

Distr.: General
7 October 2015

Original: English

**Committee of Experts on International
Cooperation in Tax Matters
Eleventh Session**

Geneva, 19-23 October 2015

Agenda item 3 (a) (ii)

Article 5 (Permanent establishment): The meaning of “connected projects”

Article 5: the meaning of “the same or a connected project”

In the seventh session of the Committee it was acknowledged that it is necessary to clarify the meaning of the word “connected” in Article 5 paragraph 12 to describe projects that are sufficiently related to be added together. Ms. Claudine Devillet was requested to prepare a paper for the eighth session as well as updates for the ninth and the tenth session. The meaning of “the same or a connected project” was discussed during those sessions. The changes to the UN Commentary in that respect should in particular clarify whether physical presence is required, which factors are relevant for the determination of whether projects are connected, and if the condition “for the same or a connected project” should be examined from the perspective of the enterprise or the customer. Furthermore, an additional optional provision for the calculation of the 183-days threshold for situations where different parts of the same or a connected project are performed by

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, most countries consider that

would be a reasonable limitation which would, as a practical matter, cover most of the important situations and would preclude administrative difficulties in the case of merely sporadic activities.”

Article 5(3)(b) refers to furnishing of services, including consultancy services, by an enterprise through employees or other personnel. Some Committee members noted, however, that the development of the digital economy might create challenges for the application of that provision. The growth of the digital economy had resulted in enterprises of a Contracting State furnishing services in the other Contracting State with a limited physical presence or without any physical presence in that other State. They further noted that enterprises might now centrally manage many functions that previously required local presence, and expressed

f the same individuals engaged by the enterprise are performing the services under the different projects.

12.4 The condition “for the same or a connected project” must not allow situations where an enterprise could easily split projects up into different parts and avoid the time threshold of subparagraph b). Consequently, to avoid possibilities of abuse of this provision this condition should be examined from the perspective of both the enterprise that furnishes the services and the customer. If the activities form part of the same or a connected project from the perspective of either the enterprise or the customer, Article 5(3)(b) should apply. The provision therefore applies if the activities are part of the same or a connected project only from the perspective of the customer even though those activities are not part of the same or a connected project from the perspective of the enterprise performing the services. Only if a single project exists neither from the perspective of the enterprise nor from the perspective of the customer should projects be regarded as unconnected.

Looking at both the perspective of the enterprise and the perspective of the customer does not require examining the state of mind of the parties but rather considers what conclusions a reasonable person would draw on the perspectives of the enterprise and the customer, taking all relevant circumstances into account. The organizational structure of an enterprise should be considered (on)-10(ecde)4(r)3(e). enterpr5C5T300uld .J 07

the medical devices. Under the second contract, another department trains the medical staff operating these devices.

From the perspective of the supplying enterprise those services can be considered as being performed in the framework of two unrelated projects. Separate contracts have been concluded and two different types of services are performed by different employees in different departments of the enterprise. The nature of the work is different as one contract provides for maintenance whereas the other contract provides for training.

From the perspective of the customer, however, the services provided under the two contracts could be considered as being part of the same project, or at least be connected projects. The contracts were concluded with the same person and are related to each other as they both concern the same medical devices. From an objective perspective the conclusion of one single contract would have been standard business practice.

The interpretation that both the perspective of the enterprise and the perspective of the customer have to be taken into account ensures that neither the state of mind of the parties nor the organizational structure of an enterprise are decisive factors for the determination whether activities form part of the same project.

performs its activities through at least one of its employees or other personnel or – if the anti-abuse provision suggested in paragraph 5 above is included in the treaty – one of the employees or other personnel of an associated enterprise is present in that State. However, a day will count only as a single day regardless of how many employees or other personnel – of the enterprise itself or of an associated enterprise – are present in that State and performing services during that day. [An enterprise that agrees to keep employees or other personnel available for a client who needs their services and charges the client for making such personnel available, the period during which the employees or other personnel are available to the client will count towards the threshold irrespective of the fact that they are idle during the days when they remain available.]

Example 4: Company R, a resident of State R, obtains a contract for the maintenance of several pieces of equipment situated on different industrial sites belonging to Company S, a resident of State S. Those activities are supposed to be performed through several employees and to last from 15 January to 31 October (i.e. 220 days of activities). In such case, the 183-day threshold would be met and Article 5(3)(b) would apply. 2.d i f e r p i

5. While discussing the meaning of “the same or a connected project” some members of the Committee have suggested adding a final sentence in paragraph 12 of the UN Commentary on Article 5, as underlined below:

12. (...) However, some countries find the “project” limitation either too easy to manipulate or too narrow in that it might preclude taxation in the case of a continuous number of separate projects, each of 120 or 150 days’ duration. In order to avoid this issue and simplify the application of the permanent establishment concept to services, some countries prefer to eliminate this requirement in Article 5(3)(b) by deleting the expression: “(for the same or connected project)”.

They understand that the original main purpose of subparagraph b) was to avoid the difficulties of applying the requirements of paragraph 1 to the service activities. The “same or connected project” requirement implies limitations that undermine this objective (e.g. the commercial coherence limitation). For these reasons they consider that this view should be clearly stated in the Commentary.