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Project: MEMORANDUM on the Representative offices of a foreign company in Ukraine

In this memorandum, we will consider what representative offices of a foreign company are in Ukraine, the procedure for registering a representative office, consider the procedure for registering employees and the need for registration with regulatory authorities. In addition, in the article we will make analysis of the procedure for opening a representative office of a foreign company in Ukraine and choosing its type in order to determine the tax burden.

1. Types of representative offices of a foreign company in Ukraine

The current legislation of Ukraine distinguishes between two types of foreign representative offices that can be opened on the territory of Ukraine: **permanent representative** office and **non-permanent (non-commercial)** representative office. The type of representative office, in particular, determines the features of tax accounting and the tax burden on the representative office.

The Tax Code of Ukraine, namely clause 14.1.193, defines a permanent establishment as a permanent place of business through which a non-resident conducts business activities in Ukraine in whole or in part, in particular:

- place of management;
- affiliate;
- office;
- factory;
- workshop;
- a facility or structure for the exploration of natural resources;

- a mine, oil/gas well, quarry or any other place of extraction of natural resources;
- a warehouse or premises used for the delivery of goods, a server.

A permanent establishment acts as a branch, a unit that sells goods or provides services, or does so simultaneously, on behalf of the main company and makes a profit. The activities of a permanent establishment may be similar to those of the parent company or may differ from them, but the defining characteristic of a permanent establishment is making a profit.

The current legislation does not contain the term non-permanent or non-commercial representation.

Clause 14.1.193 of Clause 14.1. Article 14 of the Tax Code of Ukraine stipulates that a permanent establishment is not:

- use of buildings or structures exclusively for the purpose of storing, displaying goods or products belonging to a non-resident;
- storage of stocks (goods or products) belonging to a non-resident solely for the purpose of storage or demonstration;
- storage of stocks (goods or products) belonging to a non-resident solely for the purpose of processing by another enterprise;
- maintenance of a permanent place of business solely for the purpose of purchasing goods or products or for collecting information for a non-resident;
- placing individuals at the disposal of individuals within the framework of the implementation of personnel service agreements;
- maintenance of a fixed place of business for another purpose.

A non-commercial representative office is a representative office that performs a representative and auxiliary function and does not carry out activities that are the main ones for the parent company. Representative and auxiliary activities may be related to storage, demonstration, purchase or delivery of goods, collection of information, informing about the activities of the parent company and other activities that will help the main company conduct its business, but will not duplicate it.

Therefore, we can conclude that a representative office is recognized as non-permanent or non-commercial in cases where it provides services only to the parent company, does not conduct business activities with third parties, and does not aim to make a profit.

2. Characteristics determining the type of representative office and the consequences of the tax service recognizing the activities of the representative office as meeting the characteristics of a “permanent establishment”

The State Tax Service determines the key characteristics by which it can classify the conduct of activities in the form of a permanent establishment. These characteristics are:

- receipt or non-receipt of income as a result of carrying out activities on the territory of Ukraine;
- provision by the parent company of mandatory instructions (including by electronic means or by transferring electronic media) and their execution by an authorized person of the representative office;

- the authorized person has a representative office and uses the corporate email address of the parent company to communicate with it or with third parties with whom the company has already concluded or will conclude contracts or other transactions in the future;
- the exercise by the representative of the right to own or dispose of stocks (goods) or other assets of the parent company in Ukraine or a significant part thereof on the basis of relevant instructions from the parent company;
- the presence of premises rented by the individual in his/her own name for the storage of property purchased at the expense of the parent company or which belongs to a non-resident and is subject to transfer to third parties at the direction of the parent company.
- carrying out activities carried out by the parent company.

The list of signs is not exclusive, therefore, the conduct of activities in the form of a permanent establishment may also be characterized by other markers, depending on the type and nature of the activity, the procedure for receiving funds, the sale of property, etc.

In addition, before registering a representative office in Ukraine, it is important to familiarize yourself with international treaties between Ukraine and the country in which the parent company is registered. Such treaties may establish other characteristics than those established by the legislation of Ukraine, which define a representative office as “permanent”. And if an international treaty establishes other rules than those provided for, for example, by the Tax Code of Ukraine, the rules of the international treaty shall apply.

If a representative office of a foreign company was registered and operates as a non-profit organization, but as a result of a tax audit by the tax service, it was determined that the specified representative office has the characteristics of a permanent representative office, the tax service will additionally charge income tax liabilities. In addition, financing of the parent company of its representative office will be recognized as income of such a representative office, from which it will also be necessary to pay the appropriate tax. As a result, tax notices and decisions will be sent to the address of the representative office of the foreign company and further collection of the tax debt will be carried out.

Therefore, before registering a representative office of a foreign company, it is necessary to determine the purpose of the representative office, types of activities, and the procedure for carrying out activities, which will help to choose the type of representative office and avoid undesirable consequences in the form of fines from tax authorities.

3. State registration of branches and representative offices of foreign companies in Ukraine

Registration of representative offices and branches of foreign entities is carried out by state registrars.

For state registration of the establishment of branches and representative offices of foreign companies, the following documents will need to be submitted to the state registrar:

- application for state registration of the creation of a separate unit (branch or representative office);

- a decision of a foreign legal entity to establish a separate subdivision, which must contain information about the name of the separate subdivision, its location, the head (in particular, last name, first name, patronymic (if any) and the date of commencement of powers), information about the approval of the regulations or other constituent document of the separate subdivision;
- decision of the National Bank of Ukraine on accreditation - in the case of state registration of a separate division of a foreign bank;
- a document confirming the registration of a foreign legal entity in the country of its location (extract from the trade, banking, court register);
- the ownership structure of the foreign legal entity, as well as documents regarding the identity of the ultimate beneficial owner. In the absence of the ultimate beneficial owner of the legal entity, a note shall be made to the application for state registration indicating a justified reason for his absence;
- a copy of the document certifying the identity and confirming the citizenship (nationality) of the person who is the ultimate beneficial owner of the legal entity;
- regulations or other constituent document of a separate subdivision of a legal entity, set out in writing, filed, numbered and signed by an authorized person of the relevant legal entity;
- a document confirming payment of the administrative fee (1 subsistence minimum for able-bodied persons, currently 3,028 hryvnias, or 75 US dollars).

The term for consideration of documents for registration of separate divisions in Ukraine is 5 working days. Only specially designated entities of primary financial monitoring who carry out their activities individually (notaries, lawyers, auditors) can be representatives for submitting documents for registration.

Conclusion

Before opening a representative office in Ukraine, it is important to clearly understand the purpose of its work, what activities it will carry out, and how these activities will be organized. This makes it possible to choose the correct type of representative office and avoid the risk that the tax authorities may later classify it as a permanent establishment. Correct registration, proper preparation of documents, and following the rules of Ukrainian legislation will help the representative office work lawfully and without unnecessary tax issues.

*Sincerely,
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