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Article 15 of the OECD Model: The 183-Day Rule and the Meaning of "Borne by a Permanent Establishment"

Article 15(2) of the OECD Model is important in taxing employment income in regard to a short-term assignment of employees and the hiring-out of labour. This article examines the object and purpose of the 183-day rule, when the remuneration is paid by, or on behalf of, an employer and when borne by a permanent establishment.

1. Introduction

In its discussion draft "Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention" of 2011[1] and its revised discussion draft of 2012, "OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)" (the "PE Discussion Draft"),[2] the OECD suggests that the following be added to the Commentary on Article 5 of the OECD Model (2010):[3]

> [t]he determination of whether or not an enterprise of a Contracting State has a permanent establishment in the other Contracting State must be made independently from the determination of which provisions of the Convention apply to the profits derived by that enterprise.[4]

Accordingly, regardless of whether or not income is taxable under article 6 (Income from immovable property), article 7 (Business profits) or article 8 (Shipping, inland waterways transport and air transport), a fixed place of business in the source state[5] may constitute a permanent establishment (PE). Whilst the existence of a PE in such circumstances may not be relevant in applying article 6 (the income is taxable in the source state in which the immovable property is situated) or article 8 (the income is taxable only in the contracting state in which the place of effective management is situated), it remains relevant for the purposes of other provisions, such as articles 11(4) and (5), 15(2)(c) and 24(3).[6]

If the profits of a transport enterprise are taxable under article 8 only in the residence state in which the place of effective management of the enterprise is situated and the transport enterprise has a PE in the source state, the existence of the PE is not relevant to the application of article 8 (the income is taxable only in the residence state), but is relevant to the application of the 183-day rule. If an employee temporarily works in the source state for the PE of the transport enterprise, article 15(2)(c) provides that the 183-day rule applies only if the remuneration is not borne by the PE. Can the employee's remuneration be borne by the PE in the source state even though the enterprises' profits are not taxable in the source state and, therefore, the remuneration is also not deductible in the source state? The following Example considers this.

Example

X, a bus driver resident in State X, is employed by Xco, a company resident in State X, which operates aircraft in international traffic. The place of effective management of the airline is situated in State X. Xco offers a number of flights, which take off and land at an airport in State Y. Xco also has a branch office in State Y, which sells flight tickets and is responsible for customer service, etc. Xco, in addition, operates a bus service connecting towns to the airport to provide access to and from that airport for passengers of its international flights. As there is a shortage of bus drivers in State Y, Xco sends X, who usually works in State X, to State Y to drive the route to and from the airport. X gets briefed on the technical peculiarities of the buses and the route in State Y and receives his time schedule from the branch office. During his work, X is under the direct supervision and control of a manager who is responsible for the business in State Y and functionally belongs to the personnel of the branch office. If X gets sick, another bus

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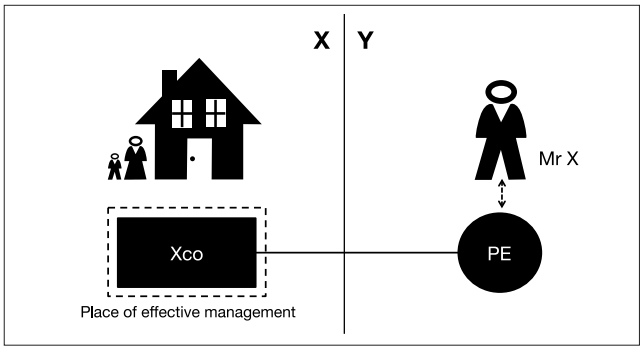
1. OECD, *Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention* (OECD 2011), International Organizations' Documentation IBFD.
2. OECD, *OECD Model Tax Convention: Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment)* (OECD 2012), International Organizations' Documentation IBFD.
3. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 5* (22 July 2010), Models IBFD.
4. *Supra* ns. 1 and 2, at m.no. 7. *See also* O.R. Hoor, *Comments on the OECD Discussion Draft on the Meaning of "Permanent Establishment"*, Tax Notes Intl. p. 208 (16 Jan. 2012); S. Bendlinger, *Neuer OECD-Bericht zur Betriebsstättendefinition*, 21 Steuer und Wirtschaft Intl. 12, p. 532 (2011); and B. Engel & L. Hilbert, *Keine Betriebsstätte nach Art. 5 OECD-MA bei Land- und Forstwirtschaft*, Internationale Wirtschafts-Briefe 9, p. 316 et seq. (2012).
5. For purposes of this article, the source state is always "the other Contracting State", regardless of what and where the source of income is, and, therefore, regardless of where the employment is exercised and whether or not the 183-day rule applies. The residence state is always the residence state of the employee and, thus, the employer may be a resident of the residence state, the source state or a third state.
6. *See also* K. van Raad, *Nondiscrimination in International Tax Law* p. 135 et seq. (Kluwer L. & Taxn. Publishers 1986); J.F. Avery Jones et al., *The Non-Discrimination Article in Tax Treaties*, 31 Eur. Taxn. 10, sec. III. A. (1991), Journals IBFD; and M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 Steuer und Wirtschaft Intl. 1, p. 14 (2011).

driver helps out who works in State Y and functionally belongs to the personnel of the branch office. During his work, X is in radio contact with the branch office, has to report any incidents or delays and may receive further instructions. X is also allowed to use the branch office's cafeteria and its means of transport to bring personnel to and from the branch office in the early morning and late evening. X is present in State Y for not more than 183 days during the relevant period.



According to article 8, Xco's profits from the operation of aircraft in international traffic, including the profits from the bus service,[7] are taxable only in State X, in which the place of effective management of the airline is situated. Accordingly, X's remuneration is merely deductible from its profits, which are taxable only in State X. If, following the PE Discussion Draft, the branch office is a PE under article 5, it is unclear as to whether or not X's remuneration is borne by the PE in State Y under article 15(2)(c). If the remuneration is borne by the PE in State Y, the 183-day rule does not apply and, therefore, the remuneration is taxable under article 15(1) in State Y, in which the employment is exercised. Otherwise the 183-day rule applies and, therefore, the remuneration is taxable only in State X.[8]

In the literature, it is assumed that "paid by, or on behalf of" in article 15(2)(b) and "borne by" in article 15(2)(c) serve a common purpose, i.e. to ensure that the source state in which the employment is exercised retains its taxation right if the remuneration is recognized as a deduction from profits taxable in the source state.[9] Accordingly, before going into detail on the meaning of the term "borne by", the object and purpose of the 183-day rule (*see* section 2.) and the meaning of the term "paid by, or on behalf of" (*see* section 3.) are analysed.

2. Object and Purpose of the 183-Day Rule

It is not exactly clear when provisions similar to the 183-day rule in article 15(2) first emerged. The Germany-Sweden Income and Capital Tax Treaty (1928) states that income in respect of an employment exercised in the source state is taxable only in the residence state if the employee is temporarily present in the source state and the employer is a resident of the residence state.[10] The Sweden-United States Income and Capital Tax Treaty (1939)[11] includes a similar rule that, inter alia, takes into account a 180-day presence.[12] According to the legislative materials, this provision "was of particular interest to the Swedish delegation", as "[t]he objective was one primarily of facilitating the departure of their nationals with the least possible inconvenience", which was valued "as relaxing a bothersome impediment to commercial intercourse".[13] The League of Nations' Mexico Model (1943) and the London Model (1946) also contain a 183-day rule to "facilitate the operations of enterprises engaged in international trade and the movement of workers across national borders".[14] When Working Party No. 10 of the OEEC Fiscal Committee (represented by Sweden) presented its first report on the taxation of income from dependent and independent personal services in 1957, numerous tax treaties already contained a 183-day rule.[15] In its first draft, the Working Party included such a rule "to facilitate it for businessmen

7. *OECD Model Tax Conventions on Income and on Capital: Commentary on Article 8* para. 6 (15 July 2005-22 July 2010), Models IBFD. *See also OECD Draft Tax Convention on Income and on Capital: Commentary on Article 8* para. 5 (30 July 1963), Models IBFD and *OECD Model Tax Conventions on Income and on Capital: Commentary on Article 8* para. 8 (11 Apr. 1977-28 Jan. 2003), Models IBFD.
8. Article 15(3) does not apply, as X is not working aboard a ship, boat or aircraft.
9. *See*, for example, K. Vogel, *Klaus Vogel on Double Taxation Conventions* 3rd ed., art. 15, m.nos. 30 and 32 (Kluwer L. Intl. 1997); R. Prokisch, in *Doppelbesteuerungsabkommen* 5th ed., art. 15, m.nos. 53a and 67 (K. Vogel & M. Lehner eds., C.H. Beck 2008); L.E. Schoueri, *The Residence of the Employer in the "183-Day Clause" (Article 15 of the OECD's Model Double Taxation Convention)*, 21 Intertax 1, p. 27 et seq. (1993); L. de Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State"*, 54 Bull. Intl. Fiscal Docn. 10, sec. II. B. (2000), Journals IBFD; F. Pötgens, *Income from International Private Employment* chap. II, sec. 6, chap. VII, sec. 1.2.3, chap. IX, sec. 5.3.2. (IBFD 2007) and *Article 15(2)(b) of the OECD Model: Problems Arising from the Residence Requirement for Certain Types of Employers*, 42 Eur. Taxn. 6/7, sec. 1. (2002), Journals IBFD; E. Burgstaller, *"Employer" Issues in Article 15(2) of the OECD Model Convention – Proposals to Amend the OECD Commentary*, 33 Intertax 3, p. 128 (2005); K. Vogel et al., *United States Income Tax Treaties* 3rd ed., art. 15, p. 51 et seq. (Kluwer L. & Taxn. Publishers 1989-1996); F. Wassermeyer, in *Doppelbesteuerung: DBA* 86th suppl., art. 15 MA, m.no. 40 (H. Debatin & F. Wassermeyer eds., C.H. Beck 2002); M. Kempermann, in *Doppelbesteuerungsabkommen Deutschland – Schweiz*, art. 15, m.no. 65 (H. Flick, F. Wassermeyer & M. Kempermann eds., Dr. Otto Schmidt 2011); V. Kluge, *Das Internationale Steuerrecht* 4th ed., p. 889 (S 280) (C.H. Beck 2000); O.H. Jacobs (ed.), *Internationale Unternehmensbesteuerung* 7th ed., pp. 1344 and 1347 (C.H. Beck 2011); and H. Schaumburg, *Internationales Steuerrecht* 3rd ed., m.no. 16.437 et seq. (Dr. Otto Schmidt 2011).
10. No. 9, para. 2 of the final protocol to the *Agreement Between Germany and Sweden for the Avoidance of Double Taxation* [German and Swedish text] (25 July 1928), Treaties IBFD, and *Reichsgesetzblatt* II 1928, p. 528. The same provision is also included in No. 10 of the final protocol to the *Germany-Finland Tax Treaty* (1935), *Reichsgesetzblatt* II 1936, p. 35. *See also* E. Reimer, *Der Ort des Unterlassens* p. 317 (C.H. Beck 2004).
11. *Agreement for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance in the Case of Income and Other Taxes* (23 Mar. 1939), Treaties IBFD [hereinafter: *Sweden-US Income Tax Treaty* (1939)], also published in *Legislative History of United States Tax Conventions – Roberts & Holland Collection* vol. XVIII, pp. 2355-2379 (Sweden 26-49) (S.I. Roberts & M.C. Robinson eds., William S. Hein 1986).
12. Art. XI *Sweden-US Income Tax Treaty* (1939).
13. Presidential Message of Transmittal to the Senate, Senate Executive K, 76th Congress, 1st Session, 20 Apr. 1939, published in Roberts & Robinson, *supra* n. 11, at pp. 2325-2328 (Sweden 3-6); C.F. Stam, Chief of Staff, Joint Committee on Internal Revenue Taxation, Memorandum, 25 May 1939, published in Roberts & Robinson, *supra* n. 11, at pp. 2334-2336 (Sweden 8-10); Technical Memorandum of the Treasury Department Slightly Edited by the Staff of the Joint Committee on Internal Revenue Taxation – In RE Proposed Tax Convention Between the United States and Sweden, published in Robert & Robinson, *supra* n. 11, at pp. 2336-2348 (Sweden 10-22).
14. League of Nations, C. 88. M. 88. 1946. II. A. (1946), *London and Mexico Model Tax Conventions – Commentary and Text*, p. 23, published in *Legislative History of United States Tax Conventions* IV, pp. 4319-4439 (Joint Committee on Internal Revenue Taxation ed., 1962). *See also* League of Nations, C. 2. M. 2. 1945. II. A. (1945), *Fiscal Committee: Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion – Second Regional Tax Conference*, Mexico, D.F., July 1943, p. 53.
15. OEEC Fiscal Committee, FC/WP10(57)1, 11 Sept. 1957, p. 2 et seq. The historical OEEC and OECD materials are available at http://www.taxtreatieshistory.org.

to send their employees (technicians, etc.) abroad in connection with deliveries of machinery and plant".[16]

The object and purpose of the 183-day rule is, therefore, to facilitate the international movement of personnel and the operations of enterprises engaged in international trade. If income in respect of an employment exercised in the source state is taxable only in the residence state, presumably under the source state's domestic law, there is no obligation on the employee to declare income and to pay tax or on the employer to withhold tax. Accordingly, the 183-day rule avoids an excessive administrative burden for employees and employers. An administrative burden is regarded as excessive if neither the employee, as the employee is temporarily present in the source state under article 15(2)(a), nor the employer, under article 15(2)(b) and (c), has a sufficient level of presence in the source state. If, however, the employer is a resident of the source state or has a PE in the source state for which the employee works, there is a sufficient level of presence, which makes withholding tax obligations reasonable. The OECD Commentary on Article 15 of the OECD Model also states that article 15(2)(b) and (c):[17]

> … can also be justified by the fact that imposing source deduction requirements with respect to short-term employments in a given State may be considered to constitute an excessive administrative burden where the employer neither resides nor has a permanent establishment in that State.

In the literature, it is assumed that article 15(2)(b) and (c) serves the common purpose of ensuring that the source state in which the employment is exercised retains its taxation right if the remuneration is recognized as a deduction from profits taxable in the source state and, therefore, that article 15(2)(b) and (c) represents compensation for the source state for its reduced tax revenue.[18] However, it is questionable as to whether or not article 15(2)(b) and (c) really has such an object and purpose.[19] Under the place-of-work principle in article 15(1), it is irrelevant where the remuneration is deductible, i.e. whether in the residence state, the source state or a third state. Why then should the deductibility be decisive under the 183-day rule as an exception to the place-of-work principle? It is also unclear why the weight of the administrative burden in the source state, which the 183-day rule is intended to eliminate, should depend on the deductibility of the remuneration. It is, rather, the presence of the employer in the source state and the connection between that presence and the employee's services that make the administrative burden caused by the levying of withholding tax excessive or not. In addition, residency in the source state cannot necessarily imply deductibility in the source state. If the employer is a resident of the source state, the 183-day rule does not apply by reason of article 15(2)(b). This is so even if the remuneration is borne by a PE that the employer has in the residence state or a third state and, therefore, where there is no danger of "double losses" for the source state.[20] Finally, from a historical perspective, the intention to link taxation to deductions is not supported. Only in its initial 1957 report did Working Party No. 10 explain the reasons for article 15(1) and (2), but the explanation focused on practical aspects and the pay-as-you-earn system.[21] It is interesting to note that even article 15(3) was never intended to make the remuneration taxable in the state in which it is deductible, i.e. the state in which the place of effective management of the transport enterprise is situated. Rather, the rule in article 15(3) appears:[22]

> … to be the correct choice for many countries which have already introduced, or which propose to introduce, taxation at the source on salaries and wages. It is normal to make the employer responsible for the formalities of taxing remuneration paid to members of crews: such a procedure ensures simple and speedy collection and permits of satisfactory control.

Given this background, it is arguable that article 15(2)(b) and (c) is not intended to offer compensation to the source state for reduced tax revenue. Rather, article 15(2)(b) and (c) assures that the place-of-work principle is followed if the employer has a sufficient level of presence in the source state and, therefore, the withholding tax obligations in the source state do not impose an excessive administrative burden.

3. Remuneration Always "Paid by, or on Behalf of, an Employer"

In the literature, it is argued that "paid by, or on behalf of" is a condition independent from the question of who the employer is[23] and that there is a requirement that the employer economically bear the remuneration.[24] However, if an employee has only one employer,[25] the question of "paid by,

16. FC/WP10(57)1, *supra* n. 15, at pp. 7 et seq. and 11. For further developments regarding the 183-day rule, *see* K. Dziurdź, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht* sec. 3.1.3. (Linde 2013).
17. Para. 6.2 *OECD Model: Commentary on Article 15* (2000-2010).
18. *See supra* n. 9.
19. *See*, in detail, Dziurdź, *supra* n. 16, at sec. 3.2.
20. Id., at sec. 5.2. However, it could be argued that the remuneration is deductible both in the source state of which the employer is a resident and in the residence state or third state in which the PE is located if, for example, the source state uses the credit method under article 23. It is, therefore, unclear when remuneration is deductible in a state. *See*, in detail, Dziurdź, *supra* n. 16, at sec. 3.2.4.
21. FC/WP10(57)1, *supra* n. 15, at p. 11.
22. OEEC Fiscal Committee, FC/WP5(56)1, 2 Oct. 1956, p. 11 and FC/WP5(57)2, 6 May 1957, p. 17. *See also* OEEC Fiscal Committee, FC(58)2, 13 Feb. 1958, p. 14; FC/M(58)2, 29 Mar. 1958, p. 7; FC(58)2 (Rev. 1) Pt. 1, 19 Apr. 1958, p. 12; TFD/FC/64, 11 Apr. 1959, p. 15 et seq.; TFD/FC/64 (Rev. 1), 5 May 1959, p. 19; FC(59)2, 21 May 1959, p. 19; and C(59)147, 18 June 1959, p. 16.
23. *See*, for example, Burgstaller, *supra* n. 9, at pp. 131 and 133; Pötgens, *Income*, *supra* n. 9, at chap. VII, secs. 3.2.2.4 and 3.2.2.5; F. Pötgens, *Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of "Employer" for Treaty Purposes*, 61 Bull. Intl. Taxn. 11, sec. 6. (2007), Journals IBFD and *The Dutch Supreme Court Reaffirms and Clarifies 'de facto employer' under Article 15 of the OECD Model*, 36 Intertax 2, pp. 78 and 81 (2008); Vogel, *supra* n. 9, at art. 15, m.no. 27; and Prokisch, *supra* n. 9, at art. 15, m.no. 49a.
24. *See*, for example, L. Hinnekens, *The salary split and the 183-day exception in the OECD Model and Belgian tax treaties (Part II)*, 16 Intertax 10, p. 329 (1988); Pötgens, *Income*, *supra* n. 9, at chap. VII, secs. 3.4.1, 3.4.5 and 3.4.7.7, chap. IX, sec. 5.3.2; Vogel, *supra* n. 9, at art. 15, m.no. 30; Prokisch, *supra* n. 9, at art. 15, m.no. 53a; De Broe et al., *supra* n. 9, at sec. II. B. 2.; and Kempermann, *supra* n. 9, at art. 15, m.no. 65.
25. It is unclear whether an employee can have only one employer or whether instead the wording of article 15(2)(b) in regard to "an employer" implies that an employee can have more than one employer. Without doubt, if an employee is employed part-time for one person under one employment contract and part-time for another person under another employment contract, overall he has more than one employer for tax

or on behalf of" is of secondary importance, i.e. either the employer pays the remuneration or somebody else pays the remuneration on behalf of the employer.[26] Still, this must not mean that the employer actually has to bear the remuneration or the economic cost of the payment. It is possible that the remuneration will be borne by a person who does not exercise any employer functions at all. If, for example, the employer receives financial support from another enterprise, a fund or the state and is allowed to pass on the employee's remuneration directly to the enterprise, fund or state, or if the employee receives a tip directly from a customer, the employer does not bear the economic cost of the payment and might not even know about the payment. Is such a payment not paid by, or on behalf of, the employer?

If "paid by, or on behalf of" is understood to be a condition that is independent from the question of who the employer is, in certain cases, there may be no relevant employer, i.e. where the employer does not pay the remuneration and the person paying the remuneration is not an employer and does not pay the remuneration on behalf of the employer. In such a case, the condition in article 15(2)(b), i.e. that the remuneration be paid by, or on behalf of, an employer who is not a resident of the source state, is never fulfilled, as there is no paying employer. Even if the employer and the person paying the remuneration (not on behalf of the employer) are not residents of the source state and, therefore, taxation of the remuneration in the source state may give rise to an excessive administrative burden, the 183-day rule does not avoid this burden. The 183-day rule can, however, be understood in a positive way. The remuneration in respect of an employment may be taxed in the source state if the employment is exercised in the source state and: (1) the recipient is present in the source state for more than 183 days in the relevant period; or (2) the remuneration is paid by, or on behalf of, an employer who is a resident of the source state; or (3) the remuneration is borne by a PE that the employer has in the source state.[27] Based on this understanding, even if the employer and the person paying the remuneration (not on behalf of the employer) are residents of the source state and, therefore, taxation of the remuneration in the source state may not give rise to an excessive administrative burden, the 183-day rule could apply, as there is no paying employer. If "paid by, or on behalf of" is understood to be an independent condition that is not connected to the status of the employer, the object and purpose of the 183-day rule might not be achieved.

It is, therefore, not only questionable whether or not the remuneration must be economically borne by the employer to be "paid by, or on behalf of" the employer, it is also questionable whether or not the condition "paid by, or on behalf of" is, in fact, independent of the question of who the employer is. Rather, the remuneration is always "paid by, or on behalf of" the employer. If it is not paid by the employer, it is paid by somebody else on behalf of the employer. In the latter case, the remuneration is usually charged to the employer. A direct charge of the remuneration by a person to another person might, therefore, indicate that the latter is the employer. Nevertheless, such a direct charge is not the reason for concluding that the remuneration is paid on behalf of the employer or a condition thereof, it is simply the logical consequence of the fact that the person who pays the remuneration is not the employer and does not receive the employee's services.

Usually, the employer also charges the remuneration to another person, though indirectly as part of a fee for goods delivered or services provided. Such an indirect charge that, ultimately, relieves the employer from economically bearing the remuneration has no influence on article 15(2)(b). The employer does not lose its employer and payer status when it charges the remuneration to another person as part of a fee for goods delivered or services provided and the latter does not become the employer on whose behalf the remuneration is paid. Under article 15(2)(b), it can be determined how and why, as a direct charge or indirectly as part of a fee for goods delivered or services provided, the remuneration is passed on. However, whether or not the remuneration is charged as part of a fee for goods delivered or services provided depends on who the employer is. As the employee's services are provided to the employer, the employee's remuneration is either paid by the employer or is paid by another person on behalf of the employer. In the latter case, the person who pays the remuneration usually charges this to the employer and, in these circumstances, the remuneration is not part of a fee for goods delivered or services provided. It is, therefore, the employer who can charge the employee's remuneration as part of a fee for goods delivered or services provided to another person. Under article 15(2)(b), the consideration of how and why

treaty purposes. The reason for this is not, however, that article 15(2)(b) uses the term "an employer" but rather that the term "an employment" in article 15 refers to each part-time employment separately. When the first part-time employment is caught by the phrase "an employment", the employee has only *one* employer in respect of this employment. When the second part-time employment is caught by the phrase "an employment", the employee again has only *one* employer in respect of this employment. It further cannot be derived from the tax treaty that the term "an employment" must always refer to the contractual relationship as a whole; "an employment" may also refer to just a part of a contractual relationship if, for example, other parts are covered by special provisions such as article 17 on artistes and sportsmen. Consequently, it is arguable that the term "an employment" in article 15 refers to each functionally and temporally separate part of a contractual relationship. In that case, for each part of a contractual relationship, there is always only *one* employer pursuant to article 15(2)(b) and (c), even if, overall, there might be more than one employer. *See*, in detail, Dziurdź, *supra* n. 16, at sec. 4.1.4.

26. De Broe et al., *supra* n. 9, at sec. II.

27. *See*, for example, P. Baker, *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital* 3rd ed., m.no. 15B.07 (Sweet & Maxwell Aug. 2007); J.F. Avery Jones, *Short-Term Employment Assignments under Article 15(2) of the OECD Model*, 63 Bull. Intl. Taxn. 1, sec. 1. (2009), Journals IBFD; H. de Vries, *Developments Regarding the Netherlands Interpretation of the Term "Employer" in Art. 15 of the OECD Model*, 48 Eur. Taxn. 3 (2008), Journals IBFD; Pötgens, Intertax, *supra* n. 23, at p. 75; B. Runge, *Wirtschaftliche Interpretation des Begriffs des Arbeitgebers in den Doppelbesteuerungsabkommen*, 68 Finanz-Rundschau 18, p. 479 (1986); B. Siefert, *Der Arbeitgeberbegriff im deutschen Abkommensrecht*, 32 Recht der Internationalen Wirtschaft 12, p. 979 (1986); Vogel, *supra* n. 9, at art. 15, m.no. 12; Prokisch, *supra* n. 9, at art. 15, m.no. 13; Vogel et al., *supra* n. 9, at art. 15, pp. 2 et seq. and 43 et seq.; Schoueri, *supra* n. 9, at p. 21; De Broe et al., *supra* n. 9, at sec. II. B. 2.; and Pötgens, *Income*, *supra* n. 9, at chap. VII, sec. 1.3. *See also* OECD, *Taxation Issues Relating to International Hiring-Out of Labour*, *Trends in International Taxation* p. 45 (m.no. 73) (OECD 1985).

the employee's remuneration is charged from one person to another, is, in fact, an analysis of who the employer is.

Against this background, the phrases "paid by, or on behalf of" and "an employer" in article 15(2)(b) are interrelated and must be considered together. The Commentary on Article 15 of the OECD Model also confirms that the condition "paid by, or on behalf of" is not independent of the question of who the employer is. Rather, a charge to a person is regarded as an indication of whether or not that person is an employer.[28] Ultimately, the remuneration is always "paid by, or on behalf of" the person who mainly exercises the relevant employer functions, i.e. the employer.[29]

4. Meaning of "Borne by" Based on the Arm's Length Principle

Articles 15(2)(c) and 7 have several things in common. Both refer to the PE definition in article 5, both require that a distinction be made between different parts of an enterprise and both require assigning expenses to a PE. Article 7(2) determines whether or not profits, i.e. earnings and expenses, such as remuneration in respect of an employment, are attributable to a PE in the source state. The profits attributable to the PE are:

> … the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through other parts of the enterprise.

Accordingly, the arm's length principle in article 7(2) can be applied in answering the question of whether or not, under article 15(2)(c), the remuneration is borne by a PE that the employer has in the source state.

Under article 7(2), general administrative expenses incurred for purposes of a PE and expenses for goods delivered or services provided to a PE may be attributable to the PE.[30] These expenses may include remuneration in respect of an employment. It would be surprising if, in such cases, the remuneration was borne by the PE in the source state under article 15(2)(c). To the extent that the remuneration is deductible in the source state at the level of the PE, article 15(2)(c) would prevent the application of the 183-day rule, even if the remuneration were simply part of a fee for goods delivered or services provided to the PE. If, between independent enterprises, the employer does not lose its employer and payer status when it charges the remuneration to another person as part of a fee for goods delivered or services provided and the latter does not become the employer on whose behalf the remuneration is paid, why, then, would such a charge be relevant under article 15(2)(c) if the PE in the source state is treated as a separate and independent enterprise?

With regard to article 15(2)(c), it must be asked how and why the remuneration is attributable to the PE. If it is attributable as part of a fee for goods delivered or services provided, it is not borne by the PE.[31] However, between independent enterprises, the question of whether the remuneration is charged as part of a fee for goods delivered or services provided depends on who the employer is. Article 15(2)(b) addresses the person who mainly exercises the relevant employer functions and this person, i.e. the employer, either pays the remuneration itself or the remuneration is paid by another person on its behalf. When the PE is treated as a separate and independent enterprise, the principles in article 15(2)(b) used to connect the employee's services with the presence of a person in the source state are relevant under article 15(2)(c) for the purpose of connecting the employee's services with the presence of a PE in the source state. In order to establish whether or not the remuneration is borne by the PE, whether the PE, as a separate and independent enterprise, would mainly exercise the relevant employer functions must be examined. The remuneration is borne by the PE if the PE, as a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, etc., would be the employer within the meaning of article 15(2)(b).

If, under article 15(2)(c), consideration is given to the part of the enterprise in which the relevant employer functions are primarily exercised, and not where the remuneration is, for whatever reason, deductible, the object and purpose of the 183-day rule will be better realized. If an employer provides products or services to customers from many different states and, therefore, an employee is active in all those states for a short period of time, the 183-day rule prevents taxation in all such states. Accordingly, this prevents an excessive administrative burden from arising and facilitates the international movement of personnel and the operations of enterprises engaged in international trade. Even if the employee's remuneration is deductible in all those states as part of a fee for goods delivered or services provided, article 15(2)(b) does not prevent the application of the 183-day rule. If an enterprise is structured along functional lines, the employer's head office provides products or services to PEs in many different states and, therefore, an employee is active in all those states for a short period of time, the 183-day rule should still prevent taxation in all such states so as to facilitate the international movement of personnel and the operations of enterprises

28. Para. 8 *OECD Model: Commentary on Article 15* (1992-2008) and para. 8.14 et seq. *OECD Model: Commentary on Article 15* (2010).
29. On the relevant employer functions, *see* K. Dziurdź, *Article 15 of the OECD Model: The 183-day Rule and the Meaning of "Employer"*, British Tax Rev. (2013), forthcoming.
30. *See*, for example, paras. 11 et seq., 13 and 18 et seq. *OECD Draft: Commentary on Article 15* (1963).
31. *See*, for example, Hinnekens, *supra* n. 24, at p. 323; Vogel, *supra* n. 9, at art. 15, m.no. 32; Prokisch, *supra* n. 9, at art. 15, m.no. 64; Kempermann, *supra* n. 9, at art. 15, m.no. 65; Wassermeyer, *supra* n. 9, at art. 15 MA, m.no. 130; B. Runge, *Steuerliche Auswirkungen der Entsendung von Arbeitskräften ins Ausland*, 32 Betriebs-Berater 4, p. 185 (1977); and K.J. von Bornhaupt, *Lohnsteuerrechtliche Fragen bei Entsendung von Arbeitnehmern ins Ausland und vom Ausland ins Inland*, 40 Betriebs-Berater 35/36, supp. 16, p. 15 (1985). However, *see also* OECD, *Discussion Draft on a New Article 7 (Business Profits) of the OECD Model Tax Convention* m.no. 18 et seq. (OECD 2008), International Organizations' Documentation IBFD (commented on by M. Bennett & R. Russo, *Discussion Draft on a New Art. 7 of the OECD Model Convention*, 16 Intl. Transfer Pricing J. 2, sec. 4. (2009), Journals IBFD) and paragraph 7.2 of the *OECD Model: Commentary on Article 15* (2010), which point in another direction.

engaged in international trade. Even if, under the arm's length principle, the employee's remuneration is deductible in all those states as part of a fee for goods delivered or services provided, article 15(2)(c) should not preclude the application of the 183-day rule, as the remuneration is not borne by the PEs. Only if the employee works for a PE in a similar manner as he would work for an employer, provided the PE is a separate and independent enterprise, is the employer's presence in the source state and the connection between the employee's services and the PE strong enough to follow the place-of-work principle.

Example (continued)

Under article 15(2)(c), what is decisive is whether or not Xco's PE in State Y, being a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, etc., would be the employer within the meaning of article 15(2)(b). Even though X has concluded his employment contract with Xco, which carries on the business of the whole enterprise, it must be assessed which part of the enterprise, in fact, primarily exercises the rights and obligations in respect of the contract and the relevant employer functions. In this case, with regard to X's activities exercised in State Y, these employer functions, i.e. the briefing and provision of the time schedule from the branch office, direct supervision and control of a branch office's manager, substitution during sickness by a branch office's employee, reporting obligations and instructions from the branch office and use of the branch office's communal services, suggest that if Xco's PE in State Y were a separate and independent enterprise it would be X's employer within the meaning of article 15(2)(b). Consequently, according to article 15(2)(c), the 183-day rule does not apply and the remuneration is taxable in State Y. It is irrelevant that, under article 8, the remuneration is not attributed to the PE in State Y, but is, rather, only deductible in State X where the place of effective management of the airline is situated. With this result, the object and purpose of article 15(2)(b) and (c) is realized. The imposition of source deduction requirements in State Y does not, arguably, constitute an excessive administrative burden, as Xco, with its branch office in State Y, has the necessary presence in State Y and likely must also deduct at source the tax of its local employees.

5. Conclusions

The object and purpose of the 183-day rule is to facilitate the international movement of personnel and the operations of enterprises engaged in international trade by avoiding an excessive administrative burden for the employee and the employer in the source state. Article 15(2)(b) and (c) serves a common purpose, but is not intended to provide compensation to the source state for reduced tax revenue. Rather, article 15(2)(b) and (c) determines whether or not there is a sufficient level of presence in the source state for withholding tax obligations to be reasonable. If there is a sufficient level of presence, as the employer is a resident of the source state or has a PE in the source state for which the employee works, the administrative burden resulting from withholding tax obligations is not intended to be excessive and, therefore, there is no reason for an exception to the place-of-work principle.

Whether or not the remuneration is "paid by, or on behalf of" an employer under article 15(2)(b) is not an independent condition that is not connected to employer status, but, rather, in fact, depends on who the employer is. Either the employer, itself, pays the remuneration or somebody else pays the remuneration on behalf of the employer. The employer need not also necessarily bear the remuneration or the economic cost of the payment, otherwise it would be possible that the conditions in article 15(2)(b) would always be fulfilled or never be fulfilled, regardless of whether or not the employer and the person paying the remuneration (not on behalf of the employer) are residents of the source state. Accordingly, for the purposes of the 183-day rule, the phrases "paid by, or on behalf of" and "an employer" are interrelated and must be considered together.

In applying the arm's length principle under article 7(2) in answering the question of whether or not, under article 15(2)(c), the remuneration is "borne by" a PE that the employer has in the source state, it can be determined how and why, as a direct charge or indirectly as part of a fee for goods delivered or services provided, the remuneration is attributable to the PE. If it is attributable as part of a fee for goods delivered or services provided, it is not borne by the PE. However, between independent enterprises the question of whether the remuneration is charged as part of a fee for goods delivered or services provided depends on who the employer is. Accordingly, in order to establish whether or not the remuneration is borne by the PE, whether the PE, as a separate and independent enterprise, would primarily exercise the relevant employer functions must be examined. The remuneration is borne by the PE if the PE, as a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, etc., would be the employer within the meaning of article 15(2)(b).