

Article 15 of the OECD Model: The 183-day Rule and the Meaning of “Employer”

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Article 15(2) of the OECD Model—the 183-day rule—is important in taxing employment income in relation to the short-term assignment of employees and the hiring-out of labour. If the 183-day rule applies, the income is taxable only in the residence state and, therefore, it is exempt in the source state in which the employment is exercised. Article 15(2) requires that the remuneration is paid by, or on behalf of, an employer who is not a resident of the source state and that the remuneration is not borne by a permanent establishment which the employer has in the source state. It is unclear whether the term “employer” in Article 15(2) refers to a domestic law meaning of “employer” or whether it has an autonomous meaning. In 2010 the OECD updated its Commentary on Article 15 by including extensive explanations of when services are provided in the exercise of an employment and to whom such services are rendered. This article examines what impact the OECD Commentary 2010 has on the interpretation of the 183-day rule and the meaning of “employer”.

Problems with different meanings of “employer”

Article 15(1) of the OECD Model Tax Convention on Income and on Capital (the OECD Model Convention)¹ establishes the general rule as to the taxation of income from employment, namely, the place-of-work principle. Such income is primarily taxable in the Contracting State in which the employment is actually exercised.² However, Article 15(2) of the OECD Model Convention (hereafter Article 15(2))—the 183-day rule—provides an exception from the place-of-work principle. If:

1. the employee is present in the source state³ for a period or periods not exceeding in the aggregate 183 days in a certain period⁴; and
2. the remuneration is paid by, or on behalf of, an employer who is not a resident of the source state⁵; and

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¹ OECD Model Tax Convention on Income and on Capital, available at: <http://www.oecd.org/ctp/taxtreaties/oecdmtcavailableproducts.htm> [Accessed February 25, 2013].

² OECD Commentary 1963–2012 on Art.15, para.1.

³ For the purposes of this article, the source state is always “the other Contracting State”, regardless of what and where the source of income is, and, therefore, regardless of where the employment is exercised and whether or not the 183-day rule applies. The residence state is always the residence state of the employee and, thus, the employer may be a resident of the residence state, the source state or a third state.

⁴ OECD Model Convention, above fn.1, Art.15(2)(a).

⁵ OECD Model Convention, above fn.1, Art.15(2)(b).

3. the remuneration is not borne by a permanent establishment which the employer has in the source state⁶;

the income is taxable only in the residence state. In cases of short-term assignments of employees and hiring-out of labour, where the formal employer is a resident of the residence state or a third state and the user is a resident of the source state, it is essential that the formal employer or the user be regarded as the employer for tax treaty purposes. If the user is regarded as the employer, the conditions of Article 15(2)(b) are not met—the user is a resident of the source state—and, therefore, the income is taxable pursuant to Article 15(1) in the source state in which the employment is exercised.

Article 15(2) uses the term “employer”, which is not defined in the OECD Model Convention. For such terms Article 3(2) of the OECD Model Convention (hereafter Article 3(2)) provides that

“[a]s regards the application of the Convention ... by a Contracting State, any term not defined therein [must], unless the context otherwise requires, have the meaning that it has ... under the law of that State.”⁷

It is unclear whether Article 3(2) refers to a domestic law meaning of “employer” or whether the context otherwise requires. Some countries apply Article 3(2) and refer to a meaning under domestic law which generally does not question the formal contractual relationship. Some countries apply Article 3(2) and refer to a meaning under domestic law which may ignore the formal contractual relationship and thus may re-characterise the relationship from self-employment to employment or vice versa, or from an employment with one employer to an employment with another employer. Finally, some countries interpret the term “employer” according to the object and purpose of Article 15(2) as an economic concept regardless of any domestic law meaning, thus emphasising that under Article 3(2) the context may require an autonomous tax treaty meaning of “employer”.⁸ In other words: countries have different views on the interpretation of Article 15 and derive the meaning of “employer” for the purposes of the 183-day rule either by reference to domestic law which may focus more on the form or on the substance, or autonomously from the tax treaty.

In cases where the formal employer is a resident of the residence state or of a third state and the user is a resident of the source state in which the employment is exercised, such different views on the interpretation of the term “employer” may lead to double taxation or double non-taxation. If, for example, the residence state interprets “employer” by referring to domestic law which follows the formal contractual relationship, it could regard the formal employer as being the employer for tax treaty purposes. As a consequence the residence state will apply the 183-day rule—under Article 15(2)(b) the employer is not a resident of the source state—and will regard the income from employment as being taxable only in the residence state. However, if the source state interprets “employer” autonomously according to the object and purpose of

⁶ OECD Model Convention, above fn.1, Art.15(2)(c).

⁷ OECD Model Convention, above fn.1, Art.3(2).

⁸ E. Burgstaller, “‘Employer’ Issues in Article 15(2) of the OECD Model Convention—Proposals to Amend the OECD Commentary” (2005) 33 *Intertax* 124–130; J. Avery Jones, “Short-Term Employment Assignments under Article 15(2) of the OECD Model” (2009) 63 *Bulletin for International Taxation* 6.

Article 15(2), it could regard the user as being the employer for tax treaty purposes. In that case the source state will not apply the 183-day rule—under Article 15(2)(b) the employer is a resident of the source state—and will regard the income as being taxable in the source state according to Article 15(1). Such a mismatch can lead to double taxation and is not a qualification conflict resulting from differences in domestic law. It is rather a conflict resulting from differences in interpretation of tax treaty rules⁹: it is unclear whether the residence state has correctly interpreted Article 15(2) and Article 3(2),—that the undefined term “employer” must have a meaning which it has under domestic law or whether the source state has correctly interpreted Article 15(2) and Article 3(2), that “the context otherwise requires”, namely, an autonomous meaning of “employer”.

In the OECD report “Taxation Issues Relating to International Hiring-Out of Labour” (1984)¹⁰ problems regarding the interpretation of the term “employer” under Article 15(2) have already been examined. Following this report, the OECD updated its Commentary on Article 15 in 1992 and included explanations of the term “employer” in order to prevent cases of abuse. The exact scope of Article 15(2) still remained unclear. Therefore, after two draft reports from 2004¹¹ and 2007,¹² revised explanations of the term “employer” have been included in the *OECD Commentary* 2010.¹³

The author will review the statements in the *OECD Commentary* 2010 regarding the interpretation of the term “employer” and will show that although the Commentary puts a lot of weight on the domestic law concept of employment it does set this concept certain limits. Thereafter the author will consider which arguments support a meaning of “employer” that is autonomously derived from the tax treaty by considering all grammatical, systematic, teleological and historical means of interpretation.

⁹ *OECD Commentary* 2000–2012 on Art.23 A and B, para.32.5. See also Avery Jones, above fn.8, 7 (fn.5) (“in fact conflicting interpretations”).

¹⁰ OECD, “Taxation Issues Relating to International Hiring-Out of Labour” in *Trends in International Taxation* (Paris: OECD Publications, 1985), 29.

¹¹ OECD, *Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the Model Tax Convention* (April 5, 2004), available at: <http://www.oecd.org/ctp/taxtreaties/31413358.pdf> [Accessed January 27, 2013].

¹² OECD, *Revised Draft Changes to the Commentary on Paragraph 2 of Article 15* (March 12, 2007), available at: <http://www.oecd.org/ctp/taxtreaties/38236197.pdf> [Accessed January 27, 2013].

¹³ OECD, *The 2010 Update to the Model Tax Convention* (July 22, 2010), available at: <http://www.oecd.org/ctp/taxtreaties/45689328.pdf> [Accessed January 27, 2013]. See also B. Arnold, “An Introduction to the 2010 Update of the OECD Model Tax Convention” (2011) 65 *Bulletin for International Taxation* 3; E. Barret, “Aspects of the 2010 Update Other than Those Relating to Article 7 of the OECD Model Tax Convention” (2011) 65 *Bulletin for International Taxation* 13, 18–19; M. Lang, “Die Bedeutung der Änderungen im OECD-Kommentar 2010 zum Begriff des Arbeitgebers nach Art. 15 Abs. 2 OECD-MA” (2011) 21 *Steuer und Wirtschaft International* 105; M. Kempermann in H. Flick, F. Wassermeyer and M. Kempermann, *Doppelbesteuerungsabkommen Deutschland—Schweiz*, 34th supplement (Cologne: Dr. Otto Schmidt, 2011), Art.15 m.no.69.1; A. Digeronimo and A. Kolb, “Überblick über das Update 2010 des OECD-Musterabkommens” (2010) *Internationale Wirtschafts-Briefe* 34–36; S. Bendlinger, “Der Arbeitgeberbegriff im OECD-Musterabkommen 2010” (2010) *taxlex* 344; A. Philipp, H. Loukota and H. Jirousek, *Internationales Steuerrecht* I/1 Z 15 (2011), m.nos 92–98.

OECD Commentary 2010 on the meaning of “employer”

Relationship with the meaning of “employment”

Article 15 covers income which a person derives “in respect of an employment”.¹⁴ In the OECD Commentary such a person is called an employee.¹⁵ Article 15(2) uses the term “employer” in order to determine where income from employment is taxable. Given that the services of an employee must be rendered to a person in an employment relationship and thus an employee always has an employer for tax treaty purposes, the criteria for what constitutes “employment” and “employer” overlap to a great extent. In finding out whether work is exercised in an employment relationship and thus by an employee the same criteria must generally be relevant as those which are applicable in determining who is the employer of an employee. This view is supported by the *OECD Commentary 2010*. It states that “[t]he issue of whether or not services are provided in the exercise of an employment may sometimes give rise to difficulties” and in this context the Commentary refers to the discussions regarding the 183-day rule and the meaning of “employer”.¹⁶ For the Commentary it is a matter of the domestic law of the source state to determine whether services rendered by an individual in that state are provided in an employment relationship.¹⁷ If the source state considers services to be employment services “[i]t will, therefore, logically conclude that the enterprise to which the services are rendered is in an employment relationship with the individual so as to constitute his employer” for the purposes of Article 15(2)(b) and (c).¹⁸

As long as the residence state acknowledges that the concept of employment in the domestic tax law of the source state allows that state to tax the employment income in accordance with the provisions of the OECD Model Convention, it must grant relief for double taxation pursuant to Article 23 of the OECD Model Convention (Article 23) and in doing so it prevents qualification conflicts.¹⁹ If, on the one hand, the source state interprets the undefined term “employer” based on its domestic law concept of employment and regards a person being a resident of the source state as the employer, the employment may be taxed in the source state in accordance with the provisions of the OECD Model Convention since the 183-day rule does not apply; the residence state is required to exempt the income or to grant a tax credit. If, on the other hand, the source state regards a person being a resident of the residence state or of a third state as the employer based on its domestic law concept of employment, the employment may *not* be taxed in the source state in accordance with the provisions of the OECD Model Convention since the 183-day

¹⁴ OECD Model Convention, above fn.1, Art.15(2).

¹⁵ See, for example, *OECD Commentary 1977–2012*, Introduction, para.21.

¹⁶ *OECD Commentary 2010–2012* on Art.15, para.1. See also F. Pötgens, “Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of ‘Employer’ for Treaty Purposes” (2007) 61 *Bulletin for International Taxation* 478 (“... [i]t follows from this that the expressions ‘employer’ and ‘employment’ are interrelated”); F. Pötgens, “Some Selected Interpretation and Qualification Issues with Respect to Article 15(2)(b) and (c) of the OECD Model” in D. Weber and S. van Weeghel (eds), *The 2010 OECD Updates* (Kluwer Law International, 2011), 128.

¹⁷ *OECD Commentary 2010–2012* on Art.15, above fn.16, para.8.4.

¹⁸ *OECD Commentary 2010–2012* on Art.15, above fn.16, para.8.7.

¹⁹ *OECD Commentary 2010–2012* on Art.15, above fn.16, para.8.10.

rule applies (provided that the other conditions are met as well); the residence state is not required to exempt the income or to grant a credit.

For the *OECD Commentary* 2010, a domestic law meaning of “employer” is not necessarily relevant for the purposes of Article 15(2)(b) and (c). It is rather the context under Article 3(2)—especially the close relationship between “employment” and “employer”—which may otherwise require. As a first step it has to be determined whether services are provided in an employment relationship. For this purpose the concept of employment under the domestic law of the source state is decisive. As a second step it has to be determined to which person the employment services are rendered, thus who the employer is for the purposes of the 183-day rule. It is a nuanced difference whether Article 3(2) refers to the domestic law meaning of “employer” or whether Article 3(2)—because the context otherwise requires—refers to the concept of employment under Article 15 which in turn refers to the domestic law meaning of “employment”. Usually the terms “employment” and “employer” will both be used by domestic law for the same concept of employment. However, this difference might become important if domestic law is lacking a definition of “employer” or if “employer” is defined very broadly for withholding tax purposes²⁰: permanent establishments and even paying agents could be deemed to be an “employer” under domestic law. In the literature it is suggested that in the latter cases the domestic law definition of “employer” is not appropriate for the purposes of the 183-day rule and thus that the context under Article 3(2) precludes the use of such a definition.²¹ If the context under Article 3(2) requires that the meaning of “employer” be determined by reference to the concept of employment under Article 15 (which, according to the *OECD Commentary* 2010, is based on the concept of employment under the domestic law of the source state), problems with missing employer definitions or with employer definitions for withholding tax purposes generally do not arise.

Also the historical development of the 183-day rule and systematic considerations support the view that Article 3(2) does not necessarily refer to a domestic law meaning of “employer”. In fact it is irrelevant whether Article 15(2) uses the term “employer” or another term such as “supervisor”, “boss”, “taskmaster”, “entrepreneur”, “enterprise” or even “person”. In Article 15(3) there is no explicit reference to the employer of the employee, only the term “enterprise” is used. Nonetheless, there are good reasons to believe that—especially if a ship or an aircraft establishes a transport enterprise for more than one person—the enterprise and its place of effective management addressed by Article 15(3) are only that of the employer.²² Also in the first OEEC drafts of the 183-day rule the term “employer” is not used at all. Instead, the employer

²⁰ L. De Broe, J. Avery Jones, M. Ellis, K. van Raad, J.P. Le Gall, H. Torriane, R. Vann, T. Miyatake, S. Roberts, S. Goldberg, J. Strobl, J. Killius, G. Maisto, F. Giuliani, D. Ward and B. Wiman, “Interpretation of Article 15(2)(b) of the OECD Model Convention: ‘Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State’” (2000) 54 *Bulletin for International Fiscal Documentation* 507.

²¹ De Broe, et al., above fn.20, 507,520. Pötgens likewise assumes that if the domestic law definition of “employer” only defines the wage tax withholding agent, there is no domestic law definition to which Art.3(2) could refer. See F. Pötgens, *Income from International Private Employment* (Amsterdam: IBFD, 2007), 583–586, 596–597, 645; Pötgens, above fn.16, 476, 481; Pötgens in Weber and van Weeghel, above fn.16, 134.

²² See K. Dziurdź, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht* (Vienna: Linde, 2013), s.4.1.5.

is referred to by the terms “person” and “person paying the remuneration”.²³ Even though a drafting group later replaced “person” and “person paying the remuneration” with “employer”,²⁴ there is no indication that changes to the contents were intended with these changes to the wording.²⁵

Objective criteria for “employment” and “employer”

According to the *OECD Commentary* 2010, it is the concept of employment under the domestic law of the source state which is decisive as far as the meaning of the undefined term “employer” in Article 15(2)(b) and (c) is concerned. However,

“the conclusion that, under domestic law, a formal contractual relationship should be disregarded must ... be arrived at on the basis of objective criteria.”²⁶

This “objective criteria test” probably aims at ensuring that the source state does not extensively broaden its domestic law concept of employment in order to obtain “inappropriate” taxing rights.²⁷

The Commentary describes the relevant objective criteria in detail:

“The nature of the services rendered by the individual will be an important factor since it is logical to assume that an employee provides services which are an integral part of the business activities carried on by his employer. It will therefore be important to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided. For that purpose, a key consideration will be which enterprise bears the responsibility or risk for the results produced by the individual’s work.”²⁸

Furthermore, the following additional factors may be relevant in determining whether there is an employment relationship that is different from the formal contractual relationship:

- “1. who has the authority to instruct the individual regarding the manner in which the work has to be performed;
2. who controls and has responsibility for the place at which the work is performed;

²³ OEEC, Working Party No.10 of the Fiscal Committee (Sweden), *Report on the Taxation of Profits or Remuneration in Respect of Dependent and Independent Personal Services* (FC/WP10(57)1) (September 11, 1957), 8; OEEC, Working Party No.10 of the Fiscal Committee (Sweden), *Second Report on the Taxation of Profits or Remuneration in Respect of Dependent and Independent Personal Services* (FC/WP10(58)1) (January 31, 1958), 3. In the commentaries on these drafts the term “employer” is used; see FC/WP10(57)1, 11; FC/WP10(58)1, 5. The historical OEEC and OECD materials are available at: <http://www.taxtreatieshistory.org> [Accessed January 27, 2013].

²⁴ OEEC, Fiscal Committee, *Taxation of Profits or Remuneration in Respect of Dependent and Independent Personal Services* (TFD/FC/34) (April 28, 1958).

²⁵ See Dziurdź, above fn.22, s.3.1.3. In cases where the term “person” is used in Art.15(2) one cannot look for a domestic law meaning of “person” pursuant to Art.3(2) since “person” is not an undefined term. Art.3(1)(a) defines “person” as including an individual, a company and any other body of persons. However, Art.3(1) allows use of this definition only if the context does not otherwise require. In this case, for giving the 183-day rule an appropriate meaning and scope, the context otherwise requires, namely, that the term “person” refers to the concept of employment under Art.15 and to whom such employment services are rendered.

²⁶ *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.11.

²⁷ Burgstaller, above fn.8, 129.

²⁸ *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.13.

3. the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided ...²⁹;
4. who puts the tools and materials necessary for the work at the individual's disposal;
5. who determines the number and qualifications of the individuals performing the work;
6. who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
7. who has the right to impose disciplinary sanctions related to the work of that individual;
8. who determines the holidays and work schedule of that individual."³⁰

According to the *OECD Commentary* 2010, the objective criteria are relevant only if the formal contractual relationship is disregarded by the domestic law of the source state. In the reverse case, however, if the domestic law concept of employment adheres to the formal relationship, this concept remains relevant for tax treaty purposes; the objective criteria are not able to oust it. Therefore, if under the domestic law of the source state the formal employer is not regarded as being the employer, this will only be acceptable for tax treaty purposes if the objective criteria also speak in favour of another person as being the employer. In the reverse case, however, if the domestic law concept of employment adheres to the formal relationship, this concept remains relevant for tax treaty purposes even if the objective criteria speak in favour of another person as being the employer. With this approach countries which interpret Article 15 as referring to the concept of employment under their domestic law are allowed to continue this practice albeit within certain limits autonomously derived from the tax treaty.

Finally, the *OECD Commentary* 2010 includes six examples which explain how the principles should be applied and who the employer is in specific cases. In these examples the main focus is on the nature of the services, that is, for whom the employee's services are an integral part of the business activities. Still, and particularly as regards examples 4 and 5, it remains unclear why and when the criterion "integral part of the business activities" is decisive and what is the exact difference between it and other objective criteria or relevant employer functions.

In example 4³¹ Gco is a company which carries on the business of filling temporary business needs for highly specialised personnel and Hco is a company which provides engineering services on building sites. Gco recruits X, an engineer, for a limited period of time and agrees to provide the services of X to Hco. According to the Commentary, the services of X form an integral part of the business activities of Hco; no attention is paid to the other objective criteria. Consequently the formal relationship with Gco could be disregarded by the domestic law of the source state and then the 183-day rule would not apply. Gco pays X's remuneration, social contributions, travel expenses and other employment benefits and charges. How these expenses are charged to Hco (possibly in the form of a fee for the time spent that bears no relationship to X's remuneration or where the remuneration is only one of many factors taken into account?)³² is

²⁹ For an explanation of this criterion, see *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.15.

³⁰ *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.14.

³¹ *OECD Commentary* 2010–2012 on Art.15, above fn.16, paras 8.22–8.23.

³² *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.15. See also H.K. Kroppen in *Jahrbuch der Fachanwälte Deutsches Anwaltsinstitut e.V.(ed.) für Steuerrecht 2000/2001* (Herne/Berlin: NWB, 2001), 633–642.

not considered in the Commentary. Whether or not Gco bears typical employer's risks is also not considered; for example, whether Gco has to continue paying X's remuneration if X gets sick and while it, Gco, does not receive any fee from Hco, or whether Gco has to provide a substitute worker if X does not arrive at work. And even though Gco hires X for the same period as that for which he is hired out, this only indicates that neither Gco nor Hco bear the risk of having unnecessary employment costs when X's services are no longer needed; only X bears the risk of unemployment.³³ If the question "to which person does the employee's services form an integral part of the business activities" is only an initial question³⁴ or a pre-selection test³⁵ for the purposes of deciding who the employer under Article 15(2) could be, then all objective criteria or relevant employer functions need to be considered. This is unlike the case in this example and in most of the other examples in the Commentary. But if all relevant facts of such a case and all objective criteria are looked at, it will not always be that easy to answer the question of who the employer could be for tax treaty purposes.

In example 5³⁶ X, an engineer, is hired out to Jco which provides engineering services. Ico which hires out the employee does *not* carry on the business of filling temporary business needs for highly specialised personnel but provides engineering services just as Jco does. For the first time it seems unclear for which enterprise, Ico or Jco, the services rendered by X form an integral part of the business activities. The relevant employer functions are, therefore, described and considered in more detail. The criterion "integral part of the business activities" is, however, relevant in example 3³⁷ where both enterprises involved, Eco and Fco, own and operate hotels and where X works in a hotel belonging to Fco; the services of X may be viewed as forming an integral part of Fco's business of operating that hotel rather than of Eco's business. It remains unclear why the criterion "integral part of the business activities" is not similarly relevant in example 5 where both Ico and Jco provide engineering services and X works for an engineering project of Jco; the services of X could be viewed as forming an integral part of Jco's business of completing that project on a construction site in State J rather than of Ico's business. Put differently, according to the Commentary, when an employee works in a hotel this work may be viewed as forming an integral part of the business of operating that hotel but when an employee works on a construction site this work may rather *not* be viewed as forming an integral part of the business of completing a contract on that construction site; in the latter case the relevant employer functions need to be considered in more detail. Even though in example 5 the criterion "integral part of the business activities" is not mentioned at all, the described employer functions (exercise of direct supervision and control, the responsibility for the work, the bearing of the cost of the remuneration) still overlap to a certain extent with the question: with which enterprise does the employee's services form an integral part of the business activities? For the latter "a key consideration will be which enterprise bears the responsibility or risk for the results produced by the individual's work".³⁸ The fact that Jco takes over the responsibility for X's work is taken

³³ However, see also H. Loukota/W. Loukota, "Kurzfristige internationale Arbeitskräfteentsendungen" (2006) 16 *Steuer und Wirtschaft International* 113.

³⁴ Avery Jones, above fn.8, 7.

³⁵ Pötgens (2007), above fn.16, 483.

³⁶ *OECD Commentary* 2010–2012 on Art.15, above fn.16, paras 8.24–8.25.

³⁷ *OECD Commentary* 2010–2012 on Art.15, above fn.16, paras 8.20–8.21.

³⁸ *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.13.

into account when concluding that Jco could be the employer for tax treaty purposes. Furthermore, Jco would probably be prepared to take over the responsibility for X's work only when it is able to directly supervise and control X; specifically, when it has certain influence on X's work for which it is responsible.

Autonomous meaning of “employer”

When does the context otherwise require?

While for the purposes of interpreting Article 15 and the term “employer” the *OECD Commentary* 2010 refers to the concept of employment under the domestic law of the source state, it does set certain limits by enumerating objective criteria for deciding on who the employer can be. According to the Commentary, these objective criteria are relevant only if the domestic law of the source state wants to disregard the formal contractual relationship; they are not relevant if the domestic law sticks to the formal contract. For the purposes of the 183-day rule there comes a point where under Article 3(2) the context otherwise requires and this context has a preference for domestic law meanings which follow the formal contractual relationship.

However, it is unclear why the context under Article 3(2) should be a “one-way road”. Why should the context be able to oust excessively broad domestic law meanings of “employment” and “employer” which disregard the formal contractual relationship while not having enough strength³⁹ to oust excessively narrow domestic law meanings which stick to the formal contract and generally do not consider substantive criteria? Article 15(2) would be rendered meaningless if the source state were allowed (by following the formal contractual relationship) to “deem” services to constitute employment services in cases where there is clearly no employment relationship (on the basis of objective criteria) or if the source state were allowed *not* to deny the quality of employer to an enterprise where it is clear that that enterprise does not provide services through its own personnel.⁴⁰ In fact, if after considering all grammatical, systematic, teleological and historical means of interpretation it is possible to derive objective criteria for “employment” and “employer” autonomously from the tax treaty, it is questionable why under Article 3(2) the context will not otherwise require in all cases where the domestic law meaning departs from these objective criteria.

³⁹ See, for example, J. Avery Jones, C. Berg, H.R. Depret, M. Ellis, P. Fontaneau, R. Lenz, T. Miyatake, S. Roberts, C. Sandels, J. Strobl and D. Ward, “The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model—II” [1984] BTR 105–108; K. Vogel, *Klaus Vogel on Double Taxation Conventions, A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation on Income and Capital*, 3rd edn (Kluwer Law International, 1997), Art.3, m.nos 68–74; K. Vogel in K. Vogel and M. Lehner, *Doppelbesteuerungsabkommen*, 5th edn (Munich: C.H. Beck, 2008), Art.3, m.nos 117–122.

⁴⁰ See *OECD Commentary* 2010–2012 on Art.15, above fn.16, para.8.11.

OECD Commentary 2010 approach and autonomous meaning of “employer”

Alleged employer			Employer under Article 15(2)	
Formal	Domestic law (source state)	Objective criteria	OECD Commentary 2010 approach	Autonomous approach
Person A	Person A	Person A	Person A	Person A
Person A	Person B	Person A	Person A	Person A
Person A	Person B	Person B	Person B	Person B
Person A	Person A	Person B	Person A	Person B

It is true that an autonomous treaty meaning of “employer” could differ from a domestic law meaning and thus the “employer” under Article 15(2) would not necessarily be the person who is required to withhold tax at source.⁴¹ However, it cannot be derived from the tax treaty that the source state should not only be allowed to tax but that it should also be allowed to tax by way of a withholding tax.⁴² Consequently it cannot be concluded that the meaning of “employer” under Article 15(2) should follow the domestic law meaning if it is also used for withholding tax purposes. It is already suggested in the OECD report “Taxation Issues Relating to International Hiring-Out of Labour” (1984) that in cases where the user is the employer based on autonomous criteria, “the domestic legislation ... should enable ... [tax to be levied], in the hands of the user”,⁴³ not that the autonomous criteria should be disregarded in favour of the domestic legislation.

Common understanding and the relationship with dependent agents

How can a meaning of “employer” be autonomously derived from the tax treaty? Income can be earned as an independent or a dependent person and the distributive rules in the OECD Model Convention are based on such a differentiation.⁴⁴ Thus, if a person renders personal services, those services can be performed either in an independent or a dependent relationship. It also can be assumed that the OECD Model Convention is based on a common understanding of the type of personal services which are covered by the term “employment”. This term is accordingly to be derived, on the one hand, by distinguishing it from other types of income (particularly from business profits) and, on the other hand, by referring to a common international understanding.⁴⁵ Gérard Coulombe summarises in the *IFA General Report 1982* that

“[t]he analysis of the twenty-four national reports enables one to conclude that the basic principle or criterion used to determine if services performed by a person are independent personal services or not is substantially identical in all countries.”⁴⁶

⁴¹ See M. Tumpel and C. Stangl, “Die Arbeitnehmerüberlassung im DBA-Recht” in W. Gassner, M. Lang, E. Lechner, J. Schuch and C. Staringer (eds), *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen* (Vienna: Linde, 2003), 119–123.

⁴² Lang, above fn.13, 108.

⁴³ OECD, above fn.10, 46 (m.no.76).

⁴⁴ See, for example, Art.7 with reference to Art.3(1)(c), (d) and (h)—“activities of an independent character”—and Art.15—“employment.”

⁴⁵ Vogel (1997), above fn.39, Art.15, m.no.16; R. Prokisch in Vogel and Lehner (2008), above fn.39, Art.15, m.no.27.

⁴⁶ G. Coulombe, General Report, in IFA (ed.), *Cahiers de Droit Fiscal International*, Vol.LXVIIb (1982), 39, 40.

This common international understanding of personal services being performed independently or dependently is the starting point for autonomously determining whether a person is an independent person or an employee and—given the close relationship between “employment” and “employer”—for finding an autonomous meaning of the term “employer” in Article 15(2).⁴⁷

Also many relevant employer functions can be derived from the distinction between dependent and independent agents under Article 5. Article 5(5) stipulates that where a person—other than an agent of an independent status—is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise is deemed to have a permanent establishment in that state. Article 5(6) states that an enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that state through a broker, general commission agent or any other agent of an independent status. It therefore distinguishes between persons who are independent agents and persons who are dependent agents. Also employees can be dependent agents and may establish an agency permanent establishment for the enterprise they represent.⁴⁸ It is furthermore considered that employees cannot be independent agents.⁴⁹ If, therefore, a person is an independent agent, he cannot be an employee and his principal cannot be an employer. If, however, a person is a dependent agent, this indicates that he can be an employee and his principal can be an employer.

The *OECD Commentary* 1963 already makes concrete the autonomous criteria for distinguishing between dependent and independent agents:

“Persons who may be deemed to be permanent establishments must be strictly limited to those who are dependent, both from the legal and⁵⁰ economic points of view, upon the enterprise for which they carry on business dealings”.⁵¹

In the *OECD Commentary* 1977 it is further specified that

“[w]hether a person is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person’s commercial

⁴⁷ M. Lang and U. Zieseritsch, “Der Begriff der unselbständigen Arbeit nach Art 15 OECD-MA” in W. Gassner, M. Lang, E. Lechner, J. Schuch and C. Staringer (eds), *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen* (Vienna: Linde, 2003), 46. Among other things the relevant criteria highlighted by Gérard Coulombe are: with whom does a subordination link exist and under whose authority and direction is the contract performed; to whom does the employee make available his ability to work and to whom does he agree to submit himself, for the purposes of performing his services, to authority and direction; with whom is there a legally binding exclusive service agreement; who provides tools, materials, and work place; who pays a fixed salary and reimbursement of the employee’s expenses; into whose regular business operations are the performed services integrated; to whom does the employee file regular oral or written status reports; with whom can the employee terminate service without being liable for failure to complete the job. See Coulombe, above fn.46, 40–42.

⁴⁸ *OECD Commentary* 1963 on Art.5, heading before para.4 (“[d]ependent agents and employees”); *OECD Commentary* 1977 and 1992–2012 on Art.15, para.31 respectively (“dependent agents i.e. persons, whether employees or not, who are not independent agents”).

⁴⁹ See, for example, A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle* (Kluwer Law and Taxation Publishers, 1991), 504; Vogel, above fn.39, Art.5, m.no.138; M. Görl in Vogel and Lehner (2008), above fn.39, Art.5, m.no.145; Pötgens (2007), above fn.21, 788–790; H. Loukota, *Internationale Steuerfälle* (Vienna: Orac, 1989), 141 (m.no.520); F. Wassermeyer in H. Debatin and F. Wassermeyer, *Doppelbesteuerung: DBA*, 108th supplement (Munich: C.H. Beck, 2009), Art.5, MA m.no.225.

⁵⁰ Skaar, above fn.49, 506–507 has demonstrated that “and” is rather meant to be “or”.

⁵¹ *OECD Commentary* 1963 on Art.5, above fn.48, para.15.

activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such a person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents.”⁵²

Given that an employee cannot be an agent of independent status, in order to determine whether a person is in an employment relationship it must be examined whether the person is subject to detailed instructions and to comprehensive control and whether he bears no entrepreneurial risk. If this is the case then who gives the detailed instructions, who exercises the comprehensive control and who bears the entrepreneurial risk can also be determined—that is, who can be an employer.

In the *OECD Commentary 2003* the autonomous criteria for distinguishing dependent and independent agents are described in even more detail.⁵³ From these criteria it can be concluded that if a person is not responsible for the results of his work but is subject to significant control and detailed instructions, this indicates that this person may be in an employment relationship. Conversely, he who is responsible for the results of the work, who exercises significant control and who gives detailed instructions can be an employer for the purposes of the 183-day rule. Of course, not every dependent agent will be an employee and not every principal of a dependent agent will be an employer. Nevertheless, by examining the autonomous criteria which identify dependent agents, important steps are taken towards identifying an employee and his employer.

Autonomous meaning in the OECD Commentary 1992

Based on the report “Taxation Issues Relating to International Hiring-Out of Labour” (1984)⁵⁴ the *OECD Commentary 1992* includes detailed explanations of the term “employer”. Even though the term “employer” is not defined in the Convention, it

“should be interpreted in the context of [Article 15] paragraph 2. ... [I]t is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks.”⁵⁵

Furthermore, the *OECD Commentary 1992* mentions a number of other circumstances which make it possible to establish who the employer is.⁵⁶

⁵² *OECD Commentary 1977* on Art.5, para.37.

⁵³ *OECD Commentary 2003–2012* on Art.5, para.38.3: “An independent agent will typically be responsible to his principal for the results of his work but not subject to significant control with respect to the manner in which that work is carried out. He will not be subject to detailed instructions from the principal as to the conduct of the work. The fact that the principal is relying on the special skill and knowledge of the agent is an indication of independence.”

⁵⁴ OECD, above fn.10, 29.

⁵⁵ *OECD Commentary 1992–2008* on Art.15, para.8.

⁵⁶ Those circumstances refer to the following questions: who has the authority to instruct the worker; who has the control and responsibility for the place at which the work is performed; if wages received by the employee are passed on, is the remuneration calculated on the basis of the time utilised, or is there, in other ways a connection between this remuneration and wages received by the employee; who puts tools and materials at the employee’s disposal; who determines the number and qualifications of the employees?

In this regard the *OECD Commentary* 1992 only refers to cases of abuse through adoption of the practice known as “international hiring-out of labour”. The Commentary, therefore, gives the impression that only

“[t]o prevent such abuse, in situations of this type, [should] the term ‘employer’ be interpreted in the context of [Article 15] paragraph 2.”

Also the circumstances which help to establish who the employer is are formulated in such a way as to lead possibly all too quickly to the conclusion that the user and not the hirer, intermediary or formal employer is the employer under Article 15(2).⁵⁷ There is, however, no indication in the Convention that the term “employer” has one meaning—an autonomous meaning—in cases of abuse and another meaning—a domestic law meaning—in all the other cases. If the meaning of the term “employer” is to be derived from the context of Article 15, as is stated in the *OECD Commentary* 1992, it is difficult to see why such a meaning should be relevant only in cases of abuse and why it should not be applied generally.⁵⁸ Furthermore, in relation to the Commentary Switzerland has observed that it is of the opinion that the comments on “international hiring-out of labour” should only apply to situations of “international hiring-out of labour” in the case of abusive arrangements.⁵⁹ If the autonomous meaning of “employer” described in the *OECD Commentary* 1992 was not generally relevant but only relevant in cases of abuse, Switzerland’s observation would not have been necessary. Finally, it is unclear to which cases of abuse the *OECD Commentary* 1992 refers. Does it refer only to cases where parties enter into complex arrangements designed to exploit Article 15(2) in an artificial way, or does it refer to every structure of cross-border hiring-out of labour or employment agency when the employee is not subject to tax in the state of the user,⁶⁰ or even to every case where the autonomous meaning of “employer” does not correspond to a domestic law meaning?

Overall, the *OECD Commentary* 1992 implies that the term “employer” in Article 15(2) has an autonomous meaning regardless of whether or not cases of abuse are at hand. The relevant employer functions can be derived from the common international understanding of personal services being performed independently or dependently, from the autonomous criteria for identifying a dependent agent and from the *OECD Commentary* 1992 itself. After considering all available means of interpretation it is possible to determine the meaning of “employer” without any reference to domestic law.

Conclusions

In 2010 the OECD updated its Commentary on Article 15 by including the extensive explanations of the term “employer” used by the 183-day rule in Article 15(2)(b) and (c). In so doing the OECD has changed its view to a certain extent as can be seen when a comparison is made with the view taken in the 1992 *Commentary*. According to the new Commentary, it is the concept

⁵⁷ De Broe, et al., above fn.20, 508. See also, for example, J. de Kock, “International Hiring-Out of Labour: Field Experience in the Netherlands” (1999) 53 *Bulletin for International Fiscal Documentation* 243, 246–247; Pötgens (2007), above fn.21, 615.

⁵⁸ De Broe, et al., above fn.20, 509.

⁵⁹ *OECD Commentary* 1992–2008 on Art.15, above fn.55, para.13.

⁶⁰ De Broe, et al., above fn.20, 509.

of employment under the domestic law of the source state which is relevant for tax treaty purposes; the residence state is generally obliged to follow the qualification of the source state. Still there are certain limits to the importance of domestic law. If under the domestic law concept of employment a person who is not the formal employer is nevertheless regarded as being the employer, this is acceptable for tax treaty purposes only if the result is arrived at on the basis of objective criteria which are further explained in the Commentary. In the reverse case, however, if the domestic law concept of employment sticks to the formal contractual relationship, this concept remains relevant for tax treaty purposes even if on the basis of objective criteria another person would be seen as the employer; the objective criteria are not able to oust domestic law. It is unclear why the context should be able to oust excessively broad domestic law meanings which disregard the formal contractual relationship while not having enough strength to oust excessively narrow domestic law meanings which stick to the formal contract and generally do not consider substantive criteria.

By utilising all grammatical, systematic, teleological and historical means of interpretation it is possible to derive an autonomous meaning of the term “employer” which does not rely on domestic law. The systematic context of “employer” in relation to the term “employment”, the common international understanding of personal services being performed independently or dependently, the autonomous criteria for identifying dependent agents, the historic development of the 183-day rule during which the term “employer” was not used, the *OECD Commentary* 1992 which supports an autonomous meaning of “employer” and provides many relevant employer functions—all these means of interpretation speak in favour of an autonomous meaning of “employer”. Even though for tax treaties concluded after the adoption of the OECD Model Convention 2010 the new Commentary is a relevant means of interpretation, it is only one of many other such means. When considering this and the unchanged wording of Article 15 it is questionable whether domestic law has much importance as regards the interpretation of “employer”.⁶¹ Not least the *OECD Commentary* 2010 itself contains detailed guidance on an autonomous meaning of “employer” with its objective criteria. [Ⓞ]

⁶¹ See also Lang, above fn.13, 105.

[Ⓞ] Employers; Income tax; Model laws; OECD; Overseas employees; Posted workers; Secondment; Treaty interpretation