

Tax

Telework and permanent establishment

The possibility that an entity, tax resident in the UK, may have had a permanent establishment in Spain during 2020 in the context of the pandemic and the health measures that prevented international mobility, assessing also the criteria generally applicable once these measures disappeared.

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The Directorate-General for Taxation, in a formal binding answer to a taxpayer's query (V0066-22 of 18 January), analyses the possibility that an entity, tax resident in the UK, may have had a permanent establishment in Spain during 2020 in the context of the pandemic and the health measures that prevented international mobility, also assessing the criteria generally applicable once these measures disappeared. In short, one of the employees of this entity, also UK resident for tax purposes, remained teleworking in Spanish territory for more than six months of that year, without the enterprise paying him any additional expenses or remuneration during that time. In this specific case, the worker, owner of a

property in Spain which he mainly gave a holiday use, was temporarily detained in our country as a result of the COVID-19 pandemic. However, once the health measures preventing his return had been lifted, he unilaterally decided, for personal reasons, to extend his stay in Spain, so that he ended up staying more than 183 days in Spanish territory during the calendar year 2020, carrying on the main business of the enterprise remotely, work which in no case involved the signing of contracts for and on behalf of the employer enterprise. The employee's intention to remain indefinitely in the same situation was not accepted by the entity, which decided to terminate the employment relationship at the beginning of the year 2021.

In this context, the existence of a possible permanent establishment in Spain is addressed, which requires a reference to Article 5 of the Spain-UK Double Taxation Convention, according to which such a situation might arise in two different ways:

- 1) The existence of a fixed place of business through which the business of the enterprise is wholly or partly carried on (the so-called material PE).

In this regard, and with reference to the provisions of Article 5(1) of the aforementioned Convention, as well as the Commentaries on the Articles of the Model Tax Convention, in their 2017 version (Commentary 6), the fact that the place where the business is carried on in our country is a dwelling owned by an employee requires specifying whether it is “at the disposal of the enterprise”, a matter that must be analysed in the context of the pandemic in which the circumstances of the case have arisen. For this reason, the Directorate-General for Taxation relies on the reports issued by the OECD in April 2020 and January 2021, which offer non-binding guidelines to address the interpretation problems that may arise from the application of tax treaties as a result of COVID-19.

On the basis of the above, it concludes that:

- The work performed by the employee from home during the months during which the public health measures lasted does not involve a sufficient level of permanence to envisage the existence of a permanent establishment of the enterprise in Spain, deeming the use of the employee’s home in Spain at that time as discontinuous and incidental. Therefore, the Directorate-General understands that such a circumstance, by itself, would not create a fixed place of business for the enterprise in Spain.

- With regard to the time that the employee remained in Spain after the end of the confinement and for more than 183 days during 2020, the particularities of such continuity must be analysed in order to determine whether or not there is a permanent establishment, since this is a question of proof based on the circumstances of each case. Having thus examined the facts of the case - the employee’s unilateral decision to continue in Spain when the measures preventing him from leaving the country have disappeared; the existence of a place that the enterprise has at the employee’s disposal to work in person in the United Kingdom; and the absence of any payment or remuneration to the employee for the use of his home to perform his work - the Directorate-General for Taxation concludes that these points determine that this office was not at the disposal of the company, and therefore did not constitute a permanent establishment.

However, these circumstances should be analysed once the exceptional nature of the pandemic has been overcome and taking into consideration that the definition of material PE or fixed place of business does not require the existence of a legal right of use of a property, the mere availability of the same, with a certain degree of permanence and from where the business of the enterprise is wholly or partly carried on, would be sufficient.

- 2) The carrying on of the business in Spain through an agent of a dependent status, i.e. one acting on behalf of the enterprise and having and habitually exercising an authority to conclude contracts on behalf of the enterprise (the so-called agency PE).

For this purpose, the Directorate-General refers to the provisions of Article 5(5) of the Convention, taking into account paragraph 32(1) of the

Commentary on Article 5 of the 2014 Model Tax Convention, applicable in this case, and the relevant provisions of the above-mentioned OECD reports.

To this effect, and after noting that the employee has not signed contracts for and on behalf of the company, but has carried on the business of the enterprise without it being known whether he could conclude contracts in this respect, the Directorate-General for Taxation concludes that:

- During the months in which the public health measures were in force, there was no evidence of sufficient ‘regularity’ in the exercise of the authority the employee might have had in order to consider him as a dependent agent of the enterprise.
- During the extended period of stay in the country, it cannot be concluded from the information provided that the business carried on by the employee can be identified with the business of an agent, since there is no indication of acting

as such. In any case, this would be a question of fact that would have to be proved.

In short, in this case the Directorate-General does not consider the existence of a permanent establishment in Spain with respect to the employee who was detained in Spain during the COVID-19 crisis, so that the exceptional and temporary change of the place where employees work due to the pandemic should not create new permanent establishments for the employer. In other words, it would not be possible to accept the existence of a permanent establishment when there are exceptional and forced circumstances, such as those that have given rise to the health crisis for three months in Spain.

However, if such a stay is prolonged, the specific facts and circumstances would have to be analysed on a case-by-case basis, i.e. in the case of an employee who does not carry on ancillary or preparatory activities, the existence of a fixed or available place of business, or whether the employee has authority that allows him or her to conclude contracts habitually.