

# International assignment perspectives — *special alert*

## A look at the OECD's revised public discussion draft on Article 15.2 of the Model Tax Convention

*As a follow-up to his article published in International Assignment Perspectives, "Issues surrounding the 'economic employer,'" William Zaleski provides some updated comments on recent developments.*

In March of 2007, the Organization for Economic Cooperation and Development (OECD) released a revised public discussion draft on Article 15(2) of the Model Tax Convention.

One of the key issues arising from the public discussion draft and, not surprisingly, causing a great deal of debate, is the concept of "economic employer." At the center of the discourse is the fact that the term does not exist in either treaty wording or in most countries' domestic law, but has been adopted through common usage to describe a situation in which an employee goes to another country for a short period of time, remains employed by his or her home country entity, but works for another entity in the host country. The revised draft notes that the trend is for states to adopt this economic employer concept.

Also, the word "employed" is not defined in the treaties or by the OECD model treaty, leading to a discussion of what the term "employed" actually means. This, in turn, led to the economic employer debate, which emerged as a topic with increased importance because there continues to be an increase in the number of assignees working across borders for durations of less than six months.

In general, terms left undefined by a treaty may generally be resolved by the state construing the terms in accordance with their meaning under its domestic laws. As a result, some countries have determined that an employee has become economically employed by an entity in their location, such that the treaty can allow the tax authorities to ignore the existing legal employment arrangements and subject the employees to taxation.

Although Article 15(2) sets out clear guidelines regarding when a claim for exemption from tax will be allowed,

a prevailing thought among many taxing authorities is that there has been quite a lot of abuse of the guidelines.

Unfortunately, although the OECD draft commentary leaves it up to each state to determine whether employment exists, this does not help an employee, or that employee's company, figure out its obligation to withhold and report taxable income.

In fact, many times the employee's resident and work countries do not agree. This may lead to situations of double taxation if there is no means of providing for relief from double taxation under the employee's resident state rules. However, the examples provided by the OECD commentary attempt to clarify employment status. They say that in situations where a conflict exists between the legal employer and the entity receiving the economic benefit of the employee's work, countries should consider the following additional factors:

- Who has the authority to instruct the individual regarding the manner in which the work has to be performed?
- Who controls and has responsibility for the place at which the work is performed?
- Who charges the enterprise that receives the services? (see paragraph 8.15 for further information)
- Who puts the tools and materials necessary for the work at the individual's disposal?
- Who determines the number and qualifications of the individuals performing the work?

While the OECD has taken steps in the right direction, its commentary still lacks the clarity and direction that employers, tax authorities, and the courts need. As a result, employers will continue to have to carefully evaluate the taxability of their short-term assignees to avoid potential, unintended consequences of double taxation.