INTERPLAY OF THE CONCEPT OF PE UNDER DIRECT AND INDIRECT TAX LAWS

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Why the interplay

- Concept of an “establishment”
- Concept of “permanent establishment” (PE) under direct / corporate tax
- Concept of “fixed establishment” (FE) under indirect tax
- Do these two words mean the same and hence can be used as interchangeable terms?
- Are there any significant or important differences that one should bear in mind?
- If a company has a FE, will it be considered to have a PE too
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Some maths to wake you up!

- “FE” and “PE” are not always interchangeable terms. In 36 countries surveyed, a foreign company must determine its FE and PE status using different criteria for each type of taxation
- In 41 countries surveyed, having an FE does not automatically create a PE. However, in 32 countries, the existence of an FE could influence the tax administration’s decision about PE status.
- In 46 countries surveyed, a non-resident company may be obliged to register for VAT/GST without having an FE. Increasingly, non-resident VAT/GST registration applies to foreign providers of e-services

The concept of Fixed Establishment

- Has sufficient degree of permanence
- Has Human and Technical resources available
- In a place to provide services from that location
- Treated as a resident business and hence all registration and compliance formalities follow. Hence FE is defined and classified as per local country regulations.
- Is physical presence anymore important to have a FE in another country?
- Selling to the country v/s. Selling in the country

The concept of Permanent Establishment

- Domestic tax laws define a PE independently but most of the DTAA's have a standard definition. Hence classification is generally as per the DTAA (and not the local tax laws)
- "A fixed place of business through which the business of an enterprise is wholly or partly carried on"
- Infact standard exclusions are defined in the DTAA too – if only storage and display, if only maintaining stock, if independent agent etc.
- There should be a virtual projection of the foreign company
- Business with the country v/s. Business in the

So what is the dilemma?

- Should countries adopt a common definition of PE/FE under direct tax laws and indirect tax laws?
- Whether the point of tax should be the Location of the supplier v/s. Location of the recipient v/s. place of supply?
- Whether the place of supply should be different for physical goods / services and non-physical goods / services?
- Whether a concept of non-resident taxable person be introduced in tax laws? How would reverse charge mechanism work in this context?
- What about digital businesses or e-commerce

Case Study - 1

- Company A is a US company with no offices in your country. It manufactures products in the US and sells them globally, and sales in your country were 5% of its total turnover.
- Company A hired an independent sales agent in your country and in two years the sales to your country were 55% of its total turnover. Agency commission paid was 5% of sales.
- The independent sales agent now decides to sell Company A products exclusively, thus becoming a PE of Company A in your country. Agency commission agreed is 7.5% of sales.
- Is Company A or the independent agent also a FE

Case Study - 2

- Company X installed and operated gaming machines on board ships to entertain passengers.
- Installation of gaming machines was done on non-regular basis and no permanent staff was employed on the ship.
- Company X is registered in Germany.
- The ship often sails from Germany to your country.
- Can it be contended by your country's indirect tax authorities that Company X has a Fixed Establishment in your country?

Case Study - 2 (contd.)

- If Yes, Whether the company shall be liable to be registered as a normal taxpayer or as Non-Resident Taxable Person?
- What shall be the Place of Supply for the gaming services provided during the passage between Germany and your country?

Case Study - 3

- Company E is registered in Australia, has no presence of any kind anywhere else in the world. Customers can log on to E's website and order their products? Company E will ship these products to the customer in your country?
- Does E have a PE in your country?
- Does E have a FE in your country?
- Based on number of orders?
- Based on turnover?
- Based on type of customer?
- Based on type of product?
- What if Company E was selling services and not goods, e.g. if Company E was selling presentation enhancing services?

Taxation of Digital businesses

- Is Equalization levy the perfect tool to tax digital businesses?
- Is Equalization levy a direct tax or an indirect tax?
- Why not allow the credit of Equalization levy to the service provider?
- Should a similar mechanism exists for sale of goods as well?

THANK YOU !