

# Multiple counting of employees present on a single day not required for determining service PE: ITAT Mumbai

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## Summary

A non-resident providing services in India constitutes a Service Permanent Establishment (PE) in India if its employees are present in India for a period exceeding 90 days in any 12 months period<sup>1</sup>. In case where more than one employee is present in India on a particular day, the manner of determining the number of days (ie man-days or calendar days) of presence of the entity in India has been a matter of debate.

The Mumbai bench of Income Tax Appellate Tribunal (ITAT), in a recent judgement<sup>2</sup>, has held that in order to determine the presence of an entity in India for the purpose of meeting the Service PE threshold, multiple counting of employees in a single day is not permissible. The ITAT also held that period during which an employee was on leave is required to be excluded for the above calculation.

## Facts of the case

- The taxpayer, engaged in the practice of law, had its head office in UK and branches in various countries around the world. During tax year 2001-02, the taxpayer was appointed as a legal advisor for some projects in India and received fees from clients for rendering legal consultancy services.

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<sup>1</sup> Under India UK Double Taxation Avoidance Agreement

<sup>2</sup> Linklaters v/s Dy. DIT [ITA No. 3250/Mum/2006]

- The fees received from Indian clients was not taxable because the taxpayer did not have a PE in India during the year as its employees were present for 87 days. In computing the period of 87 days, the taxpayer excluded:
  - Multiple counting of employees in a single day in India by placing reliance on various<sup>3</sup> judicial precedents.
  - Vacation period of one of the employees as the employee did not render any services in India and no other employee was living in India during that time.
- The tax officer, however, held that the taxpayer had a service PE in India as its employees had stayed and rendered services in India for over 90 days. Accordingly, the taxpayer was assessed to tax on the income earned by providing legal consultancy services in India.
- The first appellate authority<sup>4</sup> ruled in favour of the Revenue. So, the taxpayer filed an appeal before the ITAT.

### **ITAT's observation and ruling**

- The ITAT concurred with the taxpayer's reliance on a Mumbai ITAT<sup>5</sup> ruling and held that multiple counting of employees in a single day is not permissible for determining PE threshold under the tax treaty.
- Based on the documentary evidence furnished by the taxpayer, the ITAT accepted the taxpayer's contention that one of the employees who was on a vacation did not render any onshore services in India during that period. Hence, it was held that the vacation period has to be excluded for computing the PE threshold as no other employee of the taxpayer was rendering services in India during this period.
- Accordingly, the ITAT held that the taxpayer did not constitute a Service PE in India as the aggregate period of stay of employees in India was for 87 days. Accordingly, the income earned by the taxpayer by offering legal consultancy services in India was held not taxable.

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<sup>3</sup> Clifford Chance vs DCIT [2002] 82 ITD 106 (Mum); ADIT vs Valentine maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum); J Ray McDermott Eastern Hemisphere Ltd. vs JCIT [2010] 39 SOT 240 (Mum.)

<sup>4</sup> Commissioner of Income Tax (Appeals)

<sup>5</sup> Clifford Chance vs DCIT [2002] 82 ITD 106 (Mum)

## **Our comments**

The ruling reinforces the principle that in order to determine Service PE, the number of days of the entity's presence in India is relevant irrespective of the number of employees working in India during a particular day. However, with regards to the exclusion of temporarily unavailable employees, ie employees who are on leave, it is imperative on part of the taxpayer to ensure that they maintain adequate documentation (like log book, travel details, employee's confirmation, etc.) to demonstrate that such employees have not rendered any services during such period.

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