

Artificial Avoidance of Permanent Establishment Status under Action 7

- (i) Dependent Agent Permanent Establishment under BEPS: Is it a Permanent Establishment Under Action 7?
- (ii) Does Permanent Establishment as a Tax Concept have a long-term future in model treaties?

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Panelists: Bijal Ajinkya, India; Daksha Baxi, India; Amar Mehta, Canada; Rajesh Simhan, India; Jeffrey Van Hove, OECD

Changes to Dependent Agent PE under BEPS Action 7: Prevention of Avoidance through Commissionaire Arrangements

- **Expansion of scope of deeming fiction of Dependent Agent PE (DAPE) under Article 5(5) of the MTC**

Existing provision	Proposed change
<p>A person, being a dependent agent, acting on behalf of a foreign enterprise is deemed to be a dependent agent PE <u>if it has and habitually exercises the authority to conclude contracts</u> in the <u>name of the foreign enterprise</u>.</p>	<p>Amend to also cover persons habitually playing the <u>principle role leading to routine conclusion of contracts without material modification by the foreign enterprise</u>, and the contracts are (i) in the name of the foreign enterprise, <u>or (ii) for the transfer / license of property owned, or sublicense of property held under license by the foreign enterprise, or (iii) for the provision of services by the foreign enterprise.</u></p>

- **Narrowing of scope of 'Independent Agent' exclusion under Article 5(6) of the MTC**

Existing provision	Proposed change
<p>The deeming fiction in Article 5(5) shall not apply if the person acting on behalf of a foreign enterprise is an <u>agent of independent status and acts in the ordinary course of its business</u>.</p>	<p>Restrict the exclusion to provide that an agent should not be considered to have an independent <u>status if it acts exclusively or almost exclusively on behalf of one or more foreign enterprises to which it is closely related</u>. A person would be closely related to an enterprise, if based on all the relevant facts and circumstances, one has control of the other or both are under the common control of another enterprise.</p>

Other Changes to PE under BEPS Action 7

- Restriction of specific activity exemptions under Article 5(4) of the MTC

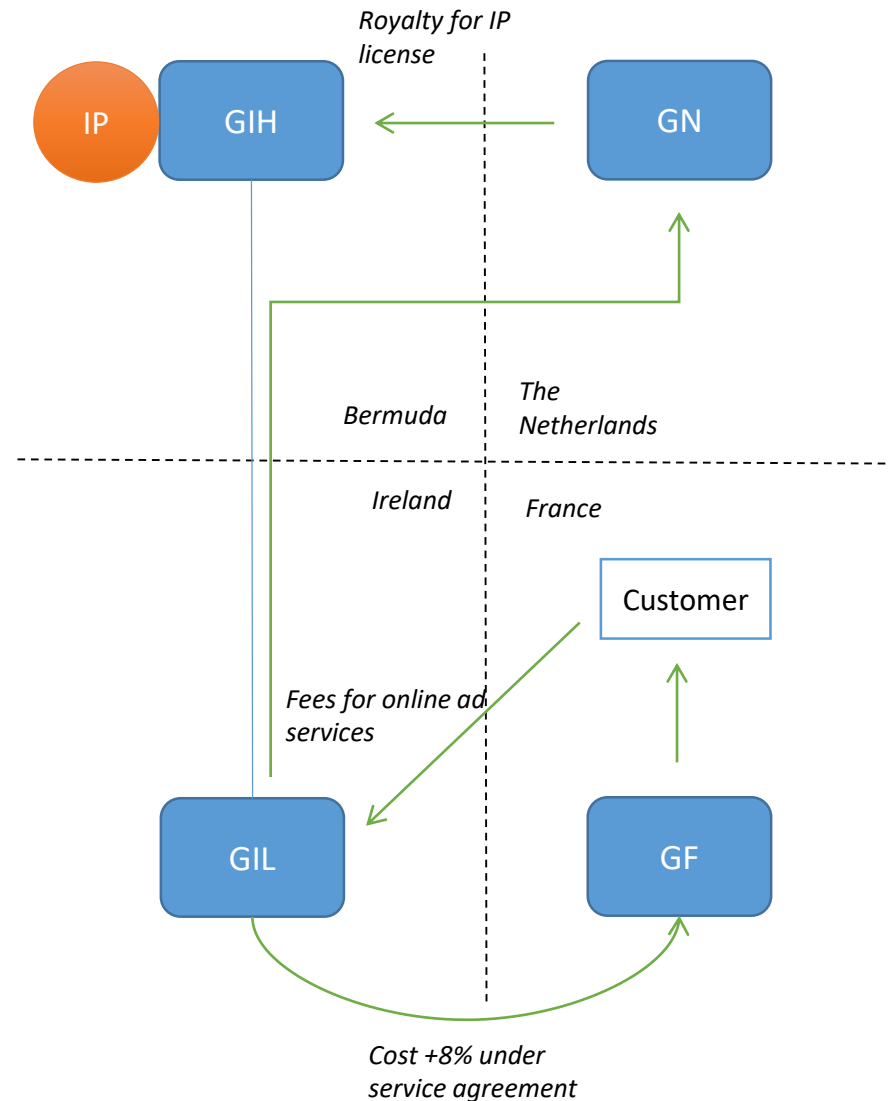
Existing provision	Proposed change
<p>Maintaining stocks of goods for storage, display, delivery or processing, purchasing of goods or merchandise, collection of information (“Specific Activity Exemptions”) <u>should not be</u> regarded as constituting a PE.</p>	<p>Restrict Specific Activity Exemptions to <u>only those which are otherwise preparatory or auxiliary in nature in the context of the business as a whole.</u> Further, introduced new <u>Anti-Fragmentation Rule</u> to prevent avoidance of PE by fragmenting a cohesive operating business into several small operations in order to argue that each part is preparatory or auxiliary in nature.</p>

Key Reservations

- Preparatory/ Auxiliary Services: India would not include scientific research in the list of examples of activities indicative of preparatory or auxiliary nature.
- Authority to conclude contracts: India is of the view that the mere fact that a person has attended or participated in negotiations in a State between an enterprise and a client, can in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise. India is also of the view that a person, who is authorised to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can be said to exercise the authority to conclude contracts.
- Use of marketing representative: Malaysia is of the view that marketing representative may constitute a permanent establishment particularly if the representative also negotiates the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident.
- Low Risk Distributor: India considers that distribution of goods owned by an enterprise by an associated enterprise or a closely connected enterprise, particularly in a case where the risks are not born by such enterprise, such as the so called “low risk distributor”, may give rise to a permanent establishment of the enterprise, whose goods are being sold.

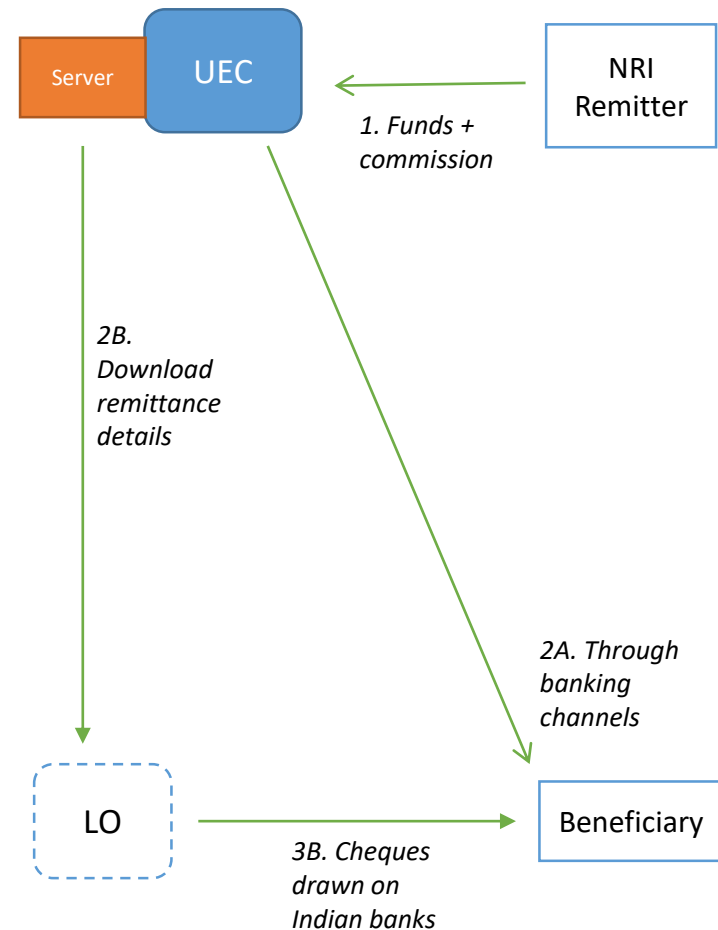
Google Ireland Limited (French Tax Court, 2017)

- Google Ireland Limited (GIL), an Irish resident, provided online ad services to French customers (B2B). Either customers managed their ad campaigns, or Google France (GF) assisted them. GIL invoiced customers for these services
- GIL and GF had a service agreement for marketing and support services by GF; GF charged GIL at cost plus 8%.
- GIL is held by Google Ireland Holding (GIH), a Bermuda resident. GIH holds the Google IP for EMEA, which it licensed to Google Netherlands Holding BV (GN), a Netherlands entity, which has further sub-licensed to GIL – thus GIL pays royalty to GN, and GN pays royalty to GIH.
- The question to be determined was whether GIL had a PE in France.



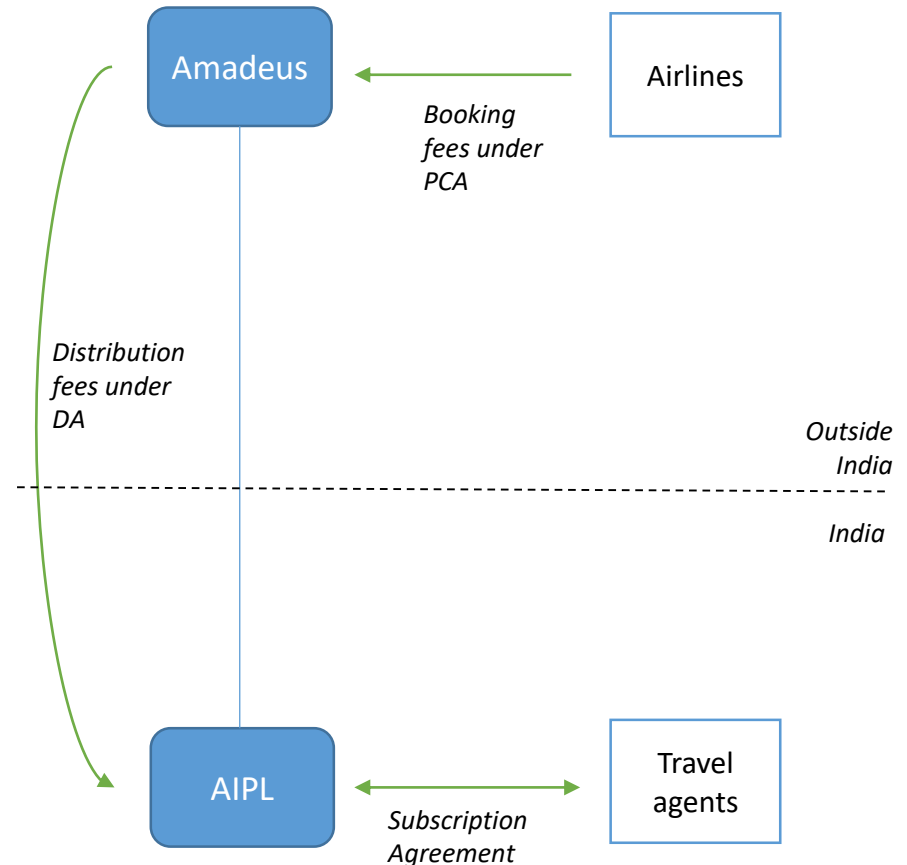
U.A.E. Exchange Centre Ltd. v. UoI (Del HC, 2009)

- UAE Exchange Centre (UEC), a UAE company, offered remittance services for transfer of money from UAE to India. It opened Liaison Offices (LOs) in India to facilitate this, under licenses from the Reserve Bank of India.
- Under contracts with NRI remitters, UEC accepted funds from them at centres in the UAE, which were transmitted to intended beneficiaries in India either (a) through telegraphic transfers through banking channels in India, or (b) by involving LOs that would download details of remittances through computers in India connected to servers in the UAE, and would draw cheques on banks in India and dispatch to beneficiaries in India.
- UEC charged a one-time commission from NRI remitters in UAE for this service. It sought an advance ruling on its taxability in India.



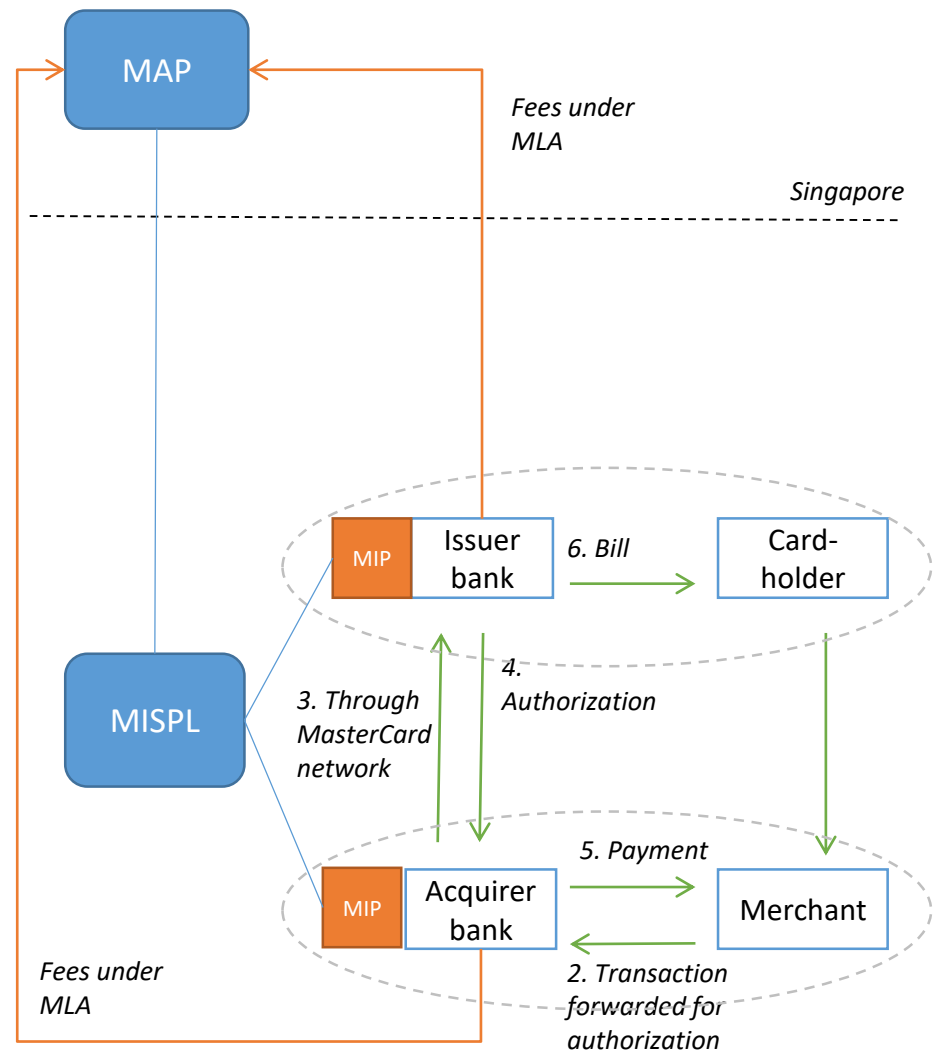
Amadeus Global Travel Distribution S.A. (Computer Reservation System cases)

- Amadeus, a Spanish entity, developed an automatic computer reservation system (CRS). It entered into Participating Carriers Agreements (PCAs) with airlines to display their information through CRS. Amadeus received a 'booking fee' from airlines, computed based on bookings made through CRS.
- Amadeus entered a Distribution Agreement (DA) with AIPL in India, for marketing of CRS in India. AIPL was required to seek subscribers to CRS (travel agents etc) and enter Subscribers' Agreement (SAs) with them, under which AIPL would configure computers etc at premises of travel agents, and carry out programming etc to provide them access to CRS. AIPL would also train travel agents. Amadeus paid AIPL 'distribution fees' for these services, computed based on segments booked through CRS by travel agents.
- Connectivity between Amadeus mainframe computer and computers of travel agents was provided by SITA worldwide. Expenses borne by Amadeus.



MasterCard Asia Pacific Pte. Ltd., In re. (AAR, 2018)

- MAP (Singapore) provides payment facilitation services to Customers in India (primarily banks) under Master License Agreements (MLAs).
- MAP charges 'processing fees' from Customers. MAP also gets 'assessment fees' for building and maintaining a processing network that serves the needs of customers globally, etc; and also gets 'miscellaneous revenue' for providing services ancillary to the transaction processing activities.
- Transaction processing: (a) Cardholder presents card to Merchant for purchase, (b) Merchant forwards transaction to its bank (Acquirer) for authorization, (c) Acquirer forwards to Cardholder's bank (Issuer) through MasterCard network, (d) Issuer authorizes, (e) Acquirer pays Merchant, (f) Issuer pays Acquirer value of transaction, less interchange fees, (g) Issuer issues bill to collect from Cardholder.
- Customer gets a MasterCard Interface Processor (MIP), placed at the customer's locations in India, that connects to MasterCard's worldwide network and processing centers. MAP's Indian subsidiary, MISPL, owns and maintains the MIPs at the customer's locations in India.



Does Permanent Establishment as a Tax Concept
have a long-term future in model treaties?

Thank You.