International Tax (and TP) Precedents from India having Global Significance

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24th International Taxation Conference 2019
FIT, IBFD, OECD-Paris

December 7, 2019

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Reliance Jio Infocomm Ltd

[2019] 111 taxmann.com 371 (Mumbai - Trib.)
[2019] 108 taxmann.com 325 (Mumbai - Trib.)

ISSUES

- Whether payment made for bandwith services (with respect to telecommunication services) amounts to 'royalty' under the India – Singapore DTAA?
- Scope of Article 3(2) of the India – Singapore DTAA

FACTS

- Reliance Jio Infocomm Ltd. ('RJIL' or 'the **Assessee**'), an Indian company, was in the business of rolling out **telecom services in India**.
- Assessee entered into a **bandwith services agreement** with **Reliance Jio** Infocomm Pte Ltd., **Singapore** ('RJPIL') which enabled it to establish, install, maintain, operate and provide telecommunication services in Singapore and also provide bandwith services to service recipients across the globe.
- In pursuance of the agreement, assessee remitted a certain sum to RJIPL.
- **Assessee** approached CIT(A) u/s 248 of the Indian Income Tax Act, 1961 and **claimed** that it was not obliged to deduct tax at source under section 195 of the Income Tax Act, 1961 as **RJIPL's income** was in the nature of **business profits** which in **absence of PE** in India could **not be taxed in India**.

CIT(A)'s FINDING

FTS

1. Services were **standard telecom services** - did not require any **human intervention** – could not be 'technical services' – could **not** be **FTS under S.9(1)(vii)**
2. Article 12(3) of the tax treaty – bandwith services did not **'make available'** any technical knowledge, experience, skill, knowhow or process to the assessee which was simply availing the said standard facility

ROYALTY

3. Assessee did **not** have **access** to any **process**
4. **Infrastructure and process** required was used and had remained under **control of RJIPL** and was not given to the assessee
5. **Process** involved was **not 'secret'** – IPR was not owned/registered in the name of RJIPL
6. Standard commercial process followed by industry players – could not be classified as 'secret process' as required under the DTAA
7. Amount paid by assessee was **not** towards **use of** (or for obtaining right to use) industrial, commercial, scientific **equipment** nor towards use of (or for obtaining right to use) any **secret formula or process**
8. Not Royalty

BUSINESS PROFITS/PE

9. Business Profit – No PE – Not taxable

REVENUE'S CONTENTION BEFORE HON'BLE TAX TRIBUNAL [I.T.A.T]

FTS

- The Revenue accepted that the payment for bandwith services was not FTS

ROYALTY

- The revenue contended that the **payment for bandwith services** amounted to **royalty** under **Article 12** of the India-Singapore DTAA as well **as Explanation 6 to Section 9(1)(vi)** of the Act**.**

SCOPE OF ARTICLE 3(2)

- **Article 3(2)** of the India – Singapore DTAA states that "as regards the application of the Agreement by a Contracting State, any **term not defined** therein shall, unless the context otherwise requires, have, the **meaning** which it has under the **law** of that State concerning the taxes to which the Agreement applies".
- **Explanation 6 to Section 9(1)(vii)** states that "for the removal of doubts, it is hereby clarified that the expression **"process"** includes and shall be deemed to have always included **transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre** or by any other similar technology, **whether or not such process is secret**".
- As per Article 3(2) of the India-Singapore DTAA, Explanation 6 to Section 9(1)(vi) must hold the field, in the context of interpretation of Article 12 of the DTAA so far as connotations of undefined expressions therein are concerned. Accordingly, the payment made by the assessee to RJIPL for providing bandwith services was royalty and could not be classified as business profits.
- CIT v. Siemens Aktiongesellschaft had upheld ambulatory approach to domestic law meaning of undefined terms under article 3(2).

DECISION

ROYALTY

1. Assessee received **standard facilities**
2. Assessee did **not** have **access to any equipment**
3. Assessee did **not** have **access to any process**
4. Infrastructure and process required for provision of bandwith services was always used and under control of RJIPL
5. **Process** was **not 'secret**' i.e. **IPR was not owned**/registered in the name of **RJIPL**
6. **Amount paid** by assessee was **not** towards use of (or **for** obtaining right to use) **industrial, commercial, scientific equipment** nor towards use of (or for obtaining right to use) any **secret formula or process**
7. 'Royalty' under Article 12 of **India-Hungary DTAA (unlike India-Singapore DTAA)** takes **within its sweep "...transmission by satellite, cable, optic fibre or similar technology..."**
8. Royalty defined in the Indian Income Tax Act was amended vide Finance Act 2012 to include the definition of "process". Subsequently, India-Singapore tax treaty was amended by Notification No. SO 935(E), dated 23.03.2017, however, the definition of royalty therein envisaged had not been tinkered with and remained as such
9. Amendment in section 9(1)(vi) will not have any bearing on definition of 'royalty'. [CIT v. Reliance Infocomm Ltd, CIT v. Siemens Aktiongesellschaft

SCOPE OF ARTICLE 3(2)

10. Provisions of **Article 3(2)** come into play for domestic law meaning of **"any term not defined"** in the tax treaty.

DECISION (...continued)

11. The expression **"term"** is defined as **"a word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study"**. A "term" is thus a word that has meaning and refers to objects, ideas, events or a state of affair. **A term is thus, in addition** to being **a word,** some kind of a point of reference, whereas a word is only a constituent of language.
12. **Article 3(2)** will come into play only in respect of the **undefined treaty terms**, which are in the nature of reference points and which have some peculiar significance, and not in respect of all the **undefined words** and expressions used in a treaty.
13. **The expression 'process' is not a treaty term *per se***, or a reference point, used in the treaty, **rather it is an expression or word used in defining the treaty term 'royalty'.** The expression **"process"** is used in the treaty in that limited context and it **does not have an independent existence**.
14. The domestic law meaning under article 3(2) is relevant only when the treaty term itself is undefined, as noted by Hon'ble Delhi High Court in the case of **DIT v. New Skies Satellite BV**. When the expression **'royalty' is a defined** expression under the applicable **tax treaty**, there cannot be any occasion to invoke **article 3(2) for further dissecting** the issue and exploring the **domestic law** meaning of each expression used in this definition for coming to the conclusions about connotations of royalty.
15. It could not, therefore, be open to invoke article 3(2) to import domestic law meaning, even partly, when the treaty term has received a definition under the treaty. It was for this reason that **Explanation 6 to Section 9(1)(vi)**, had **no role**, under article 3(2) of the treaty, in **explaining the expression "process"**, in the context of defining royalty under the Indo Singaporean tax treaty.

DECISION (...continued)

16. The next fundamental question, was whether assignment of the domestic law meaning under article 3(2), to an undefined treaty term, was to be done by way of **static interpretation** or by way of dynamic or ambulatory interpretation.

(a) The expression **"process" was not, at the point of time** relevant to static interpretation, **statutorily defined.**

(b) (i) The Court dealt with the case of **CIT v. Siemens Aktiongesellschaft** cited by Revenue, which had upheld ambulatory approach. However, in that case the treaty in question was the **Indo-German DTAA**. The relevant article [**II(2)**] of the said treaty stated "in the application of the provisions of this agreement in one of the territories any **term not** otherwise **defined** in this agreement shall unless the context otherwise requires, **have the meaning which it has under the laws in force in that territory**." The **Indo-Singapore treaty**, however, states "As regards application of the agreement by contracting state, any **term not defined** therein **shall have the meaning** which it has **under the law of that state**. Thus, the Indo-Singapore DTAA was differently worded from the German DTAA as the words 'law in force' were not found in it. Thus, ambulatory approach would not apply in the present case.

(ii) In the case of **Her Majesty The Queen v. Melford Developments Inc.** it was observed **by the Supreme Court of Canada** that unilateral amendment it is not possible for one nation which is party to an agreement to tax income which otherwise was not subject to tax. Whatever be the approach adopted, for the purpose of article 3(2) i.e. static or ambulatory, **a unilateral treaty override, is not permissible**.

DECISION (...continued)

17. (a) **Article 26 of Vienna Convention on Law of Treaties** provides that, "Pacta sunt servanda: **Every treaty in force is binding on the parties to it and must be performed by them in good faith ".**

(b) What it implies is that whatever be the provisions of the treaties, these provisions are to be given effect in good faith. **If a tax jurisdiction is allowed to amend the settled position with respect to a treaty provision, by an amendment in the domestic law, it cannot be treated as performance of treaties in good faith.**

(c) Held by the Delhi High Court in the case of **DIT v. New Skies Satellite BV**, **"the "VCLT" is universally accepted as authoritatively laying down the principles governing the law of treaties".**

(d) Held by the Supreme Court in the case of **Ram Jethmalani v. Union of India**, that "it **(VCLT) contains many principles of customary international law".**

(e) Therefore, the **additional test that is required** to be put, while **adopting the ambulatory interpretation** in such a situation, is **whether the amendment in domestic law ends up unsettling a conclusion arrived at under the pre domestic law amendment position** i.e. reversing the judicial rulings in favour of the residence jurisdiction, and, **if the answer is in the positive, the ambulatory interpretation is to be discarded** because **that approach would** patronise, and **legitimise, a unilateral treaty override**, and the outcome of ambulatory interpretation in such a case will be **incompatible with the fundamental principles of treaty interpretation under the Vienna Convention.**

(f) The approach is justified on the first principles on the ground that **when two approaches are possible** for incorporation of domestic law provisions in the tax treaties and one of these approaches is compatible with Article 26 of the VCLT while the other is incompatible with the same, **the approach compatible with the VCLT provisions is to be adopted.**

DECISION (...continued)

18. **These observations regarding ambulatory** or dynamic **approach** being inappropriate in the context of article 3(2) is **confined to the peculiar facts discussed above**, and, are not, therefore, of general application.

Maruti Suzuki India Ltd

[2010] 192 Taxman 317 (Delhi)
[2016] 237 Taxman 256 (Delhi)

Whether existence of an international transaction can be inferred from excess AMP expenditure determined by the Bright Line Test ('BLT') ?

BACKGROUND

- **Assessee,** Maruti Suzuki India Ltd (MSIL), was engaged in the **manufacture** of passenger **cars in India**. It was a **subsidiary of** Suzuki Motor Corporation **(SMC)**. A **license agreement** was entered into between MSIL and **SMC** in October 1982 by which, **MSIL** was **permitted to use the co-branded trademark 'Maruti-Suzuki'** on certain vehicle models. The **assessee incurred certain AMP expenses towards promotion of its brand.**
- A **reference** under section 92CA(1) was **made by the AO to the TPO** for determination of arm's length price for the international transaction undertaken by the assessee with Suzuki in the financial year 2004-05. A notice dated 27-8- 2008 was then issued by the TPO to the assessee with respect to replacement of the front logo 'M' by the logo 'S' in respect of three models, namely, 'Maruti' 800, Esteem and Omni in the year 2004-05, which, according to the TPO, amounted to sale of the brand 'Maruti' to 'Suzuki'. He noticed that Suzuki had taken substantial amount of royalty from Maruti without contributing anything towards brand development and penetration in the Indian market and **Maruti had incurred expenditure amounting to Rs. 4,092 crores** on **advertisement, marketing and distribution activity, which had helped it in creation** of **'Maruti' brand logo** and due to which Maruti had become the number one car company in India. **Computing the value of the brand at cost *plus* 8 per cent method**, **TPO assessed the value of the brand at Rs. 4,420** crores and the assessee was asked to show cause as to why the value of Maruti brand should not be taken at Rs. 4,420 crores and why the international transaction should not be adjusted on the basis of its deemed sale to Suzuki.

BACKGROUND (...continued)

- The **assessee**, in its reply, **stated** that at **no** point of time, had there been any **transfer of** 'Maruti' **brand or logo to Suzuki**, which did not have any right at all to use that logo or trademark; and that it was on account of its large shareholding in the company and because of strong competition from the cars introduced by multinationals in India, that Suzuki had permitted the assessee to use the 'Suzuki' name and logo, so that it could face the competition and sustain its market share, which was under severe attack. It was also submitted that Suzuki had not charged any additional consideration for use of its logo on the vehicles manufactured by Maruti and there was no question of any amount of revenue being transferred from the tax net of Indian exchequer to any foreign tax jurisdiction.
- The **jurisdiction of the TPO was, thus, disputed** by the assessee in the reply submitted to him. Since the **assessee did not get any response to the jurisdictional challenge** and the TPO continued to hear the matter on the basis of the notice issued by him, without first giving a ruling on the jurisdictional issue raised by it, **writ petition** was filed seeking stay of the proceedings before the TPO.
- **During pendency of writ petition, the TPO passed final order** where he inter alia came to the conclusion that **Maruti had developed marketing intangibles** for Suzuki in India at its cost and it had not been compensated for developing those marketing intangibles for Suzuki. He also concluded that non-routine **advertisement expenditure amounting to Rs. 107.22 crores was also to be adjusted**.
- In the circumstance, the assessee amended its writ petition so as to challenge the final order passed by the TPO.

DELHI HIGH COURT'S 1st JUDGEMENT (dated July 1, 2010)

- The expenditure incurred by a domestic entity, which was an associate enterprise of a foreign entity, on advertising, promotion and marketing of its products using a foreign trademark/logo did not require any payment or compensation by the owner of the foreign trademark/logo to the domestic entity on account of use of the foreign trademark/logo in the promotion, advertising and marketing undertaken by it, so long as the expenses incurred by the domestic entity did not exceed the expenses which a similarly situated and comparable independent domestic entity would have incurred.
- If the expenses incurred by a domestic entity which was the associate enterprise of foreign entity, using a foreign brand trademark and/or logo while advertising, marketing and promoting its products, were more than what a similarly situated and comparable independent domestic entity would have incurred, the foreign entity needed to suitably compensate the domestic entity in respect of the advantage obtained by it in the form of brand building and increased awareness of its brand in the domestic market.
- In order to **ascertain whether the expenses incurred by the domestic entity**, which was an associate enterprise of a foreign entity, **on the marketing, promotion and advertising of its products using the brand trademark/logo of the foreign entity, were more than what a similarly situated** and comparable **independent** domestic **entity would have incurred**, it would be necessary to identify appropriate comparables for the purpose of comparison of their expenditure with the expenditure incurred by the domestic entity in this regard. **Suitable adjustments would have to be made** considering the individual profiles of these entities and other facts and circumstances.

SUPREME COURT'S DIRECTION (dated October 1, 2010)

- **The TPO** who in the meantime, had already issued a show-cause notice was **to** be directed to **proceed with the matter in accordance with law uninfluenced by the observations/directions given by the High Court** in the impugned judgment.

FACTS

- The **TPO benchmarked AMP expenses by applying the 'Bright Line Test' ('BLT')** and compared the proportion of such expenses incurred by MSIL with that incurred by comparable companies. Since the ratio of selling and distribution expenses as a percentage of sales of MSIL was higher than that incurred by the comparable companies, the TPO concluded that the excess must be regarded as having been incurred for promoting the brand 'Suzuki' owned by SMC. Accordingly, **he made the adjustment on account of AMP expenses.**
- The DRP upheld the addition made by the TPO on account of AMP expenses.
- On appeal, the **Tribunal upheld assessment order.**
- On **appeal to the High Court** the **assessee contended** that once the BLT had been rejected by the decision in *Sony Ericsson Mobile Communications India (P.) Ltd.* v. *CIT* the question of there being an international transaction did not arise. Independent of the above, it was submitted by assessee that the **revenue had to show the existence of an agreement or an arrangement or an understanding between MSIL and SMC prior to incurring of the AMP expenditure**, in terms of which MSIL would incur AMP expenditure in excess of the *bona fide* requirements of its business in India and thereby may add to the value of the brand of the foreign AE, *i.e.,* SMC. In **other words, it was contended that mere incurring of the AMP expenditure would not be considered as an international transaction**.

DECISION (DELHI HIGH COURT dated Dec 11, 2015)

1. Under **section 92B**(1) an **'international transaction'** means-

   (*a*) **a transaction between two or more AEs**, either or both of whom are non-resident

   (*b*) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and

   (*c*) shall **include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to any cost or expenses incurred or to be incurred** in **connection with the benefit, service or facility provided** or to be provided to one or more of such enterprises.
2. While **SMC had a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc.** which were bench marked**, the question remained whether it had any 'transaction' concerning the AMP** expenditure.
3. The **revenue had to show that there existed an 'agreement' or 'arrangement' or 'understanding'** between MSIL and SMC **whereby MSIL was obliged to spend excessively on AMP** in order to promote the brand of SMC.
4. Even if the word 'transaction’ was given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the revenue, and even if resort is had to section 92F(v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it was still incumbent on the revenue to show the existence of the same between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of section 92B(1) what had to be definitely shown is the existence of transaction whereby MSIL had been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC.

DECISION (DELHI HIGH COURT dated Dec 11, 2015) (...continued)

5. In the instant appeals, the very existence of an international transaction was in issue. The specific case of MSIL was that the **revenue** had **failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend** of MSIL.
6. **The BLT had been applied** to the AMP spend by MSIL to (a) **deduce the existence** of **an international transaction** involving SMC and (b) **to make a quantitative 'adjustment'** to the ALP to the extent that the expenditure exceeded the expenditure by comparable entities. It was submitted that with the decision in ***Sony Ericsson*** having **disapproved of BLT** as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the revenue's case was negated.
7. In other words, the very **existence of an international transaction could not be a matter for inference** or surmise.
8. The **OECD Transfer Pricing Guidelines, para 7.13** emphasised that there should not be any **automatic inference about an AE receiving an entity group service only because it gets an incidental benefit** for being part of a larger concern and not to any specific activity performed.

DECISION (DELHI HIGH COURT dated Dec 11, 2015) (...continued)

9. (a) The decision in ***Sony Ericsson*** **had done away with the BLT** as means for determining the ALP of an international transaction involving AMP expenses. **Therefore**, the **existence of an international transaction would have to be established *de hors* the BLT.**
10.(b) Even the ***Sony Ericsson*** **judgment** made it clear that **AMP adjustment cannot be made in respect of a full-risk manufacturer.**
11. (c) In ***Sony Ericsson*** it was held that if an **Indian entity** has satisfied the **TNMM**, *i.e.*, the operating margins of the Indian enterprise are much higher than the operating margins of the comparable companies, there was no question of TP adjustment on account of AMP expenditure.
12.(d) In Sony Ericson, it was also held that the issue of arm's length price per se did not arise when deduction under section 37(1) is claimed. In the context of the AMP expenses incurred by manufacturer exclusively for its own business, it was arguable that once such expense is allowed under section 37(1), it could not be disallowed for the purpose of Chapter X by attributing some part of the said expenditure to promoting the brand of the foreign AE. **The key words as far as section 37(1) was concerned were 'any expenditure...laid out or expended wholly and exclusively for the purposes of the business or profession'.**

13.**It was not for the revenue to dictate to an entity how much it should spend on AMP**. That would be a **business decision** of such **entity** keeping in view its exigencies and its perception of what was best needed to promote its products.

Formula One World Championship Ltd

[2017] 80 taxmann.com 347 (SC)

Whether International circuit for Formula One championship constituted a fixed place PE under the India-U.K. tax treaty?

Or

Whether a place(neither owned nor leased by an entity) but at its disposal for a very short duration regularly for a few years can constitute a Permanent Establishment ?

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FACTS

- Federation Internationale de I' Automobile **(FIA)**, a French entity is a **regulatory body**; it **regulates** the FIA **Formula One World Championship** ('Championship') conducted in the **name and style** of the **Grand Prix** over **three day** duration at purpose-built circuits.
- **FIA** had **assigned commercial rights** in favour of Formula One Asset Management Limited **('FOAM')** which was **engaged in generating TV Feeds** vide agreement dated April 24, 2001. On the same day, vide an another agreement **FOAM transferred the said commercial rights to** Formula One World Championship Ltd (**FOWC-taxpayer)** for a 100 year term.
- The **taxpayer signed** the first **agreement** with Jaypee Sports International Limited **('Jaypee')** on October 25, 2007 **whereby** only **promotion rights** were **granted for the event to Jaypee**, for which **Jaypee constructed** the **Buddh International Circuit** ('the circuit'). On September 13, 2011, **the said agreement** was **replaced with** the **"Race Promotion Contract" ('RPC')**, **which granted Jaypee the right to host, stage and promote the event for a consideration of US$ 40 million.**
- Further, some other agreements were also entered into with the taxpayer.
- After entering into the aforesaid arrangement for hosting F-1 Grand Prix in India, both the **taxpayer and Jaypee** approached the Authority for Advance Rulings **(AAR)** and the **AAR held** that the **consideration received by the taxpayer amounted to royalty and was to be, accordingly, taxed under the Indian Income tax Act. It also held that the taxpayer did not have PE in India but since the amount received by the taxpayer was income in the nature of royalty, Jaypee was liable to deduct tax on the same.**

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FACTS

- Against the AAR ruling, **the Jaypee, taxpayer and Union of India (Revenue) filed a writ petition** before the **Delhi High Court** under Article 226 of the Constitution. **The Delhi High Court reversed** the **decision of AAR and held that the amount paid** under RPC by Jaypee to the taxpayer **was not royalty under the treaty**. Instead, it was held that the **taxpayer had a PE in India** and the amount received from Jaypee was taxable as **business income** under India-UK DTAA. Thus, **Jaypee** was **bound to deduct tax** from the amount payable to the taxpayer **under Section 195** of the Act.

- Against the Delhi High Court's decision, the **Jaypee, taxpayer and Revenue preferred an appeal before the Supreme Court.**

ASSESSEE'S CONTENTION BEFORE HON'BLE SUPREME COURT

- It was submitted that the track was constructed by Jaypee; for which it had own engineers, architects etc; entire expenditure was also borne by Jaypee. It was stated that the **circuit was owned by Jaypee and control thereon was that of Jaypee** on which not only Championship in question was organised, but it was **being used for many other events organised on regular basis, all** year round.
- Also, right from construction/laying down the contract for the motor races people till the conclusion of the Events/Championship, all acts and obligations were to be performed by Jaypee, with no role of taxpayer therein. Thus, taxpayer was not responsible therefor and for this reason it was necessary for Jaypee as promoter to enter into a valid and binding agreement with a third party (FIA in the present case).
- It was further submitted that the business of taxpayer was not to organise these races, hence the question of its PE in India, that too in the form of circuit where the race was to be held did not arise..
- Further, after going through all the clauses of the agreement between taxpayer and Jaypee with a toothcomb, it would be found that taxpayer had no physical control over the said circuit. It was also argued that the entire **Formula One Event was a temporary model for three days in a year** only and even if it was accepted that the **taxpayer had control over the said place for those three days, possession of the site for three days in a year cannot be termed as PE.**

ASSESSEE'S CONTENTION BEFORE HON'BLE SUPREME COURT

- Alternatively, it was submitted that as the agreement in question (RPC) under which consideration of US$ 40 million was paid was signed in UK and, the income accrued in UK. It was grant of rights which was the determinative test and merely implementation of those rights took place in India. Thus, **such income was taxable in UK.**

DECISION (SUPREME COURT dated Apr 24, 2017)

1. The Supreme Court held that the **Buddh International Circuit was a fixed place**.**From** the said circuit different races, including **the Grand Prix was conducted**, **which was undoubtedly an economic/business activity. The core question is** as to **whether this was** put at **the disposal of taxpayer?** and **whether it was a fixed place of business** of taxpayer?
2. The High Court had rightly concluded that having regard to the **duration of the event**, which **was for limited days**, and for **the entire duration the taxpayer had full access through its personnel**, number of days for which the access was there would not make any difference.
3. A **stand at a trade fair, occupied regularly for three weeks a year**, through which an enterprise obtained contracts for a significant part of its annual sales, was held to **constitute a PE**. Likewise, a **temporary restaurant** operated **in** a mirror **tent** at a Dutch flower show for a period of seven months was held to constitute a **PE**.
4. The **Physical control of the circuit was with taxpayer** and its affiliates from the inception, i.e. inclusion of event in a circuit till the conclusion of the event. Omnipresence of taxpayer and its stamp over the event was loud, clear and firm. The undisputed fact was that the race was physically conducted in India and from this race income was generated in India. Therefore, a commonsense and plain thinking of the entire situation would lead to the conclusion that **taxpayer had made their earning in India through the said track over which they had complete control during the period of race.**

DECISION (SUPREME COURT dated Apr 24, 2017) (...continued)

5. The **appellants were trying to trivialize the issue by harping on the fact that duration of the** event **was three days and, therefore, control, if at all, would be for that period** only. **But, the Duration of the agreement was five years**, which was **extendable to another five years**. The question of the PE was to be examined **keeping in mind** that the aforesaid race was to be conducted only for three days in a year but for the entire period of race the control was with taxpayer.

6. The Supreme Court concurred with the view of High Court that the conceptualization of the event and the right to include it in any particular circuit, such as Buddh Circuit was that of the FOWC; it decided the venue and the participating teams were bound to compete in the race on the terms agreed with the FOWC. All these, in the opinion of the Court, unequivocally, show that the FOWC carried on **business in India for the duration of the race (and for two weeks before the race and** a **week thereafter**). Every right, which it possessed was monetized; the US$ 40 million which Jaypee paid was only a part of that commercial exploitation by the FOWC.

7. FIA undertook to ensure that events were held and taxpayer, as CRH, undertook to enter into contracts with event promoters and host such events. All possible commercial rights, including advertisement, media rights, etc. and even right to sell paddock seats, were assumed by the taxpayer and its associates. Thus**, as a part of their business, the taxpayer** (as well as its affiliates) **undertook the aforesaid commercial activities in India.**

DECISION (SUPREME COURT dated Apr 24, 2017) (...continued)

8. The Supreme Court also adverted to **Legal commentaries** as mentioned below:

   i) Philip Baker in his **commentary** had given various illustrative cases decided by courts of different jurisdictions. The aforesaid **illustrations** confirmed that the **fixed place of business need not be owned or leased** by the foreign enterprise, **provided it was at the disposal of the enterprise** in the sense of having some right to use the premises for the purposes of its business and not solely for the purpose of the project undertaken on behalf of the owner of the premises.

   ii) While interpreting the **OECD Commentary on Article 5 pertaining to PE, Klaus Vogel** had stated that, the place qualifies as a "place of business" only if it is 'at the disposal' of the enterprise. According to him, the enterprise would not be able to use the place of business as an instrument for carrying on its business unless it controls the place of business to a considerable extent. But he hastened to add that there were no absolute standards for the modalities and intensity of control. Rather, the standards were dependent on the type of business activity carried on. According to him, 'disposal' is the power (or a certain fraction thereof) to use the place of business directly. **Further, it is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A certain amount of space at the disposal of the enterprise, which is used for business activities is sufficient to constitute a place of business. Thus, where an enterprise illegally occupies a certain location where it carries on its business that would also constitute a PE.**

DECISION (SUPREME COURT dated Apr 24, 2017) (...continued)

9. Also, the test laid down by the **Andhra Pradesh High Court in Visakhapatnam Port Trust** case fully stood **satisfied**. Not only the **Buddh International Circuit was a fixed place where the commercial/economic activity** of conducting F-1 Championship was carried out, one could clearly discern that **it was a virtual projection of the foreign enterprise, namely Formula-1 (i.e. taxpayer) on the soil of this country**

10) As per **Philip Baker**, **a PE must have three characteristics: stability, productivity and dependence. All characteristics existed** in the present case. **Fixed place of business in the form of physical location, i.e. Buddh International Circuit**, was at the **disposal of the taxpayer through which it conducted business.** Thus, Aesthetics of law and taxation jurisprudence left no doubt that taxable event had taken place in India and **taxpayer was liable to pay tax in India on the income earned.**

THANK YOU

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