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What's New

Tax Insights



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Foreign company does not constitute a PE in India through seconded employees without supervisory or business activities undertaken in India – Delhi bench of the Tribunal

In brief

The Delhi bench of the Income-tax Appellate Tribunal (Tribunal)[1] concluded that a Chinese automotive major did not have a permanent establishment (PE) in India, either as a 'Supervisory PE' or a 'Fixed Place PE', in connection with its business arrangements with its Indian subsidiary. The Tribunal emphasised that there was no evidence of operational control, and the taxpayer had no business premises at its disposal in India.

In detail

Facts

- The taxpayer, a Chinese company, engaged in the business of research, production and sale of passenger cars and commercial vehicles, had a wholly owned subsidiary in India (I Co).
- During the subject year, the taxpayer entered into two types of agreements with I Co.:
  - **Knocked Down (KD) Parts Supply Agreement** – The taxpayer supplied KD car parts to I Co. as offshore supply on a principal-to-principal basis.
  - **Technology License Agreement** – The taxpayer provided I Co. a license to use its technology to produce licensed models, in return for a royalty of 1% on the sale value of the cars sold in India, which the taxpayer offered to tax in its Indian return.
- The taxpayer had also seconded six of its employees to I Co., who worked under the employment and on the payroll of I Co. The salary of these seconded employees was reimbursed by I Co. to the taxpayer on a cost-to-cost basis.
- In the draft assessment order, the Tax Officer (TO) determined that the taxpayer had a Supervisory PE and Fixed Place PE in India and proposed addition of profits from the sale of KD parts to the Indian subsidiary.
- Aggrieved with the proposed addition, the taxpayer filed objections before the Dispute Resolution Pannel (DRP). The DRP accepted the taxpayer's position that the KD parts were sold on an

[1] ITA No.1191/Del/2025

offshore basis, with title and risk transferring outside India. However, the DRP upheld that the taxpayer had a Supervisory PE and a Fixed Place PE in India.

Revenue's contentions

Supervisory PE

- The TO alleged that the six employees seconded by the taxpayer held a crucial and critical position in I Co. These seconded employees performed supervisory activities in connection with the manufacturing and assembling process of cars by I Co. Since the duration of such activities was exceeding 182 days during the concerned year, the taxpayer constituted a supervisory PE in India (erroneously mentioned as Service PE by the TO).
- The DRP admitted that the six seconded employees were not directly engaged in any inspection activity per se but that they apparently possessed skills pertaining to managing the identification and evaluation of potential suppliers, monitoring stock of inventory, supporting the resolution of engineering issues, managing service centres, financial planning, treasury and cash management, etc.
- Furthermore, the seconded employees were Chinese expatriates working for the Chinese company, and their pay was decided by the taxpayer. The taxpayer was paying a part of the salary in China, and the lien of the seconded employees continued in the parent company.
- Additionally, the email communication gathered during the search at I Co., established that there was constant reporting or information sharing about the affairs of I Co. to the taxpayer by the seconded employees.
- In light of these facts, it was concluded that the taxpayer had a Supervisory PE in India as per Article 5(3)(a) of the India-China Double Taxation Avoidance Agreement (DTAA).

Fixed Place PE

- The Indian subsidiary is nothing but representation or extension of taxpayer in India. The taxpayer sold KD parts, software, licence and brand name to I Co., which only assembled the parts into cars. Without this assembly, the subsidiary would have no business or income. Therefore, the activities undertaken by the taxpayer and the I Co. directly contribute to the taxpayer's income from cohesive business activities.
- As per the statements recorded during the search, the key persons of I Co. have admitted that the taxpayer was exercising full control over the activities of I Co.
- The Fixed Place PE was effectively linked to a Supervisory PE because six seconded employees of the taxpayer supervised the 'screw-driver' assembly of KD products into cars and, through this supervision, controlled key functioning of the Indian subsidiary's manufacturing activity, thereby giving the taxpayer access to the office premises of I Co.

Taxpayer's contentions

Supervisory PE

- The six seconded employees were working for I Co. and not the taxpayer. All six employees were released by the taxpayer, and they were discharged from any responsibility of the taxpayer. They were working in India for I Co., and the I Co. bore the total salary expenditure of the seconded employees.
- As per the affidavit provided by the taxpayer, even though the agreement between the taxpayer and I Co. provided for inspection of goods in the presence of the taxpayer's designated personnel at the premises of I Co., no such inspection was carried out during the concerned year.

- The taxpayer relied on the Delhi High Court's decision2, wherein it was held that seconded employees working exclusively for the Indian company would not constitute a PE of the foreign company in India.

Fixed Place PE

- I Co. is a separate legal entity that manufactures and sells cars on its own account. Mere existence of a step-down subsidiary in India does not constitute a PE in India. It sources a large portion of components from third parties and bears all related risks, so it is not a mere extension of the taxpayer.
- The taxpayer undertakes offshore sales of KD parts on a principal-to-principal basis. The title, risk and rewards in KD parts pass to I Co. outside India. The same is also substantiated by the insurance policy for the KD parts wherein I Co. was named as insured.
- To constitute a Fixed Place PE in India, it is essential to demonstrate that the foreign enterprise has a fixed place available to its disposal in India, which is used for undertaking the core business activities of that foreign enterprise in India. In the present case, no core revenue yielding business activities were carried out by the taxpayer from the alleged PE.

Tribunal's ruling

On constitution of Supervisory PE

- The Tribunal perused the activities carried out by the six seconded employees and the various e-mails discovered during the search and noted that these do not show that the taxpayer was running its own business in India through these employees or managing the day-to-day business of the Indian company.
- The Tribunal noted that even though the seconded employees were skilled people in areas such as purchasing, inventory, engineering support, after-sales, finance and operations, the key question was if the secondees were using the said skills for the taxpayer's business, or for I Co.'s business. Based on the overall facts (including the size of the subsidiary's own operations and its significant third-party purchases), the Tribunal concluded that they were working for the Indian company's business.
- The Tribunal noted that it is commercially sensible for a parent company to second experienced staff to a subsidiary in the interest of business, and that doing so does not automatically mean the parent has a Supervisory PE in the subsidiary's country.
- The emails relied on by the Revenue related to overall reporting and updates from I Co. to the taxpayer, such as for overall goals, plans, costs or progress reports on various projects. The said emails did not show that the taxpayer was carrying out its business through I Co. so as to constitute Supervisory PE. Not a single email suggested that the taxpayer was controlling or directing as to how the subsidiary was to conduct its business. The email also does not show that seconded employees divulge any confidential or any strategic information to suggest the taxpayer's control on the business affairs of I Co.
- The Tribunal concluded that such communication is normal in a parent-subsidiary relationship and is not enough to establish a Supervisory PE.

On constitution of Fixed Place PE

- The Tribunal noted that the taxpayer supplied the goods in KD condition which were assembled or manufactured in India and sold to Indian customers. Such a model is commonly used by multinationals setting up subsidiaries in India. If the view of the revenue is accepted, it will create

[2] PCIT *v.* Samsung Electronics Co. Limited [2025] 170 taxmann.com 417 (Delhi High Court)

a huge disruption in the taxability of the incomes of the parent and subsidiary set-up in a multinational set-up driven economy in the entire world.

- The Tribunal concluded that such an arrangement cannot be termed a 'Fixed Place PE' unless the Revenue can establish that the taxpayer has a fixed place of business in India which is at its disposal, where the taxpayer has the right to use the said place and has control thereupon, and noted that no such evidence had been brought on record by the TO or the DRP.
- As held by the Supreme Court[3], a Fixed Place PE exists when there is:
  - i existence of a fixed place of business, and
  - ii through that place, the business of an enterprise is wholly or partly carried out.
- Since it has already been concluded that the taxpayer did not have a Supervisory PE through the six seconded employees, the argument that a Fixed Place PE is linked to the Supervisory PE because the seconded employees got access to the office premises of I Co. is not acceptable.
- In view of the above discussions, the Tribunal concluded that the taxpayer does not have a Fixed Place PE in India.

The takeaways

The Tribunal has reaffirmed that the mere existence of a business arrangement between a foreign parent and Indian subsidiary does not automatically create a PE. The Revenue must establish that the operations of the Indian subsidiary are actually being controlled or directed on a day-to-day basis in order to constitute a PE in India.

Moreover, mere secondment of employees should also not result in a presumption that they are working for the foreign entity in India. As long as such employees are working for the Indian subsidiary, their presence in India could not be attributed towards the foreign entity.

3 Formula One World Championship Limited *v.* CIT [2017] 394 ITR 80 (SC)

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