

Summary

"Creation of a permanent establishment and tax avoidance in international tax law"

The subject of the work is the analysis of the permanent establishment in the context of tax avoidance in international tax law. The issue in question serves to differentiate the right to tax the income obtained by the entrepreneur outside his country of residence. The taxation of related income of the permanent establishment in the source country is the direct consequence of the appearance of the permanent establishment therefore comes a non-taxation in the country of residence of the taxpayer. Therefore, determining the boundaries of the permanent establishment definition is a key issue. The indicated circumstance means that the author's main goal is to describe the definition of the permanent establishment and related matters of law.

The main thesis of the work assumes that the current definition of the permanent establishment is not an effective means of counteracting tax avoidance in the source country. It does not meet the expectations set for it because of the inadequate scope. There are additional theses associated with the main thesis. First, the permanent establishment that is one of the oldest institutions of international tax law has a complicated, casuistic and thus very comprehensive definition, which in consequence is prone to circumvention and abuse. The changes included in the 2017 update to the OECD Model Tax Convention did not lead to the elimination of all possibilities for performing the indicated actions. Secondly, despite the changes adopted in 2017, the definition of the permanent establishment is less and less adequate to the realities of the modern economy. Its modernization carried out by the OECD as part of the BEPS project did not bring a breakthrough in counteracting the avoidance of permanent establishment status. The lack of this breakthrough results from the limited scope of changes made. Therefore, the definition of the permanent establishment still does not include economic activity conducted via the Internet outside the country of residence of the entrepreneur. Consequently, it does not meet the requirement of completeness and does not guarantee an effective distribution of taxation rights between the residence and the source country of income. Thirdly, despite the fact that the scope of changes developed under the BEPS project is insufficient in relation to the requirements of business transactions, the very fact of their adoption should be assessed positively. The definition of the permanent establishment has in fact been complemented with some measures to counter its circumvention and abuse. However,

objections are raised about the considerable flexibility of legal measures introduced, which potentially may violate the proportionality test and go beyond acceptable limits.

The basic research method used in the work is the dogmatic analysis method. However, due to the sources studied, it is specific. The analysis of the permanent establishment definition does not, for the most part, require consideration of typical normative material in the form of standards derived from international laws or agreements, but it requires consideration from auxiliary material used to design, negotiate and interpret double taxation treaty. The material in question is primarily the provisions of the OECD and UN Model Tax Conventions. They constitute universal models on the basis of which the vast majority of double taxation agreements have been developed internationally. The nature of the standards contained in the model laws and their significant similarity to the standards used in specific international agreements justifies treating them in the same way as normative matter, although in fact they do not constitute such matter.

In this dissertation comparative and historical research methods are auxiliary. The first method includes a comparison of selected double taxation agreements on income and property tax, and to a small extent also the regulations of domestic law of some countries. The historical method is necessary to present the evolution of the permanent establishment definition starting from its birth in nineteenth-century in Germany to the modern shape that is the result of the BEPS project. While its place within the international income tax system has not changed over the years, its definition has been modified. An analysis of the pace of this evolution is necessary to show the level of (in)adequacy of definitions in relation to parallel economic changes over the last 150 years.

The work consists of an introduction, five chapters, an ending, a bibliography and an alphabetical and chronological list of normative acts, rulings and interpretations used. Each chapter was preceded by introductory remarks and completed by remarks.

The first chapter was devoted to the history of the permanent establishment and its importance in terms of tax law. The analysis covers the entire period of the permanent establishment's existence from the mid-nineteenth century to the present day with particular emphasis on key moments for changing its definition. This chapter also serves to introduce the subject of the permanent establishment and to place the analyzed issue under the international system of avoiding double taxation of income. For this reason, the definition of the permanent establishment is presented both in double taxation agreements based on the models from the OECD and UN Model Tax Convention and regional conventions, as well as on national law.

The next chapter of the work concerns the direct form of the entrepreneur's presence in the source country. It was included in the basic of permanent establishment that is a fixed place. In separate paragraphs of the chapter, the conditions for the establishment of this type of permanent establishment were analyzed, i.e. the management of the establishment, stability in geographical, temporal and economic aspects, and conducting business through the fixed place.

The third chapter is devoted to indirect forms of presence in the source country. They include construction, agency and service types of permanent establishment. Each of them is characterized by different, extensive criteria- the fulfillment of them determines the constitution of the permanent establishment. For this reason, they were discussed in separate editorial units of the work. It should be noted that the importance of the types of permanent establishments analyzed in this chapter has increased in recent years, as evidenced by the numerous examples of resolution of the court and tax authorities from all around the world presented in the work- in particular from developing countries, paying close attention to the agency permanent establishment of entrepreneurs from developed countries in their area.

The fourth and most extensive chapter covers issues related to tax avoidance in the context of the permanent establishment. First of all, it explains the concept of so-called tax optimization and differences between the concepts of tax avoidance and tax evasion. The phenomenon of avoidance of permanent establishment status and the mechanisms of counteracting it, which were adopted by OECD member states under the BEPS project, were also analyzed. The analysis of Action 7 BEPS was of key importance in this context. As part of it, a number of legal measures were developed, the application of which significantly improves the efficiency and effectiveness of the permanent establishment definition. Importantly, they are not free from defects. Apart from the problem indicated in Chapter 4, regulations containing two exclusions from the permanent establishment definition have been analyzed, i.e. the object exclusions included in Article 5 paragraph 4 of the OECD Convention and exclusion of the activities of an independent agent referred to in Article 5 paragraph 6 of the OECD Convention. In the first case, the semantic scope of the terms 'preparatory activities' and 'ancillary activities' was mainly considered. In the second case, attention was paid to establishing aspects of independence and the definition of a closely related enterprise.

The last chapter of the work concerns the issue of the permanent establishment in the context of taxing the digital economy. This chapter covers the analysis of economic models in where the Internet is used by the entrepreneur. Their development translates into an increase in problems related to the distribution of rights to tax income from digital activities obtained by the entrepreneur outside his country of residence. OECD recommendations regarding the server

permanent establishment are of crucial importance in this respect. However, they have an archaic character, resulting in a mismatch to the needs of the modern economy. In response to this circumstance, the paper presents proposals for the modernization of the digital economy taxation model, presented in the study of international tax law. However, the greatest attention was devoted to the proposals for directives presented by the European Commission in March 2018. They assume, among others, the application of the criterion of 'significant digital presence' that would significantly change the rules for establishing a permanent establishment in relation to entrepreneurs operating via the Internet.

At the end of the work, the conclusions and postulates of changes in the permanent establishment definition were presented, in particular by using the concept of 'significant digital presence' to tax digital activities. They are intended to indicate the direction of further modernization of the permanent establishment definition, initiated in the course of the BEPS project but not yet completed.

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