

Unintended Creation of Permanent Establishments Abroad

Taxation Aspects

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Structure

- I. Principles of permanent establishments according to convention law**
- II. Fixed place of business**
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- IV. Building or constructing project permanent establishment**
- V. Service and consulting project permanent establishment**
- VI. Further scheduled amendments according to BEPS**

I. Permanent Establishment Policy according to Convention Law

as a permanent establishment classified

fixed place of business:

place of management

branch of management

office

factory or workshop

Regular activity of a **dependent agent** (in particular employee) with authority to conclude contracts, unless merely ancillary and preparatory functions (**agency permanent establishment**).

Building site or construction or installation project (or related supervisory activities) if it lasts more than 12 months (**construction or project permanent establishment**).

Some double taxation agreements deem a permanent establishment to exist without a fixed place of business if the company performs services in another country (**service permanent establishment**).

not as a permanent establishment classified

Storage, display or delivery facilities of goods or merchandise for the enterprise.

The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storing, displaying or delivering or for the purpose of processing by another enterprise.

Fixed place of business maintained solely for the purpose of purchasing goods or merchandise for the enterprise or obtaining information („**purchasing permanent establishment**“).

Fixed place of business, maintained solely for the purpose of carrying out ancillary and preparatory activities and this activities are not provided directly to third parties („**representative permanent establishment**“).

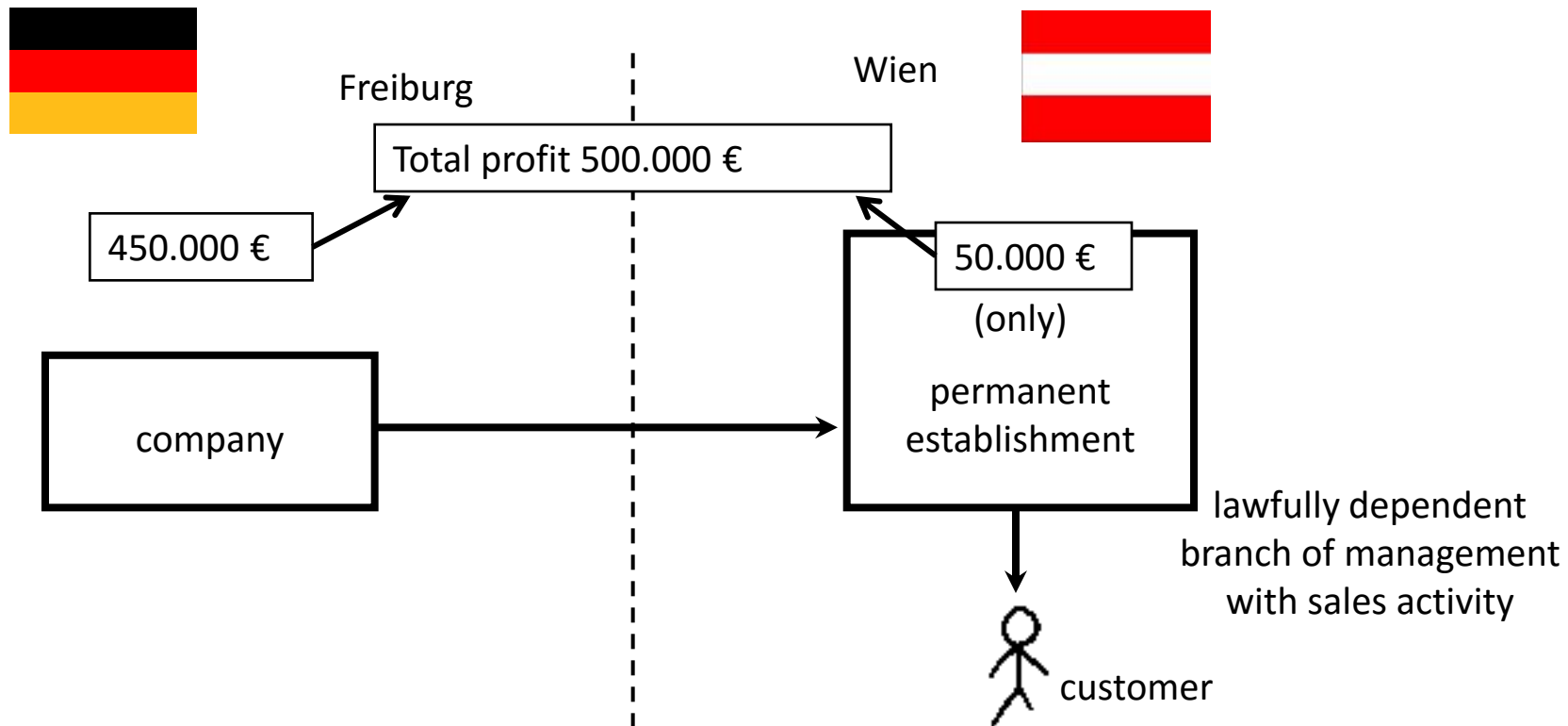
Server, as far as only installed for the activities abroad (without maintenance on site).

Activities of **independent brokers/ commission agents/** or other independent agents, as far as within their ordinary course of business.

Room Sharing?



II. Fixed Place of Business



Legal consequence: the revenues of the permanent establishment are taxed in Austria (limited liability)

III. a) Agency Permanent Establishment according to Art. 5 OECD-MA – Legal Situation until 2016

- A **dependent agent** is treated as a permanent establishment of a foreign company according to Art. 5 Abs. 5 OECD-MA if
 - he has the authority to conclude contracts in the name of the company
 - and he uses this authority frequently.

- Brokers, commission agents and other **independent agents** do not constitute a permanent establishment according to Art. 5 Abs. 6 OECD-MA if
 - this person acts within the ordinary course of his business and
 - is legitimately and economically independent from the company.



Legal consequence: the revenues of the agency permanent establishment are taxed



Legal consequence: no permanent establishment

III. a) Agency Permanent Establishment according to Art. 5 OECD-MA – Current Legal Situation

- Authorization of the agent to conclude contracts in the name of the company.
- Represented company has to be bound legally or economically by the declaration of the agent.
- The actual behavior of the contracting partner is crucial for the (potentially) present authority to conclude contracts.
- A mere (pro forma) signing of blank form collective agreements without checking by the management leads to authority to conclude contracts (the actual decision is taken by the agent).
- The authority to conclude contracts may also be present if the agent is indeed bound on the given delivery conditions, but concludes the contracts on the basis of his own decision.

Authority to conclude contracts is not assumed if the company reserves the acceptance of the contract and the scope of decision making and negotiation is highly restricted for the agent.

III. b) Agency Permanent Establishment According to Art. 5 OECD-MA – Future Interpretation

- If a person is working in a contracting member state for a company and is commonly signing contracts or playing an essential role, which leads to conclusion of contracts the company enters routinely, a permanent establishment is present if the contracts are signed under the following conditions:
 - Within the company's framework of activities **or**
 - To transfer the ownership or the right of use on assets owned by the company **or**
 - For performance of services by the company

The existence of a formal authority to conclude contracts should no longer be decisive for the creation of a permanent establishment. The integration of the agent in the economic perspective should therefore already be sufficient.

IV. Building or Construction Permanent Establishment

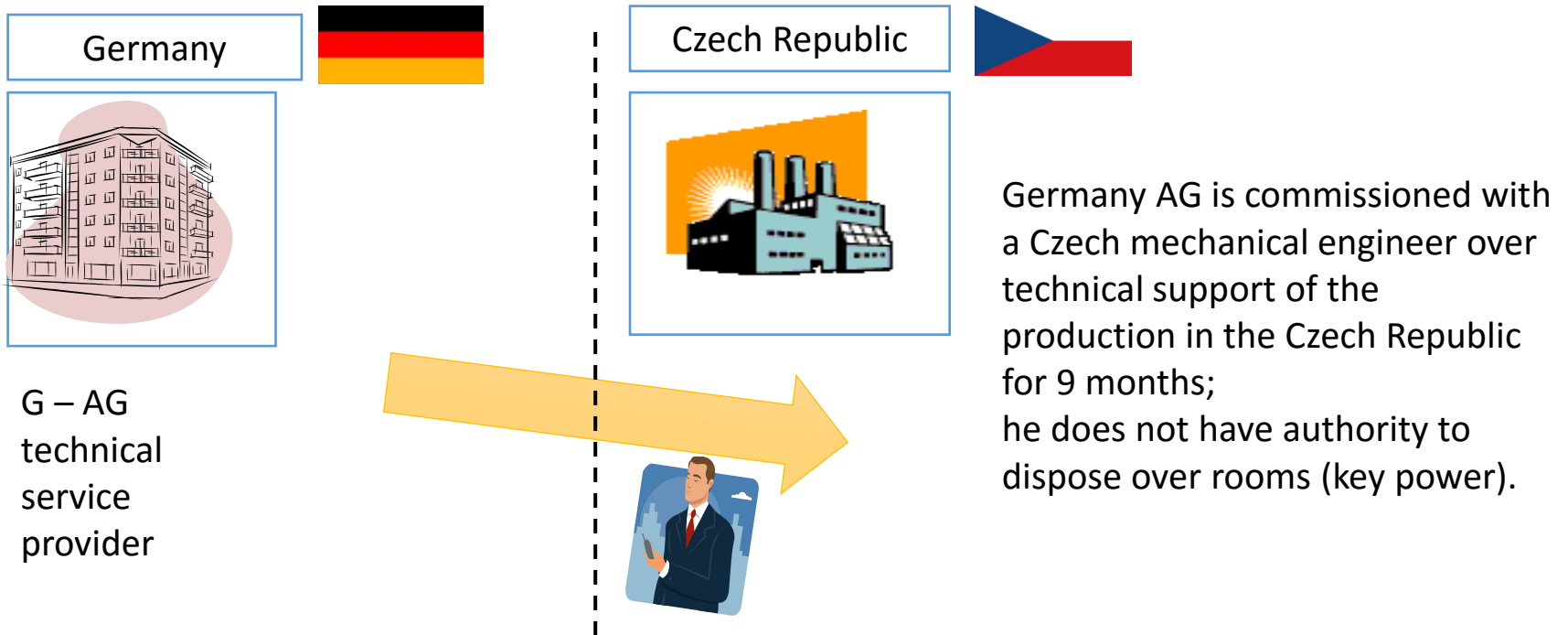
- Is usually related to a time limited project abroad as
 - building construction and civil engineering
 - large-scale plant construction
- Assembly (understood as putting individual parts together); no pure maintenance work, no pure installation supervision/ monitoring of construction.
- Building or construction permanent establishment is only constituted if a project exceeds a certain period
 - according to national German law 6 months
 - according to international agreements between 3 and 12 months
- Beginning of terms: day of arrival of the first construction worker on the construction site
- End of terms: acceptance of service by the customer or departure of the last construction worker
- interruptions do not delay the expiry of the term, unless the interruption is caused by the customer



V. Service Permanent Establishment: Risk of „painter example“ according to OECD-MC

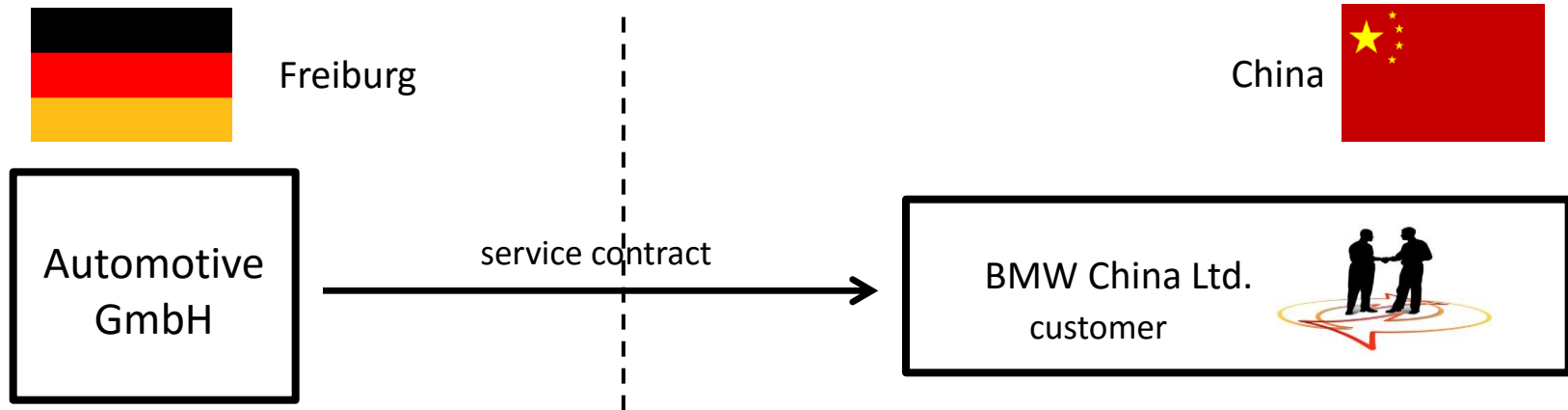
- A painter works for two years three days weekly in a building of his main customer.
- According to OECD-MC his presence constitutes a permanent establishment even without power of the keys because he performs there the most important functions of his business activities.
- Germany rejects this position and the related time assumption of six months: according to the jurisdiction of the federal finance court other circumstances have to imply a local consolidation besides the pure time assumption.
- According to the jurisdiction of the federal finance court it is ultimately decisive if a certain foothold of the company exists with the place of performance.
- However some OECD countries will refer to the “painter example” and tax – as Czech Republic.
- Only solution: mutual agreement procedure

V. Dienstleistungsbetriebsstätte: Tschechien



The customer pays only 75 % of the invoice because of withholding of construction tax.
Despite double taxation treaty the Czech tax administration rejects the refund .
Possible solution: lawsuit due to illegality of gross taxation.

V. Service Permanent Establishment: China as an Example



- Automotive GmbH is a worldwide supplier of control and automation technology in the automotive industry, whose product portfolio also includes supplying repair components as well as production support
- The BMW China Ltd. is commissioned by the German Automotive GmbH to accompany the production of a robot-controlled welding system already delivered in the production hall at BMW China Ltd..
- For the execution of this service contract, the Automotive GmbH is sending software specialists to China. These remain from 15.04.2017 to 14.07.2017 for four months in China (90 days).

Consequence: there is no service permanent establishment, neither from Chinese nor from German perspective. However, the service is to be registered with the Chinese financial authorities (both companies).

VI. Further Scheduled Amendments according to BEPS

The implementation in all existing double taxation agreements shall be realized by the so called multilateral instrument in 2017:

- All exceptions for the constitution of a permanent establishment shall be under the condition of ancillary and preparatory functions
- Anti fragmentation rule: the partitioning of ancillary and preparatory functions on/of several companies shall be prevented > the summarized consideration of the individual activities
- Characteristic feature of independent agents:
 - Controlling influence with direct or indirect participation at least 50%
 - More than 90% of the mediated sales (brokerage) to a nearby company

Consequence: a significant increase in the number of permanent establishments as well as a higher level of documentation is expected.

Thank you for your attention!

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