

Permanent representations of non-residents in Ukraine: tax aspects

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Concepts and types of permanent representations of non-residents

On 1 January 2021, certain provisions of the Law of Ukraine "On amendments to the Tax Code of Ukraine to improve tax management, eliminate technical and logical inconsistencies in tax legislation" No. 466-IX dated 16 January 2020 (hereinafter – the "Law") come into force. Among other things, the law amended the legal status of permanent representations of non-residents in Ukraine.

Permanent representation is a permanent place of activity where a non-resident in Ukraine wholly or partly carries out the business. In particular, this involves the place of management; branch; office; factory; workshop; installation or construction for exploration of natural resources; mine, oil/gas well, quarry or any other place of extraction of natural resources; warehouse or premises used for delivery of goods, a server.

For tax purposes, the term "permanent representation" includes:

- a) Construction site, construction, assembly or installation facility, or related supervision activities. At the same time, the total duration of work related to such site, facility, or activity (within one project / related projects) performed by a non-resident through employees or other personnel hired by them for such purposes must exceed 12 months.

b) Provision of services by a non-resident (except for personnel services), including consulting services, through employees hired by them for such purposes. At the same time, such activities are carried out (within one project/project related to it) in Ukraine during the period/periods with the total duration of more than 183 days in any twelve months;

c) Persons who actually have and usually exercise the authority to negotiate the essential terms of transactions based on an agreement or other deed (resulting in conclusion of agreements/contracts without significant change of conditions by the non-resident) and/or enter into agreements/contracts on behalf of the non-resident. This activity must be carried out by a person in the interests, at the expense, and/or for the benefit of solely non-resident and/or related persons – non-residents.

d) Persons who actually have and usually exercise the authority to hold (store) stocks (goods) belonging to a non-resident based on an agreement or other deed, and from whose warehouse the supply of stocks (goods) on behalf of a non-resident is carried out. Exceptions are residents – holders of temporary storage or customs warehouses.

Features of permanent representations of non-residents

A non-exhaustive list of features of a permanent representation has been established as follows:

- provision of mandatory instructions by a non-resident (among other things, by means of electronic communication) and their implementation by a person;
- existence and use of corporate e-mail of a non-resident for communication with the non-resident and/or with third parties with whom the non-resident has concluded or will conclude agreements or other deeds;
- enforcement of the right to own or dispose of assets of a non-resident by a person in Ukraine based on relevant instructions of a non-resident;
- existence of premises leased by a person on their own behalf for storage of the non-resident's property to be transferred to third parties on the instructions of the non-resident, or for other purposes specified by the non-resident.

Representations that are not considered permanent

A representation is not considered permanent in case of:

- Performance of business by a non-resident through a resident intermediary within the framework of the main (ordinary) activity of the resident and under normal conditions.

Exception: if the resident intermediary acts exclusively or almost exclusively at the expense, in the interests and/or for the benefit of one or more non-residents who are related parties.

- Maintaining a permanent place of business solely for preparatory or ancillary activities to a non-resident.

Exception: if the activity is carried out by several non-resident related parties in a closely related business process, provided that such activities together run beyond the preparatory or ancillary activities for such a group of non-resident related parties. In this case, a representation is recognized as permanent for each such non-resident related party.

The obligation of non-residents to register with regulatory authorities

Non-residents operating in Ukraine through separate divisions, including permanent representations, are required to register with regulatory authorities.

Registration of a non-resident is carried out no later than the next working day from the date of receipt of the relevant application from the non-resident. The non-resident is obliged to apply to the regulatory authority at the location of the separate division within ten days after the separate division's accreditation (registration, legalization) on the territory of Ukraine.

Copies of the following documents (with a presentation of originals) shall be attached to the application:

- legalized statement from the relevant business register of the non-resident's registration country with a notarized translation into Ukrainian;
- a document confirming the identification (registration) number (code) of a non-resident in the country of their registration;
- a legalized document confirming the authority of a non-resident representative with a notarized translation into Ukrainian;
- a document on accreditation (registration, legalization) of a foreign company's separate division, an organization on the territory of Ukraine.

Simultaneously with the registration of a non-resident, the registration of a separate division of such a non-resident is carried out.

Taxation of income of non-residents

The amounts of income of non-residents operating in Ukraine through a permanent representation are taxable on general terms. In this case, such a permanent representation is equated for tax purposes to a taxpayer performing its business independently of such a non-resident.

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Permanent Representation determines the amount of taxable income received during the reporting (tax) period, following the arm's length principle.

The taxable income of a permanent representation must correspond to the income of an independent enterprise carrying on the same or similar activities in the same or similar conditions and acting in complete independence from the non-resident, for which it serves as the permanent representation.

Performing business activity without tax registration

In case of receiving information indicating that a non-resident performs business activity through a permanent representation on the territory of Ukraine, the regulatory authority carries out an unscheduled documentary inspection of such activity.

It should be noted that inspections of non-residents that perform business activities in Ukraine and should be registered, as well as of their separate divisions, including permanent representations, can be appointed from 1 July 2021.

If the inspection reveals that the non-resident starts and/or carries out business activity through a permanent representation in Ukraine without tax registration, administrative seizure of the taxpayer's property may be used as an exceptional way to ensure the taxpayer's performance.

Performance of business operations without tax registration by a non-resident through a separate division, including a permanent representation, entails a fine of UAH 100,000 on a non-resident.