

PERMANENT ESTABLISHMENT IN BELGIUM: BRANCH OR SUBSIDIARY?

DEFINITION OF A PERMANENT ESTABLISHMENT

A permanent establishment refers to a factual situation. A permanent establishment in Belgium in most cases has to be defined according to article 5 of the OECD Model Tax Convention: a fixed place of business through which the business of an enterprise is wholly or partly carried on.

For non OECD Convention situations the internal Belgian definition applies (article 229 WIB/CIR) which is similar. The scope however is broader and includes, e.g. building and construction sites > 30 days, storage facilities, stock of goods, etc.

DEFINITION AND MAIN DIFFERENCES BETWEEN A BRANCH AND A SUBSIDIARY

A subsidiary is a proper Belgian company, whereas a branch is not a legal corporate entity independent from the foreign company.

1. Advantages of establishing a branch

A branch is an extension of the foreign head office: it does not have its own shares or its own board of directors

- No minimum assigned capital required
- No intervention of a Belgian notary public required for the opening
- No requirement regarding the establishment of a board of directors (only a legal representative), the distribution of profits or the organization of shareholders' meetings
- A number of tax advantages, including:
 - No dividend withholding tax on branch profits
 - in most cases, losses made by the branch can be offset immediately against foreign profits of the head office
 - Transfers of profits from the Belgian branch to its foreign head office can be made tax free

Note: since a branch is not a separate legal entity, the liability from the branch extends to the head office.

2. Advantages of establishing a subsidiary

- The parent company is not exposed to any liabilities of the subsidiary: the liability of the Belgian subsidiary is limited to its own assets
- From a marketing viewpoint, a subsidiary will be regarded as a 100% Belgian/European company
- A number of tax advantages, including:
 - The ability to repatriate net profits with little or no dividend withholding tax
 - Advantages given under the double tax treaties concluded by Belgium
 - In most cases, qualification as a 'parent company' under the EU Parent-Subsidiary Directive
- Annual tax filing requirements are less stringent for subsidiaries than for branches. A branch's annual filing will reveal financial information about the foreign entity that it may prefer to keep confidential

TAX AND ACCOUNTING OBLIGATIONS

A subsidiary is a Belgian company, subject to Belgian corporate income tax.

A branch is a non-resident entity and is taxable on income derived through a permanent establishment in Belgium and income from immovable property in Belgium. However, double tax treaties usually contain specific provisions to define the scope of taxation.

The common corporate tax rate is 33,99%.

Both a subsidiary and a branch have to follow Belgian accounting rules and have to draw up financial statements including a balance sheet and a profit and loss account. In principle, Belgian companies with limited liability have to publish their financial statements. A branch will have to publish the financial statements of the head office, including the results from the branch.

REGISTRATION FORMALITIES

A branch must comply with following formalities:

- File a certified true copy of the head office's articles of association at the competent Commercial Court, an extract of its commercial register, the nomination of its directors and a statement by the company's executive board authorizing the establishment of the branch and indicating name and address of its official representative in Belgium. The documents need to be translated in Dutch, French, or German, depending on the region in which the branch is situated.
- Publish certain data of the head office and the Belgian branch office in the Belgian Official Gazette.

A subsidiary has to publish the articles of association in the Belgian Official Gazette.

Both a subsidiary and a branch have to register in the Crossroads Bank of Enterprises, obtain a company number (and VAT number) and join a social security fund.

STANDARD LEGAL OBLIGATIONS AND FORMALITIES FOR A BRANCH

A branch should annually:

- Deposit the annual accounts from the head office at the National Bank of Belgium
- File a non-resident corporate income tax return in which all results derived through the permanent establishment in Belgium and income from immovable property in Belgium has to be declared