

Dbriefs Bytes Transcript

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For comments on Action 1, see [the highlighted text below](#).

BEPS

UN

- The UN Committee of Tax Experts had their annual meeting a couple of weeks ago.
- The official notes of the meeting have not yet been released. In fact, based on previous years, it will be a few months before they will be released.
- Nevertheless, some interesting information has emerged.
- First and foremost concerns the debate on Article 5(3)(b) of the UN model treaty.
- Article 5(3)(b) is the “furnishing of services” PE. Let me remind you what it says:
- “The term 'permanent establishment' ...encompasses....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 183 days in any 12-month period commencing or ending in the fiscal year concerned.”
- The traditional interpretation of this provision is that it requires actual performance of activities in the source country, in excess of the time threshold. However, the current UN Commentary, on one view, does not actually say that.
- Well, during the UN Committee's meeting, the argument was put by the Chinese and Indian representatives that Article 5(3)(b) does not require any presence in the source country at all. In other words, you can stay at home in the residence country and provide services through the internet and be caught by Article 5(3)(b).
- The basis of this argument is that the provision refers to the "furnishing of services... within" the source country, and not to the "performance of services... within" the source country. According to China and India, you can furnish services within the source country by remotely providing services to a company which is within the source country.
- This argument was not accepted by the majority of the Committee. Nevertheless, the fact that it was made, and jointly by China and India, is important. Just stop and think where this argument would lead: it would cause a deemed PE in regard to digital services, under the existing Article 5(3)(b).
- So you could say that this argument reflects a parallel initiative in regard to BEPS by these two very important countries.
- Another point to note in regard to the UN Committee's meeting is that an "in principle" decision was taken to introduce a "fees for technical services" article into the UN model.

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