

“The fact that transactions between such an agent of dependent status and multiple related enterprises are or are not at [an arm’s-length price], is not relevant at the stage of establishment of a dependent agent PE in India, which is created solely due to the nature of activities of such an agent for the overseas entity,” the decision says. ■

MULTINATIONAL

OECD Advisory Group Sets Out Framework for Digital Tax Reform

by Amanda Athanasiou and
Stephanie Soong Johnston

An OECD advisory committee has taken aim at unilateral actions and underscored the impossibility of ring-fencing the digital economy in a paper containing 11 recommendations for international tax measures in the digital age.

In a publication released January 21, the Business and Industry Advisory Committee to the OECD (BIAC) listed 11 policy recommendations to guide the development of tax reforms for the digital economy. The paper comes amid a key meeting of the OECD’s inclusive framework on base erosion and profit shifting, where delegates continue discussions to find consensus on a long-term answer to taxing digitalization.

The principles are designed to ensure that “reforms to existing tax principles are coherent, pro-growth, and do not inhibit the innovation and digitalization that is transforming our world,” according to BIAC.

Reforms should be founded on established international tax principles like taxing net income, nexus, and the arm’s-length standard, the paper says. It says core principles from the Ottawa Taxation Framework, including “neutrality, efficiency, certainty, simplicity, effectiveness, fairness, and flexibility,” should be taken into account, adding that revisions to the international tax framework must be flexible enough to adjust to future business models and other economic changes.

“The economy is now the digital economy,” the paper says, reiterating BIAC’s position — and a key conclusion of the report on action 1 of the BEPS project — that the digital economy should not and cannot be ring-fenced. Ring-fencing attempts would be “distortive and harmful to the digitalization of the whole economy,” it adds.

Taxing rights should align with value creation and be allocated in a way that avoids double taxation, the paper says. International tax policy should include effective dispute resolution mechanisms, because “any changes to the international tax rules increase the potential for

double taxation,” according to the paper. Nexus and attribution issues should be addressed together, it says.

The paper promotes uniform model treaties and warns against action that doesn’t align with a consensus led by the inclusive framework on the BEPS project. “Domestic rules should be discouraged before relevant treaties have been amended,” it adds.

International consensus and the avoidance of fragmented action are highlighted in at least two of the 11 recommendations. “Reforms must be affirmatively agreed by all [inclusive framework] member countries,” the paper says, acknowledging that some governments want to act urgently on their priorities. “It is important to reach an international consensus that meets the needs of governments and the expectations of their citizens, while promoting economic growth and job creation,” said Will Morris, chair of BIAC’s Committee on Taxation and Fiscal Policy.

Robert Stack, a managing director with Deloitte Tax LLP in its international tax practice with Washington National Tax, welcomed BIAC’s recommended principles. Stack, formerly Treasury deputy assistant secretary (international tax affairs), also served as co-chair of the Task Force on the Digital Economy.

“BIAC is to be commended for setting forth principles that should guide the ongoing work on the digital economy at the inclusive framework, and I think governments that participate in the inclusive framework will find these principles a helpful basis for moving forward,” Stack told *Tax Notes*. “I was particularly struck by BIAC appropriately focusing on the need to promote certainty for taxpayers and improved tax administration in connection with the adoption of any new rules, including its call for strong dispute resolution mechanisms.”

BIAC’s recommendations “are a thoughtful and comprehensive statement of principles for good international tax policy making,” Gary Sprague of Baker McKenzie’s Palo Alto, California, office, told *Tax Notes*. Since so many jurisdictions are now involved in tax policy development via the inclusive framework, “it is more important than ever that these principles be observed,” he said. “The OECD is making good progress toward addressing the tax challenges of

the digitalizing economy, and I am pleased to see that their work has respected these principles.”

But to Allison Christians, professor and H. Heward Stikeman Chair in Tax Law at McGill University in Montreal, BIAC’s tax principles are flawed. For example, she pointed to BIAC’s recommendation that reforms should be based on the concept of value creation. The term “value creation” evokes an idea that it is scientific and will lead to clear answers about which country should have taxing rights, according to Christians. Everyone who has studied international tax understands that the source-residence compromise when it comes to taxing rights isn’t about correctly determining which jurisdiction can tax, it’s about political compromise, she said. “When we talk about value creation . . . we are pretending this is about economic accuracy, which is incorrect,” she told *Tax Notes*.

Moreover, if everyone from the OECD to nongovernmental organizations like the Tax Justice Network agrees that value creation is the standard that should be followed, “then either that standard means nothing or it means something different to everyone,” Christians said. “It’s too pliable.”

Christians also expressed doubt about BIAC’s principle recommending that reforms should be developed via consultation that includes all businesses and other stakeholders, rather than just a small group of businesses perceived to be digital in nature. While it’s probably the best thing BIAC can say, it’s unlikely the group really believes it, she said, pointing to a “very cozy relationship” between the business sector and the OECD.

That principle seems to exclude the labor sector and everyone else in society, Christians added.

The biggest concern is the lack of input from the Trade Union Advisory Committee to the OECD, which is a “missing conversation,” Christians said. The principles constitute tax advice from business, she noted. “So when I look at it and see them talking about inclusion, I wonder what kind of inclusion they really mean,” she said. ■