

COMMENTARY ON ARTICLE 14 CONCERNING THE TAXATION OF INDEPENDENT PERSONAL SERVICES

[Article 14 was deleted from the Model Tax Convention on 29 April 2000 on the basis of the report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the Committee on Fiscal Affairs on 27 January 2000 and reproduced in Volume II at page R(16)-1). That decision reflected the fact that there were no intended differences between the concepts of permanent establishment, as used in Article 7, and fixed base, as used in Article 14, or between how profits were computed and tax was calculated according to which of Article 7 or 14 applied. In addition, it was not always clear which activities fell within Article 14 as opposed to Article 7. The effect of the deletion of Article 14 is that income derived from professional services or other activities of an independent character is now dealt with under Article 7 as business profits.]

HISTORY

[The whole of Article 14 and the Commentary thereon were deleted from the Model Tax Convention on 29 April 2000.]

Paragraph 1: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 23 July 1992 and until 29 April 2000 paragraph 1 read as follows:

“1. The Article is concerned with what are commonly known as professional services and with other activities of an independent character. This excludes industrial and commercial activities and also professional services performed in employment, e.g. a physician serving as a medical officer in a factory. It should, however, be observed that the Article does not concern independent activities of artistes and sportsmen, these being covered by Article 17.”

Paragraph 1 was amended on 23 July 1992, by replacing the words “entertainers and athletes” at the end thereof by “artistes and sportsmen”, by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 1 read as follows:

“1. The Article is concerned with what are commonly known as professional services and with other activities of an independent character. This excludes industrial and commercial activities and also professional services performed in employment, e.g. a physician serving as a medical officer in a factory. It should, however, be observed that the Article does not concern independent activities of entertainers and athletes, these being covered by Article 17.”

Paragraph 1 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 1 read as follows:

“1. Article 14 is concerned with what are commonly known as professional services and with other independent activities of a similar character. This excludes industrial and commercial activities and also professional services performed in employment, *e.g.* a physician serving as a medical officer in a factory. It should, however, be observed that the Article does not concern performances by public entertainers and athletes working on their own account, all public entertainers coming under a special Article covering their activities whether independent or not (Article 17).”

Paragraph 2: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until 29 April 2000, paragraph 2 read as follows:

“2. The meaning of the term “professional services” is illustrated by some examples of typical liberal professions. The enumeration has an explanatory character only and is not exhaustive. Difficulties of interpretation which might arise in special cases may be solved by mutual agreement between the competent authorities of the Contracting States concerned.”

Paragraph 3: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 23 July 1992 and until 29 April 2000 paragraph 3 read as follows:

“3. The provisions of the Article are similar to those for business profits and rest in fact on the same principles as those of Article 7. The provisions of Article 7 and the Commentary thereon could therefore be used as guidance for interpreting and applying Article 14. Thus the principles laid down in Article 7 for instance as regards allocation of profits between head office and permanent establishment could be applied also in apportioning income between the State of residence of a person performing independent personal services and the State where such services are performed from a fixed base. Equally, expenses incurred for the purposes of a fixed base, including executive and general expenses, should be allowed as deductions in determining the income attributable to a fixed base in the same way as such expenses incurred for the purposes of a permanent establishment (see paragraph 3 of Article 7). Also in other respects Article 7 and the Commentary thereon could be of assistance for the interpretation of Article 14, *e.g.* in determining whether computer software payments should be classified as commercial income within Articles 7 or 14 or as royalties within Article 12.”

Paragraph 3 was amended on 23 July 1992 by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992, on the basis of Appendix 3 of the Report entitled “The Tax Treatment of Software” (adopted by the OECD Council on 23 July 1992). In the 1977 Model Convention and until 23 July 1992, paragraph 3 read as follows:

“3. The provisions of the Article are similar to those for business profits and rest in fact on the same principles as those of Article 7. The provisions of Article 7 and the Commentary thereon could therefore be used as guidance for interpreting and applying Article 14. Thus the principles laid down in Article 7 for instance as regards allocation of profits between head office and permanent establishment could be applied also in apportioning income between the State of residence of a person performing independent personal services and the State where such

services are performed from a fixed base. Equally, expenses incurred for the purposes of a fixed base, including executive and general expenses, should be allowed as deductions in determining the income attributable to a fixed base in the same way as such expenses incurred for the purposes of a permanent establishment (see paragraph 3 of Article 7). Also in other respects Article 7 and the Commentary thereon could be of assistance for the interpretation of Article 14.”

Paragraph 3 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 3 of the 1963 Draft Convention, was amended and renumbered as paragraph 4 (see history of paragraph 4) and a new paragraph 3 was added.

Paragraph 4: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 4 read as follows:

“4. Even if Articles 7 and 14 are based on the same principles, it was thought that the concept of permanent establishment should be reserved for commercial and industrial activities. The term “fixed base” has therefore been used. It has not been thought appropriate to try to define it, but it would cover, for instance, a physician’s consulting room or the office of an architect or a lawyer. A person performing independent personal services would probably not as a rule have premises of this kind in any other State than of his residence. But if there is in another State a centre of activity of a fixed or a permanent character, then that State should be entitled to tax the person’s activities.”

Paragraph 4 of the 1977 Model Convention corresponded to paragraph 3 of the 1963 Draft Convention, which was amended and renumbered as paragraph 4 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 3 read as follows:

“3. The provisions of Article 14 are similar to those customarily adopted for income from industrial or commercial activities. Nevertheless it was thought that the concept of permanent establishment should be reserved for commercial and industrial activities. The term “fixed base”, which is to be found in various Conventions, has therefore been used. It has not been thought appropriate to try to define it, but it would cover, for instance, a physician’s consulting room or the office of an architect or a lawyer. A person performing professional services would probably not as a rule have premises of this kind in any other State than that of his residence. But if there is in another State a centre of activity of a fixed or permanent character, then that State should be entitled to tax the person’s activities.”

Paragraph 4.1: Deleted on 29 April 2000 together with the heading preceding it by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 21 September 1995 and until 29 April 2000, paragraph 4.1 and the heading preceding it read as follows:

“Observation on the Commentary

4.1 Mexico considers that this Article is applicable to companies that perform professional services.”

Paragraph 4.1 together with the heading preceding it were added on 21 September 1995 by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995.

Paragraph 5: Deleted on 29 April 2000 together with the heading preceding it by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 31 March 1994 and until 29 April 2000, paragraph 5 and the heading preceding it read as follows:

“Reservations on the Article

5. Turkey reserves the right to tax persons performing professional services or other activities of an independent character if they are present in this country for a period or periods exceeding in the aggregate 183 days in the calendar year, even if they do not have a fixed base available to them for the purpose of performing such services or activities.”

Paragraph 5 was amended on 31 March 1994, by deleting the reference to New Zealand and making the reservation by New Zealand a separate paragraph 9 (see history of paragraph 9), by the report entitled “1994 Update to the Model Tax Convention”, adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 5 read as follows:

“5. *New Zealand and Turkey* reserve the right to tax persons performing professional services or other activities of an independent character if they are present in these countries for a period or periods exceeding in the aggregate 183 days in the fiscal (for New Zealand) or calendar (for Turkey) year, even if they do not have a fixed base available to them for the purpose of performing such services or activities.”

Paragraph 5 and the heading preceding it were added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 6: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 6 read as follows:

“6. *Portugal and Spain* reserve their position on paragraph 1.”

Paragraph 6 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 7: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 21 September 1995 and until 29 April 2000, paragraph 7 read as follows:

“7. *Denmark, Mexico and Norway* reserve the right to tax individuals performing professional services or other activities of an independent character if they are present on their respective territory for a period or periods exceeding in the aggregate 183 days in any twelve month period.”

Paragraph 7 was amended on 21 September 1995, by adding Mexico to the list of countries making the reservation, by the Report by the Committee on Fiscal Affairs

entitled “The 1995 Update to the Model Tax Convention”. After 31 March 1994 and until 21 September 1995, paragraph 7 read as follows:

“7. *Denmark and Norway* reserve the right to tax individuals performing professional services or other activities of an independent character if they are present on their respective territory for a period or periods exceeding in the aggregate 183 days in any twelve month period.”

Paragraph 7 was previously amended on 31 March 1994, by transforming the second sentence into a separate paragraph 8 (see history of paragraph 8), by the report entitled “1994 Update to the Model Tax Convention”, adopted by the OECD Council on 31 March 1994. After 23 July 1992 and until 31 March 1994, paragraph 7 read as follows:

“7. *Denmark and Norway* reserve the right to tax individuals performing professional services or other activities of an independent character if they are present on their respective territory for a period or periods exceeding in the aggregate 183 days in any twelve month period. They also reserve the right to insert in a special article provisions regarding income derived from independent personal services relating to offshore hydrocarbon exploration and exploitation and related activities.”

Paragraph 7 of the 1977 Model Convention was replaced on 23 July 1992 when it was deleted and a new paragraph 7 was added by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 7 read as follows:

“7. *The United States* reserves the right to tax services performed by individuals who are present in the United States for more than 183 days during the taxable year. The United States also believes that this Article should be limited to individuals and to income from the performance of personal services.”

Paragraph 7 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 8: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 21 September 1995 and until 29 April 2000, paragraph 8 read as follows:

“8. *Denmark, Ireland, Norway and the United Kingdom* reserve the right to insert in a special article provisions regarding income derived from independent personal services relating to offshore hydrocarbon exploration and exploitation and related activities.”

Paragraph 8 was amended on 21 September 1995, by adding Ireland to the list of countries making the reservation, by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995. After 31 March 1994 and until 21 September 1995, paragraph 8 read as follows:

“8. *Denmark, Norway and the United Kingdom* reserve the right to insert in a special article provisions regarding income derived from independent personal services relating to offshore hydrocarbon exploration and exploitation and related activities.”

Paragraph 8 as it read after 31 March 1994 corresponded to the second sentence of paragraph 7. On 31 March 1994 the second sentence of paragraph 7 was incorporated into a new paragraph 8 (see history of paragraph 7) and the United Kingdom was added to the list of countries making the reservation by the report entitled “1994 Update to the Model Tax Convention”, adopted by the OECD Council on 31 March 1994.

Paragraph 9: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 23 October 1997 and until 29 April 2000, paragraph 9 read as follows:

“9. Greece, the Czech Republic and New Zealand reserve the right to tax individuals performing professional services or other activities of an independent character if they are present on their respective territory for a period or periods exceeding in the aggregate 183 days in any twelve month period, even if they do not have a fixed base available to them for the purpose of performing such services or activities.”

Paragraph 9 was amended on 23 October 1997, by adding the Czech Republic to the list of countries making the reservation, by the report entitled “The 1997 Update to the Model Tax Convention”, adopted by the OECD Council on 23 October 1997. After 21 September 1995 and until 23 October 1997, paragraph 9 read as follows:

“9. Greece and New Zealand reserve the right to tax individuals performing professional services or other activities of an independent character if they are present on their respective territory for a period or periods exceeding in the aggregate 183 days in any twelve month period, even if they do not have a fixed base available to them for the purpose of performing such services or activities.”

Paragraph 9 was previously amended on 21 September 1995, by adding Greece to the list of countries making the reservation, by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995. After 31 March 1994 and until 21 September 1995, paragraph 9 read as follows:

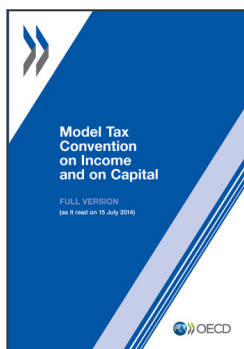
“9. New Zealand reserves the right to tax individuals performing professional services or other activities of an independent character if they are present in New Zealand for a period or periods exceeding in the aggregate 183 days in any twelve month period, even if they do not have a fixed base available to them for the purpose of performing such services or activities.”

Paragraph 9 as it read after 31 March 1994 corresponded in part to the reservation by New Zealand that was previously found in paragraph 5 (see history of paragraph 5). Paragraph 9 was added on 31 March 1994 by the report entitled “1994 Update to the Model Tax Convention”, adopted by the OECD Council on 31 March 1994.

Paragraph 10: Deleted on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). After 21 September 1995 and until 29 April 2000, paragraph 10 read as follows:

“10. Greece reserves the right to insert special provisions regarding income derived from independent personal services relating to offshore activities.”

Paragraph 10 was added on 21 September 1995, by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995.



From:
**Model Tax Convention on Income and on Capital
2014 (Full Version)**

Access the complete publication at:
<https://doi.org/10.1787/9789264239081-en>

Please cite this chapter as:

OECD (2015), "Commentary on Article 14: Concerning the Taxation of Independent Personal Services", in *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264239081-48-en>

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