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COMMISSION RECOMMENDATION

of 28.1.2016

on the implementation of measures against tax treaty abuse

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) Tax treaties play an important role in encouraging cross-border trade efficiency by improving certainty for tax payers as regards their international dealings. By entering into a tax treaty the Contracting States agree to attribute the taxing rights between themselves with a view to eliminating double taxation and thereby fostering economic activity and growth. Tax treaties should not create opportunities for non- or reduced taxation through treaty shopping or other abusive strategies which only frustrate the purpose of such conventions and undermine the tax revenues of the Contracting States. The European Commission lends its full support to the efforts to tackle tax treaty abuse.
- (2) Following the release of the report "Addressing Base Erosion and Profit Shifting" (BEPS) in February 2013, OECD and the G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. As a result of the joint undertaking final reports on Actions 6 (preventing the granting of treaty benefits in inappropriate circumstances) and 7 (preventing the artificial avoidance of permanent establishment status) were published in October 2015. Both reports propose changes to the OECD Model Tax Convention and for the inclusion in the multilateral instrument implementing the results of the work on treaty issues by the end of 2016, as mandated by the OECD-G20 Project. Taken together, the changes proposed in the two reports are intended to enable countries to address their tax treaty related BEPS concerns.
- (3) The final report on Action 6 identifies tax treaty abuse, and in particular treaty shopping, as an important source of BEPS concerns and, proposes an approach based on different types of safeguards against such abuse of treaty provisions and a certain degree of flexibility regarding how to use them. In addition to suggesting a clarification that tax treaties are not intended to create opportunities for double non-taxation, the report recommends, inter alia, the inclusion in the multilateral instrument of a general anti-abuse rule based on a "principal purpose test" (PPT) of transactions or arrangements.
- (4) The final report as regards Action 7 distinguishes in particular commissionaire arrangements and the exploitation of the specific exceptions to the definition of a permanent establishment (PE) as the most common strategies to artificially avoid taxable presence in the form of a PE. The commissionaire arrangements typically take advantage of the relatively formal approach of the current Article 5(5) of the OECD Model Tax Convention as regards conclusion of sales contracts. The specific exceptions to the definition of a PE applicable to activities of preparatory or auxiliary nature are, in addition to being vulnerable to abuse through strategies based on

fragmented activities, ill-equipped to deal with business models of digital economy. The report therefore proposes changes to Article 5 of the OECD Model Tax Convention to make it more resilient against artificial structures to circumvent its application.

- (5) It is essential for the good functioning of the internal market that the Member States are able to operate efficient tax systems and prevent their tax bases from being unduly eroded because of inadvertent non-taxation and abuse and, that the solutions to protect their tax bases create no undue mismatches and market distortions.
- (6) It is equally vital that the measures the Member States make use of in order to implement the commitments they have taken under BEPS are in line with the agreed standards across the Union so as to provide legal certainty both for taxpayers as well as tax administrations.
- (7) With a view to ensuring compliance with EU law, the general anti-abuse rule based on a principal purpose test as suggested in the final report on Action 6 needs to be aligned with the case law of the Court of Justice of the European Union as regards the abuse of law.

HAS ADOPTED THIS RECOMMENDATION:

1. Subject matter and scope

This Recommendation addresses the implementation by the Member States of the European Union of measures against tax treaty abuse.

2. General anti-avoidance rule based on a principal purpose test (PPT)

Where Member States, in tax treaties which they conclude among themselves or with third countries, include a principal purpose test based general anti-avoidance rule in application of the template provided for in the OECD Model Tax Convention, Member States are encouraged to insert in them the following modification:

"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that *it reflects a genuine economic activity or that* granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

3. Definition of a permanent establishment (PE)

Member States are encouraged, in tax treaties which they conclude among themselves or with third countries, to implement and make use of the proposed new provisions to Article 5 of the OECD Model Tax Convention in order to address artificial avoidance of permanent establishment status as drawn up in the final report on Action 7 of the Action Plan to address Base Erosion and Profit Shifting (BEPS).

4. Follow-up

Member States should inform the Commission on the measures taken in order to comply with the present Recommendation, as well as on any changes made to such measures.

The Commission will publish a report on the application of this Recommendation within three years after its adoption.

5. Addressees

This recommendation is addressed to the Member States.

Done at Brussels, 28.1.2016

For the Commission
Pierre MOSCOVICI
Member of the Commission

