

PE Watch: Latest developments and trends, November 2020

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BEPS Multilateral Instrument (MLI)

Recently, [Egypt](#), [Burkina Faso](#), and [Panama](#) deposited their instruments of ratification for the Multilateral Instrument (MLI) and confirmed their preliminary positions with respect to the permanent establishment (PE) provisions, respectively. As regards to the PE positions, Egypt and Burkina Faso have adopted all PE provisions, with the exception of Article 14 (contract splitting rule) that Egypt chose not to apply with respect to provisions of its Covered Tax Agreements relating to the exploration for or exploitation of natural resources. Panama chose not to apply any of the PE provisions of the MLI. The MLI will enter into force for Egypt on 1 January 2021, for Burkina Faso on 1 February 2021, and for Panama on 1 March 2021.

PE developments in response to COVID-19

Cyprus

On 27 October 2020, the Tax Department of Cyprus issued [guidance](#) on the impact of COVID-19 on the application of, inter alia, the provisions on PE in the Cypriot Income Tax Law. The guidance is generally in line with the [OECD Secretariat analysis](#). Among other items, the guidance stipulates that persons working remotely from Cyprus and agents concluding contracts in Cyprus

due to travel restrictions imposed by governments during COVID-19 crisis, will not create a PE in Cyprus. Moreover, the guidance provides that, in cases where persons that would otherwise be in Cyprus but due to travel restrictions are conducting activities abroad, the time spent abroad will not be taken into account to determine whether there is a PE in Cyprus. It should be noted that the guidance does not take into consideration the possible different tax treatment of the matters raised by other jurisdictions and focuses exclusively on Cypriot tax-related considerations.

The guidance is generally applicable from 21 March 2020 until 9 June 2020. In case the period is extended to before 21 March 2020 or after 9 June 2020, depending on the specific facts of each case, the taxpayer is obliged to provide relevant supporting evidence which proves the objective restriction to travel by reason of the COVID-19 pandemic.

Singapore

On 28 October 2020, the Inland Revenue Authority of Singapore (IRAS) updated its [guidance](#) on the impact of COVID-19 to PEs to require that the unplanned presence of employees in Singapore due to travel restrictions up to 31 December 2020 is temporary. Before the update, the guidance was limited to an unplanned presence not exceeding more than 183 days in the year 2020 from the date of arrival in Singapore. The guidance may be further updated as the COVID-19 situation evolves.

For additional information on the guidance, see EY Global Tax Alert, [PE Watch: Latest trends and developments, May 2020](#), dated on 14 May 2020.

Domestic law PE developments

Denmark

On 7 October 2020, the Danish Minister of Taxation submitted a [Bill](#) to Parliament proposing to amend the Danish rules on international taxation. Among other items, the Bill proposes to amend the definition of PE to align it with the new definition set out in Article 5 of the OECD Model Convention (2017), inter alia, broadening the agency PE rule and establishing an anti-fragmentation rule.

The Bill also propose the possibility for Danish companies to deduct final losses incurred by their foreign subsidiaries subject to a number of conditions. This change is in response to the decision from the European Court of Justice in *A/S Bevola, Jens W. Trock ApS v. Denmark*, C-650/16.

The Parliament had its first reading of the Bill on 30 October 2020. The next reading is scheduled for 1 December 2020 and the final reading for 3 December 2020.

The rule would be applicable for income year 2021 and onwards. In relation to the deduction for final losses in foreign entities, it is expected that the tax authorities will publish a decision that will entitle taxpayers to open prior year tax returns to claim a tax deduction for final losses suffered in previous years.

Egypt

On 29 September 2020, the Egyptian Cabinet published Law No. 199 of 2020, which amends certain provisions of the Income Tax Law No. 91 of 2005, in the *Official Gazette*. Among others, the Law introduces a 5% and 10% withholding tax on dividend distributions to individuals and corporations and a 10% tax on net profits realized by a nonresident company through a PE in Egypt. The law deems the net profit to be distributed, and subject to tax, within 60 days from the PE's financial year end. The law is effective from 30 September 2020.

See EY Global Tax Alert, [Egypt amends income tax and stamp duty law provisions](#), dated 15 October 2020.

Hungary

On 13 October 2020, Hungary submitted a [Bill](#) to Parliament proposing changes to some of the international tax rules. Among others, the Bill proposes to amend the PE definition to introduce a service PE provision for the furnishing of services by a nonresident entity in Hungary, but only if the services continue for a period of more than 183 days in any 12-month period. Also, related projects must be considered together for purposes of the Service PE. Further, the Bill provides that a tax treaty has precedence over domestic law on PE matters even if there is no PE under domestic law.

The Law is expected to be effective from 1 January 2021.

Portugal

On 12 October 2020, the Portuguese Government submitted the [Draft State Budget Law for 2021](#) (Draft Budget Law) to the Parliament. Among other items, the Draft Budget Law proposes to extend the PE "force of attraction" by including income earned by a nonresident entity from the sale of goods to Portuguese residents identical or similar to those sold through a PE in Portugal in the calculation of the profit attributable to the PE of the nonresident entity.

Moreover, the Draft Budget law proposes to update the PE definition, including the following amendments:

- ▶ Any ships (and not only drilling ships) used for the prospecting or exploitation of natural resources should be included in the concept of a PE;
- ▶ Decrease from 6 months to 90 days the creation of a PE for activities exercised through facilities, platforms or ships used in the prospecting or exploitation of natural resources;
- ▶ Introduction of a Service PE clause if the activities exceed 183 days in a 12-month period;
- ▶ Expansion of the agency PE definition to include the following elements:
 - An agent usually plays a decisive role for the conclusion of contracts on a routine basis and without substantial changes; or
 - An agent maintains a deposit of goods in Portugal for their delivery on behalf of the company, even though it does not usually conclude contracts in relation to those goods nor has any intervention in the conclusion of such contracts.
- ▶ Removal from the list of preparatory and auxiliary “ the use of facilities for the purpose of delivering goods or merchandise of the enterprise”;
- ▶ Introduction of an anti-fragmentation rule.

Once adopted the Law is expected to be effective from 1 January 2021.

See EY Global Tax Alert, [Portuguese Government submits Draft State Budget Law for 2021 to Parliament](#), dated 15 October 2020.

Case law

India

On 22 October 2020, the Income Tax Appellate Tribunal (ITAT) of India rendered its decision in the case *ESPN Star Sports Mauritius vs ACIT (ITA Nos. 3760 & 4542/Del/2016)*. In this case, the taxpayer was a partnership firm established in Mauritius and was engaged in the business of selling advertisement time from Mauritius. ESPN India entered

into agreement with the taxpayer to purchase ad time and subsequently allot it to various Indian advertisers or agencies in India. The agreement for the sale of ad time between the taxpayer and ESPN India was concluded outside India and consideration was received outside India. Further, the transaction between the taxpayer and ESPN India was at arm's length and the taxpayer had no other office or operations in India. The taxpayer claimed the income to be in the nature of business income and not taxable in India in the absence of PE in India. However, the Assessment Officer contended that ESPN India is exclusively working as an agent for the taxpayer and therefore the taxpayer had a Dependent Agent PE (DAPE) in the form of ESPN India and sought to attribute 30% of gross revenue to the deemed DAPE.

The ITAT, without determining whether the taxpayer created a DAPE in India, held that in case *ESPN India* is remunerated at arm's length, then no further attribution of profits can be made in the hands of the taxpayer, even in case where a PE is created.

Tax rulings

Denmark

On 29 October 2020, the Danish Tax Board (DTB) published a binding [tax ruling](#) analyzing whether an employee of a United Kingdom (UK) company working once a week from his home office in Denmark constitutes a PE for Danish tax purposes for the UK company. As per the tax ruling, the employee wants to move back with his family to Denmark and the UK company agreed to allow him to work from his home office in Denmark on Fridays, whereas he would continue to work from the office in the UK for four days a week and meet with clients outside both countries, conduct company visits, etc. The DTB referred to two tax rulings from [2018](#) and [2019](#) and found that the employee's move to Denmark is not required by the UK company and the employee will still be working from UK most of his time. Further, the DTB provided that the UK company does not have any business interest in the employee performing part of his work in Denmark, since the sole purpose of working from there is due to the employee's personal reasons. Therefore, the DTB found that the UK company does not have a PE in Denmark.

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