The new approach to the attribution of profits to PE: the follow up on BEPS Action 7

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BEPS Action 7 key points

1 stage

The amendments to the Article 5 of OECD MC – the changes to PE definition

2 stage

The clarification of the rules of attribution of profits to PE according to the Additional Guidance of profit attribution to PE (expected at the end of 2016)

The Authorized OECD Approach

Step 1	Step 2
• Functional and Factual Analysis • PE treated as separate and independent enterprise	• Transfer pricing rules application • Comparability analysis

The objectives to the implementation of AOA

- The 2008 and 2010 versions of Article 7 – the need to renew the article?

- The approach of the countries to AOA:
  - Some included (Germany, Netherlands, Japan)
  - some not (most)
  - some are against and say they will never

The Additional PE Guidance of the OECD

Key problems to be solved:

- The order of application of Article 7 and Article 9 OECD MC
- The difference (or even conflict?) of risk allocation under Article 7 and Article 9
- Significant people functions vs. control over risk
- The administrative burden on the nil profit PEs, the economic effect of the lowering threshold
- The "dealings" – the need for better definition

The approach to attribution of profits in Russian DDT

- Article 7 of **67 DDT (83,75%)** based on OECD MC before 2010

- Article 7 of **13 DDT (16,25%)** based on UN Model Convention 2011 (among them Armenia, Kazakhstan, Kyrgyzstan, Ukraine)

- There is no DDT where Russia applies the AOA based on OECD MC 2010

The approach of the CIS countries to attribution of profits to PEs

Generally – no application of TP rules when attributing profits to PE

Russia

- national legislation – the adoption of new allocation rules as part of the transfer pricing law at the end of 2012
- 2016 – no further guidelines or clarifications, no court practice
- in fact – direct and indirect (calculation) method

Ukraine and Belarus

- the direct method
- the fractional apportionment
- the indirect (calculation) method

Conclusion