

# Preface

In the last decades, profit attribution to permanent establishments (PE) was, next to transfer pricing, one of the most controversially discussed topics in the area of international tax law and, therefore, is of great interest and importance for both taxpayers and tax administrations. Both the provision concerning the definition of a PE in Art 5 OECD Model as well as the profit attribution rule in Art 7 OECD Model were subject to various changes throughout the last years. Regarding the attribution of profits to PEs, the start of the OECD's work already dates back to 1993/1994, which eventually resulted in a step-wise implementation of the Authorized OECD Approach (AOA) in 2008 and 2010.

During the course of the BEPS Project, the main focus was the extension of the definition of the PE while the profit attribution to PEs was addressed in the follow-up work to BEPS Action 7, i.e. latest in the 'PE Report 2018'. The OECD focused hereby on the specific aspect of the profit attribution to those PEs resulting from the changes to Art 5 OECD Model 2017.

While the profit attribution between associated enterprises (Art 9 OECD Model) and the profit attribution between head offices and its PEs (Art 7 OECD Model) are generally based upon the same structured and principle based approach to derive arm's length results that are attributable to different business units within an MNE, the question arises of whether the same approach eventually leads to the same results or, if not, what are the differences. **Chapter I** of this book deals with this question.

As part of the review of the general rationale of the existence of taxing rights, the OECD also issued new guidance on the physical presence-based PE concept. In this respect, Art 5 para 4, i.e. the PE exemption provision in the OECD Model, was revised so that all activities mentioned in that provision only constitute an exemption for the creation of a PE in the case that they have a preparatory or auxiliary character. **Chapter II** of this book deals with the principles of profit attribution with respect to specific activity exemptions, thus passing the PE threshold.

The current dependent agency provision (DAPE – dependent agent permanent establishment) in Art 5 para 5 OECD Model was also amended in the 2017 OECD Model as the previous version of Article 5 para 5 under the 2014 OECD Model did not – based on predominant opinions – cover commissionaire and similar arrangements. The attribution of profits to DAPes was and is a very controversial

issue. The latest OECD guidance was given in the Additional Guidance on Attribution of Profits to Permanent Establishments in March 2018. This guidance is still based on the so-called ‘dual taxpayer approach’ – the dependent agent enterprise (DAE) and the (fiction) of the dependent agent PE (DAPE). This leads to a duality in approaches of the attribution of profits to the DAE and the DAPE, namely, Art 9 and Art 7 OECD Model, however, the OECD guidance does not deal with the different interpretations of Article 7 and leaves the relationship between Articles 7 and 9 of the OECD Model open. **Chapter III** of this book deals with these topics.

The OECD has been focusing on the taxation of digitalized business for quite some years starting with the report on e-commerce and following up with BEPS Action 1. As no global consensus could be reached until now, different models are suggested for dealing with such taxation, one of which was the significant economic presence model (SEP or digital PE) also proposed by the EU. In October 2019, the OECD published the Secretariat’s Proposal on a Unified Approach in which it is suggested to create a new taxing right for the market jurisdiction with a new set of nexus and a profit allocation rules that are different from those suggested under the SEP approach. **Chapter IV** deals with the difference between the earlier SEP concept and the rules laid down in the secretariat’s proposal.

This book is based on the outcomes of the presentations and discussions held during the WU Transfer Pricing Symposium ‘Attribution of Profits to Permanent Establishments: Current Developments, Relevant Issues, and Possible Solutions’ that took place in October 2019 at the WU Vienna University of Economics and Business. The symposium was organized by the WU Transfer Pricing Center at the Institute for Austrian and International Tax Law which is conducting research projects on various transfer pricing topics and their global impacts, including the profit attribution to PEs. During the symposium, four renowned international experts presented their papers on various issues connected with profit attribution to permanent establishments which were accompanied by practical case studies and followed by panel discussions; all are part of this book that also includes an introduction chapter.

This book is aimed at academics, practitioners (including the business community and advisory firms), international organizations, and government officials who are tax and transfer pricing experts as well as CEOs and CFOs who are interested in the issues related to profit attribution to permanent establishments. The book provides an in-depth analysis of the above-described topics as well as suggestions for potential future solutions to any issues that are raised.

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*Michael Lang*  
*Alfred Storck*  
*Raffaele Petruzzi*