





It is key that activities which are genuinely of a preparatory or auxiliary nature should be excluded from the definition of a PE. This is why in there is support for the inclusion of the final words, as indicated in paragraph 15: “provided that such activity, or in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character”. But it has to be noted, that with this amendment the clarity of the former exclusion will be replaced by a ‘test’ which is open to subjectivity. There is concern that this test, in the absence of the detailed provisions, could be approached by tax authorities in an excessively subjective way, giving rise to a proliferation of PEs the overall test should not displace the specific tests.<sup>1</sup>

ICC does not support the deletion of the word “delivery” from subparagraphs a) and b) of paragraph 4 because the mere “delivery” activity, in isolation, of a non-resident enterprise should not be regarded as a sufficiently substantial link with a country for a PE to exist.

ICC does not support the deletion of subparagraph d) of paragraph 4 of Article 5 dealing with purchasing goods and collecting information. ICC believes that the maintenance of a fixed place of business solely for the purchasing of goods or collection of information is not by itself sufficient to trigger the existence of a PE. However, if the concerned enterprise exports goods to a jurisdiction other than the residence country the source country might more appropriately attribute profits to that fixed place of business, which would most likely result in double taxation.

As regards the collection of information, ICC believes that a functional analysis would be required to determine whether this activity is a core function of the enterprise, or of a preparatory or auxiliary nature. If information is provided gratuitously to an enterprise, it may not be practical to tax the profit of a PE as valuation and attribution would be extremely difficult and in any case the profit attributed to the PE would be very modest as more profit would be attributable to functions carried on elsewhere. This is even more so if the information is provided remotely by third parties.

Various options are presented in the Discussion Draft to address the artificial splitting of contracts. The principal purpose test has the advantage of ensuring that in cases where contracts are separate for wholly commercial purposes the enterprise is not inappropriately deprived of the benefit of the “preparatory or auxiliary” test. The Treaty should allow for cases where there are genuinely separate contracts either for particular commercial reasons, because of the way in which the particular business has developed, or for administrative, regulatory or other such reasons.

ICC does not support the addition of a new paragraph 4.1 to Article 5 mentioned in paragraph 31 of the Discussion Draft. Such a proposal would fail to recognize that associated enterprises may perform preparatory or auxiliary activities. Such a new paragraph could result in the automatic creation of a PE for the non-resident enterprise concerned, even if there is no actual business activity of that enterprise in the source country.

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<sup>1</sup> This is not the view of the US Council for International Business (USCIB). USCIB feels that the specific exclusions should be preserved without this qualification in order to avoid a proliferation of PEs in cases where existing law and practice has provided a clear outcome.



## **The International Chamber of Commerce (ICC) Commission on Taxation**

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.