



PRIMETAX GUIDE: PERMANENT ESTABLISHMENT CONCEPT IN TÜRKİYE

The concept of "residency" plays a crucial role in determining tax obligations in Türkiye. Turkish income tax law states that an individual or entity's residency status dictates their tax liability. Residents of Türkiye are subject to income taxation on their worldwide income, whereas non-residents are taxed only on income derived from Türkiye.

For corporate entities, those with a registered address or business headquarters in Türkiye (Resident Entities) are fully liable for taxes, meaning they must declare and pay taxes on their global corporate income. In contrast, corporate entities without a registered address or business headquarters in Türkiye (Non-Resident Entities) are subject to limited tax liability, taxed solely on income generated within Türkiye, as the Corporate Tax Law stipulates.

Article 3 of the Corporate Tax Law specifies that non-resident entities are taxed in Türkiye on Türkiye-sourced commercial income only if they have a fixed workplace (permanent establishment, PE) or a permanent representative within Türkiye, and the income is generated through this fixed workplace or representative. Thus, understanding the definitions of "fixed workplace" and "permanent representative" under Turkish tax law is essential.

A "fixed workplace" aligns with a permanent establishment (PE) concept in international tax terminology. While Article 156 of the Turkish Tax Procedural Code lists various types of workplaces rather than providing a precise definition, a fixed workplace can be described as any location designated for commercial or industrial activities.

Article 8 of the Income Tax Law defines a "permanent representative" as an individual authorised to conduct business transactions on behalf of a principal, whether continuously or intermittently, under a service/work contract or power of attorney. This includes commercial representatives, agents, and employees authorised to act for or represent the principal without additional requirements. Commercial representatives and agents or employees with such authority are considered permanent representatives without further conditions.

Additionally, double taxation treaties signed by Türkiye must be considered when determining whether a permanent establishment (PE) or permanent representative exists. These treaties typically align with local legislation, defining "permanent establishment" as a fixed place of business through which an enterprise's activities are either wholly or partially conducted. A "permanent representative" refers to an individual who regularly acts on behalf of an enterprise from another state, habitually concluding contracts or maintaining a stock of goods for regular delivery within the first state.

In some tax treaties, beyond the permanent establishment (PE) or fixed base criteria, the duration of the non-resident enterprise's presence in Türkiye is also considered. Specifically, if the non-resident service provider does not have a PE or fixed base in Türkiye but their services require a prolonged stay, the length of the provider's presence may be critical in determining Türkiye's right to tax. Thus, the provider's stay in Türkiye will be assessed based on whether it exceeds 6 months or 183 days or lasts longer than 183 days within any continuous 12-month period, calendar year, or fiscal year.

Under the tax treaties that Türkiye has signed, Türkiye's right to tax is based on three main factors:

- **Permanent Establishment or Fixed Base:** The activity is carried out through a Permanent Establishment (PE) or fixed base in Türkiye.
- **Length of Presence:** The non-resident service provider's presence in Türkiye lasts for a specified period, such as more than 6 months, 183 days, or over 183 days in a calendar year/fiscal year, or an uninterrupted period of 12 months.
- **Remuneration Paid in Türkiye:** The payment for services is made by a resident of Türkiye, on behalf of such a person, or through a Permanent Establishment/fixed base in Türkiye.

Unlike the OECD Model Tax Convention on Income and Capital, Turkish tax legislation does not define a minimum duration of presence for determining when a presence qualifies as a Permanent Establishment (PE). As such, the evaluation of a PE should be conducted on a case-by-case basis, considering the specifics of the situation, both from the perspective of local legislation and, if applicable, any relevant treaty.

Although Turkish law does not provide a comprehensive definition of a permanent establishment, the conditions for establishing a taxable presence in Türkiye can be inferred from various tax and commercial laws. Two primary tests determine whether a taxable presence exists: (a) the presence of a specific place of business used for business activities, or (b) the conduct of business through a permanent representative.

While there is no exhaustive definition of what constitutes a place of business, it may include a factory, office, branch, shop, warehouse, farm, vineyard, quarry, mine, hotel, home, or any other facility used for business purposes. The facility does not have to be exclusively for business use; evidence of business use can include the commencement of business activities or the facility being registered in the Trade Register.

A place of business is considered to be used by the taxpayer if the facility is available to them, either legally or de facto. Human presence is not required to qualify as a permanent establishment; even a fully automated business facility may be eligible. Turkish domestic law does not set a minimum duration for establishing a permanent business presence, though an element of permanency may be implied from various provisions.

A permanent representative can be any individual, employee or not, who acts as an intermediary in business transactions (intermediary agent) or is authorised to conclude contracts on behalf of the enterprise (dependent agent). Turkish tax authorities interpret the concept of permanent establishments broadly.

In a notable decision, the Council of State, the highest court in Türkiye's tax judicial system for ordinary appeals, recently ruled that websites can constitute a permanent establishment. In a surprising legal development, the court held that income generated in Türkiye by foreign companies offering online advertising services via their websites should be subject to taxation in Türkiye. This challenges the traditional view that a place of business must be a physical location, expanding the definition of a permanent establishment to include virtual entities.

The taxpayer has appealed to the Constitutional Court in response to this broad interpretation. While the Constitutional Court's opinion is awaited, the court is expected to rule the tax unconstitutional, given existing legal and constitutional frameworks. If the court rules in favor of the taxpayer, it could lead to a significant shift in how online services are taxed in Türkiye.

The Constitutional Court's ruling will offer a final constitutional evaluation of whether the current legal framework allows a website to be considered a place of business. This decision will set a precedent, potentially reshaping Turkish tax practices.
