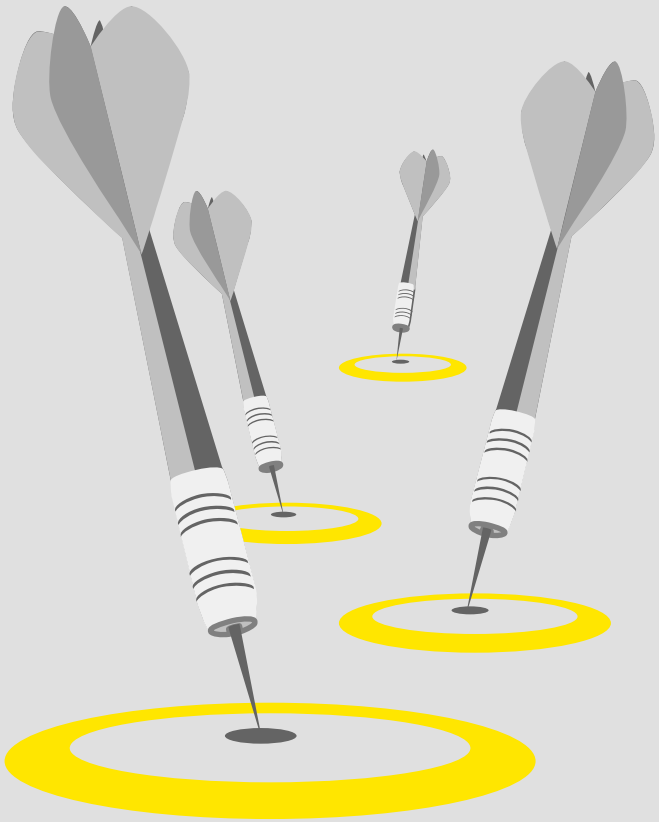
Recent International tax decisions

CA Sagar Wagh

Agenda

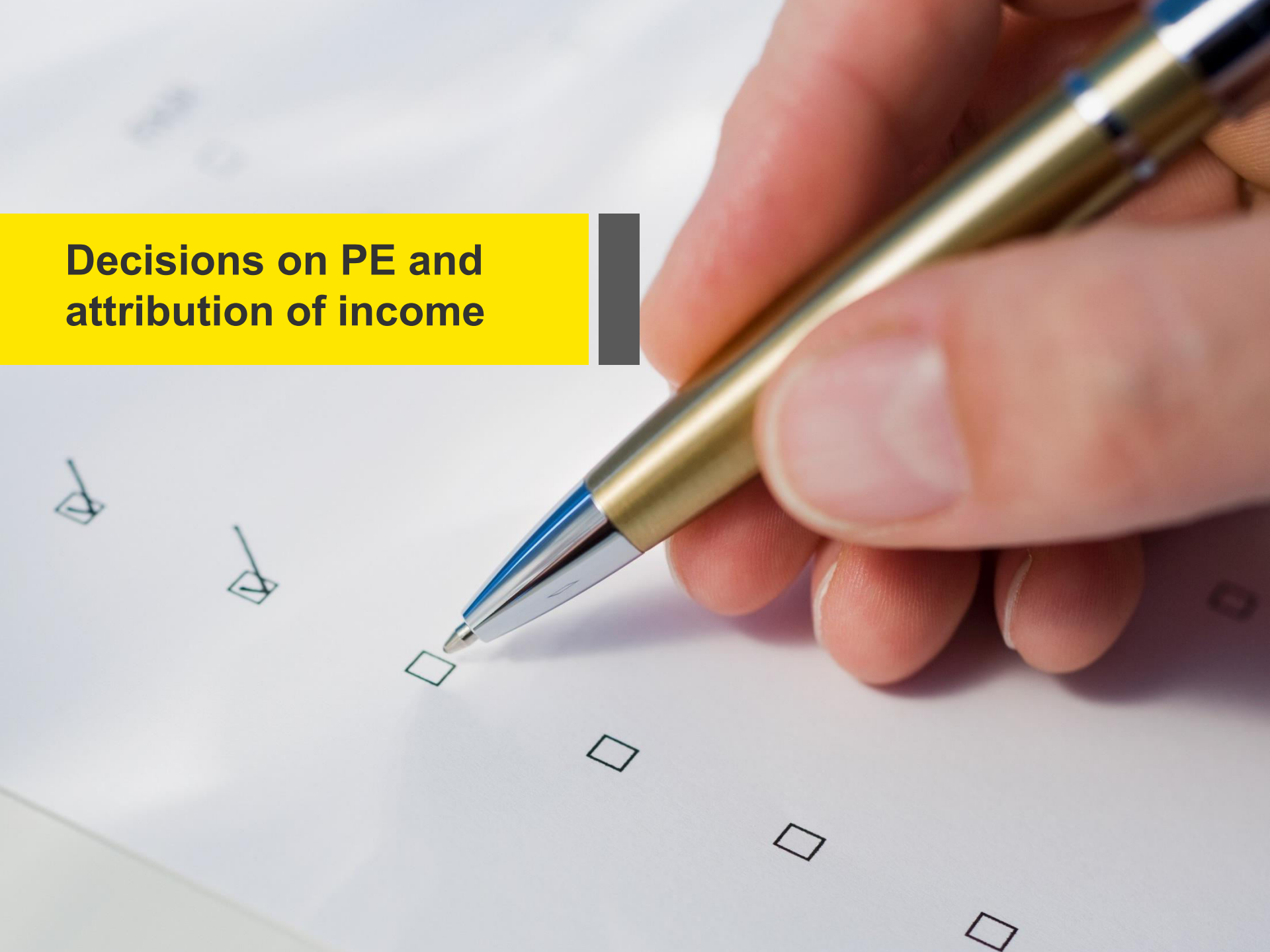
- Decisions on PE and attribution of income
- Decision on Offshore supply
- Decisions on Royalty Fee
- AAR rulings on treaty benefits



Abbreviations

- AAR – Authority for Advance Ruling
- APA – Advance Pricing Agreement
- AO – Assessing Officer
- CBDT – Central Board of Direct Taxes
- CIT(A) – Commissioner of Income Tax (Appeals)
- CCIT – Chief Commissioner of Income Tax
- DRP – Dispute Resolution Panel
- FA – Finance Act
- FM – Finance Minister
- HC – High Court
- ITAT – Income Tax Appellate Tribunal
- OGE – Order granting effect
- PCIT – Principal Commissioner of Income Tax
- PM – Prime Minister
- ROI – Return of Income
- SC – Supreme Court
- TP – Transfer Pricing
- u/s – Under Section

Decisions on PE and attribution of income



GE Parts Inc

(ITA No.671/Del/2011) (Delhi ITAT)

LO of the overseas group entity constitutes Fixed Place PE and Indian subsidiary constitutes Agency PE

Facts of the Case:

- The taxpayer was US incorporated company engaged in supply of equipment to customers in oil & gas business, energy business, transportation business and aviation business
- In relation to sales activities of taxpayers, expatriates were appointed as business heads of India operations with support staff provided by GE India and various third parties. Expatriates were on payroll of GE International Inc (GEII) but working for various businesses of GE group
- One of the group entity of the taxpayer had LO in India to undertake liaison services not including commercial activities
- In the income tax survey at LO premises, it was revealed that in addition to liaison activities, the taxpayer also performed commercial and trading activities
- Tax authorities observed that marketing and sales activities took place in India. Expatriates from GEII along with employees of GE India were always involved and participated in the negotiation of prices which took place in India
- Tax authorities observed that, taxpayer had both fixed place PE and dependent agent PE in India
- The tax authorities deemed 10% of the supplies made to clients in India as profits arising from such supplies and 35% of such profit was attributable to PE in India

GE Parts Inc

(ITA No.671/Del/2011) (Delhi ITAT)

LO of the overseas group entity constitutes Fixed Place PE and Indian subsidiary constitutes Agency PE

ITAT Ruling:

Fixed Place PE:

- The ITAT held that the Applicant had a fixed permanent establishment (PE) in India based on the following findings:
  - GE India comprising expatriates from GEII were permanently using the LO premises of the group entity
  - The said premises was also occupied by the employees of other group company of the taxpayer who was working under the direct control and supervision of the expatriates.
  - Job descriptions and appraisal reports with the manager assessment indicate that the expatriates were India Country heads or working at the top positions, managing the business, securing orders and doing everything possible that could be done here qua the Indian operations of GE overseas entities in India.
  - GE India was in full command of the sales activities in India and was conducting business of GE Overseas in India and was directly and wholly involved in negotiating and finalising the contracts
  - GE India was playing an important and proactive role in the finalisation of the deal and the terms and conditions with customers in India. The major activities about the sourcing of customers and finalising the deals with them were done by GE India in consultation, wherever required, with GE Overseas
  - The activities carried on by GE India from the LO premises were of substantial and core and not merely preparatory or auxiliary

Agency PE:

- Expatriates were rendering services to multiple GE entities in India
- GE India comprising expatriates and other employees of other group company, etc., were not working for a particular enterprise, but for multiple enterprises dealing in one of the three major businesses of GE group
- GE India cannot be said to be an independent agent
- Therefore, GE India constituted agency PE of all the GE Overseas entities in India

Attribution of income:

- The Tribunal estimated 26 per cent of total profit in India as attributable to the operations carried out by the PE in India. Therefore, as against the tax authorities applying 3.5 per cent to the amount of sales made by the taxpayer in India, it has been directed to apply 2.6 percent on the total sales for working out the profits attributable to the PE in India

Production Resource Group

(AAR No. 1330 of 2012) (Dated 8 November 2018) (Authority for Advance Ruling)

Belgian company's lighting contract for Commonwealth Games meets fixed place PE's 'disposal' test

Facts of the Case:

- The Applicant provided lighting and searchlight services during the opening and closing ceremonies of the Commonwealth Games in India in 2010, on a turnkey basis. The technical scope of work included installation, maintenance, dismantling and removal of the equipment.
- While the arrangement was entered into for a period of around 114 days, the Applicant's employees and equipment were present in India for a period of 66 days for preparatory, installation and dismantling of the equipment. For the above services, the Applicant was provided an office space and on-site space to store the equipment at the stadium where the Games were conducted.

AAR Ruling:

Fixed Place PE:

- The AAR held that the Applicant had a fixed permanent establishment (PE) in India based on the following findings:
  - The provision of a lockable space for storing its tools and equipment inside the stadium implies that the Applicant had access to and control over this space to the exclusion of other service providers engaged by the Organising Committee (OCCG), including the OCCG itself.
  - Provision of an empty workspace to the Applicant implies that such workspace was placed at the disposal and under access and control of the Applicant.
  - Subcontracting of some activities by the Applicant is indicative of the fact that the Applicant had an address, an office from which it could call for and award subcontracts.

Production Resource Group

(AAR No. 1330 of 2012) (Dated 8 November 2018) (Authority for Advance Ruling)

- The Applicant entered into various contracts for the purpose of its business in a contracting state, and was employing technical and other manpower for use at its site. The site was, thus, an extension of the foreign entity on Indian soil, as referred to in the case of Vishakhapatnam Port Trust (144 ITR 146).
- Undertaking comprehensive insurance of its equipment is also indicative of having a fixed place of business. No insurance company would insure any equipment, structures etc., against any risk of fire, damage or theft, unless the place was safe and in the exclusive custody and at the disposal of the customer, and in a well-defined address or physical care. Goods are not ordinarily insured when lying at a third person's premises.
- It was mandatory for the Applicant to acquire all authorizations, permits and licenses. This indicates that the Applicant had a definite place at its disposal, as it could, otherwise, not be made liable for any default in the absence of the same.

- Further placing reliance on Supreme Court decision in case of Formula One (394 ITR 80), the AAR held that the fixed place need not be enduring or permanent, in the sense that it should be in its control forever. The context in which a business is undertaken is relevant.

Royalty:

- The AAR held that In the present case, there was no right to use any IP which was assigned to the OCCG. Hence, the payment did not amount to royalty.

Fees for Technical Services:

- The AAR held that although in facts the services rendered are technical, but by applying the most favoured nation (MFN) clause of the DTAA, read with the India-Portugal DTAA, income did not qualify as fees for technical services (FTS), since the make available condition was not met.

Honda Motors Co. Ltd…

CA 2833 of 2018 dated 14 March 2018 (SC)

Re-assessment initiation based on PE allegation not sustainable once arm's-length threshold met

Facts of case

- The Assessee had a wholly owned subsidiary company in India and entered into several transactions with its subsidiary relating to sale of raw materials, finished goods and received royalty income and fees for technical services, etc. of which the tax due was duly deducted and deposited.
- On survey u/s 133A at the premises of the Indian subsidiary, the AO was of belief that the Assessee had a PE in India and, consequently, the profits were required to be attributed to the PE in India in terms of the functions performed, risks assumed and assets deployed. As, the Assessee had not filed its return declaring income taxable in India, the AO initiated reassessment proceedings under sections 147 and 148 of the Act. Aggrieved, the assesse filed a Writ before the HC.

Ruling of HC

- The HC observed that it was settled principle of law that "reason to believe" could never be an outcome of a change of opinion. Consequently, before taking any action, the AO was required to substantiate his satisfaction in the reasons recorded by him.
- The AO had reasoned that the assessee's income from the above transaction was taxable in India as per section 9(1)(i) and found that the employees of the assesse were using the office of the subsidiary company as a front for conducting their own business and, consequently, found that the office of the Indian company was functioning as a PE and was a fixed place of business available to the assessee as per article 7 of the DTAA between India and Korea.

Honda Motors Co. Ltd

CA 2833 of 2018 dated 14 March 2018 (SC)

- The order of the TPO was in relation with the subsidiary and not in relation with the PE. Once transfer pricing analysis was done, the computation of income arising from international transaction had to be done keeping in mind the principle of arm's length price and there was no further need to attribute profits to a PE.
- At the stage of examining the validity of the notice issued under section 148, the issue was limited only as to whether there existed any reasons for the AO believe that income had escaped assessment. Thereby the HC concluded that there was no infirmity in the issuance of the notice under section 148 and the writ petitions were dismissed. Aggrieved, Assessee filed an appeal before SC

Ruling of SC

- SC referred to Apex Court's decision in **E-Funds IT** Solutions wherein it was held that once arm's length principle had been satisfied, there could be no further profit attributable to a person even if it had a PE in India. SC thus remarked that, since the impugned notice for the reassessment was based only on the allegation that the Assessee had PE in India, the notice could not be sustained once arm's length price procedure had been followed and thus, SC allowed assessees' appeal.

Decision on Offshore supply

Michelin Tamil Nadu Tyres Pvt Ltd

(AAR No. 1218 of 2011)(Dated 19 December 2017) (AAR)

Offshore equipment supplies are not taxable in India as no income accrues in India.

Facts of the case:

- The applicant (Michelin India) a Chennai based resident company with a view to set up a plant for production/manufacture of bus and truck tyres entered into an Umbrella Agreement with its closely associated French group company MFPM, for design, engineering, manufacturing, inspection and packing, forwarding and dispatch from outside India of machinery and equipment for setting up its new manufacturing facility in India.
- Under the aforesaid agreement, MFPM would supply the equipment and it was an equipment purchase contract for pure supply of machinery and equipment.
- Subsequently it also entered into a services agreement, for providing supervisory services during installation, with Michelin France, after the supply of machinery and equipment was completed and after installation work had commenced. These installation services were rendered by different third party suppliers.
- The applicant sought ruling for taxability and withholding obligations on the payments made by Michelin India for supply of machines and equipments.

AAR Ruling:

Taxability of Off-shore supply:

- The AAR observed that the title in the property was transferred outside India, the delivery of equipment also took place outside India, the consideration was also paid to MFPM in euros to a bank outside India.

Michelin Tamil Nadu Tyres Pvt Ltd

(AAR No. 1218 of 2011)(Dated 19 December 2017) (AAR)

- The AAR held that the fact that TPO has accepted the payment of such import of equipments was at arm's length is clear indicative that the price paid only for the equipment, and cost and services related to such manufacture, prior to shipment, and is not for installation or any services post shipment or other than those covered by the Umbrella Agreement
- Further the AAR observed that in the service agreement, there is no mention of installation services being provided by MFOM personnel, and in the absence of any evidence being brought on record, it cannot be assumed that the personnel sent by MFPM under this agreement were involved in installation work.
- Applicant had entered in to agreement with third parties and a Spain entity for the installation work. No evidence or material on record was brought on record to imply that the personnel of MFPN were involved in installation of machines. Hence it was held that the installation was done by third parties, local technicians and expats employed by the Applicant on long term basis.
- The AAR held that activities of purchase and the services of supervision were carried out as per the two clearly demarcated agreements with different period of execution. The MFPM had not dealt with the applicant on a turnkey basis for supply, installation, commissioning and supervision. Thus it was held that neither the project can be called as turnkey not can the two separate contracts be read together as composite contract.
- Following the decision in case of Ishikawajima Harima (288 ITR 408) it was held that income arising in the hand of MFPM cannot be brought to tax in India.

Decisions on royalty

ABB FZ-LLC

(ITA(TP) No.1103/Bang/2013) (Bangalore ITAT)

A foreign company constitutes a service PE in India under the India-UAE tax treaty. Services provided in the form of sharing or permitting to use the special knowledge or expertise falls within the term 'royalty' under the tax treaty

Facts of the Case:

- The taxpayer is UAE-based entity engaged in the business of providing regional service activities for the benefit of ABB legal entities in India, Middle East, and Africa. In pursuance of the regional headquarter service agreement between the taxpayer and ABB Limited, the taxpayer has rendered services to ABB Limited during Financial Year (FY) 2009-10 and 2010-11
- The taxpayer claimed that the above amounts are not taxable in India under the tax treaty, as the tax treaty does not have a clause for Fees for Technical Services (FTS)
- As per taxpayer, the taxability would therefore fall under Article 22 'Other Income' of the tax treaty which would be taxable in India only if the entity has a PE in India and in the instant case since there is no PE in India, the sum is not liable to be taxed in India
- The Assessing Officer (AO) held that the services rendered by the taxpayer would be treated as FTS both under the Income-tax Act, 1961 (the Act) and under the tax treaty
- In an alternative argument, the AO held that most of the services rendered by the taxpayer were covered under the definition of 'royalty'
- The Dispute Resolution Panel (DRP) confirmed the order of the AO

ABB FZ-LLC

(ITA(TP) No.1103/Bang/2013) (Bangalore ITAT)

ITAT Ruling:

Eligibility of tax treaty benefit

- It is difficult to give the benefit of the tax treaty to the taxpayer.in absence of Tax Residency Certificate (TRC)
- It is for the taxpayer to furnish the certificate of residence of UAE and the onus is on the taxpayer to prove that the taxpayer is managed and controlled wholly in UAE

Taxability under Article 22

- For the purposes of falling in other income under Article 22 of the tax treaty, it is necessary that the income should not be expressly dealt in Articles 6 to 21 of the tax treaty

Permanent Establishment

- Furnishing of services including consultancy services by the taxpayer to ABB Ltd for the project in India or with the connected project was for a period of three months after commencing its activities in January 2010. Thus, it fulfils the prerequisite of Service PE, as Service PE do not require fixed place PE as well
- In the present age of technology where the services, information, consultancy, management, etc., can be provided with various virtual modes like email, internet, video conference, remote monitoring, remote access to desk-top, etc., through various software, the argument of fixed place of business raised by the taxpayer that three employees were rendered services only for 25 days cannot be sustained, as the services can be rendered without the physical presence of employees of the taxpayer
- Taxpayer has rendered the services on various occasions from January to March 2010
- Article 5(2)(i) of the tax treaty provides that the Service PE is not dependent upon the fixed place of business as it is only dependent upon the continuation of the activity the same project or connected project for a period/periods aggregating to more than 9 months within 12 months period
- Accordingly, it has been held that the taxpayer has a Service PE in India

ABB FZ-LLC

(ITA(TP) No.1103/Bang/2013) (Bangalore ITAT)

ITAT Ruling:

Taxability of royalty

- The activities rendered by the taxpayer were in the form of sharing or permitting to use the special knowledge, expertise, and experience of the taxpayer, and was shared by it with ABB Ltd. squarely falls within the realm of 'royalty', as defined in Article 12(3) of the tax treaty
- The visits of the officials of the taxpayer were only for the purposes of providing access for using the information pertaining to industrial/commercial/scientific experience belonging to the taxpayer and to help ABB Ltd to commercially exploit it
- The dominant character of agreement between the taxpayer and Indian company was for sharing a secret, confidential and IPRs information made available during the years
- The information provided by the taxpayer to ABB Ltd was in the nature of a know-how contract, given by the taxpayer so that such know-how can be used by ABB Ltd for its commercial and industrial purposes and further this special knowledge and experience would remain unrevealed to the public
- The information provided by the taxpayer to ABB Ltd with the right to use and exploit commercially were concerning industrial, 'commercial or scientific experience' activities and would fall under the royalty provision of the tax treaty
- As we had held that the activities under consideration of the taxpayer falls under Article 12 Royalty of the tax treaty and not under residual clause, therefore the taxpayer is liable to be taxed in India in accordance with Article 12 of the tax treaty, Section 5 read with Section 9 of the Act.

Google India Private Limited

(IT(TP)A.1511 to 1518/Bang/2013) (Bangalore ITAT)

Payment for granting distribution right of 'Adwords program' is taxable as 'royalty' under the Income-tax Act as well as India-Ireland tax treaty

Facts of the case:

- The taxpayer is a wholly owned subsidiary of Google International LLC, U.S.
- Google is specialised in internet search engines and related advertising services. It maintains an index of websites and other online content which is made available through its search engine to anyone with an Internet connection.
- The taxpayer:
  - was appointed as a non-exclusive authorized distributor of Adword programs to the advertisers in India by Google Ireland.
  - entered into a Google Adword Program Distribution agreement (the agreement) on 12 December 2005 with Google Ireland Limited (GIL) for resale of online advertising space under the advertisers program to advertisers in India.
  - was granted the marketing and distribution rights of Adword program to the advertisers in India under the agreement which also included assistance/ training to Indian advertisers if needed in order to familiarise that with the features/ tools available as part of our Adword product.
- The taxpayer claimed that no rights in the intellectual property of Google were transferred to the taxpayer from GIL and that it was mere reseller of advertising space made available under the Adword distribution program.
- The taxpayer does not have any access or control over the infrastructure or the process that are involved in running the Adword program, as program runs on software, Algorithm, data centre which are owned by Google and its subsidiaries outside India
- The Adword platform is running on servers located outside India that belonged to or hired by Google. The taxpayer in India has no control over the server of Google.
- As the taxpayer had not complied with the provisions of Section 195, the Assessing Officer (AO) initiated proceedings under Section 201 of the Act treating the taxpayer as 'assesse in default'

Google India Private Limited

(IT(TP)A.1511 to 1518/Bang/2013) (Bangalore ITAT)

ITAT ruling:

Advertisement/selling of the space or marketing for the product/services of the advertiser with the help of technology

- The agreement between the taxpayer and the GIL was not in the nature of providing the space for advertisement and display the advertisement to the consumers but an agreement for facilitating the above to the targeted customer
- The advertiser, selects some relatable key words and on the basis of which, the advertisement is displayed on the website. The module does not merely work by providing the space in Google search engine, but it works only with the help of various patented tools and software.
- With the help of the search tool/ software/ data base, Google is able to identify the targeted consumer/ person as per the requirement of the advertiser
- The taxpayer is having the access to various data with respect to the age, gender, region, language, taste habits, food habits, cloth preference, the behaviour on the website, etc. and it uses this information for the purposes of selecting the ad campaign and for maximising the impression and conversion of the customers to the ads of the advertisers. Thus, the activities of the taxpayer are not merely restricting to display of advertisement but is extended to various other facets as mentioned.
- By using the patented algorithm, the taxpayer decides which advertisement is to be shown to which consumer visiting millions of website/ search engine. Therefore, it is not the advertisement or selling of the space rather it is focused targeted marketing for the product/services of the advertiser by the taxpayer/ Google with the help of technology for reaching the targeted persons based on the various parameters information etc.
- Internet Protocol (IP) of Google vests in the search engine technology, associated software and other features, and hence use of these tools for performing various activities, including accepting advertisements, providing before or after sale services, clearly fall within the ambit of royalty.
- There is no sale of space, rather it is a continuous targeted advertisement campaign to the targeted and focused consumer in a particular language to a particular region with the help of digital data and other information with respect to the person browsing the search engine or visiting the website
- Thus, the activities would fall within the ambit of ‘royalty’ under the Act and under tax treaty

Google India Private Limited

(IT(TP)A.1511 to 1518/Bang/2013) (Bangalore ITAT)

ITAT ruling:

Patent and trademark

- The taxpayer contended that there is no transfer of the trademark or copy right of Google to the taxpayer and therefore it will not fall within the purview of the royalty. There is no specific transfer of any patent trademark
- The taxpayer was permitted to use trade name, trademarks, service marks, domains or other distinctive brand features of Google solely for the use under the distribution agreement
- The activities of the taxpayer, for the purpose marketing and distribution of Adword programme, then, it is not possible for the taxpayer to undertake these activities, without the use of Google trademark and other brand features. Further, for marketing and distribution of Google Adword programme, the use of Google trademark is essential and pivotal for doing the business of the advertisement on the search engine and the websites
- In the absence of Google trademark, it is difficult to comprehend that the taxpayer would attract lot of advertisers for its advertisement space on search engine and web site. The taxpayer was getting lot of engagement and clientage only on account of Google trademark. It may not be possible to have this kind of business inflow of advertisements without using the trade mark of Google
- Therefore, the payments made by the taxpayer under the agreement was not only for marketing and promoting the Adword programmes but was also for the use of Google brand features. The said Google brand features were used by the taxpayer as marketing tool for promoting and advertising the advertisement space, which is main activity of the taxpayer and is not incidental activities

Secret process

- The Tribunal held that though Adwords programme along with associated videos are available in public domain but how this programme functions, for targeted marketing campaign, promoting advertisements are only possible with the use of secret formula, confidential customer data only. This secret process of targeting the customers, is not in public domain therefore it is concluded that the taxpayer was using the secret process for marketing promoting displaying of the advertisement

Decisions on Treaty benefits

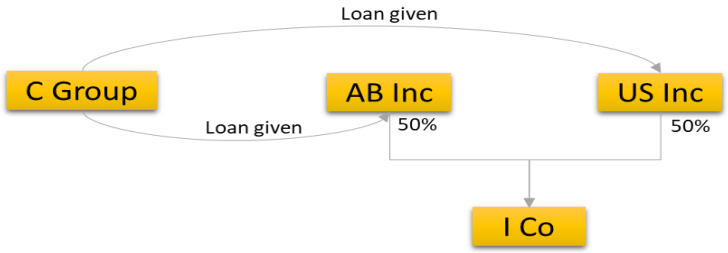
AB Mauritius

(AAR No. 1128 of 2011)

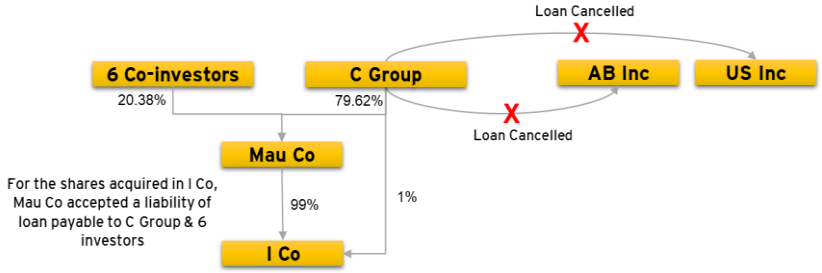
Facts

- AB Mauritius (Mau Co) is a company incorporated in Mauritius in 2003 with an objective of investing in AB India (I Co) and 'S' sector in other Asian markets
  - Mau co obtained approvals of from FSC in Mauritius and FIPB in India prior to investment in I Co
- Mau Co acquired shares I Co from sellers in US. The consideration was discharged by taking over a loan, which sellers owed to C Group in December 2003
- Mau Co ratified the acquisition along with the loan payable by resolution passed in Dec 2004 in its books for the year ended 2004. SPA in 2003 was signed by the chairman and managing partner of C Group, who was authorized by the Board to enter into SPA (but no specific resolution was passed). This has been subsequently ratified
- I Co recorded Mau Co as shareholder immediately and same is reflected in the financial statements for the year ended 2004. Entries were recorded in the books of Mau Co for the year ended June 2004
- The loan availed/taken over was repaid by Mau Co over a period of time. Mau Co exercised its shareholders rights throughout the period of its holding shares in the form of subscribing to rights issue in 2005 and 2007, buyback in 2009, receipt of dividend on a year by year basis, etc
- Mau Co held a valid TRC throughout 2003 – 2012
- BOD of Mau Co was independent and met in Mauritius to take its business decisions

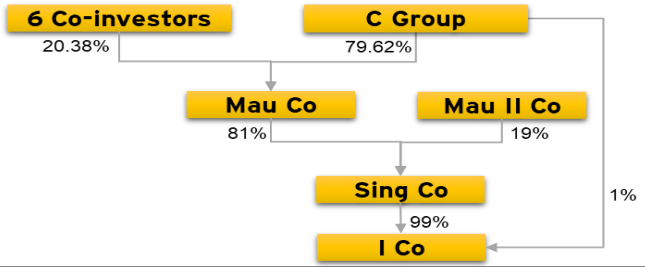
Prior to acquisition



Post acquisition in 2003



Post acquisition by Sing Co in 2012



AB Mauritius
(AAR No. 1128 of 2011)

AAR Ruling

The AAR was of a view that

- BOD minutes, FIPB and Mauritius approvals, signing of SPA by Mr A, show the intent of the C Group and not any decision taken by Mau Co, making it a mere spectator
  - No decisions/discussions in the BOD to show Mr A was authorized
  - BOD of Mau Co was neither controlling nor managing the crucial investment decisions for the purpose of which it was set up
  - Mau Co was superimposed in the SPA as part of some arrangement of which Mau Co was not aware.
- Mau Co is only a benami or a name lender for the C Group
- The acquisition was a colorable device and an impermissible tax avoidance arrangement for deriving treaty benefit
- Share acquisition with funding from parent is allowed, however Mau Co was interposed and the parent owned the shares by virtue of SPA and loan cancellation
- Section 93 is not applicable to the facts of the case as the first mentioned person is a non-resident
  - Treaty provisions shall prevail as supreme unless provisions like GAAR are inserted

Specific factual points not considered by the AAR in 1128

- Ignoring the first BOD resolution which shows discussions on regulatory approvals granted, approving business plans, including investment in I Co
- FSC and FIPB application signed by the director and FIPB approval granted to Mauritius Company not considered
- Ratification of the investment decision in the BOD resolution after a year considered recording the transaction in the accounts of Mau Co and I Co not given due weightage
- Letter of authorisation appointing Mr A as representative for signing SPA submitted in 2016 not considered
- Role of C Group in the important decisions of Mau Co, especially during its incorporation stage construed as Mau Co being a puppet of C Group
- Failed to consider that SPA and Loan agreement are separate, and fact that it is acted upon and loan has been repaid by Mau Co
- Dividends have been received and beneficially used by Mau Co
- Mau Co has been legal & beneficial owner of shares, has been accepted by Government authorities in Mauritius and India
- Transaction of acquisition of shares cannot be challenged at the time of divestment after 10 years

AB Mauritius
(AAR No. 1128 of 2011)

Conclusion

- Basis the above, the AAR ruled that
  - Since parent (C Group) acquired the shares of I Co from sellers, the gain arising in the hands of C Group, on sale to Sing Co benefit of India-Mauritius DTAA will not be available
  - Withholding tax provisions (section 195) would be applicable
  - Transfer pricing provisions would apply to the transaction
  - MAT provisions (section 115JB) are not applicable

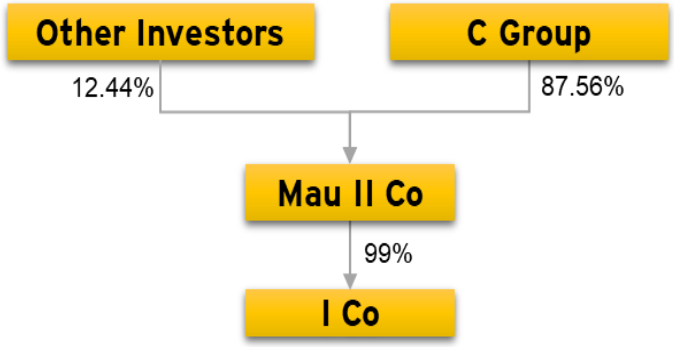
AB Holdings Mauritius II

(AAR No. 1129 of 2011)

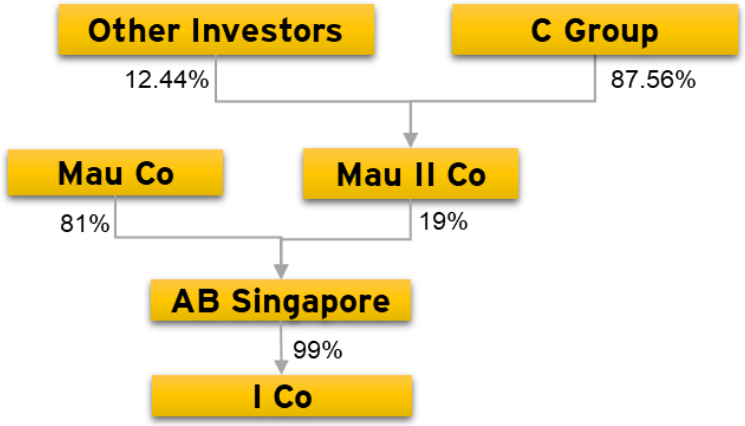
Facts

- AB Mauritius II (Mau Co II), incorporated in 2008 as a part of C Group, invested in AB International, an Indian Company (I Co)
- Sole purpose of incorporation was to invest in 'S' sector in India and other Asian markets
- Mau Co II's business is managed by 3 directors out of which 2 were residents of Mauritius at the time of making such investments
- SPA was executed by the director of Mau Co II and the considerations were linked through banking channels
- In August 2011, AB Singapore was incorporated as a group company of Mau Co II
- In 2012, Mau Co II has divested its investment in I Co to AB Singapore

Post Acquisition in 2008



Post Acquisition in 2012



AB Holdings Mauritius II

(AAR No. 1129 of 2011)

AAR Ruling

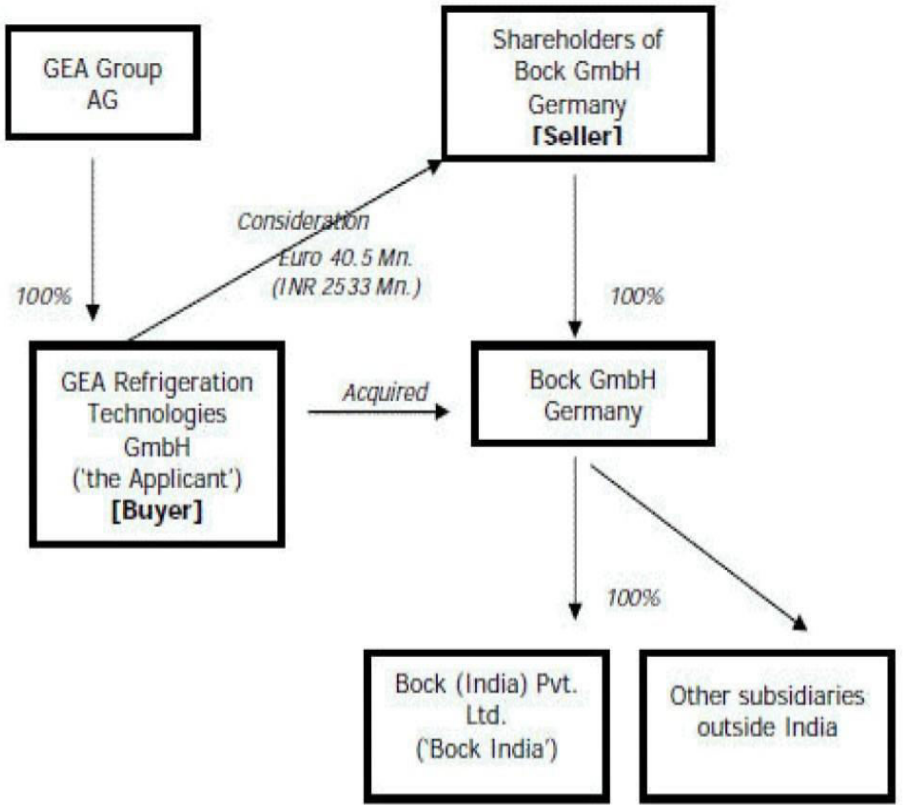
- The AAR held that Mau Co II was a beneficial holder of I Co shares and the investment decisions and its affairs were not controlled by C group based on the following factors
  - Transfer was done as a part of re-organisation indicating long term business and commercial purpose
  - Investment in I Co is not an overnight or short-term transaction (as it was for seven years)
  - Having regard to the nature of business, not many employees are required for their operations
  - Directors were well qualified to engage in meaningful discussions with reference to the Mau Co II's business
  - Signature of directors on documents pertaining to additional investment and restructuring, etc. indicates key decisions were taken by them
  - References of AAR's rulings in case of Vodafone, Ardex, E-trade and JSH Mauritius to rule that Mau Co II is an independent legal entity and the money received from holding company was immaterial
- Basis the above, AAR concluded that Mau Co II will be eligible to claim treaty benefits and capital gains would be exempt under Article 13 of the India-Mauritius DTAA

GEA Refrigeration Technologies GmbH

(AAR No. 1232 of 2012) dated 28 November 2017 (Authority for Advance Ruling)

Indirect transfer taxation u/s 9 not triggered on offshore share deal; Confirms treaty benefit Facts

- The applicant was a resident of Germany. To expand business, the applicant entered into a share purchase agreement with an unrelated German company Bock GmBH.
- Bock GmBH is a family owned company with shareholders being residents of Germany. Bock GmBH holds 100% shares in Bock India.
- As per the share purchase agreement, Bock GmBH would transfer 100% equity of the Bock India to the applicant at market value.
- The question before AAR was firstly whether, the indirect transfer of shares in India would be taxable in India and secondly whether withholding of tax would be required u/s. 195 of the Act or not.



GEA Refrigeration Technologies GmbH

(AAR No. 1232 of 2012) dated 28 November 2017 (Authority for Advance Ruling)

AAR Ruling - Question 1:

- The AAR observed that income arising to the applicant on such indirect transfer of shares would be chargeable to tax in India u/s 9(1)(i) of the Act and India – Germany DTAA which ever was more beneficial to the applicant.
- The AAR noted that as per Explanation 5 to section 9(1)(i) of the Act, a capital asset being any share or interest in a company or entity incorporated outside India shall be deemed to be and always be deemed to have been situated in India, if share or interest derived directly or indirectly its value substantially from assets located in India. Further, as per Explanation 6 to Section 9(1)(i) of the Act, there are 2 requirements to be met cumulatively, to bring the said transaction under the tax ambit:
  - The value of such assets exceeds the amount of INR 10 crores; and
  - The value of such shares represents atleast 50% of the value of all assets owned by the company.
- The Applicant had submitted a report of valuation of Bock India and also a calculation of the purchase price for valuation of Bock GMBH as whole in terms of the Indirect-Transfer Rules. The valuations indicated that Bock India contributed in the range of 5.23% to 5.57% to the value of total assets of Bock GMBH. The Applicant also submitted that the values were without considering the liabilities of Bock GMBH and if the same were also considered, the ratio will go down further. This ratios were miniscule as against the requirement of atleast 50% as mentioned in Explanation 6 to section 9(1)(i).

GEA Refrigeration Technologies GmbH

(AAR No. 1232 of 2012) dated 28 November 2017 (Authority for Advance Ruling)

- Thus AAR concluded that Applicant's income could not be brought to tax in India under the provisions of section 9 of the Act as Bock GmBH derived its value from its other subsidiaries in Germany, China, England etc.

- The AAR noted that the issue regarding applicability of India-Germany DTAA was academic in nature as the transaction would not be taxable in India under the Act and applicant would be entitled to take advantage of provision more beneficial to it.

- However, with respect to applicability of article 4 of India – Germany DTAA, the AAR noted that the shareholders of Bock GmBH were residents of Germany, the transfer was affected in Germany and payment was also made in Germany and thus gains arising on alienation of shares would be taxable only in Germany.

- Further, if it could not be contended that some other rights were also transferred, in view of the decision of **Vodafone International Holdings BV (193 Taxman 100)** and therefore Article 13 would come into operation which stated that tax would be charged only in the country of the alienator, in this case was Germany.

Question 2:

- With regards to the the liability to deduct tax under section 195 of the Act, the AAR relying on the decision of SC in case of GE technology Centre P. Ltd. (327 ITR 456) held that liability to deduct tax arise only if the sum paid was chargeable to tax. Thus the applicant had no obligation to withhold tax as gain arising from shares was not taxable in India.

Martrade Gulf Logistics FZCO-UAE

(ITA Nos. 7 to 9/Rjt/2011) (Rajkot ITAT)

Taxpayer incorporated and liable to tax in the UAE is eligible for the India-UAE tax treaty benefit

Facts of the case:

- The AO observed that when a resident of the Contracting state can be said to be resident of both the Contracting States under the tax treaty under article 4(4), then it shall be deemed to be a resident of the state in which its Place of Effective Management (POEM) is situated.
- On the basis of this provision, the AO sought to deny the status of the taxpayer being treated as a resident of UAE on the ground that the POEM is not situated in UAE.
- The taxpayer contended that it is managed and controlled wholly from UAE, even though the shareholders and directors of the UAE company are non-UAE residents.
- The Commissioner of Income-tax (Appeal) [CIT(A)] reverses the action of the AO on the basis of findings that the POEM of the taxpayer was UAE
- The CIT(A) states that in view of the residency certificate, incorporation certificate, trading license and other documents, it is clear in principle that the taxpayer was a resident of UAE and accordingly eligible for the tax treaty benefit

Martrade Gulf Logistics FZCO-UAE
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ITAT Ruling:

- Relying on the decision in the case of Green Emirates, the Tribunal observed that the necessary condition for being treated as a resident of a State under the tax treaty is that the person should be liable to tax in that State by the reason of domicile, residence, place of management, place of incorporation etc.
- The taxpayer was incorporated in UAE and, therefore had this locality related attachment which led to residence type taxation.
- For taxpayer to be considered as 'liable to be taxed in UAE', it is not necessary for taxpayer to actually pay tax in UAE.
- Tie breaker rule with respect to residential status of the taxpayer comes into play when the taxpayer is resident of both the States, i.e. India and UAE
- Tie breaker rule set out in Rule 4(4), to which so much of emphasis is placed by the AO, is wholly irrelevant in the present context


Thank you