

Edited by Ekkehart Reimer, Nathalie Urban and Stefan Schmid

Permanent Establishments
**A Domestic Taxation,
Bilateral Tax Treaty
and OECD Perspective**

2010/2011

Permanent Establishments

A Domestic Taxation,
Bilateral Tax Treaty
and OECD Perspective

Editors

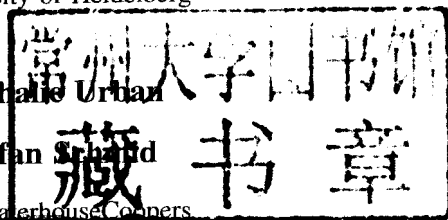
Ekkehart Reimer

University of Heidelberg

Nathalie Urban

Stefan Schindl

PricewaterhouseCoopers



Wolters Kluwer

Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Disclaimer: Information in the book relates to a subject that is constantly evolving due to changes in laws and regulations. This book is provided for general guidance only. It does not constitute the provision of legal advice, accounting services, investment advice, or professional consulting of any kind. The information provided herein should not be used as a substitute for consultation with professional tax, accounting, legal or other competent advisers. Before making any decision or taking any action, readers should consult a professional adviser who has been provided with all pertinent facts relevant to the individual situation. The information herein is provided 'as is' with no assurance or guarantee of completeness or accuracy, and without warranty of any kind, express or implied.

Printed on acid-free paper.

ISBN 978-90-411-3123-2

© 2011 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham and Eastbourne

About the Editors

Ekkehart Reimer passed his State Exams in Law in 1996 and 1998. As an assistant to Professors Klaus Vogel and Moris Lehner at the Research Center for European and International Tax Law at the University of Munich from 1996 to 2004, he authored and co-authored many publications in the area of Double Taxation Conventions as well as European Tax Law and Constitutional Law. After earning a Doctor Juris degree at the University of Munich in 2003, for which he was awarded the International Fiscal Association's Mitchell B. Carroll Prize in 2004, Ekkehart Reimer wrote a *Habilitationsschrift* on issues of conflicts of interests from a public law perspective. In 2005, he became chair of European and International Tax Law at the University of Heidelberg and was appointed Director of the Institute of Finance and Tax Law at the Faculty of Law in 2006. Since 2009, Prof Reimer has also served as a Judge at the High Administrative Court of the State of Baden-Württemberg.

Stefan Schmid studied business administration at the University of St. Gallen (Switzerland) and graduated with a lic. oec. HSG, the equivalent of a Master's degree in Finance and Accounting. In 1998 he was certified as a Swiss tax expert. In 2006 he became a corporate tax partner with PricewaterhouseCoopers Switzerland. He specializes in providing international tax planning services to multinational groups with an emphasis on implementing tax optimized business models, profit repatriation techniques and structuring of ownership and exploitation of intellectual property. He also serves as leader of the China Business Group in Switzerland. His professional career includes assignments in both New York and Shanghai.

Nathalie Urban studied business administration at the University of St. Gallen (Switzerland) and graduated with a lic. oec. HSG, the equivalent to a Master's degree in Finance and Accounting. After university, she worked in the audit department of a major accounting firm in Zurich for two years and then joined

ABOUT THE EDITORS

PricewaterhouseCoopers where she became a Swiss certified public accountant in 1996. Shortly thereafter she was certified as Swiss tax expert. She specializes in corporate tax law – particularly international structuring and business related legal matters. She has extensive experience in reorganization-, merger and value chain transformation projects including IP planning. During her consulting career, she worked for PwC in London and became a corporate tax partner in 2002.

List of Abbreviations

AALCC Bull	Asian African Legal Consultative Committee Bulletin
AAR	Authority for Advance Ruling (India)
AAT(A)	Administrative Appeals Tribunal (of Australia)
ABIC	Administrative Bureau of Industry and Commerce
ABN	Australian Business Number
ACA	Annual Compliance Arrangement
ACIT	Additional Commissioners of Income Tax (India)
ADIT	Additional Directors of Income Tax (India)
AFZ	Administratie van fiscale zaken (Belgian fiscal authority)
AG	Aktiengesellschaft <i>or</i> Assessment Guidelines
AI	Canton Appenzell Inner Rhodes
ALP	The arm's length principle
Anm.	Anmerkung (remark)
AOA	Authorized OECD Approach
AOIF	Administratie van de ondernemings- en inkomensfiscaliteit (Belgian administration of corporation and income taxation)
AP	Arbeitsberichte Praxis, Nachschlagewerk des BFH (Germany)
APA	Advance Pricing Agreement
AR	Canton Appenzell Ausser Rhodes
Art.	Article(s)
ASIC	Australian Securities & Investment Commission
AStG	Außensteuergesetz
ATA	American Taxation Association
ATC	Australian Tax Cases
ATO	Australian Taxation Office

LIST OF ABBREVIATIONS

ATR	Australian Tax Reporter
BAS	Business Activity Statement
BFH	Bundesfinanzhof (Federal Tax Court, Germany)
BFH/NV	Sammlung amtlich nicht veröffentlichter Entscheidungen des Bundesfinanzhofs (journal, Germany)
BFHE	Amtliche Sammlung der Entscheidungen des Bundesfinanzhofs (Official Court Reporter, Germany)
BFH-PR	Entscheidungen des BFH für die Praxis der Steuerberatung (journal, Germany)
BG	Bundesgericht (Swiss Federal Court)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Swiss Federal Court, Official Reporter)
BIFD	Bulletin of International Fiscal Documentation (now, BIT)
BIS	Bank for International Settlements
BIT	Bulletin of International Taxation (formerly, BIFD) <i>or</i> Bilateral Investment Treaty
BMF	Bundesminister der Finanzen (minister of finance of the Federal Republic of Germany)
BNB	Beslissingen in belastingzaken, Nederlandse belastingrechtspraak
BStBl	Bundessteuerblatt (Official Federal Tax Journal, Germany)
BT	Business Tax
BTR	British Tax Review
BV	Schweizerische Bundesverfassung
BVI	British Virgin Islands
C.I.R.	Cost-Income-Ratio
CAA	Cour administrative d'appel (higher administrative court)
CBDDT	Central Board of Direct Taxes
CDFI	Cahiers de Droit Fiscal International (journal, Netherlands)
CE	Council of European Union
cf.	confer
CFA	(OECD's) Committee on Fiscal Affairs
CFC	Controlled Foreign Company
CFE	Centre de Formalités des Entreprises
CFO	Chief Financial Officer
CGT	Capital Gains Tax
CIT(A)	Corporate Income Tax (Act)
cl.	clause
CLR	Commonwealth Law Reports
Co.	Company
Comm.	Commentary <i>or</i> Commission
Corp.	Corporation
CPM	Cost-plus method

LIST OF ABBREVIATIONS

CTA	Corporation Tax Act
Cth	Commonwealth
CTL	Corporation Tax Law
CTLBC	Corporation Tax Law Basic Circular
CTLEO	Corporation Tax Law Enforcement Order
CTLER	Corporation Tax Law Enforcement Regulation
CTLIC	Corporation Tax Law Individual Circular
CTPA	Centre for Tax Policy and Administration (OECD)
CTR	Indian journal, tax case reports
CV	Curriculum Vitae
CUPM	Comperable uncontrolled price method
Cush.	Cushing, Massachusetts (USA)
D.C.N.J.	District court of New Jersey
DBA	Doppelbesteuerungsabkommen (DTT)
DBG	Bundesgesetz über die direkte Bundessteuer
(D)CIT	(Deputy) Commissioner of Income Tax (India)
dd.	decided
(D)DIT	(Deputy) Director of Income Tax (India)
DE	Domestic enterprise
DFT	Direct Federal Tax
DIA	Discretionary Investment Agreement
DIR	Detailed Implementation Regulations
DKK	Danish Krone
DTC	Double Tax Convention/Agreement/Treaty
E&P	Earnings and profits
E.F.S	Economic and Financial Section (League of Nations Publications)
e.g.	for example
EAS	Express-Answering-Service
EBIT	Earnings before interest and taxes
EBITDA	Earnings before Interest, Taxes, Depreciation and Amortization
EC	(former) European Community (now European Union)
ECJ	European Court of Justice
ECR	European Court Reports
ed./eds.	Editor(s)
Edn	Edition
EEA	European Economic Area
EEC	European Economic Community
EEK	Estonian Kroon
EFG	Entscheidungen der Finanzgerichte (Tax Court Reporter, Germany)
EIT	Enterprise income tax
EPIL	Max Planck Encyclopedia of Public International Law
EStG	Einkommensteuergesetz (Income Tax Act, Germany)

LIST OF ABBREVIATIONS

EStR	Einkommensteuer-Richtlinien (Income Tax Guidelines)
ESTV	Eidgenössische Steuerverwaltung (reports of the federal tax administration, Switzerland)
ET	European Taxation (journal, Netherlands)
et al.	et alii
et seq.	et sequens/sequentes (and the following pages/numbers)
etc.	et cetera
ETCB	Estonian Tax and Customs Board
EU	European Union
EUR	Euro
F.Supp.	Federal Supplement (publishing US district court cases)
FA	Finance Act
FAS	Federal Antimonopoly Service (Russia)
FB	fixed base
FBT	Fringe benefit tax
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FCR	Financial Condition Report
FCT	Federal Commissioner of Taxation
FDI	Foreign direct investment
FE	Foreign enterprise
Fed. Cir.	Federal Circuit
Fed. Cl.	United States Court of Federal Claims
FEIT	Foreign Investment and Foreign Enterprises
FGU	Federal State Institution (Russia)
FIE	Foreign invested enterprise
FITO	Foreign income tax offset
FJF	Fiscale Jurisprudentie/Jurisprudence fiscale
FLE	Foreign Legal Entity
Fn	Footnote
FP	Fiscaal praktijkblad (journal, Netherlands)
FSA	Financial Service Agency
FSEA	Functionally separate entity approach
FTA	Federal Tax Administration
FTC	Foreign Tax credit
FY	Fiscal Year
GAAP	Generally Accepted Accounting Principles
GBP	Great Britain Pound
GCM	General Counsel Memorandum
GL	Canton Glarus
GmbH	Gesellschaft mit beschränkter Haftung (limited liability Company)
GST	Goods and Services Tax (Australia)
GSTA	Goods and Services Tax Act (Australia)

LIST OF ABBREVIATIONS

GTL	General Tax Law
GRP	Gross Regional Product
GU-OPFR	Office of Russia's Pension Fund
HFR	Höchststrichterliche Finanz-Rechtsprechung (journal, Germany)
HMRC	HM Revenue & Customs
HTA	Hydrocarbon Tax Act
HUF	Hungarian forint
i.e.	id est (that is, that means)
IAS	International Accounting Standard
IBFD	International Bureau of Fiscal Documentation
Ibid.	Ibidem (at the same place)
ICTA	Income and Company Taxes Act
Id.	Idem (the same author)
IFA	International Fiscal Association
IFRS	International Financial Reporting Standard
IKStR	Inter-cantonal tax law
In re	in the matter (of)
Inc.	Incorporation
IRAP	Imposta regionale sulle attività produttive
IRC	Internal Revenue Code
IRES	Imposta sul reddito delle società
IRS	Internal Revenue Service
ISP	Internet Service Provider
ISrR	Internationales Steuerrecht (journal, Germany)
ITA	Income Tax Act
ITAA	Income Tax Assessment Act
ITAC	Italian Tax Assessment Code
ITC	Income Tax Code
ITD	Income Tax Department (India)
ITG	Income Tax Guidelines
ITLBC	Income Tax Law Basic Circular
ITLEO	Income Tax Law Enforcement Order
ITLER	Income Tax Law Enforcement Regulation
ITLIC	Income Tax Law Individual Circular
ITO	Income Tax Officer (India)
ITPJ	International Transfer Pricing Journal (journal, Netherlands)
ITR	International Tax Review (journal, UK) <i>or</i> Income Tax Report (journal, India)
IWB	Internationale Wirtschaftsbrieife (journal, Germany)
JPY	Japanese yen
JV	joint ventures
KERT	Key Entrepreneurial Risk Taking

LIST OF ABBREVIATIONS

KRNG	Kammarrätten i Göteborg (appeal court in Göteborg, Sweden)
KRNS	Kammarröten i Stockholm (appeal court in Stockholm, Sweden)
LBT	Local Business tax
LIBOR	London Interbank Offered Rate
lit.	littera (letter)
LLC	Limited Liability Company
LLP	Limited Liability Partnership
loc. cit.	Loco citato (in the place cited)
Ltd.	Limited company
m.no., m.nos.	marginal number(s)
MAP	mutual agreement procedure
Mass.	Massachusetts
MAT	Minimum Alternate Tax (India)
MBB	Maandblad Belasting-Beschouwingen (journal, Netherlands)
MC	Model Tax Convention on Income and on Capital
Minfin	Ministry of Finance of the Russian Federation
Misc.	Miscellaneous
MK	(Netherlands 12)
MNC	Multinational Corporation
MNE	Multinational Enterprise
MNS RF	Ministry of Taxation of the Russian Federation
MOC	Ministry of Commerce
MOF	Ministry of Finance
Mum. ITAT	Income Tax Appellate Tribunal, Mumbai
N.Y.S.	New York Supplement
N/A	Not Available
NB	nota bene (note)
NID	Notional Interest Deduction
NL	The Netherlands
no., nos.	number(s)
Nov.	November
NPC	National People's Congress
NSV	Nederlands standaardverdrag
NTA	National Tax Administration Agency
NTFR	Nederlands tijdschrift voor fiscaal recht (journal, Netherlands)
Oct.	October
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OJ	Official Journal
OR	Obligationenrecht (Swiss Code of Obligations)
ÖStZ	Österreichische Steuer-Zeitung (journal, Austria)
P&L	Profit and Loss

LIST OF ABBREVIATIONS

p./pp.	page/pages
para.	paragraph
PAYG	Pay As You Go
PCA	Public Companies Act
PE	Permanent establishment
PID	Patent income deduction
POB	Place of business
POEM	Place of effective management
POM	Place of management
PRC	Peoples Republic of China
PUF	Presses Universitaires de France
Q&A	Questions and Answers
R&D	Research and Development
RÅ	Regeringsrättens arbok (Sweden)
Rass. trib.	Rassegna Tributaria (journal, Italy)
RD	Royal Decree
RDTI	Rivista di Diritto Tributario Internazionale (periodical, Italy)
Rep.	Republic
Req.	Request
Req.n.	File Number (France)
Rev. Proc.	Revenue Procedure
Rev. Rul.	Revenue Ruling
RF	Russian Federation
RIW	Recht der Internationalen Wirtschaft (journal, Germany)
RJF	Revenue de Jurisprudence Fiscale (journal, France)
RLE	Russian Legal Entity
RMB	Renminbi (Chinese currency)
RO	Representative Offices
Rolno.	File Number (Netherlands)
RPM	Resale price method
RStBl.	Reichssteuerblatt (Official Tax Journal of the former German <i>Reich</i>)
Rt.	Norsk Retstidende (Norway)
S.C.R.	Supreme Court Reports (Canada)
SA	Société anonyme
SAP	Substituted accounting period
SAR	Spezial Administrative Region
SAS	Société par actions simplifiée
SAT	State Administration of Taxation
SC	Supreme Court
sec.	Section
Sez. trib.	Sezione tributaria (di Corte di Cassazione) (tax department (of federal court of justice))

LIST OF ABBREVIATIONS

SG	Canton St. Gallen
SKM	Skatteministeriet (Danish Ministry of Taxation)
Skr.	Skrivelse (letter)
SOU	Statens offentliga utredningar (Swedish Government Official Reports)
SPF	Significant people function
SRN	Skatterättsnämnden (tax department, Sweden)
SSID	Service Set Identifier
STA	State Tax Act
Stb.	Der Steuerberater (journal, Germany)
StHG	Bundesgesetz zur Harmonisierung der direkten Steuern der Kantone und Gemeinden
SWI	Steuer und Wirtschaft International (journal, Austria)
SWK	Steuer und WirtschaftsKartei (periodical, Austria)
TA	Tribunal administratif (administrative court)
TAA	Tax Assessment Act <i>or</i> Tax Authority Act
TAM	Technical Advice Memorandum
TC	Tax Commissioner (US)
TCA	Tax Control Act
TCGA	Taxation of Chargeable Gains Act
Tex. Civ. App.	Texas Civil Appeals Reports
TFEU	Treaty on the Functioning of the European Union (emerged from the former EEC/EC Treaty, entered into force on 1 December 2009 according to the Treaty of Lisbon)
TFO	Tijdschrift voor Fiscaal Ondernemingsrecht (journal, Netherlands)
TFRnet	Tijdschrift voor Fiscaal Recht net (website of journal, Belgium)
TfS	Tidsskrift for Skatter og Afgifter
THA	Tax Harmonisation Act
TMIJ	Tax Management International Journal (journal, U.S.)
TNI	Tax Notes International (journal, U.S.)
TNMM	Transactional net margin method
TPSM	Transactional profit split method
TR	Taxation Ruling
TRE	Tax Resident Enterprise
Treas. Reg.	Treasury Regulations
TSA	Danish Tax at Source Act
TSD	Estonian declaration of income and social tax, unemployment insurance premiums and contributions to mandatory funded pension
TTJ	Tax Tribunal Judgement (India)
TV	Television
TVM	Time Value of Money

LIST OF ABBREVIATIONS

U.S./US	United States
UAE	United Arab Emirates
UFNS	Federal Internal Revenue Service (Russia)
UK	United Kingdom
UN	United Nations
UNTS	United Nations Treaties
USD	US Dollar
USSR	Union of Soviet Socialist Republics
UST	Unified social tax
VAT	Value-added tax
VCLT	Vienna Convention on the Law of Treaties
VGer LU	Verwaltungsgericht des Kantons Luzern
viz.	videlicet
Vol.	Volume
VwGH	Verwaltungsgerichtshof
WFR	Weekblad fiscaal recht (periodical, The Netherlands)
WStB	Wehrsteuerblatt
WTO	World Trade Organisation
ZG	Canton Zug
ZH	Canton Zürich

Preface

Less than two decades ago, permanent establishments (or at least certain types) were labeled as ‘the black hole’ of international taxation. Although both tax planning and tax compliance in connection with PEs still entail numerous thorny problems, IFA’s 2009 World Congress in Vancouver showcased the PE concept in an innovative and meaningful way. Ongoing efforts by the OECD to improve Articles 5 and 7 of its Model Tax Convention, the OECD Commentary and the OECD Reports, also aim at developing more consistent rules on the allocation of income in PE situations. In light of these developments, the time has come for a broader examination of today’s ‘state of the art’ in PE taxation.

This book has a long history. One of the late masters of international taxation, Klaus Vogel (1930–2007), had the idea of supplementing his renowned Commentary on Double Taxation Conventions by a series of books, each designed to provide comprehensive guidance to tax practitioners, treaty negotiators and academics on the main issues of tax treaty law. In fact, he initiated this very book. It covers the treatment of permanent establishments both in domestic tax practice and in the network of double taxation conventions from a truly international perspective.

Along the lines of the 2010 OECD MC, the General Part of this work explicates the meaning of each relevant term in detail. In doing so, the book follows the general understanding that each term should be interpreted, as far as possible, autonomously and without recourse to the meaning it may, or may not have under any of the domestic legal orders involved. In turn, the country chapters reflect extensive experience with, and address deviations from, OECD standards (either textual or interpretative) in nineteen important national economies. This book, however, does not aim at replacing a full Commentary. It refers to domestic case law for selected key issues.

PREFACE

This book is the result of contributions received from an array of experts scattered around the globe. All of them work within, or have a significant background in, academia. Many of them are involved in day-to-day tax practice.

In this respect, we would like to express our sincere thanks to Marianne Orell, Anna-Maria Widrig-Giallouraki and Markus Kramer who coordinated the various country teams and who made tremendous efforts to obtain a consistent overview of the permanent establishment practice in the countries profiled. We owe a special debt of gratitude to the authors of the country reports – each of whom was willing to call upon their professional experience to provide invaluable insights. Ruben Martini helped during the preparation of the General Part of the book in Heidelberg. He, as well as Prof Dr Alexander Rust, LL.M. (NYU), University of Luxembourg, and Matthias Valta, University of Heidelberg, have enriched numerous discussions on PE issues reflected in the General Part. We extend our sincere gratitude to Gwen de Vries and Lijntje Zandee of Kluwer Law International in Alphen aan den Rijn, as well as to Ginny Faber in New York and Lou Rolla in Florida, who ensured the efficient and smooth progress of the book. Without each of these individuals, this book would not have found its way to readers.

In addition to the 2010 update of the OECD MC, this book takes into consideration case law and literature published through early 2009. Later important changes have been indicated in this work and, in some cases, analysed in detail. The history of PE taxation will never come to an end. As editors and authors, we welcome all readers' comments.

September 2010

Ekkehart Reimer
Reimer@
uni-heidelberg.de

Stefan Schmid
stefan.schmid@
ch.pwc.com

Nathalie Urban
nathalie.urban@
ch.pwc.com

Permanent Establishment in the OECD Model Tax Convention