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Tax Flash News



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Performing liaising functions without habitual exercise of authority to negotiate contracts does not create permanent establishment

Executive summary

In *Expedia Lodging Partner*,[1] the Delhi Bench of the Income-tax Appellate Tribunal ('the Tribunal') examined whether the taxpayer's Indian group company constituted a dependent agent permanent establishment ('DAPE') under the India-Switzerland tax treaty ('the Swiss Treaty').

The Tribunal held that the Indian entity did not constitute a DAPE, as it merely performed liaison and support functions, while all key commercial decisions were taken by the taxpayer's overseas leadership.

It also emphasised that for DAPE to exist, the Swiss Treaty requires not only the existence of authority to negotiate and enter into contracts but also the 'habitual' exercise of such authority. One isolated instance could not automatically establish habitual exercise.

[1] *Expedia Lodging Partner Services Sarl* v. *ACIT* (ITA No. 1886/Del/2025)

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The burden rested on the Revenue to establish, through identifiable evidence, such actual and habitual authority, rather than infer a DAPE merely from the corporate relationship between the taxpayer and the Indian entity.

Facts of the case[2]

The taxpayer, a Switzerland-based entity, provided lodging-related services to hotel partners in India through an online platform that enabled the hotel partners ('lodging suppliers') to offer their rooms to travellers.

Under the 'hotel-collect' model, the travellers paid the lodging suppliers directly for their stay, and the taxpayer subsequently received commission from such lodging suppliers for bookings made through its platform.

The taxpayer categorised its lodging suppliers into two groups: Hotel Enterprise Partners ('HEP') and Hotel Market Partners ('HMP'). While HEP arrangements involved tailor-made contracts with commercial discussions and negotiated terms between the taxpayer and the lodging suppliers, HMP arrangements were executed through an online platform based on standardised contractual terms.

An Indian group company ('ICo') rendered contract software development services and various supply-support services, including account management and communication support, to the taxpayer.

The taxpayer claimed that the commission income constituted business profits and was not taxable in India in the absence of a PE in India under the Swiss Treaty.

However, based on the responses received from certain Indian lodging suppliers and the email correspondence furnished during the assessment proceedings, the Revenue alleged that ICo was actively involved in negotiation and conclusion of contracts with lodging suppliers on behalf of the taxpayer and accordingly, held that ICo constituted the taxpayer's DAPE in India under the Swiss Treaty.[3]

[2] Other grounds of appeal have not been covered in this note.

[3] Article 5(5)

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Relevant provisions

Article 5(5)(i) of the Swiss Treaty provides that a DAPE of a Swiss enterprise is constituted in India where any person (other than an independent agent), *inter alia*, has and habitually exercises in India, an authority to negotiate and enter into contracts for or on behalf of the foreign enterprise.

Article 5(6) provides that an agent will not be considered as 'independent' if it acts wholly or almost wholly for or on behalf of the foreign enterprise or its group companies.

Revenue's contentions

The authority to conclude a contract does not necessarily mean physically signing the contract – it means taking negotiations to a logical end and then, presenting the contract before the concerned authority for signatures.

Relied on the OECD Commentary on the authority to conclude contracts and India's reservations thereto, and Skaar's[4] business activity test, and contended that mere attendance or participation in negotiations for an essential element of a contract (if not for all the elements) is sufficient to establish the 'authority to conclude contracts' and constitute a DAPE.

Additionally, relied on the Delhi High Court's decision in *GE Energy*[5] wherein, considering India's reservation to the OECD Commentary, it was held that the negotiation of contracts will also give rise to the formation of a DAPE.

The information obtained from the three Indian lodging suppliers and email correspondence demonstrated that ICo's employees were the primary points of contact for the Indian lodging suppliers and were directly, actively and decisively negotiating contracts on behalf of the taxpayer (under HEP arrangement). The fact that email correspondence from the lodging suppliers was addressed to ICo's employees and that the employees created the contract, after deliberations with the lodging supplier and overseas group entities, showed that the employees were the main negotiators and not merely performing administrative or coordination functions.

ICo's activities were not merely auxiliary or preparatory in nature but formed part of the taxpayer's core business activity and went beyond the account-management services or support functions as contended by the taxpayer.

[4] A well-known tax author

[5] *GE Energy Parts Inc.* v. *CIT* (International Taxation) [2019] 411 ITR 243 (Delhi)

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Relied on the definition of “agent” under the Indian Contract Act, 1872 to argue that ICo acted on behalf of the taxpayer in negotiations with lodging suppliers and therefore constituted the taxpayer’s agent.

Since ICo catered only to the taxpayer and its other overseas group companies, there was complete economic dependence of ICo on the group and accordingly, ICo could not be regarded as an independent agent under the Swiss Treaty.

Revenue rejected the taxpayer’s reliance on the Bilateral Advance Pricing Agreement (‘BAPA’) entered into by ICo and argued that the BAPA applied to the Indian entity and did not govern the taxpayer’s PE position under the Swiss Treaty.

Tribunal’s decision

The Delhi Bench of the Tribunal ruled in favour of the taxpayer and held that ICo did not constitute a DAPE of the taxpayer in India under the Swiss Treaty. ICo’s role was confined to communicating pre-approved commercial terms, liaising, account-management and other support functions, without habitually exercising authority to negotiate and enter into contracts for or on behalf of the taxpayer.

Key observations of the Tribunal included:

The burden of establishing the existence of PE initially rests upon the Revenue.[6] Merely establishing a corporate relationship between the taxpayer and ICo was insufficient to establish PE in India.

The Revenue cherry-picked certain responses and email correspondence furnished by the Indian lodging suppliers to conclude that ICo’s employees negotiated and concluded contracts on behalf of the taxpayer, while ignoring the overall factual matrix.

The email correspondence did not establish that ICo’s employees had authority to negotiate and conclude contracts. Instead, the evidence showed that all commercial terms and contractual decisions (including acceptance or rejection of proposal, counter-proposals and renewal terms) were approved by the taxpayer’s leadership in Switzerland, Singapore and the United States.

ICo’s employees acted in a liaising capacity and merely communicated the pre-approved terms to the lodging supplier. They had no authority to accept, reject or modify the commercial proposals, and the Revenue did not establish that they signed the contracts.

[6] *ADIT* v. *e-Funds IT Solution Inc.* [2017] 399 ITR 34 (SC); *Formula One World Championship Ltd.* v. *CIT* [2017] 394 ITR 80 (SC)

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The Revenue was required to demonstrate with the identifiable evidence that ICo had negotiated the essential elements such as commission percentage, room-rate arrangements, cancellation terms etc.[7]

Mere back-office/support activity did not constitute a DAPE in India.[8]

For DAPE to exist, the Swiss Treaty requires not only the existence of authority to negotiate and enter into contracts but also the 'habitual' exercise of such authority. One isolated instance could not automatically establish habitual exercise. The responses received from only three lodging suppliers, out of approximately 10,500 lodging suppliers, were insufficient to demonstrate a recurring pattern of conduct by ICo's employees.

ICo's functions were already subjected to detailed review by the Indian and the US Competent Authorities during the BAPA process, including an examination of contracting arrangements, delegation of authority, processes for concluding contracts and operational functions of the Indian entity.

The Revenue's reliance on the Delhi High Court decision in the case of *GE Energy* was misplaced as the said decision did not establish that any employee participating in any negotiation automatically creates a DAPE. It only laid down that where Indian personnel played a substantive role in core or essential elements of contract formation, the formal signing or final approval outside India would not necessarily prevent a DAPE. However, *GE Energy* did not eliminate the requirement of actual authority, which was a crucial distinction in the instant case.

Our comments



This ruling reinforces that a DAPE of a foreign entity in India cannot be inferred merely from the Indian group entity's involvement in liaison or support activities; the Revenue must establish, through cogent evidence, that the Indian entity habitually exercised authority to negotiate and conclude contracts for or on behalf of the foreign entity.

The decision also underscores the importance of documenting the contracting process, approval matrix and allocation of decision-making authority between the Indian entity and the foreign entity.

[7] *eBay International AG* v. *ADIT* [2013] 140 ITD 20 (Mumbai Tribunal)

[8] *DIT* v. *Morgan Stanley & Co.* [2007] 292 ITR 416 (SC)

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