Geophysical services performed through vessels constitute Fixed Place PE; service PE clause under India-UAE tax treaty not applicable

April 16, 2018

In brief

In a recent decision,[1] the Authority for Advance Ruling (AAR) held that in the absence of a specific clause dealing with the activities in connection with exploration, exploitation or extraction of mineral oil etc., as per Article 5 of the India-UAE Double Taxation Avoidance Agreement (tax treaty) by vessels present in Indian territory for carrying out geophysical activities would constitute a fixed place permanent establishment (PE) in India.

In detail

Facts

- The taxpayer, a company incorporated and resident of UAE, was engaged in the business of rendering geophysical services to the oil and gas exploration industry.
- The taxpayer provided seismic data acquisition, processing and interpretation services to X in the Mumbai High Field.
- For carrying out the said activities, the taxpayer mobilised its vessels into Indian Territory for a period of 113 days in a financial year.

Issue before the AAR

Whether the taxpayer for its contract with X in India, constituted a PE as per Article 5 of the India-UAE tax treaty?

Revenue's contention

- The Revenue contended that the taxpayer had a PE in India in the form of vessels and the income from the contract with X was liable to tax in India.
- The words "through which" appearing in fixed place PE clause was open to interpretation to apply to any situation where business activities were carried out from a particular location that was at the disposal of the enterprise for that purpose.
- The Revenue, relying upon the ruling of Poompuhar Shipping Corp. Limited[2] and Fugro Engineers B.V.,[3] contended that in the case of the taxpayer, the seismic survey vessel, which was at its disposal, performed its activities within a specific geographical location. Hence, the seismic vessel itself constituted the "fixed place PE" within the meaning of Article-5(1) of the India-UAE tax treaty.

Taxpayer's contentions

- The taxpayer asserted that the activities carried out by it in India was covered under Article 5(2)(i) of the India-UAE tax treaty, being services rendered under a service contract.
- As the taxpayer's presence in India was only for 113 days, it did not have a PE in India as per Article 5(2)(i) of the India-UAE tax treaty, and hence, it would not be taxable in India.

1 A.A.R. No 1295 of 2012
2 Poompuhar Shipping Corporation Limited. *v.* ITO [2014] 360 ITR 257 (Madras)
3 Fugro Engineers B.V. *v.* ACIT [2009] 122 TTJ 655 (Delhi)

- The taxpayer also asserted that the special provision under Article 5(2) would override the general provision under Article 5(1).

AAR's ruling

- The AAR held that the requirements for constituting a PE under Article 5(1) of the tax treaty was to be analysed in the light of the facts of each case.
- The AAR observed that services envisaged under Article 5(2)(i) of the India-UAE tax treaty must be furnished through employees or personnel, and may include services in the nature of supervision, managerial, consultancy, or general, which were employee or personnel oriented.
- In contrast, in the taxpayer's case, the services of seismic surveys was conducted through the seismic vessels. Such services were not contemplated under para 5(2)(i) of the tax treaty.
- Further, the AAR observed that several treaties signed by India (such as Singapore, USA, Netherlands, UK etc.) contained a specific clause for constitution of PE in case of activities in connection with exploration of mineral oil, subject to a duration clause.
- The AAR distinguished the ruling in case of National Petroleum Construction Company,[4] wherein a UAE resident carried out installation of petroleum platforms and such activities were covered by the provisions of a specific clause i.e., Article 5(2)(h) of the India-UAE tax treaty.
- Similarly, in case of Cal dive Marine Construction (Mauritius) Limited,[5] the activity was laying a pipeline and constructing structures, which was covered within a similar specific clause Article 5(2)(i) under the India-Mauritius tax treaty.
- However, in the instant case, the activities performed by the taxpayer was not specifically covered under any clause of Article 5(2) of the India-UAE tax treaty.
- Therefore, the taxpayer's case was governed by Article 5(1) of the India-UAE tax treaty.
- The AAR held that the vessels used by the taxpayer passed all the three tests to constitute a PE namely - (a) there was permanence of duration to the extent required by the business; (b) there was a fixed place which was the vessels in the High Seas from which its business of survey was carried out; (c) lastly, the place (i.e. vessel) was at the disposal of the taxpayer.
- The AAR relied upon the Formula One World Championship Limited[6] decision to hold that the presence of vessels for 113 days would constitute a fixed place PE of the taxpayer in India as per Article 5(1) of the India-UAE tax treaty.
- Further, the AAR concluded that the income derived by the taxpayer from its PE would be computed in accordance with the provisions of section 44BB of the Act.

The takeaways

The AAR has explicitly laid out that activities in relation to exploration, exploitation or extraction of mineral oil would be governed by the Fixed Place PE, unless the applicable tax treaty provides for a specific clause with a duration test in relation to such activities.

In addition, the AAR has observed that the service PE clause is applicable only when the employees render services in a contracting state and not when such services are performed through equipment.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

[4] National Petroleum Construction Company *v.* DIT (International Taxation) [2016] 383 ITR 648 (Delhi)

[5] Cal Dive Marine Construction (Mauritius) Limited *v.* DIT (International Taxation) [2009] 315 ITR 334 (AAR)

[6] Formula One World Championship Limited *v.* CIT, (International Taxation) [2017] 394 ITR 80 (SC)

Our Offices

Ahmedabad

1701, 17th Floor, Shapath V,
Opp. Karnavati Club,
S G Highway,
Ahmedabad – 380051
Gujarat
+91-79 3091 7000

Bengaluru

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bengaluru – 560 008
Karnataka
+91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai – 600 006
Tamil Nadu
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Telangana
+91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata – 700 091,
West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road(Station Road),
Bandra (West), Mumbai – 400 050
Maharashtra
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City,
Gurgaon – 122002
Haryana
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
Maharashtra
+91-20 4100 4444

For more information

Contact us at
pwctrs.knowledgemanagement@in.pwc.com

About PwC

At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 157 countries with more than 223,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.

In India, PwC has offices in these cities: Ahmedabad, Bengaluru, Chennai, Delhi NCR (Gurgaon), Hyderabad, Kolkata, Mumbai and Pune. For more information about PwC India's service offerings, visit www.pwc.com/in

PwC refers to the PwC International network and/or one or more of its member firms, each of which is a separate, independent and distinct legal entity. Please see www.pwc.com/structure for further details.

Follow us on: