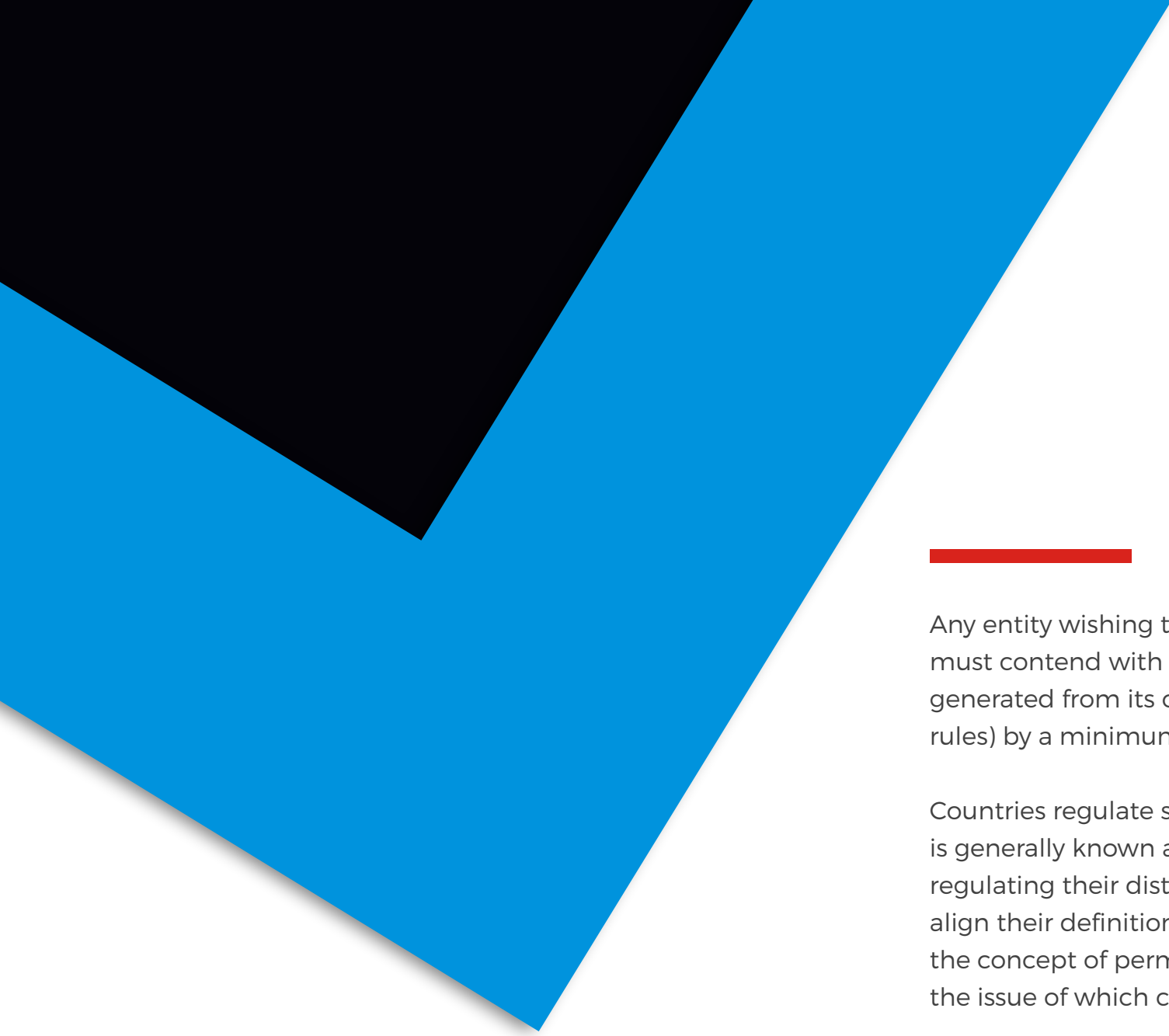


# Permanent Establishment and its Operation

under the **Ghanaian Income Tax  
Act 2015, Act 896**



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Any entity wishing to conduct cross-border business must contend with the issue of how any income generated from its operations will be taxed (distributive rules) by a minimum of two countries.

Countries regulate such distributive rights through what is generally known as Double Tax Agreements (DTAs). In regulating their distributive rights, many countries closely align their definition of significant business activities with the concept of permanent establishment. This resolves the issue of which country gets to tax what income.

# What is a Permanent Establishment (PE)?

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Article 5 of the OECD Model Tax Convention defines a Permanent Establishment (PE) as a “fixed place of business through which the business of an enterprise is wholly or partly carried on”

Any activity carried out by a business in a country that results in revenue being generated or value created is likely to be deemed by local tax authorities as resulting from acts of a permanent establishment. Local tax authorities will in turn assess corporate tax on deemed revenue arising in-country. In most countries, to recognize a PE, or a taxable presence, the revenue-generating entity needs to be formally registered under some type of corporate identity, typically a branch, representative office, or subsidiary.

In any given country, PE is determined by application of the local PE laws and any relevant double tax treaties entered by that country.

PE determination is a notoriously grey area, but some tests are commonly used by tax authorities when determining whether a PE exists due to the activities of a foreign entity. While such tests vary by country, the following are indicators of a PE.

- ❑ An entity operates out of a fixed place of business in the host country. This may include not only a formal office but also in some situations an employee’s home office.
- ❑ An entity’s employee in the host country receives sales-related compensation such as commissions or bonuses.
- ❑ An employee’s job title or description indicates that he or she performs activities related to revenue generation or sales, and that employee operates in the host country for a prolonged period.
- ❑ Sales are made to customers based in the host country and local contracts are negotiated by a locally-based employee or dependent agent. Note that even though the employee or agent may not have the authority to conclude contracts, if he or she is deemed substantially involved in negotiating the terms of the contract, a PE may be deemed to exist.

Here are some examples of situations that could trigger permanent establishment in a host country:

- Your company sends a technician to another country to conduct software installation and maintenance services over a prolonged period to service a new client. Local authorities may deem that the technical services you provide in the target country triggers a PE, since revenue can be attributed to those services.
- You hire a client liaison manager to work in the host country, assuming such a position can't be linked to revenue generation and therefore won't trigger a PE. Tax authorities may deem these kinds of "relationship-building" activities as directly contributing to overall revenue generation. Your client liaison manager, therefore, may serve as one indicator to local tax authorities that your company has triggered a PE.

A PE will generally not be deemed to exist where the activity performed is preparatory or auxiliary in nature; in other words, if it does not form an essential part of the business. In practice, it is the responsibility of the taxpayer to prove that the local activities are preparatory or auxiliary and therefore do not trigger a PE.

Businesses should note that PE laws are changing in virtually all countries, and it is increasingly difficult to apply this and other exemptions.

# Permanent Establishment under Ghanaian Local Jurisdiction

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The Ghanaian Income Tax Act 2015, Act 896 draws heavily on International best practices in defining a PE.

Section 110 of the Act stipulates activities that could trigger a PE as including:

- A place in the country where a non-resident person carries on business or that is at the disposal of the person for that purpose;
- A place in the country where a person has, is using or is installing substantial equipment or substantial machinery; and



- A place in the country where a person is engaged in a construction, assembly or installation project for ninety days or more including a place where a person is conducting supervisory activities in relation to that project;
- The provision of services in the country
- A place in the country where an agent performs any functions on behalf of the business of the non-resident person

## In Summary

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If you are considering establishing any business in Ghana, you need to be careful that your business structure does not unwittingly trigger a permanent establishment. Seek professional help to understand the tax laws and protect your business from PE-related risk.

