



Cross-border worker creates Permanent Establishment: German case on Art. 5(1)

November 2025

Reading time: 15 minutes

This blog aims to draw attention to some important aspects of Art. 5(1) of tax treaties, which deals with *fixed place* permanent establishments (“PEs”). The blog analyses a recent court case from Germany¹ wherein the Federal Tax Court of Germany (*Bundesfinanzhof*) held that, under domestic law and Art. 5(1) of the Germany-United Kingdom tax treaty, a U.K.-based aircraft-engineering company had a permanent establishment at the airport premises of a German aircraft-operator because the sole representative of the U.K. company had *at his disposal* designated facilities for personal use (i.e., a locker in a common room at the airport premises) in connection with rendering his services (i.e., maintenance work on aircraft) between 2008 and 2014.

Facts of the case

Mr. X, a U.K. national with residential properties in Germany and the U.K. (which can be considered his *center of vital interests*; relevant for Art. 4, i.e., definition of “resident”), was an aircraft mechanic/engineer who held licenses to maintain various types of aircraft during the years in question (i.e., 2008 to 2014). He was the sole shareholder and director (without a written employment contract) of X Ltd., a U.K. registered company founded in 2006. X Ltd. does not have a website or phone number, and its registered office address is shared by about 130 other companies/entities, including the tax office. The financial statements of X Ltd., prepared in the U.K., show salary payments to Mr. X in his capacity as director in 2011.

In 2008, Mr. X/X Ltd. entered into a ‘Freelance Agreement’ with Y Ltd., a U.K. company, agreeing to provide aircraft-related maintenance services as a subcontractor to the clients of Y Ltd. Y Ltd. had entered into a ‘Line Maintenance Agreement’ with A GmbH, a German operator and charterer of aircraft, agreeing to provide licensed aircraft maintenance personnel and tools.

Between 2008 and 2014, Mr. X carried out his work on the airport premises of A GmbH, where changing rooms, administrative areas and common areas were available to the engineers and mechanics working on behalf of Y Ltd. (in rooms rented by Y Ltd. from A GmbH). Among other facilities, the engineers and mechanics each had a lockable locker for storing belongings; a sign bearing their names and that of Y Ltd. was affixed to the locker doors.

At the entrance to the airport premises, all personnel (including the engineers and mechanics working on behalf of Y Ltd.) had to undergo a security check, after which they were free to move around inside the premises. Mr. X had a security pass for the airport premises. Access was technically possible regardless of the shift schedule. Engineers and mechanics working for Y Ltd. logged in and out of A GmbH's time recording system at the start and end of their shifts. Y Ltd. issued its invoices to A GmbH based on the working hours communicated to it by A GmbH.

¹ [ECLI:DE:BFH:2023:U.070623.IR47.20.0](https://eur-lex.europa.eu/eli/dec/2023/0706/2023-11-01)

On October 20, 2008, Mr. X had applied for a German tax number. In the questionnaire for tax registration, Mr. X stated that he was self-employed as an aircraft engineer since April 1, 2008, and gave his residential address as a location in Germany. On this basis, the German tax authorities concluded that Mr. X's income from the aircraft maintenance services provided at the airport in Germany was taxable in Germany.

Since Mr. X had not filed any tax returns in Germany, the German tax authorities made an assessment of his German tax liability for 2008 based on his time logs and invoices from Y Ltd to A GmbH. Mr. X appealed the assessment, commencing discussions with the German tax authorities. As the discussions progressed, the German tax authorities included the years 2009-2014 in the discussions, assessing Mr. X's tax liability in Germany the same way they did for 2008.

Discussion before the lower court

In his written statement dated January 11, 2011, Mr. X stated that he had only stayed in Germany temporarily and, since he had no permanent establishment in Germany, the income from aircraft maintenance services should not be taxed in Germany. Mr. X claimed that this income had already been taxed in the U.K. At the oral hearing, in response to a question from the lower court, Mr. X argued that the locker provided to him at the airport premises was too small to store his tools. He further explained that, while it was possible to leave his toolbox in the hangar, he did not do so for security reasons; he had carried his tools with him in a large box.

The German tax authorities asserted that Mr. X had earned income from self-employment through aircraft maintenance services provided in Germany. They supported this contention by stating that, during the years in question, Mr. X had performed his work as an aircraft engineer exclusively at the airport premises of A GmbH in Germany and had advanced from 'mechanic' to 'licensed engineer' during the audit period (according to his time logs). Further, with his security pass, he had access at all times to the facilities at the airport premises that all subcontractors of Y Ltd. were permitted to use. The use of these facilities was contractually guaranteed. Mr. X's work schedule was coordinated by an employee of Y Ltd., who also worked out of the same airport premises. The German tax authorities thus concluded that Mr. X worked out of a permanent establishment in Germany, meeting the requirements for taxation in Germany. The lower court agreed with the German tax authorities, noting that income being taxed in the U.K. did not play a role in assessing whether the income was taxable in Germany.

Judgement of the Federal Tax Court of Germany (*Bundesfinanzhof*)

The discussion at the level of the *Bundesfinanzhof* revolved around the "right of disposal". To determine whether Mr. X had the right of disposal over the fixed place of business in Germany (i.e., the airport premises owned by A GmbH), the court considered whether he held a legal position that could not be easily withdrawn (i.e., "independent right of use"). Based on established case law of the German courts, neither actual joint use nor mere authorization to use in the interest of another, nor the possibility of use, was deemed sufficient to constitute the right of disposal. The right of disposal, however, did not have to be exclusive.

The court ruled that Mr. X's right of disposal existed at least indirectly (derived from the agreement between A GmbH and Y Ltd) in the sense of the possibility of accessing and using some parts of the airport premises (hangar, computer room, administration/recreation room and changing room). The court's ruling was based on the observation that having access to these areas was essential for the provision of his services, i.e., an indispensable prerequisite for his activity. In its judgment, the court stated that the fact that the right of disposal was not exclusive and that it could have been withdrawn (including due to circumstances of the contractual relationship

between Y Ltd and A GmbH over which Mr. X had no control) did not affect his position during the years under consideration; nor did the fact that he had to undergo a (third-party) security check upon entering the premises.

The court further noted that the fact that Mr. X did not store his tools in the locker assigned to him did not preclude the business-related use of the personal locker since the locker was used for storing his personal clothing during work hours and his work clothing outside of work hours. The court also noted that Mr. X had, at least, the possibility of storing his toolbox in the hanger (if not in the locker provided). Accordingly, the court held that the activities of Mr. X constituted a permanent establishment under the relevant provisions of domestic law as well as Art. 5(1) of the Germany-United Kingdom tax treaty.

Article 5(1): Fixed place PEs

Art. 5(1) of tax treaties provides the definition of a “permanent establishment” (or “PE”). There is no difference between the 5(1) of the OECD’s Model Tax Convention and Art. 5(1) of the UN’s Model Tax Convention.² Art. 5(1) of all tax treaties reads the same: The term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Art. 5(1) of tax treaties therefore deal with “fixed place PEs”. The definition provided in Art. 5(1) is rather broad and open to interpretation. It only requires that the work of a foreign enterprise is carried out from a fixed place with a certain degree of permanence.

Many tax treaties include special provisions for when construction work can lead to the creation of a PE (“Construction PE”), when engaging an agent creates a PE (“Agency PE”), and when rendering of services leads to a PE (“Service PE”). While there are explicit time-thresholds for some specific types of PEs (usually, 9-12 months for “Service PEs” and “Construction PEs”), there is no specified duration for creating a “fixed place PE”. Therefore, it is possible for a company carrying out construction/installation services abroad to meet the criteria for “fixed place PE” while not meeting the (12-month) criteria for “Construction PE”.

OECD’s Commentary on Art. 5(1)

The definition of “permanent establishment” in Art. 5(1) provides the three essential characteristics of a permanent establishment.³ Firstly, there must be a “place of business”, i.e., a location, such as premises or, in certain instances, machinery or equipment. Secondly, this place of business must be “fixed”, i.e. there must be a certain degree of permanence. Lastly, the business of the enterprise must be carried out from this location. It is not necessary that the location be used exclusively for the business of the enterprise.⁴

Para. 2 of Art. 5 provides a non-exhaustive list of examples for a “place of business”. Hence, a location/space that is not on this list (such as, for instance, an airport premises, a shipping container, etc.) could also constitute a PE if it has the essential characteristics of a PE in Para. 1 of Art. 5. On the other hand, the locations specified in the list (“a branch”, “an office”, etc.) do not constitute PEs unless they have the essential characteristics.⁵

² The OECD’s and the UN’s Model Tax Conventions serve as a base/starting point for tax treaty negotiations. The articles of bilateral tax treaties are therefore based on the articles of these Conventions, though the negotiating countries may deviate from what is stated in the Conventions.

³ Para. 6 of the Commentary on Art. 5 of the OECD’s Model Tax Convention (2017)

⁴ Para. 10 of the Commentary on Art. 5 of the OECD’s Model Tax Convention (2017)

⁵ Para. 45 of the Commentary on Art. 5 of the OECD’s Model Tax Convention (2017)

The OECD's commentary on Art. 5 states that a "place of business" may also exist where no premises are available or required for carrying on the business of the enterprise. Therefore, merely having a certain amount of space at the foreign enterprise's disposal is sufficient to constitute a "place of business" for the foreign enterprise. Further, it is immaterial whether the "place of business" is owned or rented or otherwise at the disposal of the enterprise. According to the Commentary, the "place of business" could be situated at the premises of another enterprise. This may be the case, for instance, where the foreign enterprise constantly has access to premises or a part thereof owned by another enterprise.⁶ As seen in the case described above, the U.K.-based aircraft-engineering company (of which Mr. X was the owner and sole employee) was held to have a PE in Germany owing to the fact that Mr. X had constant access to the German airport premises owned by A GmbH.

The fact that an enterprise has a certain amount of space at its disposal, which is used for its business activities, is sufficient to constitute a "place of business". No formal legal right to use that place is therefore required.⁷ Whether a location can be considered to be at the disposal of an enterprise in such a way that it may constitute a "place of business through which the business of the enterprise is wholly or partly carried on" depends on whether the facts and circumstances point to the enterprise having access to that location as well as the extent of the presence of the enterprise at that location and the activities that it performs there.⁸

Para. 12 of the OECD's commentary on Art. 5 of the Model Tax Convention states that the location may be considered to be at the disposal of an enterprise when the enterprise is allowed to use the location belonging to another enterprise to perform its business activities on a continuous basis for an extended period, exclusively or along with multiple other enterprises. The Commentary further states that this will not be the case, however, where the enterprise's presence at a location is intermittent or incidental. The example provided for intermittent or incidental presence relates to employees of an enterprise having access to the premises of another enterprise, which they often visit but do not work at for an extended period.⁹

To elaborate on the principles stated above, the OECD Commentary on Art. 5 provides some examples of circumstances in which representatives of one enterprise present at the premises of another enterprise create a PE of the first enterprise. The most relevant example for the case discussed above relates to that of a painter who, for two years, spends three days a week in the large office building belonging to his client. In this case, the Commentary states that the presence of the painter in the office building where he performs the most important function of his business (i.e., painting) constitutes a PE.¹⁰ Germany's official stance on the "painter example" is that it does not agree with the OECD's interpretation, maintaining that the circumstances mentioned in this example do not give rise to a PE.¹¹

The only relevant distinction between the facts of the German case described above and the facts in the "painter example" relates to the time spent on-site, which is relevant for determining whether or not the "activities are conducted on a continuous basis for an extended period". The painter spends three days per week for two years on site, whereas Mr. X worked exclusively at the airport premises in Germany continuously from 2008 to 2014 (i.e., on a continuous basis for an extended period). This case, therefore, serves as an indicator of when the German tax authorities consider a given space to be "at the disposal of" the foreign enterprise based on the "activities conducted on a continuous basis for an extended period" criteria being met.

⁶ Para. 10 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

⁷ Para. 11 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

⁸ Para. 12 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

⁹ Para. 12 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

¹⁰ Para. 17 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

¹¹ Para. 178 of the Commentary on Art. 5 of the OECD's Model Tax Convention (2017)

Concluding remarks

The judgment deals extensively with the “right of disposal” in the context of a “fixed place PE”. It provides insight into the conditions necessary for a location to be considered to be at the disposal of a foreign enterprise in such a way that it constitutes a “place of business through which the business of the enterprise is wholly or partly carried on” (for the purpose of creating a “fixed place PE” under Art. 5(1)). In keeping with the OECD guidelines on Art. 5(1), the judgment analyses (i) Mr. X’s access to the location; (ii) the extent of his presence at the location; (iii) the activities that he performs there.

The conclusion that Mr. X was indeed allowed to use the location to perform his business activities on a continuous basis for an extended period appears to be based on (i) Mr. X requiring and having access to the airport premises (or some parts thereof) in order to carry out his services; (ii) the fact that he worked continuously and exclusively at this airport premises from 2008 to 2014. It didn’t matter that Mr. X’s “right of disposal” over the location (i.e., access to the location) was nonexclusive, indirect (i.e., derived from the arrangement between A GmbH and Y Ltd) and subject to third-party controls (i.e., security checks).

In other words, functional necessity (of access) and factual presence (on a continuous basis for an extended period) were seen to be sufficient for constituting a (derivative) “right of disposal” for the years in question; formal/legal right (of access) was not considered to be necessary.

**

Neha Mohan

Senior Associate

Phone: +31 (0) 644 961 086

Email: neha.mohan@noviotax.com

***This article is intended for general information only and does not constitute professional advice. Although every effort has been made to ensure accuracy, no guarantees are made as to completeness or correctness. Readers are advised to seek appropriate professional advice, specific to their situation and circumstances. No liability is accepted for any reliance placed on this content.*