

Problems with Permanent Establishments

- Problems with Determining Permanent Establishments on the Basis of Article 5 (1) OECD MC -

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A Permanent Establishment? (1)

Application:

- Domestic laws
 - Ca 100 years ago
- International law
 - Bilateral/multilateral double-tax treaties
- EC law
 - EC Treaty
 - Directives
 - Parent-Subsidiary Directive
 - Interest-Royalty Directive
 - Merger Directive

A Permanent Establishment? (2)

Purpose:

- ⇒ Allocation of taxing powers
- ⇒ Provision of legal certainty

Definition:

“A fixed place of business through which the business of an enterprise is wholly or partly carried on.” (Article 5 (1) OECD MC, 2008)

I Condition – A Place of Business (1)

- All physical objects – tangible assets (OECD Comm. on Article 5 para. 4)
 - Premises
 - Facilities
 - Installations
 - Assets
 - Equipment
 - Accessories
- Used by a taxpayer
- Wholly or partly
- Commercially necessary
- Economic activity of the taxpayer

- **But:**
 - Mobile places?
 - Legal title of the place?
 - Participation in corporation, claims, intangible property rights, operation of assets, etc?

I Condition – A Place of Business (2)

- “Virtual places of business”?
 - OECD’s approach
 - Tangible computer equipment
 - Intangible software & data
 - VCLT’s approach
 - Articles 31 & 32 – “ordinary meaning”
 - Unilateral approach
 - Functions performed through that place

Services PE

– Why?

- Source State's taxing rights
- Similar treatment of business activities

– A Broad Concept?

- Flexibility in deeming a PE to exist

– Article 14 OECD MC?

- Independent personal services

Services PE

- Presence vs. Performance of individual
 - 183 days vs. 10 days

- Number of contracts/clients
 - 1 client

- Performance vs. Consumption of services
 - State S vs. State R/3rd State

- Determination of gross revenue
 - Domestic laws

- % of entity's gross revenue

II.a Condition – Geographical Permanence

- Specific geographical location
 - Link between the place and geographical point
- Nature of Business?
 - E.g. telecommunication services
- Commercial and geographical coherence? (OECD Comm. On Article 5 paras. 5.1-5.4 & 6)
 - Size of the place?
 - Mobile activities?
 - Locations are neighboring, and
 - Same business activities
 - One vs. several PEs

II.b Condition – Temporal Permanence

- Existence vs. Usage?
- Intention of taxpayer
- Nature of activity?
- Sufficient time?
 - 4 months vs. 4 years
- Frequent activity?
- Aggregation of time?
- Time vs. Number of deals

III Condition – Disposition

- A(-n) (independent) condition?
- Wide or broad interpretation?
- Legal right?
 - Illegal disposition (OECD Comm. on Article 5 para. 4.1)
 - Implicit authorization (factual right to use)
- **Really?**
 - Factual use is an additional condition to the formal right
- Control vs. presence?

IV Condition – Carry on Business of the Enterprise through that Place (1)

- Whose business (is carried on)?
 - Employees?
 - Subcontracting?
 - Construction-clause PE (OECD Comm. on Article 5 para. 19)
 - Responsibility assumed by the main contractor?
 - Attribution of profits to the PE?
- Which connection (exists between the place and business)?

IV Condition – Carry On Business of **the** Enterprise through That Place (2)

- Active or passive business?
 - “Carry on”
 - Purpose of Article 7 OECD MC
 - Vs. Articles 10-13 OECD
- Productive character of activity?
 - Mexico/London MCs – **YES!**
 - OECD/UN MCs – **NO!**
 - Business has only expenditures?

Conclusions

- Lack of consistency between States
 - Flexible definition
 - Double-(non-)taxation
- Erosion of concept?
 - Substantial entrepreneurial activities

Suggested Literature

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Many Thanks!

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