

THIRTEENTH INTERNATIONAL  
TAXATION CONFERENCE  
Mumbai, India  
November 29 - December 1, 2007

### TIME THRESHOLDS IN TAX TREATIES

Brian J. Arnold  
Goodmans LLP  
Toronto, Canada

### Threshold Requirements

- purpose of threshold requirement: to set minimum conditions for source country taxation of nonresidents
- in absence of threshold, all domestic source income derived by nonresidents subject to tax
- different thresholds for different types of income
- thresholds apply for domestic tax and for tax treaties

7

### Threshold Requirements

- threshold requirements are closely related to rules concerning nexus and source
- nexus: are nonresident's connections with country sufficient to justify tax?
- source: what income derived by the nonresident is subject to tax?

8

### Time Thresholds under Domestic Law

- few
- no threshold in most countries for taxation of income from services
- US business visitor provision applies if less than 90 days

9

### Is a Threshold Requirement Desirable?

- avoids enforcement problems
- provides certainty
- reduces compliance costs and noncompliance
- some loss of tax revenue and tax avoidance possibilities
- facilitates cross-border activities by limiting source country taxation until nonresidents' connections with source country have met minimum threshold

10

### What Should the Minimum Time Threshold Be?

- 90 days, 120 days, 183 days?
- expressed in days or months?
- different times for different situations?
- period of presence or period of working?

11

## Threshold Requirements under Tax Treaties

### Business Profits

- general rule: existence of a PE
  - compare domestic law threshold
- PE threshold not applicable to some types of business profits:
  - shipping and air transport
  - entertainers
  - income from immovable property

12

## Threshold Requirements under Tax Treaties

- income from immovable property: property situated in source country
- investment income: no threshold, just source unless effectively connected to PE
- employment income: none for some employees; 183 days physical presence for others

13

## Time Thresholds — PEs

- general rule for fixed place PEs — at least 6 months
  - “certain degree of permanency,” i.e., not purely temporary
- exception for recurrent activities and for short-term businesses
- no time threshold for dependent agent PEs, but authority to conclude contracts must be exercised habitually

14

## Time Thresholds — Construction Sites

- PE only if it lasts more than 12 months (OECD); 6 months (UN)
- applies to each site or project
- splitting projects to avoid PE
- inconsistent with 6-month period for fixed place PE

15

## Time Thresholds — PEs

- no time limit for preparatory or auxiliary activities
- exemption for preparatory or auxiliary activities even if activities continue indefinitely

16

## OECD Model — Article 15(2)

[R]emuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and

...

17

## Article 15(2) — Exemption

- income from employment exempt if employee present for less than 183 days and not paid by resident or nonresident with PE
- all days of physical presence counted
- why not just days of work?
- consistent with PE rules?

18

## Services PEs

- OECD Model: no special rule  
– draft alternative rule (2006)
- UN Model: Art. 14 (fixed base) and Art. 5(3)(b)
- Canada-US Treaty: proposed rule in September 2007 protocol
- other examples

19

## UN Model — Article 14

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character . . . may also be taxed in the other Contracting State:  
...  
b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned;

20

## UN Model, Article 14

- income from personal services taxable by source country if “stay” is “for a period or periods amounting to or exceeding in the aggregate 183 days”
- intended to be consistent with Article 15(2)
- thus, any day of presence counted

21

## UN Model — Article 14

- consistency between time tests in Article 5(3)(b) and 14?
- note Article 5(3)(b) applies on a project-by-project basis but connected projects are treated as one
- no such condition in Article 14
- note Article 5(3)(b) includes “other personnel”

22

## UN Model — Article 5(3)(b)

3. The term “permanent establishment” also encompasses:  
...  
b) The furnishing of services, including consultancy 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 six months within any twelve-month period.

23

## UN Model — Article 5(3)(b)

- deemed PE “if activities of that nature continue ... for a period or periods aggregating more than six months”
- how is this time test to be applied?
- no indication in Commentary
- what time period is appropriate?

24

## Example

USCo sends employees to work in India pursuant to a 9-month contract. The employees spend 10 days in each month working in India. Does USCo have a PE in India under the UN Model?

25

## Example

- not necessary for employees to be present in India for more than 6 months
- not necessary for employees to be providing services in India continuously for more than 6 months
- sufficient if services provided periodically over contract period?
- Commentary should clarify

26

## Multiple Employees or Agents

- entity has one employee in source country for more than 183 days
- entity has multiple employees in source country for less than 183 days
- favours large corporations that can carry out larger projects in shorter time

27

## Draft OECD Services PE Rule

### PE deemed to exist

“... where an enterprise of a Contracting State performs services in the other Contracting State

a) through an individual who is present in that other State during a period or periods exceeding in the aggregate 183 days in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or

...”

28

## Draft OECD Services PE Rule

### PE deemed to exist

“... where an enterprise of a Contracting State performs services in the other Contracting State

... .

b) during a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more individuals who are performing such services in that other State or are present in that other State for the purpose of performing such services, ...”

29

### Draft OECD Services PE Rule

- alternative provision
- issued in draft form December 8, 2006
- 2 tests:
  - a) present for more than 183 days plus gross revenue test
  - b) performance of services for more than 183 days for same or connected project through individuals present performing services or present for that purpose in source country

30

### Draft OECD Services PE Rule

- inconsistent time periods in draft rule and Article 5(3) (construction sites)
- days of presence for (a) calculated in same way as for Article 15(2)

31

### Draft OECD Services PE Rule

- for (b) draft Commentary says individuals either performing services or present for such purpose
- performing services means working days
- present for purpose of performing services means all days of presence
- but local employees are not present for the purpose of providing services

32

### Draft Protocol to Canada-US Treaty

Deemed PE where enterprise provides services if

- (a) Those services are performed in that other State by an individual who is present in that other State for a period or periods aggregating 183 days or more in any twelve-month period, and, during that period or periods, more than 50 percent of the gross active business revenues of the enterprise consists of income derived from the services performed in that other State by that individual; or

33

### Draft Protocol to Canada-US Treaty

Deemed PE where enterprise provides services if

....

- (b) The services are provided in that other State for an aggregate of 183 days or more in any twelve-month period with respect to the same or connected project for customers who are either residents of that other State or who maintain a permanent establishment in that other State and the services are provided in respect of that permanent establishment.

34

### Canada-US Treaty: Proposed Services PE Rule

- similar to draft OECD rule
- 2-part test:
  - a) individual present for 183 days or more plus gross revenue test
  - b) services provided for 183 days or more for same or connected project for residents or nonresidents with PE

35

## Differences between OECD and Canada-US Rule

- 183 days or more/OECD more than 183 days
- “by” an individual/OECD “through”
- enterprise provides services/OECD through individuals present and performing services
- any services/OECD services provided by individual on behalf of another enterprise excluded
- no base erosion test in OECD rule

36

## India - US Treaty: Art. 5(2)

2. The term “permanent establishment” includes especially:
  - ...
    - (k) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve month period;

37

## India - US Treaty: Art. 5(2)

2. The term “permanent establishment” includes especially:
  - ...
    - (l) the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:
      - (i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve month period; or
      - (ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9 (Associated Enterprises)).

38

## India - US Treaty: Art. 5(2)(l)

- furnishing services through employees or other personnel is PE if activities continue for more than 90 days or services performed for related taxpayer
- deeming rule?
- related-taxpayer rule is alternative to time threshold

39