



Corporate tax alert

International tax

BEPS: Belgium to change its position on commissionaire arrangements

BEPS action 7 recap

To prevent the use of certain common tax strategies that are believed to circumvent the existing permanent establishment (PE) definition, the OECD recommended important changes to said definition in its BEPS Action 7 Report. In that context, the definition of 'Agency PE' in Article 5, §5 of the OECD Model Tax Convention has been revised to tackle so-called 'commissionaire arrangements' and similar strategies aimed at avoiding a PE.

Under the new Agency PE definition, whether the agent has concluded contracts on the enterprise's behalf 'in its own name' or 'in the name of the enterprise' is no longer a relevant factor. If the foreign enterprise is required to provide goods or services to the customer, as per the contract concluded by the agent, a PE of the foreign enterprise may be recognised in that country.

The new Agency PE definition also covers situations where an intermediary regularly plays the principal role leading to the conclusion of contracts that are routinely approved without material modification by the foreign head office. Hence, whenever the intermediary's activities aim towards the regular conclusion of contracts to be executed by the foreign enterprise, the latter may be deemed to have a taxable presence in the intermediary's country as well.

Belgium's position

On 7 June 2017, Belgium signed the Multilateral Instrument (MLI), which aims to incorporate the BEPS minimum standards into existing bilateral tax treaties in a pragmatic way. The MLI still needs ratification before taking effect in Belgium.

In this respect, it should be noted that upon signing the MLI, Belgium stated its partial or full reservation against a number of proposed BEPS measures, especially the new 'Agency PE' definition's introduction.

However, the central tax authorities have recently confirmed that Belgium decided to waive its objections and accept the aforementioned changes to the Agency PE definition. Consequently, Belgium now fully agrees with the modifications to Article 5, §5 in its existing double tax treaties, to the extent that the other contracting state is also a party to the MLI and does not state any reservations regarding this provision.

Given that the Belgian ratification process requires the involvement of several legislative bodies, it is reasonable to expect the MLI's entry into force by 2020.

As a final note, the modified Agency PE definition will also and most likely be the starting point for new tax treaties (to be) negotiated by Belgium.

Impact on organisations

Careful reconsideration and further analysis will be required for any arrangement where foreign agents are negotiating or driving contract conclusions on behalf of a Belgian enterprise, or, *vice versa*, where Belgian agents are negotiating or promoting contracts on behalf of a foreign principal. Commissionaire arrangements and similar strategies could affect organisations in many cases, as it may lead to PEs being identified in Belgium or abroad.

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