

Interpretation Bulletin IT-177R2 — Permanent Establishment of a Corporation in a Province and of a Foreign Enterprise in Canada

Date: May 4, 1984

Reference: Subsection 124(1)(and Regulations 400 and 402)

This Bulletin replaces and cancels IT-177R dated October 20, 1975.

1. The term “permanent establishment” is defined in Regulation 400 in connection with the determination of “taxable income earned in the year in a province” for purposes of the deduction under section 124. The principles outlined below will also apply to foreign enterprises in Canada, subject to any special provisions where a tax treaty exists.

2. To determine if a corporation has a permanent establishment in a province, it is necessary to see if the corporation meets any of the criteria in Regulation 400. This will often involve questions of fact which must be answered by the circumstances of each case. An establishment in a province is not a “permanent establishment” as contemplated in the Regulations unless a business is connected with it. Ownership by the corporation of a farm, timber land, factory or a workshop does not constitute a permanent establishment unless it is used in the corporation's business. However, if a corporation otherwise has a permanent establishment in Canada and owns land in a province, such land is deemed to be a permanent establishment. In respect of a corporation which is a non-resident of Canada, it should be noted that the term “carrying on business in Canada” is given an extended meaning by section 253 of the Income Tax Act.

3. If a corporation has a fixed place of business in a province, it has a permanent establishment according to the regulation. A fixed place of business may include a place, plant or natural resource used in the day-to-day business of the corporation. It does not mean that the place of business must exist for a long time or be located in a durable building; for instance, a temporary field office on a construction site could be a fixed place of business. Examples of fixed places of business are set out in Regulation 400 but these are not exclusive nor are they absolute. A public warehouse that is used by a corporation, but that is neither owned by it nor under some measure of its control, does not constitute by itself a permanent establishment of that corporation. An office that is maintained and controlled by an employee of the corporation at the employee's choice and expense or an office that is maintained solely to purchase merchandise is not in itself deemed to be a permanent establishment of the corporation.

4. If a corporation does not have a fixed place of business in a province, it may still have a permanent establishment in the province if it satisfies any of the other criteria listed in Regulation 400. A corporation is deemed to have a permanent establishment in a particular place if it carries on business through an employee or agent established in that place with a general authority to contract on behalf of the corporation. The fact that a corporation has business dealings in a particular place through a commission agent, broker or other independent agent is not in itself enough to result in a permanent establishment. However, there is nothing in the law which excludes a commission agent, broker or other independent agent from the reference to an “agent” in the above-mentioned deeming rule; therefore, a permanent establishment could be deemed to exist under that rule where the corporation uses such an agent, depending on all the facts of the particular case.

5. A corporation will also be deemed to have a permanent establishment if an employee or agent, established in a particular place, has a stock of goods owned by the corporation from

which the employee or agent regularly fills orders. The orders may be received directly from the corporation or may come from the customers themselves. "Regularly" is taken to mean repeatedly according to an established pattern. A corporation which transacts all its business from a source outside the province through mail order and catalogue sales and does not have a stock of goods in the province will not usually have a permanent establishment in that province.

6. A corporation that uses substantial machinery or equipment in a particular place in a province will be deemed to have a permanent establishment in that province. The corporation need not own the machinery or equipment that it uses. The size, quantity and dollar value of machinery or equipment used in the particular place are some of the criteria to be considered in the determination of "substantial". A comparison of the total or type of machinery or equipment used by the corporation as a whole with that used in the particular place is not relevant. Another factor that may be taken into account in the determination is whether the said machinery or equipment contributes substantially to the generation of the gross income of the corporation earned at the particular place. The display or demonstration of machinery or equipment by an agent is not a use as contemplated by the Regulation. For taxation years that commence after 1980, a permanent establishment will not be considered to exist in a province solely by reason of the fact that a bus or truck traveled through that province.

7. It is a question of fact whether a rental operation constitutes the carrying on of a business in Canada or whether rents received constitute income from property. Generally, however, subject to the comments in the current version of IT-420, Non-Residents — Income Earned in Canada, rental income of a corporation will be considered to constitute income from a business. If a corporation has rental income from real estate that is income from a business, the corporation will have a permanent establishment wherever each rental property is located because each property will be considered a fixed place of business. If a corporation has rental income from other business operations, a permanent establishment for those operations may or may not exist in accordance with the rules discussed in this bulletin, depending on the facts of the case.

8. A corporation's subsidiary in a province or a subsidiary engaged in trade or business in a province does not in itself constitute a permanent establishment of the corporation. However, the subsidiary may be an agent of the corporation with general authority to contract on its behalf, in which case the corporation would be deemed to have a permanent establishment in the province (as described in 4 above).