


TD 94/D40 - Income tax: do the exclusions outlined in paragraphs (e), (f) and (g) of the definition of 'permanent establishment' in subsection 6(1) of the Income Tax Assessment Act 1936 override the general test of a place at or through which a person carries on a business?

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Draft Taxation Determination

Income tax: do the exclusions outlined in paragraphs (e), (f) and (g) of the definition of 'permanent establishment' in subsection 6(1) of the *Income Tax Assessment Act 1936* override the general test of a place at or through which a person carries on a business?

1. Yes. To the extent that a person is engaged in business dealings solely through the activities of a 'non-dependent agent' in the circumstances described in paragraph (e), or carries on business solely through a 'non-dependent agent' of the type specified in paragraph (f), he is not regarded as carrying on business through a permanent establishment. This is also the position where paragraph (g) is solely applicable.

2. However, where a person carries on any business to any greater extent, the other elements of the definition of 'permanent establishment' operate to render that place a permanent establishment of the person.

3. The question of deeming permanent establishment through an agent was recently considered by the Administrative Appeals Tribunal in *Case 23/93* reported as 93 ATC 288, 26 ATR 1056. In that case, the AAT was required to consider the application of Article 4, Schedule 4 *Income Tax (International Agreements) Act 1953* (the Australia/New Zealand Double Tax Agreement). Article 4 involves similar considerations to determining permanent establishment under section 6.

4. In *Case 23/93*, the AAT found that a husband and wife, who were residents of New Zealand, conducted a business of share trading in Australia. The business was carried on through an agent who was employed by a stockbroker. By and large, the taxpayers were his only clients. The employee habitually exercised an authority to conclude contracts on the taxpayers' behalf. He was also responsible for placing their funds in cash management facilities.

5. The AAT concluded that the business was not carried on through a broker, a general commission agent nor any other agent of independent status. The employee was a dependent agent of the taxpayers and the enterprise was carried on in Australia through a permanent establishment.

Commissioner of Taxation

14/4/94

FOI INDEX DETAIL: Reference No.

Related Determinations:

Related Rulings:

Subject Ref: permanent establishment; non residents; residence

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Case Ref: 93 ATC 288, 26 ATR 1056.

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