

Kluwer International Tax Blog

Interesting PE discussions at London IFA 2019

Johann Müller (International tax professional) · Thursday, September 12th, 2019

On 10 September Wolters Kluwer organized an interesting discussion on Permanent Establishments. The discussion was led by 3 panelists, Tamara Schwärzler (PwC Switzerland); Arvid A. Skaar (Norwegian lawyer, well known for his standard work on Permanent Establishments) and myself as editor of the Wolters Kluwer [PE+ tool](#).

Tamara kicked off the session by discussing Tax challenges arising from the digitalization of the economy. Starting with defining what digitalization is, she then moved on to cover other topics such as problems with nexus in a digital world (identifying the compliance taxpayers, obtaining required information, enforcement and collection). After explaining the OECD 2-pillar approach, Tamara covered recent broader unilateral measures with regard to digital business, how it split into turnover based measures and others, and looked closer at recent UK legislation. Her slides were insightful and a worthy and clear read by themselves, without inundating participants with long paragraphs of text on the screen.

Arvid covered the beginning and ending of permanent establishments, with some clear timelines focused on construction PE's and various cross references to the appropriate paragraphs of the OECD commentaries to article 5. It was made clear that unexpected circumstances may trip up taxpayers who hope to stay below the triggering time periods for permanent establishments. Arvid raised the question whether construction PEs commence with a first exploratory visit or only with the subsequent first breaking of ground and concluded that it was the former rather than the latter. His examples were backed up and confirmed by participants from the audience with specific reference to actual construction sites where contractors were hoping to be in and out within 6 months, but ended up in protracted construction exceeding 3 years, albeit with possibly very few site visits in between.

In my presentation I covered the allocation of profits to permanent establishments. I pointed out that the Authorised OECD Approach (AOA) is overly complicated and difficult to deal with. It was interesting to note that out of a room of close to 100 people less than a handful have actually done and filed PE profit allocations in the past 3 years. We went through different scenarios from mining PEs to possible sales agencies, to show that the allocation of profits to PE's is a) highly fact dependent (due to the importance of significant people functions, arguably even more so than outside of PE scenarios) and b) can be highly subjective (and still be reasonably defensible). I expressed the hope that future publications on PE's will have more focus on the allocation of profits to PEs but also the difference between profit allocations to different types of PEs.

Our presentations were followed by 15 minutes of lively discussion of construction PEs, the question whether Google and the like should have taxable PEs in Europe (and who bears their tax for them if they do not) and whether markets are a source of value creation from an economic point of view. It was clear that PEs is a topic that bears the interest of many both from government, from advisory firms and from academia and that the answers to questions are often country dependent. The general consensus seems to have been that all are looking forward to the OECD coming with clarifying documentation in early 2020 (though I do have a bottle of champagne at stake that such guidance will still not be final).

Should anyone be interested in receiving the slides from the session, please contact international-marketing@wolterskluwer.com

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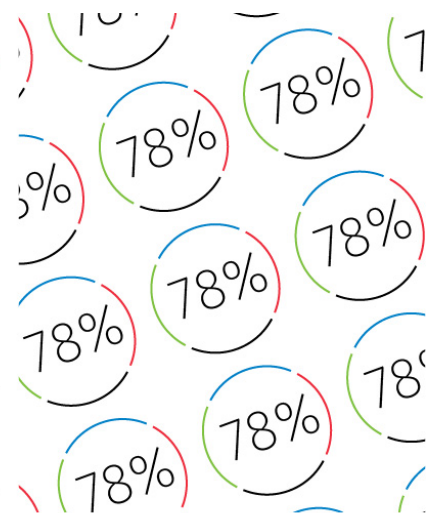
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