

Global Mobility and Corporate Tax Considerations in the Context of the 2025 Update to the OECD Model Tax Convention and Article V Commentary

– *Much ado About Nothing?*

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Agenda

1. Introduction
2. New PE takeaways
3. Remote work user case

Introduction

Remote work is trending



Heightened focus on cross-border issues



Information sharing between authorities



Increased audit activity, scrutiny at the border



Delays/denials to cross the border



Penalties and interest



HR/Tax/Payroll/Legal Impacts



Reputational risk



Sale due diligence issues



Unhappy employees

TYPES

DESCRIPTION

Global Role

Supports teams across multiple countries and travels periodically

Dual-Career Partner

Works remotely while accompanying a partner abroad

Caregiver

Temporarily relocates to support a family member in another country

Digital Nomad

Works remotely while moving between countries for extended periods

New Hire Abroad

Hired internationally and works remotely without relocating

Tax and social security contributions compliance issues

Main issues

- **Model**
 - “You work where you live”
- **Challenges :**
 - Compliance
 - Payroll system
 - Reporting

Two sides:

It is the individual who has to bear the tax burden to register to a place even though in many countries the employer has to withhold tax on salaries

The employer has to register the employee to a social system, pay part of the social security contributions & act on behalf of the employee before the relevant authorities

Failure to comply with tax at source or social security contributions rules may qualify as a **criminal offense in many countries**

New PE takeaways

Scope of the new official OECD commentary : “Home or other relevant location”

- The new official OECD commentary relates to the **employee's home** and to **another relevant location**, such as a second home, a rented holiday home or some private accommodation (friend/family).
- In our opinion, the commentary refers to **residential workplaces** without a formal or factual connection to the company.

No home or other relevant location

Location

Explanation

Co-working space rented by employer

Through rental by the employer and structural access for several employees, the location is linked to the company.

Office space of group company

The location is linked to the company through organisational ties with the company that makes the space available.

Library

Because there is a publicly accessible place, managed by third parties, without a sufficient degree of connection with the employee.

Coffee shop

Because there is a publicly accessible place, managed by third parties, without a sufficient degree of connection with the employee.



What has changed for qualifying home offices?

The traditional PE criteria still apply for qualifying home offices, which require:

1. There is a **place of business**;
2. The place of business is **fixed**;
3. The place is **at the disposal** of the enterprise;
4. The business activities are **conducted through** this fixed place of business.

Paras. 18 -19 of the new Commentary clarify that a home office may be at the disposal of a foreign enterprise when:

1. It is used on a continuous basis to perform work for the enterprise;
2. Facts and circumstances indicate that the employer requires the employee to work from home.

1977

Para. 4 of the new OECD commentary introduces the "at the disposal" criterion.

2003

2017

2025

In the new OECD commentary :

1. Paras. 18–19 of the OECD Commentary (2017) are deleted; and
2. 21 new paras. (44.1–44.21), including a 50%-time threshold, and a commercial reason test are introduced.

Revision of the “at the disposal” requirement

1

50% time threshold

The **intensity of the use** of the location, where a 50% time threshold applies.

2

Commercial reason test

The existence of a **commercial reason** for the enterprise to have the employee physically present in his country of residence to conduct business activities.

3

Other relevant facts and circumstances

All **other relevant facts and circumstances** that are important for determining whether the qualifying home office is at the disposal of the enterprise.

Introduction of a 50%-time threshold

Main rule

In principle, a home is **not** regarded as **a place of business** of the company if the employee works for the company from that location for less than 50% of his total working time during a **reference period** of 12 months that starts or ends in the relevant tax year.

Exact wording

“In the specific context of the use by an individual of that individual’s home or another relevant place to carry out activities related to the business of an enterprise, that home or other relevant place **would generally not be** considered a **place of business** of the enterprise if the individual worked from that home or relevant place for less than 50 per cent of their total working time for that enterprise [...]. **Exceptions** to the approach in the prior sentence are **not anticipated** to occur in most situations.”

Important considerations

- 50%-time threshold: safe harbour or merely a presumption?
- The reference period may span multiple tax and calendar years.
- The 50%-time threshold applies separately to each location (e.g., main residence, holiday home).

Commercial reason test



Two-step approach

- The commercial reason test requires a **two-step approach**:
 1. Determine whether there is a **commercial reason** for the enterprise to have the employee physically present in his country of residence to conduct business activities.
 2. Assess whether these activities are **not merely incidental or auxiliary**.

Examples

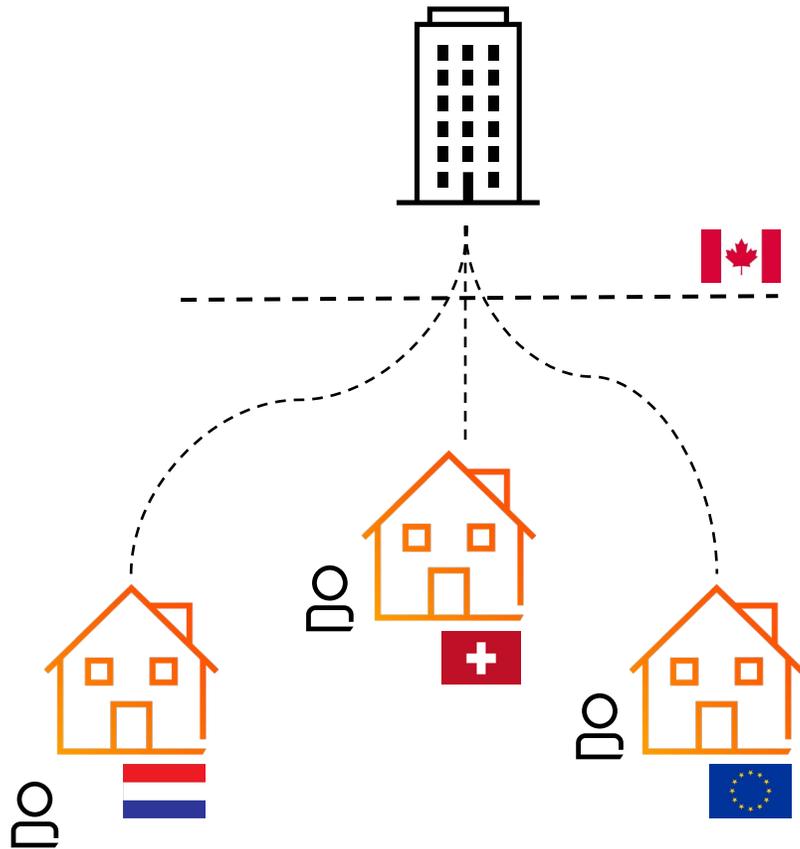
- Physical client meetings.
- Developing a new customer base or identifying business opportunities.
- Identifying new suppliers, managing supplier relationships, negotiating and managing supplier contracts.

Remote work user case

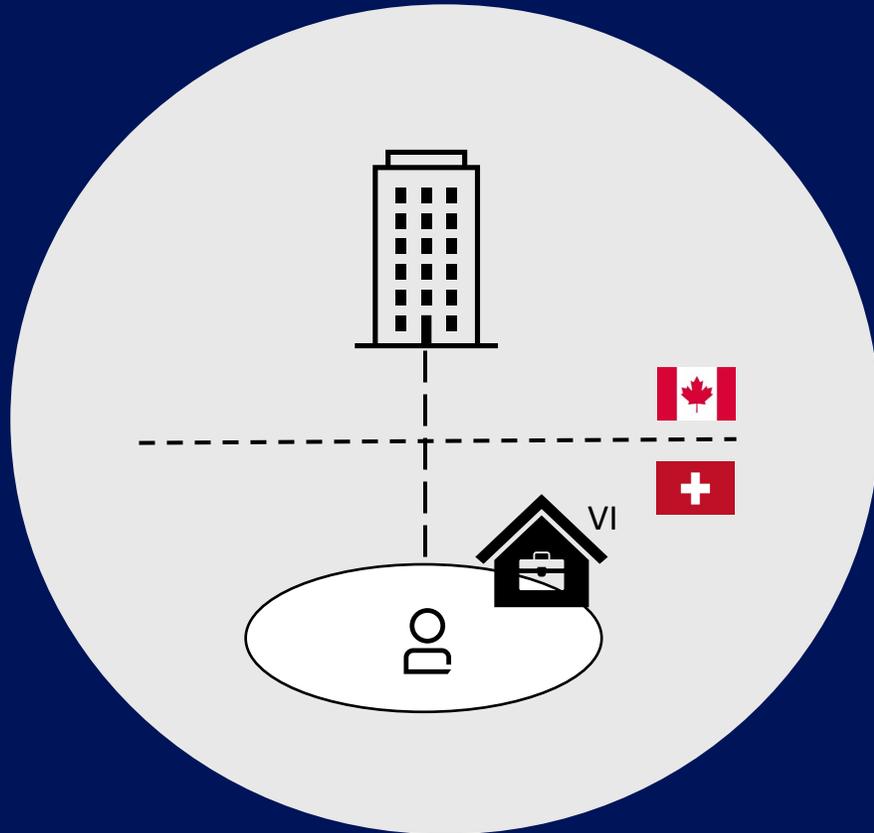
Remote working user case

Background of the case

- NorthPeak Solutions Inc., a technology and business services company headquartered in Canada, employs staff across multiple jurisdictions worldwide.
- Several employees perform their duties remotely from their private residences, including employees based in the Netherlands and Switzerland.
- These employees are engaged in business activities such as client advisory services, project coordination, and account management for NorthPeak Solutions Inc.
- This raises the question whether the activities carried out from home offices in the Netherlands and Switzerland may constitute a PE of NorthPeak Solutions Inc. in those countries, potentially triggering corporate income tax registration and compliance obligations.



PE analysis Canada – Switzerland (1/6)

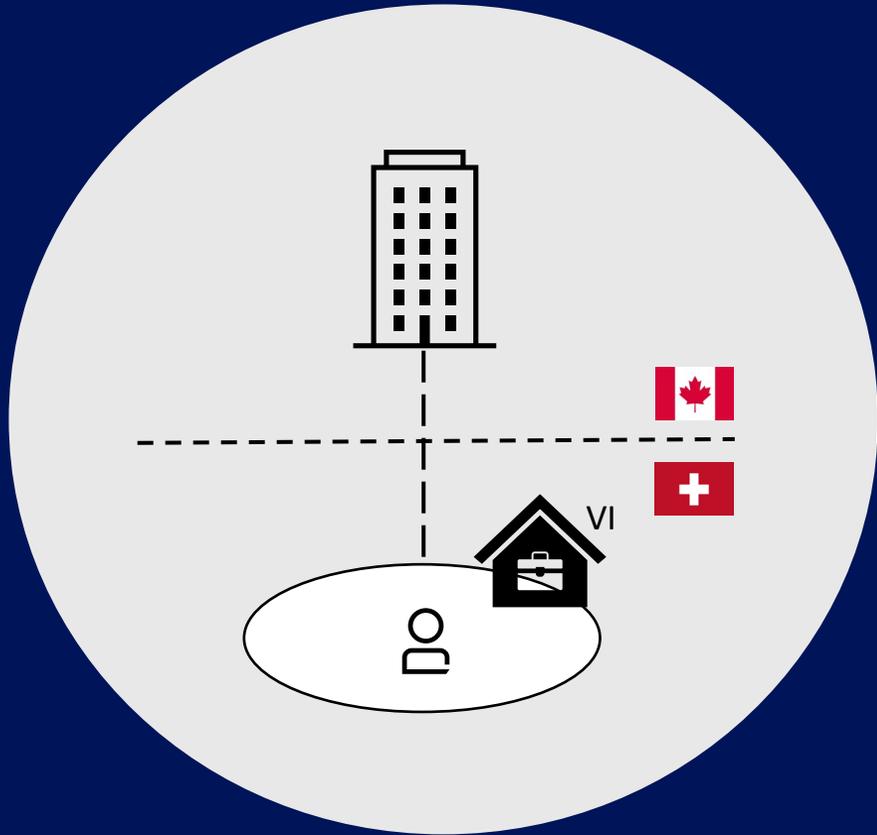


Activities in Switzerland*

- An employee of NorthPeak Solutions Inc. is based in Switzerland.
- He performs his work from his home office for approximately 60% of his total working time over a 12-month period.
- The employee has an exclusively client-facing role and provides services to clients located in Canada, Switzerland and other European countries.
- All services are provided remotely, except that once per quarter the employee visits the premises of a Swiss client for a single day to review performance under the service contract with NorthPeak Solutions Inc.

**based on example D of paragraph 44.21 of the OECD Commentary 2025 update*

PE analysis Canada – Switzerland (2/6)



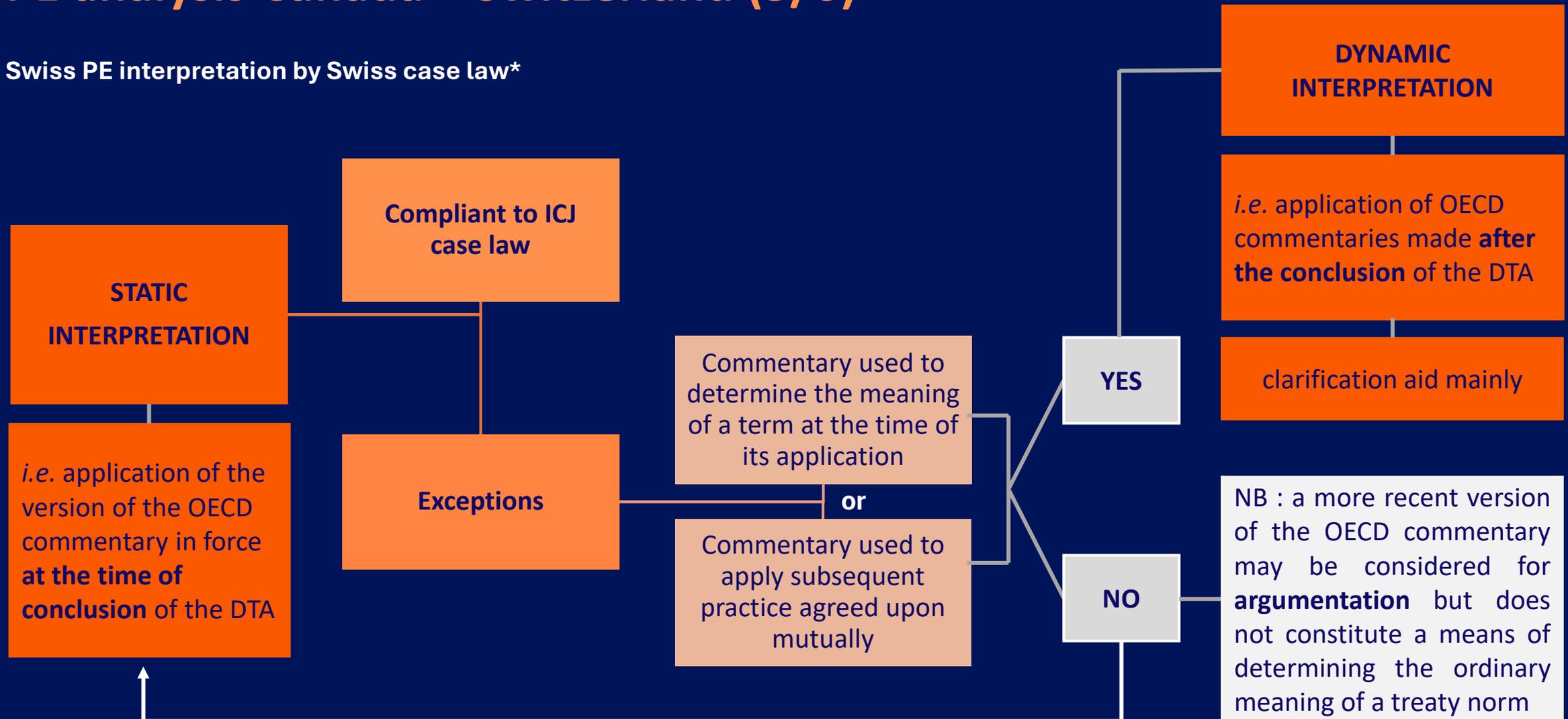
Swiss PE interpretation based on 2025 OECD Model commentary*

- The home in Switzerland from which the employee works should be considered fixed because the place has been used to undertake activities related to the business of NorthPeak Solutions Inc. throughout the 12-month period and therefore has a **sufficient degree of permanence**.
- While the individual spends more than 50% of his working time working from his home in Switzerland, **other facts and circumstances** including the reason for the individual's presence in Switzerland **must also be considered**.
- The mere presence of clients of NorthPeak Solutions Inc. in Switzerland does not mean there is a **commercial reason for his presence there**. In addition, the employee visits to a client are on an intermittent and incidental basis.
- As a result, there is no commercial reason for him to carry out activities related to the business at his home in Switzerland. In the absence of other facts and circumstances showing otherwise, the home would not be a place of business of NorthPeak Solutions Inc. and therefore would **not qualify as a PE of NorthPeak Solutions Inc. in Switzerland**.

**example D of paragraph 44.21 of the OECD Commentary 2025 update*

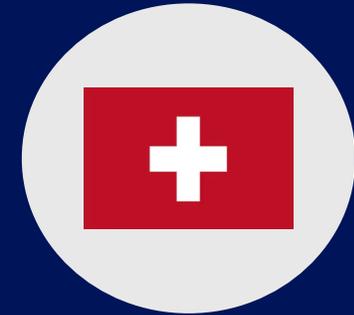
PE analysis Canada – Switzerland (3/6)

Swiss PE interpretation by Swiss case law*

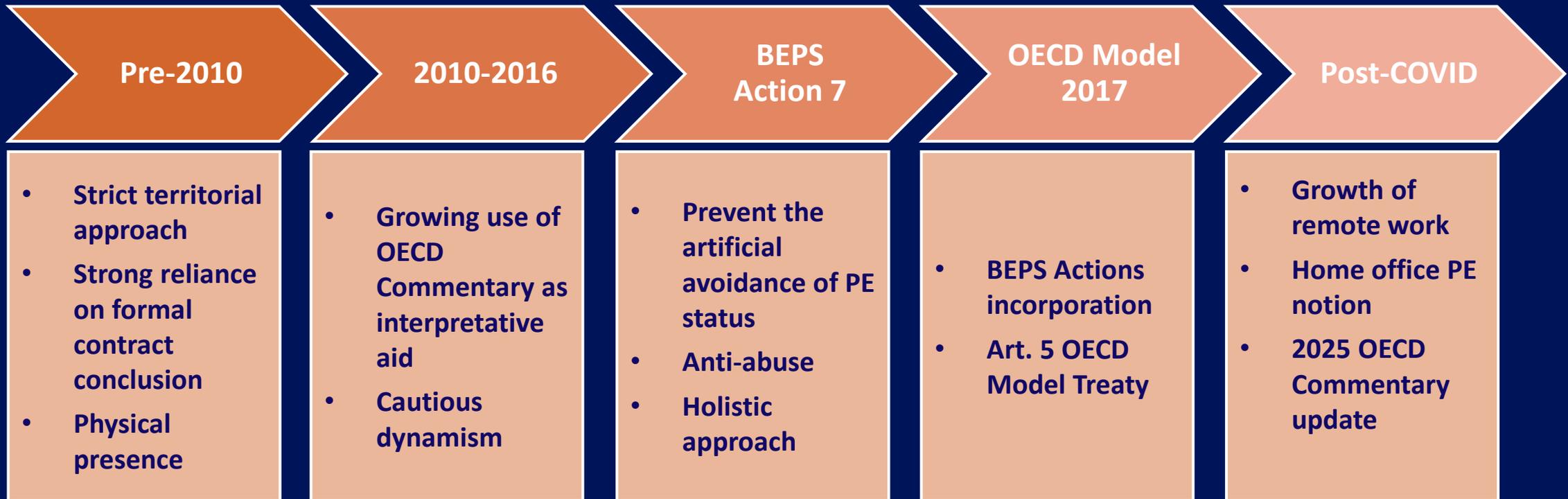


*A-4889/2024 para. 8.2.6 ; ATF 149 II 400 para. 9

PE analysis Canada – Switzerland (4/6)

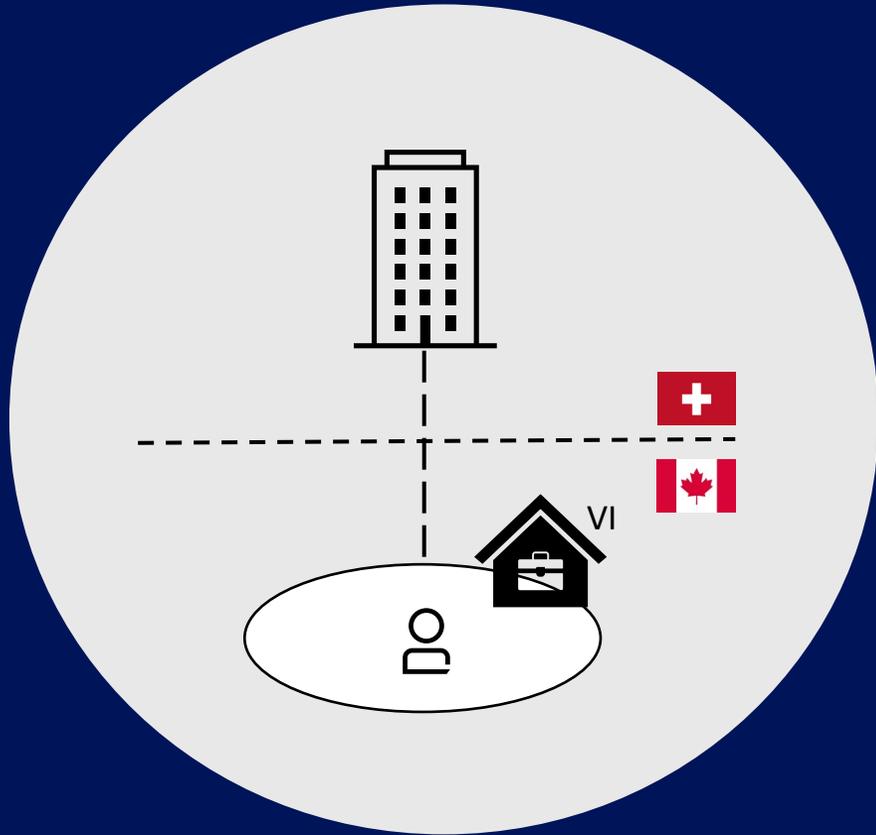


Evolution of PE definition in Switzerland



PE analysis Canada – Switzerland (5/6)

Variation



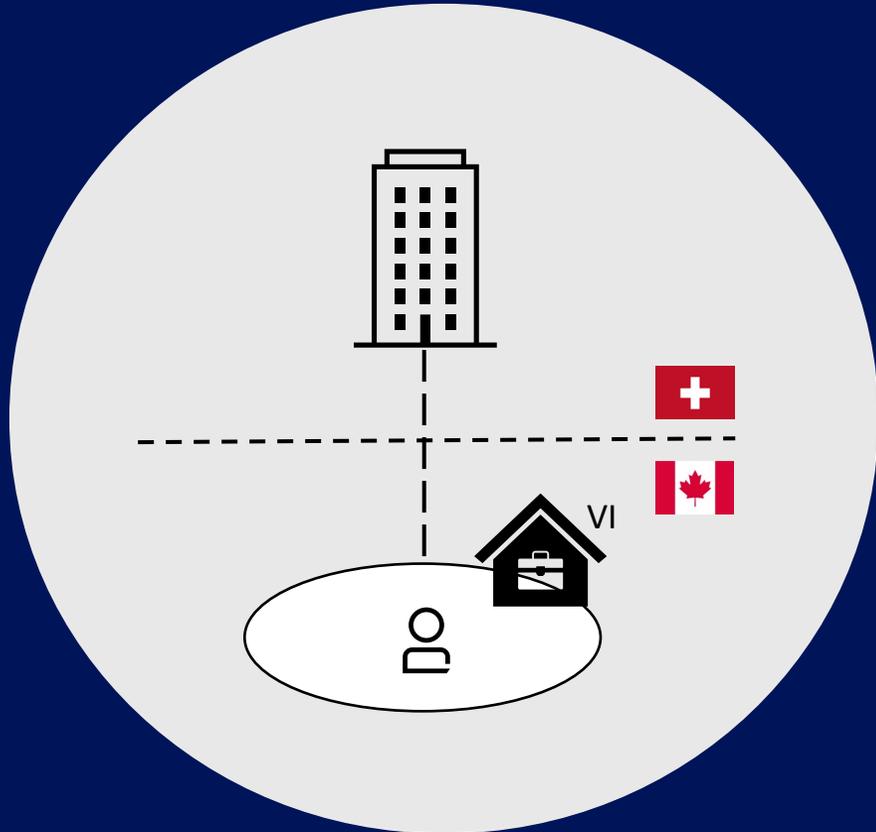
Canadian PE interpretation

If the company is headquartered in Switzerland and a remote worker is in Canada, the Canadian PE under the treaty would be interpreted with these principles:

- OECD Model Treaty and Commentaries are highly persuasive in treaty interpretation (Supreme Court of Canada – *Crown Forest*; Federal Court of Appeal – *Prévost Car*)
- If a term is **not defined in the Treaty**, the Courts may rely on **domestic law** (Tax Court of Canada – *Wolf*)
- Treaties must be interpreted to reflect the true intentions of the contracting states (Supreme Court of Canada – *Alta Luxembourg*)
 - A nuanced approach to OECD Commentaries as interpretative aids, especially revisions post-Treaty signing
- **Key Issue:** Whether the 2025 OECD Commentaries on home office PEs clarify or expand Article 5 of the relevant Treaty
- **Preliminary view:** The 2025 update likely clarifies the existing PE concept and may be relevant in Canada (*subject to Canada Revenue Agency and judicial confirmation*)

PE analysis Canada – Switzerland (6/6)

Variation

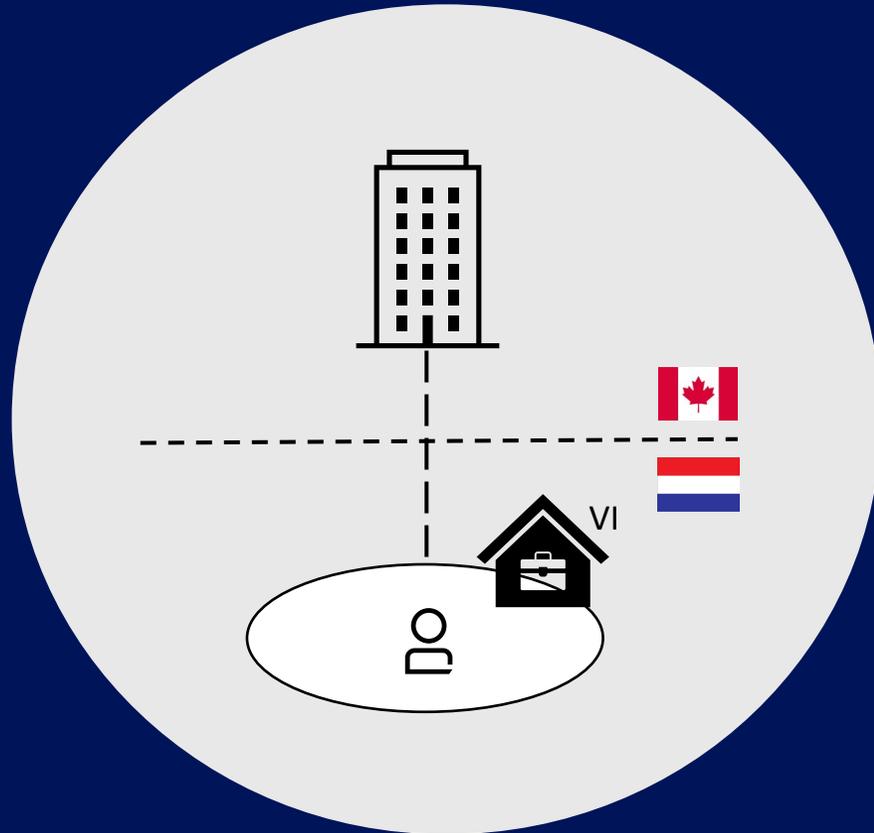


Canadian PE interpretation

If headquarters in Switzerland with a remote worker in Canada:

- In the particular example, in absence of other facts and circumstances,
 - Employee works **60% from home** over a 12-month period
 - Home office is **fixed** (degree of permanence)
 - **NorthPeak likely does not have a PE in Canada because:**
 - No clear commercial reason for the activities performed in Canada
 - Client services provided **remotely** to multiple countries
 - Quarterly visits to a Canadian client is intermittent and incidental
 - Mere presence of NorthPeak Solutions Inc.'s clients in Canada does not automatically create a PE
 - NorthPeak Solutions Inc. must monitor this situation if facts and circumstances change

PE analysis Canada – Netherlands (1/6)

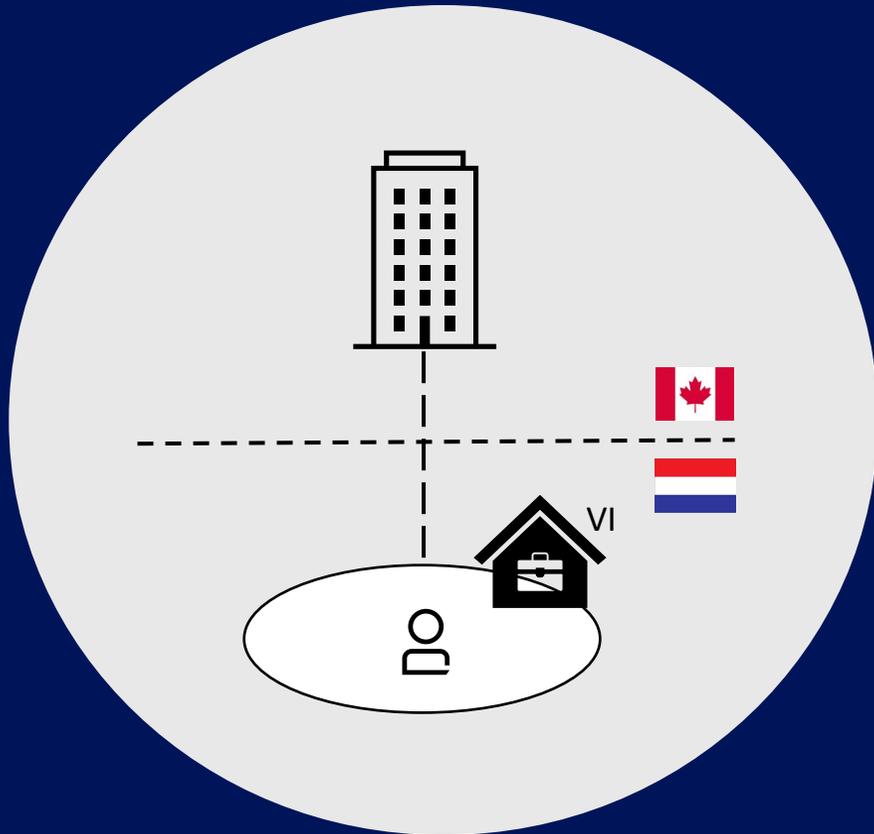


Activities in the Netherlands*

- An employee of NorthPeak Solutions Inc. is based in the Netherlands
- The employee performs work from his/her home office for approximately 80% of his/her total working time over a 12-month period
- As part of his/her role, the employee regularly visits Dutch clients to deliver consulting and implementation services on behalf of NorthPeak Solutions Inc.
- The services provided form an integral part of the company's core business activities

**based on example C of paragraph 44.21 of the OECD Commentary 2025 update*

PE analysis Canada – Netherlands (2/6)



Dutch PE interpretation

- Whether the activities performed from the employee's home office create a PE of NorthPeak Solutions Inc. in the Netherlands depends on whether:
 1. The home office constitutes a **place of business**;
 2. The home office is **fixed**;
 3. Whether it is **at the disposal** of the enterprise;
 4. Whether business activities are **conducted through** it.

Important question

- Which OECD Commentary should be considered when interpreting these criteria?
- Dutch Supreme Court case law indicates:
 1. Pre-treaty OECD commentary (in this case 1977) is generally highly relevant.
 2. Post-treaty OECD commentary (in this case 2003 and later) may serve as a supplementary means of interpretation when:
 - The treaty text aligns closely with the OECD Model Convention;
 - The commentary clarifies (rather than materially change) the treaty provision or the pre-treaty commentary.

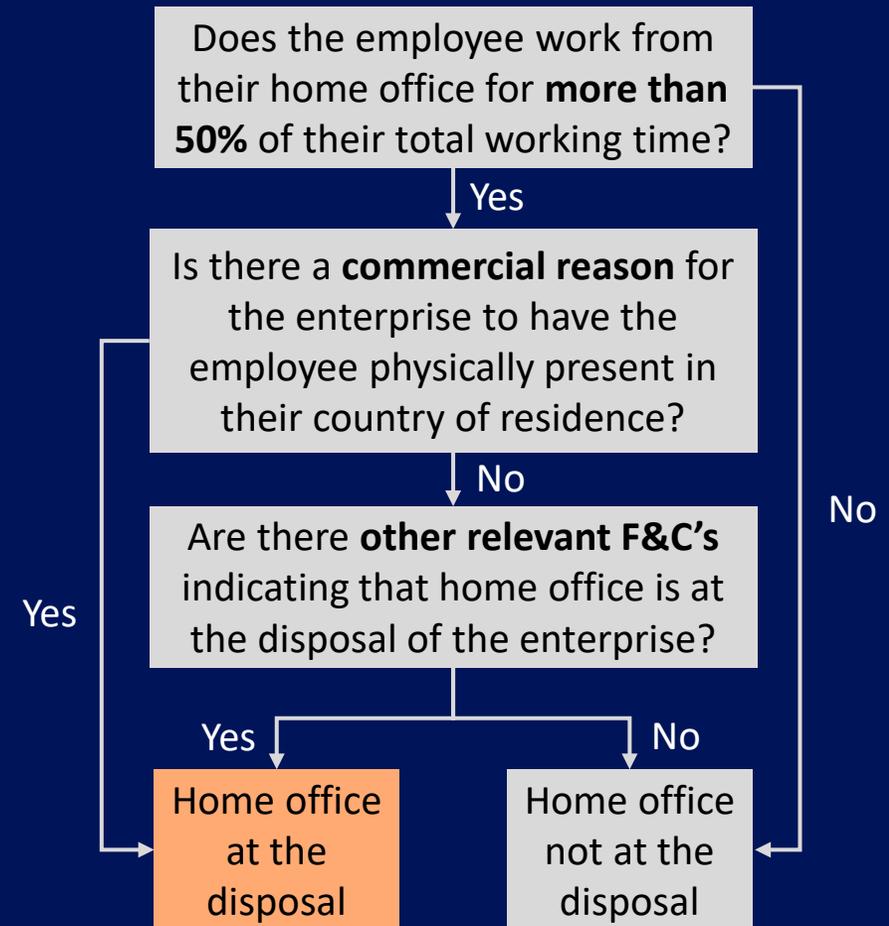
PE analysis Canada – Netherlands (3/6)

OECD Commentary 2025: clarification or material Change

- The Netherlands would likely argue that the 2025 OECD Commentary clarifies the PE treaty provision and the pre-treaty OECD Commentary.
- Implications: the 2025 OECD Commentary would in principle be relevant for the interpretation of all Dutch tax treaties.

Criterion	OECD commentary 2025
Place of business	✓
Fixed place of business	✓
At the disposal of	✓
Through which	✓
Home office PE	✓

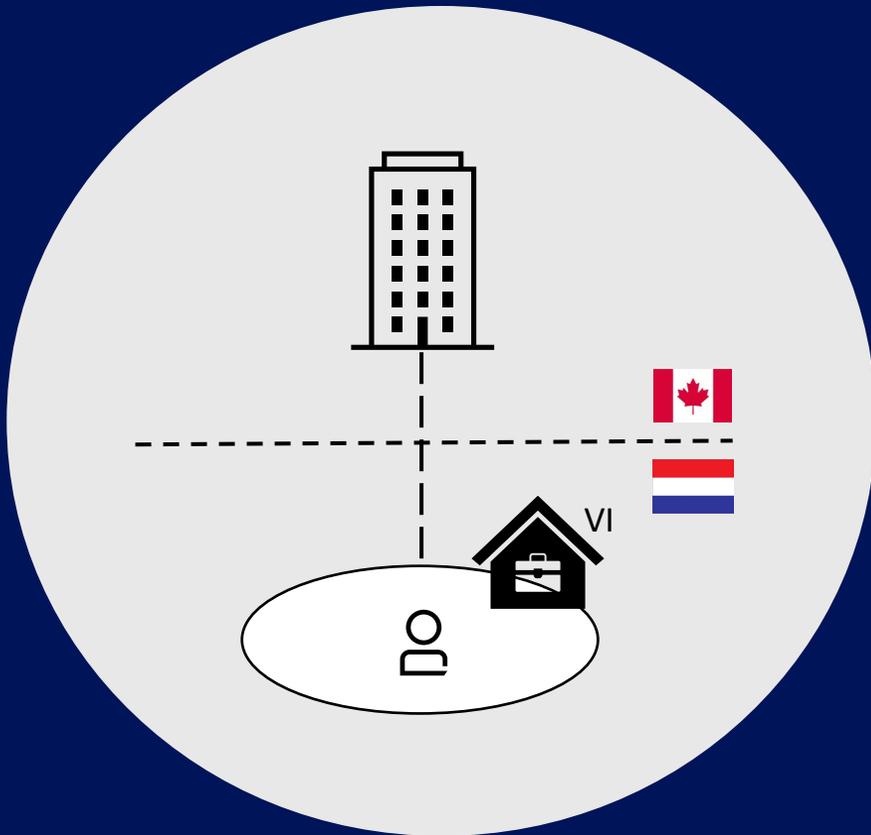
Decision tree NL – at the disposal test



PE analysis Canada – Netherlands (4/6)

Dutch PE interpretation

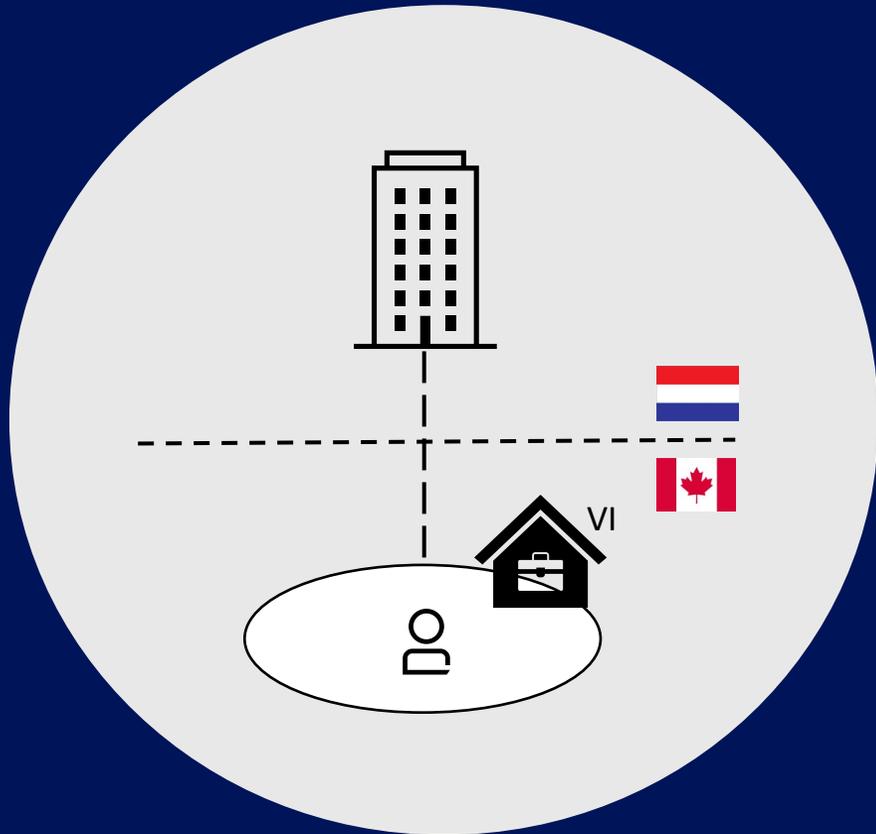
- The Netherlands would likely argue that the 2025 OECD Commentary clarifies the PE treaty provision and the pre-treaty OECD Commentary.
 - Is this position justified?
 - What are the consequences if it is not?



Criterion	OECD commentary 1977	OECD commentary 2003	OECD commentary 2017	OECD commentary 2025
Place of business	✓	✓	✓	✓
Fixed place of business	✓	✓	✓	✓
At the disposal of	✗	✗	✓	✓
Through which	✓	✓	✓	✓
Home office PE	✗	✗	✓	✓

PE analysis Canada – Netherlands (5/6)

Variation



Canadian PE interpretation

If the headquarters are in The Netherlands with a remote worker in Canada:

- Canada Revenue Agency considers two questions:
 - **Carrying on business in Canada?**
 - If yes → **through a PE?**
- **Home office alone ≠ PE**
- PE risk increases if the enterprise:
 - **has access or control over the home**
 - **pays rent or costs**
 - **shows intent to establish a Canadian office**
- **Main focus:** The nature of the remote worker's employment activities
 - Internal / support roles → **low risk**
 - Client-facing, revenue-generating work → **higher risk**

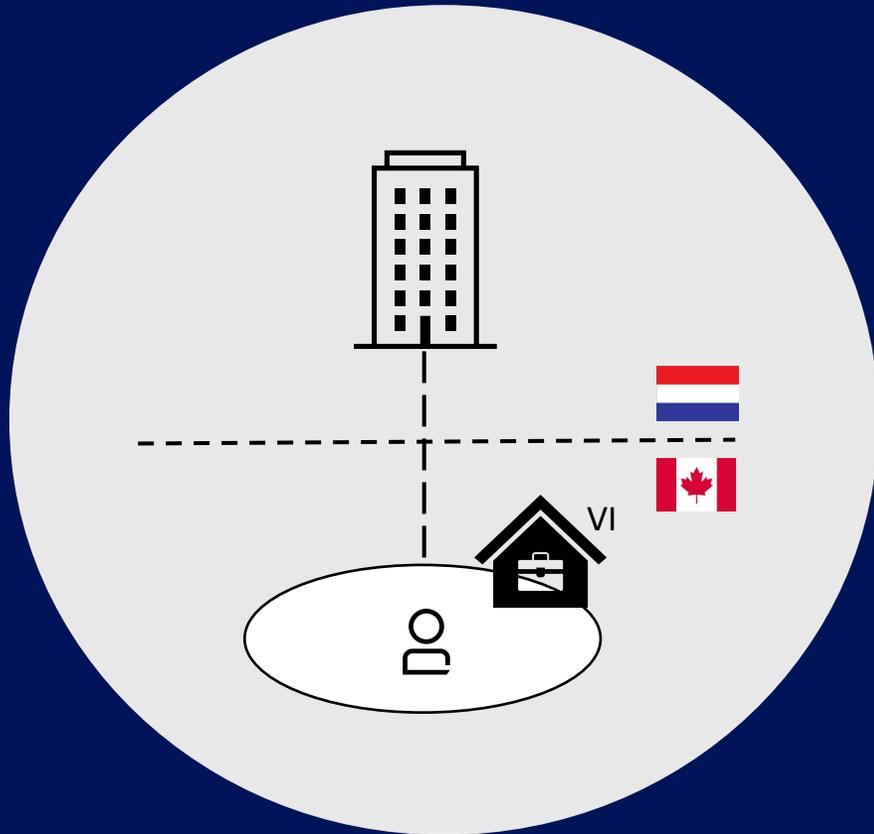
PE analysis Canada – Netherlands (6/6)

Variation

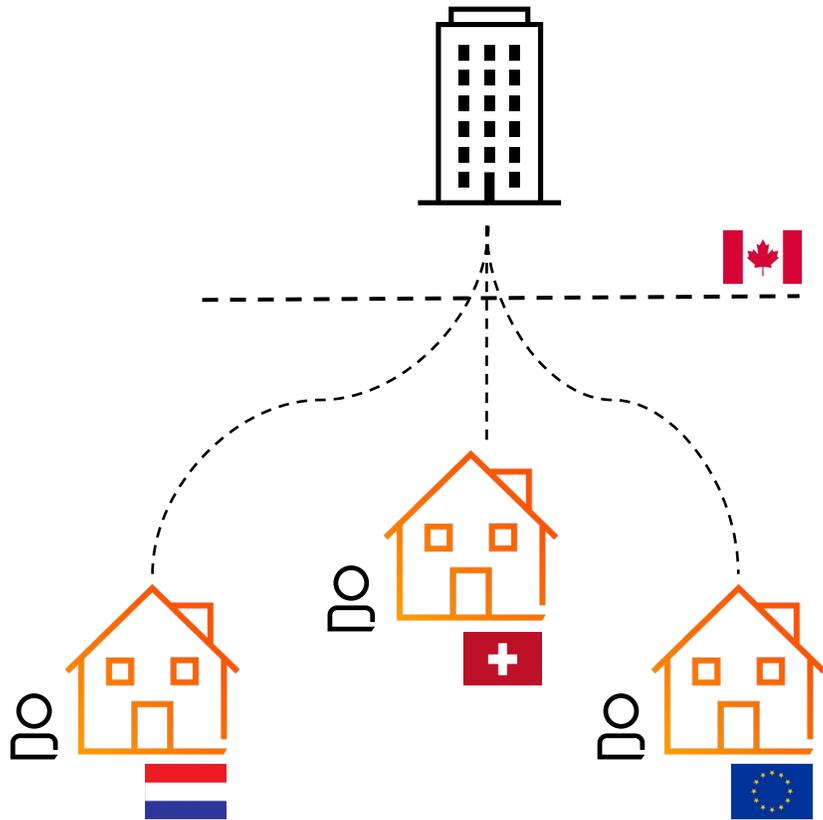
Canadian PE interpretation

If headquarters in The Netherlands with a remote worker in Canada,

- In the example, in absence of other facts and circumstances,
 - **This employee's home office would likely be considered a PE in Canada** →
 - A fixed place of business through which NorthPeak Solutions Inc.'s business is wholly or partly carried on
 - **Why?**
 - Approximately 80% of total working time spent in Canada for NorthPeak Solutions Inc. over a 12-month period
 - Activities are **core** to the business
 - Clear commercial reason exists for the activities performed in Canada
 - Employee regularly delivers consulting and implementation services to clients



Attention points & Key takeaways



- The updated OECD Commentary to Article V(1) of the OECD Model Treaty brings welcome clarifications regarding PE risk for cross-border remote working arrangements
- Employers with these arrangements should:
 - reassess their global mobility policies, and practices in host countries
 - maintain appropriate documentation for remote employee's principal place of work, nature of their activities and reasons for chosen work location
- Consider whether a specific jurisdiction applies a dynamic interpretation of the OECD Commentary to the OECD Model Treaty – the practice of OECD Inclusive Framework members is inconsistent
- Unfortunately, no uniform approach regarding the thresholds to be met, particularly in relation to international social security rules.

End