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2 September 2016

Tax Treaties, Transfer Pricing and Financial
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Via email: transferpricing@oecd.org

RE: Additional Guidance on the Attribution of Profits to Permanent Establishments

Dear Sir or Madam:

The Organisation for Economic Co-Operation and Development (OECD) published final reports pursuant to its base erosion and profit shifting (BEPS) project on 5 October 2015. The reports were the culmination of the OECD's *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Plan) published in 2013. The Plan set forth 15 actions the OECD would undertake to address a series of issues that contribute to the perception of tax bases being eroded or profits shifted improperly. Included in the October 2015 final reports was the report under Action 7 of the Plan, *Preventing the Artificial Avoidance of Permanent Establishment Status*. Subsequently, the OECD issued a public discussion draft under Action 7 (the Discussion Draft) on 4 July 2016, requesting comments on fact patterns that would benefit from additional guidance concerning the attribution of profits to permanent establishments (PE).

I am pleased to respond to the OECD's request for comments on behalf of Tax Executives Institute, Inc. (TEI). TEI requests the opportunity to speak in support of these comments at the public consultation to be held on 11-12 October 2016 in Paris.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy,

as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.[1]

General Comments

TEI commends the OECD for providing stakeholders with the opportunity to comment on the issue of profit attribution to PEs. This opportunity is especially important because the BEPS project broadened the PE definition in Article 5 of the OECD's Model Tax Convention, which will result in cliff-like, negative tax effects of unexpected PEs of a multinational enterprise (MNE) in various jurisdictions.

TEI further appreciates the desire of the OECD Member States to use the OECD's transfer pricing principles to attribute profits to PEs, which could lead to clarity and a workable approach to such attribution if a consensus among the States can be reached. Regrettably, the additional guidance provided in the Discussion Draft regarding PE profit attribution is handicapped by the lack of consensus on underlying issues, particularly the definition and ownership of, and how to tax income from, intellectual property (IP). Thus, while use of transfer pricing methods and significant people functions to allocate revenue and assets to a PE could be viable, current and future attempts to provide additional clear guidance on predictable profit attribution standards will be muddled until fundamental definitional issues are settled. It is difficult to allocate assets based upon significant people functions if the assets cannot be identified. The incoherent tax climate and lack of consensus surrounding this issue will undoubtedly result in double taxation as tax administrators assess taxes on IP income under their own definition of IP and theories of IP taxation. For these reasons, TEI encourages the OECD to return to its efforts to define IP and devise methods of taxing the income it generates, which in turn should provide additional clarity to PE profit attribution.

Separately, while TEI appreciates the OECD's efforts reflected in the Discussion Draft, the Draft is unhelpful in many respects. While the OECD recognizes that there may be circumstances where there is no additional taxable profit attributable to a PE under the new, post-BEPS project Article 5 PE definition, the Draft only briefly mentions that there may be other consequences[2] and does not elaborate on their cost or administrative complexity. The varying fact patterns of complex modern business operations, combined with the newly expanded PE definition, may result in an MNE having, *e.g.*, (i) multiple PEs, in addition to its local legal entities, in a particular jurisdiction, and (ii) a combined PE in a particular jurisdiction resulting from the operations of several of its separate, non-resident legal entities. This would create additional filing requirements, social security, payroll tax obligations, multiple VAT registrations, *etc*. In short,

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[1] TEI is a corporation organized in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

[2] Paragraph 104. (A PE with zero profit "may create filing requirements and may give rise to other tax liabilities.")

the expanded definition may impose a tremendously increased compliance burden on MNEs as additional PEs arise, even if such PE do not result in any additional local country profit. This is contrary to the OECD's stated intention not to create unreasonable additional compliance obligations for international business.

A more helpful approach, if the goal is to set the "correct" level of profit in each country, would be to adjust transfer prices between related entities. This would be simpler than creating additional PEs and engaging in a profit attribution exercise with its attendant complexity and compliance burden. For example, the collection of receivables and inventory management could be remunerated as services on a cost-plus basis rather than creating a PE. Alternatively, the OECD should provide further guidelines regarding what "other tax liabilities" may arise as a result of the PE determination as the short reference to such liabilities in paragraph 104 is insufficient. A compromise approach could be that, where a new PE arises under the BEPS Action 7 definition and where the parties are already appropriately remunerated at arm's length, adjustments are instead made under Article 9; that way the theoretical PE would be ignored for all other tax purposes. We discuss this further below in response to question 18.

The Discussion Draft also regrettably reduces the complex reality of business operations to basic examples. In general, the examples are oversimplified and the accompanying analyses often over complicated. The OECD should ensure that the final guidance includes more detailed examples, as we understand that the examples in the Discussion Draft are presented to address specific concepts and are not intended as overall guidance to tax administrators or taxpayers on how to attribute profits to these PEs.

Moreover, the Discussion Draft does not address the practical issues facing MNEs with potential multiple PEs in a jurisdiction (*e.g.*, additional registration and filing requirements not just for income tax but also for social security, payroll taxes, indirect taxes, and customs purposes). While we understand that indirect taxes and customs in theory follow a separate set of rules, the interaction between those rules must not be underestimated. On the other hand, for certain taxes (*e.g.*, payroll), there is a direct link created by Article 15 of the OECD Model Tax Convention.

That said, the simple examples are helpful at a basic level because many taxpayers and tax authorities do not have extensive experience with PEs outside the context of financial institutions. The simple examples make it easier to gain a baseline understanding of the concepts, logic, and steps to follow in the PE analysis. To supplement the more simplistic analysis, TEI recommends that the OECD include a more realistic and complex example illustrating a more complex supply chain.[3] In addition, the analyses in the examples should more clearly state how the conclusions were reached, perhaps in a step-by-step manner, to assist taxpayers and tax

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[3] We suggest a more complicated fact pattern for use as an example, along with some questions for the OECD to potentially address regarding the fact pattern, at the end of this letter.

authorities in their understanding of the guidance and how to apply it outside the particular examples in the Discussion Draft.

Further, the silence of the Discussion Draft on the revolution created by the new amalgamation rules is particularly regrettable. TEI recommends that examples in final guidance should include an example of an MNE operating in Country Y through 4-5 foreign enterprises resident in countries A, B, C, D and E, each of which would not create a PE in Country Y on its own, but would create a PE in Country Y if their activities are amalgamated. The example should not only develop what profit is to be allocated to Country Y, but also how the profit to be allocated to Country Y is to be subtracted/apportioned as a profit reduction between Countries A, B, C, D and E.

Finally, TEI recommends that the OECD provide additional guidance to clarify some of the underlying assumptions applied by the OECD in the examples. These assumptions concern: (i) facts that give rise to the creation of a permanent establishment (specifically in Example 1) providing that no additional functions, assets, and risks were attributed to DAPE; (ii) remuneration of the Related Parties / Head Office / PE (*e.g.*, an incentive fee); and (iii) the proportion of attribution of risk to the head office and PE (*e.g.*, 75%, 25%). Without further background on or guidance regarding the basis for assumptions, the risk of misinterpretation by tax authorities is significant. Our concern is the assumptions may be treated as a rule or official position of the OECD, rather than merely used for illustrating other issues in the example. Therefore, TEI recommends the OECD provide additional background on how these assumptions were made. It would also be useful to emphasize that the assumptions in the examples are solely for illustrative purposes to avoid tax authorities applying them as a rule.

Responses to Specific Questions in the Discussion Draft

Set forth in this section are TEI's responses to the specific questions posed by the OECD in the Discussion Draft. The lack of a response to a question should not be taken as TEI's agreement with the analysis in the Discussion Draft.

Q1. Commentators are invited to express their views on whether the order in which the analyses are applied under Article 9 of the [Model Tax Convention (MTC)] and Article 7 of the MTC can affect the outcome, and what guidance should be provided on the order of application.

In TEI's view Article 9 should apply first as a priority over Article 7 to determine the profit attributable to each associated enterprise. Should the application of Article 9 not be feasible because a PE is created without the involvement of any local related party, then Article 7 can be applied to determine the amount of profits attributable to a PE created under Article 5.

In addition, the Discussion Draft heavily leans toward application of both Article 9 and Article 7 in most cases where associated enterprises are involved. This substantially complicates the profit attribution analysis and could result in multiple PEs and additional filing requirements, including social security, payroll taxes, value added taxes, custom duties, *etc*. As noted, this

substantially increases compliance and administration costs for taxpayers and tax authorities without necessarily increasing income tax revenue. In addition, where an enterprise already appropriately attributes profits to a PE based on functions performed, assets used, and risks assumed under either Article 9 or Article 7, there is no need to apply the other Article.

That said, while TEI is open to the proposed approach in the Discussion Draft of attributing profits by using transfer pricing principles, which could be viable if a consensus is reached, the approach would still suffer from the lack of a definition of IP, of its ownership, and on how to tax the income arising from it, as discussed above. As just one example, given the generalization of the application of the significant people functions concept combined with the expanded PE definition, one issue raising debates among practitioners is whether IP (*e.g.*, know how) moves from a head office to its PE whenever a head office employee performs functions for the PE and whether there should therefore be remuneration for such an IP transfer. TEI believes that the OECD did not intend to present this issue under its Transfer Pricing Guidelines (the Guidelines), but a reading of the Guidelines certainly implies this result. The OECD should clarify whether it intends this result in final guidance.

Q2. Do you agree with the functional and factual analysis performed in Example 1 under the [Authorized OECD Approach (AOA)]?

No. Applying Article 9 attributes the appropriate profit to Country B. Also applying Article 7 only complicates the analysis and makes it more difficult to follow without attributing any additional profit to Country B. Such an approach would substantially increase compliance costs where an MNE operates in multiple jurisdictions. Moreover, as noted above, the analysis suffers because of the lack of a consensus OECD approach to the definition and taxation of IP.

Q3. Do you agree with the construction of the profits or losses of the [dependent agent PE (DAPE)] in Example 1 under the AOA?

No. Based upon the functions performed, assets used and risks assumed, it was clear that no profit should be attributed to DAPE in Country B. Therefore, to undertake the analysis to back into the numbers was unnecessary and an uneconomical use of time and resources. Moreover, because the definition of income remains under the auspices of the local jurisdiction, it has an incentive to attribute as much profit to the new PE as possible. Without a consensus approach on both the determination of income and profit attribution there is no guarantee that the MNE's headquarters jurisdiction will agree to the local country's determination, resulting in double taxation and disputes.

Q4. What would be the conclusion if, because of the wording of Article 7 in the applicable tax treaty, an approach other than the AOA applied? If the conclusion is different, what would be the differences?

No response.

Q5. In the types of cases illustrated by Example 1, is it appropriate to conclude that, where under the functional and factual analysis under Article 7, the dependent agent enterprise does not perform significant people functions on behalf of the non-resident enterprise, there will be no profits attributable to the DAPE after the payment of an appropriate fee to the [dependent agent enterprise (DAE)] under Article 9?

No response.

Q6. Do commentators agree with the construction of the profits or losses of the DAPE in Example 2 under the AOA?

The facts of Example 2 should make it clearer that Sellco/DAPE are also responsible for bearing the actual inventory obsolescence/loss risks and bad debt losses. If Sellco/DAPE do not bear the actual inventory obsolescence/loss risks and bad debt losses, then Sellco/DAPE should only receive compensation for their functions and not compensation for taking on the inventory and receivable risks. This could be accomplished by emphasizing the additional profit is to compensate for Sellco/DAPE taking on additional functions as well as inventory and credit risks (*e.g.*, it has to bear any bad debt and inventory losses).

Q7. What would be the conclusion if, because of the wording of Article 7 in the applicable tax treaty, an approach other than the AOA applied? If the conclusion is different, what would be the differences?

No response.

Q8. In your opinion, what would be the consequences if, in the example, Sellco does not have the financial capacity to assume the inventory and credit risks? In that case, to which party would you allocate those risks? How would it affect the fee payable to Sellco and the profits to be attributed to the DAPE?

If Sellco does not have the financial capacity to assume the inventory and credit risks, it would only perform functions such as warehousing and determining and monitoring inventory, credits, and collection, which it should be compensated for on an arm's length basis. Thus, since Sellco is an associated enterprise in this example, this example should not be part of the commentary for attribution of profits to a PE as part of article 7, but instead be developed as a transfer pricing adjustment between related entities as part of article 9.

Should this example be developed with Sellco being a 3rd party acting as a dependent agent instead of an associated party, then this would be properly developed as part of Article 7. However, Sellco's profits have already been determined at arm's length. Thus, under this scenario, should Sellco's activities create a dependent agent PE for Prima, it is Prima's in-country activities that would be taxed as part of such PE, not Sellco's. Hence, it would be Prima's financial capacity to bear risks at issue, not Sellco's.

Separately, the example raises the issue of whether a PE can be avoided if insufficient capital is allocated to a local entity – is that what the OECD intends to imply via Example 2 and this question?

Q9. What are your views on the fact that in Example 2 the same functions that are considered under the Article 9 analysis to allocate risks to Sellco, are also taken into account, under Article 7, as the SPF that result in the attribution of economic ownership of assets to the DAPE? What is your opinion about the fact that, in this example, the inventory and credit risks are allocated to Sellco under Article 9 and the economic ownership of inventory and receivables are attributed to the DAPE? Does your reading of the current guidance of the 2010 Attribution of Profits Report, and in particular with paragraphs 230 to 245, support the conclusions of the Example?

Whether or not economic ownership has shifted should be based on both the benefits and risks of ownership of an asset shifting to another enterprise (the DAPE), even though legal ownership still remain with the original enterprise (Prima). In Example 2, DAPE only took on bad debts/inventory losses (*i.e.*, it only took on risks of ownership of an asset); however, it did not acquire the benefits of inventory ownership (*i.e.*, none of the profits associated with the inventory are attributed to DAPE). Therefore, economic ownership of the assets should not be attributed to DAPE.

An example of economic ownership shifting would be where an enterprise (*e.g.*, Company B) enters into a research and development (R&D) cost contribution arrangement with its parent (*e.g.*, Company A). In return for sharing in the R&D costs and risks, Company B receives the exclusive right to exploit any intangibles developed in its country (*e.g.*, exclusive rights to sell, manufacture, and license any intangibles). For ease of administrating worldwide patents, *etc*., the parent company retains legal ownership of all intangibles globally. In the above example, Company B has economic ownership of the intangibles in its country although Company A has legal ownership of the intangibles globally.

More broadly, attribution of "economic ownership" to a PE, as opposed to a separate legal entity, can be subjective, giving significant leeway to tax authorities and leading to disputes. TEI recommends that the OECD develop additional guidelines on the proper manner and method for such attribution.

With respect to paragraphs 230-245 of the 2010 Attribution of Profits Report, TEI agrees that those paragraphs support the example's conclusions.

Q10. Do commentators agree with the construction of the profits or losses of the DAPE in Example 3 under the AOA?

The analysis of this example is overcomplicated and faulty by assessing the economic ownership of the inventory and receivables. Once it has been determined that there is a DAPE, the analysis should simply look at functions performed (various inventory, warehousing and

credit and collection activities), assets used (vehicle) and risks assumed (inventory and bad debt losses) to determine level of compensation for the DAPE.

In addition, economic ownership of the company vehicle was attributed to DAPE (in Country B), based upon the vehicle's place of use. However, when assessing the profit and loss of DAPE, it is difficult to understand which operating expenditures relate to the costs of using the car (if any). Therefore, clarification on costs of the vehicle, if they are included in DAPE's profit and loss, would be appreciated.

Q11. What would be the conclusion if, because of the wording of Article 7 in the applicable tax treaty, an approach other than the AOA applied? If the conclusion is different, what would be the differences?

No response.

Q12. Do commentators agree with the construction of the profits or losses of the DAPE in Example 4 under the AOA?

Yes, although the example is simplistic.

Q13. Do commentators agree that the profits or losses in the DAPE over and above the fee payable to Sellco arise because the contractual allocation of risk to Prima is respected under Article 9, and is not shared with Sellco, whereas under Article 7 the risk is partly attributed to Prima's Head Office and partly to the DAPE of Prima? In other words, the difference arises from differences between allocation of risk between two separate enterprises and attribution of risk within the same enterprise?

TEI agrees with these statements. In general, there is a different analysis under Article 7 than under Article 9. Because of this mismatch, TEI anticipates that the two analyses will cause controversy between taxpayers and tax authorities, as well as among tax authorities. TEI recommends that the OECD assess how analyses under Article 7 and 9 can be aligned to avoid conflicting positions. This will provide for more clarity and less controversy. Further, additional clarification regarding how the OECD arrived at the underlying assumptions for remuneration, *i.e.*, 40% under Article 9 and 75%/25% under Article 7, would be helpful as there may be the risk of misuse of those percentages due to lack of further guidance by OECD on how those percentages were determined.

Q14. Do commentators agree with the construction of the profits or losses of the PE in Scenario A of Example 5 under the AOA?

It is unclear from the example how interest costs are allocated to the PE – is it from a separate legal entity analysis? In addition, if interest costs are allocable to the PE, are there other intercompany items that can be allocated to the PE (other than those stated in the example)? With respect to the conclusion that WRU has a PE and corresponding income/expenses, a key issue is whether tax authorities in WRU's jurisdiction agree with the conclusion and allocation, as WRU,

if it did not believe it had a PE, would need to amend its home country tax return, which could lead to disputes and additional time and expense to resolve them.

Q15. Do commentators agree with the conclusion reached in Scenarios B and C of Example 5 under the AOA?

There are a number of assumptions included in the example that make it difficult to analyze. TEI does not, therefore, necessarily agree with the analysis; in particular, it is unclear how a PE arises in these scenarios.

Q16. In particular, do you agree that there can be an investment return on the asset or assets creating or being part of the PE when there are no personnel of the non-resident enterprise operating in the PE?

As noted above, it is difficult to analyze this example as it is unclear how a PE arises without personnel "on the ground" in-country performing significant people functions that may give rise to a PE. More broadly, however, the return to a PE should be attributable to more than significant people functions and can include return on assets used or risks assumed.

Q17. Do you agree with the streamlined approach proposed in this example for cases where there are no functions performed in the PE apart from the economic ownership of the asset, i.e. attribute profits to the PE commensurate with investment in that asset (taking into account appropriate funding costs and the compensation payable for investment advice)? How would you identify the investment return?

Again, it is unclear how a PE may arise in the example with no functions performed.

Q18. Do you agree that if the non-resident enterprise has no personnel operating at the fixed place of business PE, then significant people functions performed by other parties on their own account in the jurisdiction of the PE do not lead to the attribution of risks or assets to the PE, and no profits would be attributable to the PE? If not, please explain the reasons for taking a different view.

Once again, it is difficult to understand how the PE arises without any activities being performed. Assuming there is a PE, then profits arising from assets used and risks assumed should be attributable to a PE deemed to own such assets and assume such risks.

TEI notes that the creation of a PE with no attributable profits requires a cumbersome analysis and carries with it a potentially disproportionate compliance burden in other respects, such as registration and filing requirements, responsibility for value added taxes, payroll taxes and customs duties, among other things. A no-profit PE also creates compliance costs for tax administrators without resulting in any additional income tax due. To avoid this situation and eliminate the associated compliance burden, TEI recommends that the OECD adopt a *de minimis* rule for PEs with no or very little profit attributable to them (say attributable profits of €50,000 or less), where the creation of the PE would be ignored for all tax and related (*e.g.*, customs) purposes, including registration and filing requirements.

Q19. Under Scenario C, if Wareco were a related enterprise, and if it is assumed that the arm's length fee is 110% of its costs, would there be any difference to the outcome of the attribution of profits to the PE of WRU?

Whether the payment goes to a third party or an associated enterprise should not affect profit allocation. In general, it would be simpler for tax authorities to challenge the compensation paid for local activities rather than creating a PE and conducting a profit attribution analysis. Creating a PE will also have unintended consequences, including the aforementioned filing requirements, value added taxes, social security, payroll taxes, *etc*. It should be clear to tax authorities that whenever an adjustment can be made through Article 9 rather than Articles 5 and 7 that Article 9 should be the preferred path.

Q20. What would be the conclusion if, because of the wording of Article 7 in the applicable tax treaty, an approach other than the AOA applied? If the conclusion is different, what would be the differences?

No response.

Q21. Do commentators have suggestions for mechanisms to provide additional co-ordination for the application of Article 7 and Article 9 of the MTC to determine the profits of a PE, taking into account the considerations expressed above?

As noted, it should be clear to tax authorities that, whenever an adjustment can be made through Article 9 rather than Articles 5 and 7, the adjustment via Article 9 should be prioritized over such adjustment via Articles 5 and 7. This would avoid unintended consequences of an adjustment via Articles 5 and 7, *e.g.*, for social security and/or payroll taxes.

Another issue is compensating Sellco on the value of services provided within the MNE supply or value chain. Here the transactional net margin method may prove useful. More broadly, TEI generally welcomes additional guidance on PE profit attribution especially if it helps tax authorities properly apply the relevant concepts.

TEI also suggests that the OECD consider the following example, and answer the questions posed, as additional guidance on applying the PE profit attribution rules to a more complicated and realistic supply chain.

ADDITIONAL SUGGESTED EXAMPLE AND QUESTIONS FOR THE OECD

The facts in this example are the same as in Example 3 except as follows. Prima's head office is located in Country A. In addition, Prima has a marketing and sales team which operates in Country C through an office of Prima (*i.e.*, through a PE in Country C). Prima is also the regional headquarters of Parentco, which is located in Country U. In addition, Prima deploys sales Employees to Countries B, D, E, F, G, H, I, J, K. These Prima Employees are responsible for various sales territories and perform full-time selling activities in those countries.

The allocation of Prima's income between Country A and Country C is determined using a residual profit split, and the PE profit allocation has been governed by an APA in Countries A and C for over 15 years (with periodic renewals as required). The residual profit split first remunerates Prima for assembly functions performed in Country A based on cost plus, and the residual profit is split using a ratio of 35% and 65% for Countries A and C respectively. Products are sourced from third-party manufacturers as either finished products, or semi-assembled products for final assembly by Prima in Country A. Products are consumer goods and are developed by Parentco, including R&D incurred by Parentco. Products do not need to be adapted to the specific needs of customers. The tradename is owned by Prima's Parentco and R&D/product design is performed by Parentco in Country U. Prima pays a bundled IP royalty to Parentco for the use of the tradename and R&D/product design.

1. Prima (through its PE in Country C), is responsible of signing contracts with customers.
2. Prima (through its PE in Country C), organizes an annual sales meeting where new upcoming model year product lines are showcased. Although no formal orders are placed, the customers make informal commitments for future orders.
3. Prima (through its PE in Country C), sets the sales strategy and market share targets in Countries B, C, D, E, F, G, H, I, J, K
4. Prima (through its PE in Country C), is responsible for setting the pricing policy for products, as well as for tailoring that policy to Countries B, C, D, E, F, G, H, I, J, K
5. Employees of Prima (*i.e.*, local sales agents) play a role in implementing part of the marketing strategy in their respective Countries B, D, E, F, G, H, I, J, K. However, Prima (through its PE in Country C) places all local advertising. Thus, these employees have no authority to conclude contracts and their business cards only have the business address of Prima in Country A. These employees may also perform certain administrative tasks from their home offices located in their respective Countries.
6. One of the key functions of the sales employees of Countries B, D, E, F, G, H, I, J, K is to visit and follow-up with each customer every 3 or 4 months. The sales Employees encourage the customers to place orders (based on the customer's informal commitments made during the annual sales meeting). The Employees also provide further technical explanations of product specifications, discuss differences with competitor products, and discuss product returns if applicable. Significant product returns or warranty are managed by Prima (through its head office employees in Country A or through its PE employees in Country C). Significant product returns or warranties are managed by Prima in Country A. Policies and guidelines for product returns and warranties are approved by Prima in Country A. PE employees in Country C may provide input and may implement policies and guidelines issued by Prima in Country A.

7. Prima's head office employees in Country A approve new customers through the review of the customer's creditworthiness. Customers place orders electronically using Prima's ERP system. Prima's system is tailored and managed by Parentco in Country U.
8. Prima (head office in Country A) performs all warehousing and inventory management functions. The Employees in Countries B, C, D, E, F, G, H, I, J, K are not involved in the inventory management functions, other than providing sales forecast which are used in demand planning. Prima's Head Office employees in Country A perform the demand planning functions.
9. Prima's head office employees in Country A set the parameters within which credit can be extended to customers.
10. There is no explicit approval of each sale to customers once the customer has been approved by Prima's head office employees in Country A, as long as the customer respects the credit arrangement. Prima's employees in Country A can refuse a customer's order if the customer is in arrears under the credit terms.
11. Prima's head office employees in Country A handle the collection of customer receivables.
12. The Employees covering Countries B, D, E, F, G, H, I, J, K do not have authority to conclude sales. Prima has historically taken the position that the activities performed by the employees in Countries B, D, E, F, G, H, I, J, K did not constitute a PE under the "old" OECD rules.

<u>Questions for the OECD:</u>

1. Could the OECD illustrate the example above if Countries B, D, and E interpret that the functions are sufficient to constitute a PE under the "new" rules. Assume that Countries F, G, H, I, J, and K interpret that the functions of Employees are not sufficient to constitute a PE under the "new" OECD PE rules. Could the OECD comment on the mechanism to obtain competent authority relief, especially considering the 1st level PE in Country C (profit split already covered by APAs)? That is, illustrate the calculations in a multi-level PE allocation?

2. Could the OECD comment and illustrate this example, assuming the IP royalty is challenged by the tax authorities of either Country U or Country B? Could the OECD comment and illustrate the ripple effect if Countries, B, D, and E interpret that a PE exists under "new" OECD rules. That is, illustrate the multi-level PE allocations. Could the OECD comment on the mechanism to obtain competent authority relief to avoid double-taxation?

Conclusion

TEI appreciates the opportunity to comment on the Discussion Draft regarding additional guidance on profit attribution to PEs. As noted above, TEI requests the opportunity to speak in support of these comments at the Public Consultation on the Discussion Draft scheduled for 11-12 October 2016 in Paris.

These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of the Institute's legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,
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