

Permanent establishment (branch)

- International tax law –

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1. Introduction round



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1. Introduction round



#gettingcloser

**A firm of auditors, tax advisors,
legal advisors and management
consultants**

Getting closer – to people, topics, tasks



About stallmeyer

a portrait of the stallmeyer law Office

stallmeyer is a mid-sized, partner-managed law office for accounting, tax advising, legal advising and corporate consultation. Competence, trust and personality have been the cornerstones of our work since the 1950s. We still

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2. Permanent establishment - what do you need it for?

Tax purposes

- Specify place of taxation
- Taxes due in the country of the permanent establishment

Accounting and balance sheet

- Separate accounting
- Internal cost allocation

2. Permanent establishment - what do you need it for?

National tax law

- § Section 6b (4) no. 2, 3 EStG: The assets sold and acquired or manufactured must belong to a domestic permanent establishment;
- § Section 7g (2) no. 2 EStG: The asset must remain in a domestic permanent establishment;
- § Section 38 EStG: Definition of domestic employer (maintaining a permanent establishment);
- § Section 2 (1) sentence 3 GewStG: The concept of a permanent establishment is constitutive for trade tax;
- § Section 9 no. 3 GewStG: Reduction of the income of a foreign permanent establishment;
- § Section 2 no. 2 FördergebietG: Belonging to and remaining in a permanent establishment in the assisted area;
- § 2 InvZulG: Belonging to and remaining in a permanent establishment in the assisted area;

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3. Definition in the AO

§12 AO:

"[...]any fixed place of business or plant [1] serving the activities of an enterprise [2] . The following in particular [3] are to be regarded as permanent establishments

- 1.Management*
- 2.Branches*
- 3.Offices*
- 4.Factory/Workshops*
- 5.Warehouses*
- 6.Purchase/sales points*
- 7.Mines, quarries, ...*
- 8.Construction work and installation > 6 months".*

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4. Rooting as a central concept

§12 AO:

“[...]any fixed place of business or plant

The distinction between a business facility and a plant is irrelevant? Can you imagine a difference anyway?

→ **The most important criterion is "fixed":**

*A facility or installation is fixed if it has a reference to a part of the ground
(**rooting**) for a certain time.*

It can be a mechanical connection with the ground or a mere occasion where the facility or installation is in a certain place for a certain period of time. Buildings and premises are regularly fixed business facilities. The term business facility shall be interpreted broadly.

4. Rooting as a central concept

Which of the following business equipment installations are rooted?

- Dredging vessel to remove sand from a dock?
→ No, because no rooting
- Solar plant on the roof of a factory building?
→ Yes, because function only possible with roof
- Dixie toilet at a techno festival?
→ No, because no rooting
- Mobile container to house seasonal workers?
→ No, because no rooting
- Transformer on a wind turbine between tower and blade?
→ Yes, since function only with transformer

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5. Serving the activity of the company

§12 AO:

...which serves the activity of a company.

- This service must be direct and **of a certain duration**, i.e. not only temporary (occasional).
- A business is the independent exercise of a commercial or professional activity within the meaning of § 2 (1) UStG, thus **also includes agriculture and forestry as well as independent professions**.
- The business facility or installation serves the business if activities are carried out on or in it that **belong to entrepreneurial activities or promote entrepreneurial activities**, or if the facility or installation is used for entrepreneurial purposes.
- The use of **personnel is not required**: fully automated equipment is also sufficient.

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6. Forms of permanent establishment

§12 AO:

...The following in particular [3] are to be regarded as permanent establishments

- 1.Management*
- 2.Branches*
- 3.Offices*
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- 5.Warehouses*
- 6.Purchase/sales points*
- 7.Mines, quarries, ...*
- 8.Construction work and installation > 6 months".*

6. Forms of permanent establishment

Sounds clear ? But unfortunately it is not (in Germany such a thing is never easy ;-). The following special forms are of interest

Management permanent establishment:

For the concept of management in detail see § 10 AO. According to this, management is **the place of the center of business management**; this is where the decisive will of the corporation, association of persons, partnership or sole proprietor is actually formed. This **center can only be located at a single place**; several "centers" are not conceivable. § Section 12 No. 1 AO expresses this by defining a place of business as "the", i.e. **a single place** of management.

→ **What could be delimitation issues?**

- Activity at more than one place
- Factual management
- Does this also apply to the entrepreneur's private premises?

6. Forms of permanent establishment

Representative permanent establishment:

Under which of the No. of the AO on permanent establishment does the representative permanent establishment count?

→ Not § 12 AO but (!) §§ 13 AO

A permanent representative is a person **who manages the business of a company on a sustained basis** and is subject to the company's instructions. Permanent representative is in particular a person, who for an enterprise lastingly

1. **concludes or mediates contracts or obtains orders** or
2. maintains an inventory of goods or merchandise and makes deliveries thereof.

6. Forms of permanent establishment

Service permanent establishment:

Under which of the No. of the AO to the permanent establishment counts the service permanent establishment?

→ To none ;-)

Since it lacks with a bare service of the “fixed rooting” (!)

- If you become active as a tax consultant in the future and send an employee to Belgium for 5 months in order to settle VAT matters in German/Belgian border traffic, there is no permanent establishment abroad (according to AO !).
- If, for example, a German tiler (without employees) installs claddings on office buildings at regularly changing construction sites in the NL (< 6 months)

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7. Definition in tax law using the example of DBA GB

"[...] a fixed place of business through which the business of an enterprise is wholly or partly carried on."

1. Place of management
2. Branches
3. Business office
4. Factory/workshops
5. Mine, quarry, ...
6. Construction and assembly > 12 months

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8. Difference analysis AO/ DBA GB

AO §12	DBA GB
fixed place of business or plant	fixed place of business
Warehouses	according to Article 5 (4a) no permanent establishment
Purchase/sales points	according to Article 5 (4b,c) no permanent establishment
Construction work and installation > 6 months	Construction work and installation > 12 months

Definitions can be different and therefore there is a conflict of qualification.

1. What are the possible consequences?

(Double taxation or double non-taxation)

2. How could companies resolve this?

(exemption, credit or deduction method)

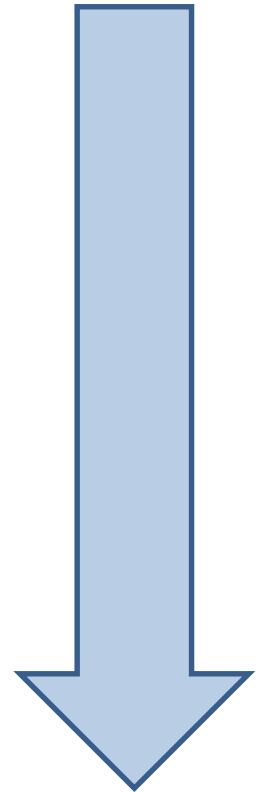
Last resort: mutual agreement or arbitration procedure (Schiedsverfahren)

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9. Characteristics of the formulations in the DBA

1	Agreement between government representatives (ministries of finance) on the basis of a multinational standard (OECD-MA; UN-MA)
2	German negotiation basis for DBA
3	Draft of the agreement
4	Participation of experts for evaluation
5	Signature by government representatives
6	Ratification by legislative authorities
7	Implementation and application



9. Characteristics of the formulations in the DBA

Dispute regarding service permanent establishment

- Formulation in **Art. 5 (1) OECD MA** refers analogously to AO to the "fixed connection"
- According to **Art. 5(3) letter (b) UN-MA** (for developing and newly industrializing countries), services rendered by employees or other personnel of an enterprise give rise to a permanent establishment in the State in which the activities are carried out if these activities last there for more than six months within any 12-month period for the same or a related project.

→ **What is this argument about?**

9. Characteristics of the formulations in the DBA

Comment 42.23:

„The following is an example of a provision that would conform to these requirements; **States are free to agree bilaterally** to include such a provision in their tax treaties:

Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State performs services in the other Contracting State

- a) *through an individual who is present in that other State for a period or periods exceeding in **the aggregate 183 days** in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or*
- b) *for a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more **individuals who are present and performing such services in that other State** the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in paragraph 4 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.“*

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- **Case 1:** Permanent establishment on restricted military land (BFH Urteil I R 30/07)
- **Case 2:** Permanent establishment in the service sector (BFH Urteil I R 47/20)
- **Case 3:** Shared use of a room by a transport company by an employee (BFH Urteil III R 8/00)
- **Case 4:** Home-Office (Österreichischer VwGH Ro 2020/13/0004-7)

Time for practice cases :)

Thank You Very much!

- Questions?
- Contact: luengen@stallmeyer.de

