

No PE even if place of business falls under inclusive definition of PE if permanency test isn't satisfied

Summary – The High Court of Delhi in a recent case of National Petroleum Construction., (the Assessee) held that PEs specified in Art 5(2) of Indo-UAE DTAA would be PEs only if essential conditions of Art 5(1) are met

Inclusive definition of PE in Art 5(2) of Indo-UAE DTAA does not expand the width of the term 'PE'

Normally an inclusive definition is used to expand the width of the term sought to be defined, however, that does not appear to be the principal intent in drafting paragraph 2 of Article 5 of the DTAA. All classes of PEs as specified in various subparas of paragraph 2 of Article 5 of the DTAA would be construed as a PE subject to the essential conditions of paragraph 1 of Article 5 being met. Insofar as sub-paras (h) and (i) of paragraph 2 of Article 5 are concerned, the test of permanence as required under paragraph 1 of Article 5 is substituted by a specified minimum period of nine months

- Normally an inclusive definition is used to expand the width of the term sought to be defined, however, that does not appear to be the principal intent in drafting paragraph 2 of Article 5 of the DTAA.
- Read in the context of the other provisions of Article 5, paragraph 2 clearly indicates that it has been used as an explanatory provision to specifically include the species of places of business that would constitute a PE of an enterprise. In this view, paragraph 1 and 2 of Article 5 of the DTAA complement each other.
- Thus, all classes of PEs as specified in various subparas of paragraph 2 of Article 5 of the DTAA would be construed as a PE subject to the essential conditions of paragraph 1 of Article 5 being met.
- Insofar as sub-paras (h) and (i) of paragraph 2 of Article 5 are concerned, the test of permanence as required under paragraph 1 of Article 5 is substituted by a specified minimum period of nine months.
- Thus, places of business as specified under sub-paras (h) and (i) of paragraph 2 of Article 5, cannot be construed as a PE of an enterprise unless they exist for a period of atleast nine months.

IT/ILT : Project Office opened in India and used only as communication channel is not a "PE"

Where Project Office was opened in Mumbai by foreign resident assessee only to comply with contractual requirements and the exchange control regulations and was used only as a communication channel and not for the execution of the Contracts, the same fell within the exclusionary clause of Article 5(3)(c) of Indo-US DTAA of "activity of preparatory or auxiliary character" and hence excluded from definition of PE

- The Project Office was only used for the purposes of correspondence and as a communication channel; apart from that, the Project Office had no role to play in the execution of the activities under the Contracts and no other business of the Assessee was carried on through the Project Office and employees of Project Office were not in any way involved in execution of contracts
- The Black's Law Dictionary defines the word 'auxiliary' to mean as *"aiding or supporting, subsidiary"*. The word 'auxiliary' owes its origin to the Latin word 'auxiliarius' (from auxilium meaning 'help'). The Oxford Dictionary defines the word 'auxiliary' to mean *"providing supplementary or additional help and support"*.

- In the context of Article 5(3)(e) of the DTAA, the expression would necessarily mean carrying on activities, other than the main business functions, that aid and support the Assessee. In the context of the contracts in question, where the main business is fabrication and installation of platforms, acting as a communication channel would clearly qualify as an activity of auxiliary character - an activity which aids and supports the Assessee in carrying on its main business.
- In view of the above, the activity of the Assessee's Project Office in Mumbai would clearly fall within the exclusionary clause of Article 5(3)(e) of the DTAA and, therefore, cannot be construed as the Assessee's PE in India.