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No PE exposure for foreign company on secondment of employees to Indian subsidiary, rules Delhi Tribunal

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Facts

- Samsung Electronics Co. Ltd. (SEC / the Company) is a Korean company engaged in the business of manufacturing and sales of electronic products.
- Samsung India Electronics Private Ltd. (SIEL / the Indian entity) is a company registered in India and a subsidiary of SEC.
- SEC deputes employees to SIEL based on mutual agreement. Seconded employees work under the direction and supervision of the Indian entity.
- Expatriates receive a portion of their salary in Korea directly from SEC for administrative convenience to meet personal obligation in home country. Such costs are reimbursed by SIEL to SEC.
- A survey was conducted on the premises of SIEL, pursuant to which the Assessing Officer (AO) issued a notice under section 148 to SEC for initiating reassessment proceedings for six years i.e. Assessment Year (AY) 2004-05 to 2009-10.
- In response to the notice, the Company filed its India tax returns for all years declaring income from branch activities which were also declared in the original tax return and income from royalty / fee for technical services (FTS) which were not declared in original return. Taxes had already been withheld on the royalty / FTS income.
- The AO passed the draft assessment order holding that the seconded employees create a Permanent Establishment (PE) in India of SEC as per Article 5 of India-Korea Double Taxation Avoidance Agreement (DTAA).
- SEC filed its objection before the Dispute Resolution Panel (DRP) against the draft assessment order.
- The AO in its remand report filed with DRP proposed to a) treat the Indian entity in its entirety as a PE of SEC; b) consider existence of the Agency PE and a place of management for south east operations in India through presence of expatriates and c) consider that the seconded employees constitute a service PE since they are rendering services to SIEL on behalf of SEC.
- DRP concluded the following –
  - SIEL is incorporated as a company under India laws and complies with all the related rules and regulations governing operation of body corporate in India. Hence it cannot be treated as a PE
  - There is no Agency PE or PE under 5(2)(a) with regard to place of management for south east operations
  - No service PE since the DTAA does not have this clause
- DRP further held that the Indian entity should be treated as a deemed fixed place PE of SEC on account of regular communication between expatriates and SEC. Moreover, there is a dependency on SEC to take any decisions relating to pricing, development of new markets etc.

  DRP took a view that the services rendered by expatriates were essentially for the benefit of SEC which were being performed in addition to the services for Indian entity. SIEL, therefore, acts as a fixed place from where SEC is conducting its business. Further, there are many other employees of SEC which frequently travels to India on short visits and hence existence of PE. Accordingly, AO passed the final assessment order giving effect to DRP's order.
- Aggrieved by this order, SEC filed an appeal before the Income-Tax Appellate Tribunal, New Delhi (the Tribunal).

Issue before the Tribunal

- Do seconded employees operating from the premises of Indian entity constitute PE for SEC?

Ruling of the Tribunal

- Although there is a continuous communication between expatriates and the Company, the entire facts need to be considered to conclude existence of a PE.
- The communication covered information on the designs / preference of India consumers, stock status, market strategies etc. This information will help SEC to make a decision on designing products based on market preference etc., which will benefit the Indian entity.
- The expatriates, through communication with SEC, are only discharging their function as employees of SIEL and are not conducting any business of SEC in India. Hence, there is no PE of SEC in India.
- Even if it is considered that SEC is rendering services to the Indian entity through seconded employees, it will not result in existence of service PE in the absence of Service PE clause in the DTAA[1].

1. India-Korea DTAA amended vide notification dated October 24, 2016 includes Service PE clause

Comments

While the question of whether secondment of employees triggers a PE exposure continues to be a litigative matter, this decision is definitely welcome. Considering the specific facts, the Tribunal has emphasized that mere deputation of employees to Indian subsidiary will not constitute a PE as long as the Indian entity is the ultimate beneficiary of the services rendered by expatriates.

Employers could revisit their deputation arrangements in light of the principle reconfirmed by this ruling.

Source
Samsung Electronics Co. Ltd. vs. DCIT (Int. Taxation, New Delhi [2018] ITA No. 65 to 70/Del/2013 (Delhi Tribunal)
References in the above decision:
Centrica India Offshore(P.) Ltd vs CIT [2014] [364ITR336](Delhi HC)

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Contacts

Ahmedabad
19th Floor, Shapath - V
SG Highway,
Ahmedabad – 380 015.
Tel: + 91 (079) 6682 7300
Fax: + 91 (079) 6682 7400

Bangalore
19th Floor, 46 - Prestige
Trade Tower, Palace Road,
High Grounds, Bengaluru,
Karnataka – 560001.Tel: + 91
(079) 6627 6000
Fax: +91 (080) 6627 6010

Chennai
No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Coimbatore
Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Delhi/Gurgaon
Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Hyderabad
KRB Towers, Plot No. 1-4,
Survey No. 65 to 67,
1st -3rd Floor
Madhapur, Serilingampally(M),
RR District, Hyderabad.
Tel: +91 (040) 6603 2600
Fax:+91 (040) 6603 2714

Kolkata
13th and 14th Floor,
Building – Omega
Bengal Intelligent Park
Block – EP & GP
Sector V, Salt Lake City,
Kolkata – 700091
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Mumbai
Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone
(W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Pune
706, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605

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