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Draft of a comprehensive Ministry of Finance circular on the definition of a permanent establishment

On 13 February 2026, the Federal Ministry of Finance (MoF) sent a comprehensive draft circular on the principles applied by the tax administration regarding the concept of a permanent establishment and the establishment of a permanent establishment in domestic and international tax law to interested associations for comment by 13 March 2026. The circular aims to systematically present the factual requirements for a permanent establishment under Section 12 of the General Tax Code (GTC) that are relevant for the application of numerous income tax regulations and to clarify the relationship to the concept of a permanent establishment under treaty law in accordance with Article 5 of the OECD Model Tax Convention. The circular takes comprehensive account of the current case law of the Supreme Tax Court and replaces the previous MoF circular dated 24 December 1999 in this respect.

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Domestic concept of a permanent establishment according to Section 12 General Tax Code (GTC)

Fundamentals

As a starting point the MoF circular sets out the basic definition of a permanent establishment (under Section 12 sentence 1 GTC) as any fixed place of business or facility used for the activities of an enterprise. According to established case law, the constituent elements are not to be considered in isolation, but rather determining their interaction with each other within the framework of an overall assessment of the individual case.

Any physical object or group of physical objects that is suitable as a basis for a enterprise's activities is considered a business facility or plant, whereby in individual cases even an office corner with a desk and filing cabinet or even a laptop may be sufficient.

A fixed connection to the earth's surface is required, whereby a physical connection to the ground is not necessary; merely occupying the same location is sufficient.

Temporal permanence

With regard to temporal permanence ("certain duration"), the MoF circular states that sufficient temporal permanence will exist from the date the connection to the "earth's surface" was first established where the connection has existed for more than six months or where the business facility is intended to remain in one location for at least six months. An interaction between local and temporal permanence exists in such a way that particularly strong local permanence will also be considered an indication of temporal permanence and vice versa.

Supporting business operations

According to the MoF circular, the criterion that the business facility must directly support the activity of the enterprise has two dimensions:

- On the one hand, the business premises must be used to carry out or promote the enterprise's own business activities with a local connection, whereby preparatory or auxiliary activities are also sufficient.
- On the other hand, the enterprise's connection to the place where it carries out its business activities must have a certain spatial and temporal "roots".

An indication of spatial roots exists in particular if the enterprise has been granted limited use of a structure

within the business premises, whereby such roots cannot be assumed in the case of communal areas without a specific enterprise-related allocation. With regard to temporal roots, the circular discusses various cases relating to the six-month period.

Power of disposal

With regard to power of disposal, the MoF circular clarifies that the enterprise must have more than just temporary power of disposal over the business premises, whereby an independent right of use is required that cannot be easily withdrawn from the enterprise or changed against its will.

In particular, power of disposal does not exist if the enterprise could be prohibited from using the business premises at any time without its concurrence.

In the case of desk sharing, such power of disposal may be considered to arise where there is a reliable prospect of obtaining a regular workplace and thus providing the necessary irrevocability: this should be the case where the number of workplaces is calculated on the basis of the typical weekly utilisation of the office and a corresponding number of workplaces are made permanently available to potential users.

Management permanent establishment

The MoF circular confirms the principle that, at minimum, every taxpayer who generates income from profits will be considered to have a permanent establishment at the place of management.

According to Section 10 GTC, management is the centre of senior management, i.e. the place where the decisions relevant to management are made and where the measures necessary for the management of the business are established. A distinction must be made between day-to-day business management and extraordinary transactions; whereby only day-to-day business management is relevant for the creation of a management permanent establishment.

Construction work and assembly

With regard to construction work and assembly work pursuant to Section 12 (2) No. 8 GTC, the MoF circular states that these constitute permanent establishments where:

- the individual construction work or assembly work
- a number of construction works or assembly works existing simultaneously or
- a number of construction works or assembly works following one another without interruption,

last(s) longer than six months. Seasonal or other temporary short-term interruptions to work do not affect the six-month period, whereas interruptions for reasons not related to business operations suspend the period if

the persons entrusted with the construction work are removed from the site.

Permanent representative pursuant to Section 13 of the General Tax Code

According to the MoF circular, the term "permanent representative" as defined in Section 13 GTC is not synonymous with that of a representative under treaty law as defined in Article 5(5) and (6) of the OECD Model Tax Convention.

A permanent representative is a person who manages the business of an enterprise on a long-term basis and is subject to its instructions.

Natural persons, legal entities and partnerships may be considered permanent representatives, whereby only a person other than the enterprise itself may be a permanent representative.

Business is considered to be conducted on a permanent basis if it is carried out with a certain degree of planning and regularity; in principle this requires repeated activity (i.e. more than short-term activity) exercised on the basis of decisions taken in advance.

Permanent establishment under treaty law

The MoF circular deals in detail with the concept of a permanent establishment under treaty law in accordance with Art. 5 OECD Model Tax Convention and its relationship to the domestic concept of a permanent establishment.

In principle, there is a high degree of consistency between the domestic and treaty-based concepts of permanent establishment, whereby the requirements for the existence of a fixed place of business specified in Section 12 Sentence 1 GTC are equally decisive for the treaty-based permanent establishment.

Differences exist in particular with regard to the business establishment exemptions for preparatory and auxiliary activities in Article 5(4) of the OECD Model Tax Convention.

The MoF circular states that in order to assess whether an activity is exclusively preparatory in nature or constitutes an auxiliary activity, the overall circumstances of the individual case must be taken into account, with the decisive criterion being whether the activity represents a substantial and significant part of the enterprise's activities as a whole.

Auxiliary activities are generally not aimed at generating turnover or profit and support the main activity without being part of it, with typical administrative tasks falling under this category, but administrative activities relating to central corporate functions being excluded.

With regard to construction and assembly work pursuant to Art. 5 (3) OECD Model Tax Convention, the MoF circular clarifies, for example, that, contrary to the OECD model commentary, mere construction or assembly supervision does not constitute a construction or assembly permanent establishment, as Germany has issued a reservation in this regard.

Construction work carried out simultaneously or consecutively must be assessed separately and may only be combined into a single permanent establishment if there is a technical and organisational connection between them.

Representative permanent establishment pursuant to Art. 5 (5) and (6) OECD Model Tax Convention

The MoF circular explains the representative permanent establishment as an independent concept under treaty law that is separate from the concept of a permanent representative under Section 13 GTC. A representative permanent establishment under treaty law is established if a person usually concludes contracts for the enterprise or usually plays a leading role in the conclusion of contracts that are regularly concluded by the enterprise without further significant changes.

However, German DTAs generally adhere to the criterion of the habitual exercise of representative authority through the conclusion of contracts, without extending the provision to the criterion of playing a leading role in the conclusion of contracts. A representative permanent establishment may also exist in the case of an activity that is carried out exclusively from an office at the representative's home.

Individual cases

The MoF circular deals with numerous individual cases relevant to practice and describes how the MoF considers they should be handled.

Working at third-party premises

Third-party premises serve as business facilities for the taxpayer's own enterprise if the taxpayer carries out his own business activities at these premises, whereas merely working inside the premises of the contractual partner is not sufficient.

Examples are used to illustrate that a cleaning enterprise that cleans a client's premises does not establish a permanent establishment, whereas IT consultants who spend twelve months implementing a merchandise management system on a client's premises and use desk sharing may establish a permanent establishment.

Service or management companies

Under certain conditions, a permanent establishment can also be established at the premises of a service or management enterprise where the taxpayer has commissioned said service or management enterprise. In such a case where there is no power of disposal, this must be replaced by the taxpayer's own business activity on the premises, for example if the management bodies are identical or if there is ongoing, sustained monitoring on site.

However, the sole transfer of tasks – even comprehensive ones – without the client simultaneously carrying out its own business activities on the third-party premises does not lead to the creation of a permanent establishment.

Market stalls

A market stall can constitute a fixed place of business if there is a sufficiently permanent connection to a specific part of the earth's surface, which is usually the case for market events that are held at more or less regular intervals, usually in the same place.

In any case, repeated use over a period of more than six months is a strong indication of sufficient permanence, whereas use of a sales area at a Christmas market for only four weeks, even if this is repeated annually, is not sufficient.

Remote Work/Working from Home

An employee's work in an office in their home does not generally constitute a permanent establishment of the employer under Section 12 (1) of the GTC or Article 5 (1) and (4) of the OECD Model Tax Convention, as the employer typically does not have sufficient power of disposal over the employee's home premises.

Even the conclusion of a rental agreement for the employee's home between the employee as landlord and the employer as tenant does not generally constitute sufficient power of disposal, nor does the employer's assumption of the costs for the office.

However, the exercise of management functions in the home office may establish a place of business for management purposes, as the place of management may also be located in the private premises of the manager pursuant to Section 10 of the GTC.

The MoF circular also refers to the relevant paragraphs 44.1 to 44.21 of the OECD Model Commentary 2025 on Article 5 OECD Model Tax Convention, according to which the use of an office by an employee in their home for less than 50 per cent of their total working time for the employer in question does not, in principle, lead to the creation of a permanent establishment attributable to that employer under the agreement. According to the OECD Model Commentary, there must also be a "business reason" for using an office in their home.

Influencers

The MoF circular addresses the tax treatment of influencers for the first time and states that an influencer

who generates income from profits created at minimum a permanent establishment for business management in accordance with Section 12 (2) No. 1 GTC.

If an influencer maintains premises where they design, create, edit or upload audio, visual or audiovisual content to the internet, these premises are typically permanent business facilities that serve the influencer's business and are therefore permanent establishments.

On the other hand, locations that the influencer uses only temporarily and not regularly as a backdrop do not constitute a business facility that is sufficiently rooted in time.

Ships

A moving ship does not in itself constitute a permanent establishment of the ship operator due to the lack of a permanent connection to the earth's surface.

Ships that are permanently moored on land and are no longer intended for the transport of goods or persons, on the other hand, constitute a permanent business establishment in accordance with Section 12 Sentence 1 GTC and Art. 5 (1) OECD Model Tax Convention, whereby the permanence is given by the leasing of the specific berth.

The MoF circular uses the example of a hotel and restaurant ship to explain that a river cruise ship permanently connected to the mainland by mechanical connections becomes a fixed business facility and that the operator maintains a permanent establishment at the berth in accordance with Section 12 (1) of the GTC and Article 5 (1) of the OECD Model Tax Convention.

Under certain conditions, floating power generation plants without a permanent fixed connection to the earth's surface, power generation plants anchored to the bottom of the water, and ships and pontoons that are permanently moored for stationary operation may also be considered permanent establishments.

Provision of personnel or operating equipment

The mere provision/lease of land and any machinery and operating equipment located thereon to another entrepreneur does not constitute a permanent establishment of the transferring enterprise.

The transferring enterprise must carry out its own commercial activity with or through the transfer of the business facilities and equipment.

The MoF circular illustrates this with several examples of the transfer of container terminals, 3D printers and conveyor technology, whereby a distinction is made between pure leasing without any entrepreneurial activity of its own and supply in conjunction with the provision of its own services.

Application rules

The MoF circular dated 24 December 1999, last amended by the MoF circular dated 22 December 2016, is

repealed insofar as it contains statements on the concept of permanent establishments and the establishment of permanent establishments in domestic and international tax law.

In all other respects, the aforementioned MoF circular continues to apply insofar as this determines the administrative principles for the allocation of permanent establishment profits, in particular in cases where neither Section 1(5) Foreign Taxes Act (FTA) nor the provisions of the Permanent Establishment Profit Allocation Regulations are applicable, as well as for the purposes of Section 1(5) Sentence 8 FTA.

The above provisions shall apply in all open cases, unless excluded by other statutory provisions.

Schlagwörter

OECD model, permanent establishment (PE)