



PERMANENT ESTABLISHMENT RISKS ARISING FROM GLOBALLY MOBILE EMPLOYEES

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Articles

Many businesses with cross border operations (but lacking a branch network or overseas subsidiaries in those jurisdictions) rely on their globally mobile employees to maintain relationships with their overseas customer bases. These practices may have developed over a number of years in line with the growth of the business and frequently without any consideration being given to the potential tax consequences of such assignments.

Where such employees are regularly conducting business in other jurisdictions, and particularly where contracts are being concluded with customers in those jurisdictions, there is a risk of the business creating a permanent establishment and thus becoming liable to local taxes.

Such activities have been subject to greater scrutiny from tax authorities in recent years and in view of base erosion and profit shifting (BEPS) Action 7, this attention is only likely to increase in the future.

This briefing will consider some of the ways in which globally mobile employees may create a permanent establishment.

If a non-UK resident company has a UK permanent establishment, then the profits of the business that are attributable to that permanent establishment are chargeable to UK Corporation Tax.

A permanent establishment of a non-UK resident company exists in the UK if:

- the non-UK resident company has a fixed UK place of business through which its business is wholly or partly carried on; or
- an agent acting for the non-UK resident company has, and habitually exercises in the UK, authority to do business on the company's behalf and that agent is not of independent status acting in the ordinary course of its business.

Agency permanent establishment risk

The most likely situation in which a globally mobile employee can create a permanent establishment in another jurisdiction is where the employee is deemed to be a dependent agent acting on behalf of the company.

Factors that may point to an agency permanent establishment are as follows:

- if the employee has the ability to bind the company in any way or exercise any discretion on behalf of the company;
- if the employee can enter into contracts on behalf of the company;
- if the employee has the authority to act on behalf of the company, and
- if the employee has dependent status (i.e. there is a high level of control exercised over them by the company, they don't bear the entrepreneurial risk for the business that they carry on for the company, and/or the company places a low degree of reliance on their skill and knowledge).

Fixed place of business permanent establishment risk

Most fixed place of business permanent establishments will arise where a business has a clearly identifiable base of operations such as a branch or office. However, the

absence of these traditional bases of operations does not completely remove the risk of creating a UK permanent establishment through a fixed place of business.

Organisation for Economic Co-operation (OECD) proposals published in 2012 and a number of non-UK cases have highlighted the possibility that an individual who works from home can be deemed to be working from a fixed place of business.

HMRC commentary suggests that no fixed place of business permanent establishment would be created if a non-UK resident company employs sales staff in the UK who simply travel around from their private residences to seek orders. However, these scenarios can be very fact specific so they should be considered on a case by case basis.

In the event that the employee does create a fixed place of business permanent establishment through home working, it may also be possible to apply the exception from creating a fixed place of business permanent establishment where the activities carried out by the employee are preparatory or auxiliary in relation to the business of the company as a whole.

Employment taxes

In addition to the corporation tax consequences of having a UK permanent establishment, the income of the employees of the permanent establishment will also be subject to UK income tax and NICs from the first day of the existence of the permanent establishment.

Non-UK jurisdictions

The permanent establishment rules in many jurisdictions reflect the OECD guidelines and thus are broadly similar to the UK rules. However, in other jurisdictions there may be significant local differences or there may be no legal definition of a permanent establishment.

As such it is imperative that companies with employees who regularly work outside of the UK should obtain appropriate local advice in order to manage permanent establishment risks.

Recommendations

- Monitoring permanent establishment risk should be an ongoing process and clear guidelines should be implemented by companies in order to track the position appropriately.
- Permanent establishment rules vary across jurisdictions and it will therefore be necessary to obtain local advice in order to ensure compliance.

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