

INSIGHT INTO PERMANENT ESTABLISHMENTS.

Back ground

Permanent establishment is a sensitive issue in taxation as from the definition and interpretation of the term, derives the power of the contracting state to tax the profits of such establishments that have permanent establishment in the said jurisdiction.

In our issue, we have a look at the OECD and what it takes permanent establishment to be and what could be noticeable differences with the Kenyan Taxation laws;

What qualifies for a P.E.

For the purposes of the OECD's Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

The term "permanent establishment" includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Notably, Kenya, in through the recently published budget requires that the aforementioned issues would qualify for permanent establishment if it continues for a period of 183 days.

What shall not be deemed to be a P.E.

OECD proceeds to define what shall be deemed not to be a "permanent establishment" as follows;

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery; This aligns well with the Kenyan Tax law which require that an activity be treated as a business if the form of the goods is changed or improved to make them more valuable and sellable, as such, an agent who alters the form of the goods will be

deemed to have done business separately away from the employer or the person they are acting on behalf of.

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character. This again aligns with the Kenyan law where activities that are of preparatory or auxiliary character shall not cumulatively add to the days of determination of the existence of a PE.

The above paragraph shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise,

or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character.

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