**INTERNATIONAL TAXATION**

**Non-resident's permanent establishment**

**Detailed description**

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1.0 INTRODUCTION

A foreign enterprise, who would like to perform business activities in Slovenia via a branch office or another legal form, shall register[[1]](#footnote-2) its activity in Slovenia. Enterprises with registered offices in another EU Member State may perform their activities in Slovenia without registration. Nevertheless, they shall obtain a tax number for tax purposes with entry into the tax register.

A foreign enterprise that is a non-resident, which will perform activities in Slovenia shall establish precisely and with due dilligence the potential existence of business unit in Slovenia. The inaccurate establishing of existence of business unit may result in avoidance of tax liabilities in Slovenia. There are no special fact-finding proceedings managed nor declaratory decision issued on the existence of the non-resident business unit in Slovenia. The taxable person, who fulfills the conditions for existence of non-resident's business unit in Slovenia based on provisions of [Corporate Income Tax Act - ZDDPO-2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4687) shall submit a tax return based on voluntary disclosure. The regular tax supervision over fulfilment of the obligations is performed by the Financial Administration of the RS (FURS).

The legal person, who has no registered office on the territory of Slovenia nor permanent establishment and performs an economic activity in Slovenia, shall be also deemed as a person liable for value added tax (VAT) in Slovenia. See FURS website for more information on [VAT](http://www.fu.gov.si/davki_in_druge_dajatve/podrocja/davek_na_dodano_vrednost_ddv/).

Conventions for the avoidance of double taxation of income and capital represent a bilateral measure for the avoidance of double taxation of income and capital. They define rules for residents of states, which conclude the convention, based on which their income is taxed. Those intergovernmental agreements divide the rights to taxation of income and capital between the contracting states at taking into consideration their own national tax legislation. The convention may limit the right to taxation of certain type of income or capital, or it defines the recognition of credit for tax, which was paid in another contracting state. The conclusion of conventions for the avoidance of double taxation of income and capital mainly enables the elimination of international double taxation of the same income and capital, prevents tax evasion and tax discrimination, and enables resolution of tax disputes. This type of agreements always refers only to direct taxes and have the advantage as regards the national tax legislation in an individual contracting state.

Some international agreements or conventions for the avoidance of double taxation of income – KIDO are adjusted to or transformed with the [Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7806) (Official Gazette of the RS, no. 12/18 – MP, no. 2/18), which is one of the results of project OECD/G20 for resolution of BEPS topics (Base Erosion and Profit Shifting), which means strategies for tax planning, which misuse gaps and discrepancies in tax rules for artificial shifting of profits to locations with low or zero taxation, where there is little or no economic activity, and consequently they have low or zero payment of total corporate income tax.

2.0 NON-RESIDENT'S BUSINESS UNIT

2.1 Definition of non-resident's business unit under the ZDDPO-2

In accordance with the provisions of [Corporate Income Tax Act – ZDDPO-2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4687) a non-resident's business unit is the place of business, in which or via which a non-resident performs the activities or business in Slovenia in whole or in part.

This definition includes especially the following premises, in which a foreign enterprise or trader performs an activity in Slovenia: office, branch, factory, workshop, mine, quarry or any other place, where natural resources are obtained and exploited. It includes also a contruction site, a project of construction, assembly or installation and supervision in connection with them if the activity or businesses exceed ~~12~~ 6 months[[2]](#footnote-3).

Construction sites, projects of construction, of assembly or of setting-up and supervision related to them, which last more than 6 months, are deemed to be non-resident’s business unit from the day of beginning of activities or transactions, including the preparation work.

The place of business may include any premises or land, which the company uses during the performing of activities in Slovenia, including machinery or equipment, which the company or sole trader manages and maintains. In certain cases it may happen that premises are not even necessary for the performing of activities. So it is only important that certain quantity of space is available to the company or sole trader.

The definition of term “the place of business” implies also the spatial permanence. This means that usually there should be a connection between the place of business and the precisely defined geographical point, although it is not necessary that the equipment, which represents a business unit, is actually attached. The activity may also be of such nature that it requires the moving of company between different locations. The single place of business is difficult to define in such cases, which means that the company may have also two business units. In general the place will be deemed as single or permanent where at taking into consideration the character of activities the location will represent a closely linked whole in commercial and geographical sense.

Notwithstanding the preceding paragraphs, an exeption is envisaged in cases where the performed activities are merely of a preparatory or auxiliary character. Such activities will not represent non-resident’s business unit, also when they would meet other conditions for performing activities in the place or through the place of business.

The activities, which we for example consider to be preparatory shall be as follows: only use of the premises in question for warehousing, exhibiting or supply of goods belonging to the non-resident; maintenance of inventories of goods belonging to the non-resident only for the purpose of warehousing, exhibiting or supply or only for the purpose of processing by another person; only maintenance of the place of business in question for the purpose of purchasing goods, or collecting information for their own use, or for the purpose of engaging in any other preparatory or auxiliary activity or business for their own purpose or maintenance of the place of business in question only for the purpose of any combination of activities or business listed above, provided that the general activity or business of the place of business which is a consequence of that combination, is of a preparatory or auxiliary nature. At defining which activities are of a preparatory or auxiliary nature and which are not, it is of key importance to establish whether they represent the essential or at least an important part of activities of the enterprise or sole trader as a whole.

In addition to the place of business, a non-resident's business unit may exist also if the person in Slovenia (dependent agent) that acts on behalf of a non-resident normally applies in connection with any activities or business for the non-resident and at this point regularly concludes contracts or has the main role at the conclusion of contracts, which the non-resident systematically concludes without substantive changes. The business unit may exist also when such agent may not hold a direct authorisation for conclusion of contracts on behalf of a non-resident, but the agent may conclude a contract binding on the non-resident. In cases where activities or transactions of agents are limited to those referred to in Article 7 of the ZDDPO-2, the place of business shall not be deemed as non-resident's business unit.

In addition to the dependent agent, the independent agent in Slovenia may also be considered the non-resident's business unit under certain conditions. This may occur when an otherwise independent agent as for example a stockbroker, an agent holding a general authorization or any other independent agent within the framework of this person's regular activities and on this person's behalf, where the agent in whole or in part acts on behalf of the non-resident (e.g. more than 50 % of income originates from one company) and where the conditions and circumstances pertaining to business and financial relations between the agent and the non-resident in question differ from those that would be in relations between non-associated enterprises to which it is closely related.

2.2. The place of business, which is not a business unit based on the ZDDPO-2

Article 7 of the ZDDPO-2 defines activities or transactions of the place of business, which don’t represent a business unit of non-resident. Those are auxiliary or preparatory activities. For this reason, they shall not be deemed as a business unit of non-resident because they are of auxiliary or preparatory nature.

The place of business shall not be deemed as non-resident’s business unit if the non-resident:

1. uses the premises anly for warehousing, disassembly or delivery of assets or goods, which belong to such person;

2. maintains the stock of assets or goods, which belong to such person, only for the purpose of processing by another person;

3. maintains the place of business only due to the purchase of assets or goods or collecting the information for him/herself;

4. maintains the place of business only due to performing of any other activities or transactions for him/herself;

5. maintains the place of business only for any combination of activities or transactions set under points 1 to 5.

The place of business (points 1 to 5) shall not be deemed as non-resident’s business unit if such an activity or in case under point 6 the whole of activity of the place of business is preparatory or auxiliary.

The place of business shall not be deemed as non-resident’s business unit if the non-resident uses or maintains it and if that non-resident or a non-resident or resident closely related to that non-resident, performs business activities at the same or another place in Slovenia, uder condition that the business activities, which are performed by those two non-residents on the same place or the same non-resident or another non-resident or resident closely related to that non-resident at two places, are secondary activities, which are a part of the whole business, and:

a) in accordance with Article 6 of the ZDDPO-2 such place or another place means a business unit for the non-resident or another non-resident or resident closely related to that non-resident or

b) the whole of activity, which is a consequence of the combination of activities, which are performed by both non-residents at the same place or the same non-resident or another non-resident or resident closely related to that non-resident at two places, is not preparatory or auxiliary.

For definition purposes for non-resident’s business unit, the ZDDPO-2 sets in paragraph four of Article 7 when the agent is closely related to another non-resident or resident.

For purposes of Articles 6 and 7 of the ZDDPO-2, the agent or non-resident is closely related to another non-resident or resident if based on all relevant facts and circumstances one has supervision over the other or both are under supervision of the same agents or non-residents.

In any case the agent or non-resident is considered to be closely related to another non-resident or resident:

- if one has directly or indirectly the beneficial interest of more than 50 % in the other (or in cases of companies, more that 50 % of sum of votes and values of shares of companies or beneficial equity interest in company) or

- if another agent or non-resident has directly or indirectly more than 50 % of beneficial interest (or in cases of companies, more that 50 % of sum of votes and values of shares of companies or beneficial equity interest in the company) in the agent and non-resident or those two non-residents or residents.

3.0 NON-RESIDENT'S PERMANENT ESTABLISHMENT

3.1 Non-resident's permanent establishment based on **conventions for the avoidance of double taxation**

The conditions for the existence of non-resident's business unit are arranged in the Slovene national legislation in the way similar to the conventions concluded by Slovenia, which follow the example of OECD Model Convention. Nevertheless, there are differences, mainly in the fact that **Model Convention additionally requests that the place of business is permanent.**

Where Slovenia has concluded [a convention for the avoidance of double taxation](http://www.fu.gov.si/davki_in_druge_dajatve/podrocja/mednarodno_obdavcenje/) (hereinafter: conventions) with another state, the conditions for the existence of business unit, mainly as regards the compliance with the condition of permanence, are assessed also in accordance with the convention criteria. The non-resident's activity shall be carried on permanently on a certain location – **shall not be of just a temporary character.**

Based on **OECD Model Convention (Article 5)** the term »permanent establishment« means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Three conditions shall be simultaneously met for the existence of a permanent establishment:

1**. place of business** – economic activity of a non-resident – enterprise or individual on a geographic area (point);

2. **fixed place of business** – the place of business shall be permanent at a distinct place or time;

3. **the carrying on of the activity through this fixed place of business** – This most often means that persons who, in one way or another, are dependent on the enterprise conduct the business of the enterprise in the state in which the fixed place of business is situated.

The concept of permanent establishment enables the Contracting State to tax the profit of an enterprise of another Contracting State. When the enterprise carries out the business in another Contracting State through a permanent establishment, the profit of enterprise attributed to such business unit may be taxed in the state where the permanent establishment is located, but only such amount of profit, which is attributed to that permanent establishment. See point 5 for more information on attributing profits to a business unit.

The Commentary on OECD Model Convention, to which amendments were made in 2017 as the result of adopting the Report on BEPS Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status (Base Erosion and Profit Shifting Project) also assists in the interpretation and implementation of conventions. The Commentary includes provisions on the business unit explained in individual paragraphs.

**The first paragraph of OECD Model Convention:**

*»For the purposes of this Convention, the term »permanent establishment« means a fixed place of business through which the business of an enterprise is wholly or partly carried on.«.*

Based on the Commentary of the Model Tax Convention the term »**place of business**« covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are required for carrying on the business of the enterprise or the enterprise has only a certain amount of space **at its disposal**. It is immaterial whether the place of business is owned or rented by or is otherwise at the disposal of the enterprise. A place of business may thus be constituted also by **a pitch in a market place**, or by a certain permanently used area **in a customs depot (e.g. for the storage of dutiable goods)**.

The place of business shall be permanent also **in time**, which means that it operates for a specified period. The length of the period depends on the type of activities and the nature of business, but usually after the six-month period of operations the place of business may already be considered as permanent in time (the time limit is not prescribed (except for construction) and it shall be assessed continuously; it shall be deemed that an enterprise has started to perform its activities already with preparatory activities).

**Criteria,** which may assist in establishing whether an activity represents a permanent establishment:

- the activity is performed less than 6 months: probably there is no permanent establishment,

- the activity is performed from 6 to 12 months: with a high likelihood we can claim that the permanent establishment exists, in the event that these are not activities referred to in Article 7 of the ZDDPO-2 or paragraph 4 of Article 5 of the KIDO,

- the activity is performed more than 12 months: the existence of permanent establishment in the event that these are not activities referred to in Article 7 of the ZDDPO- 2 or paragraph 4 of Article 5 of the KIDO.

Notwithstanding the above-mentioned criteria, one exception to this general practice has been where the activities were of a recurrent nature; in such cases, each period of carrying on the activity on a certain place needs to be considered in combination with the number of those periods of carrying on the activity, which may extend over a number of years, for the definition of permanent establishment. Another exception is a situation where an enterprise performs the activities exclusively in a certain country and they have short duration because of their nature but since they are wholly carried on only in that country, the connection with that country is very strong and represents a permanent establishment in that country.

**The second paragraph of OECD Model Convention:**

*The term » permanent establishment« includes especially:*

* *a place of management,*
* *a branch,*
* *an office,*
* *a factory,*
* *a workshop, and*
* *a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.*

In paragraph two there are for example possible ways listed for organising the permanent establishment, which shall fulfil the criteria referred to in paragraph one and these are not the activities referred to in paragraph four of Article 5, which do not represent the permanent establishment.

**Third paragraph of OECD Model Convention:**

*» A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.«*

The term »building site« includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals, the laying of water supply network and other networks. Additionally, the term »installation project« is not restricted to an installation related to a construction project; it also insludes the installation of new equipment, such as a complex machine, in an existing building or outdoors.

A building site or construction or installation project constitutes a permanent establishment only **if it lasts more than twelve months.** »Test of 12 months« refers to an individual building site or a project. The period of 12 months should be set for each individual building site or project.

Example: The construction of apartment settlement with several buildings shall be considered as one construction site although it includes several buildings where there may be also several investors.

The construction site starts to exist when the provider starts to work, including the preparatory work. When the work at the construction site is performed also by subcontractors, their time of performance is included in the time of the main provider. The subcontractor has his own permanent establishement only if his presence at the construction site lasts for more than 12 months. Temporary break in work (e.g. due to bad weather, lack of materials, problems with workers, etc.) shall not be deemed as interruption in the existence of permanent establishment.

The construction site ceases when the work ceases to perform permanently. The work, which is performed after the end of works, e.g. repairs in the warranty, as a rule are not included in the period of existence of permanent establishment, it depends on the circumstances of individual case. If the work is substantial (including the extensive repairs in the warranty), already after the end of work, this is taken into consideration also in setting the existence of permanent establishment, it depends on the circumstances of an individual case.

**Supervision or consulting, related to the construction site**

**The difference** between the national legislation and Model Convention is in the fact the the national legislation additionally defines **the activity of supervision in connection with the construction site, a project involving construction, assembly or mounting if it lasts longer than 12 months** as a business unit**.**

Under the Commentary on OECD Model Convention the term »construction site« includes also the supervisory activities in connection with the construction, where it is not important whether the activity of supervision is performed by the enterprise, which performs the construction activities, or by another enterprise. Countries, which would like to determine the existence of business unit in connection with supervisory activities more specifically, can do this in bilateral agreements.

Conventions, which ***include*** such provision, are concluded with the following countries: Belgium, Bosnia and Herzegovina, Czech Republic, Estonia, Iran, Israel, Japan, Canada, China, Korea, Lithuania, Latvia, Malta, Hungary, Moldavia, Norway, Netherlands, Portugal, Russia, Thailand and United Arab Emirates.

Conventions, which ***do not include*** the activity of supervision in connection with a construction site, a project involving construction, assembly or mounting, are concluded with the following countries: Austria, Bulgaria, Cyprus, Denmark, France, Finland, Greece, Croatia, Ireland, Italy, India, Kazakhstan, Kosovo, Luxembourg, Macedonia, Germany, Poland, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, Great Britain and USA. The activity of supervision is in these cases included in the basic definition of the term »construction site«.

Performing services, including counseling and managerial services

The conventions concluded between Slovenia and Bulgaria, Czech Republic, Canada, China, Malta, Moldavia, Slovakia and Thailand the following wording is included:

»The term “permanent establishment” includes also performing services, including counceling or managerial services, which are performed by an enterprise of contracting state with its employees or other personnnel employed by the enterprise for this purpose if this type of activities (for the same or related project) on the territory of another contracting state is performed in the period or periods, which in total last more than 183 days in any period of twelve months.«

The national legislation in Slovenia *does not include a special condition* that it shall be deemed that a non-resident has a business unit in Slovenia also when this person performs services, including counceling or managerial services, so in such case **the basic definition of business unit, under which this type of activities shall not be deemed as business unit if other conditions are not met (e.g. permanent place of business, etc.)** **applies** for the above-mentioned activities and businesses.

**Fourth paragraph of OECD Model Convention:**

*»Notwithstanding the preceding provisions of Article 5 it shall be deemed that the term* ***»permanent establishment« shall not include****:*

*a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*

*b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*

*c) the maintenance of a stock of goods or merchandise belonging to the 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 merchandise or of collecting information, for the enterprise;*

*e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;*

*f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the general activity of a fixed place of business, which is a consequence of combination, is of a preparatory or auxiliary character.*

These are activities of a preparatory or auxiliary character. At the above-mentioned activities it is difficult to differ the activity of a preparatory or auxiliary character from the activity, which doesn't have such character. We may use a criterion whether such activity means a key activity of the enterprise as a whole or not. Each actual case shall be assessed individually.

The place of business through which an enterprise carries on an activity, which has a preparatory or auxiliary character for the enterprise, shall not be deemed as a permanent establishment. It has to be emphasized that places of business of this type may well contribute to enterprise's productivity, but the services it performs on are so remote from the actual realisation of company's profits. E.g. the place of business is intended exclusively for marketing, provision of information for scientific research or supporting the exploitation of a patent or know-how. In such cases the enterprise **has no** permanent establishment, but only under condition that such activities are of a preparatory or auxiliary character.

When an enterprise performs the above-mentioned activities via the place of business *directly also for other enterprises* (e.g. for other enterprises of the concern, to which the first-mentioned enterprise belongs), it shall be deemed that such enterprise **has** a permanent establishment.

Example: An enterprise in country A (exporter of fruits) has a specialised warehouse in country B only with the purpose of storing fruits under controlled conditions during the customs procedure in that country.

In the following case it shall be deemed that company A has a permanent establishment in country B (paragraph a cannot apply): The enterprise in state A has in state B a large warehouse, where a significant number of people are employed. The main purpose of existence of the warehouse in state B is storing the goods and performing selling activities through the warehouse, which represent an important activity, request a large number of employees and represent a very important part of selling and distribution activities of that company. The above-mentioned case doesn’t include preparatory or auxiliary activities of the enterprise.

Example: A logistics company manages a warehouse in state S, where it continuously stores goods, which belong to a company from state R. The companies are not related. The warehouse doesn’t represent a permanent place of business, which is permanently available to the company from state R, so in such case sub-paragraph b) does not apply. When the unlimited access is permitted to the company from state R to a part of that warehouse for purposes of checking and maintaining its goods stored there, then in the case of establishing the existence of permanent establishment of company from state R also sub-paragraph b) is taken into consideration in state S, which means that it is established whether those activities represent preparatory or auxiliary activities of enterprise.

3.2 **Amendments to the conventions for the avoidance of double taxation due to the signed multilateral instrument – MLI**

### **3.2.1 General on MLI**

The adjustment or transformation of conventions with MLI has an influence on the application of provisions of an individual convention in practice.

One of the more significant rules, included by MLI, is the rule against misuses of conventions, which is based on the main purpose of the agreement or transaction (test of the main purpose). In accordance with that test and notwithstanding any provisions of an individual convention, the benefit under an individual convention in connection with a part of income or property is not granted if taking into consideration all appropriate facts and circumstances it is possible to conclude **that the obtaining such benefit was one of the main purposes** of any agreement or transaction, based on which such benefit was directly or indirectly obtained, except if it is established that granting such benefits in those circumstances would be in accordance with aims and purposes of appropriate provisions of that convention.

3.2.2 Artificial avoidance of permanent establishment status with the application of exceptions for separately stated activities

The content of paragraphs two and four of Article 13 of MLI is based on the Final report for BEPS Action 7 (Preventing the artificial avoidance of permanent establishment status) from 2015. The content of the above-mentioned two paragraphs was then included also in the OECD Model Tax Convention 2017 in **paragraph four** and as **new paragraph 4.1. of Article 5**. The content is explained in the commentary to the above-mentioned provisions, which includes also several cases of situations, for which those provisions apply.

The person that is closely connected to an enterprise is for purposes of implementing paragraph four of Article 13 of MLI defined in paragraph one of Article 15 of MLI. It has to be emphasized that the definition of that person under MLI partially differs from the definition of that person, which was for purposes of implementing paragraph 4.1. and paragraph six of Article 5 of OECD Model Tax Convention 2017 included in that Article as the new paragraph eight. The definition of person that is closely connected to the enterprise is for example included in transformed KIDO with Denmark, France, Israel, Serbia, Litvo, Great Britain and Northern Ireland, Slovakia, Albania, Russia, Kazakhstan, Portugal, BIH, Ireland, Netherlands, Belgium, India and Norway.

The definition of permanent establishment is of essential importance in establishing whether the foreign enterprise has taxable presence that is a permanent establishment as a permanent place of business through which enterprise’s business is carried on completely or partially in another contracting state. Changes referred to in paragraph two of Article 13 of MLI tighten the conditions important for the assessment of permanent establishment existence under Article 5 of KIDO and limit the extent of exceptions for activities, due to performance of which there is no permanent establishment of enterprise in another contracting state because activities referred to in paragraph four of Article 5 of OECD Model Convention may represent also the essential and key part of activities of enterprise as whole. Taking into consideration paragraph four of Article 13 of MLI, an enterprise or a group of closely connected enterprises will also no longer be able to avoid the status of permanent establishment with fragmeting a cohesive business operation into several small operations in the manner where each individual part would have an auxiliary or preparatory character, for which exemptions would be in force referred to in paragraph four of Article 5.

The above-mentioned MLI rule narrows the interpretation of exceptions of permanent establishment in the convention because the term of preparatory or auxiliary activities refers to all cases (indents) of the above-mentioned Article. It should be estimated whether the enterprise’s activity in a certain location represents the essential and key part of activities as a whole. **The permanent establishment does not exist if all activities of the enterprise in a certain state are of a preparatory or auxiliary character.**

The term »of preparatory character« usually means an activity, which is performed at planning to perform what represents the essential and key part of activities of enterprise as whole. Because the preparatory activity is carried on even before the performance of another activity, it is usually performed for a short period, where the duration of such period is set taking into consideration the character of enterprise’s main activity. But this is not always true because it is possible to perform the activities in a certain place also for a longer period as preparation for activities, which are performed elsewhere.

The term »of auxiliary character« refers to support functions for the implementation of the essential or key part of activities of the enterprise as whole, which are not its part. If an important share of employees or assets of the enterprise is included in such activity, it is unlikely for such activity to represent an auxiliary activity, which would exclude the existence of permanent establishment of enterprise in another contracting state.

Example: An enterprise has the seat in state R and large warehouse in state V. In the warehouse a significant share of employees is employed in the enterprise, where they store and distribute the goods owned by the enterprise, which the enterprise sells online to customers in state S. In such cases the warehouse and distribution center in state V represents the permanent establishment of the enterprise in state V because the activity of warehousing and distribution, which takes place through the warehouse and represents a significate share of enterprise’s assets and requires a large number of employees, represents the key part of selling/distribution activities of the enterprise, so it has no auxiliary or preparatory character.

**The rule for prevention of fragmeting activities**

The purpose of this rule is to prevent an enterprise or a group of closely related enterprises from fragmeting a cohesive business operation into several small operations in order to argue that each operation is merely engaged in a preparatory or auxiliary activity, for which exemptions would be in force referred to in paragraph four of Article 5. Based on the rule, the exceptions referred to in paragraph four shall not apply for the place of business, which would otherwise be considered a permanent establishment, when the activities, which are performed in that place, and other activities of the same enterprise or a group of related enterprises, which are performed in that place or another place in the same state, constitute complementary functions that are part of a cohesive business operation.

The rule may be used only if at least one of the places where the activities are performed constitutes a permanent establishment or if not, if the whole activity as the result of combination of relevant activities is not only auxiliary or preparatory.

This rule is incorporated in the reworded convention with Israel, Serbia, Lithuania, Great Britain and Nothern Ireland, Slovakia, Portugal, Kazakhstan, Russia, Ireland, Netherlands, Belgium, India, Norway, Ukraine and Denmark.

Under MLI it shall be deemed for purposes of implementing paragraph four of Article 13 of MLI that the person is closely related to the enterprise if one has based on all relevant facts and circumstances supervision over the other or they are both under the supervision of the same persons or enterprises. In any case a person shall be considered closely related to an enterprise if one of them has directly or indirectly more than 50 percent of beneficial interest in the other (or in the case of enterprise more than 50 percent of total of votes and value of shares of enterprise or beneficial equity interest in the enterprise) or if the other person has directly or indirectly more than 50 % of beneficial interest (or in cases of enterprises more than 50 percent of total of votes and values of shares of enterprise or beneficial equity interest in the enterprise) of the person and enterprise.

Case 1: Enterprise A that is a resident of state A produces and sells appliances. Enterprise C that is a resident of state C is a subsidiary of enterprise A and owns a shop (trade) in state B, which sells appliances produced in enterprise A and represents a business unit of enterprise C. Enterprise A has a small warehouse in state B, where it stores large products, which are equal to some of those, which are exhibited in the shop of enterprise C. When the buyer buys such large product, the shop obtains it from the warehouse of enterprise A.

In such case the exception from the emergence of permanent establishment cannot apply due to failure to meet the criterion “a service of auxiliary character”. This is the reason why the warehouse represents a permanent establishment of company A. Enterprise A and enterprise C are related enterprises, where the trade (shop) represents a permanent establishment of enterprise C. The activity of warehousing and the activity of trade supplement each other and constitute coordinated business operations within the meaning that the activity of warehousing cannot be considered as a service of a auxiliary character.

ENTERPRISE A

Country A

Country C

Country B

ENTERPRISE C

Warehouse

Trade (PE)

Case 2: A bank that is a resident of state R has several business units in state S (PE 1, PE 2). In state S it has also an office, where some of the employees prepare ratings of potential borrowers who have filed an application in one of the business units. The results of checking are submitted to the bank in state R, which prepares the final reports for business units in state S, where the decisions on the granting of loans are adopted.

The office of the bank through the preparation of ratings performs a complementary or advanced activity to the underlying bank activities of that bank in state S and so it represents together with bank’s business units a related business bank service in state S and the existence of PE.

BANK

State R

State S

The office of the bank, which prepares ratings.

PE 1

borrower

PE 2

3.2.3 Artificial avoidance of PE status through commissionnaire arrangements and similar strategies

The content of paragraphs one and two of Article 12 of MLI is based on the Final report on BEPS Action 7 (prevention of artificial avoidance of PE status) from 2015. The content of the above two paragraphs was then included also in OECD Model Tax Convention OECD 2017, which means in paragraphs five and six of Article 5. The content is explained in the commentary to the above-mentioned provisions on pages 141-150 (paragraphs 82-114), which includes also examples of situations, in which those provisions are applied.

As it is clear from the above-mentioned final report, the commissionaire arrangement may be in general defined as the arrangement, through which a person sells products in the state on his or her own behalf, but for a foreign enterprise owing those products. A foreign enterprise may have sold products through such arrangement in the state without having a permanent establishment in that state, to which such sells would have to be assigned for tax purposes. The person, who sold the products, didn’t own them, so it was possible to tax only the compensation, which the person received for his or her services (usually the commission), but not the profit from such sales. Similar strategies for avoiding the application of paragraph five of OECD Model Tax Convention, which was valid before 2017, included the situations where contracts which were essentially negotiated in the state, were not concluded in that state because they were completed or approved abroad, or because the person who usually used the authorization for conclusion of contracts represented »an independent agent«, for whom the exception applied referred to in paragraph six of OECD Model Tax Convention, which was valid before 2017, even if it was closely connected with a foreign enterprise, for whom it operated.

In numerous cases the commissionnaire arrangements and other strategies were described and they were formed mainly due to reducing the tax base in the state, where the products were sold. The described situations are for this reason solved through paragraphs one and two of Article 12 or the new paragraphs five and six of Article 5 of OECD Model Tax Convention 2017.

**Tied agent (paragraph one of Article 12 of MLI and paragraph five of Article 5 of OECD Model Tax Convention 2017)**

In accordance with the new definition of tied agent and notwithstanding the provisions of convention (KIDO), which define the term »permanent establishment« (those are as a rule paragraphs one and two of Article 5), but at taking into consideration KIDO provisions, which define an independent agent (that is as a rule paragraph six of Article 5 of KIDO) – when a person operates in a contracting state for an enterprise and at this point it usually concludes contracts or usually has a leading role, which leads to the conclusion of contracts, which are concluded routinely without significant changes by the enterprise, and those contracts are:

a) on behalf of the enterprise or

b) for the transfer of ownership over the property owned by that enterprise or property, which the enterprise the enterprise may use, or for granting the right to use such property or

c) for services, which that enterprise performs,

for that enterprise it shall be deemed that it has a permanent establishment in that contracting state in relation to any activities, which that person accepts for the enterprise, unless the activities of such person are not limited to those referred to in paragraph four of Article 5 of KIDO (that is the paragraph, which defines exemptions for especially stated activities), due to which under provisions of this paragraph such permanent place of business would not be deemed as a permanent establishment if they were performed through the permanent place of business.

The term **»has usually a leading role, which results in the conclusion of contracts«** has to be explained in the light of the objective and purpose referred to in paragraph five of Article 5 of KIDO, which lies in the inclusion of cases, in which the person in the state performs an activity with the purpose that a foreign enterprise would regularly conclude contracts, which means when such person acts as a sales employee of enterprise. This is the reason why this term is usually connected with actions of the person, who has convinced the third person to conclude a contract with the enterprise. The term **»contracts, which are concluded routinely, without the enterprise changing them significantly«** explains that when a person has the above-mentioned leading role in a state, the actions of such person are included in paragraph five of Article 5 of KIDO, even if the contracts are not formally concluded in that state (e.g. when the contracts are subject to routine checks and approval outside that state and due to such check the key aspects of those contracts are not changed).

The term »usually concludes contracts or usually has a leading role, which results in the conclusion of contracts, which are concluded routinely, without the enterprise changing them significantly« is applied when the person obtains and receives (although with no official conclusion) orders, which are directly sent to the warehouse, from which the goods are supplied, which are owned by the enterprise and where the enterprise routinely approves those transactions. But it shall not be applied where such persons only promote and market the goods or services of the enterprise in the manner, which directly doesn’t lead to the conclusion of contracts.

For the existence of business unit it shall be taken into consideration at the additional conditions referred to in points a, b and c that they ensure that paragraph five of Article 5 of KIDO doesn’t refer only to contracts, which create rights and obligations, which are legally enforceable, between the enterprise, for which the agent acts, and third parties, with whome the contracts are concluded, but also to contracts, which create obligations, which such enterprise will actually fulfil, and not a person, who shall fulfil them under the contract. The term **»on behalf of the company«** referred to in point a doesn’t limit the application of that point to contracts, which are literally concluded on behalf of the enterprise because that point may be used also in certain situations where the name of enterprise is not stated in the written contract.

Despite meeting the above-mentioned conditions the provisions as regards the tied agent shall not apply when the activities of permanent place of foreign enterprise are limited only to preparatory or auxiliary activities referred to in paragraph four of Article 5 of KIDO (in this case also the agent, whose activities are limited to this type of activities, doesn’t represent a permanent establishment), or when the representative may be defined as an independent agent in accordance with paragraph six of Article 5 of OECD Model Convention 2017.

This rule is included in the modified KIDO with France, Israel, Serbia, Lithuania, Slovakia, Bosnia and Herzegovina, Kazakhstan, Albania, Russia, Belgium, India, Norway, Ukraine and Denmark.

**Independent agent (paragraph two of Article 12 of the MLI and paragraph six of Article 5 of the OECD Model Tax Convention)**

In accordance with the new definition the independent agent shall be deemed to be a person, who acts in a contracting state for an enterprise of another contracting state, when such person performs business in the first mentioned contracting state as an independent agent and performs business for the enterprise within such usual business. If such person operates exclusively or almost exclusively for one or more enterprises, with which it is closely connected, then such person in connection with any such enterprise shall not be deemed as an independent agent within the meaning of this paragraph.

The second sentence doesn’t mean that such person will be automatically deemed as an independent agent, when it operates exclusively or almost exclusively for one or several enterprises, with which it is not closely related. Under the provision such person shall perform business as an independent agent and work within the usual operations. The independent status is less probable where the activities of person are performed completely or almost completely for only one enterprise (or a group of enterprises, which are mutually closely related) during performing of activities of such person or during a longer time period. When a person operates exclusively for one enterprise, with which it is not closely related, only for a short time (e.g. at the beginning of operations of such person), then it is possible that such person shall be deemed as an independent agent. All facts and circumstances of the case shall be taken into consideration at the individual case in estimation whether the person is an independent agent.

This rule is included in the modified KIDO with France, Israel, Serbia, Lithuania, Slovakia, Bosnia and Herzegovina, Kazakhstan, Albania, Russia, Belgium, India, Norway, Ukraine and Denmark.

The person, who is closely related to the enterprise, is for purposes of implementing paragraph two of Article 12 of the MLI defined in paragraph one of Article 15 of the MLI. It shall be emphasized that the definition of such person under the MLI partially differs from the definition of such person, which was for purposes of implementing paragraph 4.1 and paragraph six of Article 5 of OECD Model Tax Convention 2017 included in this Article as the new paragraph eight.

# 3.2.4 Rule on prevention of misuses for permanent establishments in third jurisdictions

The content of paragraphs one to three of Article 10 of the MLI is based on the Final Report for BEPS Action 6 (prevention of misuses of tax conventions) from 2015. The content of the above-mentioned three paragraphs was then with some adjustments included also in OECD Model Tax Convention 2017 in paragraph eight of the new Article 29 and is as such explained in the commentary to the above-mentioned provision (on pages 585-587, paragraphs from 161 to 167).

Paragraphs one to three of Article 10 of the MLI include the rule against misuses, which enables the state of source not to recognize the benefits under KIDO in cases when the income, which is attributed to a permanent establishment of enterprise in a third country, is in that state subject to low taxation. It shouldn’t be expected that in cases when the state of residence of enterprise exempts or applies low taxation to the profit of permanent establishments in third countries the state of source will recognize benefits under KIDO in connection with such income (which means that those are cases of possible misuses of the manner for the transfer of shares, claims, rights or property to permanent establishments, which are established only with such purpose in states, which offer more favourable treatment of income from such property).

In accordance with the rule on prevention of misuses of permanent establishments in third jurisdictions, the tax benefits under KIDO are not recognized in the state of source, where the enterprise achives income, which is in the state of its residence treated as the income, which is attributed to permanent establishment, which the enterprise has in a third country, and where the profit of such permanent establishment is not taxed in the state of residence if the income achieved in this way is taxed in a third jurisdiction with less than 60% of tax, with which such income would be taxed in the state of enterprise’s residence if such business unit were located in that state.

In accordance with paragraph one of Article 10 of the MLI in such cases where an enterprise, which is a resident of KIDO contracting state, achieves income in another contracting state (which is the state of source) and the state of its residence considers such income as the income, which is attributed to a permanent establishment of that enterprise in a third jurisdiction, and where enterprise’s profit, which is attributed to that permanent establishment, is exempt from tax in the state of its residence, the benefits under KIDO shall not be used for any part of income, which is in a third jurisdiction taxed with tax lower than 60% of tax, with which that part of income would be taxed in enterprise’s state of residence if that permanent establishment were located in that state. In such cases any income, for which this paragraph applies, is still taxed in the state of source in accordance with the national law, notwithstanding any other provisions of KIDO.

Paragraph two of Article 10 of the MLI defines that paragraph one shall not apply if such income is in the state of source achieved with or in connection with active performing of business activities through a permanent establishment (other than a business activity of performing, managing or simply holding investments for the account of enterprise, unless those are banking or insurance activities or activities in connection with securities, which are performed by banks, insurance companies or registered traders with securities).

Paragraph three of Article 10 of the MLI defines that it may happen if in connection with a part of income, which a resident of contracting state achieves, benefits based on KIDO in accordance with paragraph one are not recognized, the competent authority of the state of source in connection with this part of income recognizes those benefits despite this if based on the request submitted by that resident, it establishes that the recognition of those benefits is justified as regards the reasons due to which that resident has failed to fulfil the requests referred to in paragraphs one and two. The competent authority of the state of source, to whom the resident of another contracting state has submitted a request in accordance with the preceding sentence, before or refusal of the request it shall consult with the competent authority of enterprise’s state of residence.

This rule is included in the modified KIDO with Austria, Israel, Slovakia, Netherlands, India, Ukraine, Denmark, Russia, Albania and Kazakhstan.

The application of paragraph one is presented with the following hypothetical case:

The income (e.g. interest), which has the source in state B, is paid by a legal person in state B – enterprise B to a business unit of enterprise A, which is a resident of state A, and the business unit of that enterprise is located in a third country – state C. The paid interest is in the state of residence of enterprise A considered as income, which is attributed to a permanent establishment of enterprise A, which is located in state C. The profits of permanent establishment, which company A has in state C, shall not be taxed in state A. The interest in state A is not so taxed and the rate of taxation of the interest in state C is lower than 60% of tax, with which this part of income would be taxed in state A if such permanent establishment were in state A. In such case any income for which paragraph one of Article 10 of the MLI applies is still taxed in the state of source (state B) in accordance with the national law, notwithstanding any other provisions from KIDO.

state B (second state) – state of SOURCE

state A (first mentioned state)

enterprise B

income

* exemption

(based on the method fort he elimination of double taxation under KIDO between A and C or under the domestic legislation A)

* the rate of tax lower than 60% in the state of residence

enterprise A

Income may be moved physically to PE (is attributed)

Income is attributed to PE

PE of enterprise A

state C (third state)

For this purpose the enterprise should upon request of the tax authority submit a statement or supporting documents on whether the income, which the enterprise earns in Slovenia, is in the state of its residence treated as the income, which is attributed to its permanent establishment in a third country, and whether the profit, which is attributed to that permanent establishment, is exempt from tax in the state of its residence. If the reply is positive in both cases, we request also a statement or supporting documents on the rate of tax in the state, in which the permanent establishment is located, and in the state of residence.

4.0 TAX LIABILITIES OF NON-RESIDENT'S (PERMANENT) ESTABLISHMENT

4.1 Entry in the tax register

Foreign enterprises or sole traders, who want to perform an activity in Slovenia through a branch or any other legal form, shall enter their activities in the tax register by filing [DR-03 form[[3]](#footnote-4) or DR-04](http://www.fu.gov.si/davki_in_druge_dajatve/poslovanje_z_nami/vpis_v_davcni_register_in_davcna_stevilka/) form[[4]](#footnote-5) with the Slovene Financial Administration. More information as regards the entry in the tax register is available on [FURS](https://www.fu.gov.si/davki_in_druge_dajatve/poslovanje_z_nami/vpis_v_davcni_register_in_davcna_stevilka/) website.

4.2 Tax liabilities

Tax obligations of a foreign enterprise (non-resident) who in Slovenia performs business activities through a business unit are the following:

* submission of tax returns on income earned in the business unit or through the business unit in Slovenia;
* corporate income tax is charged and paid through the tax return of business unit at a rate of 19 % or at a rate of 22 % in accordance with Article 64 of the Act on the reconstruction, development and provision of financial resources (ZORZFS) from the tax base for 2024, 2025, 2026, 2027 and 2028;
* the tax year equals the calendar year and the taxable persons may choose the tax year, which coincides with their business year; for this purpose they send a written request to the tax authority;
* during the year taxable persons pay the advance payment of tax, which is calculated in relation to the tax return from the preceding year. Amounts of advance payments during the year may change if the tax base of the current year differs from the tax base from the preceding year; taxable persons request the change by a written statement.

In accordance with the Slovene legislation the profit of non-resident’s business unit in Slovenia is defined as the profit, which may be attributed to that business unit. That profit may be attributed to the business unit and for which it may be expected that business unit would have if it were an independent taxable person performing the same or similar activity or business. Revenues, which are achieved based on performing activities or businesses in the business unit or through the business unit of non-resident in Slovenia, and actual expenditures, which occur for purposes of that business unit, including management and general administrative costs, shall be attributed to that business unit if they occur in or outside Slovenia.

Taxable attributed income of enterprise shall be declared to the tax authority in the tax return. Such income is defined based on rules on transfer pricing[[5]](#footnote-6) and books of account, which shall be managed in accordance with the Slovene Accounting Standards and international standards for accounting reporting. In cases where the above-mentioned documentation is not prepared in the Slovene language a foreign enterprise or sole trader shall upon request of the tax authority provide a certified translation of requested documentation. In special cases when the activities of non-resident’s business unit are of such character (e.g. marketing activities, such as researches of market, public opinion, etc.) that they don’t create their own revenue per unit and that revenues or profit are attributed to the unit based on transfer pricing methods, the business unit shall justify any entry in the tax return with the assistance of the documentation enclosed, which in addition to the transfer pricing documentation shall include also books of account of related foreign enterprise or sole trader, business documents, contracts and other relevant documents.

Corporate income tax is paid in Slovenia through the tax return at a rate of 19 %[[6]](#footnote-7) or at a rate of 22 % in accordance with Article 64 of the Act on the reconstruction, development and provision of financial resources (ZORZFS) from the tax base for 2024, 2025, 2026, 2027 and 2028. The return shall be filed with the tax authority within three months from the beginning of the current tax year for the preceding tax year (usually until 31 March when the tax year equals the calendar year). Tax relief is claimed with it. Different time limits are set for taxable persons in special circumstances, such as bankruptcy, merger, division, liquidation, etc.

The tax year equals the calendar year, but taxable persons may choose a different tax year, which coincides with their business year. The selection is performed based on a written request filed with the tax authority at least 45 days before the date of beginning of new tax year. A new enterprise shall notify the competent tax authority of a different tax year in 8 days after the registration in Slovenia. The competent tax authority confirms the change in tax year to the taxable person within 15 days.

During the year taxable persons shall pay the advance payment of tax. The advance payment for the current year equals the amount of tax, which is calculated from the tax base based on the tax return for the preceding period. It is paid on a monthly basis (if the amount of advance payment exceeds 400 EUR) or in three-monthly instalments (if the amount of advance payment is less than 400 EUR). The payment is overdue on the tenth day in the month for the preceding month or preceding period. When taxable persons start performing activities in Slovenia, they shall calculate for themselves the advance payment, which equals the amount of tax, calculated in relation to the amount of the envisaged tax base of the tax period, for which the advance payment is paid. The reasoned calculation of tax base shall be submitted to the tax authority in 8 days after the entry into the primary register or authority’s official record. The amount of tax advance payment may be changed during the year in cases when enterprise’s tax base in the current tax period differs from the tax base from the preceding tax period. The taxable person may request the change in writing at least 30 days before the maturity of instalment for advance tax payment. The application shall be enclosed with the tax return for the current tax period, tax base assessment of the current year and the data, which prove the tax base change.

The non-resident’s business unit also has the obligation as the payer of tax and it shall calculate, withhold and pay the tax on that income, from which withholding tax is paid. See 2. 2: Taxation with withholding tax for more detail on withholding tax in the detailed description of [Tax obligations of non-residents in Slovenia](http://www.fu.gov.si/davki_in_druge_dajatve/podrocja/mednarodno_obdavcenje/) on FURS website.

5.0 ATTRIBUTING PROFITS TO THE PERMANENT ESTABLISHMENT IN SLOVENIA

When the existence of permanent establishment is established in another contracting state and this means the fulfilment of the condition for taxation of profits of enterprise of contracting state in that another contracting state, the next question that needs reply to at definition of tax liability of permanent establishment is how much profits (if any) may be taxed in the source state. Article 7 of OECD Model Convention states the rules how is that part of enterprise’s profits established, which is attributed to the permanent establishment, which the enterprise has in another contracting state and is taxable in that other contracting state.

Non-residents’ income is taxed in Slovenia only if the source is here. Non-resident’s income achieved in or through a business unit of that non-resident has the source in Slovenia if the business unit is located in Slovenia.

Non-residents shall declare the profit in DDPO return for an individual tax period. They shall determine the tax base for DDPO return in accordance with the Slovene tax rules referred to in the ZDDPO-2 at taking into consideration Article 16 of the ZDDPO-2 through which the arm’s length principle is implemented into the Slovene legislation.

5.1 Attributing profits – national legislation (ZDDPO-2)

The base for attributing profits to a business unit of a foreign enterprise in Slovenia is at first [Corporate Income Tax Act – ZDDPO-2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4687), which in Article 11 defines the subject to taxation and in Article 12 the tax base. Article 16 of the ZDDPO-2 defines transfer pricing.

a) Article 11 of ZDDPO-2 (subject to taxation)

Subject to taxation shall be non-resident’s profit, earned by the performance of activities or business in or through a business unit located in Slovenia.

b) Article 12 of ZDDPO-2 (tax base)

(1) The tax base of a resident and non-resident in respect of activities or business performed either in or through a business unit in Slovenia shall be the profit established in accordance with the provisions of this Act.

(4) The profit of a non-resident's business unit in Slovenia shall be profit that can be attributed to that business unit. The profit that can be attributed to the business unit shall be the profit that can be expected to be earned by that business unit if it were an independent taxpayer performing the same or similar activity or business. Revenues earned by performing an activity or business in a non-resident’s business unit or through a non-resident’s business unit in Slovenia, and the actual costs which are incurred for the purposes of that business unit, including executive and general administrative costs, shall be attributed to that business unit whether incurred in Slovenia or elsewhere.

c) The arm’s length principle is implemented in Article 16 of the ZDDPO-2 (transfer pricing).

5.2 Attributing profits – international regulations

The following conventions and regulations are important international regulations for attributing **profits to the permanent** **establishment**:

* Article 7 of an individual concluded convention and Article 7 of OECD Model Convention
* Commentary to Articles 5 and 7 of OECD Model Convention on Income and on Capital, 2017
* OECD Report on Attribution on profits to permanent establishments; 2008, 2010.
* OECD Guidelines for transfer pricing, Paris 2017.

Article 7 of OECD Model Convention (Business profits) defines the manner of taxation of enterprises’ profits, which means that based on paragraph one of Article 7 the profits of an enterprise of a contracting state shall be taxable only in that state where the enterprise is located that is in the state where an enterprise is a resident unless the enterprise performs business in another contracting state through a permanent establishment. When an enterprise performs business in another contracting state through a permanent establishment, the profits of an enterprise, which are attributed to such permanent establishment, may be taxed in the state, where a permanent establishment is located, but only to the extent which is attributable to that permanent establishment.

Paragraph two of Article 7 of OECD Model Convention defines the basic rule for attribution of profits to a permanent establishment.

In the OECD Report on the attribution of profits to permanent establishments; 2008, 2010 a new approach has been approved for the attribution of profits that is AOA approach, based on which the wording was also changed of Article 7 of OECD Model Convention and its Commentary in 2010.

Authorised OECD Approach (AOA) is an officially recognised OECD approach that is a separate entity approach – an approach of an independent business entity.

Based on this approach the profits to be attributed to a permanent establishment are the profits for which it would have expected to be earned if a permanent establishment were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions and performing completely independent activities with the enterprise, whose permanent establishment is – arm’s length principle.

The starting point for establishing the profits of a permanent establishment is a functional analysis, risk analysis and use of funds, based on which a comparative analysis of PE transactions with transactions among independent enterprises may be performed.

The appropriate transfer pricing method is used for attributing profits to PE, for which it may be expected to have if it were a separated and independent enterprise, which performs the same or similar activities under the same or similar conditions, at taking into consideration the performed functions, used funds and accepted risks, which are accepted by an enterprise via PE and other parts of the enterprise.

The attribution of profit under AOAapproachis performed in two steps using OECD Report for attribution of profit to PE 2008, 2010[[7]](#footnote-8) and OECD guidelines for transfer pricing:

**The first step** includes a hypothetical delimitation of PE in the manner as if it were an independent enterprise. At this point the following items are taken into consideration: all performed business functions (transactions with independent as well as with dependent entities), funds used, accepted risks, capital[[8]](#footnote-9) is attributed and debt financing.The acknowledged internal operations are also taken into consideration, the so-called “dealings” – AOA approach is based on the comparison of operations between PE and the enterprise, a part of which it is, with comparable transactions among unrelated enterprises[[9]](#footnote-10).

**In the second step** the profit is defined, which belongs to PE in the manner as if it were an independent company. A comparability analysis is performed and the method is applied for transfer pricing with the purpose to attribute the profit to PE.

6.0 QUESTIONS & ANSWERS

Q 1: What does it mean that a foreign enterprise has a permanent establishment in Slovenia?

The non-resident’s income earned in the business unit of the non-resident in question or through the business unit of such non-resident has the source in Slovenia if the business unit is located in Slovenia. This means that the whole income or profit (active income and passive income) of a non-resident of Slovenia earned in the business unit or through a business unit of a non-resident in Slovenia has the source in Slovenia.

At tax treatment of a non-resident of Slovenia who performs his or her business activities in Slovenia two important facts should be established before imposing the obligation to pay tax on profit of the enterprise:



does a foreign enterprise has a business unit in Slovenia and

if the answer is yes, how much profit of non-resident’s business unit may be taxed in Slovenia.

Slovenia has concluded conventions with many countries for the avoidance of double taxation of income and capital (hereinafter: convention). Conventions eliminate double taxation of income and capital.

Where **Slovenia has a concluded convention**, the meeting of conditions for the existence of non-resident’s business unit in Slovenia is assessed in compliance with the provisions of the Slovene legislation as well as in compliance with the provisions of the convention. At this point the principle shall be taken into consideration that **the convention cannot establish the rights of taxation where they don’t exist in the domestic legislation.** This means that the contracting state, although the convention permits it, cannot establish the existence of non-resident’s business unit if there is no base for that in its legislation.

Q 2: How may be the tax on income of permanent establishment, which a resident of Slovenia has abroad and which is paid abroad, claimed in Slovenia?

An enterprise that is registered in Slovenia (state of residence), which has such business unit abroad, records all revenues and expenditures, created by its business unit abroad (state of source) in its books of account.

If the taxable person has already paid the tax on income abroad (in the state of source) due to operations of business unit, the rules on the elimination of double taxation in the Slovene tax legislation or relevant convention define that such person doesn’t pay the profit tax again in the state of residence. The elimination of double taxation is possible under one of the methods explained below.

**Method of exclusion (exemption)[[10]](#footnote-11)**

It works at the level of income and enables that revenues and expenditures of permanent establishment abroad are not included in the tax return for the tax on income of legal person at calculation of the tax base or tax liability because they have benn already taxed abroad.

The taxable person in the form of return for corporate income tax - DDPO records all realised revenues and expenditures, including those from the permanent establishment abroad. With exclusion of revenues and expenditures of permanent establishment the taxable person achieves that the amount of tax base realised abroad is not included in the calculation of tax liabilities in Slovenia. In addition to DDPO tax return the taxable person submits also supporting documents based on which the tax authority establishes taxable person’s entitlement to the above-mentioned benefit (e.g. supporting document, from which the amount of revenues or expenditures and the profit of business unit are clear, etc.).

In conventions the method of exclusion (exemption) with progression is used, which means that the income or capital of the taxable person, which in compliance with the convention may be taxed in the state of source (contracting state), shall not be taxed in the state of this person’s residence, but that state has a right to take such income or capital into consideration in defining tax on other income or capital of the taxable person.

**Method of deduction (credit)**

It works at the level of tax and enables that at calculation of tax base or tax liability in the corporate income tax return the revenues and expenditures are taken into consideration of permanent establishment abroad (the taxable person doesn’t exclude them), but the calculated obligation for tax payment in Slovenia may be decreased for the amount of deducted foreign tax, which the taxable person paid abroad in the manner and to the extent set by the Slovene national legislation or relevant convention. In addition to the calculation of permitted deduction on DDPO return the taxable person shall submit also a proof of charged and paid tax on profit of business unit, which is charged and paid under the tax legislation of the state, in which the permanent establishment operates.

Under the method of full deduction (credit) the state of recipient’s seat deducts the whole amount of tax, which was paid in another state. The valid conventions for the avoidance of double taxation don’t include the application of this method.

Under the method of regular deduction (credit) the state of recipient’s seat deducts only the amount of tax paid in the state of source, which is equal to the tax, which it would have assessed itself from the income earned in another state.

Q 3: What does the tied agent mean in the definition of permanent establishment under the convention for the avoidance of double taxation of income and capital?

The Model Convention states that in cases, when a person other than an agent with independent status operates on behalf of the enterprise in connection with any activities or transactions for the non-resident and at this point regularly concludes contracts or has the main role at the conclusion of contracts, which the non-resident systematically concludes without substantive changes it shall be deemed for that enterprise to have a permanent establishment in that state, unless the activities of that person are limited to those activities, which are defined as exceptions (preparatory and auxiliary activities).

See 3.2.3 – Tied agent for a detailed explanation of the definition of tied agent with taking MLI provisions into consideration.

Q 4: In which case it would be considered that the tied agent represents non-resident’s business unit under the convention?

The non-resident’s business unit within the meaning of tied agent may be presented in the following case. The agent has an authorization for the conclusion of contracts, where the agent agrees and receives an order (but without formally ending the business). The agent sends orders to the warehouse, from which the goods are delivered to the contracting party and where a foreign enterprise automatically confirms businesses.

The authorization for the conclusion of contracts **shall refer to contracts, which correspond the activities of enterprise.** So the activities of the person, who has the authorization to conclude contracts, which refer only to internal operations of enterprise, cannot be deemed as a permanent establishment (e.g. employment contracts, concluding subscriptions for telephone, Internet, etc.).

The person who is authorized for agreements on all elements and details of contracts, which are binding for the enterprise, shall be deemed to exercise powers for the conclusion of contracts in that state although the contract is signed by another person in the state, where the enterprise is established.

The fact that the person is present in the state or even participates in the negotiations between the enterprise and the client shall not mean that such persons exercise their powers in that state. But this represents an important circumstance at the definition of functions, which such persons perform for the enterprise.

See 3. 2. 3. – Tied agent for additional explanations as regards definitions.

Q 5: May the independent agent be deemed as non-resident’s business unit under the convention for the avoidance of double taxation of income and capital?

The Model Convention defines that it shall not be deemed that the enterprise has a permanent establishment in a contracting state only because it performs businesses in that state through an agent, a general commission agent or any other representative with the independent status under the condition that those persons perform their regular operations.

The agent **shall not be deemed** as non-resident’s permanent establishment if such person is **independent – legally and economically – from the non-resident**, and if such persons perform work **within their regular operations.**

If between the agent with independent status and non-resident **a dependent relationship** is established, then such agent **shall be deemed** as a non-resident’s permanent establishment. Dependency is shown in the fact that its activity is linked only to one company and the relations between the agent and the company differ from those, which exist between independent companies.

The criteria of legal and financial (in)dependence may be as follows:

Who bears the responsibility for possible loss (business risk), responsibility for results,



agent’s obligations towards the company: exclusiveness – this person is probably subject to company’s instructions and control (so such person cannot be deemed as independent anymore, although this doesn’t mean that such person is dependent, so each case should be considered separately),



dependence only on one source of income – number of clients represented,

operations based on and within powers provided to such person by the non-resident,

special skills of the agent, etc.

The criterion of (in)dependence may be also a share of revenues received by one or several companies.

An agent, who on his/her own behalf works for the non-resident within his/her activities, when such person operates completely or mainly on behalf of one or several non-residents, with whom such person is closely related, is considered as non-resident's business unit.

Additional explanations as regards the definition of independent agent in relation to the MLI is available under 3. 2. 3. – Independent agent.

Q 6: May collection of insurance premiums and risk insurance be deemed a permanent establishment?

In accordance with the definition of term »permanent establishment« referred to in paragraph one of Article 5 of OECD Model Convention (VK) the insurance company may be taxed in another contracting state in connection with operations in the insurance field if it has a fixed place of business in that contracting state (paragraph one of Article 5 of VK) or it manages operations through persons referred to in paragraph five of Article 5 of VK (tied agent) with taking exemptions into consideration referred to in paragraph four of Article 5 of VK.

Foreign insurance companies frequently don’t meet any of the conditions for the existence of permanent establishment referred to in Article 5 of VK and they perform a variety of services in another contracting state, but they don’t pay any tax in that other state. To avoid the situation described, before 2017 OECD Member Countries included special additional provisions in their conventions, which despite failure to meet the general conditions referred to in Article 5 defined the existence of permanent establishments of foreign insurance companies in another contracting state.

In convention Slovenia has concluded with India and Moldova a paragraph is added, which refers to the collection of insurance premiums and risk insurance on the territory of contracting state. The reason for the inclusion of such provision was that foreign insurance companies through agents in the state earn high profits without being taxed in that state because they didn’t meet the conditions for the existence of business unit based on other criteria.

Otherwise it should be noticed that in addition to provisions of convention (KIDO) the provisions of MLI, which amend/supplement Article 5 of an individual KIDO, shall also be taken into consideration in an individual case at the definition of existence of permanent establishment of foreign insurance company in Slovenia. The MLI narrows the interpretation of exceptions of permanent establishments in the convention because the term of a preparatory or auxiliary activity refers to all cases (indents) of paragraph four of Article 5 of the convention. At taking into consideration all facts and circumstances of the case it should be estimated whether the activity of insurance company in a certain place represents an essential and key part of activities of the company as a whole, which means higher probability of existence of permanent establishment. The permanent establishment doesn’t exist only in cases if all company’s activities in a certain state are of a preparatory or auxiliary character.

More explanations are available under 3. 2. 2. – Artificial avoidance of permanent establishment status with the application of exceptions for separately stated activities.

Q 7: May a subsidiary company be deemed as non-resident’s business unit under the convention?

The fact that the company, which is a resident of contracting state, controls the company, which is a resident of another contracting state or performs businesses in that other state (through the permanent establishment or in any other way) or is controlled by such company shall not mean that one of companies is a permanent establishment of the other.

The existence itself of the subsidiary company in the contracting state shall not mean that such company represents a permanent establishment of its parent company. The subsidiary company shall be deemed as an independent legal entity for tax purposes.

The subsidiary company may be deemed as a permanent establishment within the meaning of a tied agent where it has an authorization to conclude contracts on behalf of the parent company and it usually exercises such powers. The same is valid also for activities, which are performed by the subsidiary company for another subsidiary company of the same parent company. In such cases the existence of non-resident’s business unit is estimated under the criteria, which are valid for the tied agent.

Q 8: Are services taxed in Slovenia, which are for clients or final consumers in Slovenia performed by persons from EU Member States?

a) Where they are performed by a non-resident, who is a natural person

When natural persons from EU Member States earn income by performing services for clients or final consumers in Slovenia, such income may be taxed in Slovenia if the person fails to meet any of the following conditions (exceptions are activities of the entertainers or sportspersons, which are taxed in Slovenia if the performance is realized in Slovenia):

1. the recipient of income is a non-resident,

2. the person doesn’t perform the activity in Slovenia in or through the business unit and is present in Slovenia less than 183 days in any period of 12 months and

3. that is not income, from which withholding tax would be charged.

If the above-mentioned conditions are not fulfilled, the non-residents of Slovenia who perform independent activities on the territory of Slovenia are taxed in Slovenia on income earned through such activity in accordance with the Slovene legislation.

b) When they are performed by a non-resident, who is a legal person of foreign law

The income of non-resident, achieved in the business unit of that non-resident or through the business unit of that non-resident, has the source in Slovenia if the business unit is located in Slovenia, so it is also taxable. The legal person with no seat or other registered form in Slovenia and, who performs activities on the territory of Slovenia, shall be entered in the tax register. The application for entry into the tax register shall be submitted to the financial office, on the territory of which the activity will be performed, before the beginning of performing activities on the territory of Slovenia. The application for entry into the tax register is performed on DR04 form.

In accordance with the Slovene legislation the profit of non-resident’s business unit in Slovenia is defined as the profit, which may be attributed to that business unit. That profit may be attributed to the business unit, for which it may be expected for that business unit to have if it were an independent taxable person performing the same or similar activity or business. Revenues, which are achieved by performing activities or businesses in the business unit or through the business unit of non-resident in Slovenia and actual costs, which occur for purposes of that business unit, including management and general administrative costs, are attributed to that business unit if they occur in or outside Slovenia.

Such non-resident, who in Slovenia performs an activity through a business unit, is a person liable for corporate income tax and such person shall submit a tax return on income, which such person earns in the business unit or through the business unit in Slovenia.

c) International aspect of income taxation

At defining the right to taxation of »business profits« or »independent personal services« also provisions of conventions shall be taken into consideration if they are concluded between two contracting states.

The basic rule, which is included in conventions, defines that the profit of enterprise of contracting state is taxed only in enterprise’s state of residence, unless the enterprise performs operations in another contracting state through a permanent establishment. When such condition is met, the contracting state, where the business unit is located, may tax the profit of enterprise of another contracting state, but only so much profit as attributed to such permanent establishment.

A special article is included in certain convention on income related to independent personal services, which defines that the income, which is earned by a resident of contracting state by professional services or other independent activities, is taxed only in the state of residence of individual, except if the activity is performed via the permanent base, which is regularly available to that person in another contracting state. In such cases only such part of income may be taxed in that other state, to the extent which may be attributable to such permanent base.

Some conventions in this Article include also an additional criterion, in accordance with which the state, in which services are performed, may tax income on such services if an individual lives in such contracting state in total at least 183 days in the fiscal year.

d) Taxation with value added tax (VAT)

The instructions and explanations, which refer to the identification of taxable persons established in another state for purposes of VAT, meeting their obligations and claiming rights related to VAT are published on FURS website under [VAT](https://www.fu.gov.si/davki_in_druge_dajatve/podrocja/davek_na_dodano_vrednost_ddv/) section.

Q 9: How are business entities taxed, who are registered in Slovenia and perform services in EU Member States?

A resident is in accordance with the Slovene legislation taxed in accordance with the principle of worldwide income, which means that such person is liable for tax on all income types, which have their source in Slovenia and outside Slovenia. When a taxable person that is a resident of Slovenia performs an activity or business outside Slovenia, the operations of such persons may be considered under the domestic legislation of the host state as the business unit and that other state also taxes such persons. At establishing income or profits of such permanent establishment for tax purposes of host state the tax rules of host state and the rules of the relevant convention if it is concluded are taken into consideration and apply.

The permanent establishment is a part of the Slovene enterprise, which performs an activity abroad, but it is not registered abroad as an independent legal person under the national law of the contracting state. The enterprise registered in Slovenia (state of residence), which has such business unit abroad, records all revenues and expenditures in its books of account, which its business unit creates abroad (state of source).

In accordance with the rules of the national legislation or relevant convention the Slovene taxable person may avoid the double payment of tax on profits or income. If such persons have already paid tax on income abroad (in the state of source) due to operations of business unit, the Slovene tax legislation or relevant convention may enable that in the state of residence such persons don’t repay (again) the profit tax.

VAT aspect

At performing activities (supplies of goods and services) in other EU Member States taxable persons established in Slovenia shall take into consideration also VAT legislation of the state, in which they perform the activity. The place of taxation and possible identification for VAT purposes in another EU Member State depends on the type of activities (types of supplies of goods or services), which is performed by the taxable person, so the Slovene legal or natural persons shall at first check where the supply has been performed from the VAT point of view. The supply, which is considered as performed outside Slovenia (in another Member State), is not subject to the Slovene VAT.

At defining the place of supplies of goods or services all EU Member States shall take provisions into consideration referred to in the European legislation on the common system of value added tax, so the place of performing the actual supply (of goods or services), from the point of view of VAT, is set based on the Directive and legislation of the EU Member State, in which a certain supply is performed.

Q 10: Shall a foreign legal person notify a tax authority of the existence of PE in Slovenia and in which way?

A legal person, which has no seat or other registered form in Slovenia and performs activities on the territory of Slovenia, shall be entered into the tax register. The application for entry into the tax register is submitted to the financial office, on the territory of which the activity will be performed, which means before the beginning of performing activities on the territory of Slovenia and it is performed on DR-04 form (sole trader on DR-03 trader). A taxable person that is a non-resident shall precisely and with all due diligence accurately establish the potential existence of business unit in Slovenia. Inaccurate establishing of the existence of business unit can result in the non-compliance with tax liabilities in Slovenia.

Q 11: What should foreign companies or sole traders know at the entry into the tax register based on DR-03 and DR-04 forms?

A foreign enterprise or sole trader, who wants to perform an activity in Slovenia through a branch or otherwise, shall register its activity. Such person shall be entered into the register of taxpayers for tax purposes.

The activity, which is performed by non-residents in Slovenia, may represent the existence of non-resident’s business unit or permanent establishment in Slovenia. The income of such activity is taxed in Slovenia in accordance with the Slovene national tax legislation as well as with the relevant convention for the avoidance of double taxation of income and of capital.

A foreign enterprise is a person liable for tax in Slovenia only from income, which has its source in Slovenia. The income of a foreign enterprise that is a non-resident, which is achieved in the business unit or through a business unit of such non-resident, has its source in Slovenia if the business unit is located in Slovenia.

The non-resident’s business unit or permanent establishment is described in more detail under preceding points of this detailed description.

Slovenia will tax a part of non-resident’s income, which may be attributed to its business unit. The taxable attributed income of the enterprise or sole trader shall be declared to the tax authority in the tax return. Such income is defined based on the rules on transfer pricing and books of account, which shall be kept in compliance with the Slovene Accounting Standards and international standards for accounting reporting. Where the above-mentioned documentation is not prepared in the Slovene language, a foreign enterprise or sole trader shall upon request of the tax authorities provide a certified translation of the requested documentation. In special cases when the activities of non-resident’s business unit are of such character (e.g. marketing activities, such as researches of market, public opinion, marketing activity, etc.) that they don’t create their own income for the unit and income or profit is attributed to the unit based on the transfer pricing method, the business unit shall justify each entry in the tax return return based on the documentation enclosed, which in addition to the documentation on transfer pricing it shall include also books of account of the associated foreign company or sole trader, business documentation, contracts and other relevant documents.

The additional information as regards tax liabilities is explained under 4.2 of this detailed description.

Q 12: Shall a foreign enterprise, which performs the activity of production line assembly in Slovenia, register a branch (entry into the register of companies)?

The term of foreign enterprise’s branch in Slovenia is defined within provisions of economic and not tax law. A foreign enterprise may perform a profitable activity in Slovenia through branches, which are defined as units separated from the seat of company, which have no legal personality of their own, but they may perform all operations, which may be otherwise performed by the enterprise and are entered in the register of companies. As regards the fact that in EU Member States the principle is in force for the freedom of activities of companies, the establishing of branch is not a condition for performing activities in the hosting Member State, but the right. Companies established in the EU may perform such activity in Slovenia also directly and they are not obliged to established a branch in Slovenia for the purposes of providing the legal framework. This is not valid for companies with the seat from third countries (non-EU members). The establishing or registration of branch is for foreign enterprises from those states a condition that they may perform an activity in Slovenia.

Q 13: Is a branch, which in Slovenia performs the activity of production line assembly, liable for corporate income tax in Slovenia?

Where a branch performs the activity of production line assembly in Slovenia for more than 6 months[[11]](#footnote-12) (the condition that the construction site or project of construction or assembly is deemed as a business unit) and such project does not represent one of the exceptions, due to which the place of business would not be considered as a business unit, e.g. this would not be merely the performing of activities of an auxiliary or preparatory character for itself, such branch is then liable for corporate income tax in Slovenia. In this connection it shall submit a tax return on income, which it achieves in the business unit or through the business unit.

Q 14: How is the profit, which is earned in Slovenia by foreign airlines, taxed?

In cases where a foreign airline in Slovenia performs an activity through a non-resident’s business unit (e.g. that it has a registered branch), it has to declare a tax liability in Slovenia. But in cases where there is a convention concluded between the states, the provisions on the taxation of profit from shipping or air transport in the international transport shall be also taken into consideration in addition to the provisions on the permanent establishment and on taxation of profit of permanent establishment. They may define that the profit from performing of shipping or air transport in the international transport shall be taxed only in the contracting state, in which the seat is located of the actual management of the enterprise or international transport agency (in such case in a foreign state, in which the seat of airline is located). This means that they are used only for the profit, achieved from performing air transport in the international transport. The profit is the profit, which the enterprise achieves with the transport of passangers and goods, and the profit from auxiliary or support activities, which are closely connected with the direct performing of air transport in the international transport (the same rules are usually in force also for the international shipping). The income or profit from other business activities of the enterprise (e.g. if an airline performs also an activity of car renting, hotel services, etc.) shall be treated in accordance with the standard rules on the taxation of permanent establishment.

The taxable person that is a non-resident shall submit a tax return on income, which such person achieves with performing activities or business in the business unit or through the business unit of the non-resident in Slovenia and at this point such person may exclude the amount of income, which refers to the performing of air transport in the international transport, from the taxation based on the convention for the avoidance of double taxation. Such person shall enclose also the appropriate supporting documents on enterprise’s residence and statement on the seat of actual enterprise’s management with the return.

Q 15: May the home or home office represent a permanent establishment of a foreign enterprise?

The home office may under certain conditions represent a permanent establishment of a foreign enterprise.

For the first time it may be represented by a person who works at home if such person is deemed to be a tied agent for a foreign enterprise. In addition to the explanations on the tied agent, which you may find in answers to the preceding questions, it shall be emphasized that the tied agent may represent a permanent establishment also when formally such person doesn’t have an authorization for the conclusion of contracts on behalf of a foreign enterprise (non-resident), but it actually participates in negotiations on elements or details of the contract in such manner that they are binding for a foreign enterprise (e.g. when a foreign enterprise routinely confirms confirms the agreed contracts). Even if in such cases the contract would be signed formally by another person, it may still be deemed that the agent has actually had an authorization for the conclusion of contracts and at fulfilment of other conditions (the usual use of authorization within the main activity) it may represent a permanent establishment of a foreign enterprise on behalf of which it operates.

The home or home office may represent a permanent establishment of a foreign enterprise also as the place of business of a foreign enterprise if at this point certain criteria are met, which have been in practice identified in the following manner:

 regular or uninterrupted use of individual’s home (e.g. employee) at performing the work for a foreign company within the main activity of that enterprise,

 a clear request of an enterprise that an individual performs the work from home (which is clear from actual circumstances of a case, e.g. when an enterprise doesn’t provide an office to an individual at his or her disposal) or the provision of an office by a worker is a precondition for employment or performing the work,

covering costs for office materials and costs for maintaining the equipment used in the home office,



marking such office in the telephone directory within the enterprise, business cards with the address of home office with marks of the enterprise, etc.,



availability of the home office to other employees in the enterprise (e.g. visits or supervision of superiors at home), etc.



If individuals are not employed in a foreign company and they perform the main activity for a foreign enterprise from home (e. g. computer research-development activity), the existence of permanent establishment depends mainly from the extent to which the office at home is available to a foreign enterprise, which is assessed in accordance with the above-mentioned criteria depending on the circumstances of an individual case. At this point it should be also emphasized that the wording of conventions may differ from OECD Model Convention or the definition in the national legislation, so at establishing the existence of permanent establishment the wording of the actual convention, which is applied in a certain case, shall always be taken into consideration.

Q 16: In which way will the branch office, which will have two employees performing advertising marketing, but it will not issue invoices nor earn income in Slovenia, meet the tax liability in Slovenia?

The definition of non-resident’s business unit, which is liable for corporate income tax, especially includes mainly the following premises, where a foreign enterprise performs an activity in Slovenia: office, **branch**, factory, workshop, mine, quarry or any other place, where natural resources are obtained and extracted.

Notwithstanding the preceding paragraph, an exception is set for a situation if a foreign enterprise performs activities of a merely preparatory or auxiliary character for itself through a branch. Such activities will not represent a non-resident’s business unit, also when they otherwise meet other conditions for its existence (e.g. place of operations). The essential point at defining, which activities are of a preparatory or auxiliary character and which are not, is establishing whether they compose an essential or at least significant part of activities of an enterprise as a whole, which shall be established also in cases when a foreign enterprise only wishes to perform advertising of its services in Slovenia, where all facts and circumstances of an individual case shall be taken into consideration.

The tax base for tax of a non-resident for an activity or operations in or through the business unit in Slovenia is the profit, which may be assigned to that business unit. Also that profit may be assigned to the business unit, for which it would be expected to have as if it was an independent taxable person, which performs the same or similar activity or operations. At this point it is not important whether the business unit is actually independent and creates income or issues invoices (the business unit, which doesn’t earn its own revenues, may be called also »endowment« business unit), but it shall be treated as such merely for tax purposes or for the needs of attributing profits in accordance with the transfer pricing rules, which are based on the arm’s length principle. A foreign enterprise shall include the tax base of business unit established in this way into the corporate income tax return, which it shall submit to the tax authority in Slovenia. See 5. 2. – Attributing profits for more detail.

Q 17: Which are characteristic activities of the non-resident, which fulfil the condition of permanence within the meaning of time and place at establishing the existence of PE in Slovenia (e.g. sale of agricultural products, mobile shop)?

At definition of permanent establishment under provisions of conventions the condition of permanence shall be also taken into consideration, which means that the activity of non-resident shall not be only temporary.

In addition to the fixed place of business, at the level of permanence any operations are taken into consideration (on that fixed place), which is not of a temporary character or those are repeating activities, such as the sale of agricultural products, which the producers that are non-residents sell on stalls in Slovenia. Although due to the nature of those products (e.g. mandarin oranges, tomatoes, etc.) their sale is limited to the time period of only a few months (2 to 3) in the year or to seasonal component of non-resident’s activities, it shall be expected that the economically successful activitiy is repeated also in the future (or it has been already performed), due to which there is a significant probability of existence of permanent establishment.

Also at the mobile shop (e.g. the sale of fish in another contracting state) there is significant probability of existence of permanent establishment due to a repeating activity (and usually also a seasonal character), which represents permanence within the meaning of time and place (territorially concluded area, it is usually sold on the same locations).

Stalls on events usually due to low level of permanence (occasional character, it may be also on the same locations) do not represent non-resident’s permanent establishment.

Q 18: Is it possible to consider the performing of tourist activities (e.g. rafting, canyoning, biking, mountaineering) permanently or seasonally performed on the territory of Slovenia by non-residents with their own staff and such foreign company (non-resident) is not a tourist agency, as a non-resident's (permanent) business unit in Slovenia?

In connection with the performing of activities of non-residents on the territory of the Republic of Slovenia it is necessary to take the provisions into consideration of [the Companies Act (ZGD-1)](https://pisrs.si/pregledPredpisa?id=ZAKO4291) due to differences in conditions for performing activities on the territory of Slovenia for companies established in EU Member State and companies established outside the EU. Foreign companies established in EU Member State may perform activities or business (perform services to its buyers) in Slovenia directly, without the registration of a subsidiary or other legal form of organisation in Slovenia. Companies established outside the EU may perform activities in Slovenia directly via a subsidiary registered in another EU Member State or they shall register a subsidiary in Slovenia in accordance with the ZGD-1.

When defining a (permanent) establishment of a non-resident (foreign company) for purposes of taxing a non-resident with corporate income tax in Slovenia, it is necessary to take into consideration the provisions of the ZDDPO-2 as well as the provisions of the applicable tax treaty for the avoidance of double taxation between Slovenia and the country of residence of the foreign company if one has been concluded.

In accordance with Articles 6 and 7 of the ZDDPO-2, the basic condition for the existence of a non-resident business unit in Slovenia is the fact that the non-resident fully or partially performs an activity or business on the territory of Slovenia and that this activity or business does not constitute auxiliary activities of the company. Article 5 of the OECD Model Tax Convention adds a condition that the place of performing activities or business of a non-resident in the country of non-residence is of a continuous nature or permanent.

Foreign companies (non-residents) shall self-identify[[12]](#footnote-13) about the existence of (permanent) establishment of a non-resident for tax purposes in the state, in which they perform the activity (Slovenia), and in compliance with this the taxation rules shall be observed.

In cases of organisation and realisation of canyoning, mountaineering and other tourist services, which are performed on the territory of Slovenia by companies established in other Member States or outside the EU, other that tourist agencies, a foreign company that is a non-resident shall at first assess whether the activities on the territory of Slovenia are a substantial part of services, which it performs for its own buyers, or those activities are only auxiliary activities of the company, which are otherwise needed by the company for purposes of its business activities, but they are not essential for performing of the basis activities of the company. At activities taken into consideration on the territory of Slovenia (provision of services for customers consisting of the transport of tourists, payment for canyoning fees or for other activities for tourists, possible organisation of accommodation and other related services), the essential element of which is the exploitation of natural resources of Slovenia and without that element the foreign company would not be able to provide the services. This is the reason why those activities are performing of non-resident's basic activities, which fulfills the first condition for defining the business unit of a non-resident in Slovenia.

In the second step, the foreign provider of tourist activities shall assess whether the services on the territory of Slovenia are or will be provided permanently or continuously or this is only a one-time or occasional event. When assessing the continuity of the activity of a foreign company, it is necessary to take into consideration the nature of the activity itself, which means whether it is a seasonally conditioned activity or whether it is performed throughout the year, the duration of the implementation of an individual set of services, etc. The continuity of activities depends also on business decisions, such as the frequency of non-resident's performing activities in Slovenia and whether this will be that person's main or secondary activity, the size of share of revenues, which is achieved or planned from activities in Slovenia, etc. In case of a one-time or occasional event, the condition of continuity is not fulfilled and the activity of a foreign company in Slovenia will not represent a (permanent) establishment and taxation of a non-resident in Slovenia, while a recurring activity (e.g. frequency in a particular season or year, annual or multi-year seasonal activity in Slovenia) and/or achieving a significant share of revenues in a company achieved by activities in Slovenia, mean a highly probable existence of permanent establishment of non-resident in Slovenia and consequently tax obligations from company's activities.

The information about tax liabilities of companies which are non-residents of Slovenia, which have a (permanent) establishment in Slovenia, mainly as regards the obligations in connection with the submission of corporate income tax return, is published in detailed description [Taxation of foreign enterprises – non – residents in Slovenia.](https://www.fu.gov.si/en/taxes_and_other_duties/areas_of_work/international_taxation#c4655)

1. Companies are entered in the register of companies by courts in Slovenia. See: <https://www.fu.gov.si/poslovni_dogodki_podjetja/registracija_dejavnosti/> for more information on the registration of activities in Slovenia. [↑](#footnote-ref-2)
2. This is valid for fiscal periods from 1 January 2024 onwards. The time limit of 12 months is valid for fiscal periods up to and including 2023. [↑](#footnote-ref-3)
3. Form DR-03: Application for entry of activities of the natural person in the tax register [↑](#footnote-ref-4)
4. Form DR-04: Application for entry of legal persons in the tax register [↑](#footnote-ref-5)
5. In accordance with the Slovene legislation the non-resident's business unit and the non-resident are treated as related persons, for whom transfer pricing rules are in force. [↑](#footnote-ref-6)
6. The rate of corporate income tax is defined by a provision referred to in the ZDDPO-2. [↑](#footnote-ref-7)
7. OECD Report for attributing profits to PE 2008, 2010 defines the manner for establishing the level of attributing profits to permanent establishments, in accordance with paragraph two of Article 7 of the OECD Model Convention. [↑](#footnote-ref-8)
8. Free capital – wording of Article 7 (2010) defines the treatment of PE as a separated and independent enterprise, from which also having free capital at its disposal or that it will finance from capital as well from the debt is expected for its operations. Capital is attributed to PE in accordance with the arm's length principle (thin capitalisation rule – Article 32 of the ZDDPO-2). [↑](#footnote-ref-9)
9. Internal dealings – transactions between PE and the parent enterprise in another state. If the parent enterprise performs certain services, which refer to PE, it shall charge them in accordance with the arm's length principle under the transfer pricing methodology. [↑](#footnote-ref-10)
10. *At the moment this method is defined only by the convention for the avoidance of double convention concluded between Slovenia and Sweden.* [↑](#footnote-ref-11)
11. It is valid for fiscal years from 2024 onwards. The time limit of 12 months is valid for fiscal year up to and including 2023. [↑](#footnote-ref-12)
12. A foreign company that is a non-resident, which will perform activities in Slovenia, shall carefully consider the potential existence of a business unit in Slovenia. Incorrect conclusions as regards the existence of business unit can result in a failure to meet tax obligations in Slovenia. [↑](#footnote-ref-13)