

INDIA INCOME TAX UPDATE

**Landmark Judgement on
Permanent Establishment**



High Court of Delhi (Top State Court)

- Landmark Ruling on Permanent Establishment

- Progress Rail Locomotive Inc.('Petitioner') had filed 7 writ petitions [W.P.(C) No 12405/2019 to 12411/2019] before the Hon'ble Delhi High Court ('Delhi HC') against re-assessment proceedings which was initiated on the basis that the production unit of the wholly owned subsidiary of the Petitioner constitutes a Fixed Place Permanent Establishment ('PE'), in the alternative a Service PE as well as a Dependent Agent Permanent Establishment (DAPE).
- The Delhi HC deeply examined the applicable provisions of the DTAA, inter alia, with respect Fixed Place PE, Service PE and DAPE.

- Regarding Fixed Place PE, the Delhi HC inter alia, relied upon the judgments in the case of Formula One World Championship vs. Commissioner of Income Tax (2017) 15 SCC 602, Director of Income Tax (International Taxation) vs. Morgan Stanley & Co. Inc. (2007) 7 SCC 1 and Director of Income Tax-II (International Taxation) vs. Samsung Heavy Industries Company Limited (2020) 7 SCC 347 passed by the Apex Court of India, while examining the meaning of the terms 'disposal' & 'control' used in the DTAA and concluded that no part of the premises of the subsidiary has been placed under the exclusive or significant 'control' or 'disposal' of the Petitioner.
- The Delhi HC observed that to determine whether a Fixed Place PE has been established, it is essential to conclude that the core business of the foreign entity is being conducted through the PE. The Delhi HC held that this was not the case where the

subsidiary stood created solely for the purposes of undertaking activities and discharging functions concerned solely with the core business activity of the petitioner.

- Regarding the collaboration between the holding and subsidiary companies, the Delhi HC observes that although this collaborative activity may enhance the productivity of the Petitioner's group, it does not constitute a significant portion of the petitioner's core business activities.
- Explaining the holding-subsidiary company relationship, the Delhi HC holds that the mere fact that the parent company places representatives on the Board of its wholly owned subsidiary, would hardly compel one to hold that a PE had come into existence.
- As regard to the DAPE, the Delhi HC observes that there is not an "iota of evidence" to show that the Indian subsidiary stood conferred with the authority to

conclude contracts and habitually engaged in acting in discharge of that authority,

- With respect to Service PE, the Delhi HC notes that it is clear the India Income Tax Department's conclusion relies solely on the visit of the petitioner's employees and their travel itineraries being discovered, which, according to the Delhi HC, is insufficient to support a finding regarding the existence of a Service PE.
- The Delhi HC also noted, that once the Transfer Pricing Officer (TPO) had resolved the issue of arm's length remuneration, determining the existence of a PE becomes largely academic, as no additional attribution would be necessary.
- In conclusion, the Delhi HC, upon finding that the India Income Tax Department's opinion on the issue of PE is 'perverse' and 'untenable,' quashes the reassessment proceedings against the petitioner.

For complete details, please refer the Hon'ble Delhi HC's ruling in the case of Progress Rail Locomotive Inc [W.P.(C) No 12405/2019 to 12411/2019]: -

https://dhccaseinfo.nic.in/jsearch/judgement.php?path=dhc/YVA/judgement/28-05-2024/&name=YVA28052024CW124052019_194205.pdf

DISCLAIMER:

The summary information herein is based on Hon'ble Delhi HC's ruling in the case of Progress Rail Locomotive Inc [W.P.(C) No 12405/2019 to 12411/2019] dated 28.05.2024. While the information is believed to be accurate, we make no representations or warranties, express or implied, as to the accuracy or completeness of it. Readers should conduct and rely upon their own examination and analysis and are advised to seek their own professional advice. This note is not an offer, advice or solicitation. We accept no responsibility for any errors it may contain, whether caused by negligence or otherwise or for any loss, howsoever caused or sustained, by the person who relies upon it.