tax notes international
Volume 63, Number 7 ■ August 15, 2011

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Reprinted from *Tax Notes Int'l*, August 15, 2011, p. 543

PRACTITIONERS' CORNER

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It is rare that an income tax treaty between OECD member states considers a permanent establishment to arise because of services provided across borders that are not linked to a fixed place of business. Such is the case, though, under article 5(3)(b) of the Austria-Czech Republic income tax treaty. The concept that services not linked to a fixed place constitute a PE is well known to the U.N. model tax treaty and has recently also been adopted by the OECD model tax treaty.

The idea that it is not the taxpayer's place of business that could lead to a PE is also seen in the context of a construction site PE: The site itself, even though a future building of someone else, could constitute a PE of the construction business if maintained for a specific period. The time aspect is also decisive when it comes to services that may constitute a PE. In February 2011 Austrian-Czech consultations clarified questions in this context, and by the end of March 2011, the Austrian Ministry of Finance issued an express service information (*express auskunftservice*, or EAS), an anonymous ruling similar to a private letter ruling, referring to those consultations.[1]

The wording of the Austria-Czech Republic tax treaty states that a services PE only arises if services are provided more than six months *in total* during a 12-month period. It was somewhat unclear how to calculate the six months within the 12-month period. The wording ''in total'' suggests that the services need not be provided during one continuous period of time without interruption. However, using the term ''months'' instead of ''days'' could support the argument that the services must be provided in specific stretches of periods — for example, in months, instead of on a day-to-day basis.

The U.N. model's wording in this context strongly supports the understanding that it is only periods of time, during which the services are provided, that can be taken together, not merely days. It states that services provided ''for a period or *periods* aggregating more than six months within any 12 month period'' lead to a PE (emphasis added).[2] What establishes a period to count toward six months is unclear, one day for sure not, two or three days probably also not, a week maybe, most likely two weeks or 10 days. The answer to this question is only needed in exceptional cases in which it is really a day or two that determine whether a PE arose. Therefore, it remains mostly theoretical.

Under the Austria-Czech Republic tax treaty, the wording only states that services rendered ''during a total of more than six months'' constitute a PE, without using the phrase ''period or periods aggregating more than six months.'' Regarding construction sites, the OECD commentary states that the period to be

[1]Federal Finance Ministry, Mar. 28, 2011, EAS 3204.

[2]U.N. model tax convention, article 5(3)(b).

fulfilled in order to constitute a PE is a continuous uninterrupted period.[3] Counting a period during which work on a construction site is performed is different from counting days of services. Services might be rendered for some aspects of a project at any given point in time; a construction site needs attention during a period of time.

Therefore, it is no surprise that according to the Austrian-Czech consultations on the question of how to determine the more than six months for purposes of a services PE, the counting is different from counting the same for purposes of a construction site: If the services were rendered on 183 days in total during a 12-month period, a PE is considered to have existed. Under the wording of the U.N. model tax treaty, this result would be questionable; the wording of the Austria-Czech Republic tax treaty is not as clear as the U.N. model tax treaty's wording, but in light of using the term ''six months'' instead of ''183 days,'' it appears inconsistent not to apply the same rationale as would apply under the U.N. model tax treaty and count only those services that are rendered during a certain period of time. This understanding of the six-month period is supported by the OECD's 2006 discussion paper providing an example for how to draft a services PE paragraph. The discussion paper suggests that periods of time exceeding in the aggregate 183 days should be relevant; this is a clear indication that each day must be counted. If the aggregate of six months is decisive, however, as it is under the Austria-Czech Republic tax treaty, days might not be the appropriate unit of counting. This argument is supported by the wording of article 14 of the Austria-Czech Republic tax treaty in which 183 days are relevant regarding the right to dependent work.[4]

Another important issue is whether services rendered on different projects by the same taxpayer in the other country lead to a single PE on a case-by-case basis or if the services rendered by the same taxpayer during a 12-month period are counted together. When it comes to construction sites, a PE might only arise if the site by itself fulfills the required period of time on its own, not taking into account other construction sites of the same taxpayer in that country.

Again the consultations of Austria and the Czech Republic regarding services PEs arrive at a different result: Services of a taxpayer rendered in different projects must be counted together for purposes of counting the days against the 183-day threshold. This method may have an impact on the manner that services are provided in the other country, thereby distorting business decisions. If a taxpayer envisions providing services in the other country on six different projects, each lasting a bit more than one month, it would be wise to work on all the projects at the same time or at least within a short time frame. If the taxpayer worked on the projects one after the other, the 183 days would be fulfilled and a PE constituted with possible tax implications depending on whether the taxpayer is resident in Austria or the Czech Republic.[5]

The U.N. model tax treaty is explicitly opposed to the Austrian-Czech understanding: Time spent at different projects is not aggregated together for purposes of determining the six-month threshold based on the wording that services lead to a PE if they ''continue (for the same or a connected project)'' for more than six months.[6] The commentary justifies this wording, stating:

> it is not appropriate to add together unrelated projects in view of the uncertainty which that step involves and the undesirable distinction it creates between an enterprise with, for example, one project of three months' duration and another with two unrelated projects, each of three months' duration, one following the other.[7]

It is surprising that Austria and the Czech Republic do not share this view, particularly since it is provided by experts who have experience on services PE matters.

From the March 2011 ruling of the Finance Ministry and from the cross-border consultation of the two countries involved, it is obvious that constituting a PE because of providing services between Austria and the Czech Republic may happen more easily than one would expect from reading the provisions. ◆

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[3]OECD commentary on the model tax treaty, article 5, no. 19.

[4]Austria-Czech Republic tax treaty, article 14(2)(a).

[5]Austria exempts Czech PE income from taxation, while the Czech Republic credits Austrian PE taxation onto its — generally lower — taxation.

[6]U.N. model tax treaty, article 5(3)(b).

[7]U.N. commentary on the U.N. model tax treaty, article 5, no. 12.