

Income Tax

IMP. 12-1/R3 Establishment of a taxpayer
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Reference(s): *Taxation Act* (R.S.Q., c. I-3), ss. 12-16.2

This bulletin supersedes bulletin IMP. 12-1/R2 dated December 30, 1992.

This bulletin examines the various factors considered by the Ministère du Revenu in determining whether a taxpayer has an establishment in a jurisdiction for purposes of the application of the *Taxation Act* (TA).

APPLICATION OF THE ACT

GENERAL

1. Section 1 of the TA provides that the word “establishment” has the meaning assigned to it by sections 12 to 16.2 of the TA. These sections are therefore the sole source of the principles for determining whether a taxpayer has an establishment in a jurisdiction, be it Québec or any other.
2. In determining whether a taxpayer has an establishment in a jurisdiction, questions of fact often arise and must be resolved according to the circumstances in each case.

“ESTABLISHMENT” WITHIN THE MEANING OF THE FIRST PARAGRAPH OF SECTION 12

3. It is important to clearly understand what constitutes an establishment for purposes of the TA. Under the first paragraph of section 12 of the TA, an establishment is a fixed place where a taxpayer carries on the taxpayer’s business. The place must therefore be permanent or maintained for a significant amount of time, and used currently or regularly by the taxpayer in carrying on the taxpayer’s business. If there is no such fixed place, the taxpayer’s principal place of business is the taxpayer’s establishment. In the latter case, the taxpayer may have only one establishment.

4. It is inconceivable for such an establishment to exist in a particular place unless a business and business transactions are carried on in that place.

Thus, a place where only ancillary functions related to the business are carried out does not constitute an establishment. For example, an office where only the taxpayer’s bookkeeping is done

or accounts receivable are collected by the taxpayer is generally not an establishment, because, as a rule, the business is not carried on in that place by virtue of that fact alone.

5. To constitute an establishment, a place of business need not exist for a minimum amount of time. Any place where a taxpayer carries on a business in a stable manner, permanently or for a significant amount of time may constitute an establishment, even if the place is used for only a limited amount of time in a taxation year.

6. If a taxpayer has control over a place for an extended period, as the owner or as the lessee thereof under a lease covering a significant amount of time, and uses the place currently or regularly (even for as little as two to four weeks a year) in carrying on the taxpayer's business, the Ministère du Revenu considers the place to be, for the taxpayer, a "fixed place", that is, a place which is "permanent or maintained for a significant amount of time", where the taxpayer carries on the taxpayer's business. The place may therefore constitute an establishment of the taxpayer within the meaning of the first paragraph of section 12 of the TA.

7. If a taxpayer leases a place under a short-term lease (for example, for two to four weeks) and uses the place in carrying on the taxpayer's business only during the term of the lease, the Ministère du Revenu does not generally consider the place to be, for the taxpayer, a "fixed place", that is, a place which is "permanent or maintained for a significant amount of time", where the taxpayer carries on the taxpayer's business.

Even though under such circumstances a taxpayer may not have a "fixed place" where the taxpayer carries on the taxpayer's business, the place leased by the taxpayer may, however, constitute an establishment, within the meaning of the first paragraph of section 12 of the TA, if the place is "the taxpayer's principal place of business".

8. Before deciding whether a taxpayer with no fixed place or principal place of business has an establishment in a particular place, the possible application of the second paragraph of section 12 and sections 13 to 16.2 of the TA, which provide for certain cases in which a taxpayer is deemed to have an establishment in a particular place, must be considered.

9. The Ministère du Revenu considers that the sole purpose of the words "An establishment also includes", which appear in the second sentence of the first paragraph of section 12 of the TA, is to introduce a list of examples of certain fixed places or places where a taxpayer may carry on the taxpayer's business. The purpose of these words is not, therefore, to include in the definition of the term "establishment" an office, a branch, a mine, an oil or gas well, a farm, a timberland, a factory, a warehouse or a workshop that is not above all a fixed place or a place, in accordance with point 3 of this bulletin, where a taxpayer carries on the taxpayer's business. Furthermore, the list is not exhaustive and may also include, for example, a natural spring or any other fixed place, provided the place is used by the taxpayer in carrying on the taxpayer's business.

10. The place where a warehouse is situated does not, of itself, constitute an establishment within the meaning of the first paragraph of section 12 of the TA if merchandise is not sold there.

The site of an office, a warehouse or any other place maintained for the sole purpose of purchasing merchandise cannot be an establishment within the meaning of said paragraph solely because the taxpayer maintains the office, the warehouse or the other place for that purpose.

11. Where a taxpayer uses a warehouse or storehouse over which the taxpayer has no control, such as a public warehouse, the site of the warehouse or storehouse is not an establishment of the taxpayer solely because the taxpayer uses the warehouse or storehouse. In a case where a taxpayer uses stock stored in such a place to fill orders received, the place where the orders are filled, but not the warehouse itself, may constitute an establishment with the meaning of section 13 of the TA.

12. A taxpayer, including a trucking corporation, is not considered to have an establishment solely because the taxpayer leases space in a public warehouse or holds a transport permit for a particular jurisdiction.

13. Where orders are usually received in a showroom or salesroom over which the taxpayer has control, the place may constitute an establishment of the taxpayer.

14. A place designated as the head office of a corporation may constitute an establishment of the corporation, provided some business is done there.

15. For an office in the residence of a salesperson of a taxpayer to constitute an establishment of the taxpayer, business must be done there and at least one of the following criteria must be met to show that the place or location used is indeed that of the taxpayer:

- (a) The taxpayer pays the rent for the office or the direct expenses for the use thereof.
- (b) The contract entered into by the taxpayer and the salesperson provides that the salesperson must supply an office to the taxpayer.
- (c) The taxpayer reimburses the salesperson for the expenses arising from the office.
- (d) The office is located in a specific place that is fit up as an office, and the office equipment belongs to the taxpayer.

The following factors alone do not establish the existence of a fixed place or principal place of business for the taxpayer:

- (a) The taxpayer's name is in the telephone directory and the telephone number is assigned to a telephone situated in an office in the salesperson's residence.
- (b) A telephone answering service receives calls intended for the taxpayer.
- (c) There is office equipment in the residence of the salesperson of the taxpayer.

“ESTABLISHMENT” WITHIN THE MEANING OF THE SECOND PARAGRAPH OF SECTION 12

16. The application of the second paragraph of section 12 of the TA must be considered where an immovable is situated in Québec. This paragraph provides that a corporation has an establishment in each Canadian province where it owns an immovable used principally for the purpose of earning

or producing gross revenue that is rent. For further information in this regard, refer to the current version of bulletin IMP. 12-2.

ESTABLISHMENT DEEMED TO EXIST

17. As discussed in the points that follow, even though a taxpayer has no fixed place or principal place of business in a jurisdiction, the taxpayer may nevertheless be deemed to have an establishment in a particular jurisdiction.

EMPLOYEES, AGENTS OR MANDATARIES

18. Section 13 of the TA provides for one such case referred to in point 17 of this bulletin—that of a business carried on by a taxpayer through an employee, agent or mandatary.

19. Where a taxpayer carries on a business through an employee, agent or mandatary established in a particular place, the taxpayer is deemed to have an establishment in that place, provided one of the criteria referred to in points 21 and 23 of this bulletin is met.

20. Where the employee, agent or mandatary is not established in a particular place, the taxpayer is not deemed to have an establishment in that place solely because the taxpayer carries on the taxpayer's business through that employee, agent or mandatary.

21. Where the employee, agent or mandatary referred to in point 19 of this bulletin has general authority to enter into contracts on behalf of a taxpayer, the latter is deemed to have an establishment in the place where the employee, agent or mandatary is established.

22. An employee, agent or mandatary who has the authority to bind a taxpayer in most of the transactions the employee, agent or mandatary conducts and that routinely exercises such authority has general authority to contract for the taxpayer.

However, an employee, agent or mandatary does not have general authority to contract for a taxpayer where the latter grants the employee, agent or mandatary the authority to contract in only a few exceptional cases.

The fact that an employee, agent or mandatary is required to use a list of prices set by a taxpayer does not prevent the employee, agent or mandatary from having general authority to contract for the taxpayer. The same is true where, before entering into a contract, an employee, agent or mandatary is required to obtain from the taxpayer only credit approval in respect of a potential customer.

On the other hand, an employee, agent or mandatary who only receives orders for a taxpayer, which must generally be approved by the latter, does not have general authority to contract for the taxpayer.

An employee, agent or mandatary may have general authority to contract for a taxpayer with regard to one field of activity and not another. For example, a corporation that maintains and repairs property may grant its employee general authority to contract with regard to maintenance but not with regard to repairs.

23. Where the employee, agent or mandatary referred to in point 19 of this bulletin has a stock of merchandise, owned by a taxpayer, from which the employee, agent or mandatary regularly fills orders received by the employee, agent or mandatary, the taxpayer is deemed to have an establishment in the place where the employee, agent or mandatary is established, whether the orders come directly from the taxpayer or from customers.

Here the word “regularly” means “repeatedly”.

A stock of merchandise that is regularly used to fill orders received is sufficient for an establishment to be deemed to exist in the place where the employee, agent or mandatary is established, even if the merchandise is not located in a warehouse that is leased or owned by the taxpayer.

Where a taxpayer consigns merchandise directly to the premises of a customer, for example, and the employee, agent or mandatary may not dispose of it, the taxpayer cannot, by virtue of this fact, be deemed to have an establishment in those premises.

Where the employee, agent or mandatary holds merchandise as samples or solely for the purpose of display or demonstration, the taxpayer is not, by virtue of this fact alone, deemed to have an establishment.

LAND

24. Under section 14 of the TA, a corporation that has an establishment in Canada and is the owner of land in a province is deemed to have, with respect to such land, an establishment in that province.

The fact that a corporation owns land in a province, without having an establishment in Canada under any of the provisions of sections 12, 13 and 15 to 16.2 of the TA, is insufficient of itself for the corporation to be deemed to have an establishment in respect of the land.

The fact that a corporation temporarily holds timberland in Québec from which it draws cutting rights income is not sufficient for considering that the corporation has an establishment in Québec, unless the corporation otherwise has an establishment elsewhere in Canada and owns the land in question, its business is related to the timberland, or its activities include forestry or timberland operations or the sale of cutting rights.

The rule under section 14 of the TA applies with regard to both liability for tax and the computation of the portion of business carried on in a jurisdiction.

USE OF MACHINERY OR MATERIAL

25. Under section 15 of the TA, a taxpayer using substantial machinery or material in a particular place at a particular time is deemed to have an establishment in that place.

Such an establishment may be temporary.

In this case, the determination of the existence of an establishment is based on the quantity and type of property that a taxpayer uses in carrying on the taxpayer’s business. The quantity must be

substantial. This has nothing to do with the size or value of the property. The property must be material or machinery. However, the taxpayer need not own the property.

A vessel, whether small or large, is neither machinery nor an establishment.

The term “use”, in the case of property that is material or machinery, means a use for which the property was designed. Thus, displaying machinery or demonstrating what it does is not using the machinery. The same is true with respect to the leasing of machinery. In the latter case, the leased machinery does not constitute an establishment of the lessor since the lessor is not using it.

In certain fields of activity, such as construction, the use of a substantial quantity of machinery or material is generally obvious.

In other fields of activity, such as providing entertainment, a taxpayer who is resident in Canada may bring into or lease in a particular province, for use during the period of the taxpayer’s engagement in that province, a substantial quantity of such things as tents, carousels or other mechanical rides, booths, scenery, props and costumes, with the result that an establishment is deemed to exist in that province.

Where a taxpayer who carries on a trucking business travels through a jurisdiction, or loads or unloads goods there, that fact alone does not of itself mean that the taxpayer has an establishment in the jurisdiction.

INSURANCE CORPORATIONS

26. According to section 16 of the TA, an insurance corporation is deemed to have an establishment in each place where it is registered or holds a permit to carry on business.

An insurance corporation need not have an establishment in Québec for it to be liable for the tax on capital levied by Québec.

CORPORATIONS NOT RESIDENT IN CANADA

27. Under section 16.1 of the TA, a corporation that is not resident in Canada and that operates a mine, produces, processes, preserves, packs or builds goods or products, in whole or in part, or produces or presents a public show is deemed to have an establishment in the place, in Canada, where it carries on one or the other of these activities. This provision applies in respect of taxation years that begin after June 22, 1979.

Even if the corporation exports the property and subsequently sells it outside Canada, the corporation is deemed to have an establishment in the place in Canada because of the carrying on of one or the other of the activities referred to in the preceding paragraph.

SPORTS TEAM OR SPORTS CLUB

28. Where the taxpayer’s business consists in operating a sports team or sports club, section 16.1.1 of the TA limits the application of sections 15 and 16.1 of the TA to Québec. Thus, such a taxpayer cannot be deemed to have an establishment outside Québec by reason of sections 15 and 16.1 of the TA.

RELATED CORPORATIONS

29. The second paragraph of section 13 of the TA provides that a taxpayer is not deemed to have an establishment in a place solely because of the taxpayer's control over a subsidiary carrying on business in that place.

However, where the subsidiary has general authority to enter into contracts on behalf of its parent corporation, the latter is deemed to have an establishment in the place where the subsidiary is established.

Furthermore, if, in its office, a corporation only does the bookkeeping of a corporation related to it or collects accounts receivable of the related corporation, the latter does not, by virtue of that fact alone, have an establishment in that office.

MEMBERS OF A PARTNERSHIP

30. Under paragraph *m* of section 87 and paragraph *f* of section 600 of the TA, a taxpayer that is a member of a partnership in a taxation year must include, in computing the taxpayer's income for that year, the taxpayer's share of the partnership's income or loss arising from every source, whatever its location, for the partnership's taxation year that ends in that year.

According to paragraph *f* of section 600 of the TA, that share is the taxpayer's income or loss for the year from every such source.

It follows that where a partnership of which the taxpayer is a member carries on a business through an establishment situated in a jurisdiction, the taxpayer has, for purposes of the TA, business income or a business loss attributable to an establishment situated in that jurisdiction.