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TAXATION TIMES

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India | Japan | Italy | Spain | France | German | Vietnam | UAE

Contents

Introduction

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In the last edition of 2022 Taxation Times, we will understand in brief what is foreign company and what is permanent establishment as per Income Tax Act, 1961. Let us clear the air and check out what does permanent establishment means and many more in this edition of Taxation Times.

In this month's Taxation Times, we cover:

1. An article encompassing the provisions relating to Foreign Companies and Permanent Establishment;
2. Case Laws from various courts & jurisdictions;
3. Tax Compliance Calendar – January 2023;
4. Circulars & Notifications – December 2022;
5. Tax News from around the world

We hope that you find this month's edition of the Taxation Times useful. In case you have any feedback or need us to include any information to make this issue more informative, please feel free to write to us at info@uja.in

We hope that you had wonderful 2022 and UJA wishes you a Very Happy and Healthy New Year 2023!

Happy Reading!
Best Regards,
UJA Tax Team

FOREIGN COMPANIES AND PERMANENT ESTABLISHMENT (PE)

With this article, we would like to explicate the concept of Foreign Companies and PE in light of Indian Income Tax Act provisions.

Foreign Companies

- Foreign company means a company which is not a domestic company, i.e. a company registered outside India in any other foreign country. [Section 2(23A)]

- The Foreign Company may be treated as Domestic Company if such company makes prescribed arrangement in India as per Rule 27

- Prescribed arrangement means an arrangement to be made by a company for the declaration and payment of dividends (including dividends on preference shares) within India shall be as follows:

  I. The share-register of the company for all shareholders shall be regularly maintained at its principal place of business within India, in respect of any assessment year from a date not later than the 1st day of April of such year

  II. The general meeting for passing the accounts and for declaring any dividends shall be held only at a place within India.

  III. The Dividend declared, if any, shall be payable only within India to all shareholder

- Foreign Company is treated as Resident in India if its Control and Management is located wholly in India.

- Foreign Company is treated as Non-Resident in India if its Control and Management located wholly / partially Outside India.

Permanent Establishment

- As per section 92F(iiia) of Income Tax Act, 1961, 'Permanent Establishment' includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.

- Further, as per section 90 of the Act, the Central Government has the power to enter into an agreement with other country for avoidance of double taxation or for the exchange of the information or for recovery of Income Tax under this act. These agreements are generally called DTAA agreement and may also called as Tax Treaties.

- India has one of the largest networks of tax treaties for the avoidance of double taxation and prevention of tax evasion. The country has Double Tax Avoidance Agreements (DTAAs) with over 85 countries under Section 90 of the Income Tax Act, 1961.

- Also, as per section 90(2) of the Act, if the DTAA provisions are more beneficial for an assessee than the provisions of Income Tax Act, then he may follow DTAA provisions. Therefore, the provisions of DTAA will supersede the provisions of Income Tax Act to the extent they are more beneficial to the assessee.

- In these DTAA agreement, the broad definition of Permanent Establishment has been elucidated and most of the agreements has adopted the definition of OECD's Model Tax Convention on Income and on Capital.

- Here, we would like to briefly explain the provision of Article 5 of the said convention.

- Article 5 states that 'PE' means a fixed place of business through which the business of an enterprise is wholly or partly carried on. The same as taken in section 92F(iiia) of Income Tax Act, 1961.

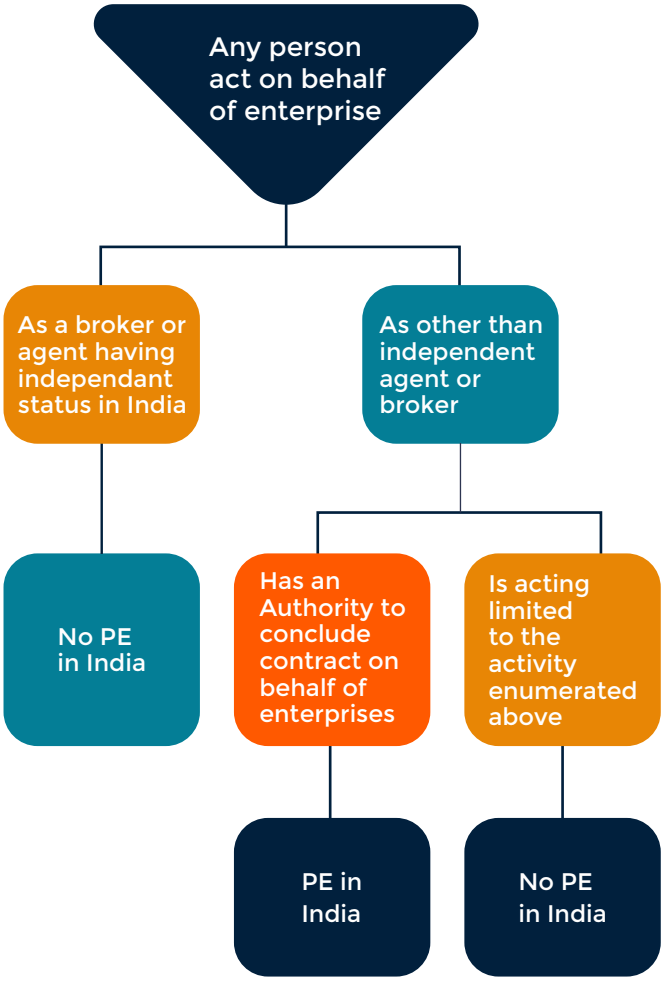
- Article 5 further explains that term 'PE' especially includes, place of management;

  - a branch; an office;
  - a factory;
  - a workshop, and

- a mine, an oil or gas well, a quarry or any other place of extraction of natural resources
- a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months

- Where a person is acting on behalf of an enterprise and has authority to conclude contracts in the name of that enterprises in other country, then that enterprise shall be called to have a 'PE' in that other country.
- However, if the activity of that person is limited to the activity mentioned below exercised through fixed place of business in other country, then that enterprise shall not be said to have 'PE' in that country,
  - the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
  - the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
  - the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
  - the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
  - the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- However, also, if that person is a broker, general commission agent or any other agent of an independent status, then that enterprise shall not be said to have a 'PE' in that country.

Let us understand the concept from the following graphical representation,



- One more point worth noting has been mentioned in Article 5 is, the fact that one enterprise resident of one country controls or is controlled by other enterprise in other country shall not itself constitute either company a 'PE' of the other. That means mere fact that a company is subsidiary or holding of other company does not make either company 'PE' of other. An enterprise has to undergo all the test as mentioned above to be held as PE.

- To conclude, we can say that a foreign company, non-resident in India may be taxed in India if it is operating through a Permanent Establishment in India.

- **Major Concerns with PE establishment in India**

    - After establishing a PE in India, the company is liable to pay taxes according to the revenue generation and profit acquisition. Article 7 of the Tax Treaty terms permanent establishment taxation as the 'business income' of the country.

    - The profit margins of foreign enterprises reduce in permanent establishment comparatively from independent operations. The enterprise has to mandatorily maintain books of accounts and records.

    - The foreign enterprise will have to register themselves for PAN card, TAN, and other Indirect Taxes

    - The Net Profit of the foreign enterprises operating in India is liable for taxation under permanent establishment. The Net Profit also excludes the tax-deductible expenses.

    - The foreign enterprise will also have to take care of the Retention T**ax popularly known as Withholding Tax (WHT)**

Case Laws

1 Devendra Chedda V/s Income Tax Officer-21(1)(1), Mumbai (ITA No.6012/Mum/2014)

Section: 50C of the Income Tax Act 1961

Facts: The assessee is an individual and is partner in various partnership firms. The assessee had declared income from such partnership firms in the nature of remuneration, interest etc. and long-term capital loss.
During the assessment proceedings the Ld. AO taxed the long term capital gain in the hands of the assessee by invoking the provisions of section 50C of the Income Tax Act, 1961 on sale of rights of land.

Aggrieved by the addition made by the Ld. AO the assessee filed an appeal before CIT(A). CIT(A) upheld the addition made by the Ld. AO.
The assessee preferred an appeal before Hon. ITAT against the order passed by the CIT(A).

Held: Hon. ITAT held that, what is transferred by the assessee is only rights in the land and not the land per se. This fact is very much evident from the fact that possession of the land was never handed over to the assessee. The assessee had only rights in acquiring the land and never had the land in his possession and never owned the land. No doubt the right to acquire the land is a capital asset. When such capital asset is transferred, the assessee is bound to offer capital gains. In the instant case, the assessee had offered capital gains in the return of income. ITAT also observed and commented that, "Substance of the transaction need to be seen than its form".

Moreover, the amendment brought in Section 50C of the Act from 01/10/2009 cannot be made applicable for transactions carried out prior to 01/10/2009. Hence, it could be safely concluded that the amendment in Section 50C of the Act by including the expression “assessable” could be made applicable only in respect of transfer of capital assets made on or after 01/10/2009.

In the instant case, the transfer according to the Revenue had been completed prior to 01/10/2009. Hence, the amended provisions of Section 50C of the Act could not be applied at all by the Revenue, as admittedly the transfer of rights in land had happened pursuant to an unregistered agreement. Prior to 01/10/2009, we hold that provisions of section 50C of the Act cannot be applied for unregistered documents.
ITAT directed the Ld. AO to delete the full value of consideration substituted by him by adopting stamp duty value in terms of Section 50C of the Act and accept the sale consideration reported by the assessee herein. And thereby delete the additions made by him.

In Favour of: Assessee

2 Commissioner of Income Tax V/s Durga Charitable Society [2022] 142 taxmann.com 540 (Allahabad)

Section: 11 of the Income Tax Act 1961

Facts: The assessee is a trust/society registered under section 12 of the Income Tax Act, 1961. The assessee is running educational institutes, medical collages and charitable hospitals. The income from charitable activities declared by the assessee was Rs. Nil and it has earned gross receipts on account of educational activity for running hostels for the students as per the UGC guidelines which is an ancillary activity.
During the assessment proceedings the Ld. AO treating hostel places provided to college student as business of the society and taxed the alleged surplus as business income of the assessee.

Aggrieved by the order passed by the Ld. AO the assessee filed an appeal before CIT(A) which in turn upheld the order passed by the Ld. AO. CIT(A) and ITAT both ruled in favour of the revenue and the assessee filed an appeal before Hon. High Court.

The department being aggrieved by the order of Hon. ITAT filed an appeal before Hon. High Court.

Held: Section 2(15), read with section 11, of the Income-tax Act, 1961 - Charitable or religious trust - Charitable purpose (Education) - Assessee was a Society running educational Institutes, Medical Colleges and Charitable Hospitals - Income from charitable activities declared by assessee was Nil - Assessee earned gross receipt of Rs. 61.63 crores on account of educational activity and assessee was also running hostels for students as per UGC Guidelines which was an ancillary activity - Whether in absence of any evidence to show that hostel facilities were provided to anybody other than students and staff of trust, hostel facilities provided by educational institution shall be construed to be incidental to providing education as per object of trust and hence come under charitable purpose. Hostel facilities provided by assessee-society, running educational institution to students and staff of educational institution, shall be construed to be incidental to providing education as per object of trust and, hence, come under charitable purpose.

In Favour of: Assessee

3 Commissioner of Income Tax V/s Mansukh Dyeing and Printing Mills (Civil Appeal No. 8258/8259 of 2022) (Supreme Court of India)

Section: 45(4) of the Income Tax Act 1961

Facts: The assessee is a partnership firm engaged in the business of dyeing and printing, processing, manufacturing and trading in clothing. One of partner having PSR of 25% was reduced to 12% and for his balance 13% share three new partners were admitted and thereafter he retired from the partnership firm and reconstituted the firm. The assessee firm filed its return of income for the relevant assessment year and assessment proceedings under section 143(3) r.w.s. 147 of the Act was carried.

During the reassessment proceedings the Ld. AO added to the income of the assessee firm short term capital gain under section 45(4) of the Act.

Aggrieved by the order passed by the Ld. AO the assessee firm filed an appeal before CIT(A) which upheld the order passed.

Against the appellate order passed the assessee firm filed an appeal before Hon. ITAT which ruled in favour of the assessee firm.

The department filed an appeal before Hon. High Court which also passed judgement favouring the aassesee firm, ultimately the department filed an appeal before Hon. Supreme Court.

Held: Where pursuant to reconstitution of assessee-partnership, assets of assessee were revalued and revalued amount was credited to partners accounts in their profit sharing ratio, credit of assets revaluation amount to capital amounts of partners could be said to be in effect distribution of increase in value of assets, furthermore newly inducted partners had huge credits to their capital accounts immediately after joining partnership which was available to partners for withdrawal, in view of said facts assets so revalued and credited into capital accounts could be said to be 'transfer' which would fall in category of 'otherwise' and provisions of section 45(4) would be applicable in instant case.

In Favour of: Revenue

4 Assistant Commissioner of Income Tax V/s Cathay Pacific Airways Ltd. [2022] 142 taxmann.com 196 (Kolkata - Trib.)

Section: 44BBA of the Income Tax Act 1961

Facts: The assessee is non resident company engaged in the business of airline service for passengers and cargo. The assessee company filed its return of income for the relevant assessment year declaring the income on

presumptive basis under section 44BBA of the Act. During the assessment proceedings the assessee company furnished the revised computation of income .

The Ld. AO sought explanation in respect of gross receipts disclosed in the service tax return for which necessary details and explanation were furnished by the assessee company. income of the assessee company was assessed.

However, the Ld. AO did not accept the claim of the assessee and held in that amount of service tax paid as service provider is treated as part of turnover and accordingly the Aggrieved by the order passed by the Ld. AO the assessee company filed an appeal before CIT(A), the Ld. CIT(A) upheld the order passed by the Ld. AO.

The assessee company filed an appeal before Hon. ITAT against the order passed by the Ld. CIT(A).

Held: For computing presumptive income of non-resident airliner u/s 44BBA,service tax collected from customers is not includible in 'gross receipts'. The expression "amount paid or payable" in section 44BBA(2)(a) and the expression "amount received or deemed to be received" in section 44BBA(2)(b) is qualified by the words "on account of the carriage of passengers, live stock material or goods from any place in India/outside India". Therefore, only such amounts which are paid or payable for the service provided by the assessee can form part of the gross receipts for the purpose of computation of gross total income u/s. 44BBA(1) of the Act.

Service tax collected by the assessee does not have any element of income. It is collected by the assessee from its customers for and on behalf of the Central Government on account of a statutory levy and, therefore, it does not form part of the receipts of the assessee on which income accrues or arises to it. Assessee merely acts as a collection agent for and on behalf of the Central Government and after collection, deposits the service tax so collected into the treasury of the Central Government.

In Favour of: Assessee

Circulars & Notifications December 2022

A.Circulars:

Central Board of Direct Taxes ('CBDT') issued a detailed circular for deduction of tax at source from salaries for FY 2022-2023.

https://incometaxindia.gov.in/communications/circular/circular-24-2022.pdf

B.Notifications:

CBDT exempts NR not having PAN from mandatory e-filing of Form 10F till 31.03.2023

https://incometaxindia.gov.in/communications/notification/notification-e-filing.pdf

C.Press Release:

Gross Direct Tax collections for the Financial Year (FY) 2022-23 register a growth of 25.90%

https://www.pib.gov.in/PressReleasePage.aspx?PRID=1884583

Central Bank Digital Currency (CBDC) pilot launched by RBI in retail segment has components based on blockchain technology

https://www.pib.gov.in/PressReleasePage.aspx?PRID=1882883

Tax Compliances for January 2023

7 January 2023

Due date for deposit of Tax deducted/collected for the month of December, 2022.

Due date for deposit of TDS for the period October 2022 to December 2022 when Assessing Officer has permitted quarterly deposit of TDS under 192, 194A, 194D or 194H

14 January 2023

Due date for issue of TDS Certificate for tax deducted under section 194-IA/194-IB /194M in the month of November, 2022

Due date for issue of TDS Certificate for tax deducted under section 194-IA/194-IB/194M in the month of November, 2022

15 January 2023

Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of December, 2023 has been paid without the production of a challan

Quarterly statement of TCS for the quarter ending December 31, 2022

30 January 2023

Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA/194-IB/194M in the month of December, 2023

31 January 2023

Quarterly statement of TDS for the quarter ending December 31, 2022

Intimation under section 286(1) in Form No. 3CEAC, by a resident constituent entity of an international group whose parent is non-resident

Tax News from around the World

New Danish government plans to boost labour force, overhaul welfare model

https://www.reuters.com/markets/europe/new-danish-govt-cut-taxes-holidays-bid-boost-labour-force-2022-12-14/

United Arab Emirates (UAE) introduces a 9% Corporate and Business tax regime

https://www.taxmann.com/post/blog/world-tax-news-uae-introduces-9-corporate-business-tax-and-more/

Singapore releases E-Tax guide on tax exemptions for certain foreign-sourced income and more

https://www.taxmann.com/post/blog/world-tax-news-singapore-releases-e-tax-guide-on-tax-exemptions-for-certain-foreign-sourced-income-and-more/

EU adopts global minimum 15% tax on multinationals

https://economictimes.indiatimes.com/news/international/business/eu-adopts-global-minimum-15-tax-on-multinationals/articleshow/96268263.cms

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