

Services rendered by a Mauritian company for improving the management performance of an Indian company, through its employees, having some place at its disposal, constitutes fixed place PE in India

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Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Renoir Consulting Ltd.¹ (the taxpayer) held the services rendered by the taxpayer Mauritian company, to an Indian company for improving the management performance quotient by enhancing the operating parameters, reducing costs, improving the work methods/services, etc. constituted a Permanent Establishment (PE) in India under the India-Mauritius tax treaty (the tax treaty), since some place was at the disposal of the taxpayer or its employees during the entire period of the stay in India. Accordingly, there was a fixed Place PE of the taxpayer in India, under the tax treaty.

The Tribunal held that the word 'permanent' means there must be a certain degree of permanence and a fixed place would include a movable place of business. However, the establishment must have a commercial coherence or purpose, without the same, the enduring quality would be immaterial.

In the present case, the location of the PE was fixed in terms of its operating parameters, and the continued physical presence in India of the taxpayer's employees/personnel at different locations as warranted under the contract.

Facts of the case

The taxpayer, a company being a tax resident in Mauritius had business in India, of applying the Renoir Performance Improvement Programme (RPIP), designed by it, for improving the management performance quotient of an enterprise by enhancing the operating parameters, as reducing costs, improving the work methods/services, providing efficient management control, etc.

The projects undertaken by the taxpayer for its clients in India were aimed at improving the market share and also the improved financial results. Accordingly, the total consideration receivable by the taxpayer would be for (i) Development and improvement programme and (ii) Providing information and scientific knowledge.

¹ Renoir Consulting Ltd. v. DDIT (I.T.A. No. 4323/Mum/2011, I.T.A. No. 4125/Mum/2011, I.T.A. No. 5298/Mum/2009)

During the year under consideration, the taxpayer received an amount from Godfrey Philips India Ltd. (GPI), an Indian company, on contract/s executed in India. The taxpayer claimed that there was no Permanent Establishment (PE) in India under the India-Mauritius tax treaty (the tax treaty), and therefore, the business income earned from GPI could not be brought to tax in India. The taxpayer relied on the decision of Andhra High Court in the case of Visakhapatnam Port Trust² and the co-ordinate bench decision in the case of Airlines Rotables Ltd.³ to support its stand. However, this amount was assessed as business income by the Assessing Officer (AO) on the grounds that the taxpayer has a PE in India.

Tribunal's ruling

The word 'permanent' in the term 'permanent establishment' does not signify a permanent character, or that the right to use the place should be perpetual, but that there must be a certain degree of permanence. A fixed place would include a movable place of business, viz. a petroleum drilling rig may constitute a PE if it is moved frequently from one location to another.

How the fixed place or the right to use the same is secured is of little significance and the same may be owned, rented or otherwise acquired in any other manner. The establishment must have a commercial coherence or purpose, without the same, the enduring quality would be immaterial.

Even the securing of the relevant contract, valued at over INR75 million (GBP1.276 million), would require extensive execution and thus, presence in India. The project required a deep conviction on the part of the customer/client of the continued presence over the period of the contract, which is itself indefinite, in-as-much as each subsequent phase would ensue only on the satisfactory completion of the preceding one.

The 'base documents' submitted by the taxpayer outlines that the application of RPIP would require that GPI share ideas which would be combined with that of the taxpayer. The clients, as the GPI, would be unaware of RPIP whose theory, mechanics, methodologies, etc. would be required to be explained to their personnel, and the taxpayer would be required to participate actively in its implementation, and thus responsible for its success. Accordingly, constant interaction at all levels, or at least upto the senior management level, between the personnel of the contracting parties is contemplated.

In this project, the initial exchanges and interactions are to form the basis of the preliminary analysis and proposals, followed by a detailed study. The study is to be followed by its actual implementation.

Constant feedback viz. formal and informal, on a regular and defined basis, and review, is also contemplated. This would ensure that the correctives and changes, validating or revising the assumptions made, are applied, and thereby the implementation stays on course, towards the desired objective.

Accordingly, it is essentially an interactive exercise which assumes various forms, viz. interviews, interactions, exchanges, meetings, training sessions, seminars, etc., as suitable for the specific objective at hand.

The initial understanding of the project had crystallised into a definite program of implementation on the basis of regular interactions between the parties, which requires the taxpayer's presence in India.

The top management's role was to provide strategic guidance and policy framework to the extent required for the project at hand. Further, the taxpayer continues its same personnel for the sake of better and smooth implementation of the project. The continued presence of the taxpayer, and not of its particular person is relevant.

The contention of the taxpayer that the personnel are operating from different places, hence there is no fixed place of business, is not acceptable since the location in case of a field job, as of a salesman, has necessarily to be a shifting one. Such location is being fixed in terms of its operating parameter/s, and the continued physical presence in India at the different locations as warranted by the exigencies of the contract.

A fixed place of business, as contemplated in the definition of PE under Article 5 of the tax treaty, does not imply or is confined to a place where the top management of the company is located. A branch of an enterprises may be its PE.

It is for the taxpayer to specify as to how and from where it has performed its work during its continued stay of 874 man-days for the consultants and 81 days for the principal consultants, since it was in the intimate knowledge of its affairs.

² CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP)

³ Airlines Rotables Ltd. v. JDIT [2011] 44 SOT 368 (Mum)

The communications between taxpayer's personnel in India and the head office has been carried out in India from a place in the vicinity of the place of the stay. Further, whether the communication has taken place from the hotel room through the medium of internet using laptops – a tangible asset/s, by the personnel, or similar facilities provided by the hotel or by a retail outlet providing such services is immaterial.

Based on the *modus operandi* to be adopted, the regular interviews, interactions, meetings, training sessions and seminars, etc., both by the consultants and the principal consultants at the GPI's premises, is as much a part of the work undertaken by the taxpayer, as is the independent collection, collation, analysis and review, etc. of the data/information being sought from the organisation during any phase of the project management.

The stated deliverables for the projects are in complete harmony and sync with the stated objectives of the RPIP. Accordingly, the services rendered by the taxpayer were not merely preparatory and auxiliary services though contended by the taxpayer.

Based on the work nature/profile and the modus operandi followed, it is concluded that some place is at the disposal of the taxpayer or its employees during the entire period of the stay in India. Accordingly, there is a fixed place PE of the taxpayer in India.

Our comments

Taxability of foreign companies providing services to an Indian enterprise through its employees/personnel has been a subject matter of debate before the courts.

In the present case, the Tribunal held that a fixed place PE, as contemplated under Article 5 of the tax treaty, does not imply to be a place where the top management of the company is located. Also, such fixed place PE may be owned, rented or otherwise acquired in any other manner. In order to complete huge contract from the Indian company, the taxpayer's extensive execution and continued presence over the indefinite period of the contract was required for which the taxpayer had some place at its disposal. Based on the nature of work and method of operation of the taxpayer, the Tribunal held that there is a fixed place PE of the taxpayer in India.

In line with the OECD commentary, the Tribunal observed that in order to determine existence of the PE, not only there should be a physical location through which the business of the foreign enterprise is carried out, but also such a place should be at the disposal of the foreign enterprise in the sense that the foreign enterprise should have some sort of a right to use the said physical location for its own business.

In the case of *Convergys Customer Management*⁴, the employees of the taxpayer frequently visited the premises of an Indian company to provide supervision, direction and control over the operations of the Indian company and such employees had a fixed place of business at their disposal. Accordingly, the Delhi Tribunal held that the taxpayer has a fixed place PE in India under Article 5(1) of the India-USA tax treaty.



⁴ *Convergys Customer Management v. ADIT* [ITA No. 1443/Del/2012 & 5243/Del/2011]

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