

PROVIDING SERVICES IN AUSTRALIA WITHOUT CREATING A PERMANENT ESTABLISHMENT THERE

1. Business profits from providing services in 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’t Do’s”

2. A NZ enterprise that provides services in Australia must not have an office, a place of management, or a workshop in Australia through which the business of the NZ enterprise is carried on. An office of an Australian enterprise in which services are provided under a contract with the Australian enterprise, will not, by itself, be an office of the NZ service enterprise. The NZ enterprise must not use the office to conduct its own business, or treat the office as its own office.
[Article 5, paragraphs 1 & 2]

3. The NZ enterprise must not perform services in Australia through an individual who is present in Australia for more than 183 days in any 12-month period, if more than 50% of the revenue of the NZ enterprise during that period is derived from the services performed in Australia through that individual. The 12-month period is a continuous rolling time period, so complete up-to-date records must be kept of time spent in Australia. A day includes any portion of the 24 hours from midnight to midnight.
[Article 5, paragraph 4(a)(i)]

4. The NZ enterprise must not perform services in Australia for more than 183 days in a 12-month period for the same project or for connected projects, through one or more individuals who are present and performing such services in Australia. Whether services relate to the same or connected projects will have to be determined on a case-by-case basis.
[Article 5, paragraph 4(a)(ii)]

5. The NZ enterprise must not have a person in Australia who acts on behalf of the NZ enterprise and has, and habitually exercises, in Australia, an authority to substantially negotiate or conclude contracts on behalf of the NZ enterprise. Therefore, service contracts must not be substantially negotiated or concluded in Australia.
[Article 5, paragraph 8]

6. There must be no involvement in a construction, installation or assembly project in Australia 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. 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.

[Article 5, paragraph 4(c)]

The “Can do’s”

8. The overriding requirement is that the direct activities on its own account, of a New Zealand enterprise that provides services in Australia, are limited to those that are of a preparatory or auxiliary character.

9. The following direct activities by a NZ enterprise that provides services 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]

10. A NZ service 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]