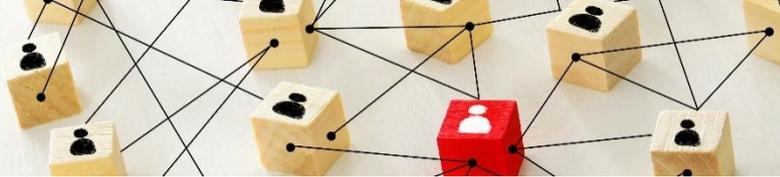


Commentary on the OECD Model Tax Convention

Regarding the Possible Existence of a Permanent Establishment of a Company in Cases of Services Provided by an Employee from a State Other Than Their Country of Residence



On November 18, after a long period of anticipation, the OECD Council adopted the updated Model Tax Convention on Double Taxation and its Commentary.

One of the most significant changes is the inclusion in the Commentary on Article 5 (Definition of Permanent Establishment) of the possibility that an employee of a company who works remotely from their own home (the entire Commentary equates the home with what it calls "another relevant place," which could be any space used by that employee) located in a State other than that of the company, may constitute a permanent establishment of that company in that State.

This inclusion stems from the growing trend among individuals, facilitated by the **offshoring of talent due to the intensive use of new information technologies**, to relocate to a specific state with a higher quality of life, or simply for family reasons, without ceasing to work for a company not located in that state.

The new paragraphs of the aforementioned Commentary aim to resolve existing doubts regarding the possibility of such an employee constituting a permanent establishment of the company for which they work (**in the sense of "the existence of a fixed place of business from which an enterprise carries on all or part of its business"**) in the state to which the employee has relocated. It should be noted that the OECD appears to have postponed comments on the concept of the "dependent agent" for the near future, and

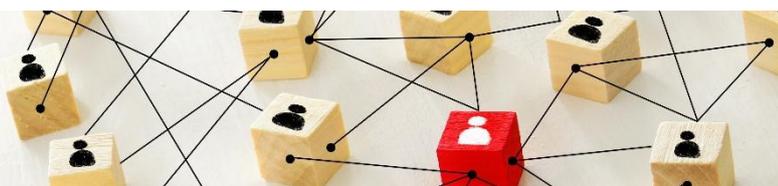
updates.

Let us begin by stating that the Commentary does not provide complete legal certainty, since the OECD itself already recognizes that the existence of a permanent establishment (PE) can only be determined **based on the facts and circumstances applicable** during a specific period of time, that is, **"case by case"** and not before or after that specific period.

Therefore, although the different situations analyzed should be subject to specialized advice, the guidelines provided below seem reasonable and can be briefly summarized by saying that a permanent establishment exists when **the company "benefits"** from the fact that the worker performs their work in the other state. Conversely, it does not exist when the worker's presence in that state is irrelevant to the company or when it is motivated by the need to retain or care for the worker within the company.

Despite the above precautions, the Commentary on Article 5 does clearly establish certain cases in which **a permanent establishment will not be considered to exist:**

1. In accordance with the definition of a permanent establishment, **it is required that it be a "fixed" place.** Therefore, a certain degree of permanence is required; a temporary situation is insufficient.



2. The same applies to the **type of activity** carried out by the employee: a permanent establishment (PE) **will not exist if they only perform auxiliary or preparatory activities.**
3. The mere fact that the employee uses a particular place **solely to carry out activities related to the company's business** does not mean that a permanent establishment exists.
4. The home (or other relevant location such as a co-working space, vacation home, a friend's home, etc.) will not be considered a PE if the employee works for the company from that home for **less than 50 percent of their total working time during a twelve-month period beginning or ending in the fiscal year in question**; conversely, **if the time dedicated by the employee is greater**, then the existence of a PE will be determined by the **facts and circumstances of each case.**
5. For a permanent establishment of a company to exist, **there must be a business reason** for the activities carried out by the employee from their home or other equivalent location in that other State, and there must be a causal link between the employee's presence at their home or other relevant location and the activity carried out in that State. In other words, **a permanent establishment will not exist if the company allows the employee to work from the other State solely to obtain or retain that employee.**
6. A permanent establishment will also not exist when the company allows

the employee to work from that other State **to save on infrastructure**, such as offices or their associated expenses.

Conversely, a company may be considered to benefit from an employee's presence in another state, **and therefore a permanent establishment (PE) exists**, if it can be concluded that **there is a legitimate business reason** behind the activities the employee carries out in the relocated state. For example, **a business reason will exist in the following cases (although this list is merely illustrative)**: when the employee's presence facilitates the company's access to certain people or resources in that state; when the employee's home serves as a substitute for premises the company would otherwise have to rent; when the employee's presence makes it easier for them to maintain direct contact with clients and suppliers, explore new markets, maintain real-time interactions with clients or suppliers located in different time zones, hold in-person meetings with university staff conducting research for the company, collaborate with other companies, etc. All of this must be done with a certain degree of continuity and not just occasionally.

Finally, and with special reference to so-called "digital nomads," a permanent establishment also exists **when the individual is the sole, or the most important, person conducting the company's business.** The OECD example is that of a non-resident consultant who spends a significant amount of time in a particular country, **conducting most of his consulting firm's activities** from a home office. According to the OECD, this office, regardless of the entity's potential tax

residency, will constitute the company's place of business in that country.

As a corollary to the above, despite the significant impact these modifications may have on taxation, we must pay close attention to how the Spanish tax authorities interpret them, while also considering the need, mentioned by the OECD Committee itself, **to analyze the facts and circumstances applicable to each specific case**. This is all while keeping in mind the **potential effects that such "remote work" may have on other areas of activity, such as social security, labor law, and the duty of care.**

For more information, you may contact:



Ramón Portela
Partner
ramon.portela@es.andersen.com



Stella Raventós
Of Counsel
stella.raventos@es.andersen.com

