Permanent establishment

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Article 5 defines a permanent establishment as a fixed place of business through which the business of an enterprise is wholly or partly carried on. It adds the usual list of examples, a construction site threshold and the dependent agent rule for persons who habitually conclude contracts in the name of the enterprise.[1] For digital-asset businesses the permanent establishment questions are three.

The first is the validator. A Singapore company that operates validator nodes on servers in a Swiss data centre has equipment in Switzerland through which part of its business is carried on. Under the OECD commentary a server at the enterprise's disposal can be a fixed place of business if the activities conducted through it are more than preparatory or auxiliary, and validation is the core activity of a staking business. The Swiss authorities have not published a position on validator nodes as permanent establishments. The cantonal practice I have seen treats leased rack space with no personnel as insufficient, but the point is open and the amounts can be large.[2]

The second is the trading desk. A Zug company whose traders sit in Singapore and execute its strategy has a Singapore permanent establishment through those traders if they have a fixed place of business. The profits attributable to the desk are then taxable in Singapore under Article 7 at 17 per cent. The usual response is to employ the traders through a Singapore subsidiary that provides services to the Zug company for an arm's-length fee, which converts the permanent establishment question into a transfer-pricing question.[3] The third is the founder himself. A Singapore founder who spends half the year in Zug and negotiates and signs the Singapore company's contracts there is a dependent agent and creates a Swiss permanent establishment of the Singapore company, which Switzerland will tax on the profit attributable to those contracts. The habitual conclusion of contracts is the test, so a founder who travels should neither sign nor finally negotiate in the other hub.

Practice note

If you manage a company in one hub and spend time in the other, keep a log of where contracts are negotiated and signed, where board decisions are taken and where staff with authority are located. A Zug company should have its signing authority exercised in Switzerland and its Singapore staff limited to functions that do not include concluding contracts. A Singapore company should do the reverse. The log is the evidence that decides a permanent establishment inquiry. In its absence the authority will infer from the founder's calendar.

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Notes

1. Singapore–Switzerland DTA 2011, Art. 5 (permanent establishment; fixed place of business; building site or construction project threshold; dependent agent; exclusions for preparatory or auxiliary activities).
2. OECD, Model Tax Convention, Commentary on Article 5, paras 122–131 (electronic commerce; a server as a fixed place of business).
3. Singapore–Switzerland DTA 2011, Art. 7 (business profits attributable to a permanent establishment) and Art. 9 (associated enterprises); Income Tax Act 1947, s. 34D (arm's length principle).

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