ATAD 2 Proposal
Hybrid Permanent Establishment Mismatches

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Introduction

- Background
- Rules specifically addressing hybrid Permanent Establishment mismatches ("hybrid PE")
  - 'non-taxation without inclusion'
  - 'double deduction'
  - 'deduction without inclusion'

Single taxation principle?

- Double taxation
- Double non-taxation
- Non-taxation without inclusion (permanent and deferral)

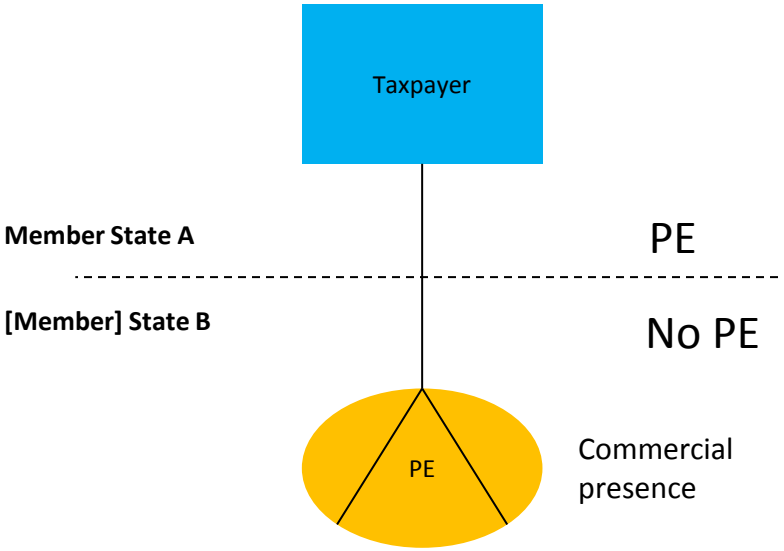
  - EU law and International law

Hybrid PE mismatch rules

- No specific rules in ATAD 1
- Specific rules in ATAD 2 and CC(C)TB Directive proposals
  - BEPS Action 2 Final Report (October 2015)
  - Public Discussion Draft BEPS Action 2 Branch Mismatch structures (22 August 2016)
- Discussion of the rules included in ATAD 2

Hybrid Permanent Establishment mismatches leading to ‘non-taxation without inclusion’

Non-taxation without inclusion



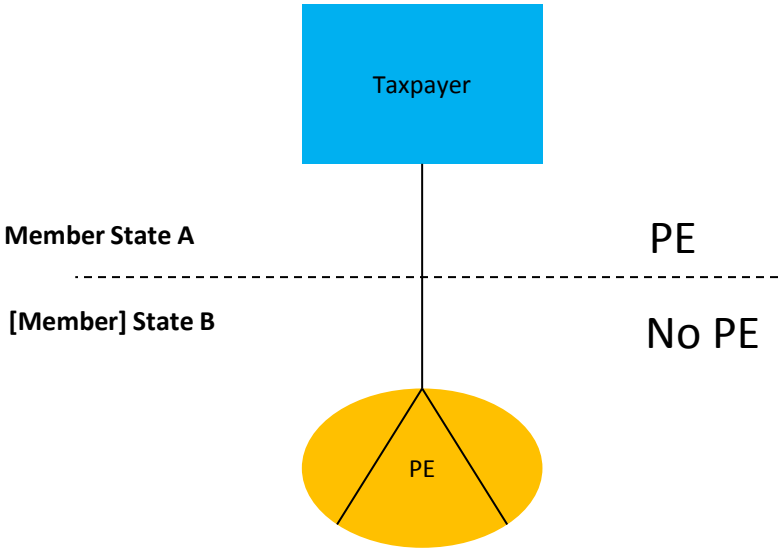
Article 2, point 9 ATAD 2

- 'hybrid mismatch' means a situation between a taxpayer and an associated enterprise (…) in different tax jurisdictions where [the following outcome is] **attributable to differences (…) in the treatment of a commercial presence as a permanent establishment:**
- **non-taxation of income** which has its **source** in a jurisdiction **without a corresponding inclusion** for tax purposes of the same income in the other jurisdiction (**'non-taxation without inclusion**')

Article 9, para. 3 ATAD 2

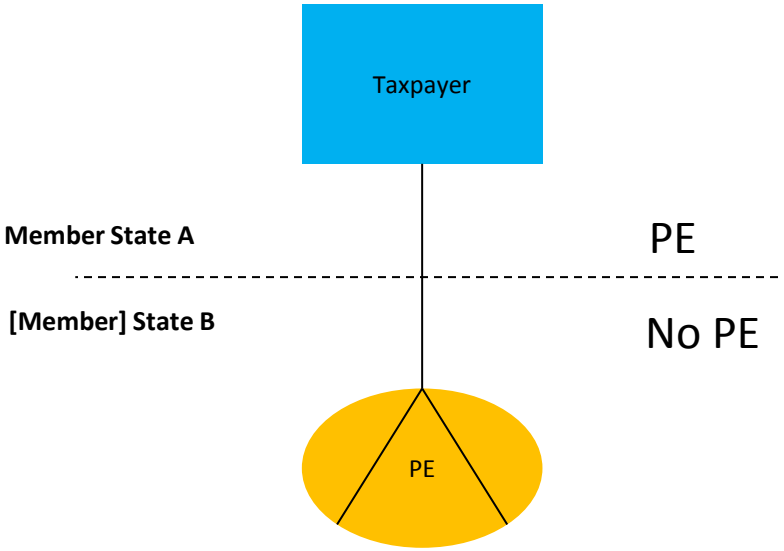
- **the Member State in which the taxpayer is resident** for tax purposes shall require the taxpayer to **include in the taxable base the income attributed to the permanent establishment**.

Non-taxation without inclusion



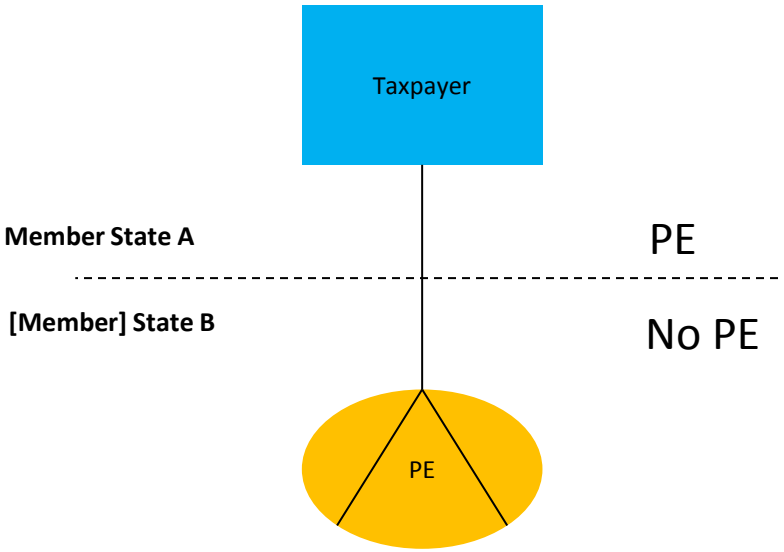
- Article 5 OECD Model
  - different treaty interpretations as regards to the PE definition under the treaty;
  - different PE concepts in domestic laws;
  - different facts taken into account.
- Article 23A para. 1 OECD Model
  - “may be taxed”
- McDonalds state aid case

Non-taxation without inclusion



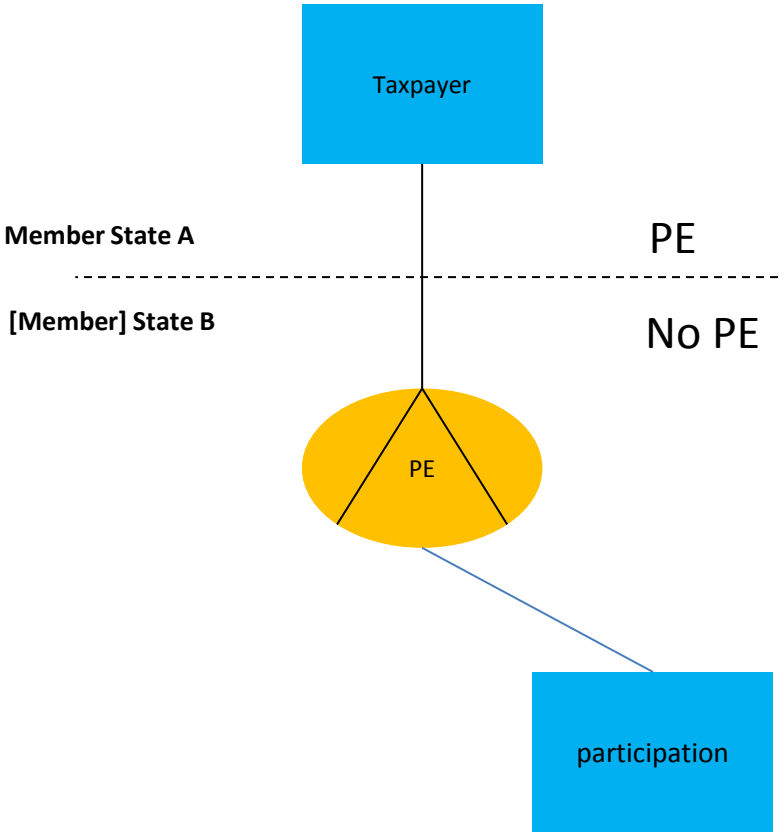
- Relation between Directive and tax treaties between Member States
- Relation between Directive and tax treaties between a Member State and a Third State

Non-taxation without inclusion



- "Non-taxation of income"
- Double taxation relief methods and territorial system
  - Tax exemption (Article 23A OECD Model)
  - Branch exemption (Dutch domestic law)
  - Territorial system?
  - Credit for foreign tax (Article 23B OECD Model)

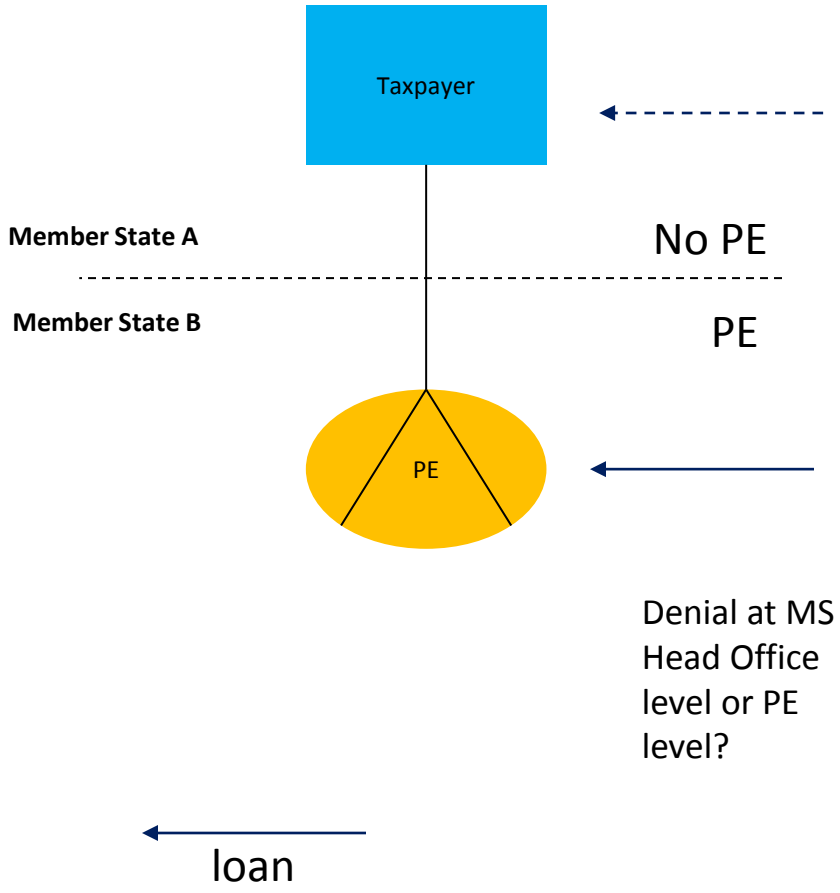
Non-taxation without inclusion



- What if PE income is exempt in Member State A pursuant to domestic law characterization of the income, e.g. participation exemption rules?

Hybrid Permanent Establishment mismatch leading to ‘double deduction’

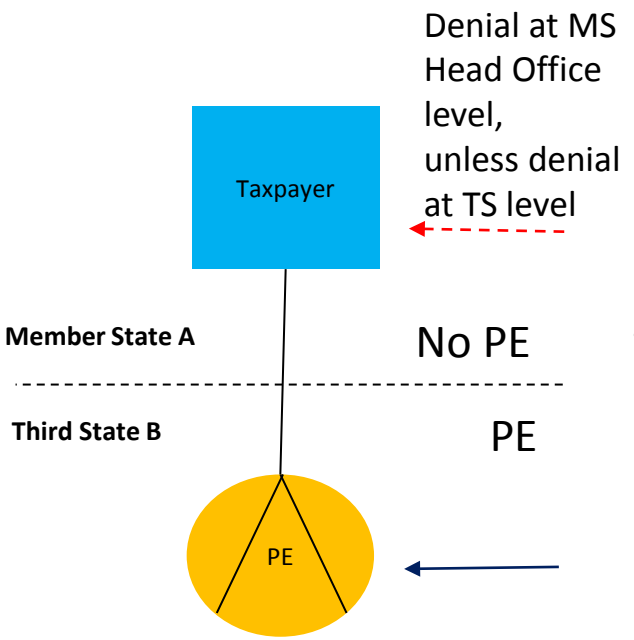
Double deduction involving two MS

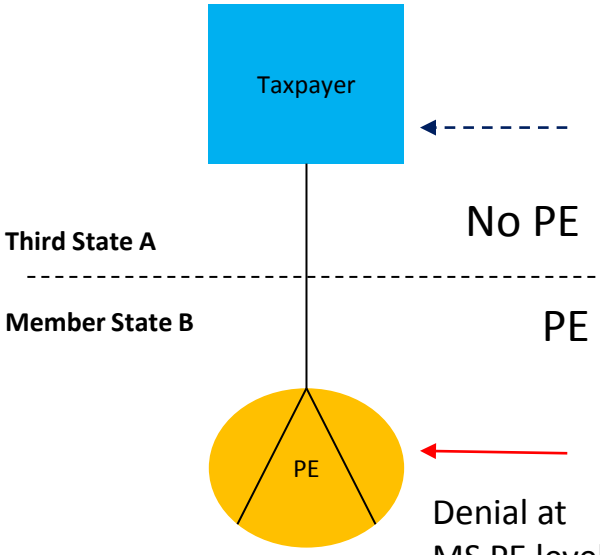


To the extent that a hybrid mismatch **between Member States** results in a double deduction of the same payment (…) **the deduction shall be given only in the Member State where such payment has its source**, the expenses are incurred or the losses are suffered.

- 'source requirement: Double taxation or double non-taxation remains?

Double deduction involving MS and TS



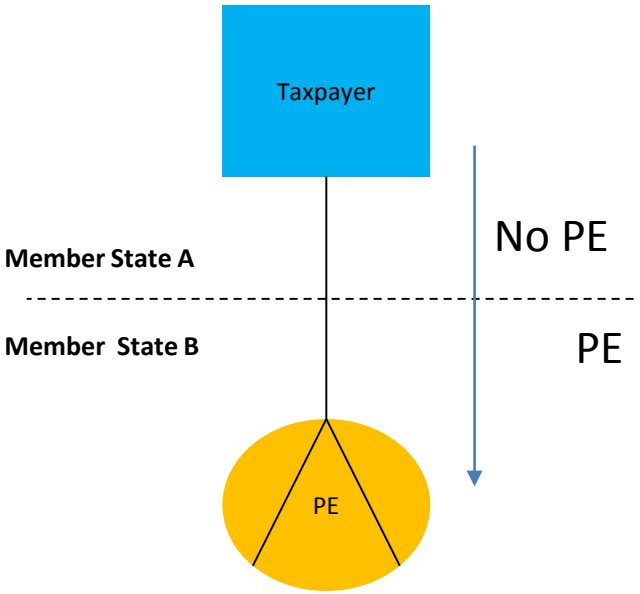


To the extent that a hybrid mismatch involving a **third country** results in a double deduction of the same payment (…) the Member State concerned shall deny the deduction of such payment (…), **unless** the third country has already done so.

loan

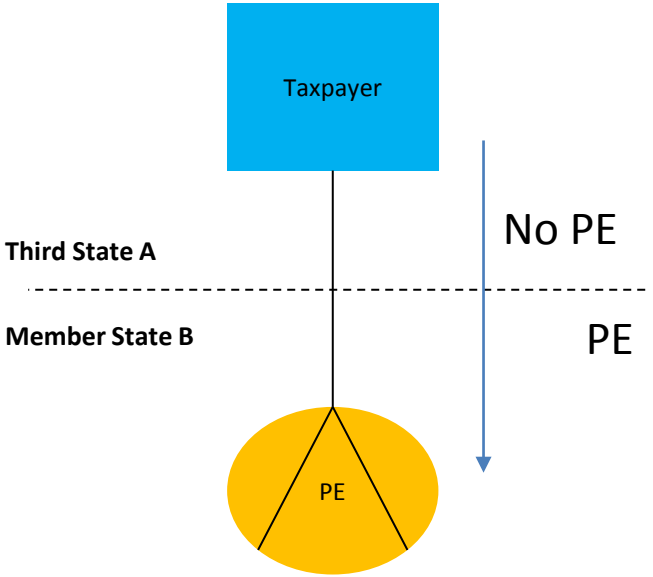
Hybrid Permanent Establishment mismatch leading to a ‘deduction without inclusion’

Deduction without inclusion



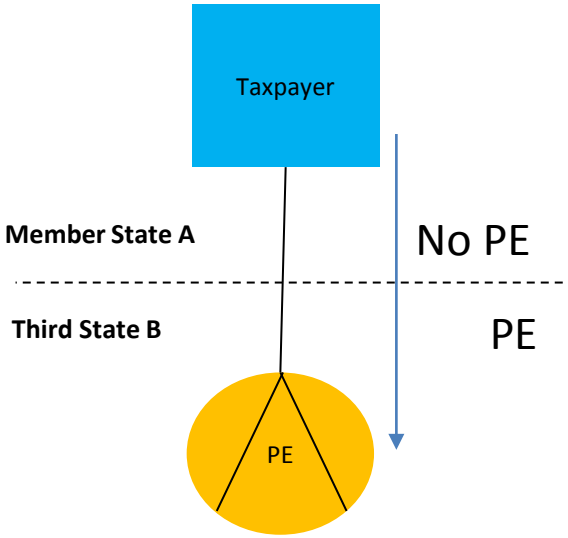
Denial at MS PE level

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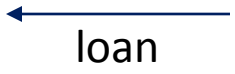


Denial at MS PE level
(unless already included at Head Office level)

Deduction without inclusion involving MS and TS



Inclusion at MS Head Office level (unless already denial at PE level)



Thank you