

# BEPS In Action

32<sup>nd</sup> Annual TESJSU High Technology Tax Institute  
10:20am–

# Panelists

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# Topics

1. Existence of PE
2. Transfer Pricing
3. Attribution of Profits
4. Hybrid Rules
5. Treaty Issues

Questions are welcome at all times!

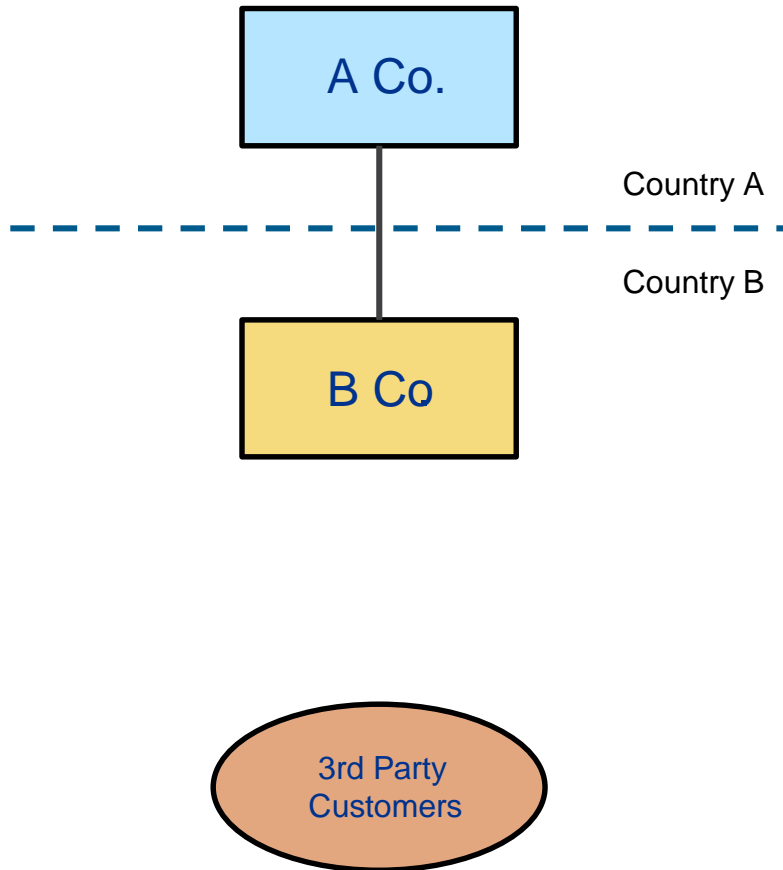
# **1. EXISTENCE OF PE**

Jim Carr

# OECD BEPS Action 7 (PE)

## Specific Activity Exemptions

### Article 5.4



# OECD BEPS Action 7 (PE)

## Dependent Agent PE

### Article 5

Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where an agent of an enterprise in a Contracting State on behalf of an enterprise and, in doing so, habitually acts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, the acts are

enterprise, or

the ownership of, or for the granting of the right to use,  
that enterprise or that the enterprise has the right to use, or

of services by that enterprise,

is deemed to have a permanent establishment in that State in respect of that enterprise if the person undertakes [unless such activities would be exempt under

## Description

- z RCO (State R resident), distributed through its websites. PC
- z SCC





# Taxpayer Responses To Manage Risk

- Stay on safe side of “convincing” vs. “marketing” line
- Rely on profit attribution rules
- Report a PE, including establishing a branch in market state (possibly converting local sales entity)
- Convert to reseller
  - Commentary language both helpful and troubling
  - clear support for LRD as not creating PE
  - caution that entity must be “distributor”, and not an “agent”
  - caution that entity must acquire and dispose of title so that it “would derive a profit from the sale” and not a “commission”
- APAs and rulings to obtain comfort may become popular

## **2. TRANSFER PRICING**

**BEPS: ACTION ITEMS 8-10:**

**ALIGNING TRANSFER PRICING  
OUTCOMES WITH VALUE CREATION**

Michael F. Patton

- According to the Final Report for Actions Items 108, traditional transfer pricing has failed to emphasize economic value creation and instead has emphasized contractual terms instead of economic substance in two significant areas:
  - Ownership of intangibles,

# Principal Operating Company (POC) Example – Dutch CV/BV

US

Distribution  
agreement

In Country  
Third-party  
customers

Distributor

.....







# **3. CONTRIBUTION OF PROFITS**

Gary Sprague



# Work on Attribution of Profits – Status

- MLI text available shortly
  - no Art. 7 changes expected
- Profit attribution Discussion Draft
  - released July 4
  - consultation Oct. 11
- Possibly DD #2 to come?

# DD Examples

- Four on sales focused activity
  1. sales agent activity
    - no profit attributed
  2. looks like a commissionaire

# DD Examples (continued)

- Three dealing with warehouses
  1. warehousing services provided to third parties
    - attributes economic ownership of warehouse asset and functions on premises
  2. warehouses own goods
    - also attributes economic ownership of warehouse asset and functions on premises
  3. warehouse owned by enterprise but operated by unrelated entity
    - attributes only economic ownership of the asset

# Major Issues Raised by the Examples

- Application of risk allocation under Art. 9 per revised TPG Ch.
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# Reliance Issues for Taxpayers

- Scope of relevant treaties
  - 2008 vs 2010 Authorized OECD Approach (“AOA”)
- Country acceptance not so great at the moment
- No treatment of marketing intangibles
- How to claim losses in PE

# Prognosis for Future

- Possible revised DD
- Possible “Plan B”
- Any effect on decision by countries to sign MLI?
- Action 1 PE possibilities connected with this project?

# 4. **HYBRID RULES**

Gabe Gartner

# BEPS Action Item 2

- Final Report on Neutralising the Effect of Hybrid Mismatch Arrangements released October 5, 2015
  - Addresses hybrid entities and hybrid instruments
  - Not intended to apply to payments made to an entity resident in ~~tax~~ jurisdiction
- Final Report identifies three categories of “hybrid mismatches”
  - D/NI (deduction / no inclusion) payment is deductible under the rules of the payer jurisdiction but not included in the ordinary income of the payee
  - DD(double deduction) payment gives rise to two deductions in respect of the same payment
  - Indirect D/NI (indirect deduction / no inclusion) payment is deductible under the rules of the payer jurisdiction and is ~~set~~ off by the payee against a deduction under a hybrid mismatch arrangr3.r 0 Td [t463(s)-16(cl)-[t4 oua d-



# BEPS Action Item 2 (continued)

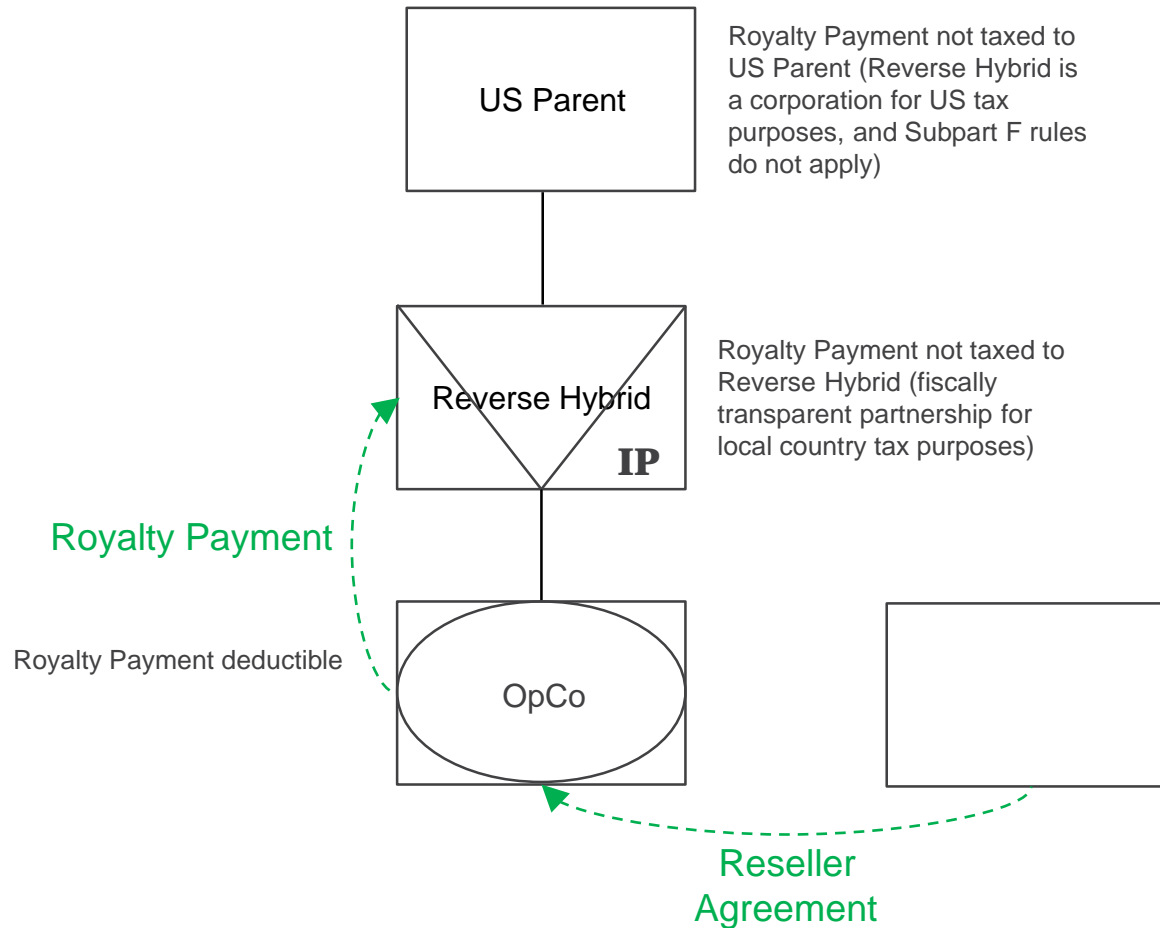
Hybrid Mismatch	Arrangement	Recommended Hybrid Mismatch Rule		
		Primary Response	Defensive	

# EU Anti-Tax Avoidance Directive

- Anti-Tax Avoidance Directive (ATAD) requires Member States to adopt hybrid rules by December 31, 2018, with effect from January 1, 2019

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# Potential Imported Mismatch in Buy-Sell Model





# **5. TREATY ISSUES**

Adam S. Halpern

# Treaty Issues

- Action 6 on preventing inappropriate granting of treaty benefits
  - Requires as a minimum standard that countries include in their treaties
    - an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including treaty shopping
    - either an LOB rule, a principal purposes test, or both; an LOB rule alone must be supplemented by a mechanism (not necessarily in the treaty) to address conduit financing entities
  - Also includes certain specific new rules on dividend transfer transactions, real property holding companies, dual residents, and exempt permanent establishment issues

# Treaty Issues

- Action 14 on making dispute resolution mechanisms more effective
  - Requires as a minimum standard that countries implement treaty MAP obligations in good faith and that cases are resolved in a timely manner
  - Thirty countries have committed in principle to provide for mandatory binding arbitration in their treaties
    - Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the U.K., and the U.S.
  - For other countries, enforcement of the minimum standard will depend on peerbased monitoring

# Treaty Issues

- Action 15 on developing a multilateral instrument (MLI) to modify bilateral tax treaties
  - Intended to address gap between most recent OECD commentary changes (including BEPS measures) and actual treaties in force
  - Discussion draft released May 31, 2016, numerous comments submitted
  - Anticipated to have flexible structure, including opt for mandatory binding arbitration
  - English language text is reported to have been agreed in principle, 2016 WTD 1854 (Sept. 23, 2016)
  - Expected that English and French language texts will be formally adopted in late November, along with an explanatory statement of how the MLI will interact with bilateral treaties and how arbitration provision will work





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