

Canada Revenue Agency Notice
Notice 193
July 7, 2004

FOR DISCUSSION PURPOSES ONLY

Revised GST/HST policy statement P-208R, *Permanent Establishment*.

This policy statement is being disseminated by the Canada Revenue Agency in draft form for comments. Comments or suggestions should be sent by October 29, 2004 to:

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P-208R Issued: January 17, 1997
Revised: xx, 2004

GST/HST Policy Statement P-208R:
PERMANENT ESTABLISHMENT

SUBJECT:

Meaning of “permanent establishment” in subsection 123(1) of the *Excise Tax Act* (the Act)

LEGISLATIVE REFERENCE:

Definition of “permanent establishment” in subsection 123(1) of the the Act

NATIONAL CODING SYSTEM FILE NUMBER:

11680-4

EFFECTIVE DATE:

January 1, 1991

ISSUE:

At issue is the meaning of the term “permanent establishment” as defined in subsection 123(1) of the Act. The application of various provisions of the Act depends on whether a person has a “permanent establishment”.

A non-resident person who has a permanent establishment in Canada is considered to be resident in Canada, in respect of, but only in respect of the person's activities carried on through that establishment¹, resulting in the following:

- The non-resident is required to register for GST/HST² as a resident person as a result of taxable supplies the non-resident makes through the permanent establishment, unless the non-resident is a small supplier³.
- Supplies made in Canada by the non-resident through the permanent establishment are not subject to the special place of supply rules applicable to non-residents⁴.
- Supplies acquired by the non-resident through the permanent establishment may not be eligible for zero-rating given that many of the zero-rating rules⁵ require that the supply be made to a non-resident person.

¹ Subsection 132(2) of the Act

² Subsection 240(1) of the Act

³ Section 148 of the Act

⁴ Subsection 143(1) of the Act

- The non-resident may be required to self-assess tax on the taxable importation of property and services acquired for consumption, use or supply through the permanent establishment⁶.

A person who is resident in Canada and has a permanent establishment outside Canada is deemed to be a non-resident person in respect of, but only in respect of, activities of the person carried on through that establishment⁷.

Where a person carries on business through a permanent establishment in Canada and a permanent establishment outside Canada, any transfer of personal property or rendering of a service by one permanent establishment to the other is deemed to be a supply of the property or service and the establishments are deemed to be separate persons dealing at arm's length in respect of those supplies⁸. As a result, cross-border transactions between permanent establishments of the same person may be subject to GST/HST.

A non-resident person who is required to register or registers voluntarily is required to provide and maintain security where the person does not have a permanent establishment in Canada, or has a permanent establishment in Canada based on the fixed place of business of another person acting in Canada on behalf of the non-resident⁹.

A non-resident person who does not have a permanent establishment in Canada may carry on business in Canada and be required to register for GST/HST. For additional information, reference should be made to GST/HST Policy Statement P-051R2, *Carrying on Business in Canada*.

DECISION:

Whether a particular person has a permanent establishment in a particular situation is a question of fact that may be determined by applying the principles set out in this policy to the facts of each case.

I. Fixed place of business through which supplies are made

A “permanent establishment” of a person is defined under paragraph (a) of the definition to mean:

“(a) a fixed place of business of the particular person, including
(i) a place of management, a branch, an office, a factory or a workshop, and
(ii) a mine, an oil or gas well, a quarry, timberland or any other place of extraction of
natural resources,
through which the particular person makes supplies, ...”

⁵ Part V of Schedule VI to the Act

⁶ Section 218 of the Act

⁷ Subsection 132(3) of the Act

⁸ Subsection 132(4) of the Act and Section 220 of the Act

⁹ Subsection 240(6) of the Act

Therefore, in order for a person to have a permanent establishment under paragraph (a) of the definition, the person must both have a fixed place of business and make supplies through that fixed place of business.

i) “Fixed place of business”

Several specific examples of what constitutes a fixed place of business are listed in the definition of permanent establishment, such as a branch, an office, a factory and a workshop. Although each of the examples listed can each be regarded, *prima facie*, as constituting a fixed place of business, they must nevertheless satisfy the requirements of the definition as a whole in order to constitute a permanent establishment. Specifically, the person must also be making supplies through such a fixed place of business, as explained in the following section.

The determination of whether a fixed place of business exists in cases that do not involve the examples listed in the definition of a “permanent establishment” will be based on the following guidelines.

Space

For a “place of business” to exist there must be space. A place of business of a person includes any premises used for conducting business activities of the person. If a business does not require actual premises to function, a place of business of a person may exist where it has a certain amount of space at its disposal, such as space at a public warehouse.

A person need not have a formal legal right to use the space by owning or leasing it in order for it to constitute a place of business of the person. Rather, the fact that the space is at the person's disposal is sufficient.

The fact that space at the disposal of a particular person is at the place of business of another person does not preclude the possibility that that space may be considered to be a place of business of the particular person.

The fact that employees of a particular person may be present at the facilities of another person does not, on its own, result in space at those facilities being at the disposal of the particular person.

Space at the disposal of a person can also exist at the location of equipment or machinery that is at the disposal of the person.

Continuity and permanency

The place of business must be “fixed” in that it must be established at a particular location with a certain degree of continuity and permanency.

Typically, a place of business is lasting or intended to last “indefinitely” (i.e., for an indefinite or unspecified amount of time). Generally, the business must be considered as “ongoing”, in that there should be an unbroken succession of business and presence at the place of business. For example, in certain circumstances, an indication of continuity and permanence could be the fact that the physical address of a place of business that is accessible to the general public is listed in a directory or on a Web site.

A fixed place of business cannot be of a purely temporary nature. However, a place of business may be fixed even though it exists, in practice, for a finite time due to the fact that the nature of the particular business activity is such that it will only be undertaken for a short period of time.

Continuity and permanency may also exist in situations where a person returns to the same location for the same business purpose on a recurring basis (e.g., a person operating a booth at an annual exhibition over an extended period of time). In these cases, the determination of whether the place of business is fixed will take into account the period of time the place is used and the frequency of such use.

Where the nature of a particular person's business is such that the person's business activity moves within a particular geographic location or area (as can be the case, for example, with certain construction or installation projects), that location or area may nevertheless constitute a fixed place of business where the activity is identifiably being undertaken as a part of a single project.

Temporary interruptions of business activity such as inclement weather or labour disruptions do not result in a place of business no longer being considered fixed.

As personnel are not necessarily required to be present at the location of equipment in order for it to be a place of business as explained below, it follows that personnel are not required to be present at that place for any period of time in order for the place of business to be considered fixed. Also, with respect to equipment that is a place of business, it is not necessary that the equipment be affixed to real property to be considered fixed. Rather, the equipment must merely remain at the place of business for a sufficient period of time so as to be considered fixed.

Control

There must be control at the place of business. This requirement may be satisfied where there is someone at the place of business who has the authority to make decisions with respect to the operations of the business. In the case of a proprietor who is the owner/operator, authority would rest with that person. In an organization with branch operations, an employee of the branch should have authority to make important business decisions.

Control can also exist at a place of business where employees are not required to be present in order for important operational decisions to be made, such as a place of business where operational activities of a business are carried out through automated equipment at the disposal of the business.

Constant presence and ordinary routine

Where the ongoing presence of personnel is required at a particular place to undertake the business activities of a person (as opposed to where, for example, the person undertakes its business activities through the operation of automated equipment as explained below), an indication of constant presence can be the visibility of personnel within a place of business. This aspect is more critical in those circumstances where common facilities are used, such as public warehouses. The constant presence of an employee or representative of the business indicates the presence of the business.

The presence of personnel at a location where a business operates equipment at its disposal is not required in order to constitute a place of business if no personnel are required at that location to operate the equipment, as in the case of automated equipment. This includes where personnel of the business may be present at the location of the equipment to initially set it up and to maintain it as required.

Also, the day-to-day business must be capable of being carried on and an ordinary routine must exist. Where activities take place with a degree of regularity, be it daily, weekly, monthly, or seasonally, there may be a fixed place of business. Conversely, a place where isolated activities occur would not qualify as a fixed place of business.

ii) “Through which the particular person makes supplies”

As previously indicated, in order for a “fixed place of business” of a particular person to be considered a permanent establishment of the person, it must also be a place “through which the particular person makes supplies”.

The phrase “through which the particular person makes supplies” requires that the activity at the fixed place of business of a person be an essential and significant part of the particular overall business activity of the person. There must be a large degree of involvement through the fixed place of business in making or facilitating supplies by the person. There is no specific set of circumstances that must exist. Rather, each case will be determined on its own facts.

There are various indicators that may be used to determine whether supplies are made through a fixed place of business.

Primary factors

The presence of any of these factors is usually enough to indicate that supplies are being made through a fixed place of business:

- there is authority at the fixed place of business to enter into contracts or accept purchase orders for the provision of supplies to other persons and that authority is regularly exercised;
- the tangible personal property that is being supplied is physically manufactured or produced at the fixed place of business;
- if the supply is a service, the service is performed at the fixed place of business; or,
- the service of maintaining equipment supplied by the non-resident person, is performed at the fixed place of business (e.g., an authorized factory repair outlet).

Other factors

Generally, the factors listed below, by themselves, are not enough to indicate that the supplies are being made through a fixed place of business. However, the presence of a combination of these factors might indicate that supplies are being made through the fixed place of business. The presence of a combination of the following factors with any of the primary factors, would indicate that supplies are being made through a fixed place of business:

- soliciting orders;
- taking (receiving) customer orders;
- arranging for customer contracts;
- providing for the storage, packing, shipping, and/or transportation of goods;
- providing general administration of accounts, including collection and depositing payments;
- providing advertising for the supply; and,

- providing for customer follow-up and after-sales support.

The above lists are not meant to be exhaustive. Any activity that is not strictly of a preparatory or auxiliary character must be considered.

A fixed place of business of a particular person that is used solely for the purpose of carrying on activities that are of a preparatory or auxiliary nature in relation to the particular overall business activity of the person does not constitute a fixed place of business of the person through which the person makes supplies. It therefore does not constitute a permanent establishment of the particular person.

“Preparatory” relates to those activities that serve to make the business ready. “Auxiliary” means activities that are designed to help or support the main business.

Activities that are generally considered to be of a preparatory or auxiliary character include:

- the use of a fixed place of business solely for the purpose of storage, display or delivery of goods or merchandise belonging to the particular person;
- the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information for the particular person;
- the maintenance of a fixed place of business solely for the purpose of carrying on any combination of the above activities, provided that the overall activity of the fixed place of business resulting from this combination is still of a preparatory or auxiliary character.

II. Fixed place of business of another person

A “permanent establishment” of a particular person is defined under paragraph (b) of the definition to also mean:

(b) a fixed place of business of another person (other than a broker, general commission agent or other independent agent acting in the ordinary course of business) who is acting in Canada on behalf of the particular person and through whom the particular person makes supplies in the ordinary course of business;

The type of person referred to in paragraph (b) is a person who is acting in Canada as an agent of the particular person other than an independent agent acting in the ordinary course of its business. Such a person is commonly referred to as a dependent agent.

Whether a person is considered to be an agent for GST/HST purposes is based on a determination of fact and an application of principles of law. For an explanation of the application of law that would apply in determining whether an agency relationship may exist in a particular situation, reference should be made to GST/HST Policy Statement P-182R, *Agency*.

Generally, an agent will be considered to be independent if the agent is both legally and economically independent of the principal on whose behalf the agent is acting. Indicative factors to be considered in determining whether an agent is independent of the principal on whose behalf the agent is acting in a particular situation would include:

- Whether the agent is subject to detailed instructions or to comprehensive control by the principal (typically, an independent agent will not be subject to significant control by the principal in terms of how to carry out its work, nor subject to detailed instructions from the principal with respect to

the conduct of the work. The principal in this case will be more interested in the results of the agent's work and rely on the special knowledge, skill or strength of the agent);

- Whether the entrepreneurial risk must be borne by the agent or the principal;
- Whether the agent sells goods in its own name rather than in the name of the principal; and
- Whether the agent acts as an agent for other persons.

In determining whether an independent agent is acting in the ordinary course of its business with respect to particular activities, consideration should be given as to whether those activities are typical of the activities that would usually be carried out in the course of the particular trade, as the case may be, of the independent agent.

In order for paragraph (b) to apply, it must be established that the dependent agent has its own fixed place of business. Such a determination will be based on the previously explained principles used to determine whether a particular person has a fixed place of business.

It must also be established that the dependent agent is a person through whom the particular person is making supplies. This does not necessarily require that the dependent agent must have the authority to conclude contracts on behalf of the particular person. Whether a particular person is considered to be making supplies through the dependent agent in a particular situation will be based on the existence of factors such as the previously listed factors used to determine whether supplies are made through a fixed place of business.

III. Electronic Commerce

In an electronic commerce environment, non-resident suppliers can make supplies into Canada with the assistance of computer equipment, such as servers, located in Canada, and Web sites stored on such servers. The issue for GST/HST purposes is whether a non-resident person making supplies into Canada through a Web site or server in Canada is considered to have a permanent establishment in Canada.

A Web site, which merely consists of software and electronic data, is not tangible property, and therefore does not have a location that can constitute a place of business. As a result, the Web site of a non-resident person, including a Web site that is being hosted in a typical Web site hosting arrangement, does not, in itself, constitute a permanent establishment of the non-resident person for GST/HST purposes.

As previously explained, a location in Canada where automated equipment is operated by a non-resident can constitute a permanent establishment in Canada of the non-resident in certain circumstances. Computer equipment, such as a server on which a Web site is stored is tangible property having a physical location. Therefore, the location of a server in Canada may constitute a place of business of a non-resident person if it is at the disposal of the person, such as where it is owned (or leased) and operated by the person. A non-resident person who has its Web site hosted on a server of an independent internet service provider (ISP) in Canada would not generally be regarded as having the ISP's server and its location at its disposal.

A server at a particular location in Canada can only qualify as a permanent establishment if its degree of permanence at that location is of a sufficient period of time to be considered fixed. The determination of whether a server is fixed is not based on whether the server may be moved to another location, but rather on whether it is actually moved to another location.

As is the case with any automated equipment, a server that is at the disposal of a non-resident person can qualify as a permanent establishment of the non-resident person for GST/HST purposes, even if no personnel are required at its location to operate it. However, the functions carried out by the non-resident person through the server must, on their own, be an essential and significant part of the business activity of the non-resident as a whole, or constitute other core functions of the non-resident.

For example, although the operation of a server by a non-resident ISP that is in the business of hosting the Web sites of other businesses would be considered to be an essential and significant part of that non-resident's particular business activity, a server will not result in a non-resident person having a permanent establishment at its location if the operations carried on through that server are restricted to preparatory or auxiliary activities.

The fixed place of business of an ISP that hosts the Web sites of non-resident persons on its servers in Canada will not generally result in the non-residents having a permanent establishment in Canada either because the ISP does not usually act as agent in making supplies on behalf of the non-resident persons or because the ISP is an independent agent acting in the ordinary course of its business, as evidenced by the fact that it typically hosts the Web sites of many different businesses.

Examples

EXAMPLE NO. 1 – REPRESENTATIVE OFFICE OF A FOREIGN BANK

Facts

1. A non-resident bank wants to expand into Canada and sets up a representative office (RO) in Toronto.
2. The RO is organized as a branch of the non-resident bank and is not a separate legal entity.
3. It is staffed with employees of the non-resident bank, including a manager, although the manager's authority is strictly limited to routine activities. Any major or capital expenses and staffing decisions are handled by the non-resident bank's home office.
4. The manager does not have the authority to accept or reject any potential client for the non-resident bank.
5. The activities carried on by the RO in Canada include organizing free seminars and meeting with Canadian residents, and providing these Canadian residents with free meals, advice, pamphlets, booklets, audio tapes, and forms. All of these activities are undertaken to inform the Canadian residents about the services offered by the non-resident bank and to induce them to do business with the non-resident bank.
6. If a Canadian resident wishes to do business (e.g., open an account, apply for a loan, etc.) with the non-resident bank, the RO will provide the necessary assistance. However, the actual banking transactions will be undertaken or carried out by the non-resident bank outside of Canada rather than by the RO in Canada.
7. No supplies are made in Canada by the RO or by the non-resident bank. The only activities carried out by the RO are those of assisting the non-resident bank in carrying out its activities outside of Canada.

Decision

The RO is not considered to be a permanent establishment of the non-resident bank.

Rationale

The making of supplies through a fixed place of business is a prerequisite to the place qualifying as a “permanent establishment” under subsection 123(1) of the Act. The non-resident bank cannot be considered to be making supplies in Canada through its RO as the activities of the RO are merely ancillary and incidental to the business carried on by the bank outside Canada.

Control by the manager is severely limited. All non-routine decisions have to be deferred to the home office. All important business decisions are made at the non-resident bank's home office and not at the RO. The manager is given a budget to support the activities of the RO, which are essentially limited to promoting the availability of banking services outside Canada.

EXAMPLE NO. 2 – INSURANCE COMPANY

Facts

1. A non-resident insurer is in the business of selling casualty (fire, auto, theft, etc.) insurance in Canada.
2. The non-resident insurer maintains an office in Canada as required by the Office of the Superintendent of Financial Institutions.
3. All insurance contracts are written through the Canadian office, including the contracts that are referred to the non-resident insurer by independent brokers.
4. All insurance contracts are reviewed and given final approval by the non-resident home office and then returned to the Canadian office where the Chief Canadian Agent (CCA) initials them.
5. The CCA is an employee of the non-resident insurer who represents the insurer in Canada as well as performing regulatory reporting functions such as:
 - ensuring the proper level of funds is invested in Canada for the amount of insurance business that is written in Canada; and
 - tracking the investments and re-investing the funds as necessary, as well as requesting additional funds as needed.
6. The Canadian office also carries out administrative functions (bank deposits, renewal/non-compliance notices, requests for supplementary information) and serves as a place of service for legal documents, i.e., the Canadian office is responsible for responding to claims by the insured.

Decision

The non-resident insurer has a permanent establishment in Canada through which supplies of insurance are made.

Rationale

The non-resident insurer has a fixed place of business in Canada, namely the office of the CCA (which, for the purposes of this illustration, is an office of the non-resident and not of another person), through which the non-resident makes supplies of insurance. The business activities conducted at the fixed place of business are considered to be an essential and significant part of the insurance business of the non-resident.

EXAMPLE NO. 3 – EMPLOYEE'S HOME

Facts

1. A non-resident agricultural machinery manufacturing company wants to expand into Canada.
2. Because of the high cost of shipping equipment overseas, the company decided to send an employee to see if the employee can develop the territory. The employee is expected to work from home. There is no office or any physical location where equipment is stored.
3. The employee has a computer, a fax, a phone, and a photocopier in the employee's "office" — a converted room in the employee's apartment. The company's phone and fax numbers are listed in the phone book, but a P.O. box number is listed as the mailing address. There is no other publicly accessible address.
4. The employee is identified on the lease as the lessee of the apartment.
5. The employee pays expenses that are within the employee's limited authorization directly and is reimbursed.
6. When the employee receives an order, the order is forwarded to the head office located outside Canada for final approval. Usually, the employee's recommendations are accepted.
7. The order is processed at the head office. The equipment is shipped to Canada. Once the equipment has been imported and cleared the Canadian border, it is sent to the customer's location. The employee arranges for the installation of the equipment by subcontractors.
8. The employee determines, in conjunction with the head office, what type of advertising and promotion is done in Canada.
9. All day-to-day and routine business activities are carried on by the employee within certain parameters that have been determined by the head office in consultation with the employee.

Decision

The non-resident machinery manufacturing company has a permanent establishment in Canada at the apartment of the employee.

Rationale

The employee has a work area available in the employee's residence and, as such, there is space available to the employee to conduct the employer's business. There is a phone number and a mailing address, and although no customers go to the place of business, there is a location.

The employee has limited authority. The employee does not have absolute contracting authority, although the employee's recommendations are usually approved by the home office (de facto authority), and all

expenses (other than those below an established limit) have to be approved by the head office. Larger expenses are forwarded to the head office to be approved and paid from there. Constant presence is assured by either the employee's physical presence or by an answering machine.

These factors indicate that there is a fixed place of business, that significant and essential business activities of the company are being conducted at the fixed place of business through the receiving of orders in respect of which the recommendations of the employee are usually accepted by the non-resident, and that supplies are therefore made by the non-resident through the fixed place of business.

EXAMPLE NO. 4 – TRAVELLING SALESPERSON

Facts

1. A non-resident individual who is a vendor of herbal remedies travels throughout south-eastern Ontario and Western Quebec during the summer months following a circuit designed to coincide with local fairs.
2. The vendor has travelled this route for the last several years.
3. Depending upon the vendor's scheduling and the timing of various fairs in other small communities, the vendor may participate and set up a display at these small (usually weekend) events as the vendor's route is traversed.
4. The vendor travels in a motor home, which acts as office, residence and warehouse. If the vendor runs short of a particular commodity, distributors are available in Canada from which the vendor can obtain additional supplies. The vendor carries a portable fold-up display booth in the cargo area of the motor home that the vendor sets up at the various fairs from which the goods are sold.

Decision

The non-resident vendor has a permanent establishment in Canada.

Rationale

The non-resident vendor has a fixed place of business. Consistent with the vendor's particular type of business, the vendor returns to the same location on a recurring basis for the same business purpose. The vendor conducts significant and essential business at that fixed place of business. Supplies are made through it, either by immediate sale or by taking orders for future delivery (in which case, the point of sale would still be the vendor's fixed place of business — the display booth).

EXAMPLE NO. 5 – ELECTRONIC COMMERCE – WEB SITE

Facts

1. A non-resident business enters into an agreement with an independent Canadian Internet Service Provider (ISP) to have its Web site hosted by the ISP.
2. The Web site provides detailed information about the non-resident business and its products.
3. The Web site is hosted on a server that is owned by the ISP and is located on an ongoing basis at a place in Canada.

4. The ISP is responsible for the operation and maintenance of the server on which the Web site is hosted.
5. The hosting fee charged by the ISP to the non-resident business is based on bandwidth used to store the software and data required by the Web site.

Decision

The non-resident business does not have a permanent establishment in Canada as a result of its Web site being hosted on the server in Canada.

Rationale

The Web site of the non-resident business does not constitute a permanent establishment of the non-resident business. The Web site is not tangible property that can have a physical location and therefore cannot constitute a place of business.

The server on which the Web site is stored is tangible property that has a physical location and may thus constitute a place of business. However, the server in this case cannot be a permanent establishment of the non-resident business as it is not at its disposal (not operated and owned or leased by the non-resident business).

EXAMPLE NO. 6 – ELECTRONIC COMMERCE – WEB SITE HOSTING

Facts:

1. A non-resident ISP is in the business of hosting the Web sites of its various customers.
2. The server on which the Web sites are hosted is permanently located at a particular place in Canada.
3. The server is owned, operated and maintained by the non-resident ISP.
4. Personnel of the ISP entered Canada to initially set up the server at its particular location and occasionally enter Canada to maintain the server.
5. Personnel of the ISP are not required at the location of the server for its ongoing operation.

Decision

The server of the non-resident ISP that is located in Canada constitutes a permanent establishment of the ISP in Canada.

Rationale

The server on which the Web sites are being hosted is at the disposal of the ISP as the ISP owns, operates and maintains it. The server is a fixed place of business as it is indefinitely located at a particular place. Furthermore, the ISP is considered to be making supplies (i.e. Web site hosting) through that fixed place of business. Given that the nature of the ISP's business is the hosting of Web sites, the functions carried out through the operation of the server are considered to be a significant and essential part of the ISP's business.

EXAMPLE NO. 7 – ELECTRONIC COMMERCE – DATA STORAGE

Facts:

1. A non-resident company is in the business of supplying goods to customers worldwide.
2. The non-resident leases a server that is permanently located at a particular place in Canada.
3. The non-resident uses the server to store its business records, including the billing information for all of its customers.
4. The server is operated and maintained by the non-resident.
5. Personnel of the non-resident are not required at the location of the server for its ongoing operation.

Decision

The non-resident does not have a permanent establishment in Canada as a result of the server in Canada.

Rationale

Although the server is at the disposal of the non-resident, it is not a permanent establishment of the non-resident because the function carried out through its operation is an auxiliary activity in relation to the non-resident's business of selling goods.

EXAMPLE NO. 8 – ELECTRONIC COMMERCE – DIGITIZED PRODUCTS

Facts

1. A non-resident company operates a Web site offering various digitized music files for downloading by subscribers.
2. The digitized products are stored on the server as part of the Web site.
3. Subscribers pay a fixed periodic fee to access the Web site and download the digitized products.
4. The Web site through which the digitized products are accessed by subscribers is stored on a server that is permanently located at a particular place in Canada.
5. The server is leased, operated and maintained by the non-resident.
6. All functions relating to the supply of the digitized products are automatically performed through the operation of the server, including the ordering by customers of the software applications, the processing of those orders, and payment processing.
7. Personnel of the non-resident are not required at the location of the server for its ongoing operation.

Decision

The server on which the non-resident's Web site is stored constitutes a permanent establishment of the non-resident in Canada.

Rationale

The server on which the Web site is being hosted is at the disposal of the non-resident as the non-resident leases, operates and maintains the server. The server is a fixed place of business as it is permanently

located at a particular place. Furthermore, the non-resident is considered to be making supplies through that fixed place of business. As the nature of the non-resident's business is the supply of on-line access to the music files, the functions carried out through the operation of the server are considered to be a significant and essential part of the non-resident's business.

EXAMPLE NO. 9 – LEASING OF EQUIPMENT

Facts

1. A non-resident company owns industrial equipment that it supplies by way of lease to a Canadian company pursuant to a long-term lease.
2. The equipment is delivered to the Canadian company at its manufacturing facility in Canada.
3. Personnel of the non-resident company enter Canada for a few days at the beginning of the lease to assist the Canadian company in setting up the equipment at its factory in Canada.
4. The Canadian company is responsible for the ongoing operation and maintenance of the equipment.
5. Throughout the term of the lease, personnel of the Canadian company will operate the equipment to manufacture its products at its factory.

Decision

The non-resident does not have a permanent establishment in Canada as a result of the equipment being located in Canada.

Rationale

Although the non-resident is making supplies to the Canadian company, the non-resident does not have a permanent establishment in Canada merely as a result of the equipment being located in Canada. The non-resident neither operates nor controls the use of the equipment. The equipment and its location are not considered to be at the disposal of the non-resident. The equipment is under the control of the Canadian company which is fully responsible for its operation and maintenance at its manufacturing facility.

EXAMPLE NO. 10 – SEABED EXPLORATION

Facts

1. A non-resident company is hired by a Canadian resident company to perform hydrocarbon exploration and development of the seabed within the territorial sea of Canada off the coast of Nova Scotia.
2. The non-resident company has expertise in offshore hydrocarbon exploration and development in the North Atlantic.
3. The non-resident company will import their own vessel and equipment. The vessel captain, geologist and seismologist are employed by the non-resident company. The Canadian company employs the remaining workers.
4. The non-resident company will anchor the vessel at the port of Halifax whenever the vessel captain believes the weather inclement or they require resupply.

5. The Canadian company has contracted with the non-resident company for the next three seasons as exploration can only be conducted between April and November due to weather and sea conditions.

Decision

The non-resident company has a permanent establishment in Canada.

Rationale

The core function of the business enterprise of the non-resident company is seabed exploration and development. In light of the nature of the non-resident company's business it is considered to be conducting significant and essential business activities in Canada.

The non-resident company conducts the activities over and on the seabed within the territorial sea of Canada. "Canada" includes its territorial sea and the seabed of the territorial sea.

The non-resident company is also considered to be making supplies through a fixed place of business in Canada. Although the vessel is transportable within the exploration area, the business activities being conducted through the operation of the vessel are confined to a single contract and to a specific geographical area thus constituting a place of business in Canada. The activities are of a sufficient duration to consider the place of business as being fixed.

EXAMPLE NO. 11 – ROAD CONSTRUCTION

Facts

1. A non-resident construction firm wins a bid to re-engineer and resurface all the existing runways and build additional runways at an international airport in Canada.
2. The non-resident company will import specialized machinery and its experienced personnel will enter Canada to perform the work.
3. The project is expected to last a total of thirteen months, including preparatory work.

Decision

The non-resident company has a permanent establishment in Canada.

Rationale

There is a fixed place of business as the construction work is being carried out by the non-resident company pursuant to a single contract within a specific geographical location (the area surrounding the airport) for a sufficient period of time.

The non-resident company is considered to be making supplies through this fixed place of business because the construction work is an essential and significant activity that is the very nature of its business activity.

EXAMPLE NO. 12 – DEPENDENT AGENT

Facts

1. An established non-resident company is in the business of supplying highly specialized software that it has developed for use by software development companies.
2. Recognizing the potentially valuable Canadian market for this product, a Canadian company enters into an exclusive agency agreement with the non-resident company to solicit and make supplies of the software in Canada on behalf of the non-resident. The Canadian company is the sole agent of the non-resident company in Canada.
3. The Canadian company's only business activity is the supply of the software on behalf of the non-resident company. The agency agreement explicitly prohibits the Canadian company from making supplies of any other type of software in Canada on behalf of any other person.
4. The non-resident company has established a standard software agreement that is to be used by the Canadian company. Pursuant to the terms of the agency agreement, the Canadian company may enter into the standard software agreement in Canada with recipients on behalf of and in the name of the non-resident company. The Canadian company does not require the final approval of the non-resident company to conclude the contract in its name unless the standard agreement is modified. As is often the case, if any modifications to the agreement are requested, the Canadian company is to formally advise the non-resident company and obtain its approval of the modifications.
5. At no time does the Canadian company obtain ownership of the software supplied to Canadian customers, nor does it incur any risk of loss with respect to the software supplied to Canadian customers.
6. Pursuant to the terms of the agency agreement, the Canadian company is to follow the established detailed instructions of the non-resident company with respect to all aspects of the supply of the software and the conduct of the Canadian company's work including the manner in which: the Canadian company is to identify itself as an agent of the non-resident company, clients are to be solicited and the product marketed, agreements for the supply are to be concluded. Training by the non-resident company in these areas is provided to the personnel of the Canadian company.
7. The price of the software is established and may only be modified by the non-resident company. Payments for the software are made by Canadian customers to the Canadian company in the name of the non-resident company and subsequently transmitted by the Canadian company to the non-resident company.
8. The Canadian company is subsequently paid a commission by the non-resident company. The commission received by the Canadian company for each particular supply of the software product is equal to a fixed percentage of the price of the software. The Canadian company is also fully reimbursed by the non-resident company for any pre-approved marketing expenses incurred by the Canadian company.
9. Following receipt of payment for the software, the non-resident sends the software from its location outside Canada to the Canadian customer.
10. The Canadian company has an office in Canada from which its personnel conducts its business. Agreements are typically concluded at these premises and it is identified, including on the non-resident's Web site, as the contact point for both existing and prospective Canadian customers.

Decision

The non-resident company has a permanent establishment in Canada.

Rationale

The Canadian company is acting as an agent on behalf of the non-resident company with respect to the supplies of software. The Canadian company is not an independent agent as it is subject to detailed instructions and comprehensive control by the non-resident company. Another indication that the Canadian company is not an independent agent is that it does not act on behalf of any supplier other than the non-resident company.

The Canadian company has its own fixed place of business in Canada (its office) and the supplies being made by the non-resident through the Canadian company are significant and essential activities.

EXAMPLE NO. 13 – INDEPENDENT AGENT

Facts

1. A Canadian company is in the business of acting as an agent in supplying various types of industrial tools in Canada on behalf of Canadian and non-resident manufacturers to Canadian retailers.
2. The Canadian company has extensive knowledge of the industrial tool industry and is renowned in the industry for being able to achieve high sales levels.
3. The Canadian company has an office in Canada from which it conducts all of its business.
4. The Canadian company has a standard agency agreement that it enters into with each manufacturer that wishes to have it act as its agent. Under the agreement, the Canadian company is to act as a non-exclusive agent on behalf of the manufacturer in supplying tools. The agreement provides that the Canadian company will undertake its best efforts to achieve high sales levels of the particular manufacturer's products. Within the scope of the authority conferred by the agency agreement, the Canadian company is free to conduct its business of selling the products in the manner that it deems appropriate.
5. The Canadian company enters into a contract for the supply of tools to Canadian customers on behalf of a particular non-resident manufacturer in the name of the manufacturer. The agreements are typically concluded by the Canadian company from its Canadian office.
6. The Canadian company does not obtain ownership of the tools.
7. The Canadian company accepts payments from customers at its office. Orders accepted and transmitted by the Canadian company to the non-resident manufacturer are automatically approved, processed and shipped from its location outside Canada.
8. The Canadian company is paid a commission by the manufacturer that is generally equal to a fixed percentage of the value of sales achieved. This commission rate takes into account the fact that the Canadian company is to incur any marketing and sales expenses on its own behalf to promote the manufacturer's products.
9. Pursuant to the agreement, if the Canadian company manages to achieve a certain level of sales beyond what has been initially targeted, including where the company negotiates a higher price (which it has the freedom to do under the agreement), its commission rate on those additional sales is increased.

Decision

The non-resident manufacturer does not have a permanent establishment in Canada as a result of the agreement it enters into with the Canadian company.

Rationale

The Canadian company is acting as an agent in making supplies on behalf of the non-resident manufacturer and has its own fixed place of business in Canada. However, this does not result in the non-resident having a permanent establishment in Canada given that the Canadian company is an independent agent acting in the ordinary course of its business.

The Canadian company is an independent agent because it is not subject to detailed instructions and comprehensive control by the non-resident manufacturer with respect to the manner in which it conducts its business. The Canadian company also acts on behalf of numerous suppliers.