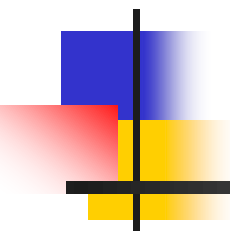


NAVI MUMBAI BRANCH OF WIRC OF ICAI

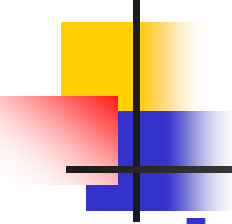
ICAI Intensive Course on International Taxation

Presentation on Concept of Permanent Establishment



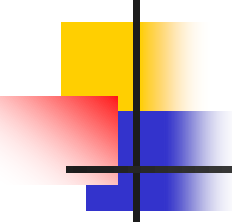
Presented by:
Mr. Paresh P. Shah

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Chartered Accountants
Email: ppshahandassociates@gmail.com



Permanent Establishment - Concept

- One of the most important and critical issues in treaty -based international fiscal law
- Instrument to establish jurisdiction over a foreigner's unincorporated business activity
- International taxation should be based on either political, residential or economic allegiance between the taxpayer and the taxing state
- The PE concept marks the dividing line for businesses trading with a country and trading in that country
- PE postulates the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country
- A PE would amount to a virtual projection of the foreign enterprise in the other country
- It defines the requisite level of nexus in a country to support taxation of income at source



Permanent Establishment – Article 5

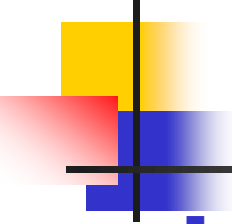
- Fixed place of business PE
 - Article 5(1) – general rule
 - Article 5(2) – illustrative list
- Construction site PE – Article 5(3)
- Excluded activities list – Article 5(4)
- Agency PE
 - Article 5(5) – dependent agent PE
 - Article 5(6) – agents of independent status
- Controlled companies – Article 5(7)



Permanent Establishment – Basic Rule

For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on

- There must be a fixed place of business (situs test);
- The fixed place of business must be located [in a] certain territorial area (locus test);
- The use of the fixed place of business must last for a certain period of time (tempus test);
- The taxpayer must have a certain right of use [over] the fixed place of business (ius test);
- The activities performed through the fixed place of business must be of a business character (business activity test)
- Swiss doctrine : Herbert Wetter
 - Objective, subjective and functional aspects of PE

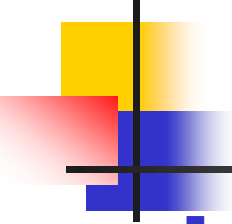


Permanent Establishment – Basic Rule (con't)

- All three tests (locus, situs and business activity) must be satisfied
- Presence to be 'visible' in the other contracting state
- Usually linked to a geographical location
- Covers premises as well as tangible assets used for carrying on business
- Movable places of business with a temporary fixed location meet the locus test
- Activities carried out within a defined geographical location could constitute a PE; e.g., a diving offshore vessel functioning within a defined area, dealer selling merchandise from a mobile van

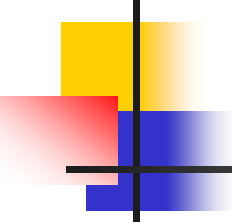
OECD Position: Both geographical and commercial coherence necessary

India's Position: India considers both the conditions i.e. geographical and commercial coherence in isolation, to constitute a fixed place of business



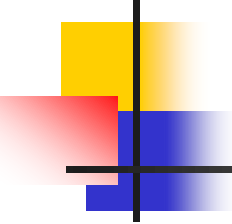
Permanent Establishment under Income-tax Act

- The concept of PE was introduced in the Act as part of the statutory provisions of transfer pricing by the Finance Act, 2001
- Circular No. 14 of 2001 clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to the tax treaty entered into by India
- However, vide Finance Act, 2002, the definition of PE was inserted in the Act under Section 92F(iia) which states that the PE includes a fixed place of business through which the business of the enterprise is wholly or partly carried on
- Morgan Stanley [2007] 292 ITR 416 (SC) – Supreme Court observed that the PE
 - is an inclusive definition
 - covers Service PE, Agency PE, Construction PE, etc.



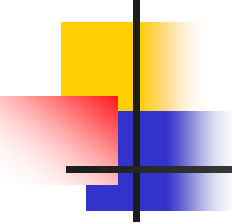
PE : CONDITIONS

- Fixed Place of Business
- Business Activity
- Business Connection



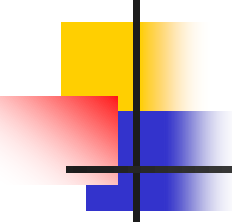
Fixed Place of Business

- Objective presence in another country
- Two embedded conditions:
 - place of business and right to use it with a certain degree of permanence
 - specific location



Fixed Place of Business (con't)

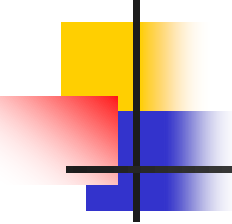
- Most significant feature of the PE as distinguished from Source State Taxation
- Emphasizes establishment of the enterprise rather than source of income
- Enterprise's presence has to be 'visible'



Fixed Place of Business (con't)

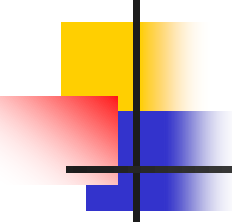
- The Positive List
 - consists of places which are 'prima facie' PE; additional requirements to be met like right of use of the place of business and the performance of business activity through it

- The Negative List
 - consists of places specifically exempted; may overrule the primacy of the positive list



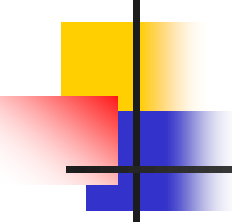
Fixed Place of Business (con't)

- The Positive List:
 - a place of management
 - a branch
 - an office
 - a factory/workshop
 - a warehouse
 - a mine, quarry, oil/gas rig or other place of extraction of natural resources
 - sales outlet/order collection center



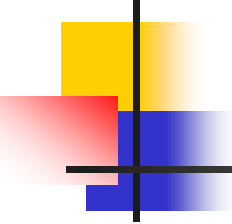
Fixed Place of Business (con't)

- The Negative List:
 - use of facilities solely for storage of goods etc.
 - maintenance of stock of goods solely for storage or display
 - maintenance of stock of goods solely for the purpose of processing by another enterprise



Fixed Place of Business (con't)

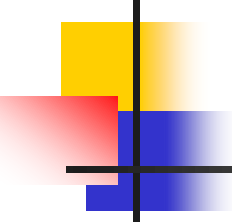
- The Negative List (con't):
 - a fixed place maintained only for the purpose of purchasing goods etc. or collecting information
 - a fixed place maintained solely for the purpose of advertising, scientific research, supply of information or similar activities which have a preparatory or auxiliary character for the enterprise



Business Activity (BA)

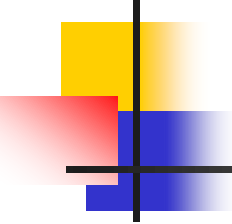
- Tax treaties characterize a fixed place as a permanent establishment only if the enterprise undertakes a business activity through it

- Threshold Requirements of Business Activities(BA):
 - Tangible Connection Fixed Place
 - Nature & level of Business Activity
 - People Presence Virtual - PE



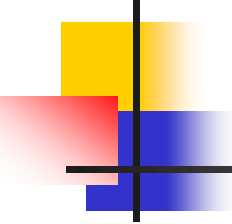
Business Activity (con't)

- Some BA specifically excluded
- BA to be differentiated from other income generating activities e.g. dividend, interest, royalty, capital gains etc.
- Core BA differentiated from minor, auxiliary or preparatory activities
- BA to be performed through the place of business



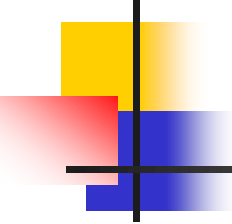
Business Activity (con't)

- Specifically excluded BA's
 - International shipping and air transport is normally taxed in the country where the enterprise's place of effective management is located. They will qualify as PE only if the PE coincides with the place of effective management
 - In order to avoid PE taxation, it is expressly required that the activities are limited to the excluded activities. If an excluded activity is performed through the same place of business, a PE is created



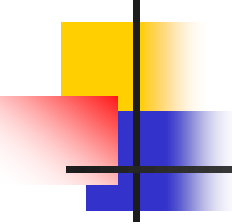
Business Activity (con't)

- Tests of Business Activity
 - Asset Value Test
 - Regrouping of Capital Resources Test
 - The Business Connection Test



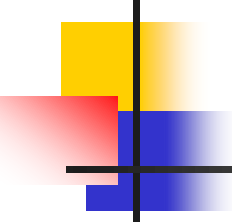
Business Activity (con't)

- Business Activity Asset Value Test
 - Activities which increase the asset value of the enterprise are core business activities
- Regrouping of Capital Resources Test
 - The principle tries to establish a rule that an enterprise uses its assets to yield income, rather than merely earning income by letting out assets



Business Activity (con't)

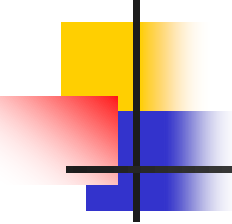
- The Business Connection Test
 - The PE definition requires a specific connection between the business activity and the fixed place of business i.e. a fixed place of business through which business activity is carried on
 - Even automated machinery, computers could perform the activity and fulfill this test



Important Aspects of the OECD Model Tax Convention

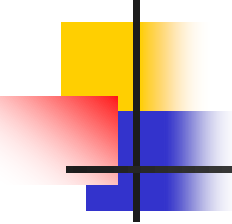
Fixed place of Business –

- PE exists only if place is there at the disposal of the enterprise
 - Formal Legal right to use such place not necessary
 - Thus, illegal occupation accepted
- The other conditions i .e. Business Activity and Business Connection test continue to apply
 - Performance of Core functions
 - Mere presence at location not conclusive



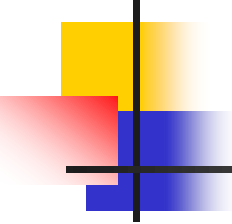
Important Aspects - Fixed Place of Business

- The words “through which” the business of that enterprise is carried on to be given wide meaning - An enterprise can carry on business through the location where its activity takes place
- If the nature of business so demands, places of business may constitute PE if they are “coherent commercially and geographically”



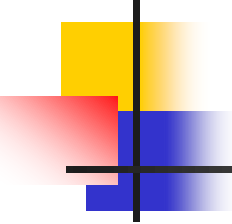
Important Aspects - Fixed Place of Business (con't)

- The “DURATION TEST” for PE
- General test is that the business is carried on for more than 6 months
- However if the nature of the business demands so, then shorter duration can also constitute a PE – seasonal business
- Activities of recurrent nature for short periods also an exception
- Anti-abuse measure considered for cases where same or related persons use a place of business for short periods of time, with an intention to constitute a temporary presence



Important Aspects - Fixed Place of Business (con't)

- Preparatory and Auxiliary Activities
- Mere delivery of spare parts to customers to whom machinery supplied, now considered to fall within core activities.
- Enterprise cannot fragment cohesive business into several small operations to contend that each are for a separate activity



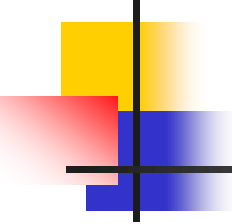
OECD Model Vs UN Model

OECD Model	UN Model
Fixed Place PE	Fixed Place PE
Construction PE where period lasts for more than 12 months	Construction PE where period lasts for more than 6 months
	Service PE, including Consultancy services (for same or connected projects) for period or periods aggregating more than 6 months within any 12 month period



OECD Update - 2010

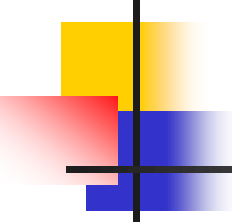
- A Satellite in a geo-stationary orbit – Satellite signal (foot print) – No PE
- Telecommunication Operator – Roaming agreement – PE of the home network provider in the contracting party's state of network
- Transmission of Data, Power or Property by Cable or pipeline – PE of the service representer – NO
- Transponder leasing – would not even qualify as payment of Royalty. It is not a right to use property or the process or the satellite technology or the satellite itself as Equipment
- Network Operator of Radio frequency spectrum – applicability – same as above
- Attribution of Economic ownership of the asset to the PE – recording in the books is not a conclusive test in context of Articles 10, 11, 12, 13, 21 & 22 respectively for Shares, debt claim, right or property, Property of a PE, right or property, Business property of a PE



Important Decisions – Stewardship function / Auxiliary services in India

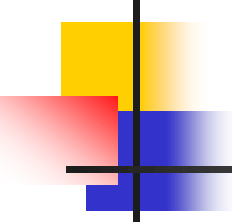
- Morgan Stanley & Co. – Supreme Court (292 ITR 416)
 - IndCo provided Back Office operations and Provision of Services
 - FCo provided Employees for deputation & Stewardship functions
 - Fco gave arms' length consideration to IndCo

Held, Fco was not carrying out any business in India. Indco was rendering back office operations in India and such functions were considered as preparatory and auxiliary in nature within the meaning of India US Treaty. Hence, no Fixed place of business was constituted under Article 5(1) of the treaty



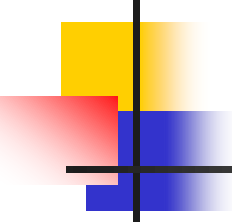
Important Decisions – Deputation of Employees to India

- Motorola Inc. – Delhi Tribunal 95 ITD 269
 - Employees of Motorola US were deputed to Motorola India for supervisory activities. Employees worked for both Motorola US & Motorola India
 - The deputed employees were on the payroll of Motorola US and perquisites of such employees were borne by Motorola India which was ultimately borne by Motorola US under cost plus arrangement
 - Office facilities of Motorola India availed by the deputed employees formed 'Virtual Projection' office of Motorola US, hence office of Motorola India constituted a fixed place



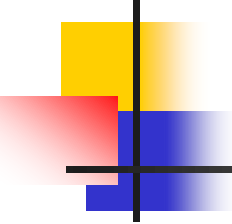
Important Decisions – Preparatory & Auxiliary services in India

- Motorola Inc. – Delhi Tribunal 95 ITD 269 (con't)
 - However, since the activities provided by Motorola India were only of preparatory and auxiliary in nature, Motorola India doesn't constitute a PE in view of exclusions provided in Article 5(3) of the DTAA
 - Held, that Income from sale of hardware supply not taxable and sale of software is business income and not royalty



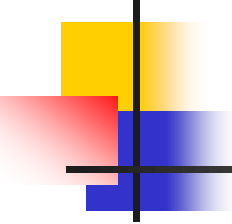
Important Decisions – Criteria for Fixed Place PE

- Airline Rotables Ltd. vs JDIT Mumbai Tribunal - (ITA 3254 / Mum / 06)
- Mumbai Tribunal held that for a foreign company to have a fixed place PE, 3 criterion should be fulfilled
 - Physical Criteria – Existence of Physical Location
 - Subjective Criteria – Right to use the Place
 - Functionality Criteria – Carrying out Business through such place
- Tribunal further held that unless there is a warehouse and the storage of goods is for outsiders, the mere storage of consignment goods cannot lead to a fixed place PE
- The onus is on the revenue to prove that the foreign enterprise has a fixed place of business in India



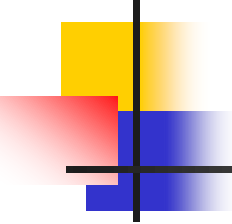
Important Decisions – Outsourcing of operations to India

- Seagate Singapore International Headquarters Pvt. Ltd. – AAR Ruling (AAR No. 831 of 2009) (2010-TIOL-08-ARA-IT)
 - Held that the place of business owned or possessed by the service provider does not detract from the position that the applicant has a distinct, earmarked and identified places which cater to its business
 - By merely outsourcing the operations leading to supplies of products, it cannot be said that the applicant does not carry on any business in India from a fixed place.
 - The question whether the person carrying on business operations on behalf of or pursuant to the instructions of the applicant is a dependent or independent agent is not very material in considering the applicability of Article 5.1



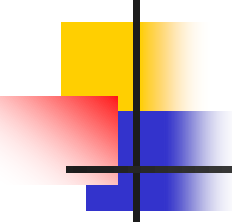
Important Decisions – Stocking of goods at Warehouse

- Seagate Singapore International Headquarters Pvt. Ltd. – AAR Ruling (AAR No. 831 of 2009) (2010-TIOL-08-ARA-IT)
 - It is the business place of warehouse / service provider which is also the fixed place of business of the applicant from where the sales activities are carried on
- The presence of a stock of goods for prompt delivery facilitates sales of the product and thereby the earning of profit in the host country by the enterprise having the facility. Therefore, a 'warehouse' used for storage of goods in order to facilitate sales of the product would create a fixed place of business.



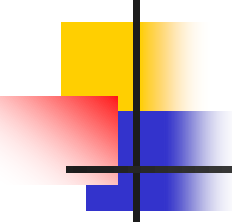
Important Decisions – Residence can be place of management

- Sutron Corporation – AAR Ruling 268 ITR 156
 - Held that the address of the country manager is the fixed place from where the business of the non-resident is partly carried on
 - It is immaterial if the same is the residential address of the country manager. The same may also be termed as the place of management or an office



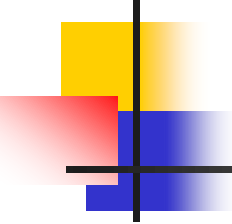
Service PE

- UN Model – The furnishing of services, including consultancy services (for the same or connected projects) for a periods of more than six months within a period of twelve months
- Service PE clause in most of the Indian Treaties – the furnishing of services other than FTS as defined under Article 12 by an enterprise through its employees or other personnel for more than the specified period



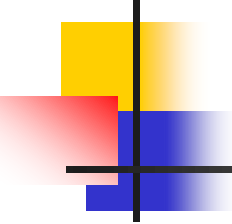
Service PE (con't)

- Guidance in Commentary on OCED Model Tax Convention
 - OECD Model does not contain a Service PE Clause
 - However, as the economies of the developing country are growing, OECD in its Commentary has stated that states may introduced the concept of Alternative threshold for services (Service PE concept)



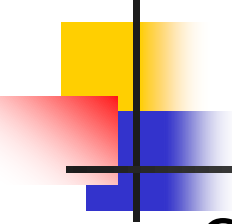
Service PE (con't)

- Services rendered should have sufficient nexus with the source state and non-residents cannot be taxed merely because the payer is the resident of that state or those services are commercially utilised in that state
- Only profits derived from the services should be taxed as against gross basis of taxation
- Services rendered for a very short period within the state should not be taxed



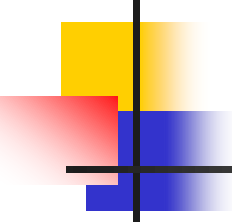
Service PE (con't)

- The OECD states as follows:
 - Conditions in sub-para (a):
 - Services are performed through an individual who is present in the source state for more than 183 days (in aggregate) in any twelve month period, and
 - More than 50% of the gross revenues (attributable) to active business activities) of the enterprise during the period of stay of such individual in the source state is derived from such services performed in the source state



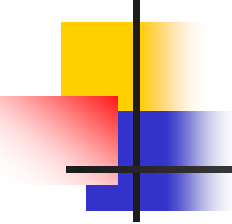
Service PE (con't)

- Conditions in sub-para (b):
 - Services are performed by one or more individual who are present and performing services in the source state for more than 183 days (in aggregate) in any twelve month period, and
 - Such services are performed for the same project or connected
- OECD's conclusion: If supervision and control on deputed personnel is with the enterprise, than only PE
- India's reservation: Does not agree with it



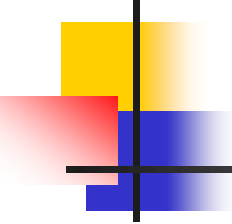
UN Model – Some Issues

- What constitutes a month for calculating the period of six months? (whether calendar month or period of 30 days, services spread over 2 months, etc.)
- Whether other personnel includes a company?
- Aggregation of Period - Services rendered for same or connected projects, however in many of the treaties entered into by India, Service PE Clause does not include the phrase 'same or connected projects'



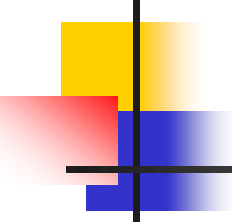
OECD Model – Some Issues

- Whether 183 day to be computed considering day as man day or singular day?
- Aggregation of Period - Services rendered for same or connected projects, however in many of the treaties entered into by India, Service PE Clause does not include the phrase 'same or connected projects'



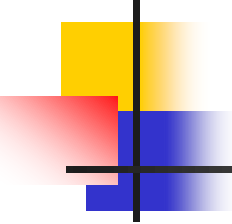
Service PE – UN Model - Guidance in OECD Commentary - Indian Treaties

Particulars	UN Model	Guidance in OECD Commentary	Indian Treaties
Services Rendered by	Employees and other personnel	Individual(s)	Employees and other personnel (in most of the cases)
Period	Period or Periods aggregating to more than 6 months	Period or Periods aggregating to more than 183 days	Period or periods aggregating to more than 90 days (especially treaties with developed countries)
Fees for Technical Services	Furnishing of services including Consultancy Services	Silent (implies services includes all services)	Services other than FTS as defined in Article 12



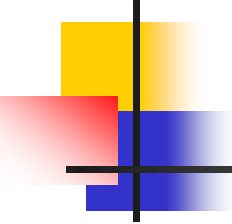
Service PE Comparison

Countries	Service PE
USA	>90 days (The services are performed within a contracting state for a related enterprise even for one day)
UK	>90 days (30 days in case of associated enterprise)
Germany	N. A.
Japan	N. A.
France	N. A.



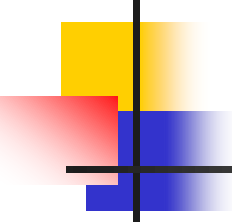
Important Decisions – Stewardship activities are shareholder activities

- Morgan Stanley & Co. – Supreme Court (292 ITR 416)
 - Stewardship activities refer to wide range of activities undertaken by a shareholder because of its ownership interest in one or more group members
 - Held that Stewardship activities by a foreign company should not be considered as services for the purpose of determination of Service PE
 - Stewardship activities are essentially shareholder activities and are rendered to protect the interest of the foreign company and as such these activities do not involve rendering of any services to the Indian Concern



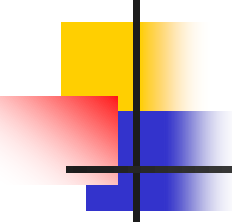
Important Decisions – Supervisory activities of lessee

- Tekniskil (Sendirian) Berhard - 222 ITR 551
 - Lessor of personnel furnishing supervisory staff for management and operation of barge involved in installation activities does not carry on supervisory activities when such staff is acting under the direction and control of the lessee.
 - Held, no Service PE constituted



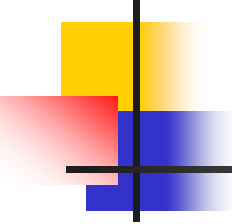
Important Decisions – Deputation of employees without supervision of foreign enterprise

- Tekmark Global Solutions LLC – Mumbai Tribunal [2010] 3 taxmann.com 38
 - Mumbai Tribunal held that mere deputation of employees to India would not constitute a Service PE in India so long as the foreign enterprise is not responsible for the work of its employees (or the employees do not work under the supervision and control of the foreign enterprise), even though the employee may continue to be on the payrolls of the foreign entity



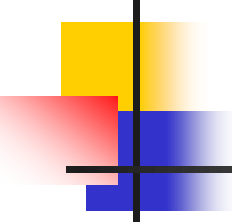
Important Decisions – Service PE – No activity in India

- ACIT vs Epcos AG Germany, ITA 398 / PN / 07 - ITAT Pune
 - A foreign company having PE in India does not, by itself, lead to the taxability in India; there must be some profit attributable to such PE which alone could be taxed in India because of its existence of PE
 - When the PE carries on the activity which does not serve overall purpose of the foreign enterprise or which does not contribute to the profit of the other enterprise, the existence of the PE in other state is wholly academic and does not have any implication in the source jurisdiction



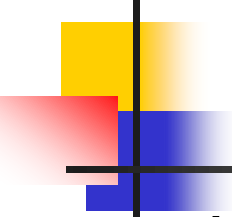
Important Decisions – Guidance to employees by foreign parent

- ACIT vs Epcos AG Germany, ITA 398 / PN / 07 - ITAT Pune (con't)
 - Tribunal held that although some of the employees of the Indian subsidiary worked under the guidance of the parent company, but the work so done was for the purpose of the Indian subsidiary and not the parent company
 - Merely because an Indian company conducts its business with the help and guidance of the parent company, it does not follow that the foreign parent company giving guidance will be deemed to have a PE in form of Indian Subsidiary



Important Decisions – Management services in India

- 242 ITR 208
 - A(Indian Co) and B (US Co) formed a joint venture ABCo in India. XYZ Inc,(USCo) a subsidiary of B rendered management services to AB, by way of Provision of employees.
 - Held service PE under Article 5(2)(L) of Indo-US treaty.



CONSTRUCTION / INSTALLATION PE

- A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months
- No fixed place of business is required
- India's position on the commentary of the OECD:
 - India reserves the right to replace "construction or installation project" with "construction, installation or assembly project or supervisory activities in connection therewith" and reserve the right to negotiate the period of time for which these should last to be regarded as a PE
 - India reserves the right to treat an enterprise as having a PE if the enterprise furnishes services, including consultancy services through employees or other personnel engaged by the enterprise for such purpose but only where such activities continue for the same project or a connected project for a period or periods aggregating more than a period to be negotiated



CONSTRUCTION / INSTALLATION PE – RECENT IMPORTANT DECISIONS

■ GFA Anlagenbau Gmbh [2014] 47 taxmann.com 313 (Hyd)

- Supervisory services provided by a foreign company through its technicians do not constitute a PE in India under Germany Tax Treaty

■ GIL Mauritius Holdings Ltd [2011] 48 SOT 17 (Del)

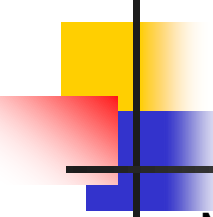
- Activities relating to installation of pipe lines by a marine vessel are treated as 'construction and assembly' and results into PE if carried on for more than nine months under the Mauritius tax treaty

■ Tiong Woon Project & Contracting Pte Ltd [2011] 338 ITR 386 (AAR)

- The time period of independent installation and assembly projects cannot be aggregated in order to determine the constitution of a PE under Article 5(3) of Singapore tax treaty

■ ABC [1999] 237 ITR 798 (AAR)

- Rectifying or supplementing installations of pipelines can be construed as installation or assembly project



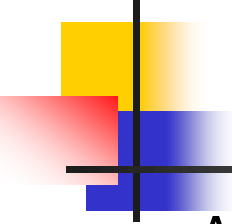
CONSTRUCTION / INSTALLATION PE – IMPORTANT DECISIONS

- M/s Krupp UDHE GmbH (2009) 124 TTJ 219 (TMum)
 - for computing the minimum period, various sites cannot be considered together, when different contracts have no effective interconnection with each other
 - if supervisory activity is carried out under an independent contract, then the minimum period would commence from the date of commencement of such activity – not from the date of commencement of the project; intervening period in a project cannot be excluded
- Pintsch Bamag In re (2009) 318 ITR 190 (AAR)
 - Where most of the work is sub-contracted to a third party the work place of the sub-contractor cannot be treated as a PE of the principal contractee
- DCIT v Hyundai Heavy Industries Company Limited (2009) 128 TTJ 4 (TDeI)
 - For computing the minimum period the period taken for execution of each project to be separately considered
 - If the duration of each project is less than the minimum period prescribed – maintenance of an office for a longer period would also not constitute a PE – to be considered in light of the latest revisions to the OECD commentary



AGENCY PE

- The primary test for an agency is the legal ability of the agent to bind the principal to a third party - replaces requirement of fixed place of business
- No fixed place of business required
- Independent agent – no PE
 - Legal and economic independence
- Only dependent agent constitutes a PE who-
 - Acts on behalf of enterprise
 - Has authority to conclude contracts
 - Has no authority but habitually maintains stock of goods and regularly delivers goods for the enterprise
- No PE if agent acts in ordinary course of business
- PE in the State would be only in respect of activities which the agent undertakes for the enterprise

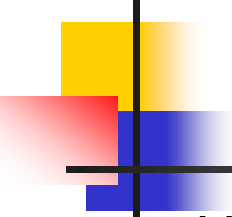


AGENCY PE – OECD MODEL COMMENTARY

- Article 5(5) :

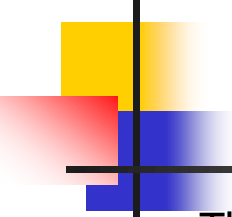
“Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph”

- Article 5(5) of the OECD Model Commentary is identical to Article 5(5)(a) of the UN Model Commentary & Article 5(5) of the US Model Commentary



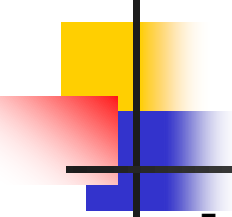
AGENCY PE – IMPORTANT DECISIONS

- Varian India Pvt. Ltd. [2013] 33 taxmann.com 249 (Mum)
 - Pre-sale activities and incidental post-sale support activities for products supplied by the foreign company cannot be treated as Dependent Agent PE (DAPE)
- Delmas, France [2012] 17 taxmann.com 91 (Mum)
 - Agency PE does not exist as long as it is shown that the transactions between the agent and the taxpayer are made under arm's length conditions
- Reuters Limited Construction House [2011] 48 SOT 246 (Mum)
 - Even though the agent acts independently in the ordinary course of his business, if they devote their activities, wholly or almost wholly on behalf of the foreign enterprise, they would be considered as dependent agents



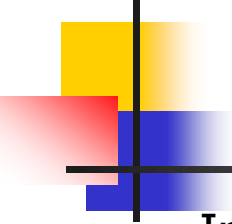
AGENCY PE – IMPORTANT DECISIONS

- The Mumbai ITAT enunciated the rationale for an agency PE in the case of SET Satellite Singapore Limited (106 ITD 175):
 - Taxation would infringe tax neutrality if tax position is to depend upon whether a foreign enterprise carries out a business directly or through an agent
 - A dependent agent is integrated into the principal's business to a large extent
 - Easy to circumvent taxation in source country, if agency PE was absent
- SC (292 ITR 416) and AAR [2006 (284) ITR 0260 AAR] in the case of Morgan Stanley & Co Inc
 - No dependent agency PE
- An Indian entity conducting professional exams which was certified by certain US institutes was held to be an independent agent and not an agency PE since there was no financial, managerial or any other type of participation between the agent and the principal. The agent had similar relationships with other entities [KnowerX Education (India) Private Limited v DIT (301 ITR 207)]



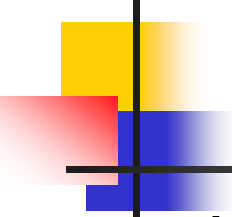
AGENCY PE – IMPORTANT DECISIONS

- In *Rolls Royce PLC v DDIT* (2009) 122 TTJ 359 (Delhi), where an Indian subsidiary of the British company provided a number of business support services, it was held that the Indian entity constituted a fixed place as well as an agency PE since it carried out a number of core marketing activities
- In *Re: Speciality Magazines (P) Limited* (2005) 274 ITR 310 (AAR), a British publisher of magazines engaged an Indian company as an advertisement concessionaire for which it obtained a percentage of the consideration received. The AAR held that although the Indian company obtained about 75 percent of its revenue from the British publisher, it cannot be treated as a dependent agent PE since it catered to a number of clients on a similar basis
- Interestingly, in the above case it was held that the expression 'secures orders almost wholly for the enterprise' would mean that at least 90 percent of the revenues are sourced from the foreign company



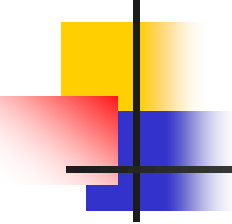
AGENCY PE – INDIA'S POSITION

- India's position on the commentary of the OECD:
 - Even if a person has attended or participated in negotiations it can, in certain circumstances, be sufficient, to conclude that he has exercised an authority to conclude contracts in the name of the enterprise
 - A person, who is authorized to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can also be said to exercise the authority to conclude contracts and hence constitute a PE
 - India reserves its right to treat an enterprise of a Contracting State as having a PE in India if a person habitually secures orders in India wholly or almost wholly for the enterprise
 - India reserves its right to make it clear that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered an agent of an independent status



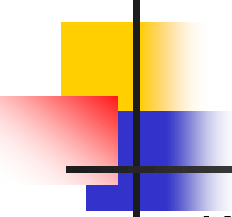
SUBSIDIARY PE

- Article 5(7) of the OECD Model Commentary:
 - “The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other”
- Definition is identical under UN and US Model Commentaries
- Existence of a subsidiary by itself does not constitute PE
 - Legal independence of the subsidiary is respected
- Test of fixed base PE / service PE / agency PE need to be satisfied



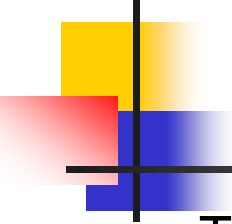
SUBSIDIARY PE – IMPORTANT DECISIONS

- Aramex International Logistics Pvt. Ltd. [2012] 348 ITR 159 (AAR)
 - The exception with respect to control over subsidiary not constituting a PE as per Article 5(10) of the tax treaty is not applicable as the whole business in India of the multinational group is carried on within the geographical contours of India
- Lucent Technologies International Inc. [2009] 28 SOT 98 (Del)
 - Subsidiary of the taxpayer was treated as a PE in India by virtue of employees of affiliates being made available to the Indian subsidiary to carry out the project



E-COMMERCE – VIRTUAL PE

- Key elements in an e-commerce transaction – website, server, computer of user, telecom infrastructure, etc.
- No physical presence or contact
- Lack of identification of parties to a transaction
- No physical trails or records
- New methods of payment
- Lack of active human involvement at point of service



E-COMMERCE (con't)

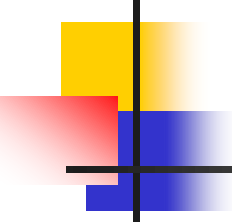
- Treaty characterisation of E-commerce transactions:

E-Commerce Transaction	TAG (OECD View)	India position
Online shopping portals	Business profits	Business profits
Online auctions	Business profits	Business profits
Subscription to a web-site allowing the download of digitized products	Business profits	Royalty
Electronic access to professional advice	Business profits	FTS
Electronic ordering and downloading digital products	Business profits	Royalty
Electronic ordering and downloading digital products for purposes of copyright exploitation	Royalty	Royalty



VIRTUAL PE – INDIA'S POSITION

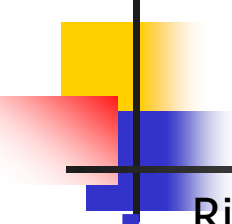
- India's position on the commentary of the OECD:
 - WEBSITES
 - India holds the view that even an internet website may constitute a PE in certain circumstances; the circumstances themselves have not been defined
 - SERVERS
 - India holds the view that depending on the facts, a foreign enterprise may be considered to have a PE by the virtue of it hosting its website on a particular server in India
 - Under such a scenario, foreign enterprises having internet website hosted on servers located in India owned by third party service providers may constitute a PE
 - SATELLITE
 - India holds the view that a satellite can be treated as a PE in the space in the jurisdiction of the source country



VIRTUAL PE – INDIA'S POSITION

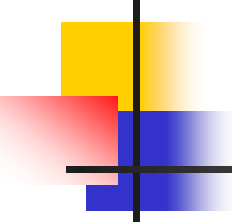
- TELECOMMUNICATIONS
 - India holds the view that a telecommunications operator of a Contracting State who enters into a “roaming” agreement with a foreign operator of other Contracting State in order to allow its users to connect to the foreign operator’s telecommunications network can be treated as a PE of that other Contracting State

- UNDERSEA CABLES AND PIPELINES
 - India holds the view that a undersea cables and pipelines lying in the territorial jurisdiction of a source country can be treated as a PE of an enterprise



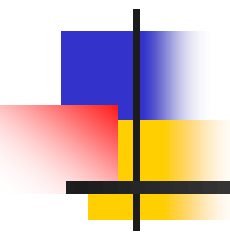
VIRTUAL PE – IMPORTANT DECISIONS

- Right Florist Pvt. Ltd. [2013] 143 ITD 445 (Kol)
 - Reliance placed on OECD MC to conclude that a search engine, which has a presence through its website cannot have a PE in India unless the web servers are located in India
- eBay International AG [2013] 40 taxmann.com 20 (Mum)
 - No DAPE under Article 5(5) of DTAA as:
 - Indian group companies are dependent agents but do not constitute DAPE
 - Indian group companies have not negotiated or entered into contract for and on behalf of Assessee
 - There is no case of habitually maintaining stock of goods for or on behalf of Assessee since goods are delivered by seller to buyer directly
 - No existence of Place of Management PE as Indian group companies are not taking any managerial decisions, are simply rendering certain marketing services to taxpayer and have no role in the operation of the websites



BEPS – ACTION PLAN

- Study the new Business Models and identify key features of Digital economy
- Discuss the core elements of BEPS strategy
- Identification of broader challenges raised by Digital economy
- Summarise potential options to address the issues
- Article 5(4), Verizon Communications Singapore Pte Ltd. [TS 577 HC 2013 (Mad)]



Thank You
