



GMS Flash Alert

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European Union – Remote Working and Corporate Taxation

Even though the most recent publications about remote working and taxation from the Organisation for Economic Co-operation and Development (OECD)¹ date back to 2021, the European Union (EU)² is calling on countries for a coordinated approach around issues relating to both personal and corporate taxation when employees work remotely.

This *GMS Flash Alert* will address corporate taxation issues concerning permanent establishments (PE) and consideration about dual-company residence when directors and executives work remotely.

WHY THIS MATTERS

Employees who work remotely can under certain circumstances trigger PEs.

Companies are implementing and reviewing their policies for cross-border remote working, with some not yet taking an active approach to incorporating an assessment of their PE risk in such policies. This is understandable since most countries are vague about when remote working triggers a PE and thereby taxation of the company in the country where the remote work is performed.

However, current lack of clarity should not be understood as a signal that remote working does not trigger PEs and that the local tax authorities will not take an interest in the issues surrounding corporate taxation when employees work remotely. When devising or reviewing their approach to cross-border remote working, companies should consider including, and reviewing on a regular basis, their risk for triggering a PE.

Background

Permanent establishment (PE) is a term that describes an ongoing presence of a business in a country. If it is determined that a PE exists, the company becomes liable for corporate taxation in that country and subject to tax filing requirements. The practical meaning of a PE is that it creates a taxable presence for a company outside the company's

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country of establishment. A PE must be duly registered with the local tax administration and separate accounting and tax filing must be arranged.

Generally, employees working from a home office can trigger a PE. Employees can also trigger a PE through the so-called “agency permanent establishment” (or “agency “PE”), which describes a situation in which employees habitually perform decision-making activities in another country (e.g., negotiating and concluding sales contracts). Employees can trigger a PE through ongoing service delivery in another country.

Another aspect which commonly arises in this context is dual residence which is not the same as PE. To determine tax residence for a company, some countries assess the place of effective management. So, if directors and executives are working from their home office in another country and for example move all or some board meetings online, this can give rise to questions about whether the company has residence, and thereby a corporate tax liability, in more than one country.

During the COVID-19-related restrictions on movement, the OECD recommended³ that employees who are working from a jurisdiction other than the one where their employer is located due to pandemic-related restrictions **should not** trigger PE. The focus of this guidance was on the fact that restrictions imposed by governments due to COVID-19 were exceptional and temporary in nature.

MEIJBURG & CO. NOTE

However, restrictions on movement have generally been removed, but some employees continue to work remotely, either permanently or temporarily (and repeatedly). It is therefore relevant for companies to assess their PE risk and dual tax residence in connection with employees working remotely.

Home Office (Fixed Place of Business)

When assessing whether a PE is triggered, all relevant facts and circumstances must be taken into account for each situation. However, on a general level in a home-office situation a PE would be triggered in cases where all the following criteria are met:

- Home office is a place of business;
- Home office is a fixed place of business (a certain degree of permanence);
- Home office is at the disposal of the foreign company through which it conducts its business.

Generally, countries have either introduced local law provisions or have agreed under double taxation treaties to exempt certain activities from classification as a PE. The common feature of these exemptions is that they are preparatory or auxiliary to the carrying out of business activities.

When assessing the above-listed criteria, the authorities usually look at how much time is spent working from the home office and whether the employee works from the home office voluntarily or because the employer has determined that the work must be done from the home office. The authorities will also assess the character of the working activities to determine if they have preparatory or auxiliary character.

Agency Permanent Establishment

Agency permanent establishment refers to a situation when a PE is triggered by the so-called dependent agent, e.g., sales representative or a person who exercises decision-making power on behalf of a company in a country. One of the key conditions under this rule is that the activities of a dependent agent are habitually performed, which is again an assessment of facts and circumstances.

Employees do not necessarily have to conclude contracts themselves, but their involvement in contracting activities would be taken into account when assessing agency PE and if they performed their activities habitually.

The concept of agency PE exists nevertheless independently from that of a fixed place of business, and a PE could be triggered by the so-called dependent agent despite not operating from a location that qualifies as a “fixed place of business.”

Dual-Company Residence

Countries usually have the right to tax their own resident individuals, and resident companies on their worldwide profits, which is why many countries have broader definitions of who is considered to be tax resident. Where the definitions overlap, a taxpayer might be deemed to be tax resident in two countries, the so-called “dual residence.”

It is common that in addition to incorporation, the place of effective management triggers tax residence for a company. In a case of dual residence, two countries will want to tax company profits.

When directors and executives work remotely in another country, this can present a risk for a company to have dual residence. However, it is necessary here to observe any tax treaties that might apply and how the assessment of effective management is conducted in the relevant countries.

Experiences

Finland

Finland’s Supreme Administrative Court overturned a ruling delivered by a lower court and concluded that the three employees working from their home office in Finland for a Swedish biopharmaceutical company did not trigger PE⁴.

The employees in Finland promoted company products and related research to various health professionals and experts in Finland. The employees worked exclusively from their respective home offices where they kept promotional materials and necessary equipment. They did not have authority to take any legal action, conclude any sales contracts, or take part in negotiations of such contracts.

Finland’s lower court had concluded⁵ that even though the employees did not sell products or participate in sales contracts, their activities were aimed at making these products known in Finland. Therefore, their activities were not preparatory or auxiliary in nature. On the other hand, Finland’s Supreme Administrative Court assessed the proportionality between the activities done by the three employees on the one hand and the activities performed by the rest of the Swedish company on the other.

Finland’s Supreme Administrative Court found that the activities performed by the employees in Finland were not significant or substantial enough to be other than auxiliary in nature which led that court to conclude contrary to the lower court and find that the Swedish company did not indeed have PE in Finland.

Denmark

The Danish tax authorities issued a binding statement⁶ in a case concerning a managing director who was partially working from home in Denmark for personal reasons in which they concluded that PE was not triggered.

The conclusion was focused on the fact that the nonresident employer did not have a fixed place of business at its disposal in Denmark and did not have control over the managing director’s home office. Furthermore, the authorities noted that the managing director would not be involved in sales in Denmark and the work in Denmark would be sporadic.

Spain

The Spanish tax authorities published a binding tax ruling⁷ which describes circumstances where a PE was not triggered. The authorities concluded that the nonresident company did not have access to the home office of the employee in Spain, the company did not require that the employee work in Spain, and lastly the company did not assume any cost that derives from the employee's stay in Spain.

Sweden

The Swedish Tax Agency published a statement⁸ about PE and remote working where the emphasis is put on whether there is an implicit requirement for employees to work from home. Further, it is taken into consideration if work from home in Sweden provides a certain advantage to the company, e.g., customers in Sweden that the employee works for and if there is any connection between the company's activities and the geographical location.

KPMG NOTE

Companies whose employees are working remotely in another country should consider actively if and how PEs can impact their business. This could be in the form of an internal note or annex to a remote working policy in which the company analyses relevant issues for PEs and their cross-border working arrangements.

The examples of cases and local guidance provided in this newsletter show how easily a PE could be triggered and how important it is to carefully assess the potential consequences of any decision a company makes in connection to cross-border remote working.

KPMG is following such developments internationally and locally to be able to provide valuable insights to companies to address their risk level for PEs in the context of remote working.

FOOTNOTES:

1 OECD, "[Implications of Remote Working Adoption on Place Based Policies: A Focus on G7 Countries](#)," 22 June 2021. See also "[OECD Policy Responses to Coronavirus \(COVID-19\) – Tax Administration: Towards Sustainable Remote Working in a Post COVID-19 Environment](#)," 19 July 2021.

2 European Economic and Social Committee, "[Taxation of cross-border teleworkers and their employers](#)," adopted 13 July 2022; see also "[Taxation rules on cross-border teleworking must be updated and simplified](#)," 18 July 2022.

3 See footnote 1.

4 Korkein hallinto-oikeus (Supreme Administrative Court of Finland), No. 22072/2020, ECLI:FI:KHO:2021:171, December 2021.

5 Päätös, jota valitus koskee Helsingin hallinto-oikeus 29.09.2020 nro 20/1762/3.

6 Skatteforvaltningen (Danish tax authorities), "[Ikke fast driftssted ved direktørs arbejde fra hjemmet i Danmark](#)," SKM2022.406.SR, 29 August 2022.

7 Secretaría de Estado e Hacienda, Dirección General de Tributarios (Spanish tax authority), Doctrina Tributaria - Consultas Tributarias, [Nº de consulta V0066-22](#), 18 January 2022 .

8 Skatteverket (Swedish tax authorities), "[När medför en anställds arbete i hemmet att ett utländskt företag får fast driftställe?](#)," Dnr: 8-1677220, 13 May 2022.

Contact us

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