



TR 2002/5A - Addendum - Income tax: Permanent establishment - What is 'a place at or through which [a] person carries on any business' in the definition of permanent establishment in subsection 6(1) of the Income Tax Assessment Act 1936?

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Addendum

Taxation Ruling

Income tax: Permanent establishment -
What is 'a place at or through which [a]
person carries on any business' in the
definition of permanent establishment in
subsection 6(1) of the *Income Tax
Assessment Act 1936*?

This Addendum amends Taxation Ruling TR 2002/5 to update references to legislation; Taxation Rulings; and the OECD *Commentaries on the Articles of the Model Tax Convention*.

TR 2002/5 is amended as follows:

1. Footnote 2

Omit 'For a discussion of whether a person can obtain a private ruling on the question of whether that person is carrying on a business, see TD 96/16'.

2. Footnote 3

Omit 'Note also in relation to PEs and e-commerce the OECD report entitled "Clarification on the Application of the Permanent Establishment Definition in E-Commerce" (OECD, Paris, 22 December 2000).'

3. Paragraph 6

- (a) Omit 'Part IVAAA of'; substitute 'Division 358 of Schedule 1 to'.
- (b) Omit '14ZAAA of'; substitute '358-5 of Schedule 1 to'.

4. Footnote 4

Omit 'purposes'; substitute 'for the purpose of'.

5. Paragraph 10

Omit '21 and 22 of Taxation Ruling TR 92/20'; substitute '75 and 77 of Taxation Ruling TR 2006/10'.

6. Paragraph 12

After 'his'; insert 'or her'.

7. Footnote 7

Omit the footnote; substitute:

⁷ For example, paragraph 8(1)(b) of the *A New Tax System (Australian Business Number) Act 1999* (ABN Act) provides that you are entitled to have an Australian Business Number if in the course or furtherance of carrying on an enterprise, you make supplies that are connected with Australia. Section 41 of the ABN Act provides that 'connected with Australia', in relation to a supply, has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST ACT). Section 195-1 of the GST Act in turn provides that 'connected with Australia', in connection with a supply, has the meaning given by sections 9-25 and 85-5 of the GST Act. Subparagraph 9-25(5)(b) of the GST Act provides that a supply of anything other than goods or real property is connected with Australia if the supplier makes the supply through an enterprise that the supplier carries on in Australia. Subsection 9-25(6) of the GST Act provides that an enterprise is carried on in Australia if the enterprise is carried on through a permanent establishment as defined in subsection 6(1) of the ITAA 1936.

Thus, while paragraph 8(1)(b) of the ABN Act does not specifically mention the subsection 6(1) definition of PE, that definition as adopted by subsection 9-25(6) of the GST Act is integral to the operation of paragraph 8(1)(b) of the ABN Act.

8. Footnote 8

Omit 'April 2000'; substitute '22 July 2010'.

9. Footnote 11

Omit '*OECD Model Tax Convention on Income and on Capital*, op. cit., p.74 at paragraph 2'; substitute '*OECD Commentaries on the Articles of the Model Tax Convention*, op. cit., p.92 at paragraph 2'.

10. Footnote 12

Omit the footnote; substitute:

¹² Australia's tax treaties are now given force of law by the *International Tax Agreements Act 1953*.

11. Paragraph 24

Omit 'description'; substitute 'definition'.

12. Footnote 15

Omit 'pages 12 to 13 of the OECD's Draft Contents of the 2002 Update to the Model Tax Convention. It is anticipated that that draft will be finalised some time after the issue of this ruling.'; substitute 'pages 93-95 of the OECD's *Commentaries on the Articles of the Model Tax Convention*, op.cit.'

13. Footnote 16

Omit the footnote; substitute:

¹⁶ See also *Unisys Corporation Inc v. FC of T* 2002 ATC 5146; (2002) 51 ATR 386; [2002] NSWSC 1115 at paragraph 76 where Gzell J stated 'a place of business must be more than merely temporarily at the enterprise's disposal', and *Henrikson v. Grafton Hotels* [1942] 2 KB 184 at 196; [1942] 1 All ER 679 at 684; per du Parcq LJ. In *McDermott Industries (Aust) Pty Ltd v. FC of T* 2005 ATC 4398; (2005) 59 ATR 358; [2005] FCAFC 67 the Full Federal Court considered Article 4(3)(b) of the Singapore Agreement which relates to deemed substantial equipment permanent establishments. At paragraph 53 of its decision the Court stated 'the deeming provision operates without a time limit'. The ATO view is that the Court's statement has no application to 'a place at or through which [a] person carries on any business' in the subsection 6(1) definition of PE. The basis for the Court's statement was that the Singapore Agreement specifies minimum times for other types of permanent establishments, but not for substantial equipment permanent establishments. The subsection 6(1) definition of 'permanent establishment', by contrast, does not specify minimum times for any type of permanent establishment.

14. Footnote 17

Omit the footnote; substitute:

¹⁷ Internationally six months is recognised as an appropriate benchmark. This issue is discussed at page 95, paragraph 6, of the OECD's *Commentaries on the Articles of the Model Tax Convention*, op.cit.

15. Paragraph 34

(a) Omit 'paragraph 6'; substitute 'paragraph 6.3'.

(b) Omit:

'If the place of business was not set up merely for a temporary purpose, it can constitute a permanent establishment, even though it existed, in practice, only for a very short period of time because of the special nature of the activity of the enterprise or because, as a consequence of special circumstances (e.g., death of the taxpayer, investment failure), it was prematurely liquidated.'

Substitute:

'A place of business can also constitute a permanent establishment from its inception even though it existed, in practice, for a very short period of time, if as a consequence of special circumstances (e.g. death of the taxpayer, investment failure), it was prematurely liquidated.'

16. Footnote 18

Omit the footnote; substitute:

¹⁸ OECD *Commentaries on the Articles of the Model Tax Convention*, op.cit., p. 96

17. Paragraph 41

Omit 'Sarah is one of many'; insert 'Many'.

18. Related Rulings/Determinations

- (a) Omit 'TR 92/1; TR 92/20; TR 97/16; TD 96/16'.
- (b) Insert 'TR 2006/10'.

19. Legislative references

(a) Omit:

- ITAA 1936 128A(4)
- ITAA 1936 128A(5)
- ITAA 1936 128A(6)
- ITAA 1936 128A(7)
- ITAA 1936 221YL
- ITR 1936 152B
- ITR 1936 152C
- ITR 1936 152D
- TAA 1953 Part IVAAA
- TAA 1953 Sch 1
- TAA 1953 12-190
- TAA 1953 12-190(1)
- TAA 1953 12-280
- TAA 1953 16-120
- TAA 1953 14ZAAA
- ANTSA(GST) 1999 9-25
- ANTSA(GST) 1999 9-25(6)
- ANTSA(ABN) 1999 8(1)(b)

(b) Insert:

- TAA 1953 Sch 1 12-190
- TAA 1953 Sch 1 12-280
- TAA 1953 Sch 1 Div 358
- TAA 1953 Sch 1 358-5
- ANTS(GST)A 1999 9-25
- ANTS(GST)A 1999 9-25(5)(b)
- ANTS(GST)A 1999 9-25(6)
- ANTS(GST)A 1999 195-1
- ANTS(ABN)A 1999 8(1)(b)
- ANTS(ABN)A 1999 41

20. Case references

Omit:

- Fowler v. The Minister of National Revenue (1990) 90 DTC 1834

Insert:

- McDermott Industries (Aust) Pty Ltd v. FC of T 2005 ATC 4398; (2005) 59 ATR 358; [2005] FCAFC 67
- Unisys Corporation Inc v. FC of T 2002 ATC 5146; (2002) 51 ATR 386; [2002] NSWSC 1115

21. Other References

Insert:

Other references:

- Explanatory Memorandum to Income Tax Assessment Bill (No. 4) 1967
- OECD Model Tax Convention on Income and on Capital (condensed version), Paris, 22 July 2010
- OECD Commentaries on the Articles of the Model Tax Convention, Paris, 22 July 2010

22. Appendix A(a) Omit from table ***INCOME TAX ASSESSMENT ACT 1936***:

221YL	Deductions from dividends, interest and royalties
377	Exempting receipt of an unlisted country company

(b) Omit from table ***INCOME TAX ASSESSMENT ACT 1997***:

136-25	When a business has the necessary connection with Australia
136-30	Reducing a capital gain or loss from a business asset
320-35	Exempt Income – Life Insurance companies

Insert:

320-37	Non-assessable non-exempt income – Life Insurance companies
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(c) Omit from table ***TAXATION ADMINISTRATION ACT 1953***:

16-120	When certain amounts must be paid to the Commissioner
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(d) Omit from table ***INCOME TAX REGULATIONS 1936***:

152B	What are capital gains?
152C	When are income or profits subject to a reduction of tax?
152D	Income or profits as designated concession income

This Addendum applies on and from 4 August 2011.

Commissioner of Taxation

4 April 2012

ATO references

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ATOlaw topic: Income Tax ~~ Assessable income ~~ business and professional income - Australian sourced
Income Tax ~~ Assessable income ~~ business and professional income - foreign sourced