

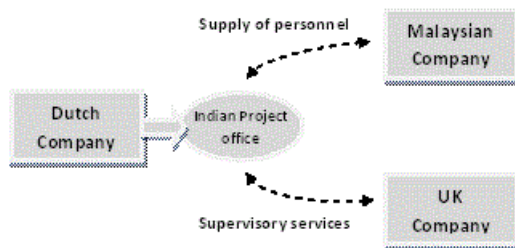
Tax Hotline

January 15, 2009

DEPUTATION OF SUPERVISORY PERSONNEL NOT TO CREATE PE IN INDIA

Contrary to what one may summarily infer from the Supreme Court's decision in *Morgan Stanley*¹, deputation of employees may not always give rise to a permanent establishment ("PE") in India. This has been upheld in the recent decision of the Income Tax Appellate Tribunal² which clearly brings out the dichotomy between agreements for the supply of personnel and those for the supply of services.

The assessee (taxpayer), a Dutch company was awarded a contract to construct a refinery in India on a turnkey basis. The assessee set up a project office in India for the purposes of execution of the project. It contracted with its Malaysian subsidiary to provide technical personnel who would provide services in connection with the Indian project. The Malaysian company was engaged in the business of hiring and supplying personnel with the required expertise. The personnel, though employed by the Malaysian company, were under the direct control and supervision of the assessee.



The tax authorities disallowed deduction of the payments made to the Malaysian company under Section 40(a)(i) of the Income Tax Act, 1961 on the grounds that the assessee had not withheld tax payable thereupon. It was contended that the Malaysian company, by virtue of rendering supervisory activities in India (through its employees) for a period exceeding six months, had a PE exposure in India. It may be noted that while the India-Malaysia tax treaty does not have a service PE clause, a PE may be constituted under Article 5(4) of the treaty through the rendering of supervisory services in connection with construction activity in India.

Presuming that the said payments were in the nature of business profits and not fees for technical services under the India-Malaysia tax treaty, the Tribunal accepted the contention that the Malaysian company was only required to supply personnel and not to provide any service in India. The mere deputation of personnel to the assessee would not imply that the Malaysian company carried on any business activity in India. The role of the Malaysian company ended with the supply of personnel who subsequently functioned under the direction, supervision and control of the assessee.

The Tribunal also relied upon an earlier advance ruling³ dealing with similar facts where it was held that the mere recruitment and supply of labor from abroad would not give rise to a PE in India.

Since the Malaysian company did not carry out any business in India, the Tribunal held that there was no PE exposure and the payments received by it for the supply of personnel would not be taxable in India.

The Tribunal also reversed other disallowances made by the tax authorities in respect of salary payments to engineers functioning from the head office, and fees paid to another Dutch company for certain technical services. With respect to payments made to a UK company for providing supervisory services in relation to the construction of the refinery, the Tribunal made an interesting observation that such services cannot be construed as being rendered in connection with the production of mineral oil which would have otherwise given rise to PE exposure under the India-UK tax treaty.

ANALYSIS

The Tribunal has appreciated the fact that all cases of deputation may not create a PE in India. This basic principle of PE jurisprudence had become slightly blurred after the *Morgan Stanley* decision which held that the secondment of employees by a non-resident would give rise to a service PE in India. This judgment brings out an important distinction between the service of providing employees and rendering services through employees which is a fundamental consideration while determining both the characterization of income (whether fees for technical services or business income) as well as the degree of PE exposure.

Research Papers

Taxing Offshore Indirect Transfers in India

February 28, 2025

Unlocking Corporate Philanthropy

February 27, 2025

Digital Health in India

February 26, 2025

Research Articles

Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

Key changes to Model Concession Agreements in the Road Sector

January 03, 2025

Audio

CCI's Deal Value Test

February 22, 2025

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice

December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Arbitration Amendment Bill 2024: A Few Suggestions | Legally Speaking With Tarun Nangia | NewsX

February 12, 2025

- Mahesh Kumar & Parul Jain

You can direct your queries or comments to the authors

¹ DIT v. Morgan Stanley, 292 ITR 416 (SC)
² DCIT v. M/s Stock Engineer & Contractors BV, 2009-TIOL-30-ITAT-MUM
³ Tekniskil (Sendirian) Berhard v. CIT, 222 ITR 551

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.