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Relevant aspects to regard a server as a permanent establishment

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The Spanish Directorate-General for Taxation (DG Tax) details the aspects that must be present in order for a server installed in our country, through which a non-resident enterprise operates, to be considered a permanent establishment in Spain. In this case, the DG Tax, especially when analysing some of these requirements, provides a detailed list of indications whose usefulness may go beyond the specific case under analysis in its formal binding answer to a taxpayer's query.

The DG Tax, in its formal binding answer V0066-18, of 17 January 2018, analyses the case of an enterprise registered in Ireland – mainly engaged in international electronic and algorithmic trading of financial products – which, in order to reduce latency in its transactions, plans to use a server in Spain, which would be located very close to the financial markets in which it would carry out its transactions. The question is whether or not the server used for those purposes constitutes a permanent establishment in Spain.

In order to resolve this issue, the DG Tax is guided by the provisions of the Convention between the Kingdom of Spain and Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains. In this regard, and observing the provisions of Article 5 thereof, the DG Tax points out that the Irish enterprise could be understood as having a permanent establishment in Spain through two distinct channels: firstly, by having a fixed place of business in Spain through which the business of the enterprise is wholly or partly carried on or, secondly, by operating in Spain through an agent acting on behalf of

the enterprise and has, and habitually exercises, an authority to conclude contracts in the name of the enterprise.

Analysing the first of these possibilities, i.e., that the enterprise has a fixed place of business that may constitute a permanent establishment in our country, the DG Tax takes note of the Commentaries on Article 5 (paragraphs 2 and 4) of the OECD Model Tax Convention, as well as the provisions contained in the commentaries themselves under the heading of "Electronic Commerce", in seeking to respond to the specific problems posed by the concept of permanent establishment in the context of electronic commerce such as found in the case subject to query.

The above allows the DG Tax to draw a series of conclusions about the requirements that must be met in order for a server to be considered a permanent establishment. They are as follows:

— That it may be considered a "place": for this purpose, a server, insofar as it is computer equipment with a physical location - as opposed to, for example, a cyber-site, understood as a combination of software and electronic data stored on a server, and which is not a tangible asset - fulfils the requirement to be considered a "place".

— That it may be considered "fixed": this requirement is deemed to be met if the server is located in a place, without actually moving from it, for a sufficiently long period of time.

— That the enterprise partly carries on its business through this server: with regard to this, the DG Tax stresses that the presence of personnel is not necessary to consider that an enterprise wholly or partly carries on its business at a location when no personnel are in fact required at that location.

— That this server can be deemed "at its disposal": in order to verify that this condition - which the DG Tax is particularly concerned about - is met, the circumstances of each case must be taken into account, to which end the terms of the agreement between the non-resident enterprise and the enterprise that owns or operates the server may be highly relevant. Thus, by way of example, the query under examination provides some prima facie evidence which could lead to the conclusion that the enterprise has a permanent establishment. Hence, the DG Tax mentions aspects such as that: the enterprise owns or leases the server; the server is available for use at the enterprise's own discretion; the enterprise is responsible for contracting the maintenance service for the server or for paying the costs associated with it; the enterprise has the right of access to the physical space in which the server is installed or the right to inspect it; the enterprise has imposed contractual restrictions on the ability of the owner or operator to use the server beyond those strictly necessary to ensure the stable provision of services and the protection of programmes, parameters or other data stored on the server; and, finally, the enterprise has the power to prevent the re-use of the server for other purposes by the owner or operator after the programmes, parameters or other data have been completely deleted.

— That the business activities exercised through this server do not merely have a preparatory or auxiliary character, but that through these, the functions that constitute the core business are performed. In this respect, the DG Tax recalls that the decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole, each individual case having to be examined on its own merits. A fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity.

Thus, the DG Tax concludes that, to the extent that the server in Spanish territory used by the enterprise making the query complies with all the requirements analysed, it should be concluded that such server would constitute a permanent establishment in Spain.

Finally, in light of the analysis as to a possible fixed place of business, the possibility of a dependent agent must be ruled out, since, according to the data examined in this case, use of an Internet service provider, which could be considered to be such an agent, does not seem to be made.