6 27 32 86 47
gert-jan.hop@noviotax.com