



PERMANENT ESTABLISHMENT ITR ASIA TAX EXECUTIVES' FORUM 2010

Shangri-La Hotel, Singapore

 YOUR GLOBAL NETWORK OF LEADING TAX ADVISORS

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- I. PE RISKS AND HOW THEY CAN BE MITIGATED
- II. EXAMPLES OF HOW PE POLICY IS DEVELOPING IN TREATIES
- III. THE INTERSECTION WITH TRANSFER PRICING
- IV. LESSONS FROM 2009 / 2010 KEY RULINGS
- V. KEY CONTACTS

PE RISKS AND HOW THEY CAN BE MITIGATED

FIXED PLACE PE

- ❖ place of business
- ❖ permanence of place
- ❖ carrying on business through such place

PE RISKS AND HOW THEY CAN BE MITIGATED

GLOBALLY

- ❖ Broadly consistent
- ❖ Fixed place rule constrains other sub-article of PE definition in some treaty countries

PE RISKS AND HOW THEY CAN BE MITIGATED

AUSTRALIA

- ATO's administrative guidelines
- McDermott case

INDIA

- Warehouse PE
- An independent warehousing agent held PE – **not a welcome interpretation!**
- '**Substantial equipment PE**' – Australia ATO's rulings
- Comparison with other countries

FIXED PLACE PE & E-COMMERCE

- ❖ Distinction between ‘website’ and ‘server’
- ❖ Consistent view that website hosted on a third party server should not constitute a PE
- ❖ MTC now provides for ‘preparatory or auxiliary activities’ in e-commerce

AGENCY PE

- ❖ Two taxpayer theory – increasing acceptability in several jurisdictions
- ❖ ‘substantial negotiation’ concept – Australia ATO ruling in the context of Australia-Japan treaty
- ❖ India’s reservation on 2008 Update to OECD MTC – bone of contention!!
- ❖ mere ‘participation’ in negotiations sufficient to conclude that authority to terminate contract is exercised

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RECENT OECD POLICY DEVELOPMENTS

- ❖ 2008 Update to the OECD Model Tax Convention
 - ❖ 17 July 2008, the OECD Council approves the Update
- ❖ E-commerce & 'PE' – Article 5
- ❖ Service PE inclusion in Update to OECD MTC
- ❖ 'Force of attraction' vs 'multiple PE concept'

- ❖ OECD focus on improving **functioning of MAP**
- ❖ 2008 MTC – changes to commentary on Article 25
- ❖ **Para 5 added to Article 25** - compulsory arbitration procedure prescribed in case CAs are unable to reach an agreement within 2 years
- ❖ Arbitration clause adopted in some of recently concluded treaties eg US-Belgium, US-Canada, US-Germany

❖ Future agenda for development of tax treaty policy

- ❖ Finalise the new Article 7 for inclusion in 2010 Update to MTC
- ❖ More guidance on 'PE' and 'Beneficial owner' concepts
- ❖ Non-discrimination under the tax treaties

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❖ Article 9 of OECD MTC

❖ Article 9(1) – **Arm's Length Principle**

❖ Article 9(2) – Corresponding adjustment prescribed

❖ Transfer pricing for PE – Attribution of income

❖ Article 7(2) – **Arm's Length Price**

❖ Choice of most appropriate method

❖ **OECD report** on Attribution of profits to PE

TAX AVOIDANCE MOTIVE AND TRANSFER PRICING

- ❖ OECD Guidelines (2009) contains guidance for applying the arm's length principle
- ❖ 'Safe harbour' rules for ALP

THE INTERSECTION WITH TRANSFER PRICING

- ❖ Advance Pricing Arrangements (APA) - Increased emphasis and renewed focus
- ❖ Resounding success of APAs globally
- ❖ Role of APA emphasised by US tax laws for resolution of transfer pricing disputes involving attribution of profits to PE
- ❖ Experience with APAC region encouraging – China /Japan /Korea
- ❖ India - Futuristic outlook: APA proposed under Draft Tax Code

THE INTERSECTION WITH TRANSFER PRICING

- ❖ Mutual Agreement Procedure (MAP) – Challenges!!
 - ❖ Flexibility of information exchange
 - ❖ Synchronisation and co-operation of tax authorities in different countries

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LEARNINGS FROM INDIA – AN EVENTFUL YEAR!!

SEVERAL RULINGS – SOME GOOD, SOME BAD!!


- ❖ **E*Trade** (AAR) – Principle of treaty shopping and underlying objective of tax mitigation could not be equated to a “colourable device”
- ❖ **Dassault Systems K.K.** (AAR) – Payments received by applicant from its Indian reseller for supply of software products to end users should not be classified as royalty

LEARNINGS FROM INDIA – AN EVENTFUL YEAR!!

- ❖ **Amiantit International Holding (AAR) & Dana Corporation (AAR)** – No capital gains tax could arise if capital asset was transferred for NIL consideration; TP provisions could not be applied even if transaction is between associated enterprise
- ❖ **Samsung Electronics (HC)** – Obligation to withhold tax an absolute liability – payer has no right or obligation to determine whether payment is liable to tax in hands of non-resident recipient

LEARNINGS FROM INDIA – AN EVENTFUL YEAR!!

- ❖ **Star Television Entertainment Ltd (AAR)** – Where amalgamation satisfies all relevant conditions for claiming capital gains tax exemption under the Income Tax Law (“ITL”), there would be no tax liability, subject to High Court sanctioning the scheme as required by the provisions of Indian corporate laws
- ❖ **Vodafone (Bombay High Court & SC)** – Off-shore sale of shares of a non-resident company to transfer underlying interest in Indian company is taxable

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