TR 2001/D6 - Income tax: Permanent establishment - What is 'a place at or through which [a] person carries on any business' in the definition of permanent establishment in subsection 6(1) of the Income Tax Assessment Act 1936?

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This document has been finalised by TR 2002/5.

Draft Taxation Ruling

Income tax: Permanent establishment - What is 'a place at or through which [a] person carries on any business' in the definition of permanent establishment in subsection 6(1) of the *Income Tax Assessment Act 1936*?

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Preamble

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. This Ruling provides the Commissioner's interpretation of the meaning of the phrase 'a place at or through which [a] person carries on any business'[1] in the definition of 'permanent establishment' (PE) in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

2. The definition of PE in subsection 6(1) of the ITAA 1936 also applies for the purposes of both the *Income Tax Assessment Act 1997* (ITAA 1997) and Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), except so far as the contrary intention appears.

3. The subsection 6(1) definition is relevant not just for income tax purposes. Appendix A contains a list of some of the provisions which utilise the subsection 6(1) PE definition, or elements of it.

4. This ruling is concerned with the meaning of the phrase 'a place at or through which [a] person carries on any business'. It does not deal with the other aspects of the definition.

5. In some contexts Australian tax liability will arise as a consequence of the application of the approach adopted in this Ruling.[2] To that extent, this document is a 'public ruling' on the way

[1] The subsection says that permanent establishment in relation to a person means 'a place at or through which *the* person carries on any business …' For grammatical reasons we use 'a place at or through which [a] person carries on any business'.
[2] For example, the concept of PE is used in subsections 128B(2), (2A), (2B) and (2C) of the ITAA 1936 and can be crucial in determining if a liability to interest or

in which a tax law applies in terms of Part IVAAA of the TAA 1953. In other contexts, this document will assist in determining a range of non-liability issues, including administrative or collection questions.[3] In those situations, the Ruling is not a 'public ruling' as defined in section 14ZAAA of the TAA 1953.

6. While this Ruling refers to the concept of PE used in Australia's tax treaties, it does not deal with the specific application of the tax treaty definitions.

7. The subsection 6(1) definition of PE does not have a specific territorial limitation. Depending on the context in which the PE definition is used, the definition can apply both to activities in Australia and outside Australia.

Ruling

8. The subsection 6(1) definition of PE is based on the concept of PE used in Australia's tax treaties. For the purposes of the definition of PE in subsection 6(1) 'a place at or through which [a] person carries on any business' means a place used for carrying on that person's business activities. That place must have an element of permanence, both geographic and temporal.[4] Permanence must be construed in the context of each particular business and is a question of fact and degree. Permanent in this context does not mean forever.

Date of effect

9. This ruling, when finalised, will apply to years commencing both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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royalty withholding tax exists. A further example of the importance of the PE concept for liability to interest withholding tax purposes can be found in subparagraph 128B(3)(h)(ii) of the ITAA 1936.

[3] This would be the case, for example, in relation to section 12-190 of Schedule 1 to the TAA 1953.

[4] To the extent to which Taxation Ruling IT 2324 relates to the former 1953 Australia/United States Double Tax Convention, it is withdrawn.

Explanations

Contextual approach

10. This ruling adopts the contextual approach to interpretation used by Australian Courts. For example the Full Federal Court in *Chaudhri v. FCT* 2001 ATC 4214 at 4216; (2001) 47 ATR 126 at 128 said:

> "The guiding principle of statutory interpretation may be summed up as being the ascertaining of the meaning of the words which Parliament has used by reference to the context in which they appear, where 'context' has the wide meaning which extends to the legislative history, the parliamentary intention and the mischief to which a particular provision has been directed as well as the narrower meaning which would dictate reading the words to be construed by reference to the immediately surrounding or otherwise related provisions."

Statutory definitions

11. Subsection 6(1) of the ITAA 1936 defines permanent establishment as:

> '*permanent establishment*', in relation to a person (including the Commonwealth, a State or an authority of the Commonwealth or a State), means a place at or through which the person carries on any business and, without limiting the generality of the foregoing, includes:
>
> (a) a place where the person is carrying on business through an agent;
>
> (b) a place where the person has, is using or is installing substantial equipment or substantial machinery;
>
> (c) a place where the person is engaged in a construction project; and
>
> (d) where the person is engaged in selling goods manufactured, assembled, processed, packed or distributed by another person for, or at or to the order of, the first-mentioned person and either of those persons participates in the management, control or capital of the other person or another person participates in the management, control or capital of both of those persons - the place where the goods are manufactured, assembled, processed, packed or distributed;
>
> but does not include:

(e) a place where the person is engaged in business dealings through a bona fide commission agent or broker who, in relation to those dealings, acts in the ordinary course of his business as a commission agent or broker and does not receive remuneration otherwise than at a rate customary in relation to dealings of that kind, not being a place where the person otherwise carries on business;

(f) a place where the person is carrying on business through an agent:

(i) who does not have, or does not habitually exercise, a general authority to negotiate and conclude contracts on behalf of the person; or

(ii) whose authority extends to filling orders on behalf of the person from a stock of goods or merchandise situated in the country where the place is located, but who does not regularly exercise that authority;

not being a place where the person otherwise carries on business; or

(g) a place of business maintained by the person solely for the purpose of purchasing goods or merchandise;

12. This Ruling deals only with the opening words of the definition of PE in subsection 6(1). It will still be necessary for the parties concerned, where appropriate, to look at the rest of the definition to determine if a PE exists or not under paragraphs (a) to (g).

13. Subsection 6(1AA) of the ITAA 1936 says that so far as a provision of the ITAA 1936 gives an expression a particular meaning, the provision does *not* also have effect for the purposes of the ITAA 1997 or for the purposes of Schedule 1 to the TAA 1953, except as provided in the ITAA 1997 or in that Schedule. Section 995-1 of the ITAA 1997 says that 'in this Act, except so far as the contrary intention appears: ***permanent establishment*** has the meaning given by subsection 6(1) of the ITAA 1936'. Likewise, subsection 3AA(2) of the TAA 1953 says that 'an expression has the same meaning in Schedule 1 (of the TAA 1953) as in the ITAA 1997'. The end result is that the definition of PE in subsection 6(1) of the ITAA 1936 is also the definition in the ITAA 1997 and Schedule 1 to the TAA 1953 except so far as the contrary intention appears.

14. Appendix A contains a list of some of the provisions which utilise the subsection 6(1) PE definition, or elements of it. Not all the provisions refer to the PE definition in subsection 6(1) directly.

However all depend on the definition in some way.[5] It is clear from that list that the PE concept is used in a significant range of tax situations. It needs to be emphasised that the subsection 6(1) definition, including the phrase 'a place at or through which [a] person carries on any business', is relevant not just for income tax purposes.

The PE Concept

15. 'Permanent establishment' is a concept used both in international and domestic tax law. In Australia it was first used in our tax treaty with the United Kingdom signed in 1946. It appeared specifically in Australia's domestic tax law outside the tax treaty context in 1959.

16. PE is defined in most of Australia's tax treaties to mean, among other things, a fixed place of business through which the business of an enterprise is wholly or partly carried on (or words to similar effect). This follows the OECD Model Tax Convention on Income and on Capital.[6]

17. The Commentary[7] on the *Permanent Establishment* Article (Article 5) of the OECD Model Tax Convention says that the general definition of PE outlined in the previous paragraph:

> '… contains the following conditions:
>
> - the existence of a "place of business", i.e., a facility such as premises or, in certain instances, machinery or equipment;[8]

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[5] For example subsection 12-190(1) of Schedule 1 to the TAA 1953 refers to 'an *enterprise *carried on in Australia'. The phrase 'carried on in Australia', in relation to an enterprise, has the meaning, according to section 995-1 of the ITAA 1997 given by subsection 9-25(6) of the *GST Act', being the *A New Tax System (Goods and Services Tax) Act 1999* (and this has effect for the purposes of Schedule 1 to the TAA 1953 – see subsection 3AA(2)). Subsection 9-25(6) of the GST Act includes a reference to 'a permanent establishment (as defined in subsection 6(1) of the ITAA 1936)'.

[6] OECD *Model Tax Convention on Income and on Capital* (condensed version) (Paris April 2000.)

[7] Australian courts have indicated on a number of occasions that the OECD Model Commentary is relevant to the interpretation of Australia's tax treaties (*Thiel v. FC of T* (1990) 171 CLR 338; *Lamesa Holdings BV v. FC of T* 97 ATC 4229; (1997) 35 ATR 239, at first instance, confirmed on appeal 97 ATC 4752; (1997) 36 ATR 589 but without reference to this point). Given that this Ruling argues that the subsection 6(1) definition of PE is based on the tax treaty concept of PE, it is appropriate to have regard to the OECD Model Commentary in understanding the provision.

[8] Unlike other countries, Australia has a specific provision dealing with equipment and machinery in the PE context. Paragraph (b) of the subsection 6(1) definition of PE contains a reference to substantial equipment or substantial machinery. The reference to machinery or equipment in the OECD Model Commentary will only be relevant in the Australian context in relation to a discussion of the phrase 'a place at

- 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.'9

18. While the general definitions of PE in Australia's tax treaties refer to a fixed place of business through which the business of the enterprise is wholly or partly carried on, the subsection 6(1) definition refers only to 'a place at or through which [a] person carries on any business'. The ATO does not consider it significant that the word 'fixed' does not appear in the subsection 6(1) definition of PE.

Historical context

19. The *Income Tax Assessment Act 1947* gave force of law to the 1946 United Kingdom Double Tax Agreement (DTA). Subparagraph 1(j) of Article II of that DTA said that the term 'permanent establishment', when used with respect to an enterprise of one of the territories, meant a branch or other fixed place of business and included a management, factory, mine or agricultural or pastoral property. As the Explanatory Memorandum (EM) put it, 'the substantive part of the definition is designed to ensure that an enterprise of one of the territories having a fixed place of business in the other territory shall be regarded as having a permanent establishment in that territory.'

20. The *Income Tax International Agreements Act 1953* among other things gave force of law to the 1953 United States Double Tax Convention (DTC). Paragraph 1(o) of Article II of that DTC said a 'permanent establishment' meant a branch, agency, management or fixed place of business and included a factory, workshop, mine, oilwell, office or agricultural or pastoral property.

21. The *Income Tax and Social Services Contribution Assessment Act (No. 3) 1959* introduced a dividend withholding tax regime in Australia. Dividends derived by non-residents engaged in business through a PE in Australia were excluded from the tax. A non-resident was deemed in section 128A (as it then was) to be engaged in business

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or through which a person carries on any business' where the machinery or equipment is not a PE under paragraph 6(1)(b) of the definition.

[9] *OECD Model Tax Convention on Income and on Capital*, op. cit., p.74 at paragraph 2.

through a PE in Australia only if, in connection with a business carried on by him:

> (a) he [had] in Australia a branch, agency, place of management, office, factory, mine, quarry, oilwell, agricultural, pastoral or forestry property or other place of business…

22. The EM to that Act said about this definition:

> The substance of sub-sections (4.) and (5.) corresponds closely with definitions of 'permanent establishment' found in double taxation agreements entered into by Australia.

23. The *Income Tax Assessment Act 1968* repealed the description of PE mentioned (in part) above in paragraph 21 and inserted the present subsection 6(1) definition. The EM on that Act said:

> Paragraph (a) of clause 3 will insert a definition of the phrase 'permanent establishment'. The concept of a permanent establishment is significant in the imposition of withholding tax on dividends and interest paid from Australia to non-residents. It will also have effect for the purposes of the proposals in this Bill relating to the taxation of royalties paid from Australia to non-residents.
>
> Section 128A of the Principal Act at present contains provisions in sub-sections (5.), (6.) and (7.) which determine the circumstances in which a place of business in a country is regarded as a permanent establishment for the purposes of the withholding tax on dividends and interest derived by non-residents. As a drafting measure, these provisions are being repealed by a later clause of the Bill (Clause 8) and replaced by a definition in section 6 of the Principal Act. This will not make any change in the basis on which the withholding tax on dividends and interest is now applied. In the future, however, the definition will also have effect for the purposes of taxing royalties paid to non-residents.

Concept of Permanence

24. Having regard to the context in which the definition arose, it is clear that the subsection 6(1) definition of PE continued the previous approach, which was based on the meaning of permanent establishment in the 1946 UK DTA and the 1953 US DTC. The predominant idea in these two tax treaties was of a fixed place of business. For these reasons, it is the Commissioner's view that the phrase 'a place at or through which [a] person carries on any business'

in the subsection 6(1) definition of PE has as its essence the concept of permanence.

25. Further arguments support this approach. First, the term 'permanent establishment' itself connotes permanence.[10] Secondly, the word 'place' denotes something that is not transitory or temporary, ie something that is permanent. The requirement that the person carry on a business at or through a place reinforces the idea of permanence in the sense of not being transitory or temporary. The phrase links the business to a particular place for a particular period. As McHugh J said in *Thiel v. FCT* (1990) 171 CLR 338 at 359; 90 ATC 4717 at 4728; 21 ATR 531 at 544 '…the carrying on of a business requires the habitual pursuit of business activities.'[11] The phrase 'a place at or through which a person carries on any business' thus requires a place - something of permanence - at or through which the habitual pursuit of business activities (also something of permanence) occurs.

26. The analysis set out in paragraphs 15 to 25 above leads the Commissioner to conclude that the phrase 'a place at or through which [a] person carries on any business' in the definition of PE in subsection 6(1) should be construed in a way that is broadly consistent with the meaning of PE in our tax treaties. Interpreting the phrase to include the concept of permanence in both its geographical and temporal senses facilitates such an approach.

27. While each situation needs to be judged in the context of the particular business, and is a question of fact and degree, the following comments offer guidance in determining whether a place at or through which a person carries on any business exists for the purposes of the definition of PE in subsection 6(1).

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[10] See *Consolidated Premium Iron Ores Ltd et al v. Commissioner of Inland Revenue* (1957) 57 DTC 11 46 at 1162 per Van Fossan J, cited in *Fiebert v. The Minister of National Revenue* (1986) 86 DTC 1017 at 1018 per Brulé T.C.J. The decision of Hill and Sackville JJ in the Federal Court case of *FCT v. Prestige Motors Pty Ltd* 98 ATC 4241 at 4261; (1998) 38 ATR 568 at 591 says that 'it is not helpful to resort to the ordinary meaning of a defined word or expression in construing the definition: *Telstra Corporation Ltd v. Australasian Performing Right Association Ltd* (1997) 146 ALR 649 at 657, per Dawson and Gaudron JJ.' However because there is some doubt about the meaning of the definition itself, it is the ATO view that the international context and the use of the word 'permanent' reflect on and help us understand the definition, in particular the meaning to be given to the reference to 'a place'. See for example Barwick CJ in *UG Insurances Pty Ltd v. Comr of Stamp Duties (NSW)* (1973) 128 CLR 353 at 359-360; 4 ATR 60 at 65.

[11] McHugh J was rebutting the argument that cases such as *Kirkwood v. Gadd* [1910] AC 422 and *Smith v. Capewell* (1979) 142 CLR 509 which dealt with the meaning of 'carrying on … any business' were relevant to understanding the meaning of the phrase 'the enterprise carries on business' in the context of the *Business Profits* Article in the Australia/Switzerland DTA. His analysis however of the rationale for those cases is appropriate in helping to understand the meaning of the phrase 'a place at or through which [a] person carries on any business' and the linkage between the business activity and the place.

Geographic Permanence

28. A place at or through which a person carries on any business in the context of the definition of PE in subsection 6(1) must be geographically permanent. Any area, viewed commercially and as a whole, may, in relation to the business concerned, be a place. Examples include business premises such as a factory, office, farm, mine or market. Thus a market is a place at or through which a trader carries on business where that trader operates a stall regularly in that market. This is the case even if the stall is set up at different locations within the market at different times. It is the market which is, in relation to the trader, the distinct or discrete commercial area and it is therefore a place at or through which the trader carries on their business within the definition of PE in subsection 6(1).

Temporal Permanence

29. The second criteria for a place at or through which a person carries on any business to exist for the purposes of the definition of PE in subsection 6(1) is temporal permanence, ie the business presence must not be of a purely temporary nature. In other words, the business must operate at that place for a period of time. Again, this has to be judged in the context of the particular business and is a question of fact and degree.

30. Permanent in this context does not mean forever. As Sheppard J said in *Applegate v. FCT* 78 ATC 4054 at 4060; (1978) 8 ATR 372 at 378 in discussing the meaning of permanent in the phrase permanent place of abode:

> …permanent is used in the sense of something which is to be contrasted with that which is temporary or transitory. It does not mean everlasting. The question is thus one of fact and degree.

31. This is the sense in which permanence is used in this ruling.[12]

Six months

32. As a rule of thumb, if a business operates at or through a place continuously for six months or more it will generally be considered to be temporally permanent and thus a PE for the purposes of subsection 6(1) provided the requirement for geographical permanence is also satisfied. This, however, does not mean that if a business operates at

[12] See also *Henrikson v. Grafton Hotels* [1942] 2 KB 184 at 196; [1942] 1 All ER 679 at 684; per du Parcq LJ.

or through a place for less than six months it cannot be temporally permanent. It is a matter of fact and degree.

33. Where the period in Australia is less than six months there may still be temporal presence where the connection with Australia is very strong. For example, a place may be set up in Australia with a view to carrying on business permanently in Australia at or through that place but the business may cease after a short period of time. One example would be where the taxpayer dies after a short time but their intention had been to carry on business in Australia at or through a place for more than six months. This is consistent with the Commentary on the *Permanent Establishment* Article (Article 5) of the OECD Model Tax Convention on Income and on Capital[13] which says at paragraph 6:

> 'If the place of business was not set up merely for a temporary purpose, it can constitute a permanent establishment, even though it existed, in practice, only for a very short period of time because of the special nature of the activity of the enterprise or because, as a consequence of special circumstances (e.g., death of the taxpayer, investment failure), it was prematurely liquidated.'

Examples

34. The following examples are intended to illustrate the analysis set out above. They concentrate on the issue of whether there is a place at or through which a person carries on any business.

Example 1

35. Neil is a professional golfer and a resident of Namibia. He visits Australia to compete in an Australian golf tournament. The event is played at a prominent course in a major Australian city and takes four days. Neil is in Australia for a total of two weeks in the particular income year (including practice days and rest days). The question is whether the golf course is a place at or through which Neil carries on his golfing business.

36. For the golf course to be a place at or through which Neil carries on his golfing business for the purposes of the definition of PE in subsection 6(1) his activity as a professional golfer in Australia would need to be both geographically and temporally permanent. While the activities on the golf course are undertaken at a single location which is geographically permanent, Neil plays at the course

[13] *OECD Model Tax Convention on Income and on Capital*, op. cit., p.74.

for only seven days (including practice days). As a result, sufficient temporal permanence does not exist and the golf course is therefore not a place at or through which Neil carries on his business for the purposes of the definition of PE in subsection 6(1).

Example 2

37. Plays & Co is a theatrical company incorporated in Iceland. The company visits Australia with a production of a modern Icelandic play. Plays & Co performs in a theatre in Melbourne over a 12 month period. It pays royalties to the author of the play who is a resident of Iceland. In this case the company has a PE in Melbourne because it satisfies the geographic and temporal permanence requirements.

Example 3

38. If Plays & Co did not have a base in Australia and were to tour the country giving 'one-off' performances at numerous towns and cities for four months (and with separate performance contracts with local clubs and other venues) the company would not have a place at or through which it carries on business for the purposes of the definition of PE in subsection 6(1) in Australia in either its geographic or temporal sense. If the tour lasted more than six months there would be temporal permanence but because of the itinerant nature of the activity in Australia, Plays & Co does not satisfy the geographic permanence requirement and so does not have a place at or through which it carries on its business.

Example 4

39. Ausco Ltd is an Australian resident retailing company. As well as its on-going Australian operations, for four months it sells products through rented premises in Zimbabwe. Without more the company does not have a place at or through which it carries on business in Zimbabwe for the purposes of the definition of PE in subsection 6(1). This could have tax implications for Ausco.[14]

Example 5

40. ChiCo is a Chilean wine maker. It has a vineyard in Chile where it grows its grapes and makes and bottles its wine. The company advertises its wines in an Australian wine magazine. It has no other connection with Australia. Sarah is one of many Australian

[14] It may, for example, have consequences for the application of section 23AH of the ITAA 1936.

residents who after reading the advertisement in the magazine have ordered and paid for substantial amounts of ChiCo's wines. ChiCo does not have a place at or through which it carries on business in Australia for the purposes of the definition of PE in subsection 6(1).

Detailed contents list

41. Below is a detailed contents list for this Ruling:

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Your Comments

42. You have until 28 September 2001 to make comments on this draft. Please provide comments to:

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Commissioner of Taxation
15 August 2001

Previous draft:
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Related Rulings/Determinations:
TR 92/20

Subject references:
- permanent establishment
- a place
- carrying on a business

Legislative references:
- TAA 1953 6(1)
- TAA 1953 Schedule 1
- TAA 1953 Part IVAAA
- TAA 1953 14ZAAA
- TAA 1953 3AA(2)
- ITAA 1936 6(1)
- ITAA 1936 6(1AA)
- ITAA 1997 6(1)
- ITAA 1997 995-1
- International Tax Agreements Act 1953
- Income Tax & Social Service contribution Assessment Act (No.3) 1959 128A

Case references:
- *Applegate v. FCT* (1978) 78 ATC 4054; 8 ATR 372.
- *Chaudhri v. FCT* 2001 ATC 4214; (2001) 47 ATR 126.
- *Henrikson v. Grafton Hotels* [1942] 2 KB 184; [1942] 1 All ER 679.
- *Consolidated Premium Iron Ores Ltd et al v. Commissioner of Inland Revenue* (1957) 57 DTC 1146.
- *Fiebert v. The Minister of National Revenue* (1986) 86 DTC 1017.
- *FCT v. Prestige Motors Pty Ltd* 98 ATC 4241; (1998) 38 ATR 568.
- *UG Insurances Pty Ltd v. Comr of Stamp Duties* (NSW) (1973) 128 CLR 353; (1973) 4 ATR 60.
- *Thiel v. FCT* (1990) 171 CLR 338; (1990) 90 ATC 4717; (1990) 21 ATR 531.
- *Kirkwood v. Gadd* [1910] AC 422.
- *Smith v. Capewell* (1979) 142 CLR 509.
- *Fowler v. The Minister of National Revenue* (1990) 90 DTC 1834.

ATO references:
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APPENDIX A

INCOME TAX ASSESSMENT ACT 1936

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