



UNRAVELLING PERMANENT ESTABLISHMENT CONCEPT IN DOUBLE TAX AVOIDANCE AGREEMENTS

Applying Double Tax Avoidance Agreements (“DTA”) is a measure which helps companies to reduce the tax expenses in transactions with parties being residents of a country who entered into a DTA with Vietnam. However, understanding and correctly applying the DTA is the prerequisite condition to help the tax payers mitigate the risk of being subject to tax claw-back by the tax authorities. One of the difficulties in applying for tax relief and exemption under the DTA is to determine whether the foreign parties have a Permanent Establishment (“PE”) during the transaction or not. Upon the assessment of the DTA notification dossier, the tax authorities now tend to have stricter views on the PE. In this Alert, we would like to analyze the tax authorities’ view on the PE, especially for some typical transactions.

- **The definition of “Permanent Establishment” in Paragraph 1, Article 5 of the DTA in general**

Under the DTAs, the term “Permanent Establishment” means a fixed place of business of an enterprise, through which the business of the (*foreign*) enterprise is wholly or partly carried out.

- **Vietnam tax authorities’ view on “Permanent Establishment” in recent cases**

Pursuant to the guidance of the Circular 205/2013/TT-BTC as well as other official letters of the General Department of Taxation, except for other specific cases, the tax authorities often determine the PE based on the following three (03) conditions:

- 1) The existence of an “business establishment”;
- 2) This business establishment must be “fixed”;
- 3) The enterprise carries out wholly or partly of its business activities through fixed business establishment.

Defining the existence of a “business establishment”

A business establishment is not necessarily attached with a complete establishment such as a building, an office with management system. A business establishment may simply be just a vehicle, machinery or equipment or even merely a specific space used by the enterprise.

Defining the “fixed” place of business

The fixed place of business is assessed based on the regularity and stability criteria in operation of that business establishment at a specific location in Vietnam for a certain period.



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Defining the term of “carrying out business operation through a fixed place of business”

The fact that a business establishment carry out wholly or partly of its business activities (e.g. providing service and selling goods etc.) at fixed business establishment mentioned above during the contract implementation period is considered as carrying out business activities in Vietnam through a fixed business establishment. Determination of carrying out wholly or partly of its business activities may be attached with a subjective interpretation since the concept of “partly” has not been attached with any specific quantitative or qualitative requirements.

• **Certain specific cases determined as constituting a “Permanent Establishment in Vietnam”**

- (i) Equipment, machineries, self-unloading vessels that foreign companies set up in the sea area of Vietnam;
- (ii) Ships, rigs employed for the service provision of foreign companies in Vietnam;
- (iii) Using warehouse of buyers in Vietnam;
- (iv) On-the-spot import and export transactions;
- (v) Goods trading via bonded warehouses;
- (vi) Sales of goods/services via sole agents.

In light of the above strict views of the tax authorities on PE determination, we note that the assessment of the transactions in practice would be more complicated. We therefore recommended that in case of having similar transactions, the company should carefully analyse the relevant criteria to determine whether or not the foreign parties constitute a PE in Vietnam for DTA application. If the company would like to discuss further on a specific case, please kindly contact us for further practical discussion.

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