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The interpretation of the term “employer” in
Article 15(2) (b) OECD Model
and its implication on short-term
secondments
- from a Swedish perspective

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Contents

SUMMARY	1
SAMMANFATTNING	3
ABBREVIATIONS	5
1 INTRODUCTION	6
1.1 Background	6
1.2 Aim of the Study	6
1.3 Method and Material	7
1.4 Delimitation	7
1.5 Disposition	8
2 THE OECD MODEL	9
2.1 Essential concepts of international taxation	9
2.2 An introduction to the OECD Model	9
2.3 Article 15 OECD Model	10
2.4 The term “employer” in Article 15(2) (b) OECD Model	12
2.4.1 <i>The issues of interpretation</i>	12
2.4.2 <i>Formal or economic employer</i>	12
2.5 Concluding remarks	13
3 TAX TREATY INTERPRETATION	14
3.1 The Vienna Convention on the Law of Treaties	14
3.2 Article 3(2) OECD Model	15
3.2.1 <i>The provisions stipulated in the Article</i>	15
3.2.2 <i>The tension between domestic and autonomous international interpretation</i>	15
3.3 The Commentary on the OECD Model	16
3.3.1 <i>The legal status of the Commentary</i>	16
3.3.2 <i>The relationship between the Commentary and the VCLT</i>	17
3.4 The Mutual Agreement procedure in Article 25 OECD Model	18
3.5 The interpretation of tax treaties in Swedish case law	19
3.5.1 <i>A shortage of authoritative cases</i>	19
3.5.2 <i>The Luxembourg case</i>	19
3.5.3 <i>The United Kingdom case</i>	20
3.6 Concluding remarks	21

4	THE COMMENTARY ON ARTICLE 15(2) OECD MODEL	22
4.1	The provisions contained in the Commentary	22
4.1.1	<i>Paragraph 8 of the Commentary on Article 15(2) OECD Model</i>	23
4.1.2	<i>The extension of the stipulations</i>	24
4.2	The 2007 Revised Public Discussion Draft on changes in the Commentary	25
4.3	The Brynäs Ice Hockey Association case	26
4.4	Concluding remarks	27
5	THE MEANING OF THE TERM “EMPLOYER”	28
5.1	A versatile process of interpretation	28
5.2	Swedish case law on the interpretation of the term “employer”	28
5.2.1	<i>The White Arkitekter case</i>	29
5.2.2	<i>The Dansico Sugar cases</i>	30
5.2.3	<i>The SAS case</i>	31
5.3	A comparative outlook	33
5.3.1	<i>The international dimension as a learning experience</i>	33
5.3.2	<i>Germany</i>	34
5.3.2.1	The German Federal Tax Court’s decision of 21 August 1985	34
5.3.2.2	The approach adopted in Germany	35
5.3.3	<i>The Netherlands</i>	35
5.3.3.1	The Netherlands Supreme Court’s decisions of 1 December 2006	35
5.3.3.2	The approach adopted in the Netherlands	36
5.4	Expressed arguments for the concept of formal employer	37
5.5	Expressed arguments for the concept of economic employer	38
5.6	Concluding remarks	38
6	ANALYSIS	40
6.1	Article 15 OECD Model	40
6.2	Is there a true meaning to the term “employer”?	40
6.3	The Swedish experience – the approach adopted as derived from the case law	42
6.4	Practical consequences due to the attitude assumed by the Swedish Tax Agency	43
6.5	A preferred way of understanding the concept	44
6.5.1	<i>The VCLT</i>	44
6.5.2	<i>Article 3(2) OECD Model</i>	45
6.5.3	<i>The Commentary on Article 15(2) OECD Model</i>	46
6.6	Alternatives for the future of Article 15 OECD Model	47

BIBLIOGRAPHY	49
TABLE OF CASES	54

Summary

The global mobility is constantly increasing and numerous of international groups have recognised the need for a dynamic workforce. In order to adapt to the international market and to widen the knowledge within a multinational group, employees are seconded between affiliated companies.

The secondment of an employee puts several questions of taxation to the fore. Primarily, the issue as to where the remuneration should be taxable is made topical. When different States present deviating tax claims, a situation of juridical double taxation might arise. In order to mitigate the occurrence of such taxation and to encourage cross-border movement, States enter into tax treaties. The vast majority of the current tax treaties are drafted in accordance with the OECD Model.

The fundamental provisions regarding the taxation of cross-border streams of income from employment are stipulated in Article 15 OECD Model. However, the wording of the Article is ambiguous and it contains several terms that are not defined. Such undefined conditions in the Model Convention have proven to cause interpretative problems. One of the most controversial issues of interpretation is the understanding of the term “employer” in Article 15(2) (b) OECD Model.

The assessment of which of the companies that should be regarded as the *real* employer of the seconded employee can prove to be decisive for the awarding of the taxing rights. The current legal position on the construal of the term “employer” is divided into two different approaches, namely the concept of formal and economic employer. The circumstance that the expression can be perceived throughout various perspectives should not be regarded as satisfactory, since the legal and the economical consequences of a secondment can be difficult to establish in advance.

In Sweden, the County Administrative Court and the Administrative Court of Appeal have not illustrated an unanimous attitude towards the understanding of the term “employer”. However, the Swedish Tax Agency seems to be determined to maintain a strict interpretation, based on the concept of formal employer. Such an attitude causes many problems for internationally active companies. The inconvenience is especially obvious when an employee is seconded to or originating from a Contracting State that advocates the concept of economic employer.

In order to resolve the issues surrounding the term “employer”, and to establish which of the concepts that should be prevailing, guidance can be drawn from the international methods of tax treaty interpretation. Thus, the Vienna Convention on the Law of Treaties, the general rule of interpretation in Article 3(2) OECD Model and its adjacent Commentary play an important role in the interpretative process. In addition, case law from the

different OECD Member countries and the opinions expressed in the legal doctrine might be used as arguments supporting either of the concepts.

However, when evaluating the wording of the available international methods of interpretation, it is difficult to establish a comprehensible solution to the juridical impasse of today. In addition, the current legal remedies are not efficient enough to sort out a conflict of interpretation between the Contracting States. Thus, in order to accord the requirements of numerous of seconded employees and to secure a suitable interpretation of the term “employer”, the OECD and its member countries need to acknowledge the fact that amendments to the OECD Model or the Commentary are necessary.

Sammanfattning

Den internationella rörligheten ökar ständigt och en övervägande del av de multinationella koncernerna har uppmärksammat behovet av en dynamisk arbetskraft. För att kunna konkurrera på marknaden och bidra till en global kunskapsutväxling, uppmuntras följaktligen personal till att medverka i tidsbegränsade utstationeringar vid utländska moder- eller dotterbolag.

Vid utsändningen av en anställd aktualiseras en mängd beskattningsfrågor. En av de primära frågeställningarna som uppkommer är bedömningen av vilket land som ska ha rätt att beskatta de gränsöverskridande tjänsteinkomsterna. I det fall då två olika stater gör anspråk på att beskatta den aktuella inkomsten uppstår juridisk dubbelbeskattning. För att lindra uppkomsten av en sådan beskattning och för att uppmuntra internationell rörlighet, ingår länder bilaterala eller multilaterala skatteavtal. Den övervägande delen av dagens skatteavtal är utformade i enlighet med OECD:s modellavtal.

De grundläggande reglerna avseende beskattning av gränsöverskridande tjänsteinkomst stipuleras i artikel 15 i OECD:s modellavtal. Dessvärre har det visat sig att artikeln ger upphov till en rad olika tolkningsproblem. Detta då den är otydligt formulerad samtidigt som den innehåller ett antal odefinierade uttryck. Ett av de mest uppmärksammade problemen associerat med artikel 15 i OECD:s modellavtal, rör tolkningen av begreppet ”arbetsgivare” i punkten 2 (b).

Bedömningen av vilket bolag som ska anses vara den utsände arbetstagarens *egentlige* arbetsgivare kan visa sig vara avgörande för vilket land som bör tilldelas beskattningsrätten. Det nuvarande rättsläget avseende arbetsgivarbegreppet är fördelat i två olika förhållningssätt. Utifrån synsätten riktas fokus antingen på den formella eller på den ekonomiska arbetsgivaren. Omständigheten att två olika perspektiv kan antas resulterar många gånger i delad uppfattning beträffande definitionen av den *egentlige* arbetsgivaren. Ett sådant förhållande leder till en ovisshet som inte bör ses som önskvärd. Detta då den bidrar till att det kan vara svårt att förutse de juridiska och ekonomiska konsekvenserna av en utsändning.

I Sverige har kammarrätten och länsrätten inte visat något enhälligt resonemang vid tolkningen av arbetsgivarbegreppet. Emellertid verkar det som att Skatteverket är övertygat om att termen ”arbetsgivare” ska tolkas restriktivt i enlighet med det formella arbetsgivarbegreppet. Ståndpunkten medför problem för företag som ingår i multinationella koncerner. Svårigheterna blir särskilt tydliga då en utsändning involverar en fördragslutande stat som förespråkar det ekonomiska arbetsgivarbegreppet.

För att finna en lösning på problematiken kring arbetsgivarbegreppet och för att fastställa vilket av koncepten som bör tillämpas, kan vägledning hittas i

de internationella tolkningsmetoderna. De metoder som aktualiseras vid en sådan tolkning är Wienkonventionen om traktaträtten, den allmänna tolkningsregeln i artikel 3(2) i OECD:s modellavtal samt dess tillhörande kommentarer. Vidare kan även domstolsavgöranden från de olika medlemsländerna i OECD samt juridisk doktrin på området vara vägledande för att hitta argument för de olika koncepten.

Trots att det finns ett antal tolkningsmetoder att utgå ifrån är det svårt att hitta en uppenbar lösning på de juridiska svårigheterna som är associerade med arbetsgivarbegreppet. Slutsatsen beror till största delen på det faktum att ordalydelserna i de tillgängliga tolkningsmetoderna är vagt formulerade. Dessutom är de legala möjligheterna att lösa en konflikt mellan de fördragsslutande staterna alltför ineffektiva. Följaktligen behöver OECD och dess medlemsstater uppmärksamma att vissa modifieringar krävs i modellavtalet eller dess kommentarer. Detta för att möta kraven från ett ökat antal av de utsända arbetstagarna samt för att säkerställa en korrekt tillämpning av arbetsgivarbegreppet i framtiden.

Abbreviations

The Commentary	The Commentary on the OECD Model Tax Convention on Income and on Capital
e.g.	for example
et al.	and others
et seq.	and the following
i.e.	id est
OECC	The Organisation for European Economic Cooperation
OECD	The Organisation for Economic Cooperation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
p.	page
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

The fact that the mobility between countries is intensifying and that the world is becoming smaller in relation to economics and law is a reality that modern companies need to acknowledge. In this regard, the international movement of employees is an important prerequisite for a multinational group in order to remain competitive. The need for a dynamic workforce has been recognised by numerous of international enterprises and the temporary secondments of employees to affiliated companies are constantly increasing.¹

The global mobility of workers puts several issues of taxation to the fore, in particular the question as to which country has the right to tax the cross-border income of a seconded employee. In a situation where two States present deviating tax claims, double taxation might arise. With regards to mitigate the occurrence of such taxation, tax treaties are concluded between States.

A vast majority of the established tax treaties are based on the OECD Model. The provisions concerning the allocation of taxing rights in respect of a cross-border employment are stipulated in Article 15 OECD Model. However, the wording of the Article is ambiguous and unclear, which generates problems of interpretation. One of the most controversial unresolved issues of interpretation is the definition of the term “employer” in Article 15(2) (b) OECD Model. The current legal position, on the understanding of the concept, is inconsistent in several member countries which might lead to conflicting claims of taxation. Since such conflicts are due to a divided approach on which company should be regarded as an employer, the question is of utmost importance for a seconded taxpayer.

1.2 Aim of the Study

The purpose of the thesis is to analyse the emergence of the divided approach on the interpretation of the term “employer”. In order to illustrate the practical problems surrounding the issue, the current approach adopted by the Swedish Tax Agency will be examined from a critical perspective. To provide a comprehensible outline, selected case law from the various Swedish Administrative Courts will be examined on outbound and inbound short-term secondments involving Sweden.

¹ The increased mobility of employees has attracted the attention of various legal and economical journals, see for example; Butovitsch (2009) p. 24 et seq.

Furthermore, the author will seek to establish the preferred interpretation of the concept based on available instruments of interpretation and a comparative study of case law. The thesis will also evaluate alternative ways to clarify the term “employer” in order to facilitate the future applicability of tax treaties drafted in accordance with the OECD Model.

1.3 Method and Material

The purpose of the thesis will be accomplished through the traditional legal dogmatic method. Hence, an analysis based on the relevant provisions in the OECD Model, international instruments on the interpretation of treaties and significant case law will be performed. In order to enrich the discussion, interesting arguments from the juridical authors will also be put forward.

With the objective to create a comprehensive overview of the current legal situation on the interpretation of the term “employer”, the provisions in the OECD Model and the associated Commentary will be examined. In addition, the Vienna Convention on the Law of Treaties will be considered. Furthermore, relevant case law from the OECD member countries and the legal doctrine will form the basis of the deliberation. The discussion will envisage all relevant sources up until the 10 December 2009.

1.4 Delimitation

As illustrated above, the point of convergence of the thesis will be the interpretation of the term “employer”. Hence, other undefined terms in Article 15 OECD Model in general and subparagraph (b) in particular will not be elaborated further.

The examination will focus on the allocation of taxing rights in regard to income tax. Thus, issues of social security and taxes on personal capital gains of the seconded employee will not be regarded in the discussion. However, the existence of a link between income tax and questions related to social security and personal economic circumstances should not be ignored when dealing with an actual secondment.

Due to considerations of delimitation, only a selection of case law will be reviewed. Hence, the cases referred to in the following should not be regarded as an exhaustive outline, but are merely presented to discern the different approaches adopted by the parties involved. Furthermore, the elaboration will concentrate on cases of *bona fide* secondments, i.e. secondments initiated by non-abusive motives. However, the provisions governing abusive practices will be regarded to the extent that is adequate to supplement the examination.

1.5 Disposition

In order to realise the purpose of the thesis, the examination has its point of departure in an overview of the essential concepts of international taxation and a brief presentation of the OECD Model. Furthermore, the provisions in Article 15 OECD Model will be examined and the core issue of interpretation is introduced. The initial chapter will be followed by a presentation of the different instruments of interpretation available when dealing with tax treaties. The outline will have the characteristics of a general examination, which will present the reader with a sense of the context that the term “employer” exists in.

Thereinafter, with the intention to specify the analysis, the Commentary on Article 15(2) OECD Model will be elaborated. In the following, Swedish case law on the interpretation of the term “employer” will be reviewed in connection with a comparative outlook on cases from Germany and the Netherlands. Before the summarizing analysis, the arguments highlighted in the legal doctrine advocating the different concepts of the term “employer” will be demonstrated. The thesis will be concluded with an analysis that reveals the authors own opinion on the current legal situation. The discussion will revolve around the topics elaborated in the above and what perspective that should be adopted in the future in order to simplify the allocation of taxing rights on short-term secondments.

Since the perspective adopted in the thesis emerge from a Swedish context, a majority of the chapters contain a sequence that deals exclusively with relevant Swedish case law. At the end of every chapter, concluding remarks will sum up the main issues that have been discussed and prepare the reader for the following subsection.

2 The OECD Model

2.1 Essential concepts of international taxation

There are two basic principles to determine the tax jurisdiction of a State, namely the concept of residence and source taxation. The principle of residence taxation is based on the presumption that a State will tax its residents on their worldwide income.² In an international context, such a requirement constitutes a competing motion in regards to the principle of taxation at source, where another State has the ambition to tax all the income and capital gains originating within its jurisdiction, regardless of the residency of the taxpayer.³

Hence, disputes of international taxation arise when two States submit contradictory claims of taxation based on the illustrated principles. In cases of cross-border income from employment, such a conflict could result in a juridical double taxation, where a taxpayer is subject to tax in different States on the identical income. In order to resolve jurisdictional conflicts and mitigate the emergence of double taxation, States enter into tax treaties.⁴

Tax treaties are categorised as international agreements and may only reduce or eliminate the taxing rights of the Contracting States. Thus, a tax treaty can never impose a greater tax burden on the taxpayer than stipulated in domestic law. In general, the incidence of double taxation is mitigated by an allocation of the taxing rights to the State of source, while the State of residence of the taxpayer offers a relief by way of credit or exemption.⁵

2.2 An introduction to the OECD Model

To facilitate the design of tax treaties, various international organs and organisations have developed suggested Model Conventions.⁶ A vast majority of the contemporary tax treaties are based on the model that is prepared by the OECD. Consequently, the OECD Model is regarded as one

² Vogel (1997) p. 9.

³ Miller/Oates (2006) p. 21 et seq.

⁴ Juridical double taxation should be distinguished from economic double taxation, where an income is taxed in two, or several, States in the hands of different taxpayers, see; Vogel (1997) p. 10.

⁵ Miller/Oates (2006) p. 110. The method of relief is dependent on the provisions in the actual tax treaty, see; Article 23A and 23B OECD Model, van Raad (2008) p. 29.

⁶ Examples of Model Conventions are; the OECD Model, the US Model Income Tax Convention and the UN Model Convention.

of the most influential bodies in contributing to the evolution of tax treaties.⁷

The final Draft of the OECD Model was published in 1963.⁸ During the past decades, the underlying purposes of the OECD Model have permeated innumerable international transactions by providing solutions to problems of double taxation, preventing tax evasion and by encouraging cross-border investments.⁹

The provisions contained in the OECD Model are not binding upon the parties and the Contracting States are free to decide on derogations in the drafted tax treaty. Therefore, the OECD Model should be regarded as a template and the wording of a specific tax treaty might differ.¹⁰ Regardless of eventual reservations, Article 15 OECD Model constitutes the fundamental basis of allocating the right to tax cross-border remuneration.¹¹

2.3 Article 15 OECD Model

Article 15 OECD Model governs the taxation of income from employment.¹² The wording of the Article is of an extraordinary complex structure; containing a general rule with one exception, accompanied by an exception of the exception.¹³

The point of departure in Article 15 OECD Model is the assumption that income from employment should be taxed in the State of residence of the employee. However, if the employment is performed in another State, the principal right to tax is shifted to the State of employment (hereinafter: the State of source).¹⁴ Consequently, the basic principle underlying the Article is to award the right to tax to the country where the employment is exercised.¹⁵

The second paragraph of Article 15 OECD Model stipulates an additional exception, which reverts the allocation of the taxing rights back to the State

⁷ Miller/Oates (2006) p. 21.

⁸ The OECD was founded 14 December 1960, with 20 original members. Today, the Organisation consists of 30 member countries and additionally 25 non-member countries who publish their opinions concerning the OECD Model and the Commentary. For a more elaborate discussion, see; Ward *et al.* (2005) p. 6 et seq. and Pötgens (2006) p. 42 et seq.

⁹ Paragraph 7 of the Commentary on Article 1 OECD Model, van Raad (2008) p. 67.

¹⁰ Miller/Oates (2006) p. 95 et seq.

¹¹ Article 15 OECD Model, van Raad (2008) p. 23.

¹² Before 2000, the heading of the Article was "Dependent Personal Services". The change of wording was initiated by the removal of Article 14 OECD Model and has not changed the scope of the Article, see; the first note in the Commentary on Article 15(1) OECD Model, van Raad (2008) p. 291.

¹³ Waldburger (2008) p. 190.

¹⁴ The expression "State of source" has been chosen by the author and is used in several doctrinal articles, see for example; De Broe *et al.* (2000) p. 507. However, critique has been put forward in regards to the definition since it is not always the State of employment that represents the origin of the income, see; Waldburger (2008) p. 186.

¹⁵ Vogel (1997) p. 886.

of residence, regardless of the fact that the employment has been carried out in another State. The purpose of the provision is to facilitate international short-term secondments of employees.¹⁶

A secondment can preferably be described as a situation where an employee is sent abroad by his employer to work for a company within the same group.¹⁷ In general, the transmitting company, established in the employee's State of residence, continues to pay out the full remuneration to the employee. The cost of the employment, attributable to the receiving enterprise, is subsequently compensated through intercompany invoicing.¹⁸

The applicability of the supplementary exception in Article 15(2) OECD Model is dependent on three cumulative conditions. If these conditions are fulfilled, the Contracting State of source is restrained from levying income tax on remuneration derived from an employment exercised within its jurisdiction.¹⁹ The paragraph reads as follows;

2. Notwithstanding the provisions of Paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a. the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned and,
- b. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State and,
- c. the remuneration is not borne by a permanent establishment, which the employer has in the other State.²⁰

Article 15(2) OECD Model contains several terms that are not defined in the Model Convention. Such undefined treaty conditions have been shown to cause numerous problems of interpretation.²¹ One of the most controversial questions of interpretation is the understanding of the term “employer” in Article 15(2) (b) OECD Model. Since the concept of “employer” has a crucial impact on the awarding of the right to tax income from cross-border employment, the interpretation of the term will be the focus of the following examination.²²

¹⁶ Article 15(2) OECD Model, van Raad (2008) p. 23.

¹⁷ Vogel (1997) p. 899.

¹⁸ De Broe *et al.* (2000) p. 503.

¹⁹ *Ibid.* p. 504. Remuneration, as mentioned in Article 15 OECD Model, includes benefits received in respect of an employment such as stock-options and insurance, see; paragraph 2 of the Commentary on Article 15(1) OECD Model, van Raad (2008) p. 291.

²⁰ van Raad (2008) p. 23.

²¹ Examples of undefined terms in Article 15(2) (b) OECD Model are “employer”, “paid by/on behalf of” and “or”, see; De Broe *et al.* (2000) p. 504.

²² Peeters (2004) p. 72.

2.4 The term “employer” in Article 15(2) (b) OECD Model

2.4.1 The issues of interpretation

As illustrated above, Article 15(2) OECD Model focuses on cases of short-term secondments, where the employer has neither residence nor a permanent establishment in the State of source. One of the decisive imperatives governing the provision is dependent on the interpretation of the term “employer” in subparagraph (b).²³

The identification of an employer is essential in several aspects. Primarily, the question functions as a prerequisite for the application of the entire Article. This is because an actual employment relationship is required for the remuneration to qualify as income from employment. If no such relationship exists, the revenue is reclassified as income from self-employment, which falls out of the scope of Article 15 OECD Model. Another important aspect, which generates the most practical problems, is the issue of which of the companies involved in the secondment that should be considered as the employer. The conflicting interpretation of the term is the main topic of the thesis and the divided approach on the issue will be elaborated in the following passage.²⁴

2.4.2 Formal or economic employer

The term “employer” in Article 15(2) (b) OECD Model is perceived by the member countries of the OECD throughout two different approaches.²⁵ The first method has its point of departure in the legal circumstances surrounding the employment and is categorised as the concept of formal employer.²⁶ Such a concept is derived from a domestic civil or labour law definition of the term. In general, an assessment based on the legal approach includes a vast majority of the elements contained in a formal contract of employment. Thus, focus is directed at issues related to where the employee’s obligation to perform duties is situated and which one of the companies involved in the assignment that pays out the remuneration. Consequently, States that advocate the legal approach attaches a great significance to the formal contract of employment.²⁷

The second method is based on a material approach and is known as the concept of economic employer.²⁸ The material application differs from the

²³ The term “employer” has been subject to numerous discussions by the legal scholars, see for example; De Broe *et al.* (2000), Burgstaller (2005) and Waldburger (2008).

²⁴ Burgstaller (2005) p. 123.

²⁵ De Broe *et al.* (2000) p. 509.

²⁶ De Vries (2005) p. 181

²⁷ De Vries (2008) p. 152.

²⁸ Pötgens (2006) p. 580.

formal approach to the extent that the company with a formal contract of employment is not consistently equivalent to the employer. On the contrary, the concept of economic employer concentrates at the reality of the employment. Hence, great emphasis is attached to factors such as the beneficiary of the assignment and the actual bearer of the cost and the risk of the employment.²⁹

It goes without saying that conflicts emerge from the incompatible views adopted by the OECD member States.³⁰ The divided understanding of the term “employer” might even lead to cases of double taxation, despite the existence of a tax treaty.³¹ An example of this undesired consequence is Contracting States who disagree on the question as to whether or not the company in the State of source qualifies as an employer. In such a situation, the State of residence of the employee can decide to deny relief by way of credit or exemption for the tax levied in the State of source based on Article 15(2) OECD Model. In order to justify its decision, the State of residence can claim that the affiliated company, where the employee exercises the employment, does not qualify as an employer. Since the criteria in the second paragraph are cumulative, the approach can deprive the State of source its taxing rights. Consequently, double taxation emerges if the State of source takes on the opposite position, that the company resident within its jurisdiction is in fact the employer, and decides to levy a tax depending on the presumption that the exception in Article 15(2) is not applicable.³²

2.5 Concluding remarks

The OECD Model is the most frequently used Model Convention in the drafting of tax treaties. The fundamental provisions governing the taxation of cross-border income from employment are stipulated in Article 15 OECD Model. However, the wording of the Article is ambiguous and equivocal, which creates problems of interpretation. In particular, the understanding of the term “employer” in Article 15(2) (b) OECD Model can prove to be decisive for the allocation of taxing rights and it is consequently of practical importance for innumerable taxpayers working abroad.

In order to discover the essence of the separated theories surrounding the term “employer”, an analysis of the rules governing the general interpretation of tax treaties and the interpretative process will be contained in the following. The point of departure of the examination is the methods of interpretation stipulated in the Vienna Convention on the Law of Treaties.

²⁹ De Vries (2005) p. 181 et seq.

³⁰ Pötgens (2006) p. 580.

³¹ De Broe *et al.* (2000) p. 518.

³² van Raad (2002) p. 223.

3 Tax treaty interpretation

3.1 The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (hereinafter: VCLT) is an important instrument of public international law, containing rules on the interpretation of international treaties.³³ VCLT is commonly recognized as a codification of customary international law. Since tax treaties have the characteristics of international agreements, it is widely accepted that they are governed by the Convention.³⁴

Article 31 VCLT contains a general rule of the interpretation of undefined treaty terms. As a point of departure, the Article stipulates an interpretation based on good faith in accordance with the ordinary meaning of the treaty at issue. In order to establish the ordinary meaning, special attention should be given to the context, the object and the purpose of the treaty.³⁵ The substance of Article 31 VCLT should be seen in the light of the Official Explanation on the VCLT. In the Official Explanation, it is stated that an interpretation in accordance with good faith is derived from the well-known principle of *pacta sunt servanda*. The accompanying reference to the ordinary meaning of the treaty embodies the essential of the textual approach that is advocated in VCLT.³⁶

Furthermore, Article 32 VCLT stipulates supplementary means of interpretation, if the result of an interpretation in conformity with Article 31 VCLT is considered as ambiguous or unreasonable. Examples of such supplementary means, which are relevant for the interpretation of tax treaties, are the circumstances of the conclusion of the tax treaty and the accompanying preparatory work. Finally, Article 33 VCLT governs the interpretation of treaties that are certified in various languages.³⁷

The provisions specified in the VCLT provide the outer limits of the interpretative process. However, in order to reach a more concrete solution, guidance can be derived from Article 3(2) OECD Model. The Article stipulates the typical rule on interpretation of undefined terms that are expressed in a tax treaty drafted in accordance with the Model Convention.³⁸

³³ Vienna Convention on the Law of Treaties. For an extract of the Convention, see; van Raad (2008) p. 1405 et seq.

³⁴ Lindencrona (1994) p. 78.

³⁵ van Raad (2008) p. 1407.

³⁶ Paragraph 12 of the Official Explanation on Articles 31, 32 and 33 VCLT, van Raad (2008) p. 1414.

³⁷ van Raad (2008) p. 1407 et seq.

³⁸ Article 3(2) OECD Model, van Raad (2008) p. 9.

3.2 Article 3(2) OECD Model

3.2.1 The provisions stipulated in the Article

Article 3(2) OECD Model contains general rules on the interpretation of terms that are not defined in the Model Convention.³⁹ An adequate summary of the Article is that it prescribes the relationship between the means of interpretation in international and domestic law. Primarily, Article 3(2) OECD Model refers to an interpretation of undefined treaty terms based on the domestic law of the Contracting State applying the tax treaty. The reference to an apprehension supported by national legislation subsumes any relevant provision stipulated therein. However, if the domestic law contains diverging meanings of the term at issue, the definition expressed in the income tax legislation will prevail.⁴⁰ Despite the fact that guidance might be found in domestic law, the utmost important and controversial provision in the Article is the limitation of national interpretation to cases that do not result in an understanding contrary to the context.⁴¹

The demarcation of what can be considered to be contrary to the context in Article 3(2) OECD Model is not defined in the Model Convention and only limited guidance can be derived from the Commentary. The circumstance calls for an observation since the scope of the context can be a decisive factor in the interpretative process.⁴²

3.2.2 The tension between domestic and autonomous international interpretation

Several national Courts and Tax Authorities have interpreted Article 3(2) OECD Model as an encouragement to apply domestic law in an almost exclusive manner, with only extreme situations as possible exceptions. The approach might be deduced from the ambition of retaining as much of national autonomy in the field of taxation as possible. However, such an application has been criticized since it does not realize the purpose of concluding tax treaties. The statement is based on the fact that an interpretation established on grounds of domestic law might contribute to, rather than mitigate, double taxation.⁴³

Another aspect of the discussion, which advocates the autonomous international interpretation, deals with the independence of different normative systems. It is undisputable that domestic and international law

³⁹ Article 3(2) OECD Model, van Raad (2008) p. 9.

⁴⁰ De Broe *et al.* (2000) p. 505.

⁴¹ Pötgens (2006) p. 581.

⁴² Paragraph 11 et seq. of the Commentary on Article 3(2) OECD Model, van Raad (2008) p. 93.

⁴³ Van Brunschot (2005) p. 8.

constitutes two different systems. Thus, if an undefined tax treaty term is assumed to be given a meaning in accordance with internal law, without a critical approach on the matter, the balance between the legal systems could be disturbed.⁴⁴

Apart from the VCLT and Article 3(2) OECD Model, another important and rather controversial instrument when interpreting tax treaties that are drafted in conformity with the OECD Model, is the related Commentary. The Commentary contains explanatory notes to the Articles in the Model Convention. Consequently, it is intended to provide further guidance to eventual issues of interpretation.

3.3 The Commentary on the OECD Model

3.3.1 The legal status of the Commentary

The Commentary on the OECD Model is drafted by the Committee on Fiscal Affairs, which is the same Committee that draws up the Model Convention. The content of the Commentary has been updated continuously subsequent to the first Draft Model in 1963, and it has been revised every two years since 1992.⁴⁵ The applicability of the Commentary is advocated by the OECD Council as a recommendation to the Member countries.⁴⁶ The fact that the Commentary should be seen as a mere recommendation highlights the important condition that the provisions contained therein are not binding upon the Member countries.⁴⁷

Despite the fact that it is generally accepted that the Commentary is not compulsory upon any party, endless debates seem to surround its role and function in the interpretative process. Although the subject has been exhausted by numerous of legal authors in several forums, consensus on the matter seems to be an inconceivable ambition.⁴⁸ Obviously, the underlying legal uncertainty can primarily be discerned from the optional nature of the Commentary. It is also precarious that the Commentary is not attributable to any actual tax treaty, but is explicitly intended to illustrate the OECD Model.⁴⁹ Furthermore, there is a debate as to whether or not later amendments to the Commentary may be considered influential in regards to an already existing tax treaty.⁵⁰ Regardless of the academic issues surrounding the matter, a vast majority of the member States assigns the Commentary a major importance when interpreting tax treaties that are

⁴⁴ Heinrich/Moritz (2000) p. 149.

⁴⁵ Ward (2006) p. 97. The current Commentary was revised in July 2008 and is enclosed in van Raad (2008) p. 43 et seq.

⁴⁶ Wattel/Marres (2003) p. 224.

⁴⁷ Vogel (2000) p. 614.

⁴⁸ For examples, see; Vogel (2000), Wattel/Marres (2003), Ward *et al.* (2005), van Brunschot (2005), Engelen (2006) and Ward (2006).

⁴⁹ Ward *et al.* (2005) p. 18.

⁵⁰ Burgstaller (2005) p. 124.

based on the OECD Model.⁵¹ The circumstance has been noticed by the OECD and incorporated into the introduction of the Commentary.⁵²

Some authors have subscribed the Commentary the character of international soft law. However, David A. Ward, the former President of the International Fiscal Association, *et al.* believe that such a categorisation is unnecessary since it rather contributes to the ambiguity of the Commentary than rewarding it any modified status. Additionally, Ward *et al.* argue that the non-binding provisions of the Commentary can not be considered as becoming mandatory to the Contracting States on the grounds of neither customary international law, good faith nor acquiescence.⁵³ The reasoning presented by Frank van Brunschot, a judge of the Netherlands Supreme Court, follows in the same line. As an inference, Brunschot argues that the utmost significance that can be attached to the Commentary is equivalent to an expert opinion of great importance.⁵⁴

Regardless of the non-compulsory nature of the Commentary, one of the most controversial questions concerning its status is whether the application of the Commentary has a legal foundation within the frames of the VCLT.⁵⁵ Since the juridical authors seem to focus on this issue, some of the contributions to the debate will be highlighted in the following.

3.3.2 The relationship between the Commentary and the VCLT

The linguistic attempts to fit the Commentary into the interpretative process in the VCLT tend to revolve around a discussion concerning the context in Article 31 VCLT and the supplementary means of interpretation in Article 32 VCLT.⁵⁶ Professor Klaus Vogel argues that the context, as expressed in Article 31(2) VCLT, is too limited to contain any reference to the Commentary. According to Vogel, such a context is restricted to agreements entered into by the Contracting States in affiliation with the conclusion of the tax treaty at issue. Nevertheless, Vogel advocates an application of the Commentary based on its status as a supplementary means of interpretation in Article 32 VCLT. However, attention is drawn to the rather strict limitation of the Article to cases where an interpretation would remain ambiguous or unreasonable.⁵⁷

Frank Pötgens, who has written a comprehensive study on Article 15 OECD Model, believes that the Commentary does not need to be embedded into the

⁵¹ For examples, see; Pötgens (2006) p. 585 and De Vries (2005) p. 183.

⁵² Paragraph 28 et seq. of the General Remarks on the OECD Model, van Raad (2008) p. 56 et seq.

⁵³ Ward *et al.* (2005) p. 38 et seq.

⁵⁴ van Brunschot (2005) p. 7.

⁵⁵ Ward *et al.* (2005) p. 18.

⁵⁶ Pötgens (2006) p. 74 et seq.

⁵⁷ Vogel (2000) p. 614 et seq.

VCLT to gain an interpretative value. The perception is based on the assumption that the tax treaty at issue is substantially based on the OECD Model.⁵⁸ Such an inference is also shared by David A. Ward, who argues that the Commentary plays an important part in the interpretive process regardless of its relationship to the VCLT. This is because the Commentary forms a part of the present legal context, which should be considered as autonomous from the context expressed in the VCLT.⁵⁹

The above-illustrated means of interpretation present the national Courts with guidance on the application of tax treaties. In a vast majority of the cases, the issue of interpretation is settled through a domestic legal procedure. However, if a taxpayer finds that a national Court is violating the underlying purposes of a tax treaty, Article 25 OECD Model provides a supplementary legal procedure on an intergovernmental level.⁶⁰

3.4 The Mutual Agreement procedure in Article 25 OECD Model

Article 25 OECD Model stipulates that a taxpayer, who is dissatisfied with a decision delivered by one or both of the Contracting States, has the opportunity to present the case to the component authority in his State of residence. Such an opening is available within three years from the first notification of the action, if the subsequent decision results in a taxation that could violate the provisions of the current tax treaty.⁶¹ Thus, the procedure is designed to resolve practical issues of double taxation and inconsistencies in the interpretation of a tax treaty. If the component authority in the State of residence of the complaining taxpayer is unable to settle the case on its own, a mutual agreement procedure should be initiated with the corresponding Contracting State.⁶²

Consequently, the mutual agreement procedure should be seen as a valuable instrument and a resort in cases where the taxpayer regards the legal situation as unsatisfactory. An important component of the procedure is that it is not interfering with remedies available in domestic law. Hence, a mutual agreement procedure is autonomous and can be conducted parallel with an internal legal process.⁶³ However, there is no requirement for the Contracting States to reach an actual solution to the conflict. The only demand that is contained in the Article is that the Contracting States shall employ their foremost endeavours to resolve the dispute.⁶⁴ Nevertheless, in a situation where an issue has remained unresolved for a period of two

⁵⁸ Pötgens (2006) p. 78.

⁵⁹ Ward (2006) p. 98 et seq.

⁶⁰ Article 25 OECD Model, van Raad (2008) p. 32.

⁶¹ *Ibid.* p. 32.

⁶² OECD Manual on Effective MAP, p. 4 et seq.

⁶³ Paragraph 7 et seq. of the Commentary on Article 25(1) and (2) OECD Model, van Raad (2008) p. 406.

⁶⁴ Miller/Oats (2006) p. 105.

years, the taxpayer has a final choice of submitting the matter to arbitration. Such an arbitration process is not intended as an appellate body. It should merely be seen as an instrument to reassure some kind of settling of the conflict.⁶⁵

In order to illustrate how the Swedish Supreme Administrative Court has dealt with the general interpretation of tax treaties, two cases will be analysed in the following. The review will put the various principles of interpretation in a context. Moreover, it will also provide general guidance to the interpretation of the term “employer” in Article 15(2) (b) OECD Model.

3.5 The interpretation of tax treaties in Swedish case law

3.5.1 A shortage of authoritative cases

Judgements where the Swedish Supreme Administrative Court expresses its opinion regarding the interpretation of tax treaties is not commonplace. The following presentation will therefore consist of two landmark rulings with some odd years behind them.⁶⁶ The cases concern the tax treatment of foreign fund management companies and the taxation of capital gains on shares. Thus, the specific questions are not relevant in the context of income from employment and will therefore not be developed further. However, the focus will be directed at the indicative reasoning in the cases, where the Court delivered comprehensive presentations regarding the interpretation of tax treaties.⁶⁷

3.5.2 The Luxembourg case

The Swedish Supreme Administrative Court delivered a statement on its position regarding the general principles of tax treaty interpretation in the *Luxembourg* case from 1996.⁶⁸ The dispute at issue concerned the interpretation of Article 4 in the former tax treaty between Sweden and Luxembourg.⁶⁹ The outcome of the interpretation was decisive in regards to the tax treatment of a number of fund management companies acquired by a Swedish company in Luxembourg.⁷⁰

⁶⁵ Paragraph 63 et seq. Of the Commentary on Article 25(5) OECD Model, van Raad (2008) p. 423.

⁶⁶ The Swedish Supreme Administrative Court, RÅ 1987 ref. 162 and RÅ 1996 ref. 84.

⁶⁷ Nelson (2001) p. 346 et seq. The cases have been considered to be indicative and have been quoted in several following judgements, see; note 70 and 76.

⁶⁸ The Swedish Supreme Administrative Court, RÅ 1996 ref. 84.

⁶⁹ The tax treaty between Sweden and Luxembourg of 1983.

⁷⁰ Pelin (2006) p. 213 et seq. For following judgements, see; The Swedish Supreme Administrative Court, RÅ 1998 ref. 49 and RÅ 2001 ref. 38. The Swedish Administrative Court of Appeal, case number 640-08, case number 641-08 and case number 642-08.

In the judgement, the Swedish Supreme Administrative Court emphasized the fact that Articles 31 to 33 VCLT governs the interpretation of tax treaties. Additionally, the Court stressed that the means of interpretation, as expressed in the VCLT, should not be seen as exclusive to resolve disputes between States. Hence, the provisions are also applicable for conflicts between an individual taxpayer and the Tax Authorities. Furthermore, the Swedish Supreme Administrative Court ascribed the OECD Model and its Commentary special significance by advocating its status as a widely accepted source of law. The Court recommended an interpretation in conformity with the Commentary in cases where a tax treaty has been drawn up in accordance with the OECD Model.⁷¹

Since the Court could not find any guidance in the matter from the wording of the tax treaty nor the Commentary, it also directed its attention to the underlying purpose of the conclusion of tax treaties. The purposes brought to the fore by the Swedish Supreme Administrative Court were to provide relief from double taxation, hinder tax evasion and to achieve an equitable distribution of taxing rights between the Contracting States. Finally, the Court turned its attention to the opinions expressed in the international legal doctrine. Before presenting a final judgement, the Swedish Supreme Administrative Court also discussed the practical consequences of each of the applicable alternatives of interpretation.⁷²

Consequently, the outcome of the case was based on a general assessment of several means of interpretation, which ended up in the conclusion that the fund management companies were considered residents of Luxembourg. Such an inference resulted in the fact that the Swedish company was not imposed any Swedish tax in respect of the holdings. Hence, the Swedish Supreme Administrative Court held in favour of the interpretation that seemed to have gained the majority support in the various analyses.⁷³

3.5.3 The United Kingdom case

Another example, where the Swedish Supreme Administrative Court displayed its adopted position on the interpretation of Article 3(2) OECD Model, is the *United Kingdom* case from 1987.⁷⁴ The question of interpretation in the case regarded Article II(2) and II(3) in the former tax treaty between Sweden and the United Kingdom.⁷⁵ The wording of Article II(3) of the tax treaty was identical to Article 3(2) OECD Model and the dispute concerned the issue whether the term “income”, in Article II(2) of the tax treaty, included capital gains.⁷⁶

⁷¹ The Swedish Supreme Administrative Court, RÅ 1996 ref. 84, The 1996 Annual, p. 358.

⁷² *Ibid.* p. 359 et seq.

⁷³ *Ibid.* p. 361.

⁷⁴ The Swedish Supreme Administrative Court, RÅ 1987 ref. 162.

⁷⁵ The tax treaty between Sweden and the United Kingdom of 1960.

⁷⁶ For following judgements, see; the Swedish Supreme Administrative Court, RÅ 1989 ref. 37 and RÅ 2002 ref. 89.

The Swedish Supreme Administrative Court stressed the fact that any undefined term in a tax treaty should be considered in the light of the treaty as a whole. On the subject of the application of Article II(3) in the tax treaty, the Court advocated the reasoning presented by the Swedish Council for Advanced Tax Ruling in the case. Such reasoning set the domestic interpretation of the term “income” aside in favour of an interpretation based on the underlying principles governing the tax treaty, the provision at issue and the shared intention of the contracting parties.⁷⁷ The Swedish Supreme Administrative Court also referred to the Commentary on the specific Article governing the rules of remittance in the tax treaty.⁷⁸

Because the negotiations of the tax treaty had been held in English, the Swedish Supreme Administrative Court found guidance in the wording of the English version of the tax treaty. Interestingly enough, the Court held in favour of the English understanding of the term “income”, irrespective of the fact that it was contrary to the Swedish view. Since capital gains were excluded from the term “income” in accordance with the English terminology, the Swedish Supreme Administrative Court ruled that Article II(2) of the tax treaty was considered not to contain any capital gains.⁷⁹

3.6 Concluding remarks

The general interpretation of tax treaties is governed by the VCLT. In addition, Article 3(2) OECD Model and the Commentary provide further guidance to the understanding of terms that are undefined in the Model Convention. However, the methods of interpretation have evoked several debates in the legal doctrine due to different understandings on their causes and effects.

A taxpayer, who apprehends that an interpretation of a tax treaty might render taxation against its underlying purposes, has the supplementary choice to evoke a mutual agreement procedure in Article 25 OECD Model.

There are two authoritative cases on the general interpretation of tax treaties in Sweden. In the *Luxembourg* case, the Swedish Supreme Administrative Court attached importance to e.g. the Commentary. Hence, with the intention to establish the significance of the term “employer”, the Commentary on Article 15(2) OECD Model will be presented below.

⁷⁷ The Swedish Supreme Administrative Court, RÅ 1987 ref. 162, The 1987 Annual, p. 505 with reference to p. 496 et seq.

⁷⁸ *Ibid.* p 505.

⁷⁹ *Ibid.* p. 506 and Lindencrona (1994) p. 87.

4 The Commentary on Article 15(2) OECD Model

4.1 The provisions contained in the Commentary

The Commentary on Article 15(2) OECD Model is designed to provide guidance to the interpretation of the three cumulative conditions in the paragraph. However, the Commentary leaves many questions unanswered in regards to the conception of the term “employer” in cases of *bona fide* secondments.⁸⁰

The sole indication that can be clearly inferred from the Commentary on the matter is the discussion concerning the objectives and purposes of the provisions in subparagraphs (b) and (c) of Article 15(2) OECD Model. Hence, as an underlying point of departure, the Commentary emphasises the ambition to avoid any unnecessary splitting of taxation rights between the Contracting States.⁸¹ Paragraph 6 of the Commentary on Article 15(2) OECD Model states that the subparagraphs stipulate an elimination of source taxation of short-term secondments in situations where the cost of the employment is not deductible in the State of source. Consequently, the right to tax seems to be linked to the State that allows a deduction for the cost of the employment. Furthermore, it is argued that the provisions should be seen as an instrument to facilitate the bureaucratic process. This is because a possible requirement of a deduction at source, when the employer does not reside nor has a permanent establishment in the State that the employee is assigned to, might render a great administrative burden.⁸²

In addition to the clarification of the objective and purposes in paragraph 6, the Commentary displays another passage that contains further guidance to the interpretation of the term “employer”, i.e. paragraph 8 of the Commentary on Article 15(2) OECD Model. However, the extent of the applicability of the paragraph is controversial since it explicitly concerns cases of international hiring-out of labour. In order to clarify the legal situation, paragraph 8 will be discussed in detail below.⁸³

⁸⁰ Paragraph 3 et seq. of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 291 et seq.

⁸¹ Waldburger (2008) p. 186.

⁸² Paragraph 6 of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 294.

⁸³ Paragraph 8 of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 295 et seq.

4.1.1 Paragraph 8 of the Commentary on Article 15(2) OECD Model

Paragraph 8 of the Commentary on Article 15(2) OECD Model was amended in 1992 in order to combat tax motivated international hiring-out of labour.⁸⁴ The paragraph is aimed at the abusive practice where an employer, who has the intention to engage a foreign employee for a period of less than 183 days, operates through an intermediary established abroad. In such a case, the intermediary proclaims to be the employer and thereafter rents out the worker to the factual user of the employment. Because of the arrangement, the three criteria governing the exception in Article 15(2) OECD Model are fulfilled and the employee may claim a relief in accordance with the applicable tax treaty in the State of source.⁸⁵

The illustrated circumvention of the conditions set out in Article 15(2) OECD Model is an undesired use of the provision. Hence, paragraph 8 of the Commentary on the Article advocates the applicability of the principle of substance over form in suspected cases. Therefore, it is stated that the term “employer” should be perceived as the company who earns the rights produced by the employee and who bears the responsibility and risks of the employment, rather than the company mentioned as the employer in the formal contract of employment. Additionally, the Commentary stipulates that the context of Article 15(2) OECD Model must be considered as an important factor in the interpretative process.⁸⁶

In order to determine whether the intermediary or the user should be considered as the employer, the Commentary contains further guidance in the case of a mutual agreement procedure between the Contracting States.⁸⁷ Thus, the consumer of the employment is evaluated through a number of criteria, introduced in paragraph 8 of the Commentary on Article 15(2) OECD Model. If the following criteria are fulfilled the user, resident in the State of source, will be considered as the *real employer*.

- the hirer does not bear the responsibility or risks for the results produced by the employee’s work;
- the authority to instruct the worker lies with the user;
- the work is performed at a place which is under control and responsibility of the user;
- the remuneration to the hirer is calculated on the basis of the time utilised, or there is in other ways a connection between this remuneration and wages received by the employee;
- tools and materials are essentially put at the employee’s disposal by the user;
- the number and qualifications of the employees are not solely determined by the hirer.⁸⁸

⁸⁴ Burgstaller (2005) p. 124 and Pötgens (2006) p. 605.

⁸⁵ Paragraph 8 of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 295.

⁸⁶ *Ibid.* p. 295.

⁸⁷ For an elaborate discussion on the mutual agreement procedure, see heading 3.4.

⁸⁸ Paragraph 8 of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 296.

Article 15(2) OECD Model is generally applicable to international hiring-out of labour. However, some tax treaties contain derogatory rules. An example of this is the additional subparagraph (d) in Article 15(2) of the Nordic Tax Treaty, which explicitly stipulates that international hiring-out of labour is exempted from the Article as a whole.⁸⁹ Such a statement, and the fact that the provisions in the Commentary on the matter are limited to cases of abuse, contributes to the uncertainty surrounding the extension of the guidance in the paragraph. Therefore, the impact of the provisions in paragraph 8 of the Commentary on Article 15(2) OECD Model on the interpretation of the term “employer” will be handled in the following.

4.1.2 The extension of the stipulations

As can be derived from the above, the provisions contained in paragraph 8 of the Commentary on Article 15(2) OECD Model serve as a supplementary tool for the interpretation of the term “employer”. Additionally, the factors governing the terms in the paragraph clearly opt for an economic approach.⁹⁰ Since the passage is explicitly designed for the abusive practice of international hiring-out of labour, the question emerges whether the guidelines in the paragraph can be rewarded any significance when defining the term “employer” in cases of *bona fide* secondments.⁹¹

Several legal authors emphasises that the provisions contained in paragraph 8 of the Commentary on Article 15(2) OECD Model are exclusively intended for cases of abuse.⁹² For instance, Professor Luc De Broe *et al.* indicate the potential problems that might arise from an application of the paragraph in cases of acknowledged secondments.⁹³

De Broe *et al.* stress the fact that the provisions in paragraph 8 are insufficient in regards to the multifaceted assessment that is required in cases of *bona fide* secondments. The inference is based on the fact that the receiving company generally benefits from the secondment. In addition, it often bears the cost and the risk of the employment. Thus, a predominant part of the evaluations will lead to the conclusion that the company in the State of source is regarded as the real employer. According to De Broe *et al.*, such a legal situation could eventually end up in a presumption of taxation at source, which would render the purpose of the exception in Article 15(2) (b) OECD Model meaningless.⁹⁴

The argumentation proves the difficulties involved in a direct adaptation of paragraph 8 of the Commentary on Article 15(2) OECD Model to cases of

⁸⁹ The Nordic tax treaty of 1996 includes Denmark, the Faeroe Islands, Finland, Iceland, Norway and Sweden.

⁹⁰ Peeters (2004) p. 79.

⁹¹ Pötgens (2006) p. 615.

⁹² As an example, see; Burgstaller (2005) p. 124.

⁹³ De Broe *et al.* (2000) p. 508.

⁹⁴ *Ibid.* p. 508 et seq.

bona fide secondments. However, the mere existence of the guidelines in the paragraph reinforces the divided approach to the term “employer”. Frank Pötgens, who believes that it is peculiar that the meaning of the term “employer” should be dependent on whether the situation concerns an abusive behaviour or a *bona fide* secondment, have identified this circumstance. From his point of view, it is contrary to several legal principles to exercise the usage of the term in such an ambiguous manner. Hence, Pötgens argues that the context of Article 15(2) OECD Model requires an interpretation that involves the provisions in paragraph 8 of the Commentary, even in cases of *bona fide* secondments.⁹⁵

The debate concerning the extension of the provisions in paragraph 8 of the Commentary on Article 15(2) OECD Model is not only compelled by academic motives. Another contributing factor is the different level of importance attached to the paragraph by the various OECD member countries.⁹⁶ In order to remedy the complex legal situation, the OECD released a Draft on the matter in 2007. Since the discussion in the Draft concerns the term “employer” in general and the modification of paragraph 8 in particular, the proposed amendments will be discussed below.

4.2 The 2007 Revised Public Discussion Draft on changes in the Commentary

In 2004, the OECD offered a Public Discussion Draft with the necessity to clarify the scope of the provisions in Article 15(2) OECD Model.⁹⁷ The Draft was an attempt to resolve the interpretative issues surrounding the term “employer” in the Article.⁹⁸ With regards to a public consultation meeting and the gathered response from the Public Discussion Draft, the OECD published the final version of the Draft in 2007.⁹⁹ However, the suggested amendments, contained in the Draft, were considered highly controversial. Therefore, they were not included in the 2008 update of the OECD Model.¹⁰⁰

Despite the unaltered legal position in the OECD Model, the 2007 Revised Public Discussion Draft embodies the issues that are related to the second paragraph of Article 15 OECD Model. The Draft suggests a rather drastic change in regards to paragraph 8 of the Commentary on Article 15(2) OECD Model. Hence, it is proposed that the current version should be replaced with quite an exhaustive description on the interpretation of the term “employer”, without any limitation to cases of abuse.¹⁰¹ The approach

⁹⁵ Pötgens (2006) p. 637.

⁹⁶ For an elaborate outline on the different application of paragraph 8 of the Commentary on Article 15(2) OECD Model in the member countries, see; Pötgens (2006) p. 637 et seq.

⁹⁷ OECD Public Discussion Draft of 2004, p. 1.

⁹⁸ Pötgens (2006) p. 580.

⁹⁹ OECD Revised Public Discussion Draft of 2007.

¹⁰⁰ Avery Jones (2009) p. 6.

¹⁰¹ OECD Revised Public Discussion Draft of 2007, p. 3 et seq.

adopted in the Draft is clearly economic and emphasises factors in the interpretative process such as the authority to instruct and control the employee and the actual bearer of the cost of the employment.¹⁰²

Furthermore, the 2007 Revised Public Discussion Draft stipulates the introduction of a number of explanatory cases into the Commentary, in order to provide guidance when applying Article 15(2) OECD Model. One of the explanatory cases sorts out the situation where an employee is assigned to an affiliated company within an international group. In the case at issue, the employee is described as a hotel receptionist, seconded for a period of five months. The employee in the example is still formally hired by the company in the State of residence, which also pays out the full remuneration. However, a cost contribution is provided by the enterprise in the State of source. In accordance with the Draft, such a situation should be evaluated through a material approach. Since the employee forms an integral part of the business of the affiliated company, which also bears the actual cost of the employment, the enterprise in the State of source should be considered as the real employer.¹⁰³

Whether or not the proposals in the 2007 Revised Public Discussion Draft are going to be implemented in the Commentary or not, it is clearly established that the current legal position is unsatisfactory. Nevertheless, in order to form an idea of the present position adopted by the Swedish Supreme Administrative Court on the application of paragraph 8 of the Commentary on Article 15(2) OECD Model, guidance can be found in the *Brynäs Ice Hockey Association* case.

4.3 The Brynäs Ice Hockey Association case

Paragraph 8 of the Commentary on Article 15(2) OECD Model has been referred to once by the Swedish Supreme Administrative Court in the 2001 *Brynäs Ice Hockey Association* case. Primarily, the case dealt with issues of internal law and no actual tax treaty was involved. Nevertheless, the Court displayed a rather interesting approach on the applicability of the Commentary in the light of the interpretation of the term “employer”.¹⁰⁴

The dispute in question concerned the tax treatment of three foreign Ice Hockey players who played for Brynäs, a Swedish Ice Hockey Association. Brynäs hired the players from a management company established at the Isle of Man. Agreements announced as “Contract Agreements” were signed between Brynäs and each of the individual players. The latter had also entered into “International Contracts of Employment” with the foreign management company. Hence, the intention between the parties was to

¹⁰² OECD Revised Public Discussion Draft of 2007, p. 6.

¹⁰³ *Ibid.* p. 7.

¹⁰⁴ The Swedish Supreme Administrative Court, RÅ 2001 ref. 50.

present the management company as the employer. However, the Swedish Tax Agency contested the arrangement and imposed Swedish payroll taxes on Brynäs, based on the ground that Brynäs should be considered as the real employer.¹⁰⁵

Paragraph 8 of the Commentary on Article 15(2) OECD Model was not mentioned in the case until the Swedish Supreme Administrative Court handled the matter. The Court stressed the fact that the OECD had highlighted the issue of international hiring-out of labour. In regards to the applicability of the Commentary, the Swedish Supreme Administrative Court stated that the object of paragraph 8 should not be considered to include the question of the delineation of social security charges. However, the Court emphasized the authority of the Commentary and claimed that paragraph 8 concerned an adjacent area of law, which justified its relevance in the case. Furthermore, the Court revealed that a major part of the criteria to establish the concept of “employer” in paragraph 8, are in conformity with the Swedish civil law delimitation of the concept of an employee.¹⁰⁶

To enable a classification of the various agreements between the parties, the Court made an overall assessment of the facts in the case. The Swedish Supreme Administrative Court delivered an impressive and thorough analysis, with a point of departure in the economic and social relationships between the players and the two different companies. As an inference, the Court held in favour of the Swedish Tax Agency and established that Brynäs was regarded as the real employer.¹⁰⁷

4.4 Concluding remarks

The Commentary on Article 15(2) OECD Model does not contain any particular guidance on the interpretation of the term “employer” in cases of *bona fide* secondments. However, Paragraph 8 of the Commentary on the Article stipulates valuable directives on the concept when dealing with international hiring-out of labour. Since the extension of the provisions in the paragraph is highly controversial, amendments to the sequence have been proposed in the 2007 Revised Public Discussion Draft.

The Swedish Supreme Administrative Court found interpretative guidance in paragraph 8 of the Commentary on Article 15(2) OECD Model in the *Brynäs Ice Hockey Association* case. However, the case is not entirely representative in the context of the distinction of the term “employer”. Therefore, an additional sequence of Swedish and comparative case law will be presented under the next heading. The judgements will also be followed by a review of the legal debate surrounding the matter.

¹⁰⁵ The Swedish Supreme Administrative Court, RÅ 2001 ref. 50, The 2001 Annual, p. 304 et seq.

¹⁰⁶ *Ibid.* p. 314 et seq. In regards to the term “employer” in Swedish civil law, the Court referred to; SOU 1975:1 p. 721 et seq.

¹⁰⁷ *Ibid.* p. 315 et seq.

5 The meaning of the term “employer”

5.1 A versatile process of interpretation

In the previous, general examples to identify potential conflicts between the Contracting States have been illustrated. However, the divided approach to the term “employer” is not primarily a matter of State interest. In fact, a major part of the practical issues stemming from Article 15(2) (b) OECD Model occurs before the conflicts rise to an intergovernmental level.¹⁰⁸

The origin of the multifaceted procedure of interpretation regarding the concept can be displayed through the following sequential structure. At the first stage, the taxpayer and his tax adviser will interpret the term “employer”, in order to organize the secondment and to prepare the tax return. Furthermore, the Tax Authorities in the Contracting States involved in the assignment will interpret the concept in connection with the tax assessment. If a dispute arises due to differing perceptions by the taxpayer and the Tax Authorities, the issue will be submitted to the domestic judiciary for a ruling.¹⁰⁹

Thus, if the Tax Authority and the taxpayer assume contradictory understandings on the matter, complications might arise that can be both time consuming and inflicting cash-flow problems for the employer and the seconded employee.¹¹⁰ In order to establish the current legal situation in Sweden, which the transmitting and receiving resident companies have to take into consideration, the approach adopted by the Swedish Tax Agency will be demonstrated through an examination of selected case law.

5.2 Swedish case law on the interpretation of the term “employer”

Unfortunately, the Swedish Supreme Administrative Court has not yet had the incentive to deliver a judgement on the interpretation of the term “employer”. Hence, the Swedish case law with relevance in this context consists of decisions from the Swedish Administrative Court of Appeal and the Swedish County Administrative Court.¹¹¹

¹⁰⁸ Peeters (2004) p. 72.

¹⁰⁹ Vogel (2000) p. 614.

¹¹⁰ De Vries (2005) p. 181.

¹¹¹ Worth noting is that the Swedish Supreme Administrative Court has handled cases concerning the interpretation of Article 15(1) OECD Model in regards to the taxation of employee stock options; RÅ 2004 not 134 and RÅ 2004 ref. 50 and the taxation of severance payment; RÅ 2001 not 88.

5.2.1 The White Arkitekter case

The first judgement that will be reviewed is the *White Arkitekter* case, which was published by the Swedish County Administrative Court in 2007.¹¹² The dispute in question involved a Swedish resident taxpayer, employed by the Swedish company White Arkitekter AB. The Swedish employee had been performing approximately 20 percent of his work in the Danish subsidiary White Arkitekter A/S. White Arkitekter AB paid out the full remuneration. However, White Arkitekter A/S reimbursed the part of the salary attributable to the employee's work performed in Denmark through intra-group invoicing. Since the taxpayer's periods spent in Denmark had not exceeded 183 days during a twelve-month period, the essential matter of the case was to determine whether the Swedish or the Danish company was to be considered as the real employer in accordance with the Nordic tax treaty.¹¹³

The Swedish Tax Agency claimed that the full remuneration should be exclusively taxable in Sweden. The conclusion was based on the assumption that the Danish company was not qualified as an employer. The Swedish Tax Agency especially stressed the fact that the formal contract of employment was signed between the taxpayer and White Arkitekter AB and that the latter paid out the full remuneration.¹¹⁴ Additionally, by reference to Article 3(2) in the Nordic tax treaty, the Swedish Tax Agency claimed that the term "employer" should be interpreted in accordance with domestic tax law, i.e. Chapter 1, Article 6 of the Swedish Tax Payment Act.¹¹⁵ Such an interpretation would result in the conclusion that White Arkitekter AB should be considered as the real employer because they actually pay out the remuneration. Finally, the Swedish Tax Agency stated that the Nordic tax treaty could not resolve any juridical double taxation that may arise due to their position taken on the matter.¹¹⁶

The Swedish taxpayer contested the approach adopted by the Swedish Tax Agency. To support his point of view, the taxpayer argued that an oral contract of employment existed in regards to White Arkitekter A/S. An additional claim was based on the fact that the costs of the work performed in Denmark was borne by White Arkitekter A/S and was only paid out by White Arkitekter AB. The taxpayer stressed that the reason for such an arrangement was purely administrative and was considered the most practical solution. Furthermore, the taxpayer pleaded that paragraph 8 of the Commentary on Article 15(2) OECD Model should be regarded as a general guidance for the interpretation of the term "employer". Consequently, White Arkitekter A/S should be considered as the real employer.¹¹⁷

¹¹² The Swedish County Administrative Court in Malmö, case number 901-02-07.

¹¹³ *Ibid.* p. 1 et seq.

¹¹⁴ *Ibid.* p. 2.

¹¹⁵ The Swedish Tax Payment Act (1997:483).

¹¹⁶ The Swedish County Administrative Court in Malmö, case number 901-02-07, p. 3.

¹¹⁷ *Ibid.* p. 2 et seq.

In the judgement, the Swedish County Administrative Court held in favour of the Swedish Tax Agency. The decision was based on the Court's understanding that the term "employer" should be interpreted in accordance with Swedish domestic law, by reference to Article 3(2) in the Nordic tax treaty and its underlying government bill.¹¹⁸ The Swedish County Administrative Court stressed the fact that the remuneration was paid out by White Arkitekter AB and that the taxpayer had not been able to prove any contract of employment with White Arkitekter A/S. Consequently, the Court established that White Arkitekter AB should be considered as the real employer and the total remuneration should be taxable in Sweden.¹¹⁹

5.2.2 The Dansico Sugar cases

The Swedish County Administrative Court delivered the judgements in the Dansico Sugar cases simultaneously in 2009.¹²⁰ The conflicts originated from the appeals presented by several Swedish resident taxpayers in regards to the Swedish Tax Agency's decisions to deny relief by way of exemption for the remuneration attributable to their work performed in Denmark.¹²¹

The disputes in question concerned the interpretation of the term "employer" in Article 15(2) (b) of the Nordic tax treaty. In all of the cases, the employees were seconded from the Swedish company Dansico Sugar AB to the Danish Company Dansico Sugar A/S. An additional similarity was the fact that all of the disputes regarded periods without any existing contract of employment between Dansico Sugar A/S and each of the employees. Furthermore, the total remuneration was paid out by Dansico Sugar AB, which was later on compensated by a cost contribution from Dansico Sugar A/S to cover the costs of the employees work performed in Denmark.¹²²

The taxpayers claimed that the part of their remuneration attributable to Denmark should be exempted from Swedish tax since Dansico Sugar A/S should be considered as the real employer. Their argumentation was based on the fact that Dansico Sugar A/S had received the benefits from the work performed in Denmark. Furthermore, Dansico Sugar A/S had the authority to give them instructions and made all of the tools and materials required to perform the work available at their place of management.¹²³

¹¹⁸ The Swedish County Administrative Court referred to the Swedish government bill 1989/90:33 p. 44.

¹¹⁹ The Swedish County Administrative Court in Malmö, case number 901-02-07, p. 6. The judgement was not appealed by the taxpayer.

¹²⁰ The County Administrative Court in Malmö, case number 9837-07, case number 1780-09, case number 2311-09 and case number 2587-09.

¹²¹ Article 25 in the Nordic tax treaty of 1996.

¹²² The County Administrative Court in Malmö, case number 9837-07 p. 3, case number 1780-09 p. 3, case number 2311-09 p. 3 and case number 2587-09 p. 3.

¹²³ The County Administrative Court in Malmö, case number 9837-07 p. 3, case number 1780-09 p. 4, case number 2311-09 p. 4 and case number 2587-09 p. 4.

In its decision, the Swedish County Administrative Court drew attention to the fact that the taxpayers' claim were based on the criteria for determining the real employer in accordance with paragraph 8 of the Commentary on Article 15(2) OECD Model. Despite this, the Court maintained its previous line, as displayed in the *White Arkitekter* case, and held that the term "employer" should be interpreted in accordance with domestic law.¹²⁴ Consequently, the Swedish County Administrative Court advocated an interpretation of the term "employer" based solely on domestic law by reference to Article 3(2) in the Nordic tax treaty, without regards to the view illustrated in the Commentary.¹²⁵

With a point of departure in the illustrated statement, the Swedish County Administrative Court ruled in favour of the Swedish Tax Agency. As further reasons for the ruling, the Court stressed that a formal or oral contract of employment should be considered as the decisive factor. Since the taxpayers had failed to demonstrate such an agreement in regards to Danisco Sugar A/S, the Swedish company Danisco Sugar AB was held to be the real employer. Consequently, the Swedish County Administrative Court established that the full remuneration should be taxable in Sweden.¹²⁶

The judgements referenced above have dealt with situations of outbound secondments. In the following, the rather contrasting *SAS* case, concerning an inbound situation will be presented. Another feature that distinguishes the case is the fact that it does not concern the direct application of an actual tax treaty. Nevertheless, the domestic tax provisions at issue were implemented with the objective to correspond with the principles of the OECD Model.¹²⁷

5.2.3 The SAS case

The *SAS* case was delivered by the Swedish Administrative Court of Appeal in 2009 and concerned the interpretation of the term "employer" in the Swedish tax legislation stipulating the levying of a special tax on the income of persons resident abroad.¹²⁸ The question of interpretation originated from the fact that a Danish resident taxpayer had been working temporarily in Sweden. The Danish resident, employed at the Danish company SAS, had been performing duties as an instructor at the Swedish SAS Flight

¹²⁴ The County Administrative Court in Malmö referred to the Swedish government bill 1989/90:33 p. 44.

¹²⁵ The County Administrative Court in Malmö, case number 9837-07 p. 3, case number 1780-09 p. 4, case number 2311-09 p. 4 and case number 2587-09 p. 4.

¹²⁶ The County Administrative Court in Malmö, case number 9837-07 p. 4, case number 1780-09 p. 5, case number 2311-09 p. 5 and case number 2587-09 p. 5. The judgements have been appealed by the taxpayers and are currently pending in the Swedish Administrative Court of Appeal.

¹²⁷ The Administrative Court of Appeal in Gothenburg, case number 7248-08. The case is based on an appeal from the Swedish Tax Agency of the decision of the County Administrative Court in Malmö, case number 7009-08.

¹²⁸ The Swedish law on special income tax for persons resident abroad (1991:586).

Academy. The full remuneration was paid out by SAS and the part of the salary attributable to the employee's work performed in Sweden was reimbursed by SAS Flight Academy. The Swedish company had the right to hire and train the instructors. The work description was also provided by the SAS Flight Academy. Another important aspect of the case was that the Danish instructor was not seconded by SAS; on the contrary, the employee had made the decision to work for SAS Flight Academy on his own.¹²⁹

The Danish employee argued that the certain Swedish tax rate for foreign residents should be applicable on the remuneration attributable to his work performed at SAS Flight Academy. However, the Swedish Tax Agency denied the application on the ground that the salary should not be considered as taxable in Sweden at all. The decision was based on the Swedish Tax Agency's persistent view that the company paying the remuneration should be considered as the real employer. In accordance with the previously illustrated cases, the argumentation was based on a reference to Chapter 1, Article 6 of the Swedish Tax Payment Act. Additionally, The Swedish Tax Agency claimed that the economic approach to the term "employer", as displayed in paragraph 8 of the Commentary on Article 15(2) OECD Model, should be limited to cases of abuse in regards to international hiring-out of labour. Consequently, the Swedish Tax Agency stated that the Commentary was of no use in the case and maintained that the income of the Danish employee should be taxed solely in Denmark.¹³⁰

The taxpayer countered the argumentation of the Swedish Tax Agency and claimed that the definition of the term "employer" in the Swedish Tax Payment Act was not generally applicable. This was because the wording of the Swedish Tax Payment Act and the Swedish law on special income tax for person's resident abroad differed in a fundamental manner. Furthermore, the taxpayer argued that it should be considered as inappropriate to interpret the term "employer" differently depending on the situation at issue. Therefore, paragraph 8 of the Commentary on Article 15(2) OECD Model should be regarded as a general instrument of interpretation.¹³¹

The Swedish Administrative Court of Appeal held in favour of the taxpayer and thus maintained the Swedish County Administrative Court's decision. In the latter judgement, the Swedish County Administrative Court stressed the fact that the Swedish domestic legislation in question was introduced as an adjustment to the OECD Model.¹³² Because the domestic tax provisions were a reflection of Article 15(2) OECD Model, the Court argued that the Commentary and cases from other member countries could be an appropriate mean of interpretation.¹³³

¹²⁹ The Administrative Court of Appeal in Gothenburg, case number 7248-08, p. 5.

¹³⁰ *Ibid.* p. 2.

¹³¹ *Ibid.* p. 2.

¹³² The Swedish County Administrative Court referred to the Swedish government bill 1989/90:47 p. 21 et seq.

¹³³ The Administrative Court of Appeal in Gothenburg, case number 7248-08, p. 10.

After having cited paragraph 1 and 8 of the Commentary on Article 15(2) OECD Model, the Court argued that all of the circumstances of the case had to be taken into consideration, as opposed to the Swedish Tax Agency's formal approach. Therefore, the Swedish Administrative Court of Appeal stated that the payer of the remuneration should not be the decisive element but rather a circumstance as any other. After an evaluation of all the relevant factors, the Court established that SAS Flight Academy was the real employer. To support its decision, the Swedish Administrative Court of Appeal held that SAS Flight Academy was detached from SAS and that they were running an independent business. Furthermore, the taxpayer had presented a formal contract of employment with SAS Flight Academy.¹³⁴

5.3 A comparative outlook

5.3.1 The international dimension as a learning experience

Even though the attitude displayed by the various Swedish Tax Courts might be considered as ambiguous, the Swedish Tax Agency has clearly maintained a legal approach on the term "employer". Hence, Sweden is regarded as generally adopting the concept of formal employer. Such a position is e.g. also shared by Switzerland, where the material approach discerned in Paragraph 8 of the Commentary on Article 15(2) OECD Model is restricted to cases of abuse.¹³⁵

On the contrary, the United Kingdom has strongly taken the view that the term "employer" should be interpreted through the concept of economic employer.¹³⁶ Additionally, the inclination is also supported by countries like Denmark, Germany and the Netherlands.¹³⁷

Despite the fact that the case law of foreign Courts can not be directly referred to in a national legal procedure, the development and the positions of other OECD member countries might provide general guidance for a taxpayer who wants to oppose the opinion of the Swedish Tax Agency. Furthermore, the Swedish Tax Courts might even consider a comparison as an inspiration to adopt a modified perspective in the interpretative process. Hence, in order to provide an enriching outline and to broaden the perspective, an examination of authoritative cases from Germany and the Netherlands will be displayed in the following.¹³⁸

¹³⁴ The Administrative Court of Appeal in Gothenburg, case number 7248-08, p. 11 et seq. The decision was not appealed by the Swedish Tax Agency.

¹³⁵ De Broe *et al.* (2000) p. 510.

¹³⁶ *Ibid.* p. 509.

¹³⁷ Peeters (2004) p. 80 and De Vries (2008) p. 152.

¹³⁸ The outline is based on cases that have been frequently cited in the legal doctrine. A summary of each of the cases is available at the IBFD Tax Treaty Case Database.

5.3.2 Germany

5.3.2.1 The German Federal Tax Court's decision of 21 August 1985

The German Federal Tax Court delivered the leading decision on the interpretation of the term “employer” in Germany as early as 1985.¹³⁹ The case concerned the interpretation of the tax treaty between Germany and Spain.¹⁴⁰ The dispute in question originated from the 147 days secondment of a German employee to a Spanish resident company. The full remuneration was paid out by the German employer and then charged to the Spanish company. During the secondment, the German employee followed the instructions of the Spanish company. The German Tax Agency denied the employee's claim for relief by way of exemption. The denial was based on the conception that the Spanish company did not fulfil its obligation as an employer in accordance with Article 15(2) (b) of the tax treaty.¹⁴¹

The German Lower Tax Court held in favour of the taxpayer and stated that the remuneration attributable to work performed in Spain should be exempted from German income tax. The Court expressed the position that it was uncertain whether the Spanish company would qualify as an employer according to German domestic law. Regardless of that, the Court found that the interpretation should not be based on internal law, but rather on the international economic approach to the concept “employer”. The German Lower Tax Court stressed that since the term “employer” was not defined in the tax treaty, an evaluation should be made in accordance with the intentional context of the treaty. Such an intentional context was considered to reward the taxing rights to the State where the corresponding cost of the employment was located. Therefore, the State of source should only be deprived of the right to tax when the income from employment does not affect the domestic tax revenue. Since the cost of the employment was ultimately borne by the Spanish company, the Court consequently held that the Spanish company was the real employer.¹⁴²

The German Federal Tax Court maintained the judgement of the German Lower Tax Court. In addition, the Court accentuated that an outcome based on the underlying intentions of the tax treaty might differ from an interpretation in accordance with domestic law. However, such an inference was supported by the primacy of the context, as expressed in Article 3(2) of the tax treaty. The Court also stressed that the affinity between the German employee and the Spanish company appeared to have the characteristics of an employment relationship.¹⁴³

¹³⁹ The German Federal Tax Court, case number I R 63/80.

¹⁴⁰ The tax treaty between Germany and Spain of 1966.

¹⁴¹ The German Federal Tax Court, case number I R 63/80, IBFD summary, p. 1.

¹⁴² *Ibid.* p. 2.

¹⁴³ *Ibid.* p. 3.

5.3.2.2 The approach adopted in Germany

As illustrated above, the reasoning in the German Federal Tax Court's decision of 21 August 1985 is considered typical and has been maintained in Germany.¹⁴⁴ Hence, the judgements delivered by the German Tax Courts seem to be based on an autonomous international interpretation, which concentrates on the question of the bearer of the cost of the employment.¹⁴⁵

Consequently, the German case law has displayed a material approach and has adopted the concept of economic employer throughout more than two decades. However, such a firm position can be considered as rather exceptional and the legal position on the matter remains unclear in several OECD member countries. Other member States have recently changed their attitude towards the issue. A good example of this is the Netherlands, where the Dutch Supreme Court has revised its position from a strictly formal approach on the term "employer" to an economic interpretation. This interesting change of approach will be discussed below.¹⁴⁶

5.3.3 The Netherlands

5.3.3.1 The Netherlands Supreme Court's decisions of 1 December 2006

The adjustment from a legal approach based on a civil or labour law perspective to an economic application had already been commenced in the Netherlands in 2002.¹⁴⁷ However, the transformation was not concluded until 2006, when the Netherlands Supreme Court concurrently delivered a number of decisions containing an identical economic reasoning.¹⁴⁸ The analyses presented by the Court in the judgements were clearly a milestone in the legal development and the decisions have been characterized as the leading authority concerning the interpretation of the term "employer" in the Netherlands.¹⁴⁹

A Dutch resident taxpayer initiated one of the most typical decisions in the package of cases. The case concerned the interpretation of the tax treaty between the Netherlands and Germany.¹⁵⁰ The wording of Article 10(2) on income from employment in the tax treaty differs slightly from Article 15(2) OECD Model. However, the substance of the Article is equivalent to the Model Convention.¹⁵¹

¹⁴⁴ See for example; the German Tax Court of First Instance, case number I 6/96 and case number 1 K 1195/99. For an elaborate discussion and more examples of following cases, see; Pötgens (2006) p. 592 et seq.

¹⁴⁵ Pötgens (2006) p. 593.

¹⁴⁶ De Vries (2008) p. 151.

¹⁴⁷ *Ibid.* p. 152.

¹⁴⁸ The Netherlands Supreme Court, case number 38.850, case number 38 950, case number 39.535, case number 39.710 and case number 40.088.

¹⁴⁹ De Vries (2008) p. 151.

¹⁵⁰ The Netherlands Supreme Court, case number 40.088.

¹⁵¹ The tax treaty between the Netherlands and Germany of 1956.

The dispute in question concerned the temporary secondment of a Dutch employee to a German company within a multinational group. The employee had been working in Germany for thirteen days in the year concerned and the Dutch company had paid out the full remuneration. The salary attributable to the work performed in Germany was subsequently reimbursed by a cost contribution from the German company. The taxpayer claimed relief in the Netherlands for the part of the remuneration that was derivative from the work performed in Germany. However, the Dutch Tax Agency contested the adopted view and pointed out that the full remuneration should be taxable in the Netherlands.¹⁵²

In the judgement, the Netherlands Supreme Court emphasized that the significance of the employees formal contract of employment with the Dutch company should not be exaggerated. On the contrary, the Court focused on which of the companies that had the authority to instruct the employee, the right of the advantages produced and who had borne the costs and the risks involved in the employment. Additionally, the Netherlands Supreme Court argued that the fact that the Dutch company paid the full remuneration does not need to lead to the conclusion that the company had to bear the actual cost of the employment. Since the German company had fulfilled all of the above-mentioned criteria and since it had reimbursed the salary of the Dutch employee by an identifiable figure, the Netherlands Supreme Court held that the German company was regarded as the real employer.¹⁵³

5.3.3.2 The approach adopted in the Netherlands

The reasoning delivered by the Netherlands Supreme Court in the case discloses an extended application of the criteria in paragraph 8 of the Commentary on Article 15(2) OECD Model. As illustrated above, the position adopted by the Court on the matter should not be regarded as an isolated case. On the contrary, the Court has adopted the extension of paragraph 8 in several recent judgements.¹⁵⁴

In addition to the extended application of paragraph 8, it has also been argued that the analysis provided by the Netherlands Supreme Court is a good example of how the principles of the VCLT should be incorporated into the interpretative process. By establishing the ordinary meaning of the term “employer” as someone who has the authority over the employee, the Court clearly endorsed Articles 31 to 33 VCLT as the point of departure in its reasoning.¹⁵⁵

¹⁵² The Netherlands Supreme Court, case number 40.088, IBFD summary, p. 1.

¹⁵³ *Ibid.* p. 2.

¹⁵⁴ See for example; the Netherlands Supreme Court, case number 07/00361.

¹⁵⁵ Pötgens (2006) p. 597 et seq. Although the analysis delivered by Pötgens is based on previous case law from the Netherlands Supreme Court, the principles are still generally applicable since the Court has maintained an identical reasoning in its decisions of the 1 December 2006.

In addition to the relevant case law of the various OECD member countries, there is an ongoing debate in the legal doctrine on the matter. Hence, the following sequence contains an abbreviated review with the intention to highlight some of the arguments put forward in the discussion.

5.4 Expressed arguments for the concept of formal employer

Legal doctrine and doctrinal articles that support the concept of formal employer is quite rare. As will be shown below, a predominant part of the juridical authors seem to opt for a material approach. However, Professor Robert Waldburger, who was commissioned to examine the complications of Article 15 OECD Model at the 2007 Vienna University Conference, is of another opinion.¹⁵⁶

Waldburger advocates the adoption of the legal approach through a rather complex argumentation based on the policy considerations to Article 15 OECD Model.¹⁵⁷ As a point of departure, Waldburger emphasises that the connection between the awarding of the taxing right and the possibility to deduct the cost of the employment should be considered as one of the fundamental policy considerations behind the Article.¹⁵⁸ If one should accept such a position, Waldburger states that the compliance of Article 15(2) (b) is dependent on the interpretation of the term “employer”.¹⁵⁹

Subsequently, through an analysis of the history and the wording of Article 15 OECD Model, Waldburger rejects the concept of economic employer. The position is achieved by the statement that the advocates of the concept of economic employer insist on the misperception that subparagraphs (b) and (c) of Article 15(2) OECD Model should be interpreted in the same manner. However, according to Waldburger, such a standpoint is not accurate since the latter contains a clear link to the policy consideration of the connection between the right to tax and its influence on the tax base.¹⁶⁰

In order to explain his opinion, Waldburger stipulates that the company in the State of residence of the employee will most definitely try to get some additional remuneration, beyond a cost contribution, for making the employee available to an affiliated company. Hence, the cost of the employment will consistently be borne by the State of source. According to Waldburger, if the policy consideration that the awarding of the taxing rights and the possibility to deduct the cost of the employment should be

¹⁵⁶ For a summary of the Conference, see; Brugger *et al.* (2008) p. 233 et seq.

¹⁵⁷ Waldburger (2008) p. 186 et seq.

¹⁵⁸ *Ibid.* p. 186. The position on the policy consideration is also advocated by; Pötgens (2002) p. 214 and De Broe *et al.* (2000) p. 511.

¹⁵⁹ Waldburger (2008) p.187 et seq.

¹⁶⁰ *Ibid.* p. 192.

persistently upheld, it would undermine Article 15(2) OECD Model completely.¹⁶¹

5.5 Expressed arguments for the concept of economic employer

As illustrated above, the support for the concept of economic employer is expressed in a rather large scale.¹⁶² In the vast majority of the doctrinal articles published with such an opinion, the argumentation is based on the sentiment of the Commentary on Article 15 OECD Model. For instance, it has been highlighted that the Commentary does not contain any reference to either the concept of formal or economic employer.¹⁶³ However, paragraph 8 of the Commentary on Article 15(2) OECD Model introduces the term “real employer”, which implicitly subsumes a material perception.¹⁶⁴ According to Bernard Peeters, engaged at the University of Brussels, it is obvious that the introduction of such a concept in the Commentary is intended to disseminate the material approach to the general interpretation of the term “employer”.¹⁶⁵

Even though the Commentary on Article 15 OECD Model is a compelling reason to adopt the concept of economic employer, some authors emphasise that there are deficiencies in such an argumentation. As illustrated in the previous, Professor Luc De Broe *et al.* have stated that paragraph 8 of the Commentary on Article 15(2) OECD Model is an insufficient method of interpretation in cases of *bona fide* secondments. However, that does not mean that they do not advocate a general applicability of the concept of economic employer. On the contrary, they promote a material interpretation based on several different aspects, with paragraph 8 of the Commentary on Article 15(2) OECD Model in conjunction with an estimation of the level of control and the integration that the employee retains in the master’s business.¹⁶⁶

5.6 Concluding remarks

The interpretation of the term “employer” is not solely a matter of State interest. On the contrary, most of the practical problems surrounding the concept emerge from conflicts between the taxpayer and the Tax Authorities in the States involved in the secondment.

¹⁶¹ Waldburger (2008) p. 193.

¹⁶² For a brief summary of some expressed opinions, see; Pötgens (2006) p. 603 et seq.

¹⁶³ De Broe *et al.* (2000) p. 509 and paragraph 8 of the Commentary on Article 15(2) OECD Model, van Raad (2008) p. 296.

¹⁶⁴ Burgstaller (2005) p. 124.

¹⁶⁵ Peeters (2004) p. 79.

¹⁶⁶ De Broe *et al.* (2000) p. 508 et seq.

The Swedish Administrative Court of Appeal and the Swedish County Administrative Court have delivered the Swedish case law on the matter. Even though the positions of the various Courts are not entirely clear, the reviewed cases discern that the legal approach is maintained by the Swedish Tax Agency.

The understanding of the term “employer” tends to vary in the OECD member countries. Such an inference can be derived from an examination of the case law from different States. The subject has also been exhausted by the juridical writers in various doctrinal articles. A vast majority of the authors advocate the application of the concept of economic employer.

With this chapter, the examination of the multifaceted context of the interpretation of the term “employer” is concluded. In order to present the authors view of the current legal situation and to summarise the different topics discussed in the thesis, a final analysis will be contained in the last sequence.

6 Analysis

6.1 Article 15 OECD Model

As a primary remark, I would like to emphasise that the issues of interpretation stemming from Article 15 OECD Model are quite expected, since it is a complicated rule with multiple functions. On the one hand, the provisions have been agreed upon in order to assure that the taxing rights are awarded to the State in which the employment is exercised. On the other hand, it is clear that the cumulative exceptions in the second paragraph are intended to illustrate the complexity of the matter, in providing an alternative way of taxation.

One could argue that the wording of the Article is a factor that contributes to the issues surrounding the taxation of the cross-border streams of income from employment. Although it is an adequate remark, I believe that the ambiguous language is intentional by the drafters, since it reflects the lowest common denominator between the parties involved. However, when examining the actual impact of Article 15(2) (b) OECD Model and the accompanying practical problems, it is obvious that further measures need to be taken.

In my opinion, it is important to emphasise that the issues surrounding the Article should not be regarded as a problem exclusively intended for the OECD to solve. Since tax treaties are concluded between States in order to distribute the taxing rights as fair as possible, there should also be an ongoing ambition from the Contracting States to achieve the rightful purpose of each of the provisions contained therein.

As shown in the previous, the second paragraph of Article 15 OECD Model, with its main purpose to facilitate short-term secondments, is functioning in another direction in practice. An example of this is the ongoing situation in Sweden, where it is hard for the taxpayer and his tax adviser to foresee the legal and economic consequences of a secondment in advance. Such a legal position can and should not be regarded as tolerable. Therefore, amendments need to be done in order to solve the current juridical impasse.

6.2 Is there a true meaning to the term “employer”?

The debate on the interpretation of the term “employer” tends to revolve around the distinction between the concept of formal and economic employer. Therefore, it is also the appropriate point of departure when analysing Article 15(2) (b) OECD Model.

In my opinion, the concept of formal employer is too narrow, in a way that should preclude it from becoming the universally adopted approach. This is due to the fact that a vast majority of the case law that is based on the legal approach, seems to end up in an interpretation established by domestic law, which can be rather static. Hence, I disagree with Professor Robert Waldburger, who appears to be awarding the history and the policy considerations behind Article 15 OECD Model an excessive amount of significance. According to my understanding, it is of utmost importance to maintain a clear link between the academic discussion and the legal reality. Therefore, I believe that the current practical issues require a more dynamic solution, which recognises all of the circumstances surrounding the secondment.

Thus, I believe that the concept of economic employer is a more appropriate way of deciding on which of the companies that should be regarded as the real employer. This is because it provides a wider approach to the issue. In my opinion, circumstances such as control, risk management and the actual bearer of the cost should be at least as important as the wording of a formal contract of employment. However, with that said, I would like to highlight the fact that there are a lot of inadequacies with the material approach as well. For instance, the scope of the concept needs to be clarified. It is not sustainable to maintain the current status of paragraph 8 in the Commentary on Article 15(2) OECD Model, where some of the Contracting States are applying the provisions as a basis for the concept of economic employer, whilst others are persistently arguing that the provisions are exclusively intended for cases of abuse.

Consequently, none of the approaches are flawless up to this date but the concept of economic employer does provide further opportunities to enable a fair evaluation. Another important aspect that I would like to highlight is the fact that the reality is not always as factual as the compilation in the above might give the appearance of. Hence, issues of interpretation may still occur, even if the Contracting States decide to adopt the same concept. This is due to the fact that the actual assessment made by the national Courts may vary. An example of this is the reviewed case law from Germany and the Netherlands. Both of the States clearly adopt the concept of economic employer. Nevertheless, in Germany the focus seems to be directed at the intentional context of the tax treaty. Whereas, in the Netherlands the Supreme Court emphasised the importance of the criteria stipulated in paragraph 8 of the Commentary on Article 15(2) OECD Model.

Therefore, considering all of the circumstances, I believe that the term “employer” needs to be clarified. However, this should not only be done in regards to the conflict between the concept of formal and economic employer but also in regards to the way in which the prevailing concept should be perceived. Hence, it is my understanding that it would benefit all of the parties involved to decide on an uniform process of interpretation. Such a solution would mitigate the impact of the current case-by-case approach and diminish the discrepancies between the different legal

systems. Nevertheless, in order to present any modifications, it is crucial to identify an application of Article 15(2) (b) OECD Model that needs to be improved. Thus, the Swedish Tax Courts and the Swedish Tax Agency's ongoing practice will be determined in the following.

6.3 The Swedish experience – the approach adopted as derived from the case law

The referred Swedish case law does not illustrate an unequivocal approach by the various Swedish Tax Courts. Hence, in my opinion, the legal position in Sweden is currently rather intangible. In order to create a firm position on the interpretation of the term “employer”, I would prefer it if the Swedish Supreme Administrative Court delivered a judgement on the matter. Based on the previous statements published in the adjacent *Luxembourg*, the *United Kingdom* and the *Brynäs Ice Hockey Association* cases, I sense that the Swedish Supreme Administrative Court might be inclined to try on a material approach to the issue. Therefore, it would not be implausible if the highest instance decided to rule in favour of the concept of economic employer. In spite of that, these remarks should merely be regarded as speculations from my side and I genuinely look forward to follow the legal developments on the matter.

However, one thing that can be considered as certain is the Swedish Tax Agency's approach on the interpretation of the term “employer”. It is clear that the concept of formal employer is adopted straight off, without room for any another assessments. On this matter, several principles can be apprehended from the illustrated cases. Primarily, according to the Swedish Tax Agency, the concept should be strictly interpreted from the definition in domestic law. Hence, there is no need to yield for the context of the tax treaty, or any other provision of international tax treaty interpretation. If such a position would lead to double taxation, the Swedish Tax Agency advocates that the issue should be resolved throughout the mutual agreement procedure. These opinions are expressed by the Swedish Tax Agency directly or indirectly in all of the cases reviewed concerning the interpretation of the term “employer”.

Due to the Swedish Tax Agency's total focus on the definition expressed in Chapter 1, Article 6 of the Swedish Tax Payment Act, it is also clear that the payer of the salary is the utmost important factor. Another statement that I would like to highlight is the total lack of importance that the Swedish Tax Agency awards to the Commentary. For instance, in the *Danisco Sugar* and the *SAS* cases, the Swedish Tax Agency dismisses the taxpayers claims to take a notion to paragraph 8 of the Commentary on Article 15(2) OECD Model.

In my opinion, the attitude disclosed by the Swedish Tax Agency is highly questionable. Regardless of my own disapproval of the adoption of the concept of formal employer, I believe that the intrinsic problem is contained in the actual reasoning presented by the Swedish Tax Agency. This is because it goes against several of the international sources of tax treaty interpretation. In order to demonstrate the practical consequences that might emerge from the Swedish Tax Agency's attitude on the matter, some potential conflicts will be discussed in the following.

6.4 Practical consequences due to the attitude assumed by the Swedish Tax Agency

Disputes of taxation are never preferable for companies with an internationally mobile workforce. Time, money and manpower are just some of the valuable resources that are wasted because of the equivocal provisions in Article 15(2) (b) OECD Model. As can be discerned from the above, conflicts can take place on different levels and at various times. Primarily, issues might arise even before the actual start of the assignment.

One of the situations that I have in mind has its point of departure in the situation where a Swedish taxpayer and his tax adviser advocate the concept of economic employer and the Swedish Tax Agency maintains its position on the concept of formal employer. In such a case, the Swedish Tax Agency can more or less function as a judiciary in the process of the tax adjustment. This is because the Swedish Tax Agency may choose to reject the application for a tax adjustment, based on the sole fact that the concept of formal employer results in the preservation of the taxing rights in Sweden. Hence, the Swedish transmitting company will have to withhold preliminary tax on the remuneration paid out during the secondment, until the dispute is settled in Court or through a mutual agreement procedure.

With the current legal position in Sweden in mind, the result of a domestic judicial process is very hard to assess in advance. In addition, it is my belief that the mutual agreement procedure in Article 25 OECD Model should not be regarded as a satisfactory solution. This is due to the fact that a mutual agreement procedure can be extremely time consuming and processes that extend for over a year are not unusual. During such a process, where two Contracting States file a petition for the taxing rights, the taxpayer might have to deal with dual tax claims that can cause a lot of administrative work and cash-flow problems. This circumstance is obviously very inconvenient for the involved companies but can also be extremely burdensome for a seconded employee without a tax equalization agreement.

Consequently, it is clear that companies and seconded employees can get into many problems due to the current status of the term "employer" in Sweden. To my understanding, a possible reaction to this might be that

international groups will begin to reconsider the short-term secondments. Another likely repercussion is that it could lead to a higher usage of foreign local contracts. In order to prevent such developments, I believe that there has to be some changes made to the international guidelines, initiated by the OECD and its member countries. However, before some of the possible modifications to Article 15 OECD Model are discussed, an evaluation of the current provisions will be presented. This will be done with the intention to provide the Swedish Tax Agency with a renewed way of interpretation, to sort out some of the issues regarding the term “employer”.

6.5 A preferred way of understanding the concept

In order to enable a development of the eligible way of interpreting the term “employer”, I will assume the structure of the methods of interpretation that has been presented in the above. Consequently, the outline will be similar to the one that was advocated by the Swedish Supreme Administrative Court in the *Luxembourg* case. Hence, the focus will primarily be aimed at the provisions in the VCLT, followed by an evaluation of Article 3(2) OECD Model and finally, a glance will be cast at the Commentary.

6.5.1 The VCLT

As can be discerned from the previous, the applicable provisions in the VCLT are vague and can be interpreted in various ways. In my opinion, there are two main conclusions that can be drawn from the Convention. Primarily, a tax treaty should be interpreted in accordance with its underlying purposes. Hence, the point of convergence when applying Article 15(b) (2) OECD Model has to be to mitigate the occurrence of double taxation and to promote cross-border activities. It is also important to assure that the income from employment is actually taxed in one of the Contracting States, in order to avoid tax evasion. To enable a realisation of these underlying purposes, it is important that the parties involved agree upon the meaning of the expressions contained in the tax treaty. For that reason, the primary objective that should be extracted from the VCLT is that the Contracting States have an obligation to enforce an unanimous application of the concept “employer”.

Another inference that can be envisaged from the VCLT is the importance of the context. To my understanding, the context constitutes the undisputable basis of any tax treaty interpretation. However, to what extent, and what can be considered to be encompassed in the context, is another question. Fortunately, in contrast to the context expressed in Article 3(2) OECD Model, there is some guidance to be found in regards to the context in Article 31 VCLT. In my opinion, the context necessitates an interpretation based on all of the instruments available to the parties when

the actual tax treaty was concluded. Since the discussions on the specific Articles are seldom expressed in the documents directly linked to the ratification of the tax treaty, I support the use of the generally acknowledged Commentary. Hence, contrary to the opinion expressed by Professor Klaus Vogel, I believe that the Commentary should be included in the context in Article 31 VCLT, without the need to exhaust the supplementary means of interpretation in Article 32 VCLT.

Consequently, I advocate a quite general approach to the application of the VCLT. The practical inference that I would like to draw from the Convention is that the Contracting States should interpret the term “employer” unanimous and that the Commentary should be a part of the interpretative process. Thus, the reasoning does not present any concrete answer to the understanding of the concept “employer”. However, such an inference should not be regarded as dissatisfactory, since I rather seek the answer in the more specific means of interpretation in Article 3(2) OECD Model.

6.5.2 Article 3(2) OECD Model

The relevance of Article 3(2) OECD Model should not be underestimated. That circumstance can be proven by the amount of case law in which the impact of the Article is discussed. To my understanding, the provision contains the fundamental crossroads underlying the whole debate on the interpretation of the term “employer”. Thus, the core issue is namely which level that should be taken in regards to the concept, a domestic or an autonomous international perspective.

In my opinion, an interpretation based on the domestic level, with reference to a definition in internal law, should only be applied as a last resort. This is because a domestic solution is more likely to end up in a divided understanding to the term “employer” between the Contracting States. In Sweden for example, the Tax Authorities usage of the internal definition has led to an exclusive adoption of the concept of formal employer. Since the domestic definitions of the term “employer” tends to vary widely between the OECD member countries, conflicts are bound to arise.

Therefore, with the objective to promote an unanimous interpretation of the term “employer” in mind, I believe that the Contracting States are obliged to make an effort to solve the interpretative conflict at the international level. In addition, it is my understanding that the context, even though it is not defined in the Article, requires the parties to at least have their interpretative point of departure at the international level. Such a solution would also bring more legal security to the matter. This is because an interpretation based on the international level would be easier for the all of the parties involved to access, in comparison to a domestic definition that can be derived from virtually anywhere in the multifaceted body of legislation in a State.

Consequently, it is clear to me that Article 3(2) OECD Model opts for an autonomous international solution to the interpretative conflict. However, such a conclusion remains at a rather general level of claims. Therefore, in order to assume a more concrete approach, the Commentary on Article 15(2) OECD Model will be evaluated.

6.5.3 The Commentary on Article 15(2) OECD Model

In general, I would like to express my discontent with the Commentary on Article 15(2) OECD Model. Based on an interpretation strictly in accordance with the wording of the Commentary, it is very difficult to find any guidance on the interpretation of the term “employer” in regards to *bona fide* secondments. As mentioned in the above, one of the core issues of the provisions is the fact that paragraph 8 of the Commentary on Article 15(2) OECD Model, which actually provide some substance on the matter, is explicitly applicable to situations of international hiring-out of labour.

In addition, further problems arise when the scope of paragraph 8 is extended on the one hand and diminished on the other one, in various OECD member countries. Hence, I realise that there are issues connected to the application of the current wording of the provisions, which needs to be taken into consideration. Nevertheless, in regards to the interpretation of the term “employer”, I advocate a reasoning that at least includes paragraph 8 of the Commentary on Article 15(2) OECD Model in the assessment. Such an inference is also supported by the fact that the Commentary as a whole constitutes an important part of the context of a tax treaty. In addition, it is rather peculiar that a term should require a different process of interpretation depending on whether there is a case of suspected abuse or not.

Thus, in my opinion, claims that are based on the criteria in paragraph 8 of the Commentary on Article 15(2) OECD Model should not be dismissed all too quickly in cases of *bona fide* secondments. As an example, this has been shown by the analysed case law from the Netherlands Supreme Court. However, one does not have to study foreign case law to find an encouragement to acknowledge the impact of the provisions in paragraph 8. This can be inferred from the Swedish Supreme Administrative Court’s reasoning in the *Brynäs Ice Hockey Association* case. In the case, the Swedish Supreme Administrative Court decided to adopt a dynamic approach. Hence, in order to identify the *real* employer, a parallel was drawn between the Swedish civil law delimitation of the concept of employee and the criteria established in paragraph 8 of the Commentary on Article 15(2) OECD Model. In its reasoning, the Court referred to SOU 1975:1, in which factors such as the level of control that the employer has over the employee and the fact that the tools needed to perform the work is provided by the employer are mentioned. In my opinion, such a connection is definitely worth considering, but it has not been taken into consideration by the Swedish Tax Agency in any of the other cases reviewed.

Consequently, I believe that paragraph 8 of the Commentary on Article 15(2) OECD Model contributes with the additional dimension that is required to make an adequate assessment of the *real* employer. The mere existence of the prerequisite to adopt a substance over form approach in the Commentary should therefore be acknowledged, despite the fact that the particular wording of the provisions are intended for cases of abuse. Hence, I would prefer it if the Swedish Tax Agency decided to let themselves be influenced by the international case law and the attitude discerned from other institutions in their surroundings. In my opinion, an autonomous interpretation of the term “employer” based on a substance over form approach, with the criteria in paragraph 8 of the Commentary on Article 15(2) OECD Model as a basis, would probably be the preferred way of understanding the concept.

Nevertheless, even though one could hope that the Swedish Tax Agency would assume the presented way of interpretation, it is rather unlikely that any adjustments will be made without pressure from changes in the international guidelines. Hence, the final subject that will be discussed concerns some of the alternatives that could contribute to an easier environment for employees on short-term secondments.

6.6 Alternatives for the future of Article 15 OECD Model

In my opinion, there are several conceivable alternatives to facilitate the application of Article 15 OECD Model in general and Article 15(2) (b) OECD Model in particular. However, before some of the various suggestions are presented, I would like to remark that the problems surrounding the future of Article 15 OECD Model does not seem to origin from any linguistic predicaments. On the contrary, I believe that there are many ways to draft a modified provision on the allocation of taxing rights on cross-border income from employment. Nevertheless, as emphasised in the above, the substantive issue appears to be that every adjustment to the Article is a highly politically sensitive question.

The political sensitivity is due to the fact that any alternation to Article 15 OECD Model might render a change in the allocation of taxing rights. Such a change will most likely affect the tax bases of the Contracting States and is especially delicate for countries where there is a discrepancy in the number of inbound and outbound secondments. Thus, it is of utmost importance to have these political economic aspects in mind when evaluating the different ways to deal with the forthcoming of Article 15 OECD Model.

Amendments to facilitate the interpretation of the term “employer” can be done on various levels. The primary and most inflicting way to resolve the interpretative issues would be to add or remove some of the wording in the

Model Convention. As an example, a possible solution could be to include an extra subparagraph of Article 3(1) OECD Model, with a definition of the term “employer”. Such an attachment would definitely secure an unanimous application of Article 15(2) (b) OECD Model. However, the lack of consensus on the question of how the definition should be designed would probably restrain the adaptation of such a proposal.

Another possibility, which could be attainable at the same level as the modification of Article 3(1) OECD Model, is the removal of subparagraphs (b) and (c) of Article 15(2) OECD Model. Such a rather controversial suggestion could present a final solution to the interpretative issues, since the term “employer” would be permanently removed. The inference that the future Article 15(2) OECD Model would only consist of the 183-days rule, in the current subparagraph (a), is arguable but not inconceivable. To my understanding, the proposal would most probably reduce the taxing rights of the State of Source. This is due to the fact that the consequential assessment would only be an objective calculation of the employees days spent abroad, without any regards taken to the circumstances of the employer. However, the decreasing number of conflicts of interpretation might compensate the loss of some tax revenues.

A final, and probably the most likely change, could be achieved at an inferior level, namely by a change in the Commentary. In my opinion, it would be a pity if the OECD did not proceed with the work initiated by the 2007 Revised Public Discussion Draft. Even if it is inconceivable to realise the Draft in its full version, I believe that some of the amendments should be continuously discussed at future negotiations within the OECD. Thus, it should be regarded as necessary to extend the dynamic criteria in paragraph 8 of the Commentary on Article 15(2) OECD Model, to cases of *bona fide* secondments. Additionally, the current criteria could even be complemented with factors such as the employees control and integration in the employer’s business, as expressed by Professor Luc De Broe *et al.*

However, one important aspect that needs to be highlighted when considering any changes to the Commentary is the fact that the status of the Commentary is difficult to establish. In addition, all too imposing amendments would probably be regarded as a major change in the Commentary, which would only have an impact on tax treaties that are concluded after the changes were made. Hence, the OECD and its member countries have a delicate task to achieve regarding the interpretation of the term “employer”. Nevertheless, a change has to start somewhere and any amendment on the matter would probably improve the current legal position. In addition, one thing that can be regarded as a matter of course is the fact that the international groups and the growing amount of internationally active employees would receive every initiative with open arms.

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