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# WTS International Tax & Permanent Establishments Newsletter

## Editorial

Dear Reader,

It is our pleasure to present the first edition of our WTS Global Newsletter International Tax & Permanent Establishments (ITP).

The global environment for businesses with cross-border activities in respect of international tax in general and – due to the BEPS initiatives around the globe – concerning the assumption of permanent establishments of various types in particular, is changing in a dynamic way.

In order to keep you up to date, our WTS Global Newsletter International Tax & Permanent Establishments (ITP) will therefore give you an overview of current developments in this sector, with a particular focus on changes in international tax law and country-specific developments with respect to the taxation of permanent establishments in 10 selected countries.

A special thank you goes out to our WTS Global partners, who contributed to this first WTS Global ITP Newsletter as a starting point for a series of newsletters to follow covering further jurisdictions.

We hope you will find this newsletter useful and we would appreciate your feedback and suggestions.

Our experts at the WTS Global ITP team will be happy to answer any questions you may have regarding any aspects of this newsletter.

Kind regards,

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WTS Global
International Tax & Permanent Establishments Team

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Please find the complete list of all contacts at the end of the newsletter.

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## Austria

# Construction PE – Austrian MoF on influence of trial runs and subcontracting

**The Express Answer Service (EAS) of the Austrian Ministry of Finance (MoF) offers taxpayers the opportunity to post questions of interpretation regarding international tax matters to the MoF. In 2018, one question dealt with the influence of trial runs on the 12-month term in Article 5(3) of a double taxation agreement (DTA). Another question dealt with the issue of subcontracting total projects.**

### Trial runs and the 12-month term (EAS 3407)

In this case a German company was commissioned to provide construction and assembly works in Austria. The operational plant was provisionally accepted by the customer, with final acceptance some months later after trial runs and minor improvements were finished. Hence, the question was whether the provisional or the final acceptance of the plant was relevant for the end of the 12-month term of Article 5(3) in the DTA between Austria and Germany.

Based on MN 55 of the commentary to Article 5 OECD-MC, trial runs are generally included in the 12-month period during which the construction site exists. However, based on the principle of the OECD commentary that a construction site ceases to exist when the work is completed or permanently abandoned, the Austrian MoF is of the opinion that a trial run can be included in this 12-month period only if:

- the unfinished plant is left in an orderly condition, or
- defects have been rectified so as to guarantee the full operability of the plant, or
- the trial run is essential for the operability of the plant.

A trial run performed after the on-site work is finished is therefore not relevant for calculating the 12-month term. This also applies for the removal of minor defects, repair work during the warranty period, and other services provided after on-site work has been completed. The formal act of a final acceptance can be an indicator for the end of the PE term, but it will only be relevant if it corresponds with the actual end of the works on-site.

### Subcontracting of entire projects (EAS 3405)

In the relevant case, an Italian company (ITco) subcontracted the execution of an Austrian project to its Italian subsidiary (SUBco). The project lasted well beyond 12 months: the question was whether a PE would be triggered for ITco, even though it had subcontracted the project.

According to the MoF, the existence of a PE of ITco depends on whether ITco is able to dispose of the Austrian construction site. This would, for example, be the case if ITco has legal possession of the site, controls access to and use of the construction site, and has overall responsibility for what happens at the site (see also MN 54 of the commentary on Article 5 OECD-MC). In such cases employees of ITco would typically be present to perform supervisory activities. We would generally assume that the general contractor (ITco) is in charge of the total project, and hence liable to the customer for the correct delivery of the order placed.

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If in fact the total project is delegated to SUBco, and hence ITco cannot dispose of the construction site, the existence of a PE of ITco would be questionable. However, we would have to question the economic purpose of introducing ITco as a general contractor, if no functions remain with ITco.

## Azerbaijan

## Amendments to the Tax Code of Azerbaijan

It should be noted that significant changes have been made to the Tax Code of the Republic of Azerbaijan by adopting the Law on Amendments to the Tax Code dated 30 November 2018, effective from 1 January 2019 ("Amendment Law").

### 1. Personal Income Tax

According to the Amendment Law, for a period of seven years starting from 1 January 2019, personal income tax rates for non-oil and gas sector and non-public sector employees will be as follows:

| | Taxable monthly income | PIT rate |
|---|---|---|
| 1 | up to AZN 8,000 | 0% |
| 2 | over AZN 8,000 | 14% of the amount exceeding AZN 8,000 |

Personal income tax rates for the oil and gas sector and public sector are not affected by the Amendment Law. They remain as follows:

| | Taxable monthly income | PIT rate |
|---|---|---|
| 1 | Up to AZN 2,500 | 14% |
| 2 | Over AZN 2,500 | AZN 350 + 25% of the amount exceeding AZN 2,500 |

The new amendments have not provided any criteria for determining oil and gas activities and those of the non-public sector. According to a Presidential Decree dated 20 December 2018, the respective criteria shall be determined by the Cabinet of Ministers within one month. In cases where the taxpayer is involved in both oil and gas and non-oil and gas activities simultaneously, the company shall keep separate accounting records for those employees working in multiple sectors. Should the company fail to keep separate accounting records, then all employees will be subject to the income tax rates indicated for the oil and gas and public sectors (i.e. the higher rate).

By means of Resolution 56 dated 18 February 2019, the Cabinet of Ministers approved the respective criteria for determining oil and gas activities and those of the non-public sector for the purposes of Article 101.1-4 of the Tax Code and Article 14.7 of the Social Insurance Law.

The oil and gas sector covers the activities of:

(i) The state oil company of the Republic of Azerbaijan (including its structural subdivisions), and contractors and operating companies that are engaged in PSAs;

(ii) Local and foreign subcontractors that provide services to the persons indicated above (1). The activities of this group of persons will be regarded as oil and gas sector for PIT and SSC purposes if certain conditions are met pursuant to Resolution 53.

A definition of 'non-public sector' covers the legal entities established in accordance with the laws of the Republic of Azerbaijan and individuals, except for public legal entities established by the state, budget organisations and other bodies and organisations funded by the state budget, as well as other state-owned funds in the Republic of Azerbaijan, and legal entities in which the state directly or indirectly holds a controlling package of shares (51% or more).

## 2. Social Security Contributions

It should be also noted that, for a period of seven years starting from 1 January 2019, social security contribution rates for non-oil and gas activities and the non-public sector will be as follows:

| Accrued monthly income | SSC rate | | |
|---|---|---|---|
| | **Total** | **From insured (employees)** | **From insurers (employers)** |
| AZN 200 | 25% | 3% | 22% |
| Over AZN 200 | 25% | 10% of the amount exceeding AZN 200 plus AZN 6 | 15% of the amount exceeding AZN 200 plus AZN 44 |

SSC rates for the oil and gas sector and the public sector remain as follows:

| Accrued monthly income | SSC rate | | |
|---|---|---|---|
| | **Total** | **From insured (employees)** | **From insurers (employers)** |
| N/A | 25% | 3% | 22% |

## 3. Simplified Tax

The simplified tax regime in Azerbaijan applies if (i) a taxpayer is not registered for VAT purposes, and (ii) their taxable turnover does not exceed the AZN 200,000 threshold during any month (or months) of a consecutive 12-month period. The simplified tax regime also applies to persons who are engaged in a public catering business, even if an entity's turnover exceeds AZN 200,000.

The Amendment Law limits the applicability of the simplified tax regime in Azerbaijan. Under the Amendment Law, the following persons do not qualify as simplified taxpayers (Art. 218.5.8-13):

- Persons who are engaged in production activities with more than 10 employees;
- Persons who are engaged in wholesale trading activities;
- Persons who provide services to taxpayers (i.e. individual entrepreneurs and legal entities) rather than to individuals (population) who are not registered with the tax authority;
- Persons who are engaged in sale of gold, gold jewellery and diamond products;
- Persons who are engaged in sale of leather and fur products;
- Persons who are engaged in licensable activities (except for building construction and services on compulsory insurance contracts).

In addition, the simplified tax rate in Baku has been reduced from 4% to 2%.

### 4. Excise

In general, the Amendment Law increases excise rates. Energy drinks have also been included in the list of products subject to excise duty.

| | Products subject to excise duty | Excise rate |
|---|---|---|
| 1 | Alcoholic energy drinks | AZN 2 per litre |
| 2 | Non-alcoholic energy drinks | AZN 3 per litre |
| 3 | Cigars | AZN 1 per unit |
| 4 | Liquids for electronic cigarettes | AZN 20 per litre |

### 5. Profit Tax

The Amendment Law also provides some profit tax exemptions for micro-businesses. According to Resolution 55 of the Cabinet of Ministers dated 21 December 2018, a micro-business is a business with (i) between 1 and 10 employees, and (ii) an annual income of up to AZN 200,000. Article 106.1.20 of the Tax Code provides a 75% exemption on the profit of micro-businesses as legal entities. Additionally, micro-businesses are exempted from paying property tax, pursuant to the Amendment Law (Art. 199.14 of the Tax Code).

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## Benin

## Permanent Establishments – forthcoming developments after introduction of public-private partnership law

Benin's tax legislation does not provide a precise definition of the notion of permanent establishment of foreign companies; however, there are some articles in the CGI (General Tax Code) to link the application of certain taxes to permanent establishments of foreign companies. This is the case, in particular, for the provisions of Article 147 of the CGI regarding the territoriality of corporation tax, which make it possible to tax the exploitation carried out by a foreign company within the framework of a permanent establishment.

The taxation applicable to permanent establishments of foreign companies in Benin has not changed significantly over the past three years.

As a major innovation, a taxpayer file was established in 2017 under the operational structures of the DGI (Tax Administration), which includes foreign companies with a permanent establishment in Benin who regularly fulfil their reporting obligations and payments.

If a file is withdrawn because no declaration is made, the tax will be levied on operations carried out by natural and legal persons not included in the DGI file, subject to Article 179-bis to 179-*sexies* of the CGI.

In addition, Benin actively participates in the BEPS project and hosted the second regional meeting of the Inclusive Framework on BEPS for French-speaking countries, organised by the OECD in partnership with the *Centre de rencontres et d'études des dirigeants des administrations fiscales* (CREDAF) and the *Pôle Stratégies de développement et finances publiques* (a joint initiative of UNDP and France), which took place from 3 to 5 July 2017 in Cotonou (Benin).

This commitment has not yet been put into practice by taking legislative and regulatory measures to regulate the activities carried out by permanent establishments of foreign companies in Benin.

The recent adoption of the public-private partnership law in Benin will, however, in the medium to long term, result in the establishment of several permanent establishments of foreign companies selected to carry out works under public and private contracts in several fields. Aware of the shortcomings of the tax law on the tax regime applicable to these institutions, the state is preparing to make several decrees on the tax regime, to be applied to foreign companies that operate in Benin through their permanent establishments.

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## Chile

## Permanent establishment – a modern concept?

In a global and growing economy, the concept of permanent establishment (PE) is extremely relevant and controversial in terms of international taxation. This parameter is used to determine which states can collect the taxes when multinational companies develop activities or obtain income in multiple countries or territories.

Since the Chilean Income Tax Law does not cover the concept of PE, a few months ago the Chilean Government announced a tax modernisation project that includes a legal definition. However, this project has not yet been discussed in the National Congress of Chile.

The project includes part of what the Servicio de Impuestos Internos (SII; Internal Revenue Service) has established in its administrative interpretations, as well as making changes to define and clarify the concept of PE, taking the OECD guidelines and adapting international concepts to our specific national tax law.

(1) PE is defined from a domestic perspective, for cases in which a double taxation treaty is not applicable.
(2) The definition is extended to facilities and construction projects.

(3) A representative is divided into two categories: a dependent agent, which is considered a PE if it has an active and main role; and an independent agent, which is not considered a PE if the activity is developed in the regular course of business.
(4) A POA or representation agreement is crucial when considering whether a company is a PE or not. This restricts the current SII concept, which has until now not considered the existence of a POA or agreement, but applies to all kinds of representation or performance.
(5) Organisation and start-up activities are not considered a PE.

It is worth noting that the project repeats the paradigm of physical presence as a requirement for a company to be understood as exercising economic activities in a territory. This is no longer consistent with a globalised world, in which technology has changed ways of conducting business through internet-based markets that no longer require physical presence.

The EU and the OECD have suggested modifying double taxation treaties through the OECD Model Conventions and BEPS Actions. However, the legislator is missing the chance to include the permanent digital or virtual establishment, or that of a significant economic presence, or even to solve complex cases of PE linked to the provision of services to the network and other technologies.

The final point of the project, regarding organisation or start-up activities, is also relevant. The rule does not specify which activities are referred to as preparatory or auxiliary, or both. It does not mention the effects of these activities with respect to subsequent qualification as a PE. There is no doubt that this last case would be defined a PE, but the starting point of developing an organisation or start-up activities is unclear; it may have been developed from a company already established in the country. This is very important in terms of deducting expenses, because only expenses or amortisations incurred as part of a PE's activities in Chile can be deducted.

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To conclude, a better explanation is required than that contained in the project's message. Foreign taxpayers need to know with certainty when they must or must not pay taxes in Chile, and the digital economy must be included when adopting new concepts that are appropriate to our times.

## Indonesia

## Development of permanent establishment in Indonesia

The definition of permanent establishment (PE) as stipulated in the Income Tax Law has already been amended from 1983 to 2008. A PE is defined as a business form used by an individual who does not reside in Indonesia, an individual who lives in Indonesia for not more than 183 (one hundred and eighty-three) days in a period of 12 (twelve) months, or an entity that is not established and has no domicile in Indonesia to carry out business or conduct activity in Indonesia.

In this respect, the form of PE in Indonesia can be classified as follows:

**1. Assets/facilities**

Domicile of management; branch of company; representative office; office building; factory; workshop; warehouse; space for promotion and sale.

**2. Businesses activities**

Mining and quarrying of natural resources; natural oil and gas mining; fisheries, animal husbandry, agriculture, plantation or forestry; construction project, installation or assembly project; furnishing of services in any form by an employee or any other persons, as long as it is conducted for more than 60 (sixty) days in a period of 12 (twelve) months.

**3. Agents**

A person or entity that acts as an agent with a dependent position.

**4. Assurances**

An agent or employee of an insurance company that is not established and has no domicile in Indonesia, and that receives insurance premiums or covers risk in Indonesia.

**5. Assets and agents**

Computer, electronic agent or automatic equipment that is owned, leased or used by an operator of electronic transactions to conduct business activities online.

The Directorate General of Tax (DGT) issued a regulation in February 2017 on the determination of PE for foreign tax residents who provide applications and/or content services online (over-the-top (OTT) services). PE is defined as follows for foreign tax residents who provides OTT services:

1. Companies owned, leased or controlled by a foreign tax resident or other parties domiciled in Indonesia, such as places of management, branch companies, representative offices, office buildings, garages or workshops, warehouses, rooms for promotions and sales, computers, including servers and data centres, electronic agents and other automatic devices, which are used by a foreign tax resident who provides OTT services in order to conduct business or activities in Indonesia.

2. Companies who act for or on behalf of a foreign tax resident who provides OTT services in order to operate businesses or activities in Indonesia, under:
   a) Income Tax Law: operating for more than 60 days within a period of 12 months
   b) Double taxation treaty: satisfying the time test requirements under the tax treaty between Indonesia and partner countries or jurisdictions, or their agents, whose positions are dependent.

## Branch profit tax

The net post-tax profits of a PE are subject to branch profit tax at a rate of 20%. This rate may be reduced under a double taxation treaty. Branch profit tax applies regardless of whether the income is remitted to the head office or not. An exemption may apply if the profits are reinvested in Indonesia.

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## Malaysia

## Permanent establishment: a total revamp or just a formality?

Malaysia has more than 70 tax treaties in force, but until lately it has not defined "permanent establishment" (PE) in its domestic law.

Presumably as a consequence of the anti-BEPS initiative, Malaysia amended domestic tax law, effective 1 January 2019, to include a definition of "place of business" (PoB), as follows:

(1) Physical PoB:
- place of management
- branch
- office
- factory
- workshop
- warehouse
- farm or plantation
- mine, oil or gas well, quarry or any other place of extraction of natural resources

(2) Project PoB:
- building site
- construction project
- installation or assembly project
- supervisory activities in connection with a building or work site, or a construction, an installation or an assembly project

(3) Agency PoB: has another person acting on their behalf who
- habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely finalised without material modification;
- habitually maintains a stock of goods or merchandise in that place of business from which such person delivers goods or merchandise; or
- regularly fills orders on their behalf.

At first glance, the new definition appears consistent with BEPS Actions. So is it just a formality or a total revamp? This depends on a few things – the most important of which is whether a tax treaty is applicable to the case.

Where there is no tax treaty applicable (for example, the business operator is a tax resident in the United States), the new definition may constitute a revamp, or at least introduce some uncertainty. For example, the definition of PoB includes installation or assembly projects but does not state any minimum time they may take.

Where a tax treaty is applicable, the new definition in the domestic tax law may be just a formality, i.e. no difference to the final tax exposure as it is widely acknowledged that the definition in the tax treaty supersedes the definition in domestic tax law (note: from a broader perspective, the tax treaty itself may change when the multilateral instrument comes into effect).

However, there may be specific cases where the new PoB definition in domestic tax law makes a difference, or leads to uncertainty despite application of a tax treaty. For example, some tax treaties entered into by Malaysia recognise "service PE", which is not expressly provided for in the domestic tax law.

Foreign businesses with a business presence in Malaysia are advised to reassess their tax exposure in Malaysia in the light of the new definition of PoB. Businesses may also want to plan ahead by simulating the potential exposure once the multilateral instrument comes into effect.

Malaysian businesses that make payments to foreign businesses are also advised to reassess their withholding tax obligations in the light of the recently enacted PoB definition.

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## The Netherlands

## Changing (Dutch) permanent establishment

The rules regarding permanent establishment are changing. The implementation of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument", or MLI) will provide new definitions and views of permanent establishment. The MLI was signed by the Netherlands on 7 June 2017. It is expected that the MLI will be ratified and will enter into force on 1 January 2020 in the Netherlands.

Introduction of the MLI may cause the existing definition of permanent establishment to change in a tax treaty with the Netherlands. However, a wider permanent establishment definition may not be effectuated in the Netherlands due to the lack of such wider definition in Dutch tax law. Amending Dutch law regarding permanent establishment will be considered by the Dutch Government after the MLI has been implemented, as recently announced in Parliament. It is unclear what the impact will be of the MLI in combination with future legislation.

Given the expected ratification of the MLI in 2020, we recommend investigating the impact of the MLI on your business. What is considered an exempt activity under the current treaty (e.g. warehousing) may not be regarded as an exempt (auxiliary) activity under the new MLI definition, resulting in a permanent establishment. Taking a non-defendable tax position regarding the (non-)existence of a permanent establishment could be qualified as tax fraud by the authorities. Apart from the penalties that could be imposed, a risk of double taxation and reputational risk also exist.

To avoid risks regarding the (non-)existence of a permanent establishment, the Dutch tax authorities provide the certainty of an Advance Tax Ruling (ATR), in which these authorities confirm the (non-)existence of a Dutch permanent establishment. Given the differences in the definition of a permanent establishment for corporate income tax, wage tax and VAT, certainty avoids many tax issues, especially regarding the correct VAT invoicing in the Netherlands.

During the past decade, WTS NL has successfully applied for many ATRs, often also in combination with an Advance Pricing Agreement, thus obtaining certainty on the transfer pricing remuneration method. One example of a non-existent permanent establishment ATR was for a foreign company that leased an installation together with operating personnel, for more than 12 months, to a Dutch affiliated company. It avoided a substantial administrative burden of salary split calculations, social security premium allocations, cost reimbursement reclassifications and interrelated costs, plus calculations to determine the taxable profit for corporate income taxation.

What is often not recognised in practice is that personnel from a permanent establishment in their home country, who visit the head office outside their home country, are often taxable for wage tax purposes in the country of the head office. When anticipating such a tax obligation, the financial consequences are often minimal compared to repairing the situation retroactively via a self-disclosure procedure, or compared to the consequences of a tax audit (high penalties).

Changing the rules on permanent establishment are therefore a good reason to investigate the status of (possibly) existing permanent establishments in the light of the expected changes.

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## Pakistan

## Permanent establishment tax regime – key developments and issues

Pakistan's tax code has witnessed significant changes, introduced through the Finance Act 2018 (effective from 1 July 2018), which affect the tax position of permanent establishments (PE). This article describes notable developments with regard to the scope of PE and the determination of its tax liability.

### BEPS Action 7

#### Dependent agent PE

The definition of PE has been amended to address the artificial avoidance of PE status through commissionaire and undisclosed agent arrangements, pursuant to BEPS Action 7. The amendment seeks to include not only contracts in the name of the person but also contracts for transferring or granting the right to use property, or the provision of services by the person where the agent habitually concludes contracts or plays the principal role in the conclusion of contracts that are routinely finalised without material modification. It has also been clarified that "independent agent" does not include the person acting exclusively or almost exclusively on behalf of the person with whom it is an associate – thus limiting the scope of exclusion for independent agents.

#### Cohesive business operations

Amendments to the definition of PE, rules for determining Pakistan source income, and withholding tax provisions together have the effect of taxing the cohesive business operations (CBO) of non-residents as income of PE (commonly known as turnkey or composite arrangements). CBO are defined to include an overall arrangement for the supply of goods (including import in the name of an associate or any other person regardless of the place where the title is transferred), installation, construction, assembly, commission, guarantees or supervisory activities whereby all or principal activities are undertaken by the person or their associate. Taxation of such arrangements has historically been a contentious issue in Pakistan. In the past, courts have taken a source-based view, exempting offshore supply where the title to goods is transferred to a customer outside Pakistan. Taxing offshore supply on the premise of CBO may give rise to a new controversy, and its implementation may be challenged. It is further noted that in the case of contracts undertaken by a consortium of unrelated members, the activities of each member may not qualify as CBO. Nevertheless, the avoidance of double taxation treaties will continue to have an overriding effect, and their implications need to be considered in each case.

### Minimum tax for a service PE

Payments received by a PE against services rendered or provided is subject to a deduction of tax at source (rates: 8% for filers or 14% for non-filers). Previously, the tax deducted by the payer was treated as an advance payment of the provider's corporate tax liability. A recent amendment has designated such tax deduction as the minimum payment of the PE's corporate tax liability. Effectively, the corporate tax liability of a service PE is now the higher amount of (a) corporate tax at 29% on taxable income; or (b) tax deducted at source at 8% or 14%; or (c) alternative corporate tax at 17% of accounting profits. This development aims to align the taxation of a service PE with resident service providers.

As an exception to this rule, certain specified services of PE shall be subject to minimum tax at 2% of gross turnover, subject to fulfilling additional requirements including a tax audit.

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## Senegal

## For a contract concluded between a Senegalese company and a foreign one, are all the products necessarily subject to corporate income tax (CIT) in Senegal?

Article 3 of the Senegalese General Tax Code (GTC) provides that: "Subject to the provisions of international double taxation treaties (DTT), CIT is due on profits made in Senegal. Profits from companies operating in Senegal are deemed to be made in Senegal". This issue was raised recently in a tax adjustment case where the tax administration considered that all revenues from a contract concluded between a Senegalese company and a foreign one, including profits made by its Senegalese branch, must be subject to CIT.

The case in point related to the design and manufacture abroad of materials and supplies delivered to a Senegalese company as an importer and, for assembly in Senegal, those supplied by a foreign company (i.e. a company domiciled in a country which has not signed a DTT with Senegal) through a subcontracting agreement with its Senegalese branch.

### What tax problem arises from this case?

Is subjecting all the revenues from this contract to the CIT in compliance with Article 3 of the GTC, despite the price split between (i) the design and the supplies manufactured and delivered from abroad, (ii) the transportation within in Senegal, and (iii) the assembly in Senegal?

As mentioned above, CIT is only due on the profits made in Senegal.

The profits from businesses operating in Senegal are deemed to be made in Senegal. On the other hand, profit from businesses operating outside Senegal are made abroad.

The tax auditors referred to Article 3 of the GTC, but in our opinion, they did not apply it correctly.

**Does a legal form of an establishment in Senegal (branch or subsidiary) have anything to do with global or partial taxation in Senegal?**

The tax auditors essentially base their opinion on Article 117 of the OHADA Uniform Act on commercial companies and the economic interest group, according to which a foreign company and its Senegalese branch are one single legal entity because of the absence of the independent legal personality of the branch.

Article 117 of the Uniform Act states that: "The branch does not have an autonomous legal personality distinct from that of the company or the natural person that owns it."
As a result, the tax auditors consider that no subcontract can be signed between such foreign company and its Senegalese branch, because of the uniqueness of its legal status.

They (i) refuse to admit the existence in Senegal of a permanent establishment despite the presence of an assembly site; (ii) consider that the entire project price (including the amount paid to the Senegalese branch for local services provided from Senegal) is part of the foreign enterprise products operated in Senegal; and (iii) claim that the CIT must be paid by the parent company on the entire profit made in Senegal.

**Our opinion:** The only question that matters is where the contract has been materially executed. The reason is known to everyone: CIT does not only charge legal persons. It essentially taxes profit centres controlled by foreign companies in Senegal.

The truth is that for all markets partially executed abroad and with services provided on the Senegalese territory, the division of profit must be the key to distributing the power to levy tax. Profits made abroad should be subject to foreign taxation; the profits made in Senegal by the company (branch or subsidiary, regardless) operating in Senegal should be subject to Senegalese CIT: this is the meaning of Article 3 of the GTC.

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## Vietnam

## Permanent establishment (PE) in Vietnam

Vietnam has established the Foreign Contractor Withholding Tax **(FCWT)**, which is not a special tax, but a system for calculating and paying VAT and CIT. Under the FCWT regime, it is not generally important whether a foreign company has a PE in Vietnam. With a PE, no exemption from FCWT-CIT under a DTA is possible. Without a PE, exemption from FCWT-CIT is possible but very complicated to achieve. In no case is exemption from FCWT-VAT possible.

The administration of the FCWT is normally straightforward. If another method has not actively been chosen, the withholding method is applied. The Vietnamese partner must calculate and apply the FCWT, while the foreign contractor does not have to proceed with any registration or declaration, whether there is a PE or not. If a PE is created, the foreign contractor may choose to be taxed for this contract just like a Vietnamese company, or have the withholding system applied on the FCWT-CIT under the mixed method and have the VAT calculated and paid under the credit method, with paid input VAT refunded.

More recently, tax authorities have been meticulously checking additional sources of taxation. Certain PE constellations are of special interest.

If a PE in Vietnam is used for a foreign entity's business in third countries, the full contractual revenue is subject to taxation under the FCWT regime in Vietnam. In several cases, Representative Offices established in Vietnam operate regional business. Representative Offices are not legal entities and are not allowed to operate such activities. For example, if the Representative Office handles sales for a German company represented in Vietnam via the Representative Office in India, the full contract is taxable in Vietnam. Investigating this is a new development.

By means of Official Letter 2623/TCT-CS, the General Department of Taxation has clarified that a foreign e-commerce entity with revenue from Vietnam is subject to FCWT. A customer that is an enterprise registered in Vietnam must calculate the FCWT, deduct it from payment to the foreign entity and make a payment to the State Budget. If the enterprise in Vietnam makes the full payment requested to the seller and pays the FCWT on top to the State Budget, the payment is a non-deductible expense. If the foreign e-commerce business has private persons as customers in Vietnam, it must appoint a tax agent in Vietnam for calculating FCWT and making the related payment to the State Budget, or establish an office in Vietnam for handling this. This regulation has so far largely been ignored by foreign businesses.

Uber Netherlands has faced claims by the Vietnamese tax authority, but it has not fully paid; it transferred its active business to Grab and is no longer active in Vietnam. Uber was officially declared a target of tax inspections in the tax authority's action plan, and others will follow.

For achieving exemption from FCWT-CIT under the provisions of a DTA, an extensive dossier must be filed with the tax authority before commencing the relevant business. The tax authority will not normally respond to this, and might well decide, years later during a tax audit, that conditions for a FCWT-CIT exemption have not been met.

To avoid this risk, many foreign companies therefore find it more convenient to structure the project in a way that clearly establishes a PE. The result is that no exemption from FCWT-CIT in Vietnam is possible and double taxation can be avoided in the home country.

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