

**OECD MODEL TAX CONVENTION: COMMENTS ON REVISED DISCUSSION DRAFT
INTERPRETATION AND APPLICATION OF ARTICLE 5 (PERMANENT ESTABLISHMENT)**

Section 2: Meaning of “at the disposal of” (paragraph 4.2 of the Commentary)

In our view, the concept of “at the disposal of” in para 4 of the Commentary suffers from the defect that it is treated as being determinative or at least highly persuasive in relation to all three aspects of the definition of a permanent establishment, whereas in fact it is only limited assistance in relation to two of those aspects.

Place of business

As regards the first aspect of the definition of a permanent establishment, namely whether the business is carried on through a “place of business”, it is clear that premises which are not owned by the enterprise but are merely at its disposal can constitute a place of business through which the enterprise carries on business. The concept of premises being “at the disposal of” of an enterprise merely means that the enterprise has the formal or informal right to use the premises (not necessarily exclusively) for the purpose of carrying on its business. As a place of business cannot constitute a permanent establishment unless the enterprise carries on its business there, it is implicit that the enterprise must be able to use the premises for that purpose. Accordingly, the concept of “at the disposal” adds very little to what is in any case implicit. However, the concept of “at the disposal” does make clear that the enterprise does not need to own the premises. All that is needed is a formal or informal right to use the premises for business purposes.

Fixed

Where the Commentary falls into error is in regarding the concept of “at the disposal” as having some function to perform in relation to a second aspect of the definition of a permanent establishment, namely whether the place of business is “fixed” (dealt with at paras 5 and 6 of the Commentary). This requires that the business be established at a distinct place with a certain degree of permanence (para 2 of the Commentary). As premises will be at the disposal of an enterprise even though its formal or informal right to use them is on a wholly temporary basis, the concept “at the disposal” is of no assistance in determining whether an enterprise’s use of premises has the necessary degree of permanence to make them a “fixed” place of business.

Through which the business is wholly or partly carried on

As regards the third aspect of the definition of a permanent establishment, namely whether the business is carried on “through” a place of business, the concept of “at the disposal” is of assistance in distinguishing premises which are merely “where” a business is carried on from premises “through which” a business is carried on. Only the latter premises can constitute a permanent establishment. An enterprise which fits new or replacement windows to its customers’ premises does not carry on its business “through” those premises, because it has no right to “use” the premises. The premises are merely “where” the business is carried on. It might be different if an individual whose job was to fit windows had a single customer with premises of such magnitude that he was constantly employed in those premises fitting windows (though he might then be categorised as an employee of the customer).

Need to expand the concept of “at the disposal”

The concept “at the disposal of” could only perform the function of being of assistance in relation to all three aspects of the definition of a permanent establishment if it was split into three concepts as follows:

- (i) premises not at the disposal of the enterprise, because the enterprise does not have any formal or informal right to use the premises for its business purposes and does not, therefore, carry on its business “through” those premises;
- (ii) premises at the disposal of the enterprise for business purposes on a sufficiently constant, stable, secure or continuous basis and for a sufficiently extended period of time to give a degree of permanence to the enterprise’s use of the premises and, therefore, to

make them a “fixed” place of business “through which” the enterprise carries on its business (“at the fixed and regular disposal of”); and

- (iii) premises at the disposal of the enterprise for business purposes on too casual, insecure or intermittent a basis for the premises to be regarded as a “fixed” place of business (“at the precarious or temporary disposal of”).

Premises not at the disposal of the enterprise would not constitute a permanent establishment. Premises at the “fixed and regular disposal” of the enterprise would constitute a fixed place of business, whereas premises at the “precarious or temporary disposal” of the enterprise would not.

These distinctions could then be applied to the various examples discussed in the Commentary.

Examples

Premises not at the disposal of the enterprise

Where a salesman regularly visits a major customer to take orders and meets the purchasing director in his office to do so, the customer's premises would not in our view be at the disposal of the enterprise employing him, because it does not have any right to “use” the premises to carry on its business. It merely has the right to visit the premises.

Where an enterprise is engaged in paving a road, the road would not in our view be at the disposal of the enterprise, because it does not have any right to “use” the road to carry on its business. The road is “where” the business is carried on but is not a place “through which” it is carried on. It might be different in the case of a road improvement project lasting more than 12 months (having regard to Article 5(3)).

Where a painter paints a customer's premises, the premises would not in our view be at the disposal of the enterprise employing the painter, because the enterprise has no right to “use” the premises to carry on its business. The premises are “where” the business is carried on but are not a place “through which” it is carried on.

Where CarCo manufactures and sells automobiles and sets up SubCar to assemble cars from parts owned and supplied by CarCo, SubCar's premises would not in our view be at CarCo's disposal for the purposes of its (CarCo's) business, because CarCo does not use SubCar's premises to carry on its business. The only business carried on in SubCar's premises is SubCar's business (of contract manufacturing).

Premises at the “precarious or temporary disposal” of the enterprise

Where a salesman regularly visits a major customer to take orders and is allocated a spare room in which he can be consulted by different members of the purchasing team, the room would in our view be at the “precarious or temporary disposal” of the enterprise employing him for the purposes of its business. The room is at the disposal of the enterprise on too casual and insecure a basis for the premises to be regarded as a “fixed” place of business. We assume, in this example, that the room allocated to the salesman changes from visit to visit, that the room is used for other purposes when he is not there and that, where no spare room is available, his visit is cancelled.

It follows that we do not agree with BIAAC that unutilized capacity of a host operation made available to an enterprise should be regarded as not satisfying the requirement of being “at the disposal of” the enterprise. However, we regard premises which the enterprise has the right to use only if and when they are unutilized by the host operation (being at that time surplus to its requirements) as an example of premises at the “precarious or temporary disposal” of the enterprise.

Where a manager of a company is allowed for a period not exceeding 6 months to use a room in the offices of another company (eg a newly acquired subsidiary) for up to 3 days a week, in order to ensure that the subsidiary complies with its obligations under contracts concluded with its new parent, the room allocated to the manager changes from day to day, the room is used for other purposes when he is not there and, where no spare room is available, he is not able to visit, the rooms would in our view be at the “precarious or temporary disposal” of the parent.

Where a road transportation enterprise is allowed on a non-exclusive basis to use a delivery dock at a customer's warehouse every day for a number of years for the purpose of delivering goods purchased by that customer, the dock would in our view be at the "precarious or temporary disposal" of the enterprise for the purposes of its business. The dock would be at the disposal of the enterprise on too casual, insecure or intermittent a basis for it to be regarded as a "fixed" place of business.

Where a market trader regularly sets up his stand in an outdoor market, space at the market is allocated on a first come first served basis and the space allocated to the trader changes from market day to market day, the market would in our view be at the "precarious or temporary disposal" of the trader. Although the trader is a regular attender at the market (arriving early to avoid disappointment), space at the market is at his disposal on too casual, insecure or intermittent a basis for it to be regarded as a "fixed" place of business.

Premises at the "fixed and regular disposal" of the enterprise

Where Peter provides training to ClientCo's staff over a 20 month period at ClientCo's headquarters and 10 training rooms are made available to him to prepare and deliver the training sessions, the training rooms would in our view be at his "fixed and regular disposal" for the purposes of his business. The training rooms are at Peter's disposal on a sufficiently constant, stable, secure and continuous basis and for a sufficiently extended period of time to give a degree of permanence to his use of the premises and, therefore, to make them a "fixed" place of business "through which" he carries on his business.

Where a salesman regularly visits a major customer to take orders, is allocated a room (generally the same one) in which he can be consulted by different members of the purchasing team, the room is rarely used for other purposes when he is not there and the availability of a room to the salesman does not depend on there being spare capacity (such that his visits are never cancelled), the room would in our view be at the "fixed and regular disposal" of the enterprise employing him for the purposes of its business. The room or rooms are at the enterprise's disposal on a sufficiently constant, stable, secure and continuous basis to give a degree of permanence to its use of them and, therefore, to make them a "fixed" place of business "through which" it carries on its business.

Where a manager of a company is allowed for a 2 year period to use a room (generally the same one) in the offices of another company (eg a newly acquired subsidiary) in order to ensure that the subsidiary complies with its obligations under contracts concluded with its new parent, the room is rarely used for other purposes when he is not there and the availability of a room to the manager does not depend on there being spare capacity (such that his ability to carry out his work is never interrupted), the room would in our view be at the "fixed and regular disposal" of the enterprise employing him for the purposes of its business.

Where a painter paints and decorates a customer's premises, the premises are of such magnitude that the painter is constantly employed in those premises painting and decorating them and a small area is made available to him in a shared storage room for him to store his equipment, the premises would in our view be at the "fixed and regular disposal" of the enterprise employing him for the purposes of its business. The same would apply if a self-employed painter had a single customer with premises of such magnitude that he was constantly employed in those premises painting and decorating them (though he might then be categorised as an employee of the customer, rather than as being self-employed).

Where a market trader regularly sets up his stand in an outdoor market, space at the market can be pre-booked for many months at a time and the space allocated to the trader rarely changes from market day to market day, the market would in our view be at the trader's "fixed and regular disposal" for the purposes of his business.

Section 3: Can the premises of a (converted) local entity constitute a permanent establishment of a foreign enterprise under paragraph 1? (paragraph 4.2 of the Commentary)

We recommend that the following words be added at the end of new paragraph 3.1:

"and without evaluating those circumstances by reference to their derivation or history".

Section 4: Home office as a PE (proposed new paragraphs 4.8 and 4.9 of the Commentary)

We do not agree that the question whether the employer *requires* an employee to work at home is the most appropriate criterion for distinguishing a home which is a PE from one which is not. We would draw the distinction as follows.

Where an employee's home is used by him for business purposes on a casual, insecure or intermittent basis, the terms of employment do not specifically contemplate the employee working from home and the job can be properly performed without the employee working at home, the employee's home would in our view be at the "precarious or temporary disposal" of the enterprise employing him and would not, therefore, be regarded as a "fixed" place of business through which the enterprise carries on its business.

Where an employee's home is used by him for business purposes on a constant, stable, secure or continuous basis and for an extended period of time and either the terms of employment specifically contemplate the employee working from home or the job cannot be properly performed without the employee working at home, the employee's home would in our view be at the "fixed and regular disposal" of the enterprise employing him and, accordingly, his use of his home for business purposes would have a sufficient degree of permanence to make it a "fixed" place of business "through which" the enterprise carries on its business. A common feature of this kind of arrangement is that a significant amount of equipment (particularly, IT equipment) is made available by the enterprise to the employee for home use. Where the terms of employment include a rental payment for the business use of the home, those terms clearly contemplate the employee working from home. However, home working may be still contemplated by the terms of the employment notwithstanding that the indications are rather less clear than that.

The fact that the employee does not permit visits to his home for business purposes is a factor pointing against a PE but we do not regard it as a particularly strong factor.

Section 6: Time requirement for the existence of a permanent establishment (paragraph 6 of the Commentary)

On the need for a time requirement, we agree with the concerns raised by BIAC and do not support the recommendations of the Working Party. We, therefore, agree that a fixed place of business should only be regarded as existing if the enterprise's business is conducted there for a minimum period of time. BIAC recommended 12 months. We would accept a minimum period of 6 months (the period currently mentioned in para 6).

In our view, the approach of the Working Party (reflected in the current para 6) that a PE can exist for a very short period of time (just a few weeks in the case of a catering enterprise which hires premises to provide catering services to its country's athletes during the Olympic Games) where the nature of the business is such that it will only be carried on for that short period of time is wholly inconsistent with the fundamental concept of a "*permanent* establishment".

Furthermore, we do not accept that the fact that the activities carried on by the enterprise for a short duration in the host country constitute a business that is carried on exclusively in that country has any bearing on the question whether the premises in which the activities are carried on is a fixed place of business. It is a factor which is simply not relevant to the question of permanence.

Section 7: Presence of foreign enterprise's personnel in the host country (paragraph 10 of the Commentary)

In our view, the revised para 10 should explain the three different scenarios which may arise where the personnel of one enterprise work at the premises of another enterprise. Using the hotel management example, they are as follows.

In the first scenario, a hotel management company provides a hotel management service to an hotel owning company. This service obviously requires personnel employed by the hotel management company to be physically present in the hotel. The question whether the hotel constitutes a PE of the hotel management company does not raise any new issues not already considered above.

In the second scenario, an employment agency employs personnel which it seconded to the hotel owning company. The personnel become part of the hotel owning company's management team. The secondment service obviously requires the employment agency's personnel to be physically present in the hotel. The question whether the hotel constitutes a PE of the employment agency is a difficult one. Is the secondment service one which is carried on, at least partly, "through" the hotel? Or, is the only business which is carried on in the hotel that of the hotel owning company? The Commentary needs to address this difficult issue.

In the third scenario, a parent company employs personnel which it seconded to other group companies, one of which is an hotel owning company. The personnel seconded to the hotel owning company become part of that company's management team. The secondment service obviously requires the employment agency's personnel to be physically present in the hotel. Under the law of the host country, the personnel are regarded as employees of the hotel owning company, as that law comprises a principle similar to the "economic employer" in the Commentary on Article 15. In this case, we agree that the hotel is not a PE of the parent company, as the only business which is carried on in the hotel that of the hotel owning company.

Section 8: Main contractor who subcontracts all aspects of a contract (paragraphs 10 and 19 of the Commentary)

In our view, the question whether a main contractor can be considered to carry on its business through a fixed place of business where the only personnel present at the relevant premises are employed by its sub-contractors cannot be decided by reference to whether or not the main contractor itself controls access to and use of the premises.

The answer to this question depends, in our view, on whose business is carried on at the premises. If the main contractor's business is carried on there, it will have a PE at those premises (provided the other requirements of a PE are met). As the main contractor will have a contract with the customer and will earn profits from that contract (after deducting the fees which it pays to its sub-contractors), it should in most cases follow that the main contractor's business is carried on at the premises (albeit it is carried on on its behalf by the sub-contractors).

This must be contrasted with the CarCo/SubCar example discussed above. In that case, we concluded that CarCo's business was not carried on at SubCar's premises, even though CarCo had subcontracted to SubCar work which it had previously performed itself. What distinguishes this example from that of the main contractor is that the main contractor supplies the "output" side of its business (the provision of a service to its customer) through the agency of its subcontractors, whereas CarCo merely subcontracts an "input" function (manufacturing) to SubCar and retains the selling part of the business for itself.

Section 19: Meaning of "to conclude contracts in the name of the enterprise" (paragraph 32.1 of the Commentary)

We agree with the recommendation of the Working Party (to be reflected in para 32.1) that, where an agent has authority to conclude contracts on behalf of the enterprise and concludes them in its own name as undisclosed agent but, under the relevant law, the enterprise as undisclosed principal is bound by the contracts, the agent "has authority to conclude contracts in the name of the enterprise".

However, where an agent has authority to conclude contracts on behalf of the enterprise, concludes them in its own name as undisclosed agent and, under the relevant law, the enterprise as undisclosed principal is *not* bound by the contracts, we do not agree that the agent "has authority to conclude contracts in the name of the enterprise". The fact that the enterprise may indemnify the agent against the legal consequences of having acted, at least apparently, as a principal does not, in our view, make any difference.

Where an agent solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse of the enterprise from which goods are delivered and where the enterprise routinely approves the transactions, the agent does not, in our view, have "authority to conclude contracts in the name of the enterprise". Authority lies with the enterprise. The fact that it routinely gives such authority does not matter.

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