

Permanent Establishment



Determining if there is a permanent establishment (PE)

This is an absolute key question in the modern world of globalisation.

Most of the time you don't wish to create a PE because it will mean an overseas company has created a taxable presence in the UK, and that activity is taxable in the UK.

Sometimes however, such as when you wish to access [EIS/SEIS/VCT](#) you may wish to ensure you do have a PE so that you can access this incentive to raise capital in the UK.

The key questions for determining whether a company has a permanent establishment in the UK are as follows:

- Is there a fixed place of business in the UK?
- Is there a dependent agent in the UK?
- Are the activities undertaken 'preparatory and auxiliary'?
- Is a business carried on through the permanent establishment?
- If a Double Tax Agreement is in place, does a permanent establishment also exist under the provisions of this agreement?

Best practice to reduce the risk of inadvertently creating a permanent establishment in the UK

Fixed place of business:

- The non-resident company should not have a lease or rental agreement; and should not own property in the UK.
- The non-resident company should not have the right to use any premises in the UK – for example, premises that are owned by another group company, or an employee. Access to any such premises should be limited – for example, employees of the non-resident company should not be issued entry passes; and should be treated as visitors.

- The non-resident company should not regularly use the same premises, for example a stand at a trade fair or a particular hotel room.
- Employees of the non-resident company should not have business cards showing a UK address.
- The website of the non-resident company should not advertise a UK address (although a group website could show a UK address as belonging to a subsidiary).
- Any advertisements or stationery of the non-resident company should not show a UK address.

Dependent agent:

- All prices should be determined outside the UK, including any bulk discounts. Prices should only be communicated in the UK.
- Any price negotiation should take place outside the UK.
- Other contractual terms should be determined or negotiated outside the UK.
- Contracts with customers should not be signed in the UK. A permanent establishment should only be created if contracts are 'habitually' concluded in the UK, and employees of the non-resident company may therefore attend occasional meetings in the UK to discuss contractual terms without necessarily creating a permanent establishment in the UK. However, best practice would suggest that this should happen only where it is not possible to do otherwise.
- BEPS Action 7 consideration: UK personnel or overseas personnel present in the UK should limit UK activity to promotion and advertising and this will ensure that a permanent establishment is not created.

Staff members in the UK conducting key activities

Similar to the points on dependent agent, the presence of sales staff in the UK, who have the right to conclude contracts, is likely to mean there is a PE.

Senior staff making management decisions, or a "management team" could also create a PE in the UK.

Even “[working from home](#)” could create a PE. It is preferable that any staff working in the UK do not use their home address on any company documents and do not receive mail, or conduct business meetings there.

Difficulties may arise regarding their employment contract and the need to state a place of work therein.

In short, staff can be employed in the UK without creating a PE, but those activities must be preparatory or auxiliary to the primary business activity.

There is a huge grey area as to whether customer service staff, or software engineers would constitute a PE. It will very much depend on the company's primary activities. Generally speaking, provided they are working from home, under the instruction of people from overseas, it is probably not quite enough to have a PE.

Preparatory and auxiliary activities:

- Where a fixed place of business or a dependent agent is unavoidable, the activities undertaken in the UK should be preparatory and auxiliary to the main trading activities of the non-resident company in order to avoid a PE being established.
- BEPS Action 7 consideration: core business activities should not be fragmented either internally or between connected parties with a view to individually meeting the preparatory or auxiliary exception.

Documentation

- If a non-resident company has an employee based in the UK, the employee should not be given authority to negotiate or conclude contracts, otherwise a permanent establishment will be created. This restriction can be written specifically into the employment contract and followed in practice.
- Similar restrictions can be written into inter-company agreements if there is a risk that a UK resident subsidiary could be regarded as being a dependent agent of its overseas parent in addition to its own ‘normal’ business activities.

Examples that will constitute a PE

1. An office with employees carrying out any non predatory or auxiliary activities, where the address is publicly known and meetings and post are received.
2. A senior sales person who is concluding sales contracts in the UK.
3. A senior management team residing in the UK making decisions. This could also cause issues of “residence” for the overseas company.

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