



## Global Business Tax Alert

### Sharp Insights

**The Apex Court of India in the case of Formula One World Championship Ltd.(FOWC)<sup>1</sup> has laid down the guiding principles for qualifying as a 'Permanent Establishment' ('PE') in India. Only that portion of the income which is attributable to a PE in India would be subject to Indian withholding tax.**

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## **Background**

- FOWC (the taxpayer), a U.K. resident company; the Federation Internationale de I' automobile (FIA), an international motor sports events regulating association and Formula One Asset Management Limited (FOAM) entered into certain agreements whereby FOAM licensed all commercial rights in the FIA Formula One World Championship (Championship) to FOWC for a period of 100 years w.e.f. January 01, 2011.
- The taxpayer entered into a race promotion contract (RPC) with Jaypee Sports International Ltd. (Jaypee) on September 13, 2011, under which it granted the right to host, stage and promote the Formula One Grand Prix of India event at the Buddh International Circuit in Noida for a consideration of \$ 40 million.
- An artwork license agreement (ALA) was also entered into between FOWC and Jaypee on the same day whereby FOWC permitted Jaypee to use certain marks and intellectual property belonging to FOWC for a consideration of \$ 1 million.
- Various other agreements were also entered into between the parties to give effect to their understanding relating to racing event in India.
- The taxpayer and Jaypee both approached Authority for Advance Rulings (AAR) for determination of tax position having regard to the factual matrix of the case.
- The AAR concluded that the consideration received by FOWC is in the nature of royalty and FOWC does not have a fixed place of business/PE in India.
- FOWC filed writ challenging the ruling of the AAR on the issue of royalty and Revenue filed writ challenging the ruling of the AAR regarding the issue of existence of a PE in India.
- The High Court reversed the findings of the AAR on both the issues and held that the amount received by FOWC would not be treated as royalty. It was held that FOWC had a PE in India and therefore, consideration received shall be taxable in India.

## **Key arguments of the taxpayer**

- The Buddh International Circuit was not at the disposal of the taxpayer. Jaypee was responsible for conducting the event and had complete control over it.
- Total duration for which limited access to the race venue which was granted to FOWC was not sufficient duration to constitute the degree of permanence necessary to establish a fixed place, PE, in India.

## Issue for consideration before Apex Court

The Supreme Court was required to examine the entire gamut of agreements between the parties to adjudicate the characterisation, withholding tax and attribution issues.

## Ruling of the Apex Court

- The Court's observations on the factual matrix of the case are as follows:
  - Buddh International Circuit is a fixed place.
  - From this circuit, different races including the F-1 Grand Prix is conducted and income is generated which is an economic / business activity.
  - Commercial rights vested with FOWC which were exploited by conducting the event in India.
  - Physical control of the circuit was with FOWC and its affiliates from inception till the conclusion of the event.
  - The participating teams and paddock were controlled by FOWC and its affiliates.
  - Against the FOWC contention that duration of the event was three days only, the Apex Court observed that
    - race was to be conducted only for three days in a year and for the entire period of race, FOWC had full control and exclusive access to the circuit.
    - the control over the venue i.e. Buddh International Circuit continued at least two weeks prior and one week after the event.
- The Court noted that PE has to be a fixed place of business 'through' which business of an enterprise is wholly or partly carried out.<sup>2</sup> The fixed place of business need not be owned or leased by the foreign enterprise but it shall be at the disposal of the foreign enterprise in the sense of having some right to use the premises for the purposes of its business.
- Referring to Queen's Counsel Philip Baker's commentary, the Court held that a PE must have three characteristics: stability, productivity and dependence. The Court extensively relied upon the OECD commentary, commentaries of international tax authors, and leading domestic and international judicial precedents for adjudicating the PE issue.
- The Court concluded that:
  - Buddh International Circuit is a fixed place where the commercial/economic activity of conducting F-1 Championship was carried out, it was a virtual projection of the FOWC in India.
  - In the present case, all the above mentioned characteristics for a PE - stability, productivity and dependence are present. Fixed place of business in the form of physical location i.e. Buddh International Circuit was at the disposal of FOWC through which it conducted business.

<sup>2</sup> referred the commentary of renowned International tax author Philip Baker

- FOWC had made their earning in India through the said track over which they had complete control during the period of the race.
- The taxable event has taken place in India and FOWC is liable to pay tax in India on the income earned in India.

### **On attribution of Income taxable in India**

- It has been held that portion of the income of FOWC, which is attributable to the Indian PE would be treated as business income of FOWC and subject to tax in India.
- The Apex Court has also held that so far as the issue of default in deducting Indian withholding tax is concerned, the same will be to the extent of profits that are considered attributable/ taxable in India.

## **Conclusion**

This Apex Court decision is of considerable importance in the field of furthering international tax jurisprudence. The taxpayer would need to take into cognizance the principles laid down by the Apex Court w.r.t. fixed place PE in India. The Court has reiterated that the machinery provisions relating to collection and deposit of tax via TDS in non-resident payments are integral to the scheme of the Act and need to be appropriately considered while giving effect to such transactions.

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