Price ₹ 300/- per copy

No. MCS/149/2019-21 / R.N.I. No. MAHENG/2012/47041 - Total Pages: 172

Vol. IX | No. 07 | April 2021

THE CHAMBER'S JOURNAL

Estd. 1926
ज्ञानं परमं बलम्

A Monthly Journal of
The Chamber of Tax Consultants

Your Monthly Companion on Tax & Allied Subjects

The Chamber of Tax Consultants

Estd. 1926

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Unveiled by **Shri S. E. Dastur,** Senior Advocate on 30th January, 2008.

Vol. IX | No. 7 | APRIL – 2021

CONTENTS

"Permanent Establishment" in Indian Taxation – Analysing 3 Supreme Court Cases

CA Vinita Krishnan, CA Jimmy Bhatt & CA Avin Jain

Permanence – the word evokes images of strength and durability, akin to a large tree with roots so deep it becomes immovable. However, in an ever-evolving world of business, where new technologies and business models seem to be erasing all physical boundaries, the concept of a "Permanent Establishment" (PE) becomes increasingly complex.

Nations have a right to levy tax in relation to the economic activities carried out in their jurisdiction. It is therefore important that there exists some degree of permanence for any economic activity so that it can be taxed in the concerned jurisdiction. The concept of PE in tax treaties sets the ground rules in this regard.

Since the liberalisation of the Indian economy, three decades back, India has seen a paradigm shift in the amount of foreign capital inflows and activity of foreign players. Naturally, the concept of PE has also become increasingly important over the past three decades. There can be several types of PE – fixed place PE, service PE, construction PE, agency PE, etc, depending on the nature of activities carried out in the source state, the concerned tax treaty, and also the applicability of the (relatively) recently concluded Multilateral Instrument (MLI).

Litigation History

Since the early 1990s, several foreign companies tussled with the Indian tax authorities over the determination of PE in India. Fixed place PE has been alleged by tax authorities in several cases. As the determination of PE is a mixed question of fact and law, Courts have time and again laid down several principles, in this regard, keeping in perspective the factual nuances of each case. Cases relating to PE travelled to the Supreme Court (SC) as early as 2007; in this article, we have discussed three relatively recent SC judgments relating to fixed place PE.

Formula One World Championship Ltd vs. Commissioner of Income-tax [2017] 394 ITR 80 (SC)

Summary

The SC upheld the order of the High Court that the motor racing circuit constituted a fixed place PE of Formula One World Championship Limited (F-1 UK), a UK-based company, as F-1 UK had complete control on the circuit during the 3-day racing event in India.

Facts

1. F-1 UK was a tax resident of UK;

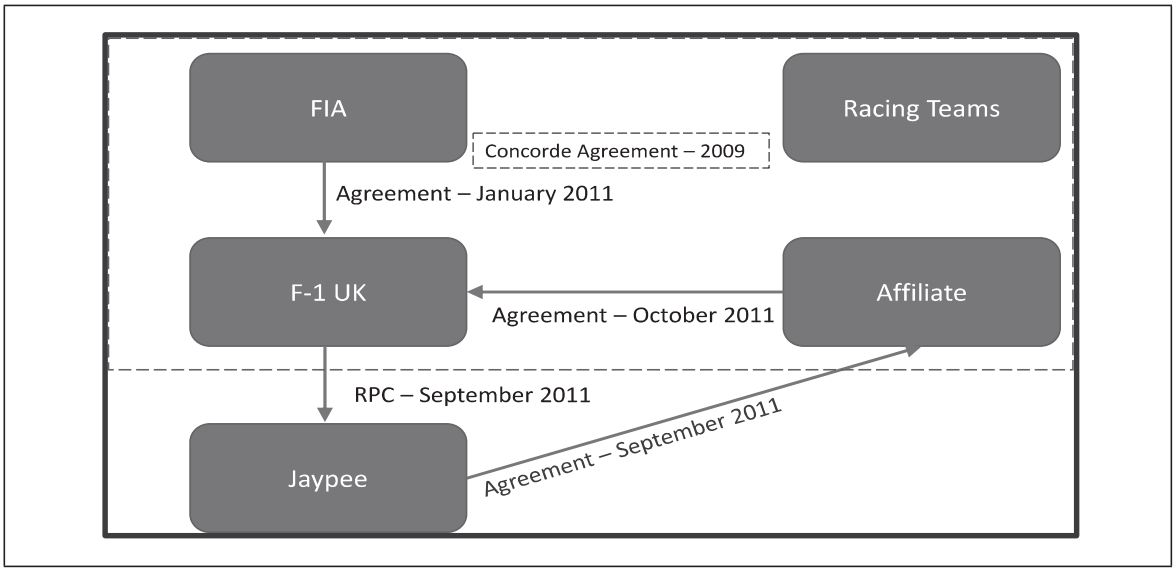
2. Subsequent to agreements between Federation International Automobile (FIA – an international motorsports event regulating association), Formula One Asset Management Limited (FOAM) and F-1 UK, with effect from 1 January 2011, F-1 UK was assigned commercial rights in the FIA Formula One World Championship for a period of 100 years;

3. In 2009, a Concorde Agreement was entered between FIA, F-1 UK and the racing teams whereby FIA authorised F-1 UK to exclusively exploit the commercial rights relating to Formula 1 Championship directly or through its affiliates. These rights included media rights, hospitality rights, title sponsorship, etc.

4. In September 2011, F-1 UK entered into a five-year Race Promotion Contract with Jaypee group company (2011 RPC) granting Jaypee Sports (Jaypee) the right to host, stage and promote the Formula One Grand Prix of India for a consideration of USD 40 million. The 2011 RPC was preceded by another RPC of 25-10-2007 between FOAM predecessor and Jaypee.

5. Conditions precedent to the 2011 RPC required Jaypee to enter into contractual arrangements with F-1 UK's affiliates, namely, Beta Prema 2 Ltd (Beta Prema), Allsports Management SA (Allsports), and FOAM. Under agreements with these F-1 UK affiliates (which were entered on the same day as 2011 RPC), Jaypee gave back commercial exploitation rights such as i) the circuit rights, mainly media and title sponsorship; ii) paddock rights; and iii) TV feed generation rights to these F-1 UK affiliates.

6. Separately, a service agreement was signed between F-1 UK and FOAM on the date of the race whereby FOAM engaged F-1 UK to provide various services like licensing and supervision of other parties at the event, travel, and transport and data support services.



F-1 UK and Jaypee approached the Authority for Advance Ruling (AAR) to seek an advance ruling on the following three questions: i) whether the consideration of USD 40 million receivable by F-1 UK from Jaypee in terms of the 2011 RPC was "royalty" as defined in Article 13 of the India-UK Double Tax Avoidance Agreement (DTAA); ii) whether F-1 UK was justified in its position that it did not have a PE in India in terms of Article 5 of the India-UK DTAA; and (iii) whether any part of the consideration received or receivable from Jaypee by an assessee outside India was subject to tax at source under Section 195 of the Indian Income Tax, Act 1961 (IT Act)?

The AAR ruled that the consideration payable by Jaypee to F-1 UK was 'royalty' in terms of the India-UK DTAA and also ruled that F-1 UK did not have a PE in India. Interestingly, in deciding the writ petitions filed by F-1 UK, Jaypee, and the tax authorities against the AAR ruling, the Delhi High Court (HC) reversed the AAR's ruling on both these issues.

The HC held that the payments under RPC to F-1 UK do not constitute royalty and that F-1 UK had a PE in India. Aggrieved, F-1 UK and Jaypee preferred a writ before the SC on the issue of PE (the tax authorities did not challenge the findings of the Delhi High Court on the issue of the consideration under the 2011 RPC not constituting royalty).

Thus, the issue before the SC was whether F-1 UK had a PE in India.

Apex Court's Ruling

The SC held that "The Buddh International Circuit" constituted F-1 UK's fixed place PE in India.

(i) As per Article 5 of the India-UK DTAA, the PE must be a fixed place of business 'through' which business of an enterprise is wholly or partly carried on. Some examples of fixed place are given in Article 5(2) of the India-UK DTAA, by way of inclusion. Article 5(3) of the India-UK DTAA, on the other hand, excludes certain places which would not be treated as PE. On a combined reading of sub-articles (1), (2) and (3) of Article 5 of the India-UK DTAA, only certain forms of the establishment are excluded as mentioned in Article 5(3) India-UK DTAA, which would not be PEs. Otherwise, sub-article (2) uses the word 'include' which means that not only the places specified therein are to be treated as PEs – instead, the list of such PEs is not exhaustive. To bring any other establishment which is not specifically mentioned, the requirements laid down in sub-article (1) are to be satisfied. Twin conditions that need to be satisfied are: i) existence of a fixed place of business; and ii) through that place business of an enterprise is wholly or partly carried out.

(ii) The Buddh International Circuit owned by Jaypee was a fixed place, from where the Indian Grand Prix was conducted including all other activities in relation thereto as set out in various agreements and this undoubtedly constituted economic and business activity of F-1 UK. Two important questions which need to be answered are:

(a) whether the fixed place was at the disposal of F-1 UK?; and

(b) whether it was a fixed place of F-1 UK's business?

Disposal test

(iii) To answer the question of whether the racing circuit was put at the disposal of

F-1 UK, the SC examined the manner in which commercial rights held by F-1 UK and its affiliates were exploited. To this end, the SC opined that the various agreements executed between F-1 UK, Jaypee, and F-1 UK's affiliates could not be looked at in isolation. A combined reading thereof was necessary to understand the real transaction between the parties and to capture the real essence of F-1 UK's role and to determine who had real and dominant control over the event.

(iv) Basis perusal of various agreements, the SC observed that F-1 UK, directly or indirectly through its affiliates, was authorised to exploit the commercial rights like media rights, hospitality rights, title sponsorship, etc. While the right to host, stage, and promote the Formula One Grand Prix of India was given by F-1 UK to Jaypee for a consideration of USD 40 million, another agreement was signed between Jaypee and three affiliates of F-1 UK, whereby Jaypee gave back: (a) circuit rights, mainly media and title sponsorship, to Beta Prema; (b) paddock rights to Allsports; and (c) rights to services such as generation of television feed, licensing and supervision of other parties at the event, travel, transport, and data support to FOAM. These rights were critical to hosting the Formula One race in India. The success of the event depended not only on the track and participation by teams but was also guaranteed by services aimed at ensuring maximum public viewership such as paddock seating, media advertising, television broadcasting, etc. - all of which were outsourced to affiliates of F-1 UK. Revenue generated therefrom solely accrued to F-1 UK's affiliates. Such an arrangement clearly demonstrated that the entire event had been taken over and controlled by F-1 UK and its affiliates.

(v) The argument that the race was held for only three days in a year, i.e., the business was to be conducted only for three days and that such a short duration should not result in PE exposure was rejected. The SC held that since for, all the three days the entire control was with F-1 UK, the duration was sufficient to constitute fixed place PE. Concurring with the views of the HC, the SC held that notwithstanding that the event was held for limited days in a year, F-1 UK had unbridled access through its personnel to the circuit for the entire duration of the event, and for two weeks prior thereto and a week thereafter.

(vi) The HC's diagnosis of the 2011 RPC (elaborated below) was also held to be leading to the same conclusion that F-1 UK exercised real and dominant control over the event.

(a) The Buddh International Circuit is defined in Clause 1(q), as one suitable in every respect for the staging of the event. Clause 5(e) further states that a circuit shall be constructed, laid out, and prepared in accordance with the agreement, i.e., RPC, "in a form and manner approved by the FOWC and the FIA".

(b) The inclusion of the event was through the F-1 UK's actions. In terms of its arrangement with the FIA, it is the exclusive agency

through which any circuit is introduced for an event in a given calendar year.

(c) The term of the RPC was 5 years according to Clauses 3.3 and 3.4.

(d) In terms of Clause 11, Jaypee was obliged to ensure that during the period commencing 14 days before the race and ending 7 days after the race, the pit, paddock buildings and surrounding areas within the circuit, and land remain open to receive the competitors, F-1 UK as well as F-1 UK's affiliates, contractors and licensees, other personnel, and equipment. Jaypee also had to assure security in these areas.

(e) Under Clause 14, Jaypee was obliged to authorise access to parts of the circuit which were not open to the main public only through passes issued by the F-1 UK. Under Clause 14(b), the public could not have access to the cars in any of the places where the competitor's mechanics may be called upon to work and under Clause 14(c), the validity of passes issued by F-1 UK was unquestionable.

(f) Under Clause 18.1, throughout the term during the access period, from the test session held at the circuit till the end of the event, the promoter, i.e., Jaypee could not permit or access any sound recording or visual or audio-visual footage, for broadcast or any other purpose of the event.

(g) Under Clause 18.2, Jaypee had to ensure that the terms of the ticket sale, giving admittance to the event, included a condition imposed on the ticket holder not to make any kind of recording or take any recording device that could store or transmit any part of the event and that the ticket holder as a spectator could be filmed and a sound made by him could be recorded for broadcast or any other such item that F-1 UK could impose on Jaypee.

(h) Jaypee was obliged to engage a third party approved by F-1 UK to carry out and perform on its behalf all services relating to the origination of the international television feed and host broadcasting for each event during the term specified in the guidelines published by F-1 UK and provided to Jaypee.

(i) Jaypee unconditionally and irrevocably under Clause 19.2 assigned to F-1 UK all copyright and other intellectual property rights, titles, and interest in any image or recording or other presentation or recording in any image/form whatsoever for the duration of the rights and give consent to F-1 UK to deal with such rights as it pleased.

(j) Clause 20.1 obliged Jaypee to ensure that those accredited and authorised by F-1 UK were permitted to enter upon the premises to make sound, television or recordings or transmissions or make films or other pictures and use the facilities throughout the access period and undertook

to accord to such personnel all help and facilities that F-1 UK would require, including assistance for consent, permission or authorisation with any local authority.

(k) Under Clause 21, Jaypee was prohibited from causing, permitting, enabling, assisting display of any advertisement (other than the normal advertisement displayed on any competitor's cars) or other displays on, near, or which could be seen from the circuit or the land which, in the opinion of F-1 UK, could prevent lawful transmission of images or recordings of the event. F-1 UK say in this regard was final.

(l) In the Director's report of F-1 UK, the company mentioned that its current company had entered into an agreement with FIA because of which F-1 UK acquired commercial interests in the championship which became operative from 01.11.2011 and that in the exploitation of such commercial rights in the championship, the total revenues generated was US$ 1205 million.

(vii) The following examples based on international cases as cited in Dr. Philip Baker's commentary on international taxation were also cited in this regard:

(a) A stand at a trade fair, occupied regularly for three weeks a year, through which an enterprise obtained contracts for a significant part of its annual sales, was held to constitute a PE [***Josepn Fowler vs. M.N.R [1990] 90 DTC 1834];***

(b) A temporary restaurant operated in a mirror tent at a Dutch flower show for a period of seven months was held to constitute a PE [Antwerp Court of Appeal, decision of February 6, 2001, noted in 2001 WTD 106-11]; and

(c) In the case of a Swedish company having an individual in Norway to look after the Swedish Company's sales in Norway, the individual's house in Norway could be said to be at the disposal of the Swedish Company and therefore it amounted to a fixed place of business of the Swedish Company in Norway [Universal Furniture Ind. AB v. Government of Norway Case No. 99-00421, dated 19-12-1999].

Whether it was a fixed place of F-1 UK's business – Business test

(viii) Commercial rights, including advertisement, media rights, etc., and even the right to sell paddock seats, were assumed by F-1 UK and its associates. As a part of its business, F-1 UK (as well as its affiliates) undertook the aforesaid commercial activities in India. Save a limited class of rights (those relating to paddock entry, ticketing, hospitality at the venue, and a restricted class of advertising), commercial exploitation rights vested exclusively with F-1 UK.

(ix) HC's order was cited to state affirm that:

(a) By virtue of the Concorde Agreement, the teams had

undertaken to race in any circuit chosen by F-1 UK. The 2011 RPC also assured that the F-1 UK would ensure that such a team did in fact participate in the event in the Buddh Circuit. This important fact shows that the entire event, i.e.F1 FIA Championship in the circuit was organized and controlled in every sense of the term by F-1 UK.

(b) If Jaypee was the event promoter, which owned the title to the circuit in the sense that it owned the land, F-1 UK was the commercial rights owner of the event, by virtue of the Concorde Agreement. FIA parted with all its rights over each commercial right it possessed to F-1 UK. The bulk of the revenue earned is through media, television, and other related rights.

(x) Mere construction of the track by Jaypee at its expense was of no consequence. Ownership of the track or use thereof for hosting other events was also immaterial. The argument that F-1 UK's role came to an end with granting permission to host the event was categorically rejected by the Court. It was held that the conduct of the F1 Championship and control over the track during that period unequivocally reflected the omnipresence of F-1 UK and its affiliates. F-1 UK's stamp over the entire event was ominous.

(xi) The test laid down by the Andhra Pradesh High Court in Visakhapatnam Port Trust case stood fully satisfied - not only the Buddh International Circuit was a fixed place where the commercial/ economic activity of conducting F-1 Championship was carried out, but it was also a virtual projection of F-1 UK on Indian soil.

(xii) Dr. Philip Baker's commentary states that a PE must have three characteristics – (i) stability; (ii) productivity; and (iii) dependence. All characteristics are present in this case – (i) fixed place of business in the form of Buddh International Circuit, (ii) it was at the disposal of F-1 UK; (ii) through such place F-1 UK actively conducted business.

In view of the above, F-1 UK had a fixed place PE in India.

Union of India vs. U.A.E. Exchange Center; [2020] 425 ITR 30(SC); Dated 24/04/2020

Summary

The SC held that where an assessee has a Liaison Office (LO) in India to carry out certain activities permitted by the Reserve Bank of India (RBI) which are not core activities of the assessee's business, they would fall into the exclusion of 'preparatory or auxiliary' under the concerned DTAA and such LO could not be regarded as the assessee's fixed place PE in India.

Facts

The assessee (Assessee) was a UAE based company engaged in providing remittance services to its UAE based clients for transferring funds from UAE to various places in India. For ease in the facilitation of such remittance services, the Assessee had opened its LO in India in the year 1996 under a specific permission granted by the RBI. The RBI's permission contained an exhaustive list of permitted activities that the LO could undertake and corresponding restrictions.

The RBI permission permitted the LO to undertake the following activities in India: i) responding quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts; ii) undertaking reconciliation of bank accounts held in India; iii) acting as a communication centre receiving computer (via modem) advices of mail transfer TT (telegraphic transfer) stop payments messages, payments details, etc., originating from the Assessee's several branches in UAE and transmitting to its Indian correspondent banks; iv) printing Indian Rupee drafts with facsimile signature from the Assessee's head office and countersignature by the authorised signatory of the LO, and v) following up with the Indian correspondent banks.

Further, the RBI restricted the LO from the following functions: i) undertaking any activity other than the permitted activities in India; ii) charging any fees/commission for carrying out the permitted activities in India, i.e., the LO shall not earn any 'income' in India; iii) entering into any business contracts in its own name; iv) rendering any consultancy or any other services directly/indirectly, with or without any consideration; v) borrowing or lending any money from or to any person in India; vi) no signing authority with the in-charge of the LO in India except those required for normal functioning of LO on behalf of the head office; and vi) the entire expenses of the LO in India to be met exclusively out of the funds received from abroad through normal banking channels.

In line with the above stipulations, the contracts between Assessee and its clients were executed in UAE and the Assessee received remittance amount as well as commission from its clients in UAE. Based on the clients' instructions, the Assessee remitted funds on their behalf in either of the following modes: i) by telegraphic transfer through normal bank channels, or ii) by couriering cheques through its LO to the designated beneficiaries in India.

The Assessee had approached the AAR, for determination of the question of whether any income is accrued/deemed to be accrued in India from the activities of the LO in India. The AAR had observed that in the second mode of remittance money to India i.e., by couriering cheques through its LO to the designated beneficiaries in India, the LO downloads the particulars of remittance using electronic media and prints cheques/drafts drawn on the banks in India, which are then couriered to beneficiaries in India as per the client's instructions (Remittance Activities). The AAR held the remittance activities of the LO are a significant part of Assessee's main business, without which its contractual obligations to its clients cannot be fulfilled Accordingly, the AAR concluded that the LO constitutes Assessee's PE in India and the income attributable to such PE would be taxable in India. Aggrieved, the Assessee filed a writ petition before the HC, which set aside the AAR's ruling noting that the permitted activities were 'preparatory and auxiliary' in nature and therefore, were excluded from the scope of PE under the India-UAE DTAA. The tax authorities approached the SC, asserting the existence of the Assessee's PE in India.

The SC had to answer the following question: Whether the activities undertaken by the LO in India would fall within the exclusion of 'preparatory and auxiliary activities' under the India-UAE DTAA?

Apex Court's Ruling

(i) In view of section 90 of the IT Act, the Assessee's case had to be examined

under the provisions of the India-UAE DTAA and not under the provisions of the IT Act.

(ii) SC agreed with the HC ruling on the point that the activities undertaken by LO were 'preparatory and auxiliary' and hence, outside the purview of PE. The SC emphasised the limited set of activities permitted by the RBI. The LO was only allowed to provide services of and incidental to the delivery of cheques/drafts drawn on banks in India. The LO was restricted from performing any core business activities such as, entering into a contract with any party in India or rendering consultancy or any other service directly or indirectly with or without consideration to anyone in India or borrowing or lending any money from or to any person in India without RBI's permission, etc. It was, therefore, clear that the LO was not allowed to undertake any trading activity or enter into any business contracts in its own name.

(iii) In view of the above, the SC concluded that the nature of permitted activities of the LO were 'preparatory and auxiliary' in character, and hence, outside the purview of PE under the India-UAE DTAA.

Director of Income-tax (IT) vs. Samsung Heavy Industries Co. Ltd [2020] 426 ITR 1 (SC)

Summary

The SC affirmed the judgement of the Uttarakhand High Court that where the assessee, a Korean company, was awarded a project by the Oil and Natural Gas Corporation (ONGC) to, inter alia, undertake surveys, design, etc./and such assessee has a Project Office (PO) in India, it would per se not constitute a PE in India so long as that the assessee was not carrying on any core business activity through its PO in India.

Facts

In 2006, the assessee (Assessee), along with Larsen & Toubro Limited was awarded a 'turnkey' contract by ONGC to carry out work comprising surveys, design, engineering, procurement, fabrication, installation, start-up, and commissioning of entire facilities covered under the 'Vasai East Development Project' (Project). In the same year, the Assessee set up a PO in India to act as 'a communication channel' between the Assessee and ONGC in respect of the Project. The activities of designing, engineering, and material procurement activities were undertaken by the Assessee outside India. From November 2007, such platforms were brought to India for installation at the project site. For the financial year 2006-07, the assessing officer (AO) held that the India PO constituted the Assessee's fixed place PE in India under Article 5(1) of the India-Korea DTAA. Basis this, the AO held that profits from Offshore Activities were associated with the Indian PE and brought to tax 25% of the revenues earned from Offshore Activities attributable to the Indian PE.

The order passed by the AO was upheld by the Dispute Resolution Panel and later by the Income Tax Appellate Tribunal (Tribunal). Specifically, the Tribunal cited the letter to the RBI for opening the PO as also the board resolution of the Assessee in relation to the same wherein it was stated that the Assessee's personnel was authorised to establish the PO and for 'coordinating and executing delivery of documents in connection with construction of offshore platform modification of existing facilities for ONGC above'. The Tribunal had also held that the Assessee's arguments

that the accounts of the PO do not contain any expenditure relating to the execution of the contract was not acceptable, as the maintenance of account is in the hands of the assessee and merely the mode of maintaining accounts alone cannot determine the character of the PE. Only the role of PE will be relevant to determine what kind of activities it has carried on.

Aggrieved, the Assessee appealed before the Uttarakhand High Court (UK HC). The UK HC's order, while not elaborate, held that the profits attributable to the PE from Offshore Activities (held to be 25% of revenues by the AO) was without any basis and therefore struck down the Tribunal's order. Aggrieved by the UK HC's order, the tax authorities filed an appeal before the SC.

The question before the SC was whether the PO constituted fixed place PE of the Assessee in India and whether profits from the offshore supply of platform was taxable in India under India-Korea DTAA.

Apex Court's Ruling

The SC held that the PO did not constitute Assessee's PE in India within the meaning of Article 5(1) of the India-Korea DTAA during the concerned year.

The SC cited its earlier judgments[1] to state that the condition precedent for applicability of Article 5(1) of the DTAA and the ascertainment of a PE is that it should be an establishment 'through which the business of an enterprise' is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment. What is equally clear is that the maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5. Also, it is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment.

The SC emphasised the fact that under the India-Korea DTAA, profits of a foreign enterprise are taxable in India only where the enterprise carries on its core business through a PE in India. As regards the documents relied upon by the lower tax authorities (letter to RBI for setting up the PO, board resolution, RBI approval, etc.), the SC held that these documents, when read in entirety, showed that the PO was established only to 'coordinate and execute delivery documents' in connection with the construction of offshore platform modification of existing facilities for ONGC, and not to coordinate and execute the Project in its entirety.

The SC also set aside the Tribunal's finding relating to the Assessee's accounts being inconclusive of the scope of activities carried on by the PO. Further, in setting aside the Tribunal's view, the SC relied on its own

1. *M/s DIT (International Taxation), Mumbai vs. M/s Morgan Stanley & Co. Inc., [2007] 7 SCC 1; Commissioner of Income-tax and Another vs. Hyundai Heavy Industries Co. Ltd. [2007] 7 SCC 422; Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income Tax, Mumbai, [2007] 3 SCC 481; Asst. Director of Income Tax, New Delhi vs. E-Funds IT Solution Inc. [2018] 13 SCC 294.*

judgment in E-Funds IT Solution Inc. (2018) 13 SCC 294 and held that the initial onus to show that the PO constituted a PE was on the tax authorities and not the Assessee. Finally, as only two people were working in the PO, with neither of being qualified to perform any core activity of the Assessee, the SC held that it was clear that no fixed place PE was constituted under Article 5(1) of the India-Korea DTAA as the PO could not be said to be a fixed place of business through which core business of the Assessee was wholly or partly carried on. The SC, therefore held, that it was unnecessary to go into any of the other questions argued before the SC (such as whether the Project contract was a divisible contract or a composite contract). The SC also held that the PO would fall within Article 5(4)(e) of the India-Korea DTAA, as the office was solely carrying out an auxiliary activity that was meant to act as a liaison office between the Assessee and ONGC (the aforesaid article of India-Korea DTAA provides that PE does not include a fixed place of business that is maintained solely for the purpose of carrying on any activity of a preparatory or auxiliary character).

Analysis and takeaways

- Sine qua non for fixed place PE characterisation: The SC has re-emphasised that all the following attributes need to exist for a fixed place PE to exist in India:
    - o Such fixed place should be at the disposal of the foreign enterprise; and
    - o The core business of the foreign enterprise should be carried out from such a fixed place.

  It is, therefore, important to examine each aspect independently in detail in any fixed place PE analysis.

- *Facts/substance reigns supreme*

  The importance of facts in PE analysis cannot be overemphasised. In the Formula One case, the SC looked beyond the form of any single agreement and looked at least half a dozen contracts on a holistic basis to examine the legal question. In a way, the SC applied the rule of substance over form by rejecting a siloed view of any particular agreement concerning F-1 UK or its affiliates.

  The SC dissected the issues regarding the 'disposal' test and 'permanence' / 'duration' test on a pragmatic basis in view of the peculiar facts/business model. A reading of the AAR ruling in Golf in Dubai [2008]306 ITR 374/174 Taxman 480 (AAR) is also recommended in relation to the 'permanence' aspect based on a very short period of activity in India.

- *Regulatory aspects*

  Regulatory aspects also need to be holistically considered in a PE analysis. This aspect has come out clearly in both the UAE Exchange case as well as the Samsung case. In the UAE Exchange case, the assessee's case was bolstered by the fact that the remittance activities of the LO were specifically permitted by RBI. Historically, where an LO has exceeded its scope of permitted activities, courts have looked at such fact negatively to hold that such LO can constitute an Indian PE. Thus, it is important to ensure an LO at all times operates within the boundaries set out by RBI.

In Samsung case as well, the SC placed reliance on the assessee's correspondence with the RBI in coming to its conclusion.

Having said that, one is advised to take a considered view while setting up a physical presence in India. This is because in the Samsung case, the assessee's PO was finally held to be carrying out activities which are normally associated with an LO.

- *Documentation*

  PE being a mixed exercise driven by facts and law, the documentation of transactions remains critical at all times.

- *International jurisprudence*

  Given that India's tax treaties are largely based on the OECD model, the OECD commentary should continue to have a persuasive value for interpretation. Re the Formula Once case, the credence given by the SC to the OECD Commentary and commentaries of Dr. Philip Baker and Klaus Vogel further demonstrates the judiciary's commitment to respect international public law and related aids to interpretation – it should go a long way for taxpayers from the perspective of getting uniformity and predictability in tax treaty interpretation.

- *Multilateral Instrument*

  Going forward, in relation to tax treaties to which the provisions of the MLI regarding specific activity-based exemption apply, it will be important to examine whether a particular activity in the exclusion clause of PE (advertising, storage, delivery, etc.) is indeed 'preparatory or auxiliary' in nature. Further, any artificial splitting-up of contracts between different group entities to avoid PE constitution would also fall foul in the MLI era.

> "No man ever steps in the same river twice, for it's not the same river and he's not the same man."
>
> **- *Heraclitus***

This quote continue to be relevant even in the context of PE analysis – whereby a change in one fact or application of relevant law (DTAA, MLI, etc.) can lead to a completely different conclusion. One would therefore be well advised to approach PE analysis afresh for each financial year.

(*Authors: Vinita Krishnan is Director, Jimmy Bhatt is Principal Associate and Avin Jain is Senior Associate at Khaitan & Co. The views expressed are personal.*)

■●■