

OECD 「Revised discussion draft on Action 7 (Preventing the Artificial Avoidance of PE Status) of the BEPS Action Plan (BEPS 行動 7 (恒久的施設 (PE) 認定の人為的回避防止に係る改訂討議草案) ) 」に対するコメント

2015 年 5 月 15 日、経済協力開発機構 (OECD) は標記改訂討議草案を公表し、意見募集を開始した。本改訂討議草案は、BEPS (Base Erosion and Profit Sifting: 税源浸食と利益移転) 行動計画 7 で要請されているものであり、現行の PE (恒久的施設) ルールの改正を目的としている。

本行動計画は、2014 年 10 月、当初の討議草案が公表され、その中で PE を巡る重要な問題について種々の代替的な選択肢を提示し意見募集を行っており、当会も意見提出を行った ([http://www.jftc.or.jp/proposals/2014/20150109\\_2.pdf](http://www.jftc.or.jp/proposals/2014/20150109_2.pdf)) 。

今回の改訂討議草案では、当初の討議草案で提示された各検討課題に係る種々の選択肢について、民間からのコメントやパブリックコンサルテーション等を踏まえ、それぞれについて提案しており、代理人 PE の範囲を広げる一方で、PE 除外規定の範囲を狭める等、全体として既存の PE ルールを拡大するものとなっている。

経理委員会では、同改訂草案の内容は、産業界からのコメントの一部を反映している点について評価するが、PE 認定の threshold を過度に引き下げる提案に大幅な変更は見受けられず、PE 帰属所得の範囲について各国間での合意形成が難航している状況下、PE 概念の再定義のみが先行することは過度に納税者側の予見可能性を低下させ、二重課税を生じさせるリスクを孕んでいること、また、税務当局及び納税者に対して多くの事務負担を強いることになり兼ねないことを総論とし、各論点に関する意見を取り纏め、2015 年 6 月 12 日、OECD 宛提出した。

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政 発 第 14 号  
2015 年 6 月 12 日

**Ms. Marlies de Ruiter**

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## BEPS 行動 7「PE 認定の人為的回避の防止に関する改訂討議草案」に対するコメント

本レターは 2015 年 5 月 15 日付でリリースされた“Preventing the Artificial Avoidance of PE Status”に対する一般社団法人日本貿易会（※）としてのコメントを貴会宛提出させていただくものである。

（※）一般社団法人日本貿易会は、日本の貿易商社及び貿易団体を中心とする貿易業界団体であり、その中で経理委員会は、各種税制に対する意見発信を、主な活動内容の一つとしている（末尾に当会経理委員会の参加会社を記載）。

### <全般的なコメント>

PE 概念の解釈及び適用に関しては、各国で税務当局及び納税者間にて論争となることが多いことから、課税の安定性（Stability）及び確実性（Certainty）の観点からも、PE の定義及び範囲をより明確化しようとする OECD の従前からの取組みを支持する。また、PE 認定を人為的に回避する行為に焦点を充てた対抗措置の必要性も理解する。

今回の Revised Discussion Draft において、産業界からのコメントの一部反映、コメントリーへの実例記載の対応・充実化が図られたことは評価できる。但し、PE 認定の threshold を過度に引き下げる提案に大幅な変更は見受けられず、BEPS プロジェクトの目的から外れた PE 認定拡大に繋がる懸念が排除されていない。

PE の帰属所得の範囲についても、今回の Revised discussion draft において新たな提示はなく、多国間協定の交渉期限である 2016 年末までに必要なガイダンスを提供するというコメントに留まっている。PE 帰属所得の範囲について各国間での合意形成が難航している状況下、PE 概念の再定義のみが先行することは過度に納税者側の予見可能性を低下させ、二重課税を生じさせるリスクを孕んでいること、また、税務当局及び納税者に対して多くの事務負担を強いることになり兼ねない。

従い、本行動計画の最終化に向けて、改めて本行動計画の目的を再確認し、PE の帰属所得の範囲について各国間の一定のコンセンサスをとった上で、税務当局及び納税者にとり過度な事務負担とならない範囲で適正かつ安定的な税務執行が可能な提案となることを念頭に置き、PE 認定を人為的に回避する行為に焦点を充てた対抗措置が構築されることを要望する。

### <個別コメント>

#### OECD モデル条約第 5 条 5 項（従属代理人）について

・ Revised Discussion Draft の記載では、外国法人のために契約条件を顧客へ伝達すること

自体が「交渉」に該当すると解される可能性があるが、交渉を行ったか否かの判断は事実関係を踏まえて慎重になされるべきである。特に、Revised Discussion Draft で示されている事例では、SCO の従業員が標準契約の条件を受け入れるよう顧客を説得 (convincing the account holder to accept these standard terms) したかどうかを前提条件として明らかでないことから、誤解を招く恐れがある。

- 多国籍企業の中には、顧客情報の一元管理、業務の効率性、様々な取引に付随するリスク管理及びその負担能力の観点から、契約交渉や締結等の営業機能を本社に集約している場合がある。顧客との交渉や締結は本社が行うが、時差のある国や言語が異なる国の顧客とのコミュニケーションを円滑に行うためには、現地の子会社によるサポートが必要となる。現地の子会社は単に本社と顧客間のサポート活動を行っているに過ぎず、何ら交渉は行っていない。このような場合は、パラグラフ 32.6 にて示される sales force の活動が PE を構成する事例とは明確に区分されるべきである。上記を踏まえ、以下の通り、事例の明確化を要望する。

<p>Para. 32.6</p>	<p>The paragraph applies to a person who acts as the sales force of the enterprise and, in doing so, makes or accepts contractual offers even if standard contracts are used for that purpose, <u>provided that based on all the relevant facts and circumstances the person substantially concludes contracts or negotiates the material elements of contracts.</u> ………these employees’ remuneration is partially based on the revenues derived by RCO from the holders of these accounts. <u>As a result of SCO’ s activity to obtain contracts on behalf of RCO, w<del>h</del>en one of these account holders agrees to purchase a given quantity of goods or services promoted by an employee of SCO, the employee indicates the price ……… When concluding that contract online, the account holder is offered a choice of payment options. <u>Whenever queries are raised by the account holders, SCO’ s employees reply thereto and try to convince them to follow the standard terms of RCO’ s contracts.</u> In this example, SCO’ s employees are negotiating the material elements of the contracts that are concluded with RCO. The fact that SCO’ s employees cannot vary the terms of the contracts does not mean that there is no negotiation but rather means that the negotiation of the material elements of the contracts is limited to convincing the account holder to accept these standard terms. <u>However, it should be noted that such an act as SCO’ s employees</u></u></p>
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	<p><u>explaining the standard terms of RCO' s contracts does not always indicate the employees negotiating the material elements of contracts, but rather just intermediating the communication between RCO and the account holders. In the above example, suppose RCO' s employees directly promoting its products in State S and SCO' s employees only providing RCO with supporting services such as translation of the contractual documents or maintenance of communication with the clients in accordance with RCO' s instructions. SCO' s employees are not allowed to make any decisions and/or proposals relating to the terms of the contracts and are only requested to convey RCO' s proposal to the clients and report such clients' responses to RCO. In such a case, it would be reasonable to conclude that SCO does not negotiate any material elements of contracts.</u></p>
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#### OECD モデル条約第 5 条 6 項（独立代理人）について

- ・ 今回の Revised Discussion Draft では支配関係を従属代理人の判断基準とする新たな概念が導入されたが、新しい概念導入の背景の説明が十分になされているとは言えず、取引実態の精査無しに支配関係のみをもってして従属代理人を判断することは不合理であり、当該概念を導入することによる実体経済への影響については慎重に検討されるべきである。
- ・ 第 5 条 6 (b) にて “One has control of the other or both are under the control of the same persons or enterprises” とあるが、“control” の明確な定義がなく、その範囲が無制限に拡大される可能性があることを懸念する。ある者が “connected person” に該当するかどうかの判定における客観性の確保、及び、間接的保有等の場合もその判定において考慮するとの第 5 条コメンタリー改定案のパラグラフ 38.10 における事例の趣旨を踏まえ、条約本文にて以下の通り明確化することを要望する。

<p>Para. 6b Article 5</p>	<p>……. In any case, a person shall be considered to be connected to an enterprises if, based on all the relevant facts and circumstances, one <del>has control of the other or both are under the control of the same persons or enterprises</del> <u>directly or indirectly owns at least 50 percent of the beneficial interest in the other.</u></p>
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- ・ 独立代理人についての判定例として、非接続企業に関する売上が 10%未満かどうかとあるが、売上比率等を用いて画一的に判断するべきではなく、例えば当該代理人が自らの技術や知識等を使って提供する業務につきリスクを負担し報酬を得ているか否かの実態を勘案

の上で判断するべきである。

#### OECD モデル条約第 5 条 4 項（準備的・補助的活動）について

- ・従来は PE に該当しないとされてきた同項 a)～d)の業務を遂行する事務所に対する、過度な再評価は避けなければならない。加えて、納税者と税務当局間で「準備的・補助的活動」に対する認識に齟齬が生じることがないように、更なる例示がコメントリーに盛り込まれることを要望する。
- ・会社の全体的な事業活動（overall activity）が第三者に対する調達サービスの提供である場合には、調達国における調達活動はその会社の事業活動の不可欠かつ重要な部分を構成するとして、準備的・補助的活動に該当しないとすることが合理的であると考えられるが、調達だけでなく販売活動をも行う会社の調達活動は常に準備的・補助的活動に該当しないと断定することは早計である。会社の全体的な事業活動が販売活動の場合でも、調達活動は既存のサプライヤーからルーティーンに行うものに過ぎない一方、販売活動に多くの人的資源を投下して新規顧客の開拓を行っているケースもあり、そのような場合には調達活動の重要性は相対的に低いというべきである。従い、当該販売会社の販売活動やその他の活動の重要性を含む全ての事実関係を精査の上、調達活動がその会社の事業活動の不可欠かつ重要な部分を構成するか否かを個別に判断する必要が有る。
- ・従い、事業活動全体に占める調達活動の重要性の判断が容易になるよう、以下の通り、Example 1 の事例が準備的・補助的活動に当たらない理由をより明確化することを提案する。

Para. 22.5	The first part of subparagraph d) relates to the case where premises are used solely for the purpose of purchasing goods or merchandise for the enterprise. Since this exception only applies if that activity has a preparatory or auxiliary character, it will typically not apply in the case of a fixed place of business used for the purchase of goods or merchandise where the overall activity of the enterprise consists in <del>selling these goods</del> <u>procurement services for other enterprises. On the other hand, where the overall activity of the enterprise consists in selling these goods, whether the activity of the fixed place of business used for the purchase of goods or merchandise forms an essential and significant part of the overall activity of the enterprise has to be determined having regard to all the relevant facts and circumstances including the significance of selling activity and other activities of</u>
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	<p><u>that enterprise.</u> …………….</p> <p>Example 1: RCO is a company resident of State R that is a <u>service provider rendering procurement service to large buyers</u> of a particular agricultural product produced in State S, <del>which RCO sells from State R to distributors situated in different countries.</del> RCO maintains a purchasing office in State S. The employees who work at that office are experienced and well-paid buyers who visit producers in State S, determine the type/quality of the products according to international standards and enter into different types of contracts (spot or forward) for the acquisition of the products by <u>buyers RCO</u>. In this example, although the only activity performed through the office is the purchasing of products <del>for RCO</del>, which is an activity covered by subparagraph d), paragraph 4 does not apply and the office therefore constitutes a permanent establishment because <u>RCO's overall activity is to procure agricultural product itself and,</u> that purchasing function <u>performed by purchasing office in State S</u> forms an essential and significant part of RCO's overall activity.</p>
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### 細分化防止規定について

契約を細分化し、不当に租税条約の恩典を利用し PE 認定を回避することを取り締まる趣旨には同意する。一方、当該条項は事業上の理由が無い場合に限り適用すべきであり、表面的な形態にとらわれず、活動実態並びにその背景を踏まえた上での判断となるよう、コメントリーに補足頂きたい。

### 契約期間の分割に係るルール

コメントリーのパラグラフ 18.1 が導入された場合、自動合算ルールが追加されることになるが、活動実態を考慮せずに機械的に合算されるのは不合理であり、契約期間を分割する理由が、租税回避を意図としたものではなく、事業上の理由であるか否かを踏まえた上での判断となるよう、コメントリーに補足頂きたい。

以 上

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**Comments on Revised Discussion Draft on  
Action 7 (Preventing the Artificial Avoidance of PE status)  
of the BEPS Action Plan**

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the “Revised Discussion Draft on Preventing the Artificial Avoidance of PE status”.

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTC’s Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

**General Comments**

1. Since disputes between tax authorities and taxpayers frequently occur in various states concerning the interpretation and application of the PE concept, we support the ongoing efforts of the OECD to clarify the definition and scope of PE from the perspective of stability and certainty of taxation. We also appreciate the need to focus on actions aimed at artificial avoidance of PE status.
2. It should be appreciated that the revised discussion draft partly considers opinions from industries and additionally includes some cases in the commentaries. However, there does not seem to be a drastic change from the



initial suggestion of excessively lowering PE threshold. Concern about the increase in qualifications for PE status, which is clearly outside the purpose of the BEPS project, remains.

3. In the revised discussion draft, without a new indication regarding profit attribution to PE, the comments are still at the stage of offering necessary guidance by the end of 2016, which is the due date of negotiations on a multilateral agreement. Under the current situation that a consensus on a methodology of calculating income attributable to PE has not been achieved, foregoing the redefinition of PE may seriously undermine predictability for taxpayers and hold the risk of incurring double taxation. It may also substantially increase the administrative burden on tax authorities and taxpayers.
4. Therefore, first we request a reconfirmation of the purpose of the action plan toward its finalization. Next, we strongly request the formulation of countermeasures after gaining a certain level of international consensus on a methodology of calculating income attributable to PE, bearing in mind that the final proposal that will enable both tax authorities and tax payers to carry out tax practices appropriately and steadily. It is also necessary to avoid placing an excessive administrative burden on both tax authorities and tax payers.

## **Specific Issues**

### **OECD Model Convention Article 5-5(Agent of Dependent Status)**

- On a plain reading of the explanation in the revised discussion draft, even a mere conveyance of contract terms to customers on behalf of a foreign enterprise may be treated as “negotiation”. However, whether or not negotiation was carried on needs to be determined carefully, taking into account all the relevant facts and circumstances. Especially, the second example provided in the revised draft may lead to misunderstandings, because whether the employees of SCO convinced the account holder to accept the standard terms is ambiguous in the assumption.
- Some MNEs centralize at their headquarters the sales functions such as negotiation or conclusion of contracts, in view of effective maintenance of

customer information, efficiency of work, or risk management and risk capability relating to various transactions. There is a case where negotiation with customer and conclusion of contracts are carried on by the headquarters but local subsidiaries support smooth communication with customers located in countries where there are differences of time and language. The local subsidiaries merely perform support activities between headquarters and customers, without carrying on any negotiation. Such cases should be clearly distinguished from the case considered in paragraph 32.6, where PE is constituted due to activities of sales force.

- Considering the above, we would like to request the following clarifications of this paragraph.

Para.32.6	<p>The paragraph applies to a person who acts as the sales force of the enterprise and, in doing so, makes or accepts contractual offers even if standard contracts are used for that purpose, <u>provided that based on all the relevant facts and circumstances the person substantially concludes contracts or negotiates the material elements of contracts.</u></p> <p>.....these employees' remuneration is partially based on the revenues derived by RCO from the holders of these accounts. <u>As a result of SCO's activity to obtain contracts on behalf of RCO, w</u><del>W</del>hen one of these account holders agrees to purchase a given quantity of goods or services promoted by an employee of SCO, the employee indicates the price ..... When concluding that contract online, the account holder is offered a choice of payment options. <u>Whenever queries are raised by the account holders, SCO's employees reply thereto and try to convince them to follow the standard terms of RCO's contracts.</u> In this example, SCO's employees are negotiating the material elements of the contracts that are concluded with RCO. The fact that SCO's employees cannot vary the terms of the contracts does not mean that there is no negotiation but rather means that the negotiation of the material elements of the contracts is limited to convincing the account holder to accept these standard terms.</p> <p><u>However, it should be noted that such an act as SCO's</u></p>
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	<p><u>employees explaining the standard terms of RCO's contracts does not always indicate the employees negotiating the material elements of contracts, but rather just intermediating the communication between RCO and the account holders. In the above example, suppose RCO's employees directly promoting its products in State S and SCO's employees only providing RCO with supporting services such as translation of the contractual documents or maintenance of communication with the clients in accordance with RCO's instructions. SCO's employees are not allowed to make any decisions and/or proposals relating to the terms of the contracts and are only requested to convey RCO's proposal to the clients and report such clients' responses to RCO. In such a case, it would be reasonable to conclude that SCO does not negotiate any material elements of contracts.</u></p>
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### OECD Model Convention Article 5-6(Agent of Independent Status)

- In this revised discussion draft, a new concept is introduced which defines standards for determining a dependent agent. However, the background of introduction of the new concept is not explained appropriately. Judgment based on only a dominant interest without a detailed examination of the actual transaction is irrational. Also, the influences on actual economies by introducing the new concept should be considered carefully.
- The proposed amendment includes the sentence “one has control of the other or both are under the control of the same persons or enterprises” in paragraph 6b of Article 5. We are concerned about abusive interpretation of this sentence as the definition of “control” is not clearly given. In this regard, we would request for a clarification in the Article 5 of the Model Convention as follows, in order to ensure objectivity in testing whether a person is a “connected person”, and having regard to the example shown in paragraph 38.10 where it is explained that the aim of this sentence of the Article is to cover situations where the structure of control is not very simple, including a situation where the beneficial interests in an enterprise are possessed indirectly.

Para.6b	<p>..... In any case, a person shall be considered to be connected to an enterprises if, based on all the relevant facts and circumstances, one <del>has control of the other or both are under the control of the same persons or enterprises</del> <u>directly or indirectly owns at least 50 percent of the beneficial interest in the other.</u></p>
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- Regarding the example for determining independent/dependent agent status based on whether “the sales that an agent concludes for enterprises to which it is not connected represent less than 10 per cent of all the sales that it concludes as an agent acting for other enterprises”, the determination of the status should not be uniformly assigned based on the sales ratio or other criteria with no regard for the actual situation. For example, whether the agent is using its technologies, knowledge and other factors in taking on risk and receiving compensation should be taken into account for when determining the status.

#### OECD Model Convention Article 5-4(Auxiliary and Preparatory Activities)

- Excessive reassessment of facilities conducting the work in a)~d) of the paragraph, which has not been qualified formerly as PE, should be avoided. Moreover additional examples should be inserted for avoiding a perception gap about “auxiliary and preparatory activities” between tax authorities and tax payers.
- It is rational that the purchase of goods or merchandise by a local office is not of a preparatory or auxiliary character when the overall activity of an enterprise consists of rendering procurement services to other enterprises, as it forms an essential and significant part of the enterprise’s overall activity. However, it is not appropriate to determine that the purchase of goods or merchandise by a local office is always not of a preparatory or auxiliary character when the overall activity of the enterprise consists in selling these goods. Even in case where the overall activity of an enterprise consists in selling goods, procurement may be a mere routine activity e.g. goods are purchased from existing suppliers, whereas much more human resources may be devoted in selling activity to develop potential customers. In this case, it should be concluded that the significance of the procurement activity is relatively low. Therefore, whether the purchase of goods or merchandise forms an essential and significant part of

the enterprise's overall activity needs to be determined on a case by case basis, after carefully examining all the relevant facts and circumstances including the importance of selling activity or other activities of that enterprise.

- Therefore, we would request for clarifications as follows, as to why the activity in example 1 is not a preparatory or auxiliary character.

Para.22.5	<p>The first part of subparagraph d) relates to the case where premises are used solely for the purpose of purchasing goods or merchandise for the enterprise. Since this exception only applies if that activity has a preparatory or auxiliary character, it will typically not apply in the case of a fixed place of business used for the purchase of goods or merchandise where the overall activity of the enterprise consists in <del>selling these goods</del> <u>procurement services for other enterprises. On the other hand, where the overall activity of the enterprise consists in selling these goods, whether the activity of the fixed place of business used for the purchase of goods or merchandise forms an essential and significant part of the overall activity of the enterprise has to be determined having regard to all the relevant facts and circumstances including the significance of selling activity and other activities of that enterprise.</u> .....</p> <p>Example 1: RCO is a company resident of State R that is a <u>service provider rendering procurement service to large buyers</u> of a particular agricultural product produced in State S, <del>which RCO sells from State R to distributors situated in different countries.</del> RCO maintains a purchasing office in State S. The employees who work at that office are experienced and well-paid buyers who visit producers in State S, determine the type/quality of the products according to international standards and enter into different types of contracts (spot or forward) for the acquisition of the products by <u>buyers RCO</u>. In this example, although the only activity performed through the office is the purchasing of products <del>for RCO</del>, which is an activity covered by subparagraph d), paragraph 4 does not apply</p>
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	and the office therefore constitutes a permanent establishment because <u>RCO's overall activity is to procure agricultural product itself and,</u> that purchasing function <u>performed by purchasing office in State S</u> forms an essential and significant part of RCO's overall activity.
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### **Proposal 3: New Anti-Fragmentation Rule**

- Cracking down on the artificial avoidance of PE status by applying inappropriately treaty benefits is appreciated. On the contrary, the new rule should be applied only when there is no practical business reason. We request the addition of supplementary commentary to make clear that judgments should be made after due consideration of a company's actual activities and background rather than being based solely on its superficial form.

### **Proposal 4: Changes dealing with the Splitting-up of Contracts**

- If the commentary paragraph 18.1 is included, contract periods will be added automatically for determining construction PE. We believe that mechanical addition without considering the actual situation is irrational. An explicit provision should be included in the commentary that stating judgments should be done based on whether there is business purpose or not, and if the reason for splitting-up of contracts isn't tax avoidance, it should not be subjected to the paragraph 18.1.

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CBC Co., Ltd.  
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