



Global Business Tax Alert Sharp Insights

AAR upholds existence of PE, consequential tax in India for Belgium company Rejects assessee's argument of transient presence based on Supreme Court ruling in Formula One

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Background / Facts

- Production Resource Group (PRG), a Belgium-based company, entered into a contract with the Organizing Committee of the Commonwealth Games, Delhi (OCCG), for providing on a turnkey basis, lighting and searchlight services during the opening and closing ceremonies of the Commonwealth Games Delhi, 2010.
- Employees and equipment of PRG were in India for a period of 66 days, for carrying out preparatory, installation and dismantling activities.
- The actual services were rendered only on 2 days – the opening and closing days of the ceremony.
- In light of the above facts, PRG approached the Authority for Advanced Rulings (AAR), for determining the taxability of the receipts from OCCG.
- In its submission before the AAR, PRG claimed the following:
 - The consideration for the aforesaid services was not taxable as Fees for Technical Services (FTS), in the absence of the services being 'continuously rendered', as against a one-off project.
 - The services were also claimed to be standardized in nature, and hence, not taxable as FTS.
 - Based on the Most Favored Nation (MFN) clause in the India-Belgium Double Taxation Avoidance Agreement (DTAA), the requirement of 'make available', appearing in the India-Portugal DTAA, was sought to be imported. In the absence of services being made available, it was claimed that the services would not be taxable in India.
 - The consideration was also not taxable as business profits, in the absence of a Permanent Establishment (PE) in India. It was submitted that the conditions of place of business, power of disposition, permanence, location, business activity and business connection, were not cumulatively satisfied, for the existence of a PE.
- The AAR ruled as under:

AAR's finding

- Based on a reading of the agreement between PRG and OCCG, the AAR held as follows:
 - PRG was provided with a 'lockable' space for storing its tools and equipment, inside the stadium. The very existence of a 'lockable' space implies access to and control over the space, to the existence of others. Based on the nature of business, it was held that this place was not merely for storage, but for carrying out the business itself.
 - The fact that the space was within the stadium, i.e. where the revenue generating activity would take place, itself was a factor in establishing a PE.
 - Coupled with the space, the lighting facilities created and erected by PRG, were also held to be a part of the 'place of business'.

- The contention of a transient presence was rejected on the basis that the establishment need not be permanent, and the context of the business would be relevant.
- An analogy was drawn to the Supreme Court decision in *Formula One World Championship Limited (2017) 80 taxman.com 347*, to state that the permanence was for as much time as the business required.
- The contention of PRG that services were provided only for 2 days, was rejected on the basis that this was a turnkey project, covering the entire duration of the Commonwealth Games and more.
- Some of the other factors that were considered by the AAR while upholding the existence of a PE, were as follows:
 - The fact that some of the activities were sub-contracted - the AAR held that PRG would need an Indian address/ office, to do so.
 - The very fact that some of the key technical and other manpower were employed onsite, was held to be an extension of the foreign enterprise on Indian soil.
 - Insurance on the project, obtained by PRG, was also held to be an indicative factor, on the basis that no insurance company would insure any equipment, structures against any risk of fire, damage or theft unless the place was safe and in exclusive custody and at the disposal of the customer i.e. PRG in this case.
 - The clause in the agreement requiring mandatory licensing was held to be indicative of a place being at the disposal of PRG.
- Based on the above, the AAR concluded that each of the criteria for establishment of a PE - place of business, power of disposition, permanence, location, business activity and business connection, were cumulatively satisfied.
- On the aforesaid basis, the AAR also held the income to be taxable under section 9(1)(i) of the Act, stating that 'business connection' is much wider in import, than a PE.
- Separately, the AAR rejected the tax department's contention that the payment was in the nature of royalty, on the basis that consideration received by PRG was for a final product and not for the know-how, technical expertise, etc.
- The AAR also rejected the stand of both PRG and the tax department that the consideration was not in the nature of FTS. On the basis that there was clear human element involved, highly skilled technical personnel rendered the services and the services were non-standard, the AAR held that the consideration was indeed in the nature of FTS.
- However, the AAR further held that such FTS was not made available, and hence, the consideration would not be taxable as FTS under India-Belgium DTAA.
- In light of the above findings, the AAR concluded that the consideration was connected with the PE in India, and hence, was chargeable to tax in India, as business profits, both under the Act and under India-Belgium DTAA.
- The question of attribution of profits was not discussed, as this was not one of the questions posed before the AAR.

Conclusion

The question of existence or otherwise of a PE, is predominantly a fact driven exercise. The concept of PE is an evolving one, and is subject to different interpretations between the assessee, the tax department and the courts.

The recent decision of the Supreme Court in the case of Formula One, provides a new perspective on the principles to be used for determining the existence of a PE. It would be important to keep track of the emerging principles and re-evaluate previous conclusions on the subject.

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1 February 2018, 6:30 – 7:30 p.m. IST

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