

SELLING GOODS IN AUSTRALIA WITHOUT CREATING A PERMANENT ESTABLISHMENT THERE

1. Business profits from Australia will be taxable in Australia if a NZ enterprise has a “permanent establishment” there. Article 5 of the double tax agreement between NZ and Australia, sets down the circumstances in which a permanent establishment will, and will not, be created in Australia.

The “Can do’s”

2. The overriding requirement is that the direct activities of a New Zealand enterprise in Australia are limited to those of a preparatory or auxiliary character.

3. The following direct activities by a NZ enterprise in Australia will not give rise to a permanent establishment in Australia:

- (a) The use of facilities solely for the purpose of storage, display or delivery of goods belonging to the NZ enterprise.
- (b) The maintenance of a stock of goods belonging to the NZ enterprise solely for the purpose of storage, display or delivery.
- (c) The maintenance of a stock of goods belonging to the NZ 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 carrying on any other activity of a preparatory or auxiliary character.
- (f) The maintenance of a fixed place of business solely for any combination of the activities already referred to in paragraphs (a) to (e) above.

[Article 5, paragraph 7]

4. A NZ enterprise can indirectly carry on business in Australia 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.
[Article 5, paragraph 9]

The “Can’t Do’s”

5. A permanent establishment is a fixed place of business through which the business of the enterprise is wholly or partly carried on. This means that a NZ enterprise cannot have any of the following in Australia, unless the activities are limited to being those of a preparatory or auxiliary character:

- (a) A place of management.
- (b) A branch.
- (c) An office.
- (d) A factory.
- (e) A workshop.

[Article 5, paragraph 2]

6. There must be no involvement in a construction, installation or assembly project for longer than six months. This includes involvement by an associated NZ enterprise (i.e. joint involvement in an Australian project with a NZ parent company, sister NZ subsidiary, or NZ subsidiary). The duration of the involvement in the project is determined by adding the periods during which activities are carried on by the NZ enterprise and associated NZ enterprises, but there is no doubling up of time if the enterprise and an associated enterprise are involved in a project in Australia at the same time.

[Article 5, paragraphs 3 & 6]

7. Under no circumstances should there be a person - other than an agent of independent status referred to in paragraph 4 above - who acts on behalf of a NZ enterprise and:

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

(b) manufactures, or processes, in Australia for the NZ enterprise, goods belonging to the NZ enterprise.

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

[Article 5, paragraph 8]

8. There must be no operating of substantial equipment in Australia for a period, or periods exceeding in total, 183 days in any 12-month period. The 12-month period is a rolling test, either starting on the first day of any activity and counting forwards, or starting on the last day of any activity and counting backwards. A day includes any portion of the 24 hours from midnight to midnight.

[Article 5, paragraph 4(c)]