



## **ACTIVITIES THAT CONSTITUTE A PERMANENT ESTABLISHMENT**

1. The business profits of a non-resident enterprise, from a country with which NZ has negotiated a double tax agreement (a "Contracting State"), will be taxable in NZ, if the enterprise carries on business in NZ through a permanent establishment in NZ. The circumstances in which a permanent establishment will, and will not, be created, are usually set out in Article 5 of the double tax agreements.
2. ***The specific provisions of the relevant double tax agreement should always be referred to.*** There are 38 countries that have double tax agreements with NZ (at the time of writing) - refer to paragraph 15 below. The provisions of Article 5 in the double tax agreements with Australia and Chile have been used by way of examples.

### **Activities that will not give rise to a permanent establishment**

3. The overriding requirement is that the direct activities in New Zealand, of an enterprise of a Contracting State, are limited to being of a preparatory or auxiliary character.
4. In general, but not always, the following list of direct activities (taken from Article 5, paragraph 7 of the agreements with Australia and Chile) in NZ by an enterprise of a Contracting State will not give rise to a permanent establishment in NZ:
  - (a) The use of facilities solely for the purpose of storage, display or delivery of goods belonging to the enterprise.
  - (b) The maintenance of a stock of goods belonging to the enterprise solely for the purpose of storage, display or delivery.
  - (c) The maintenance of a stock of goods belonging to the enterprise solely for the purpose of processing by another enterprise.
  - (d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or for collecting information, for the enterprise.
  - (e) The maintenance of a fixed place of business solely for the purpose of advertising, supplying information or carrying out scientific research for the enterprise, if such activity is of a preparatory or auxiliary character. *(Included in the agreement with Chile, but excluded from the agreement with Australia.)*
  - (f) The maintenance of a fixed place of business solely for the purpose of carrying on any other activity of a preparatory or auxiliary character. *(Included in the agreement with Australia, but excluded from the agreement with Chile.)*

(g) The maintenance of a fixed place of business solely for any combination of the activities already referred to in paragraphs (a) to (e) above. *(Included in the agreement with Australia, but excluded from the agreement with Chile.)*

[Article 5, paragraph 7 (both agreements)]

5. An enterprise from a Contracting State can indirectly carry on business in NZ through a person who is a broker, general commission agent or any other agent of independent status, who acts in the ordinary course of their business as a broker or agent. A permanent establishment will not arise in such cases.

[Article 5, paragraph 9 (both agreements)]

### **Activities that will give rise to a permanent establishment in NZ**

6. A permanent establishment is a fixed place of business through which the business of the enterprise is wholly or partly carried on. The term “permanent establishment” includes especially:

(a) A place of management.

(b) A branch.

(c) An office.

(d) A factory.

(e) A workshop.

(f) A mine, an oil or gas well, a quarry or any other place relating to the exploration for or the extraction or the exploitation of natural resources. *(The underlined parts are in the agreement with Chile but not in the agreement with Australia – see paragraph 7 below)*

(g) An agricultural, pastoral or forestry property. *(Included in the agreement with Australia, but excluded from the agreement with Chile.)*

[Article 5, paragraph 2 (both agreements)]

7. The agreement with Australia requires a minimum 90-day period before exploration or exploitation of natural resources will result in a permanent establishment. An Australian enterprise will have a permanent establishment in New Zealand if it carries on activities (including the operation of substantial equipment) in NZ in the exploration for or exploitation of natural resources or standing timber situated in NZ for a period or periods exceeding in the aggregate 90 days in any 12 month period.

[Article 5, paragraph 4(b) in the agreement with Australia]

8. A building site, or construction, installation or assembly project or supervisory activities in connection with that building site or construction, installation or assembly project constitutes a permanent establishment if it lasts for longer than six months. *(The provisions in the agreement with Chile are underlined)*

[Article 5, paragraph 3 (both agreements)]

9. An enterprise will be deemed to have a permanent establishment in NZ if, for a period or periods exceeding in the aggregate 183 days in any twelve month period (or: for more than six months), it operates substantial equipment in NZ (or: substantial equipment or machinery is used in NZ by, for or under contract with the enterprise) *(The provisions in the agreement with*

*Chile are underlined*), unless the activities are limited to those mentioned in paragraph 7 of the double tax agreement (*this last bit is only in the agreement with Australia*). (See paragraph 4 above for the activities mentioned in paragraph 7 of the double tax agreement.)

[Article 5, paragraph 4(c) (Australia) and paragraph 4 (Chile)]

10. The performance of services in NZ, by an enterprise of a Contracting State, will be deemed to be carried on through a permanent establishment in NZ, if:

(a) The services are performed through an individual who is present in NZ for more than 183 days in any 12 month period, *and* more than 50% of the revenue of the Contracting State enterprise during that period is derived from the services performed in NZ through that individual; or

(b) The services are performed for a period or periods exceeding 183 days in a twelve month period, *and* the services are performed for the same project or for connected projects, through one or more individuals who are present and performing such services in NZ.

[Article 5, paragraph 4(a) in the agreement with Australia]

11. A permanent establishment includes the performance of professional services and other activities of an independent character by a resident of a Contracting State in NZ if:

(a) Such services or activities are carried on within NZ for a period or periods exceeding in the aggregate 183 days within any 12 month period; or

(b) The Contracting State resident performing such services or engaged in such activities is present in NZ for a period or periods exceeding 183 days within any 12-month period.

[The equivalent provision in the agreement with Chile: Article 5, paragraph 5]

12. The 12-month period is a continuous rolling time period, so complete up-to-date records must be kept of time spent in NZ. A day includes any portion of the 24 hours from midnight to midnight.

13. Time spent in NZ by a Contracting State enterprise will include time spent in NZ by an associated enterprise (i.e. joint involvement in a NZ project with a NZ parent company, sister subsidiary, or subsidiary) on the same activity in NZ. The duration of the involvement in the project is determined by adding the periods during which activities are carried on by the Contracting State enterprise and associated enterprises, but there is no doubling up of time if the enterprise and an associated enterprise are involved in a project in NZ at the same time.

14. A Contracting State enterprise will be deemed to have a permanent establishment in NZ if **a person** - other than an agent of independent status referred to in paragraph 4 above - **who acts on behalf of a Contracting State enterprise**:

(a) Has, and habitually exercises, in NZ, an authority to **substantially negotiate or conclude contracts** on behalf of the enterprise; or

(b) **Manufactures, or processes**, in NZ for the enterprise, **goods belonging to the enterprise**, (*this "manufacturing or processing" provision is not in the agreement with Chile*)

Unless it can be clearly shown that the person's activities on behalf of the Contracting State enterprise are purely of a preparatory or auxiliary character.

[Article 5, paragraph 8 (both agreements)]

**Countries with double tax agreements with NZ**

15. At the time of writing, the 38 countries with double tax agreements with New Zealand are: Australia, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Fiji, Finland, France, Germany, Hong Kong, India, Indonesia, Ireland, Italy, Japan (newly re-negotiated and signed on 10 December 2012 – new agreement not yet in force), Korea, Malaysia, Mexico, the Netherlands, Norway, Papua New Guinea (newly negotiated and signed on 29 October 2012 – not yet in force), the Philippines, Poland, the Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, United Arab Emirates, United Kingdom and United States America.