

Does remote cross-border work pose risk of permanent establishment? 3/19/24



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Cross-border work done remotely has become very popular among digital nomads after the Covid-19 pandemic. However, an employer accepting or offering this option may face administrative obstacles and tax risks, one of which is the risk of having a permanent establishment (PE). This article explores the reasons for the growing popularity of remote work and the inherent PE risks.

Why so popular?

The increased popularity of remote work is due to a combination of factors mainly arising from the Covid-19 pandemic and the revelation that work can be done and managed from a distance.

Remote work gaining traction over the last five years has created a new trend among employees preferring to work outside the office. Behavioural changes also come from innovations in talent recruitment – the option of remote work is now one of the top fringe benefits. More and more workers expect that employers will allow them to work outside the company's office or country so they can optimise their work-life balance and work for a foreign company without breaking ties with their place of living. And many employers are interested in offering the remote option because this makes it easier to attract new talent from around the world.

Tax challenges

Working remotely from abroad can pose tax challenges for both the employer and the worker. Before having people work abroad, the employer should not only understand labour taxation but also analyse whether the conditions would create a PE requiring the company to register its presence for tax purposes. This matter is even more complicated because it's based on local and international law, as well as case law. Thus we need to analyse what approach the tax authority of each country takes to finding a PE and attributing profits to a PE that arises from remote work.

Several international organisations have stressed the need to adopt uniform guidelines for assessing remote cross-border work and PE risk. For example, tax experts on committees reporting to the Organisation for Economic Co-operation and Development (OECD) and to the United Nations (UN) advocate drawing up a uniform set of PE criteria for remote work to facilitate an understanding of how a PE arises in such situations and to simplify the workforce tax treatment of teleworkers' income.

Conditions for assessing PE risk

In assessing the presence of a PE, we need to consecutively examine local law (primarily) and international law, mainly taken to mean tax conventions and the OECD/UN commentaries on the Model Tax Convention.

It follows that each case should be assessed on its merits to determine whether teleworkers create a PE. However, based on article 5 of the OECD commentaries on the Model Tax Convention as well as on the established practice and experience, a PE would arise from remote work in the following circumstances:

1. The employee uses an office, home office or other fixed place of business in the country where they are physically employed. The office or other place of work is fixed, it's at the employer's disposal, and it has a specified duration (e.g. six months).
2. The employee or self-employed person working for the company enters into contracts on behalf of the employer, conducts negotiations and agrees on key parts of the contract.
3. The employee or self-employed person carries out work or provides services to the company in that country on a permanent basis, typically for more than 183 days, performing the company's core business functions that cannot be treated as marketing or preparatory activities. It's also important to determine the self-employed person's independence and evaluate working for the company as agent.

Using a home office

The first point above may put the employer in the greatest doubt because it's a wide and general statement that tax authorities may interpret differently. In international practice, teleworkers tend to work for a long time from certain places (owned/rented apartments or houses, hotel rooms etc) so we need to focus on whether a place of work is at the employer's disposal and whether it has a certain degree of permanence.

To establish whether a place of work is at the employer's disposal, we need to assess who – the worker or the employer – decided to organise work remotely. If the offer of remote work came from the employer, without providing any other workplace options, this increases PE risk significantly. However, if the employer makes it possible to work at the office or other place of business in the worker's or employer's country, but the worker chooses to start or continue remote work and even changes countries, this is one of the elements that may rule out PE risk. Yet this is not the only condition the tax authorities and courts will assess to find a PE. These conditions should be examined together with other conditions according to the country's practice.

The tax and other authorities have been considering work availability aspects in international practice. For example, the Austrian Ministry of Finance says a home office the worker uses at the employer's request may be treated as a sign of a PE.¹ The Swedish tax authority says PE risk should not arise if remote work is the worker's choice and the employer has no commercial objective or other advantage in employing them remotely in that country.²

In a recent ruling on remote work, the Spanish tax authority says a worker's home office is not at their UK employer's disposal because their activities have not changed since they relocated to Spain, the relocation was the worker's decision, and the employer does not cover costs the worker incurs in staying in Spain. And the worker could theoretically use the employer's office in the UK without having to work in Spain.³

Business or not?

Tax authorities will often examine whether the activities carried out at the fixed place of business (i.e. home office) represent an essential part of the business. So it's important to establish how closely the teleworker's activities are linked with the employer's core business functions and revenue generation (not

necessarily in the country the worker has relocated to).

For example, the Danish tax authority examined a Swedish employer's teleworker in Denmark and decided there was no PE because the functions of the employee working remotely in Denmark included neither management nor direct communication with customers.⁴ One of the Polish tax authority's letters says a Danish company does not have a PE in Poland because its teleworkers' activities are not similar to the company's core business functions.⁵

Key takeaways

Based on the above, it's equally important to analyse the following aspects:

1. How often is the home office used? For how long? Who owns the equipment being used there?
2. Who decided to work remotely? Was it a strategic decision made by the company to develop its business?
3. Is the worker granted the power to manage staff or make decisions, which confers more responsibility and is an essential part of the business at the same time?
4. Does the place of work dictate the need to employ a worker with specific skills or knowledge of the local market or culture?
5. If the worker was employed before relocation, does working remotely create any additional job responsibilities associated with relocation?

It follows that each case of PE risk should be assessed on its merits by examining these conditions in the context of the country's practice. Still, all the considerations are significant because they can help the employer assess *prima facie* the likelihood of being liable to register a PE.

¹ Austrian Federal Ministry of Finance, EAS 3415 (June 2019)

² 32 Swedish Tax Agency, dnr: 8-1677220, para. 4.1 (13 May 2022)

³ Spanish General Directorate of Taxes, V0066-22 (18 January 2022)

⁴ Danish Customs and Tax Administration, Tax Council Decision No. SKM2021.412.SR (16 August 2021)

⁵ Poland: Regional Administrative Court in Gliwice, II FSK 1340/21 (31 January 2022)