

Home offices and PE

Cross-border remote working
and permanent establishment







Introduction

Covid-19 has led to a significant change in working conditions. Almost overnight, busy offices were abandoned as employees were told to work from home while governments grappled with the pandemic. In certain circumstances, some employees even moved countries, at least temporarily.

Over time, most countries have re-opened their borders and travel has tentatively resumed. Working practices, however, have not necessarily returned to the status quo ante - for many organisations, some degree of remote working is here to stay. A number of countries have even introduced digital nomad visa programmes which allow individuals to work remotely for extended periods of time.

This article examines fixed place permanent establishment (PE) considerations arising from cross-border home offices, mainly using the 2017 OECD Model¹ and associated commentaries (Commentary) as a reference.²

Of course, fixed place PE is not necessarily the end of the story. Among other things, businesses and individuals also need to consider other aspects such as dependent agent or service PE, whether the activities carried on in the foreign jurisdiction have a preparatory or auxiliary character, individual income tax implications and associated employer and employee reporting and withholding, etc. In this article however, our focus is fixed place PE.

1. OECD Model Tax Convention on Income and on Capital, 21 November 2017 ("OECD Model").

2. While we note the Commentary is not binding, it should be persuasive in many cases.



1 What is a PE?

A PE is a taxable presence of an enterprise outside its state of residence.

Under the OECD Model, a PE may be created through either a fixed place of business or a dependent agent (leaving aside construction sites, etc. which are outside the scope of this discussion). The UN Model also allows for a PE to be constituted via the provision of services.³

While dependent agent and service PEs are of course relevant to any cross-border discussion, they tend to have more clearly defined thresholds. Fixed place PE, especially for remote workers, seems to us to be less well understood as a concept.

2 What is a fixed place PE?

Article 5(1) of the OECD Model states “the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on”.⁴

Article 5(2) of the OECD Model goes on to note “[t]he term “permanent establishment” includes especially... an office”,⁵ which is normally interpreted as an example of an Article 5(1) PE, rather than as expanding the scope of fixed place requirements.

Wording along these lines is included in most tax treaties. So how does this apply to cross-border remote workers? Can cross-border remote working give rise to fixed place PE?

3. United Nations Model Double Taxation Convention between Developed and Developing Countries, 2017 (“UN Model”), Article 5(3)(b).

4. OECD Model, Model Convention, M-19.

5. Ibid.



3 What does the OECD say about fixed place PE?

According to the Commentary, the general fixed place PE definition in Article 5(1) contains the following three conditions: ⁶

“... ”

- ▶ the existence of a “place of business”, i.e. a facility such as premises or, in certain instances, machinery or equipment;
- ▶ this place of business must be “fixed”, i.e. it must be established at a distinct place with a certain degree of permanence;
- ▶ the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.”

In the context of cross-border remote working, assuming the employee is doing her day job (i.e., core business activities of the enterprise) from her home office permanently or on a regular basis (i.e., more than just incidental), the first two conditions above may be seen as met. The third condition, however, requires some thought.

“...the carrying on of the business of the enterprise **through** this fixed place of business...” (Emphasis added.)

To satisfy this condition, the fixed place of business must be at the disposal of the enterprise. The mere presence of the enterprise at a particular location (e.g., the home office) is insufficient - the enterprise must also have effective power to use that location for it to be regarded as a PE.⁷

So, a fixed place PE can be constituted if the home office is **at the disposal of** the enterprise (i.e., if the employer has effective power to use the home office). The question then becomes: can an employee’s private residence be considered to be at the disposal of her employer?

6. OECD Model, Commentary on Article 5, para. 6.

7. OECD Model, Commentary on Article 5, para. 12.

4 Can a home office constitute a fixed place PE?

According to A.A. Skaar, a noted scholar on PE, “[w]ithout any evidence to the contrary, the starting point must be that the private home of an employee is not at the disposal of the employer, even if the employee is doing some work at home.”⁸

Vogel, a well-known commentator on international tax and treaties, echoes this view, stating that “home offices do not automatically constitute a PE of the employer...but that the requirement of disposal (control) is pivotal here.”⁹

5 What does the OECD say about home offices?

The Commentary specifically addresses the home office by way of example, as follows:¹⁰

“Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities.”

On this basis, although a home office can constitute a fixed place PE, one should not automatically jump to this conclusion. As always, the facts and circumstances of each case should be subject to a careful and complete evaluation; however, the analysis of whether the fixed place is at the disposal of the enterprise turns on whether the enterprise requires the employee to work from home (e.g., by not providing an office to the employee when one is required).

A discussion draft released by the OECD in 2011 (parts of which were subsequently included in the 2017 Commentary) included examples in which the employer pays rent or reimburses the employee's home working expenses.¹¹ In other words, reimbursement or compensation for the employee to carry on parts of the enterprise's core business activity at her private dwelling could constitute evidence that her home office is at the disposal of the employer, and so may constitute a PE.¹²

8. Jacques Sasseville and Arvid Skaar, ‘Is there a permanent establishment?’ [2009] 94A IFA Cahier 17, para. 2.6.4.

9. Klaus Vogel on Double Taxation Conventions, 5th Edition, edited by Ekkehart Reimer and Alexander Rust, Chapter II, Article 5, para. 128.

10. OECD Model, Commentary on Article 5, para. 19.

11. OECD, The Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention, p 12-13.

12. OECD Model, Commentary on Article 5, para. 18.

6 PE guidance during Covid-19

Guidance issued by the OECD in April 2020, as Covid-19 travel restrictions ramped up globally, re-emphasised this position, referring the reader to paragraph 18 of the Commentary - a PE must be at the disposal of an enterprise to be considered a fixed place of business.¹³ Since employees typically worked remotely as mandated by government directives, this was not a requirement of the business and hence could not constitute a PE.

Interestingly, this OECD release noted that **“to the extent that it does not become the new norm over time, teleworking from home (i.e., the home office) would not create a PE for the business/employer, either because such activity lacks a sufficient degree of permanency or continuity or because, except through that one employee, the enterprise has no access or control over the home office. In addition, it provides an office which in normal circumstances is available to its employees.”**¹⁴ (Emphasis added.)

Further OECD guidance issued in January 2021 supported this position, again referring to paragraph 18 (and 19) of the Commentary and potential permanent changes to working practices:¹⁵

7 Conclusion and final thoughts

For now, the OECD’s view seems reasonably well settled that provided 1) the employee chooses to work from home for personal reasons rather than at the request of the employer; and 2) the employer has made an office available to the employee; the home office is not at the disposal of the enterprise, and therefore, it does not constitute a fixed place PE.

However, the OECD may not be the only body to offer guidance. The United Nations recently agreed on a new resolution¹⁸ to begin intergovernmental discussions on tax, including the possibility of developing a new international tax cooperation framework.

“If an individual continues to work from home after the cessation of the public health measures imposed or recommended by government, the home office may be considered to have certain degree of permanence. However, that change alone will not necessarily result in the home office giving rise to a fixed place of business PE. A further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the enterprise following this permanent change to the individual’s working arrangements.” (Emphasis added.)

During the pandemic, a number of tax authorities, including the Australian Tax Office and the Inland Revenue Authority of Singapore, announced that the physical presence of employees in a jurisdiction due to travel restrictions will not create a PE (subject to conditions). Those announcements are expected to be read as bypassing the usual PE requirements and postulating that there will be no PE, regardless if the home office is, for example, “at the disposal” of the employer. However, as travel restrictions were lifted, those tax authorities announced the cessation of the concessional treatment, effectively returning to the ordinary tests for PE existence.^{16, 17}

Further, with the planned introduction of BEPS 2.0 Pillar 2, the existence of a PE may become even more important, as a PE will not only potentially allow profit attribution under existing rules but will also create a Constituent Entity under the GloBE rules, with potentially far-reaching implications.

It will be interesting to see how tax authorities and policymakers interpret and apply Article 5 of the tax treaties in response to changing patterns of work in a post-pandemic world.¹⁹

13. OECD, OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020, paras. 8-9.

14. Ibid.

15. OECD, Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21 January 2021, paras. 14-19.

16. <https://www.ato.gov.au/Business/International-tax-for-business/Working-out-your-residency/>.

17. <https://www.iras.gov.sg/news-events/singapore-budget/covid-19-support-measures-and-tax-guidance/tax-guidance/for-companies-self-employed-partnerships/tax-residence-status-of-a-company-and-permanent-establishment>.

18. Promotion of inclusive and effective international tax cooperation at the United Nations, UNGA Res 77/244 (7 December 2022) UN Doc A/77/441 DR <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/730/81/PDF/N2273081.pdf?OpenElement>.

19. An analysis of home office PE precedents can be found in Giorgio Beretta, “Work on the Move”: Rethinking Taxation of Labour Income under Tax Treaties [2022] International Tax Studies 1.

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