

LB&I International Practice Service Transaction Unit

Shelf		Cross-Over		
Volume	16	Treaties	UIL Code	9450
Part	16.6	Determination of Permanent Establishment Status	Level 2 UIL	9450.06
Chapter	16.6.2	Fixed Place of Business	Level 3 UIL	N/A
Sub-Chapter	N/A	Seconded Employees		

Unit Name	Creation of a Permanent Establishment (PE) through the Activities of Seconded Employees in the United States
------------------	--------------------------------------------------------------------------------------------------------------

Document Control Number (DCN)	TRE/9450.06_02(2014)
Date of Last Update	09/03/14

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Table of Contents

(View this PowerPoint in “Presentation View” to click on the links below)

General Overview

- [Issue and Transaction Overview](#)
- [Transaction and Fact Pattern](#)

[Summary of Potential Issues](#)

[Audit Steps](#)

[Training and Additional Resources](#)

[Glossary of Terms and Acronyms](#)

[Index of Related Issues](#)

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue and Transaction Overview

Creation of a PE through the Activities of Seconded Employees in the United States

Background: Under the Internal Revenue Code, a foreign company that carries on a trade or business in the United States is subject to tax at the same progressive rates as U.S. corporations, but only with respect to income effectively connected with its U.S. trade or business. However, if the foreign company elects to be taxed under the provisions of an applicable U.S. income tax treaty, it will generally only be subject to U.S. tax on its profits attributable to a U.S. permanent establishment. In general, the nature and amount of activities that would lead to a foreign company being engaged in a U.S. trade or business are broader than those that would create a U.S. permanent establishment.

Permanent Establishment Concept in U.S. Income Tax Treaties: In general, U.S. income tax treaties define a U.S. permanent establishment to include a fixed place of business in the United States through which the foreign enterprise carries on its business. However, a foreign enterprise will not be deemed to have a U.S. permanent establishment if its activities in the United States are limited to certain activities -- generally those of a preparatory or auxiliary nature. A separate IPS unit covers this exception.

A foreign enterprise will also be considered to have a U.S. permanent establishment in respect of activities undertaken on its behalf by a dependent agent who has and habitually exercises in the United States an authority to conclude contracts that are binding on the foreign enterprise. A foreign enterprise will not be deemed to have a permanent establishment in the United States merely because it carries on business in the United States through a broker, general commission agent, or any other agent of an independent status, provided that such person is acting in the ordinary course of his business as an independent agent. A separate unit covers how to determine whether a U.S. permanent establishment is created through the activities of a dependent agent.

Permanent Establishment Concept in U.S.-U.K. Income Tax Treaty: This IPS unit examines whether a U.K. company has a U.S. permanent establishment as a result of the secondment of its employees to its U.S. affiliate. Article 5(1) of the U.S.-U.K. Income Tax Treaty provides: The term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Therefore, under paragraph 1 of Article 5 (Permanent Establishment) of the U.S.-U.K. Income Tax Treaty, a U.K. company has a U.S. permanent establishment if it carries on business through a fixed place of business in the United States. As noted above, there is an exception when the activities of the U.K. company are limited to specified activities listed in the treaty.

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue and Transaction Overview (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

If the U.K. company has a U.S. permanent establishment, the next step is to determine the profits attributable to such permanent establishment under Article 7 (Business Profits) of the U.S.-U.K. Income Tax Treaty. A separate IPS unit covers the attribution of profits to a permanent establishment.

Caveats and Explanations: *Eligibility for Treaty Benefits:* This IPS unit assumes that the U.K. company qualifies for the benefits of the U.S.-U.K. Income Tax Treaty. The residence article and the limitation on benefits article of U.S. income tax treaties are covered in other IPS units.

Appropriate U.S. Treaty: Remember that every U.S. income tax treaty is different. Although this IPS unit addresses the meaning of permanent establishment found in the U.S.-U.K. Income Tax Treaty, the test in the treaty you are applying might differ. Therefore, in every case involving a tax treaty, you should carefully review the permanent establishment article and any other applicable articles in the treaty, and any contemporaneous or subsequent protocol(s), memoranda of understanding, or exchange(s) of notes between the treaty countries, to determine if treaty benefits should be granted. In addition, more interpretive guidance may be found in the Treasury Department's Technical Explanation of the treaty/protocol, as well as the Joint Committee on Taxation Report, the Senate Foreign Relations Committee Report, authoritative case law, and guidance issued by the IRS.

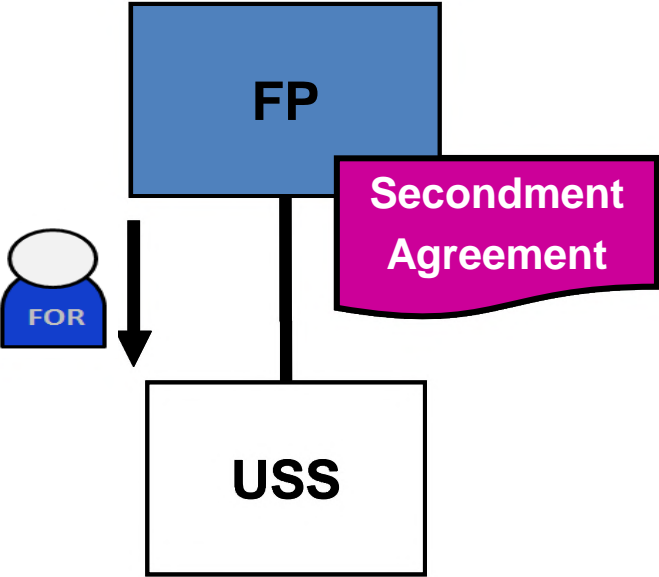
Technical Explanation and OECD Model: This IPS unit refers to the Technical Explanation to the U.S.-U.K. Income Tax Treaty and the Commentaries on the Organization for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital (OECD Model). A separate IPS unit on treaty interpretation explains the importance of Technical Explanations and the Commentaries on the OECD Model in developing cases.

Issue Ordering: The ordering of the issues in this unit may not be appropriate for every fact pattern. A foreign corporation must satisfy all aspects of Article 5(1) for there to be a U.S. permanent establishment.

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Transaction and Fact Pattern

Creation of a PE through the Activities of Seconded Employees in the United States

Diagram of Transaction	Facts
 <p>The diagram illustrates the transaction structure. At the top is a blue rectangular box labeled 'FP'. Below it is a white rectangular box labeled 'USS'. A vertical black line connects the bottom of the 'FP' box to the top of the 'USS' box. A pink, ribbon-like banner with the text 'Secondment Agreement' is positioned over the middle of this vertical line. To the left of the 'FP' box is a blue icon of a person wearing a blue shirt with 'FOR' written on it. A black arrow points downwards from the 'FOR' icon towards the 'USS' box.</p>	<ul style="list-style-type: none"> ▪ FP is a U.K.* resident company that runs an international hotel business through both owned and franchised hotels. ▪ In 200X, FP acquired USS, a U.S. corporation. USS owns and operates U.S. hotels. ▪ FP wholly owns USS. ▪ USS is FP's U.S. headquarters and its base for running its business in the United States. ▪ FP seconds** employees to USS to train USS employees and franchise owners. <p>* If FP were a Canadian corporation, it would be necessary to consider whether FP had a U.S. permanent establishment as a result of services performed by FP in the United States under para. 9 of Article 5 (Permanent Establishment) of the U.S.-Canada Income Tax Treaty. See separate IPS unit for an explanation of this rule and for the applicable treaties (including Canada and India).</p> <p>** A secondment arrangement is an arrangement where one legal entity transfers its employees to work for a related or unrelated legal entity in another country for a specified period of time.</p>

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Summary of Potential Issues

Creation of a PE through the Activities of Seconded Employees in the United States

<u>Issue 1</u>	Do the seconded employees carry on the business as employees of FP or USS?
<u>Issue 2</u>	Is there a “place of business” in the United States through which the FP employees operate?
<u>Issue 3</u>	Is the U.S. place of business “fixed”?

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?

Fact Element	Resources	6103 Protected Resources
<p>To identify whether FP has an unreported U.S. permanent establishment under Article 5(1), look for the following:</p> <ul style="list-style-type: none"> ▪ FP may file a Form 1120-F with a Form 8833 and claim that it does not have a U.S. permanent establishment, but FP indicates on p.1, part D of Form 1120-F that it maintains a place of business in the United States. ▪ USS may attach the Form 5472 to its Form 1120, and the Form 5472 may indicate that FP has a U.S. permanent establishment (e.g., in Part II, the foreign shareholder indicates that its business is conducted principally in the United States). ▪ FP's financial statement notes and the Management, Discussion & Analysis may state or indicate that FP carries on business through its employees in the United States. 	<ul style="list-style-type: none"> ▪ FP's Form 1120-F, U.S. Income Tax Return of a Foreign Corporation ▪ FP's Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b) (Attached to FP's Form 1120-F) ▪ USS's Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business ▪ Request and/or review relevant Taxpayer financial statements (FP financial statements, USS financial statements). Many times financial statements can be found on the Investor / Shareholder page of a company's website. 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?


Fact Element	Resources	6103 Protected Resources
<p>To identify whether FP has an unreported U.S. permanent establishment under Article 5(1), look for the following (Continued):</p> <ul style="list-style-type: none"> Internet research may reveal that FP carries on business through a fixed place of business in the United States. Organizational charts by business unit, legal entity, department, division, and branch might indicate potential fixed places of business in the United States. 	<ul style="list-style-type: none"> Request and/or review relevant organizational charts Internet (e.g., Westlaw, Accurint, Bureau van Dijk, Dun & Bradstreet, EDGAR, Other search engines) IRS Internal Research Tools (Information Document Retrieval System (IDRS), Y-K1, LB&I Imaging Network (LIN), Governmental Liaison) Sample IDR for U.S. Trade or Business Case Audit Steps for Permanent Establishments Recommended Procedures for 1120-F 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?


Fact Element	Resources	6103 Protected Resources
<p> CONSULTATION. You might determine that FP does not have a permanent establishment either because i) FP does not have a fixed place of business in the U.S. through which the business of FP is wholly or partly carried on; or ii) FP does not have a dependent agent who has and habitually exercises its authority to conclude contracts on behalf of FP. However, certain U.S. source income that FP receives from USS may be subject to U.S. withholding tax under the Internal Revenue Code.</p> <p>Request USS's Form 1042-S to determine whether USS has withheld U.S. income tax on payments to FP. Consult with the Repatriation/Withholding IPN to determine whether it is more appropriate to pursue a case with respect to U.S. withholding, as opposed to a permanent establishment case.</p>	<ul style="list-style-type: none"> ▪ USS's Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding ▪ IPS units on FDAP payments 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?


Fact Element	Resources	6103 Protected Resources
 <p>CONSULTATION. Similarly, consult with the Income Shifting IPN to decide, based on the amount of income reported on USS's Form 5472, and other initial research, e.g., transfer pricing documentation, whether the matter is primarily related to the appropriate transfer price for transactions between related parties as opposed to a permanent establishment issue.</p>	<ul style="list-style-type: none"> ▪ USS's transfer pricing documentation ▪ USS's Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business ▪ IPS units on Inbound Income Shifting 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?


Fact Element	Resources	6103 Protected Resources
 <p>DECISION POINT. Conduct initial employee interviews to determine the activities conducted by the employees. For example, certain types of activities will not give rise to a permanent establishment. See IPS unit on preparatory & auxiliary activities and Article 5(4). Also note that, in general, the management of USS's trade or business by FP will not give rise to a permanent establishment.</p> <p>In addition, you might identify that the activities of FP and USS are so distinct that it is obvious that the activities carried out by FP's employees relate solely to USS's business. In this fact pattern, the activities are not so distinct -- the activities appear to relate to the businesses of both FP and USS.</p>	<ul style="list-style-type: none"> ▪ Para. 4 of Article 5 of the U.S.-U.K. Income Tax Treaty ▪ Commentary on Article 5(7) of the OECD Model ▪ Treas. Reg. Section 1.864-7(c) 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

All Issues, Step 1: Initial Factual Development (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Are the seconded professionals USS or FP employees and does FP have a fixed place of business in the United States if the seconded professionals are employees of FP?

Fact Element	Resources	6103 Protected Resources
 <p>CONSULTATION: Consider travel to interview relevant officers and employees of FP if discussions with USS employees and officers are inconclusive. Discuss with Exchange of Information (EOI) personnel whether on-site interviews of FP employees may be permitted by the government authorities and whether an invite letter is necessary. Obtain IRS approval using trip Form 1321, an official government passport and travel funds.</p> <p>Consult with the Information Gathering IPN for the appropriate procedures for conducting FP employee interviews and for requesting information. If necessary, customers should be interviewed. In this case, an agent should consult the Information Gathering IPN to determine appropriate summons procedures.</p>	<ul style="list-style-type: none"> ▪ IRM 4.10.3.2 Interviews: Authority and Purpose ▪ International Travel Office ▪ Authorization for Official Travel ▪ Information Gathering IPN website ▪ Information Gathering IPS Unit “Using Alternative Means to Obtain Foreign Based Evidence.” ▪ Contact with a Foreign Corporation (Form 1120F) Instructions ▪ 1120-F IE Training ▪ Foreign Information Gathering ▪ Formal Document Requests 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 2: Review Potential Issues

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Issue	Resources	6103 Protected Resources
<p>The business of a foreign enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g., dependent agents).</p> <p>As explained in the Commentary, the critical element in determining whether FP carries on the business is identifying whether the FP employees remain FP employees or whether, under a secondment arrangement, they become the employees of USS. This requires determining whether FP or USS is the employer.</p> <p>“Employer” is not defined in the U.S.-U.K. Income Tax Treaty. Therefore, in general, U.S. law is applicable to determine the meaning of such term.</p> <p>Section 3121(d)(2) and the regulations thereunder provide that the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished.</p>	<ul style="list-style-type: none"> ▪ Commentary on Article 5(1) of the OECD Model ▪ Paragraph 2 of Article 3 (General Definitions) of the U.S.-U.K. Income Tax Treaty ▪ IRC Section 3121(d)(2) and Reg. Section 31.3121(d)-1(c)(2) 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 2: Review Potential Issues (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Issue	Resources	6103 Protected Resources
<p>In general, the United States respects the employment relationship put forth in the contract.</p> <p>U.S. case law provide factors for consideration in determining whether a person is an employee where there is not a formal contractual relationship. In addition, Rev. Rul. 87-41 highlights and summarizes twenty factors or elements that have been used in common law to indicate that sufficient control is present to establish an employer-employee relationship. Some of those factors are listed below:</p> <ul style="list-style-type: none"> ▪ Who has the authority to instruct the individual regarding the manner in which the work has to be performed ▪ Who controls and has responsibility for the place at which the work is performed ▪ Whether the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided ▪ Who puts the tools and materials necessary for the work at the individual's disposal 	<ul style="list-style-type: none"> ▪ <i>Jacobs v. CIR, T.C. Memo, 1993-570, 1993-570, 1993 WL 495594, Tax Court, 1993, December 2, 1993, at 3-4</i> ▪ <i>Weber v. CIR, 60 F.3d 1104, C.A.4, 1995, July 31, 1995</i> ▪ <i>Blodgett v. CIR, T.C. Memo. 2012-298, 2012 WL 5259054 U.S. Tax Ct., 2012, October 24, 2012</i> ▪ Rev. Rul. 87-41 ▪ 2007 JCT report summarizing worker classification law – JCX – 26 – 07 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 2: Review Potential Issues (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Issue	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Who determines the number and qualifications of the individuals performing the work ▪ Who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose ▪ Who determines the holidays and work schedule of that individual ▪ Does the individual work exclusively for the principal ▪ Who bears the risk of loss for the individual's work 	<ul style="list-style-type: none"> ▪ <i>Jacobs v. CIR, T.C. Memo, 1993-570, 1993-570, 1993 WL 495594, Tax Court, 1993, December 2, 1993, at 3-4</i> ▪ <i>Weber v. CIR, 60 F.3d 1104, C.A.4, 1995, July 31, 1995</i> ▪ <i>Blodgett v. CIR, T.C. Memo. 2012-298, 2012 WL 5259054 U.S. Tax Ct., 2012, October 24, 2012</i> 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 3: Additional Factual Development

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine whether the seconded employees carry on the business as employees of FP or USS: <ul style="list-style-type: none"> – Is there a formal secondment agreement (FP-USS Secondment Agreement)? – Based on the FP-USS Secondment Agreement, are the FP employees considered employees of USS or FP? – Evaluate whether USS or FP is the employer based on employee interviews taking into account the factors in Step 2. – Review financial statement or tax return charges and payroll records indicating whether USS or FP is the employer. 	<ul style="list-style-type: none"> ▪ FP-USS Secondment Agreement ▪ Conduct employee interviews ▪ Recording in financial statements or tax filings of a charge by USS to FP for the employee services ▪ Payroll records indicating whether the employees are employees of USS or FP ▪ Tax planning documents, including slide decks, internal correspondence, tax research, memos, or opinions 	


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 4: Develop Arguments

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Approach	Resources	6103 Protected Resources
 <p>DECISION POINT: If:</p> <ul style="list-style-type: none"> the FP employees are on the payroll of USS, there is a formal or informal arrangement that USS is the employer of the FP employees, and the factors indicate that USS is the employer, it is likely that USS is carrying on the business, rather than FP. <p>FP may still be deemed to have a permanent establishment through the activities of USS as a dependent agent. See separate IPS unit.</p> <p>As discussed above, certain U.S. source income that FP receives from USS may be subject to U.S. withholding tax. As also discussed above, consider reviewing whether transactions between FP and USS are in accordance with the arm's length principle.</p>	<ul style="list-style-type: none"> Para. 5 of Article 5 of the U.S.-U.K. Income Tax Treaty IPS unit on dependent agents USS's Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding IPS units on FDAP payments USS's transfer pricing documentation USS's Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business IPS units on Inbound Income Shifting 	


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 4: Develop Arguments (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Approach	Resources	6103 Protected Resources
 <p>DECISION POINT: The FP employees might be acting as employees of both FP and USS. In this case, it is possible that FP has a U.S. permanent establishment with respect to the activities carried by the employees on behalf of FP. However, the activities carried on by the employees on behalf of USS, will not create a U.S. permanent establishment for FP.</p>		


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 1, Step 4: Develop Arguments (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 1

Do the seconded employees carry on the business as employees of FP or USS?

Explanation of Approach	Resources	6103 Protected Resources
 <p>DECISION POINT: If there is:</p> <ul style="list-style-type: none"> ▪ no FP-USS Secondment Agreement, and ▪ the factors indicate that FP is the employer or that the employees are dependent agents of FP, consider pursuing an argument that FP has a U.S. permanent establishment under Article 5(1). <p>Proceed to the next steps to determine if:</p> <ul style="list-style-type: none"> ▪ FP carries on its business and ▪ if FP has a fixed place of business in the U.S. <p>Where there is secondment agreement, but it is clear that FP and USS are not following such secondment agreement, it still may be possible to pursue an argument under Article 5(1) if the common law factors indicate the FP is the employer.</p> <p>NOTE: FP may also have a permanent establishment through a dependent agent under Article 5(5) depending on additional facts.</p>	<ul style="list-style-type: none"> ▪ IRC Section 3121(d)(2) and Reg. Section 31.3121(d)-1(c)(2) ▪ Commentary on Article 15 of the OECD Model ▪ <i>Jacobs v. CIR, T.C. Memo, 1993-570, 1993-570, 1993 WL 495594, Tax Court, 1993, December 2, 1993, at 3-4</i> ▪ <i>Weber v. CIR, 60 F.3d 1104, C.A.4, 1995, July 31, 1995</i> ▪ <i>Blodgett v. CIR, T.C. Memo. 2012-298, 2012 WL 5259054 U.S. Tax Ct., 2012, October 24, 2012</i> ▪ Commentary on Article 5(1) of the OECD Model 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 2, Step 2: Review Potential Issues

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 2

Is there a “place of business” in the United States through which the FP employees operate?

Explanation of Issue	Resources	6103 Protected Resources
<p>It is generally accepted that the existence of a subsidiary company does not, of itself, constitute a permanent establishment of its parent company.</p> <p>However, any space or premises belonging to the subsidiary that is at the disposal of the parent company and that constitutes a fixed place of business through which the parent carries on its own business will generally constitute a permanent establishment of the parent.</p> <p>An example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g., a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a “fixed place of business.”</p>	<ul style="list-style-type: none"> ▪ Commentary on Article 5(7) of the OECD Model ▪ Commentary on Article 5(1) of the OECD Model 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 2, Step 3: Additional Factual Development

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 2

Is there a “place of business” in the United States through which the FP employees operate?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Based on the facts, it appears that FP has a place of business in the United States, i.e., the offices of its wholly owned affiliate, USS. However, employee interviews and the FP-USS Secondment Agreement may confirm the answers to the following questions: <ul style="list-style-type: none"> – Do FP employees have a place set aside at USS (e.g., office cubicle) or another U.S. location to conduct the business of FP? – Is this place always available to the FP employees during the period of the secondment? 	<ul style="list-style-type: none"> ▪ FP-USS Secondment Agreement ▪ Conduct employee interviews ▪ Tax planning documents, including slide decks, internal correspondence, tax research, memos, or opinions 	


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 2, Step 4: Develop Arguments

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 2

Is there a “place of business” in the United States through which the FP employees operate?

Explanation of Approach	Resources	6103 Protected Resources
<p> DECISION POINT: If the FP employees have an office, cubicle, or other space available to them at the USS offices or another U.S. location during the secondment period, continue to the next issue.</p> <p>If the FP employees do not have space available to them at a U.S. location, FP may still have a U.S. permanent establishment through a dependent agent. (see Article 5(5) of the U.S.-U.K. Income Tax Treaty). See separate IPS unit.</p> <p>As discussed above, FP may not have a U.S. permanent establishment, however, certain U.S. source income that FP receives from USS may be subject to U.S. withholding tax. As also discussed above, consider reviewing whether transactions between FP and USS are in accordance with the arm’s length principle.</p>	<ul style="list-style-type: none"> ▪ Paras. 1 and 2 of Article 5 of the U.S.-U.K. Income Tax Treaty ▪ Para. 5 of Article 5 of the U.S.-U.K. Income Tax Treaty ▪ IPS unit on dependent agents ▪ USS’s Form 1042-S, Foreign Person’s U.S. Source Income Subject to Withholding ▪ IPS units on FDAP payments ▪ USS’s transfer pricing documentation ▪ USS’s Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business ▪ IPS units on Inbound Income Shifting 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 3, Step 2: Review Potential Issues

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 3

Is the place of business “fixed”?

Explanation of Issue	Resources	6103 Protected Resources
<p>A place of business has to be a “fixed” one: there has to be a link between the place of business and a specific geographical point. (Geographically Fixed).</p> <p>A permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, i.e., if it is not of a purely temporary nature. (Temporally Fixed)</p> <p>A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time. Experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment has been considered to exist where the place of business was maintained for a period longer than six months).</p> <p>Temporary interruptions of activities do not cause a permanent establishment to cease to exist.</p>	<ul style="list-style-type: none"> ▪ Commentary on Article 5(1) of the OECD Model ▪ <i>CIR v. Consolidated Premium Iron Ores, Limited</i>, 265 F.2d 320 (6th Cir. 1959) 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 3, Step 2: Review Potential Issues (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 3

Is the place of business “fixed”?

Explanation of Issue	Resources	6103 Protected Resources
A nonresident alien individual or a foreign corporation shall not be considered to have an office or other fixed place of business merely because such alien individual or foreign corporation uses another person’s office or other fixed place of business, whether or not the office or place of business of a related person, through which to transact a trade or business, if the trade or business activities of the alien individual or foreign corporation in that office or other fixed place of business are relatively sporadic or infrequent, taking into account the overall needs and conduct of the trade or business.	<ul style="list-style-type: none"> Treas. Reg. Section 1.864-7(b)(2) 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 3, Step 3: Additional Factual Development

Creation of a PE through the Activities of Seconded Employees in the United States		
Issue 3		
Is the place of business “fixed”?		
Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Based on the facts, FP appears to have a fixed place of business at the offices of USS. ▪ However, employee interviews and the FP-USS Secondment Agreement, may confirm whether FP employees work in the United States for a minimum period of time (e.g., less than six months). ▪ Consider whether time away from the United States is due solely to temporary interruptions. ▪ Consult with other employees to determine if the visits of the employees are sporadic or infrequent, taking into account the overall needs and conduct of the trade or business. 	<ul style="list-style-type: none"> ▪ FP-USS Secondment Agreement ▪ Conduct employee interviews ▪ Tax planning documents, including slide decks, internal correspondence, tax research, memos, or opinions 	


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 3, Step 4: Develop Arguments

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 3

Is the place of business “fixed”?

Explanation of Approach	Resources	6103 Protected Resources
<p> DECISION POINT: If the FP employees conduct business in the United States for a significant period of time taking into account the industry standard and temporary interruptions, consider pursuing a case that FP has a U.S. permanent establishment under Article 5(1).</p> <p>If the FP employees do not conduct business in the U.S. for a significant period of time, FP may still have a U.S. permanent establishment through a dependent agent (see Article 5(5) of the U.S.-U.K. Income Tax Treaty). See separate IPS unit.</p> <p>As discussed above, certain U.S. source income that FP receives from USS may be subject to U.S. withholding tax. As also discussed above, consider reviewing whether transactions between FP and USS are in accordance with the arm’s length principle.</p>	<ul style="list-style-type: none"> ▪ Commentary on Article 5(1) of the OECD Model ▪ <i>CIR v. Consolidated Premium Iron Ores, Limited</i>, 265 F.2d 320 (April 10, 1959) 	


Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Issue 3, Step 4: Develop Arguments (cont'd)

Creation of a PE through the Activities of Seconded Employees in the United States

Issue 3

Is the place of business “fixed”?

Explanation of Approach	Resources	6103 Protected Resources
<div style="display: flex; align-items: flex-start;">  <p>CONSULTATION: To the extent that there are strong indicators of a permanent establishment, but there is still incomplete information, the Information Gathering IPN may be consulted. Under Article 27 (Exchange of Information and Administrative Assistance) of the U.S.-U.K. Income Tax Treaty, information may be obtained from the United Kingdom about the extent of FP’s activities in the United States.</p> </div>	<ul style="list-style-type: none"> ▪ Contact Information for Tax Attaches and the Headquarters Group ▪ IRM 4.60.1 Exchange of Information ▪ Information Gathering IPS Unit “Using Alternative Means to Obtain Foreign Based Evidence.” ▪ Document Request Instructions ▪ Contact with a Foreign Corporation (Form 1120F) Instructions ▪ 1120-F IE Training 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Training and Additional Resources

Chapter 16.6.2 Fixed Place of Business

Type of Resource	Description(s) and/or Instructions for Accessing	References
CENTRA sessions	<ul style="list-style-type: none"> ▪ Jan 2013 CENTRA: IBC - Permanent Establishments - Part I (KSG468515) ▪ Jan 2013 CENTRA: IBC – Permanent Establishments – Part II (PRD783940) ▪ 10/24/12 CENTRA: Jurisdiction to Tax / Form 1120-F 	
Other Training	<ul style="list-style-type: none"> ▪ 2011 International Training Phase II Module F 3135-411 (Taxation of Foreign Corporations) 	
Podcasts / Videos	<ul style="list-style-type: none"> ▪ IBC FY11 CPE: Jurisdiction to Tax 	
Reference Material - Treatises	<ul style="list-style-type: none"> ▪ Tax Analysts Worldwide Tax Treaties Combined Files ▪ Andersen: Analysis of United States Income Tax Treaties: Chapter 3. Definition of “Permanent Establishment” ▪ Publication 901, U.S. Tax Treaties 	

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Glossary of Terms and Acronyms

Acronym	Definition
EOI	Exchange of Information
FDAP	Fixed, Determinable, Annual, and Periodical
FP	Foreign Parent
IBC	International Business Compliance
IDR	Information Document Request
IDRS	Information Document Retrieval System
IEs	International Examiners
IPN	International Practice Network
IPS	International Practice Service
IRM	Internal Revenue Manual
JCT	Joint Committee on Taxation
JTT	Jurisdiction to Tax
LIN	LB&I Imaging Network

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Glossary of Terms and Acronyms (cont'd)

Acronym	Definition
OECD	Organization for Economic Cooperation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
USS	U.S. Subsidiary
Y-K1	YK1 Tier Structure Tool (for highly tiered partnerships having a significant number of partners)

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Index of Related Issues

Issue	Associated UIL(s)	References
Identification of a U.S. trade or business (or PE) - via dependent agent	9421.01-03	<ul style="list-style-type: none"> ▪ Paragraphs 5 and 6 of Article 5 of the U.S.-U.K. Income Tax Treaty
Fixed place of business permanent establishment	9450.06	<ul style="list-style-type: none"> ▪ Paragraph 1 of Article 5 of the U.S.-U.K. Income Tax Treaty
Exception to permanent establishment for certain activities generally of preparatory and auxiliary nature	9450.06	<ul style="list-style-type: none"> ▪ Paragraph 4 of Article 5 of the U.S.-U.K. Income Tax Treaty
Attribution of profit - under authorized OECD approach (AOA)	9422.02-01	<ul style="list-style-type: none"> ▪ Article 7 of the U.S.-U.K. Income Tax Treaty ▪ OECD Report on Attribution of Profits to Permanent Establishments
Limitation on benefits issues	9450.01	<ul style="list-style-type: none"> ▪ Article 23 (Limitation on Benefits) of the U.S.-U.K. Income Tax Treaty
Treaty-based exchange of information	9460.01	<ul style="list-style-type: none"> ▪ Article 27 of the U.S.-U.K. Income Tax Treaty ▪ IRM 4.60.1 Exchange of Information
Treaty interpretation	9450.06	<ul style="list-style-type: none"> ▪ OECD Model ▪ Technical Explanation to U.S.-U.K. Income Tax Treaty

Volume	Part	Chapter	Sub-Chapter
Treaties	Determination of Permanent Establishment Status	Fixed Place of Business	Seconded Employees

Index of Related Issues (cont'd)

Issue	Associated UIL(s)	References
Dual residency issues	9450.05	<ul style="list-style-type: none"> ▪ Article 4 (Residence) of the U.S.-U.K. Income Tax Treaty
Inbound Income Shifting <ul style="list-style-type: none"> ▪ Provision of high-value services ▪ Other transfer pricing issues 	9422.05 9422.09	<ul style="list-style-type: none"> ▪ Article 9 of the U.S.-U.K. Income Tax Treaty
Income from Employment	To be developed	<ul style="list-style-type: none"> ▪ Article 14 (Income from Employment) of the U.S.-U.K. Income Tax Treaty
Non-financial intermediary payor - Repatriation (e.g., dividends, interest, or royalties to foreign parent/affiliate)	9424.01-03	<ul style="list-style-type: none"> ▪ U.S.-U.K. Income Tax Treaty