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# 1. Tax Residency

## 2. Sales Agency PE

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# 1. Tax residency

- “based on the circumstances”
- Further specified in case law:

*“There must be a durable bond of a personal nature based on all eligible circumstances”*

- Statement during recent meeting with the Dutch tax authorities:

*Having a permanent home available “plus, something else that connects the person to the Netherlands” makes a person a Dutch tax resident under domestic law*

- The “personal ties” with the Netherlands do not have to be bigger than with another country.

# Tie-breaker art. 4(2) OECD/UN model treaty



1. permanent home available
2. personal and economic relations are closest (“centre of vital interests”)
3. habitual abode
4. nationality
5. mutual agreement by competent authorities

**The tie-breakers must be interpreted independently of any domestic terms**

# Test 1: Permanent home available



“Continuously used” is not needed; “always be available” is enough

## Permanence test:

- OECD Comm. do not provide a specific time; it must not be ‘intended to be of short duration’
- Jurisprudence does not provide any guidance

## What constitutes a “home”?:

- room in someone else’s house
- stay in a hotel room
- boat
- motorhome
- recreational vehicle

# Test 2: Centre of vital interests



- Only applicable when a person has a home available in both States
- Unlike the other tests this test should not be applied to each State separately
- To be applied each year rather than generally (confirmed by Canadian courts)
- Must be sufficiently clear

# Test 2: Personal Relations



Special weight: location of the spouse and minor children.

## **Other factors:**

- location other family members;
- place where children attend school
- availability of health insurance
- membership golf course, fitness centre, business club ...
- etc.

- **Starting point OECD Commentaries:**  
occupations, place of business, place from which property is administered.
- **Similar are French Administrative Regulations:**
  - main investments made
  - headquarter of personal business activities
  - managing property
  - majority of income earned



- Much debated topic (and no consensus)
- In principle: both “relations” have equal weight.  
In practice the residency of the spouse and minor children get special attention
- Most widely accepted interpretation of applying the “centre of vital interests” test:

*Take into account the taxpayer’s facts and circumstances as a whole, but at the same time giving importance to the factors which are of most importance to the taxpayer*

# Test 3: Habitual abode



- Also applicable when no home is available in either State
- Not only including a specific physical location, but also periods spent in any location
- To be applied over a number of years; not simply a comparison of the numbers of days
- In brief, “habitual” must show that the stays of the person in the State are of such a nature that it is the State in which he normally lives

- Netherlands – UAE Tax Treaty:  
*Only persons that are a national of the UAE can qualify as a resident of the UAE*
- Dutch nationals who live and work in Dubai, but own a 2<sup>nd</sup> home in the Netherlands, can very quickly qualify as a Dutch tax resident under domestic law.
  - The NL-UAE tax treaty does not protect them from taxation of their worldwide income!
  - The same applies to inheritance and gift tax!

- Netherlands: only a handful inheritance (and/or gift) tax treaties
- **In case no inheritance and/or gift tax treaty is applicable:**
  - Dutch inheritance and gift tax can be levied even in the situation where the person is a tax resident of another country under the applicable “income tax” treaty!



## 2. Sales Agency Permanent Establishment

# Article 5 OECD / UN model treaty



Par. 1            **Basic Rule PE:** *fixed place of business*

Par. 4            **Negative List:** *auxiliary or preparatory*

Par. 5            **Sales Agency PE \***

- UN vs OECD \*\*
- Fundamental starting point: an agent may create a PE for somebody else

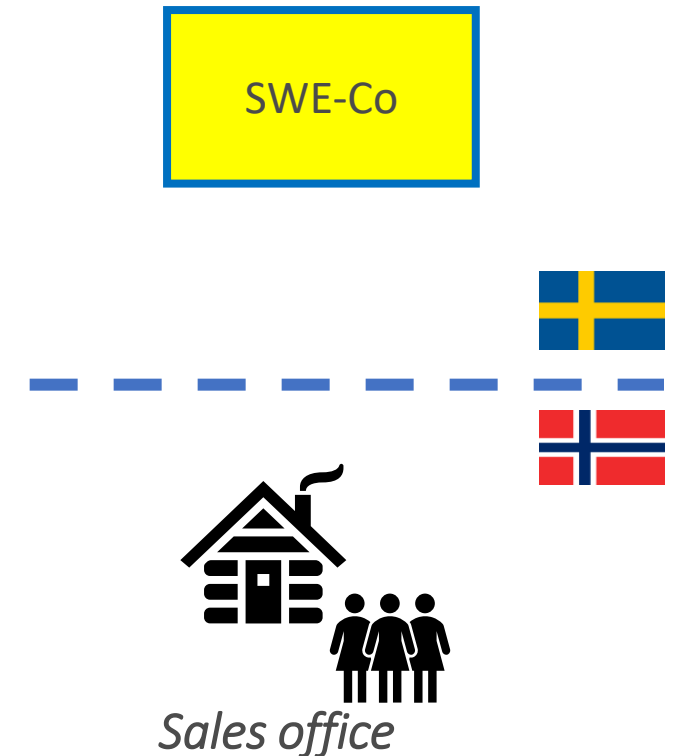
# Basic-rule PE vs sales agency PE

Norwegian administrative case (1980):

- Employees: soliciting orders but not authorized to conclude contracts
- Fixed place of business (basic-rule PE)?  
Is soliciting orders a core business activity?

## Conclusion

The existence of an agency does not influence the effectiveness of the basic-rule



# Agent's connection to the country (i)



Certain presence is needed in the country where business is pursued.

## What kind of presence?:

1. Residency?
2. Habitual abode?
3. Merely transient presence?

ad 1 Not needed

ad 2 Is sufficient

ad 3 Is not enough

## German case (1934)

The presence of agents in Germany had to be **more than transient or occasional**.

Occasional dispatching of traveling agents did not constitute an agency PE.



# Agent's connection to the country (ii)



Agency PE constituted if salesman travels **in and out** of a country regularly and frequently?

**German Supreme Court “Portugal” (2006) :**

*Manager concluded several contracts in Germany but **did not live or have a habitual abode in Germany.**  
He traveled in and out of Germany for this purpose. He stayed in Germany for two to six days an altogether  
**60 days in a calendar year** (in 4 years, he was in Germany 8, 10, 13 and 14 times).*

Court supports “habitual abode” requirement. The stays were so short that no agency PE was constituted.

A **habitual abode** is probably always enough when the “**permanence test**” is met.

An agency PE exists even if the agent is merely traveling around if he has a habitual abode in the country.

# The place where the contract is signed



## Question

Has the place for signing of the contract any significance for the constitution of an agency PE?

## Answer

Text OECD model treaty: does not provide clarity.

Commentaries 2017 (no. 87): it is immaterial where the signing of the contracts takes place, if the agent has performed the core part of his/her activity in the PE state with binding effect on the principal i.e., the signing had no material influence on the obligations under the contracts negotiated by the agent.

# Sole conclusion of contracts, no power to negotiate?

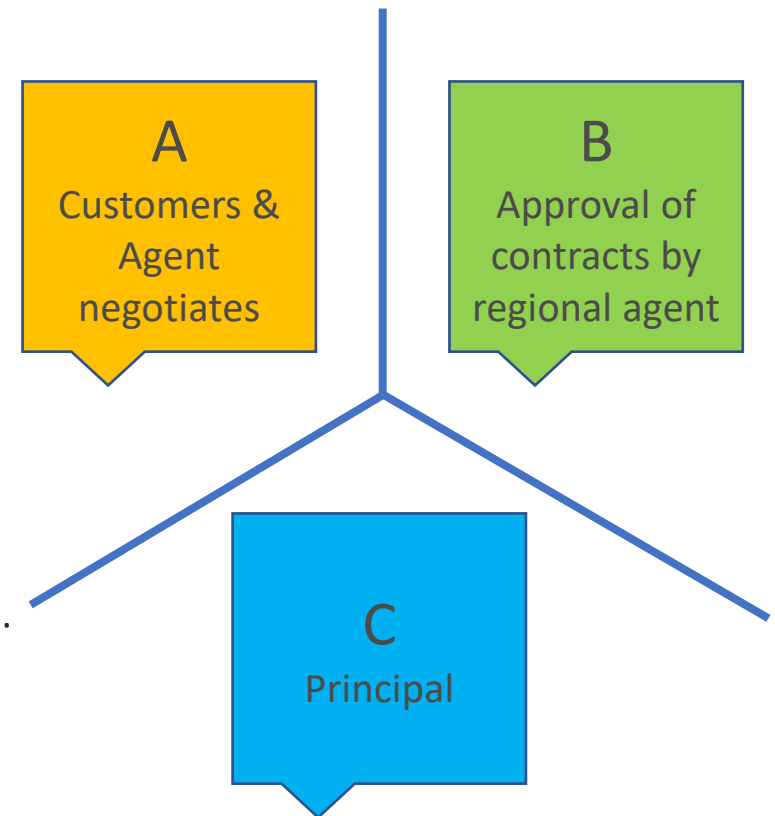
**Question:** Agency PE in country A or B, or possibly in both?

**Answer:** agency PE should be attributed to the country where the major part of the business activities is performed, and where the customers are; normally the country where the contract is negotiated, even if it is signed in another country. \*

This does not follow from the text of the OECD-based treaties.

However, the activity of the agent in the country where the contract is solicited and negotiated involves the principal in business within that country.

PE taxation in this country (i.e., **Country A**) conforms to the (general) intentions of the model treaty



... where a person is **acting on behalf of** an enterprise (\*\*) and ... .. **habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts** that are **routinely concluded** (TG: “honored”, “accepted” or “executed” etc.) **without material modification** by the enterprise ... .. that enterprise shall be deemed to have a PE

- “authority to conclude contracts” is not needed anymore, although this is still the crucial point.

The **main change** is that the 2017 agency clause may create an agency PE based on the **agent’s role in the negotiations** of contracts, not only on conclusion of contracts.

- It’s sufficient for a PE that the agent “involves the enterprise to a particular extend in business activities”.

# Habitually concludes contracts (i)



The agent should use his authority “repeatedly and not merely in isolated cases” \*

*The signature of one contract does not meet the required frequency.*

## Commentaries

The regularity of the exercise of authority has to be determined on the basis of the commercial realities of the situation. It depends on the nature of the contracts and the business of the principal.

It's not possible to lay down a precise frequency test.

## Norwegian Supreme Court: Alphawell (1994)

Does the renewal of a standard contract, once a year, meet the PE requirement?

No.

# Habitually concludes contracts (ii)



**Concluding one contract in the course of two years?**

This cannot be considered a habitually exercised authority

**Two or three contracts per year?**

Should be sufficient, if that's all that is required by the nature of the business.

**Conclusion**

Decisive is the relative frequency, compared to the nature of the business involved.

The duration of the agent's activity in a country must in practice meet the same duration as under the basic rule.

# Playing a principal role (i)



There was a clear trend toward such a rule in practice, but difficult to establish under the wording of the pré-2017 model treaties.

Collecting or accepting offers from third parties, without negotiations?

> May be sufficient

Soliciting and negotiating contracts but the decision to conclude the contract and signing are made by HQ?

> May be sufficient

Interviewing prospective customers and notify their requirements to the principal, while the contracts are negotiated and concluded by “principal resident” employees of the principal?

> Should not create an agency PE.

*Agency PE was also denied by Canadian court case (1951): “American Wheelabrator”*

# Playing a principal role (ii)

Seek out possible customers, demonstrate the products and take orders for subsequent approval by the principal?

> Denial of agency PE by Norwegian Ministry of Finance (1972): the authorization was limited to receiving buying offers from the customers, as opposed to having power to commit the company.

Marketing agent without pricing power and no right to accept or reject orders?

> Denial of agency PE by the IRS

A person who is active in promoting the goods of the enterprise cannot constitute an agency PE. This person does not play a principal role in the conclusion of contracts. In addition, these activities will often be exempt under the “negative list” (\*).

## Pre-2017 OECD model treaties

Negotiating of contracts is also insufficient if the draft contracts are subject to a genuine subsequent approval by the principal. An agency is constituted, however, when the approval of the contract is a pure formality and not a real part of the conclusion of the contract.



# Playing a principal role (iii)



What if the principal has pre-determined the conditions in the contracts to be signed by the agent (the agent has the power to engage and commit the principal in business in another country)?

This may constitute an agency PE

However, the limitations must not deprive the agent of the power to conduct business as required under the “**business activity test**”.

An agent who is authorized to perform only **auxiliary** activities, for example, as a messenger, does not constitute a PE (*Finanzgericht Berlin in EFG 19710, at 327*).

# Playing a principal role: main characteristics (i)

**Playing a principal role = the sales force of the enterprise:** identifies the customers based on e.g., an analysis of their needs, approaches them, negotiates terms subject to approval and uses his relationship skills to persuade the customer to order the product.

\* Does merely promoting and marketing goods create an agency PE?

No; might also be exempt under the “negative list”.

\*\* And what if the agent:

- Convinces the client and uses his relationship skills
- Receives a revenue-based remuneration
- Standard contract terms and prices are applicable

*The agent could be deemed in fact to be authorized to conclude the contract himself, because the signing abroad is close to a mere formality.*

**Conclusion: the threshold is high!**

# Playing a principal role: main characteristics (ii)



**Question:** is a “messenger” playing the principal role in involving the enterprise in business activities?

A person who regularly visits customers to pick up orders to be carried out by the enterprise e.g., in grocery stores?

This person could constitute an agency PE.

However, somebody different from the person may have established the relationship with that customer e.g., a chain of grocery stores. The enterprise itself has made the analysis of the grocery chain’s needs, approaches them, negotiates general terms subject to approval, and the employees of the enterprise use their relationship skills to persuade the chain to become a customer?

Simply collecting orders should not constitute an agency PE.

# Practical steps in application agency clause under the OECD Model Treaty (including 2017 version)



1. Is there a “person” who is acting on behalf another enterprise?  
**If no; no agency PE**
2. If yes; does the “person” have an authority to conclude contracts binding on the principal (OECD 2014) or does the “person” play a principal role in the conclusion of contracts by the enterprise (OECD 2017)?  
**If no; no agency PE**
3. If yes; does the “person” act in this capacity “habitually” i.e., enough to satisfy the “frequency test” and for a sufficiently long period of time to satisfy the “permanence test” (both OECD 2014 & 2017)?  
**If no; no agency PE**
4. If yes; is the “person” acting as an independent agent of the principal (both OECD 2014 & 2017)?  
**If no, an agency PE is constituted under clause 5(5)**
5. If yes; does the “person” act in the ordinary course of his business?  
**If no; an agency PE is constituted** under clause 5(5) with no exception of par. 6.  
**If yes; no agency PE**



# Questions?

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