



TP PANEL DISCUSSION

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Your global tax partner

INTRODUCTION



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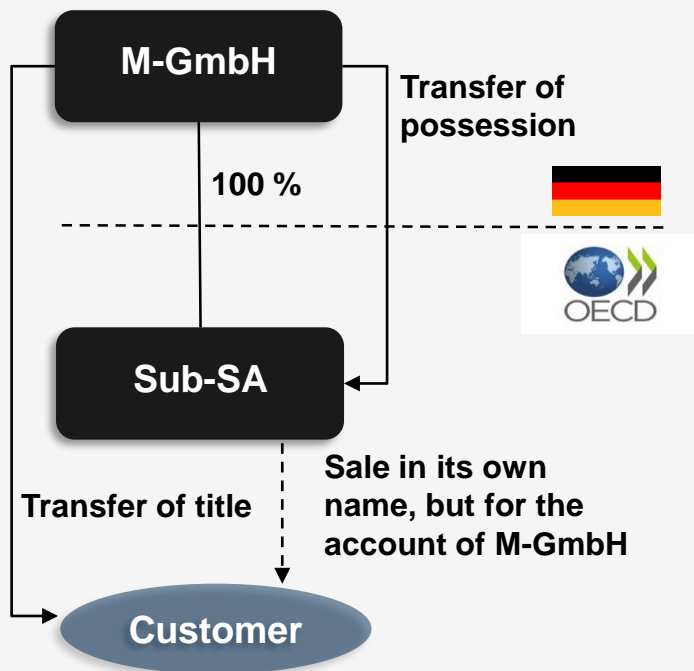
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1. Agency PE
2. Auxiliary & preparatory activities
3. Profit allocation
4. Splitting up contracts



AGENCY PE

CASE 1 - COMMISSIONAIRE PE



Case

- ❖ M specialises in production and distribution of jewelry.
- ❖ Sub sells the products of M in its own name but for the account of M in its state of residence.
- ❖ Sub is responsible for identifying customers, soliciting, placing and processing customer orders with M.
- ❖ M transfers possession, but not the title to the goods to Sub. The latter is directly transferred from M to the customer.
- ❖ M invoices customers and bears credit risk with respect to customers receivables.
- ❖ Sub receives a commission from M for its activities.

Questions

- ❖ Does the activity performed by Sub create a PE of M in Sub's residence state?
- ❖ Which profits should be allocated to the PE of M?

AGENCY PE - GERMAN POSITION



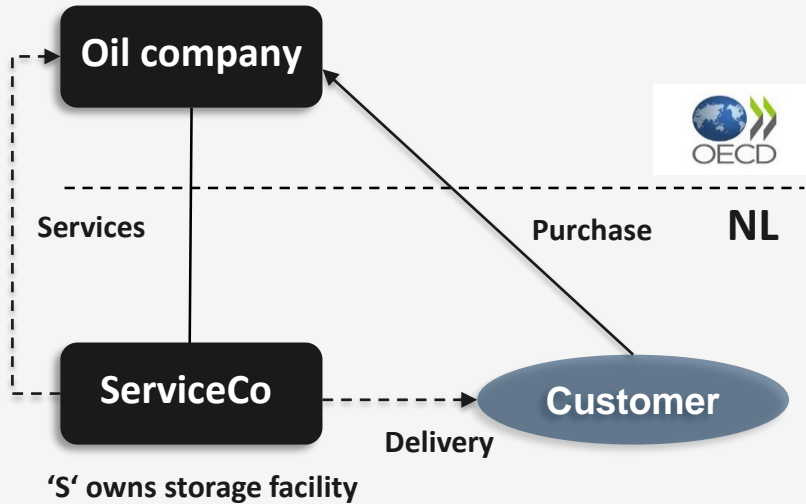
- ❖ Tendency to **blur and broaden the definition of what constitutes a PE** for tax treaty purposes has always been **widely rejected**.
 - Prevailing view: commission agent does not constitute an agency PE in the meaning of Art. 5 (5) OECD-MTC, as he **lacks an authority to legally bind the principal**.
 - But: Tax authorities decree dating December 24, 1999, no. 1.2.2: “*Where a person is authorised to **negotiate all details** of a contract in a way that is **binding** on the enterprise, the **enterprise may be** assumed to be **bound economically**.*”
- ❖ Germany’s position to the **MLI**:
 - **35 treaties** covered by the convention.
 - **Reservation** not to apply, among others, Art. 12 of the MLI (Commissionnaire Arrangements).

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**AUXILIARY
ACTIVITIES**

AUXILIARY & PREPARATORY ACTIVITIES – PRE BEPS



- ❖ Art. 5 (4) of the OECD-MTC 2010 includes a list of exceptions according to which a permanent establishment is deemed not to exist where a place of business is used solely for activities that are listed in that paragraph.
- ❖ Amongst others the following activities are excluded:
 - Storage;
 - Display;
 - Delivery;
 - Specified activities with a preparatory or auxiliary character.



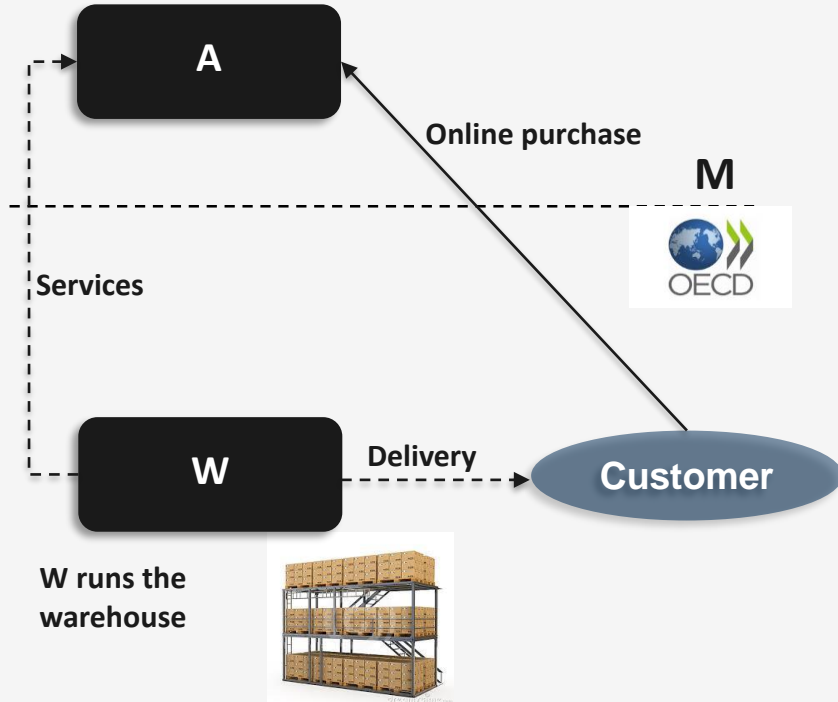
AUXILIARY & PREPARATORY ACTIVITIES – BEPS ACTION NO.7



- ❖ BEPS Action Plan 7 is intended to prevent artificial avoidance of a PE where there is significant activity in a country.
- ❖ The changes to the auxiliary and preparatory clause were deemed necessary to adapt to the digital economy.
- ❖ Activities previously considered to be merely preparatory or auxiliary in nature nowadays correspond to core business activities.
- ❖ In Action 7 it is agreed to modify Art. 5 (4) so that **each of the exceptions** included in that provision is restricted to activities that are otherwise of a **“preparatory or auxiliary” character**.

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CASE 1 – PREPARATORY & AUXILIARY ACTIVITIES?



Case

❖ Facts and circumstances:

- W, an **unrelated enterprise** resident of an OECD country, operates the warehouse on behalf of A.
- W has the **right to use and access** to the warehouse.
- W runs the warehouse under a **service agreement** where it uses specialised **know-how and software** developed by A.
- A has **no employees** in the OECD country.
- The warehouse is **accessible and at the disposal** of A.

Question

- ❖ Does A create a PE in the OECD country?

AUXILIARY ACTIVITIES - DUTCH POSITION



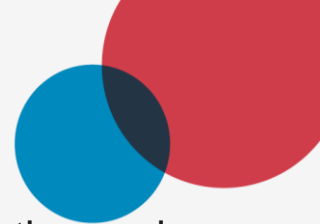
- ❖ The Netherlands' position to BEPS Action 7:
 - The Netherlands chose option A, Art. 13 (1) MLI, stating explicitly that the exceptions of Art. 5 (4) MTC should all be of auxiliary or preparatory nature.
 - Applicable with approx. 30 countries based on the MLI.
 - For specific bilateral situations you need to check the MLI Matching Database.
- ❖ In the Netherlands this set up would not constitute a PE under the new PE definition. Just having access is insufficient to trigger a PE.
- ❖ If W would be a related party, the profit allocation becomes relevant. The Dutch authorities would not adopt a PE for A as long as W would report sufficient profit.
- ❖ This would be different if A **operates the warehouse** with its **own software** and **employees**. The Dutch authorities would analyse how relevant the warehouse function is compared to the overall business.

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**PROFIT
ALLOCATION**

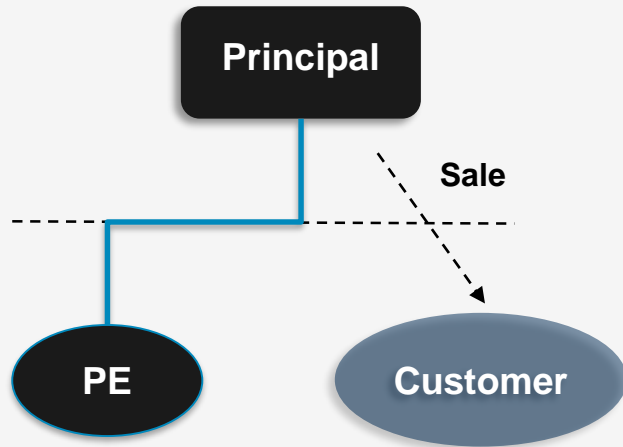
PROFIT ATTRIBUTION



- ❖ **BEPS Action Plan (Action 7)** recognises that 2010 guidance on profit attribution and Authorised OECD Approach (“AOA”) remain valid
- ❖ AOA requires:
 - PE treated as a separate enterprise with its own local functions
 - Risks and assets allocated by analysing significant people functions managing them
 - Transfer pricing applied to the resulting allocation of functions, risks and assets to determine the profit or loss allocable to the PE
- ❖ NB “branch accounts” prepared for accounting purposes are not relevant in determining the appropriate profit attribution for tax purposes
- ❖ Discussion draft published July 2017 explores interaction of transfer pricing and profit attribution. Public OECD consultation was held on 7 November 2017.

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PROFIT ATTRIBUTION – CASE 1

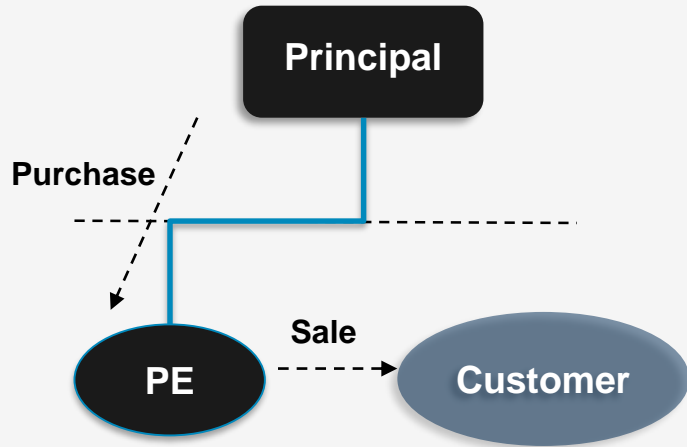


Case

- ❖ PE undertakes all sales, marketing, distribution and customer support functions in local market
- ❖ Sales are made in the name of the Principal

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PROFIT ATTRIBUTION – CASE 1 CONT'D

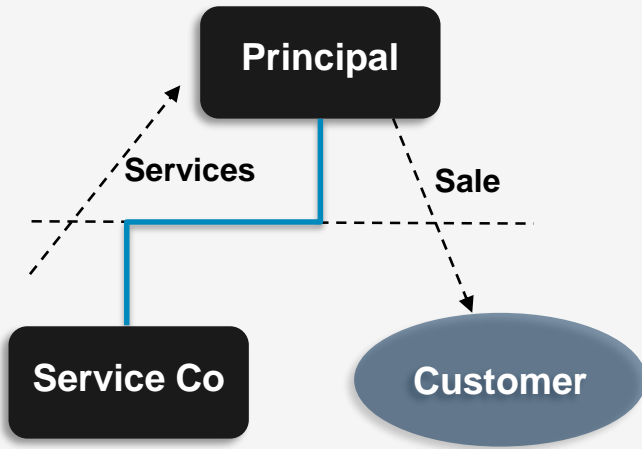


- ❖ AOA deems PE to be a separate enterprise owning local intangibles and making the sales
- ❖ PE's profit is determined by giving it an arm's length return for its functions assets and risks

Questions

- ❖ Would you expect the same characterisation?
- ❖ How would you anticipate the profit should be determined?

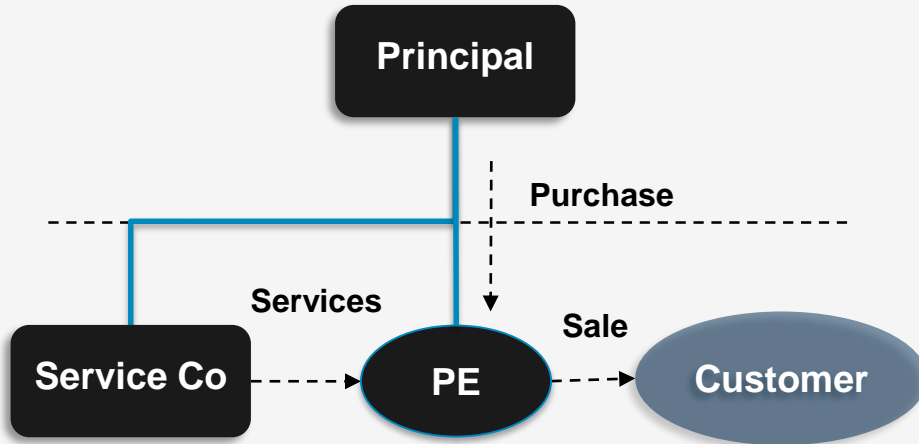
PROFIT ATTRIBUTION – CASE 2



Case

- ❖ Services co undertakes all sales, marketing, distribution and customer support functions in local market
- ❖ Sales are made in the name of the Principal

PROFIT ATTRIBUTION – CASE 2 CONT'D



- ❖ DAPE analysis
- ❖ AOA deems PE to be a separate enterprise owning local intangibles and making the sales
- ❖ PE's profit is determined by giving it an arm's length return for its functions assets and risks

Questions

- ❖ How do you anticipate the profits would be allocated?



**SPLITTING
CONTRACTS**

SPLITTING CONTRACTS



- ❖ projects with significant cross-border elements
- ❖ documentation split into two or more contracts
- ❖ to reduce local tax liabilities by avoid local corporate taxes on offshore work
- ❖ result in lower overall price for the contract works
- ❖ also split onshore contracts to mitigate indirect taxes
- ❖ offshore contract allows for fixed price contracts in harder currency

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CLASSIC SPLITS



- ❖ split into:
 - offshore contract
 - onshore contract
 - With different contracting entities

- ❖ offshore contract for:
 - design
 - engineering
 - out-of-country procurement

CLASSIC SPLITS



- ❖ onshore contract for:
 - managing import process
 - in-country transport
 - onshore procurement
 - installation and erection
 - testing and commissioning
- ❖ consider splitting supply of training and spare parts
- ❖ may require Umbrella Agreement with parent guarantees

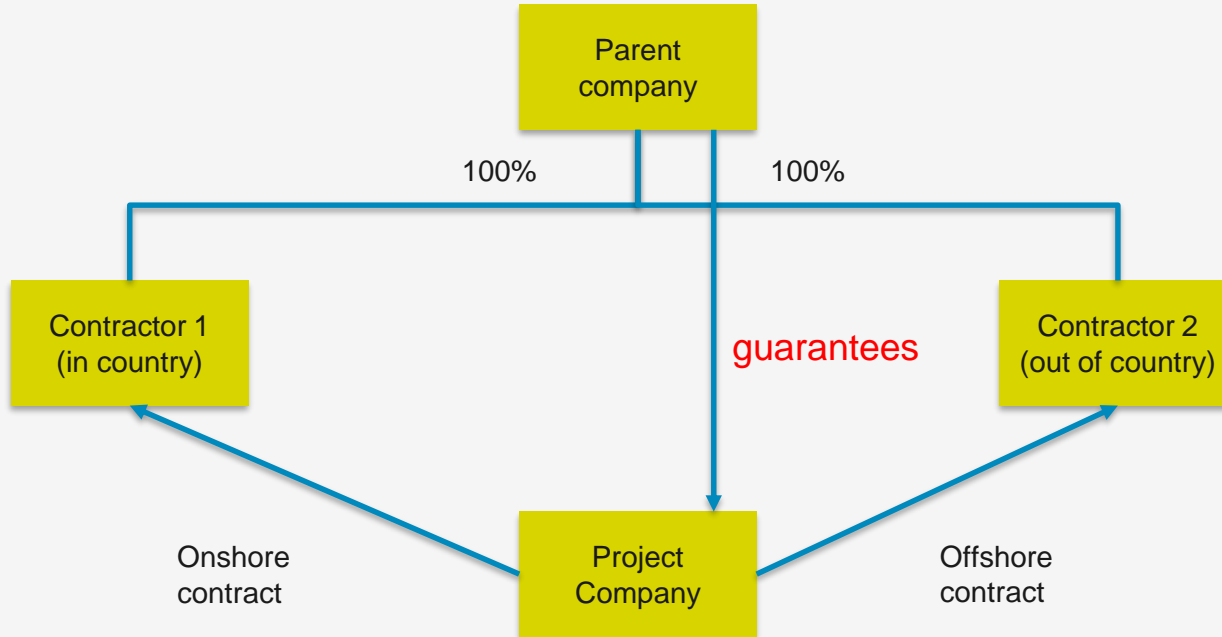
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LEGAL ASPECTS



- ❖ tax efficiency must consider the legal mechanics - not create risks
- ❖ splitting of contracts driven by specific tax circumstances
- ❖ all key contractual issues must still be addressed by both contracts
- ❖ splitting must be sensitive to:
 - underlying local tax risks
 - drafting complexities

CLASSIC SPLIT



APPLICATION IN SA / AFRICA



- ❖ employing someone in SA under offshore contract will require registration of a branch
 - is this a PE?
- ❖ Revenue will try to link it to the in-country building site
- ❖ if services are provided in country
 - sourced there?
 - PE under the services clause?
- ❖ many rely on preparatory or auxiliary services exclusion
 - but new definition may create PE now

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**SPEAKER
PROFILES**

SPEAKER PROFILE



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Jimmie is a partner of Taxand Netherlands.

He specialises in corporate tax issues and heads the Dutch Transfer Pricing practice. For his clients he is involved in functional and economic analysis, profit allocation and advance pricing arrangements with the tax authorities. He is also called upon to assist with domestic and international matters such as tax control frameworks, setting up new businesses and joint ventures, both in the Netherlands and internationally. He is often involved in analysing new businesses and optimising of existing business structures and the tax qualification thereof. Herein the existence of permanent establishments plays an important role.

SPEAKER PROFILE



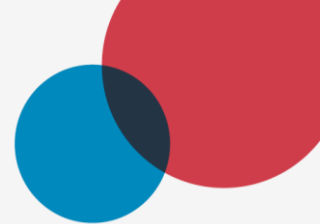
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Carsten is a tax advisor at Flick Gocke Schaumburg where he specialises in international tax law, with a strong focus on transfer pricing, double tax treaty law and the taxation of permanent establishments. In this connection he regularly advises clients on transfer pricing issues as well as all aspects of corporate reorganisations. He also defends and advises clients during tax audits.

SPEAKER PROFILE



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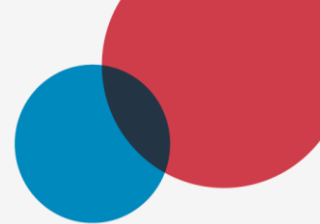
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Richard Syratt is a Managing Director with Alvarez & Marsal Taxand in London, with more than 20 years of corporate and international tax and transfer pricing experience. He focuses on international tax structuring.

Richard's clients include a number of the U.K.'s top-listed multinationals, with projects ranging from "boxes-and-lines" planning such as large debt restructuring projects, tax efficient financing, acquisition structures, mergers, demergers and JV structuring, to substance-based business changes, including intellectual property centralisation, structuring into tonnage tax and implementing franchise arrangements.

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Okkie is based in Taxand South Africa where he is an executive at ENSAfrica. He is a qualified CA (SA) and specialises in international tax (with special emphasis on inward and outward investments and the funding of transactions such as restructurings, take-overs and merger and acquisition), transfer pricing, thin capitalisation, the application of international double tax agreements and exchange control regulations.

Okkie has gained commercial experience working as a group tax advisor for a South African manufacturer, and has worked for a leading international firm of auditors, advising multinational companies on cross-border tax implication.