

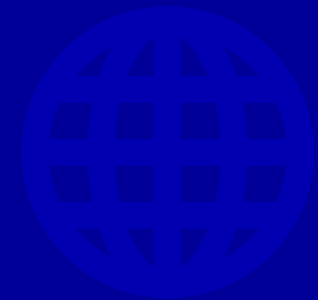
# Permanent Establishment Issues in Electronic Commerce

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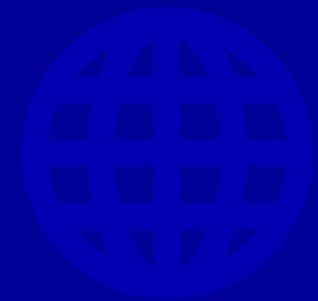
# Overview

- The concept of PE
- The application of PE concepts to electronic commerce
- The OECD approach
- The Singapore approach
- Profit allocation to a PE in electronic commerce
- Questions



# The concept of PE

- **OECD Model Tax Treaty**
  - **Allocation of right to tax business income**
  - **PE – defined in Article 5 of the OECD model treaty**
  - **Two possible forms of PE:**
    - **A fixed place of business**
    - **Carrying on business through a dependent agent**
  - **Theoretically, both are separate limbs**



## The concept of PE

- **A fixed place of business - examples**
  - **A place of management**
  - **A branch**
  - **An office**
  - **A factory**
- **Normally exclude the use of a place solely for storage, display, delivery, advertising, processing, or activities which are preparatory and auxiliary in nature.**



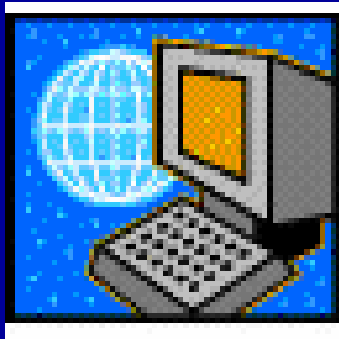
## Dependent Agent

- **Carrying on business through a dependent agent**
  - **Exclude the use of independent agent**
  - **Ordinary course of business**
  - **Financial independence**
  - **Legal independence**
  - **Habitually:**
    - **Conclude contracts on behalf of the non-resident**
    - **Fill orders from a stock of goods**

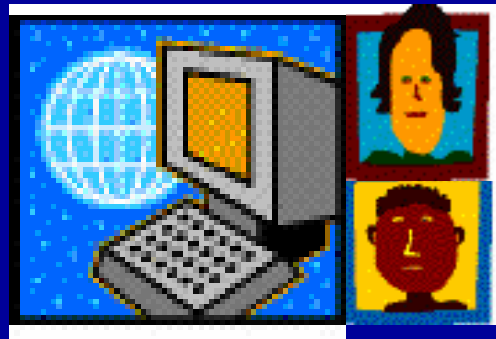


# Application of PE concepts to electronic commerce

Which of these is a PE?



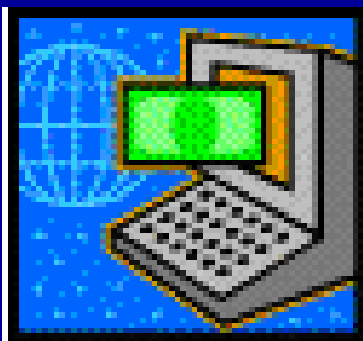
Your server



Your server w/your human



ISP server w/their humans



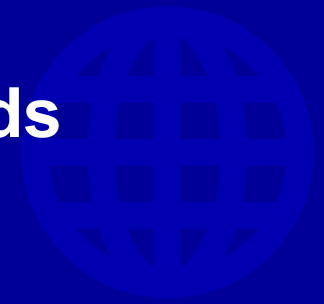
Your automated server ('vending machine')

Call Centre



# Application of PE concepts to electronic commerce

- **Characteristics of a electronic commerce business**
  - **Departure from traditional business concepts**
  - **No requirement for physical space, or employees**
  - **Contracts concluded through a server**
  - **Customers can be located anywhere in the world**
  - **Sometimes, no supply of physical goods**  
eg: search services, advisory services



## OECD Approach

- **Probably fall under the fixed place of business PE**
- **A PE requires some physical presence, so a website cannot, of itself, constitute a PE**
- **A server which is owned or at the disposal of an enterprise may constitute a PE if the enterprise carries on business through it.**





## OECD Approach

- Whether an enterprise is carrying on business through a server is a factual inquiry based on the business functions performed through the server, in the light of the nature of the business of the enterprise. Human intervention, however, is not essential for a PE to arise
- Use of ISP to provide services per se should not be regarded as a PE



## OECD Approach

- **Server not PE if it performs activities which are preparatory or auxiliary in nature**
- **Examples:**
  - **providing a telecommunications link between suppliers and customers;**
  - **advertising of goods and services;**
  - **relaying information through a mirror server;**
  - **gathering market data for the enterprise; and**
  - **supplying information.**



## The Singapore Approach

- IRAS issued several tax guides to illustrate how electronic commerce transactions will be taxed under Singapore law
  - Income Tax Guide on E-Commerce, 23 Feb 2001
- Looks predominantly at source of income, rather than PE issues
- Focus on where the primary business activity is carried out
- Question of fact and degree – look at the business model of each entity



## The Singapore Approach

- **The use of a web site or a server by an entity whose business activity is in Singapore in itself will not allow the entity to argue that the income is foreign sourced**
- **Conversely, the mere presence of a web site or a server of a foreign business will not result in the income being regarded as Singapore sourced**



# The Singapore Approach

- **Comments**
  - **Based on fixed factual scenarios**
  - **May not be easy to apply if there is a change in the factual scenario**
  - **“Business activity” or “business operations” test may not apply to every transaction**
  - **Classification of income from electronic commerce – withholding tax issues if income classified as royalty or technical services**



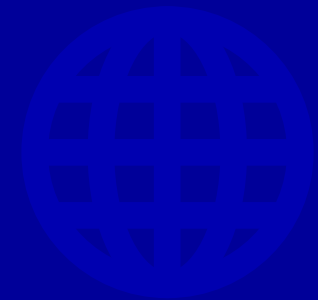
## Attribution of Profits to PE in Electronic Commerce

- How much profit is attributable to the PE?
- Profit Split method or other methods?
- Do you have regard to the degree of activity performed by the PE?



## **Attribution of Profits to PE in Electronic Commerce**

- **Some other issues relating to attribution of income to PE**
  - **Attribution of capital to PE**
  - **Attribution of business risk to PE**
  - **Attribution of ownership of intangible assets to PE**



# The End - Questions

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