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By PwC Deutschland | 26. Juli 2022

# Definition of permanent establishment under previous and current travel expense law

**The owner of a business has a permanent establishment at the fixed place of business of his client if he continuously works there, even if he has his own permanent establishment at a different place. After the revision of the tax law on travel expenses as of 2014, the first place of work is primarily determined based on the employee's contractual assignment or by internal instructions of the employer.**

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**Specific situation:** The case in dispute covered years in which both the old (until 2013) and the new (from 2014) travel expense law was applicable. In 2013, the business and the employee travelling expense rules were revised. Under the new travel expense law in force since 2014 new rules for tax deduction of travel expenses were introduced. One major feature was to replace the (old) definition of the “regular workplace” by a “primary place of work”. The primary place of work, per definition, is the place where the employee is permanently assigned to, in a firmly established place of business of the employer, or a company or a third party determined by the employer.

**Background:** The plaintiff in the case of dispute initially worked as an employee at his father's demolition company. Since June 2010, he ran such a company for himself at the same address as his father (in R) as a one-man business. There, he carried out demolition and cleaning work on aluminum stoves as well as mowing and cutting work on the premises of his sole client (A, who had his office in E). He had "taken over" this customer from his father. In addition to his own equipment, the plaintiff used his father's machines and vehicles. The plaintiff made the trips to E from R, where he also lives. He noticeably pursued his own business more often than his employment duties at his father’s company (occasional office work).

In the opinion of the local tax office and of the Duesseldorf Tax Court as court of first instance, all journeys made by the plaintiff to his client (A) are journeys between his home and his place of business (as a fixed business establishment of a primary place of work). The plaintiff maintained another permanent establishment on the premises of his father (in R) because he had stored the equipment necessary for his work there, maintained and picked it up when needed. The plaintiff argued that the job for A had not been established on a permanent basis, as he had not been bound to A by a long-term contract.

**Supreme Tax Court decides against plaintiff**

The Supreme Tax Court agreed with the opinion of the tax office and with the decision of the Duesseldorf tax court. The expenses for the trips of the part-time self-employed plaintiff with his company car can only be considered by way of lump sum commuter allowance at €0.30 for each kilometer travelled (for 2021 the allowance was €0.35 for each kilometer travelled over 20 KM, for 2022 a further increase to € 0.38 starting 2022 is time limited and will cease in 2026).

The Supreme Tax Court pointed out that the Tax Court of Duesseldorf was correct to assume that the business place of the client (A) constituted a permanent establishment of the part-time self-employed plaintiff (due to the provision of the service owed). A specific contractual minimum term (for the business relationship with A) - as claimed by the plaintiff - is not required under the legal environment and the statutes in force until 2013.

According to the circumstances of the case, the completion of tasks for the client (A) clearly was the main part of the plaintiff’s business activity, both in terms of substance and time spent. The orders had been placed by A without interruption for many years. In addition, and from the plaintiff's point of view, it must have been an extraordinary durable and stable business relationship, which he could count on. This is all the more true since he did not try to find any other clients and also did not take any other orders.

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According to the landmark decision of the Supreme Tax Court of 10 April 2019 (VI R 6/17) with respect to the implementation of the tax law on travel expenses as of 2014, the first place of work is primarily determined either based on the employee's assignment under the employment (contract) or by way of internal instructions from the employer.

**Source:**

Supreme Tax Court, decision of 16 February 2022 (X R 14/19), published on 21 July 2022.

**Schlagwörter**

business travel, permanent establishment (PE), travelling expenses