

# tax:watch

Danish Tax and VAT News in English



## Permanent establishment: Office in the residence of an employee

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*Once again, a ruling holds that a home office constitutes a permanent establishment in Denmark even though the employee is unauthorised to conclude contracts on behalf of the enterprise.*

By Poul Erik Kryger Enevoldsen, [ene@bdo.dk](mailto:ene@bdo.dk)

The Danish tax authorities appear to follow the restrictive practice that has been dominating case law on the issue of "permanent establishment" since 2011.

This affects foreign enterprises seeking to establish their businesses on Danish grounds, initially applying a tentative approach - e.g. by hiring a salesperson without authority to conclude contracts on behalf of the enterprise who will work from his residence.

The activity of the salesperson will often be considered as part of the core business of the enterprise in spite of the fact that the salesperson is unauthorised to conclude contracts. Thus, the home office constitutes a permanent establishment and the enterprise must register for business tax in Denmark from first day of business.

### *Permanent establishment*

There are two definitions of the term "permanent establishment". The definitions serve as a two-step-test to determine the existence of a permanent establishment.

The primary definition entails a fixed place of business through which the business of an enterprise is wholly or partly carried on.

The secondary definition entails that an agent of a dependent status is acting on behalf of an enterprise and has - and habitually exercises - authority to conclude contracts in the name of the enterprise.

The definitions are delimited as the term does not include business solely for the purpose of carrying on activity of a "preparatory or auxiliary character".

A permanent establishment in the form of a home office usually falls within the primary definition as the salesperson typically is unauthorised to conclude contracts in the name of the enterprise - consequently falling outside the scope of the secondary definition.

### *Home office as permanent establishment*

The primary definition contains the following conditions:

- The existence of a "place of business"
- The place of business must be "fixed"

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The Danish tax authorities will often consider these conditions fulfilled in case of a home office. However, foreign enterprises should consider whether the business of the enterprise is carried on “through” the home office and also whether the activities in the home office are of a “preparatory or auxiliary character”.

In relation to the term “through”, it is important to consider whether the business of the enterprise has a sufficient connection to the home office. Arguably, lack of connection between the foreign enterprise and the home office will not induce a permanent establishment based on the home office.

Regarding the term “preparatory or auxiliary character”, it is important to assess whether the business of the foreign enterprise solely constitutes activity of a preparatory or auxiliary character. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and core business.

Previously, the tax authorities often considered business carried on through a salesperson as described above as preparatory or auxiliary activity due to the salesperson being unauthorised to conclude contracts on behalf of the enterprise. Thus, the home office would not constitute a permanent establishment.

However, recent cases indicate that business carried on through a salesperson constitutes a permanent establishment in Denmark because the general purpose of the fixed place of business is one which is identical to the general purpose of the whole enterprise. Hence, the sales activities are often seen as core business even though the salesperson is unauthorised to conclude contracts.

If your business requires assistance in determining whether activities or planned activities in Denmark will constitute a permanent establishment, BDO can help you.

## Adoption of an international anti-abuse clause in Danish tax law

*In a new draft bill, the Danish government proposes adoption of an international anti-abuse clause in Danish tax law. The clause is scheduled to take effect from 1 May 2015.*

By Anders Kiærskou, [aek@bdo.dk](mailto:aek@bdo.dk)

Based on recently introduced EU legislation, the Danish government proposes a bill that will implement an international anti-abuse clause in Danish tax law.

The international anti-abuse clause will prevent tax payers from benefitting from Danish double tax treaties and several EU-directives concerning international taxation with respect of company reorganizations, payments of dividends, interests and royalties if the main purpose or one of the main purposes of the arrangement is to achieve a tax advantage contrary to the purpose of the EU-directive or double tax treaty.

Although implementing rules designed to prevent tax evasion may seem like a beneficial initiative, the international anti-abuse clause in the draft bill is disturbingly vague in its wording. Neither the comments to the draft bill provides much guidance as to how the clause will be applied by the Danish tax authorities. This seems detrimental to other government efforts to attract foreign businesses to Denmark due to the significant uncertainty associated with an unclear tax position. Hopefully, this will change during the legislative process in the parliament.



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