



Tax alert: Operational control, implementation over India business constitutes fixed place PE

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The Supreme Court (SC) has held that business carried on by a UAE-based taxpayer, through hotel premises in India, by exercising substantive operational control and implementation over business operations, constitutes fixed place permanent establishment (PE) in terms of Article 5(1) of the India-UAE tax treaty.

In a nutshell



For a PE to exist, two essential conditions must be satisfied: (i) the place must be 'at the disposal' of the enterprise, and (ii) the business of the enterprise must be carried on through that place. A PE must demonstrate the three core attributes of: **stability**, **productivity**, and a **degree of independence**.



'**Disposal test**' is pivotal, meaning the enterprise must have a right to use the premises in such a way that enables it to carry on its business activities. This test is to be applied contextually, taking into account the commercial and operational realities of the arrangement.

Determining whether a fixed place PE exists must involve a fact-specific inquiry, including: the enterprise's right of disposal over the premises, the degree of control and supervision exercised, and the presence of ownership, management, or operational authority.



Exclusive possession is not essential, temporary or shared use of space is sufficient, provided business is carried on through that space. The test is not whether a formal right of use is granted, but whether, in substance, the premises are at the disposal of the enterprise and are used for conducting its core business functions.



Scroll down to read the detailed alert

Background:

- The taxpayer¹ is a company incorporated in and a tax resident of the United Arab Emirates (UAE).
- During the Financial Year (FY) 2008-09 corresponding to Assessment Year (AY) 2009-10, the taxpayer entered into two Strategic Oversight Services Agreement (SOSA) with an Indian company (I Co) in respect of the Indian hotels owned by the I Co. In terms of the SOSA, the taxpayer agreed to provide strategic planning services and know-how to ensure that the hotel was developed and operated as an efficient and high quality international full-service hotel.
- The taxpayer filed nil return of income for the AY under consideration, claiming that:
 - The income was not taxable as there was no specific Article under the India-UAE tax treaty for taxing fees for technical services (FTS).
 - The taxpayer had no fixed place of business, office or branch in India. The presence of the taxpayer's employees in India during the relevant FY did not exceed the specified time of 9 months under Article 5(2) of the India-UAE tax treaty and therefore, the taxpayer did not have the Permanent Establishment (PE) in India as contemplated under Article 5 of the India-UAE tax treaty. Hence, business income was not taxable under Article 7 of the India-UAE tax treaty.
- During the course of audit proceedings, the Assessing Officer (AO), amongst others, held the following:
 - The taxpayer was '*actually operating the hotels, belonging to the owners, in each and every manner*'. There was continuous presence of the taxpayer through its employees or other personnel throughout the year.
 - The taxpayer had a fixed place of business at its disposal throughout the year in the premises of the hotel. Although the taxpayer had restricted the stay of its employees in India below the specified period, but the premises were available to the taxpayer for the entire duration. The taxpayer had carried out its activities for performing its obligations under the SOSA from the said premises.

Hence, the AO held that the taxpayer constituted PE in terms of Article 5(1) and Article 5(2) of the India-UAE tax treaty.

- Aggrieved, the taxpayer filed an appeal and in the course of appellate proceedings, the matter reached before the Delhi High Court (HC) which held, amongst others, that the taxpayer had a PE in the form of a fixed place of business under Article 5(1) of the India-UAE tax treaty.
- Aggrieved, the taxpayer filed an appeal before the Supreme Court (SC).

Relevant provisions in brief:

Relevant extract of Article 5 of the India-UAE tax treaty

"(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes especially...

... (i) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period."

Relevant extract of Article 7 of the India-UAE tax treaty

¹ Hyatt International Southwest Asia Ltd. v. ADIT [Civil Appeal No. 9766 to 9773 of 2025] (SC)

“(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

Decision of the SC:

The principal issue that arose for determination before the SC was whether the taxpayer had a PE in India under Article 5(1) of the India-UAE tax treaty, and consequently, whether income derived under the SOSA was taxable in India. In this regard, the SC noted/observed the following:

- Under the tax treaties, the taxing rights of the source state over the business profits of a foreign enterprise are contingent upon the existence of a PE in the source country. One of the sine qua non for a fixed place PE is that the place through which the business is carried on must be 'at the disposal' of the enterprise (disposal test).
- The OECD² does not rigidly define this test but provides illustrative examples. There is no strait-jacket formula applicable to all cases. Typically, trading operations require a continuously used fixed place, whereas service-oriented business may not. Some jurisdictions consider mere use of a place sufficient, while others require legal or operational control over the premises.
- Determining whether a fixed place PE exists must involve a fact-specific inquiry, including: the enterprise's right of disposal over the premises, the degree of control and supervision exercised, and the presence of ownership, management, or operational authority.
- The taxpayer's following contentions were rejected by the SC and it was held that:
 - Contention that the absence of an exclusive or designated physical space within the hotel precluded the existence of a PE, was misconceived.
 - The absence of a specific clause in the SOSA permitting the conduct of business from the hotel premises negated the existence of a PE, was without merit.

Reliance was placed on an earlier ruling³ of the SC wherein it had been observed that:

- For a PE to exist, two essential conditions must be satisfied: (i) the place must be 'at the disposal' of the enterprise, and (ii) the business of the enterprise must be carried on through that place.
- A PE must demonstrate the three core attributes of: **stability, productivity, and a degree of independence.**
- Among these, the '**disposal test**' is pivotal, meaning thereby the enterprise must have a right to use the premises in such a way that enables it to carry on its business activities. This test is to be applied contextually, taking into account the commercial and operational realities of the arrangement.
- Further, exclusive possession is not essential, temporary or shared use of space is sufficient, provided business is carried on through that space.
- The test was not whether a formal right of use was granted, but whether, in substance, the premises were at the disposal of the enterprise and were used for conducting its core business functions.
- In the case under consideration, a detailed review of the SOSA executed between the taxpayer and I Co demonstrated that the taxpayer exercised pervasive and enforceable control over the hotel's strategic, operational, and financial dimensions. Specifically, the SOSA vested the taxpayer with powers to:

² OECD – Organisation for Economic Co-operation and Development

³ Formula One World Championship Ltd. v. Commissioner of Income-tax (International Taxation) [2017] 80 taxmann.com 347 (SC)

- Appoint and supervise the General Manager and other key personnel,
- Implement human resource and procurement policies,
- Control pricing, branding, and marketing strategies,
- Manage operational bank accounts,
- Assign personnel to the hotel without requiring the owner's consent.

These rights were well beyond mere consultancy and indicated that the taxpayer was an active participant in the core operational activities of the hotel. The actual role of the taxpayer was not just advisory in nature but extended to various other administrative roles.

The 20-year duration of the SOSA, coupled with the taxpayer's continuous and functional presence, satisfied the tests of stability, productivity and dependence.

- From the nature of functions carried out by the taxpayer, it could not be said that they were performing merely 'auxiliary' functions. Rather, the functions performed, through its staff operating from the hotel premises, were not just limited for setting up a pattern of activities for the hotel, but were core and essential functions, clearly establishing their control over the day to-day operations of the hotel.
- Moreover, they were to be continuously performed over a period of 20 years, under an agreement that included revenue sharing. Therefore, the hotel premises clearly satisfied the criteria required to be classified as a 'fixed place of business' or PE.
- With respect to daily operations being handled by a separate legal entity in India, the same did not decisively support the case. It is well established that legal form does not override economic substance in determining PE status. The extent of control, strategic decision-making, and influence exercised by the taxpayer clearly established that business was carried on through the hotel premises, satisfying the conditions under Article 5(1) of India-UAE tax treaty.
- Thus, the taxpayer's role was not confined to high-level decision making but extended to substantive operational control and implementation. The taxpayer's ability to enforce compliance, oversee operations, and derive profit-linked fees from the hotel's earnings, demonstrates a clear and continuous commercial nexus and control with the hotel's core functions. Therefore, this nexus satisfied the conditions necessary for the constitution of a fixed place PE under Article 5(1) of the India-UAE tax treaty.

In view of the above, the SC held that taxpayer has a fixed place PE in India within the meaning of Article 5(1) of the India-UAE tax treaty, and that, the income received under the SOSA is attributable to such PE and is therefore taxable in India.

Comments:

Constitution of a PE or otherwise is a combination of factual or legal analysis. There have been SC rulings⁴ in the past which have dealt with the fixed place PE concept.

This ruling has held / upheld the following:

- For a PE to exist, two essential conditions must be satisfied: (i) the place must be 'at the disposal' of the enterprise, and (ii) the business of the enterprise must be carried on through that place. A PE must demonstrate the three core attributes of: **stability, productivity, and a degree of independence.**
- '**Disposal test**' is pivotal, meaning that the enterprise must have a right to use the premises in such a way that enables it to carry on its business activities. This test is to be applied contextually, taking into

⁴ Formula One World Championship Ltd. v. Commissioner of Income-tax (International Taxation) [2017] 80 taxmann.com 347 (SC); ADIT vs. E-Funds IT Solution Inc. [2017] 399 ITR 34 (SC); DIT vs. Morgan Stanley & Co. [2007] 292 ITR 416 (SC); etc.

account the commercial and operational realities of the arrangement.

- Determining whether a fixed place PE exists must involve a fact-specific inquiry, including: the enterprise's right of disposal over the premises, the degree of control and supervision exercised, and the presence of ownership, management, or operational authority.
- Exclusive possession is not essential, temporary or shared use of space is sufficient, provided business is carried on through that space. The test is not whether a formal right of use is granted, but whether, in substance, the premises are at the disposal of the enterprise and are used for conducting its core business functions.

Interestingly, the SC has also considered the revenue sharing arrangement between the taxpayer and the hotel owner while arriving at its conclusion.

Separately, with respect to reliance placed by the taxpayer on an earlier ruling⁵ of the SC, the SC has held that the same was distinguishable on facts based on the following:

- In that case, the Indian subsidiary merely provided back-office support and was compensated on arm's length basis, with no involvement in core business functions.
- In the case under consideration, the hotel itself was the situs of the taxpayer's primary business operations, carried out under its direct supervision and aligned with its commercial interests. The taxpayer's executives and employees made frequent and regular visits to India to oversee operations and implement the SOSA. The findings of the AO, based on travel logs and job functions, established continuous and coordinated engagement, even though no single individual exceeded the 9-month stay threshold.
- Under Article 5(2)(i) of the India-UAE tax treaty, the relevant consideration was the continuity of business presence in aggregate - not the length of stay of each individual employee. Once it was found that there was continuity in the business operations, the intermittent presence or return of a particular employee became immaterial and insignificant in determining the existence of a PE.

The SC in this ruling has also referred to the decision of larger bench of the Delhi HC⁶ which held that profit attribution to a PE in India is permissible even if the overall foreign enterprise has incurred losses. However, it has not given its finding on this issue.

Also, from GST⁷ perspective it becomes imperative to evaluate whether there exists a 'fixed establishment' of the taxpayer in India and the requirement of obtaining GST registration.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

⁵ ADIT vs. E-Funds IT Solution Inc. [2017] 399 ITR 34 (SC)

⁶ Hyatt International Southwest Asia Ltd vs. ADIT [2024] ITA No 216/2020 and others (Delhi- HC)

⁷ Goods and Service Tax

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