



ACTL (The 2010 Update to the OECD MC)

Income from Employment

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Remaining issues

Art. 15(2)(b) and (c) of the OECD Model

- Interpretation of “employer”
- Qualification conflicts and interpretation conflicts
- “Paid by, or on behalf of” and “borne by”

Interpretation

- Commentary takes “employment” as point of departure (states following “de facto approach”) -> determining whether an employment relationship arises as regards the enterprise in the work state for which the employee renders services (Art.15/para.8.4) -> however, focus is (also) on the expression “employer”:
 - (i) place in the Commentary
 - (ii) relevance and position of “employment”
 - (iii) analysis made in the Commentary (objective criteria and examples)
 - (iv) introduction Discussion Draft (2004)

Interpretation

- Approach adopted in the Commentary -> employment -> domestic law (Art. 15/para. 8.4) -> meaning of "employer" is determined by first interpreting "employment" -> if an employment relationship exists, the person to whom the services are rendered is regarded as the "employer" (Art. 15/para. 8.7) -> domestic laws of a state lack definition of "employer" but has definition of "employment"

Interpretation

- Is this interpretation to be regarded as an (indirect) reference to the domestic law of the state applying the treaty or as an autonomous interpretation of “employer”? -> probably autonomous interpretation -> Commentary: employer = enterprise to which individual renders services in an employment relationship (Art. 15/para. 8.7) -> conclusion is drawn independently from domestic law of states ->

Interpretation

-> However, Commentary is not entirely clear -> it does not explain this interpretation method further -> Is it more appropriate to be silent on interpretation method? ->

(i) States lacking definition of employer in their domestic law -> Art. 3(2) is N/A -> autonomous interpretation (e.g. Germany and the Netherlands; no definition of employer, but of employment)

(ii) Art. 3(2) is to be applied by states having a definition of employer in their domestic law, not limited to withholding tax concept (e.g. Belgium, US, UK)

Interpretation

-> Result: no mention of interpretation (also for states following a formal approach -> suggestion in Art. 15/para. 8.3 for alternative text to counter abuse) -> only a set of criteria (Art. 15/para. 8.14) what is an employer at a tax treaty level -> maybe that is the way in which the Commentary is applied in practice

Qualification and interpretation conflicts

- Qualification conflicts (Art. 23/para. 32.3) -> different treaty rules apply because of differences in the domestic law of the source and residence state -> residence state must follow source state's qualification
- Interpretation conflicts (Art. 23/para. 32.5) -> difference in interpretation of the facts of the tax treaty provisions (PE) -> mutual agreement procedure (Art. 25)

Qualification and interpretation conflicts

- Qualification conflicts -> differences in the domestic laws of the source and residence state -> presuppose that both states apply Art. 3(2) OECD MC (includes reference to domestic law) -> if the Commentary indeed follows an autonomous interpretation of "employer" or Art. 3(2) is N/A (one or both contracting states) -> different interpretations of "employer" \neq qualification conflict, but interpretation conflict

Qualification and interpretation conflicts

- Art. 15/para. 8.10 makes reference to para. 32.1-32.7 of Commentary to Art. 23 (qualification and interpretation conflicts) -> the source state has a taxation right (and Art. 15(2) is N/A) in case of (i) abuse or (ii) its domestic law follows a formal approach (and the employee is formally employed by a non-resident of the source state)-> residence state is compelled to follow that qualification and to grant relief for double taxation ->

Qualification and interpretation conflicts

- > in case (ii), way of interpretation is relevant ->e.g. autonomous interpretation
- > no qualification conflict -> residence state is not obliged to follow source state's qualification -> interpretation conflict -> mutual agreement
- > inconsistent?

Paid by, or on behalf of + Borne by

- Art. 15/para. 6.2. -> "paid by, or on behalf of" (Art. 15(2)(b) OECD MC) and "borne by" (Art. 15(2)(c) OECD MC) serve a common purpose -> nevertheless, the Commentary does not give an explicit explanation of "paid by, or on behalf of" (contrary to "borne by")
- Example 5 (Art. 15/para. 8.24 and 8.25) -> assigning company pays salary on behalf of receiving company (individually identifiable recharge) -> bearing the costs

Paid by, or on behalf of + Borne by

- Art. 15/para. 8.14 mentions the direct recharge of the employee's remuneration as one of the objective criteria, but it remained silent on the explanation of "paid by, or on behalf of"
- Conclusion is apparently that (i) "paid by, or on behalf of" needs no separate consideration or (ii) has the meaning given to the objective criteria (direct recharge in line with at arm's length principle)

Paid by, or on behalf of + Borne by

- “Borne by” -> Art. 15/para. 7. (included in the Commentary in 2000) -> decisive is attribution under Art. 7 OECD MC (at arm's length principle) -> actually claiming “deduction” is irrelevant (Art. 15/para. 7.1)
- Art. 15/para. 7.2 (included in the Commentary in 2010) -> anticipated newly drafted Art. 7 -> notional charge -> does not affect explanation of “borne by”

Paid by, or on behalf of + Borne by

- Common purpose of paid by, or on behalf of” and “borne by” could lend support to the argument that for affiliated companies the at arm's length attribution of the remuneration costs should be decisive when explaining paid by, or on behalf of” -> not followed by the Commentary