KPMG

Tax Flash News

15 March 2024

Duration of the provision of services from outside India is not relevant for the purposes of service permanent establishment

Executive summary

- The Delhi bench of the Tribunal in *Clifford Chance*[1] held that for the purposes of service permanent establishment (service PE) in India, the actual performance of services in India is essential. Accordingly, only the duration of the employees physically present in India for furnishing the services is to be taken into account for the purposes of the duration threshold under the service PE clause of the treaty. The Tribunal rejected the tax officer's position that the duration of the provision of services from outside India is also to be included.
- The Tribunal also held that the taxpayer's presence in India should not include the days during which the employees did not render any services to the clients such as the employees' vacation days and days on which they performed non-revenue generating business development activities.
- Further, the taxpayer's presence should be computed on the basis of solar days (and not man days) i.e., common days (i.e., days on which more than one employee was present in India) should be counted as one day.

Facts of the case

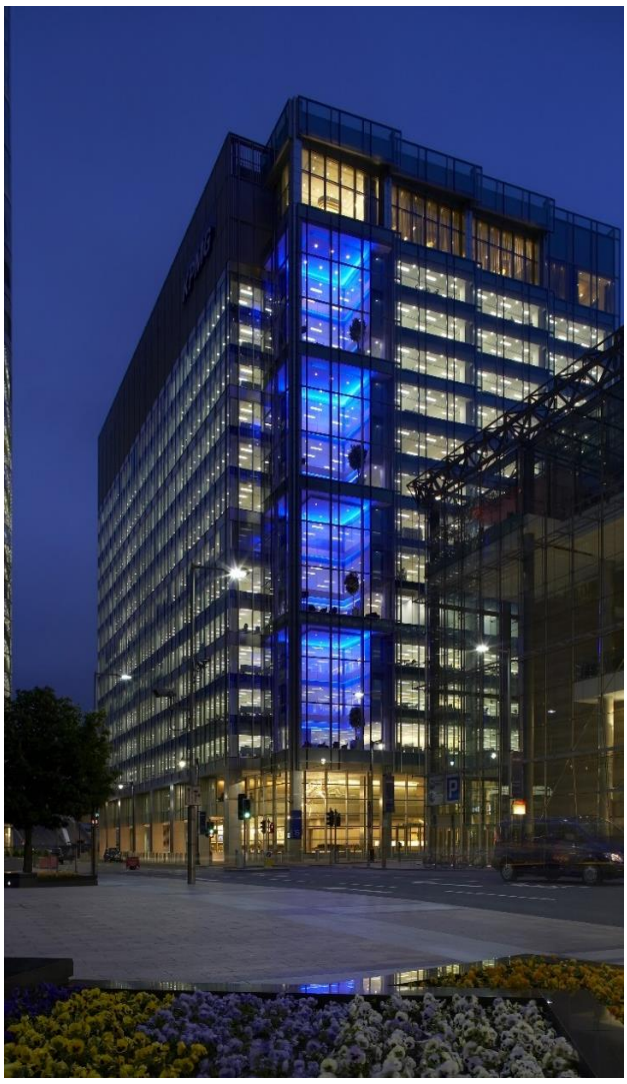
- The taxpayer, a resident of Singapore, provided legal advisory services to its clients in India.
- A part of the services were rendered remotely from outside India, and some services were rendered by its employees physically present in India.
- The tax officer held that the taxpayer had permanent establishment (PE) in India in accordance with the service PE clause of the India-Singapore treaty (the treaty) as the taxpayer provided the services for more than 90 days during the relevant tax years.
- The service PE clause of the treaty provides that a non-resident shall be deemed to have a PE in India if it furnishes services within India through employees or other personnel if the activities of that nature continue within India for a period or periods aggregating more than 90 days.
- The tax officer was of the view that for the purposes of the service PE clause, the aggregate duration of provision of services by the non-resident within as well as outside India is relevant. There is no mandate in the treaty that the employees providing services within India must be stationed in India. The duration of the services provided from outside India is also to be considered for the purposes of the service PE in India.
- The taxpayer argued that it is the performance of services in India which is relevant for the purposes of the service PE clause. During the relevant tax year, the aggregate stay of its employees in India for furnishing of services was 44 days[2] which is less than the 90-days threshold provided under the treaty.

[1] *Clifford Chance PTE Ltd.* v. *ACIT* (ITA Nos. 2681 & 3377/Del/2023) (Del) - Source: Taxsutra

[2] It was substantiated based on the time sheet of the employees, the HR system of the taxpayer and the employees' declaration.

Tribunal's decision

- The Delhi bench of the Tribunal held that for the purposes of the service PE clause, the actual performance of services in India is essential and accordingly, only the duration of the employees physically present in India for furnishing the services are to be taken into account.
- Accordingly, the taxpayer does not have a service PE in India as the presence of its employees in India is less than the 90-days threshold.
- The Tribunal also accepted the positions taken by the taxpayer for calculating its presence in India for the purposes of service PE:
    1. The taxpayer's presence in India should not include the days during which the employees (though physically present in India) did not render any services to the taxpayer's clients. These include the employees' vacation period and days on which they performed non-revenue generating business development activities (such as identification of customers, technical presentation/ providing information to prospective customers, developing market opportunities, providing quotations to the customers).
    2. The presence in India should be based on solar days (and not man days). Accordingly, the common days (i.e., days on which more than one employee was present in India) should be counted as one day.
- The Tribunal distinguished the decision in *ABB FZ*[3] based on the facts of the case.
- The Tribunal also rejected the tax officer's reliance on the OECD interim report 2018[4] on the ground that there is no provision in the treaty regarding the virtual service PE. The report itself mentions that in the absence of any amendments to the treaty provisions, the measures relating to the virtual PE can be challenged by the taxpayers before the courts.



Our comments

The Tribunal has reiterated an important principle that for constituting a service PE in India, only the duration of the employees physically present in India for furnishing the services are to be taken into account. The Tribunal rejected the concept of virtual service PE in the absence of any specific provision in the treaty.

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[3] *ABB FZ-LLC* v. *DCIT* [2017] 83 taxmann.com 86 (Beng)
[4] OECD Interim Report 2018 under the OECD/G20 BEPS Project Titled "Tax challenges arising from Digitalisation"

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