

Table of Contents

About the Editors	v
List of Abbreviations	xxv
Preface	xxxv
Permanent Establishment in the OECD Model Tax Convention <i>Ekkehart Reimer</i>	1
1 Fundamentals	3
1.1 Domestic Law	5
1.1.1 Why Domestic Law Matters	6
1.1.1.1 No Taxation Unless National Rules Impose a Tax	6
1.1.1.2 Impact of Domestic Law on the Interpretation of Terms Used in a DTC	6
1.1.1.3 Impact of Domestic Law for All Issues Left Open by the DTCs	7
1.1.2 Specific Domestic Concepts	7
1.1.2.1 Variances in Permanent Establishment Definition	7
1.1.2.2 Direct or Indirect Assignment of Profits	8
1.1.2.3 Territorial Scope of Permanent Establishment Taxation	8
1.1.2.4 Types of Taxable Transactions	9
1.2 Tax Treaty Law	10
1.2.1 Evolution of the PE Concept	10
1.2.2 Justification of the PE Threshold Concept	11
1.2.3 Relationship and Interactions between Articles 5 and 7 OECD MC	13

TABLE OF CONTENTS

1.2.4	Articles 5 and 7 OECD MC in the Context of the OECD Model	14
1.2.5	Particularities of Specific DTCs	15
1.2.6	Methodology: the interpretation of Articles 5 and 7 OECD MC	16
1.2.6.1	Functions of the Methodological Rules on the Interpretation of Treaty Terms	16
1.2.6.2	Autonomous DTC Interpretation as the Starting Point	18
1.2.6.3	General Rules of Treaty Interpretation	19
1.2.6.4	Reference to Domestic Law as an Exception	22
1.2.7	Approaches to Procedural Coordination	23
1.2.7.1	Advance Rulings	24
1.2.7.2	Article 25 OECD MC	24
1.2.7.3	Compulsory Arbitration under Bilateral DTCs	25
1.2.7.4	EC Arbitration Convention	25
1.3	Permanent Establishment Taxation as a Subject of International Tax Research	26
2	Is There a Permanent Establishment? (Article 5 OECD MC)	30
2.1	The Basic Definition (Art 5(1) OECD MC)	33
2.1.1	'Place'	33
2.1.1.1	Purpose of the Term	33
2.1.1.2	Definitions	34
2.1.2	'Business' and 'Enterprise'	36
2.1.2.1	Purpose of the Terms	36
2.1.2.2	Definitions	38
2.1.3	'Fixed'	42
2.1.3.1	Purpose of the Term	42
2.1.3.2	Definition	44
2.1.3.3	Relative Standards	45
2.1.3.4	Relocation and Roaming of POBs	45
2.1.4	'Permanent'	47
2.1.4.1	Purpose of the Term	47
2.1.4.2	Definition	47
2.1.4.3	Beginning and End of a Permanent Establishment	50
2.1.4.4	Insignificant interruptions	52
2.1.4.5	Activities of a Recurrent Nature	52
2.1.4.6	Relative standards	54
2.1.5	'Through' – Control by the Taxpayer	55
2.1.5.1	Purpose of the Term	55
2.1.5.2	Definition	55
2.1.5.3	Source of Control	56

TABLE OF CONTENTS

2.1.5.4	Relative Standards	57
2.1.5.5	Joint control	58
2.1.6	'Through' – Functional Integration	59
2.1.7	Aggregation	62
2.1.7.1	Contraction of Two or More Synchronous POBs	62
2.1.7.2	Contraction of Two or More Short-term Activities at the Same POB	64
2.1.7.3	Diagonal contractions	64
2.1.7.4	Intertemporal Force of Attraction	65
2.2	Typical Permanent Establishments (Article 5(2) and (3) OECD MC)	65
2.2.1	List of Typical Examples (Article 5(2) OECD MC)	66
2.2.1.1	Relation to Article 5(1) OECD MC	66
2.2.1.2	Connections between the Examples in Article 5(2) OECD MC	68
2.2.1.3	Article 5(2) and the Requirement of a Fixed Place	69
2.2.1.4	Article 5(2) and the Requirement of Permanence	69
2.2.1.5	Deviations in State Practice	69
2.2.2	Building Sites, Construction and Installation Projects (Article 5(3) OECD MC)	70
2.2.2.1	Relation to Article 5(1) and (2) OECD MC	70
2.2.2.2	Relation to the other Paragraphs of Article 5 OECD MC	72
2.2.2.3	Mixed Activities or Facilities	73
2.2.2.4	Persons Covered	73
2.2.2.5	Objects Covered	74
2.2.2.6	Activities Covered	75
2.2.2.7	Aggregation	76
2.2.2.8	Minimum Period	81
2.2.2.9	Deviations in State Practice	84
2.3	Exclusion of Subordinate POBs (Article 5(4) OECD MC)	84
2.3.1	Functions of Article 5(4) OECD MC	84
2.3.2	The Systematic Relevance of Article 5(4) OECD MC	85
2.3.2.1	Relationship vis-à-vis Article 5(1) OECD MC	85
2.3.2.2	Relationship vis-à-vis Article 7 OECD MC	85
2.3.2.3	Impact on the Issue of 'Service Permanent Establishments'	86
2.3.3	The Internal Structure of Article 5(4)(a) to (f) OECD MC	86
2.3.3.1	Use and Maintenance as Visible Activities	87
2.3.3.2	Facilities, Stocks and Fixed Places of Business as Visible Locations	88

TABLE OF CONTENTS

2.3.3.3	Goods, Merchandise and Information as Imaginary Objects	88
2.3.3.4	Intended Activities	89
2.3.4	Preparatory or Auxiliary Character	91
2.3.4.1	As a General Requirement for Article 5(4)(a) to (f) OECD MC	91
2.3.4.2	Confinement to Internal and Administrative Activities	94
2.3.5	Combinations of Non-Qualifying POBs: Article 5(4)(f) OECD MC	94
2.3.6	Deviations in State Practice	95
2.4	Agent Permanent Establishments (Article 5(5) to (7) OECD MC)	95
2.4.1	Person (Articles 5(5), 3(1)(a) and (b) OECD MC)	97
2.4.1.1	Individuals (Article 3(1)(a) OECD MC)	97
2.4.1.2	Companies and Other Bodies Corporate (Article 3(1)(b) OECD MC)	98
2.4.1.3	Partnerships and Hybrid Entities as Agents	99
2.4.1.4	No Identity with the Taxpayer	99
2.4.2	Activity (Article 5(5) OECD MC)	100
2.4.3	Authority to Conclude Contracts (Article 5(5) OECD MC)	100
2.4.4	Habitual Exercise of Contracting Authority (Article 5(5) OECD MC)	101
2.4.5	Exclusion of Short-Term Agents	102
2.4.6	Exclusion of Independent Agents (Article 5(6) OECD MC)	102
2.4.6.1	Persons Covered	103
2.4.6.2	Acting in the Ordinary Course of One's Business	105
2.4.6.3	Deviations in State Practice	106
2.4.7	Exclusion of Subordinate and Auxiliary Activities	106
2.4.8	Legal Consequences	107
2.4.8.1	Scope of Profits Assigned to the Agent Permanent Establishment	107
2.4.8.2	Remuneration of the Agent and Deduction of Expenses	107
2.5	PEs within Groups of Controlling/Controlled Companies (Article 5(7) OECD MC)	108
2.5.1	The Textual Elements of Article 5(7) OECD MC	108
2.5.2	Object and Purpose of Article 5(7) OECD MC	109
2.5.3	Consequences for Different Types of Group Taxation Schemes	109
2.5.3.1	Full Consolidation Schemes	110
2.5.3.2	Other Group Taxation Schemes	111

TABLE OF CONTENTS

2.5.4	Constellations of Cases	111
2.5.4.1	Sharing Locations	112
2.5.4.2	Principle-Agent Tandems	113
2.5.5	Participation in Controlled Foreign Corporations (CFCs)	113
2.6	Fixed Bases (Article 14 of the pre-2000 OECD MC)	113
2.7	The Broadened Concept of ‘Service Permanent Establishments’	114
2.7.1	Overview	114
2.7.2	The Situation under Article 5(1) OECD MC	115
2.7.3	The Situation under Article 5(3)(b) UN MC	117
2.8	Examples A-Z	117
2.8.1	Affiliated Companies	117
2.8.2	Agents	117
2.8.3	Branch (Article 5(2)(b) OECD MC)	118
2.8.4	Building Site (Article 5(3) OECD MC)	120
2.8.5	Computer	120
2.8.6	Container Leasing	120
2.8.7	Controlled Foreign Corporations	120
2.8.8	Extraction of Natural Resources (Article 5(2)(f) OECD MC)	120
2.8.9	Factory (Article 5(2)(d) OECD MC)	121
2.8.10	Gas Well (Article 5(2)(f) OECD MC)	121
2.8.11	Head Office	121
2.8.12	Insurance Companies	121
2.8.13	Internet Server	123
2.8.14	Mass Storage	126
2.8.15	Mine (Article 5(2)(f) OECD MC)	126
2.8.16	Natural Resources	127
2.8.17	Office (Article 5(2)(c) OECD MC)	127
2.8.18	Oil Well (Article 5(2)(f) OECD MC)	128
2.8.19	Quarry (Article 5(2)(f) OECD MC)	128
2.8.20	Partnerships	128
2.8.21	Place of Management (Article 5(2)(a) OECD MC)	129
2.8.21.1	Literal Interpretation	129
2.8.21.2	Linking and Delimitation to Other Articles of the OECD MC	130
2.8.21.3	The POM Concept in the Context of Article 5 OECD MC	131
2.8.22	Representatives	132
2.8.23	Studios	132
2.8.24	Workshop (Article 5(2)(e) OECD MC)	132
3	Taxation of Business Profits in Permanent Establishment Cases (Article 7 OECD MC)	132
3.1	Fundamentals	132
3.1.1	The Evolution of the Rules: Once Steady, Now by Leaps and Bounds	133

TABLE OF CONTENTS

3.1.1.1	The 1977 Version of Article 7 OECD MC	133
3.1.1.2	Genesis of the Authorized OECD Approach (AOA): 1977–2008	135
3.1.1.3	The 2010 Version of Article 7 OECD MC	137
3.1.1.4	Retrospective Effect of the AOA?	139
3.1.2	Article 7 in the Context of the OECD MC	140
3.1.3	Business Profits	143
3.1.4	The Relevant Entity	146
3.1.4.1	Enterprise	146
3.1.4.2	Permanent Establishment	147
3.1.4.3	Separate spheres within a PE as the relevant entities (Article 7(5) OECD MC 1977)	150
3.1.5	Authority Competent for the Application of Article 7(2) OECD MC	150
3.2	The Basic Rule: Exclusive Taxation by the State of Residence (Article 7(1) OECD MC)	151
3.3	The Permanent Establishment Case: Fractioning the Tax Base between the States (Article 7(1) and (2) OECD MC)	152
3.3.1	Direct versus Indirect Methods	154
3.3.2	Focal Width	156
3.3.3	Issues of Quantification	158
3.3.3.1	Direct Methods	158
3.3.3.2	Indirect Methods (Article 7(4) OECD MC 1977)	160
3.3.4	Continuity of Choice (Article 7(6) OECD MC 1977)	162
3.4	The Functionally Separate Entity Approach (FSEA) in Detail	163
3.4.1	Identifying Transactions	164
3.4.2	Assigning Transactions to a PE	165
3.4.2.1	Assignment of Assets and Liabilities	167
3.4.2.2	Assignment of Functions, Opportunities and Risks	169
3.4.2.3	Assignment of Operational Transactions	171
3.4.2.4	Assignment of Overhead Costs (Article 7(3) OECD MC 1977)	172
3.4.2.5	Carve-out of de minimis functions (Article 7(5) OECD MC 1977)	173
3.4.2.6	Temporal Aspects	174
3.4.3	Quantifying Transactional Profits	175
3.4.3.1	Fractioning Transactions	175
3.4.3.2	Selection of Methods	178
3.5	Obligations of the State of Residence in the Case of Article 7(1), 2nd sentence	178

TABLE OF CONTENTS

3.5.1	Exemption versus Credit Method	178
3.5.2	Triangular Cases	179
3.6	Corresponding Adjustment (Article 7(3) OECD MC 2010)	180
3.6.1	State Symmetry	181
3.6.2	Constellations covered by Article 7(3) OECD MC 2010	181
3.6.3	Deviations in State Practice	182
3.7	Procedural Aspects	183
3.7.1	Advance Pricing Agreements (APAs)	183
3.7.2	Documentation Duties	184
3.7.3	Settlement of Disputes	185
3.8	Obligation of the PE State to Grant Non-Discriminatory Treatment (Article 24(3) OECD MC)	185
3.8.1	Treatment of Earnings and Expenses	186
3.8.2	Treatment of Profits and Losses	187
4	Tax Planning and Policy Perspectives	187
4.1	The Tax Planning Perspective	187
4.2	The Treaty Policy Perspective	188