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Hyatt Ruling: Indian Court Sets a New Benchmark for Determining Permanent Establishment

This tax alert summarizes a recent judgment of the Supreme Court of India in the case of Hyatt International Southwest Asia Ltd¹ ('Hyatt'). The Court has, while deciding the matter in favour of the Indian tax department, laid down important principles/aspects in the context of Permanent Establishment ('PE') under India-UAE Double Taxation Avoidance Agreements ('DTAA').

Background

The concept of PE is a cornerstone of 'international taxation', serving as the threshold for a source country's right to tax the business profits of a foreign enterprise. Under the DTAA, a Fixed Place PE is defined as a "fixed place of business through which the business of an enterprise is wholly or partly carried on". Over the years, the Indian courts have developed a nuanced understanding about constitution of a Fixed Place PE, by relying upon various international model conventions such as the OECD and UN Model Conventions.

Earlier, the Supreme Court of India had, in the *Formula One World Championship Ltd*² case, held that for a Fixed Place PE to exist, two essential conditions must be satisfied: (i) the place must be "at the disposal" of the enterprise, and (ii) the business of the enterprise must be carried on through that place. The Court in the *Formula One* case emphasized on three core attributes of PE: *stability, productivity, and dependence*. The "disposal test" was held to be pivotal i.e. whether the foreign enterprise has a right to use the premises in a manner that enables it to carry on its business. The Court clarified that exclusive possession is not necessary; even temporary or shared use can suffice if the business is carried on through that space. This judgment of the Supreme Court was, thus

far, an important guiding light regarding interpretation of Fixed Place PE in the Indian context.

The recent decision in the case of Hyatt, while reiterating such principles as laid down in the *Formula One World Championship Ltd (supra)*, further lays down important additional criteria for determination of Fixed Place PE as well as for attribution of income to such PE.

Facts of the Hyatt Case

Hyatt, a company incorporated in Dubai and a tax resident of the UAE, entered into two long-term Strategic Oversight Services Agreements ('SOSA') with Asian Hotels Limited ('AHL'), one in respect of a Delhi hotel and another for a Mumbai hotel. Under these agreements, Hyatt provided strategic planning services and know-how to ensure that the hotels were developed and operated as an efficient and a high-quality international full-service hotel.

Hyatt filed tax returns in India declaring that its services are not taxable in India under India-UAE DTAA since the consideration for services did not qualify as Royalty / 'Fees for Technical Services' ('FTS') under the DTAA and also, it did not have a PE in India.

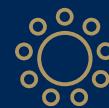
Proceedings before the lower authorities

The Indian tax authority [Assessing Officer ('AO')], however, adopted a contrary view and held that Hyatt's income is taxable in India on following two counts:

- Hyatt has a PE in India under India-UAE DTAA and;
- Hyatt's income is taxable as 'royalty' income under the India-UAE DTAA (Alternate argument by the AO).

¹ Hyatt International Southwest Asia Ltd v. Additional Director of Income tax: CIVIL APPEAL NO. 9766 OF 2025

² Formula One World Championship Ltd v. CIT: CIVIL APPEAL NO. 3849 OF 2017



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Feeling aggrieved, the assessment order was sent for a review by Hyatt before Dispute Resolution Panel ('DRP'). DRP after considering the clauses of SOSA, observed that:

- Involvement of Hyatt in every aspect from overall strategic planning to execution could not be possible without a PE; and
- Once a PE is established, attribution of profits to the PE can be made even if no profits have been realized by the enterprise. This view was based on the '*functionally separate entity*' approach.
- Alternatively, the know-how which Hyatt has developed and accumulated overtime as operators and managers of similar luxury full-service hotels is squarely covered within the definition of '*royalty*'. As per the India – UAE DTAA, the term '*royalty*' provides for "*payment of any kind received as a consideration for information concerning industrial, commercial or scientific experience*".

Based on the above directions of the DRP, the AO passed a final assessment order in which it attributed 25% of gross receipts to the PE. Further, as an alternative taxation, the AO considered the consultancy services as royalty. This alternative taxation was based on the principle that if it is held by appellate authorities in future that Hyatt does not have any PE in India, the income can still be taxed as per the tax department as '*royalty*'.

Hyatt challenged this AO's order before the Tax Tribunal wherein the Tribunal upheld the action of the AO on both counts and held as under:

- **Fixed Place PE:** The availability of office premises to a foreign enterprise on the premises of a contracting party to ensure that both parties comply with their obligations to the contract for a long period of time should constitute a fixed place PE. The disposal test is satisfied when premises are available for running the business even for a limited time. The hotel premises were at the disposal of Hyatt to carry on their business for a period of 20 years. Hyatt was technically operating the hotel belonging to AHL through its employees. The physical criteria, right-to-use criteria and the functional criteria (i.e. carrying on the business through that place) are all met.
- **Service PE:** The limitation period of stay of 9 months is in relation to invocation of Article 5(2) of the India-UAE DTAA and not with respect to Article 5(1). Thus, PE is constituted under Article 5(1) of the DTAA.
- **Royalty:** Based on the review of SOSA, the income is taxable as royalty under Article 12 of the DTAA. Further, such royalty was held to be linked to PE and hence, the attribution was directed to be made under Section 44DA of the Indian Income Tax Act, 1961.

On further appeal, the Delhi High Court held that:

- **Access to information is incidental:** In terms of SOSA, though Hyatt agreed to provide AHL with its proprietary, written knowledge, skills, experience, operational and management information and associated technologies related to operation of luxury hotel, the terms made it clear that it is in furtherance of oversight and strategic services. Thus, the fee received by Hyatt was in consideration for provision of services and not for the right to use information. Thus, it should not be treated as royalty income.
- **Hotel premises constituted a fixed place PE:** The plain test is to determine whether *de facto* the enterprise had sufficient control over the fixed place for the purpose of carrying on its business. The terms of SOSA confirm that Hyatt had control over the hotel premises. Hence, the constitution of PE was upheld.

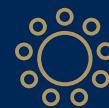
With respect to attribution of profits to PE, the High Court referred the case to larger bench (considering the favorable decision in *Nokia Solutions and Networks OY*³ wherein it was held that PE attribution can be made only in case of global profits).

On account of the High Court decision, an appeal was preferred by Hyatt before the Supreme Court of India.

Proceedings before Supreme Court

Arguments by Hyatt's Counsel

- **Nature of Services/ Non-Core Business Activity:** Hyatt's role was limited to involvement in the policy decisions and enforcement of brand standards. It provided strategic guidance, brand compliance, and long-term planning. The day-to-day operations of the hotel were carried out by Hyatt's Indian entity i.e. Hyatt India Pvt. Ltd, under a separate Hotel Operating Services Agreement (HOSA) entered with AHL.
- **No Right of Disposal:** There was no designated space or office at the hotel premises (in Delhi or Mumbai) that were either specifically reserved for or at the disposal of Hyatt. Hyatt exercised no control or dominion over any part of the premises. In the SOSA, while there was no express prohibition on decision-making by Hyatt's employees during their visits but the same cannot lead to the inference that Hyatt had a right of disposal over the premises.
- **Employee Visits:** SOSA explicitly stipulated that Hyatt would render its services from Dubai and was not obligated to send or station any employees in India. However, the agreement permitted Hyatt, at its sole discretion, to send employees on occasional and temporary visits to India.



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- **Activities in India** – The visits by employees were brief and routine in nature and the same executives visited other Hyatt hotels across India including those in Goa, Bengaluru, Kochi, and Chennai. These oversight visits were intended to ensure brand uniformity and quality compliance.
- **Duration of stay** – The limited and occasional presence of its employees in India, did not exceed the threshold of nine months, as provided under Article 5(2)(i) of the DTAA. The short duration spread across multiple locations in India, and lack of exclusive use or control over any space do not satisfy the legal requirement of a fixed place of business PE.

Arguments by the Tax Department

- **Nature of Services/ Core Business Activity:** Hyatt's role extended beyond high-level policy formulation. Hyatt was involved in the appointment and training of staff, monitoring daily operations, exercising financial oversight, and influencing procurement and operational decisions – all of which demonstrate managerial and functional control, particularly through the General Manager, who reported to Hyatt. Hyatt entered into a long-term agreement (20 years) under which it enjoyed broad and continued control over the hotel's key functions, including staffing, operations, strategic policy, and financial oversight.
- **Right of Disposal/ Employee Visits:** Some employees of Hyatt remained in India for up to nine months and were involved in substantive hotel operations indicating operational presence.
- **Three Attributes of PE:** The arrangement reflects the three core attributes of PE:
 - Stability – Long term contract of 20-year term;
 - Productivity – Fee earned by Hyatt was linked to business outcomes' and
 - Dependence – Hyatt relied on hotel infrastructure and staff to carry out its business.

Supreme Court's Observations

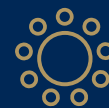
- **Nature of Services:**
 - As per SOSA, Hyatt is responsible for providing strategic plans, policies, procedures, and guidelines to ensure adherence to the 'Hyatt Operating Standards'.
 - Hyatt is vested with complete control and discretion in formulating and establishing the strategic plan for all aspects of hotel operations, including branding, marketing, product development, and daily operations.
 - Hyatt is also responsible for formulating policies relating to human resources, procurement, guest admittance, use of premises, pricing, sales and marketing, reservations, hotel's operating bank account.
 - Hyatt also has power to identify, recruit and assist in

appointing non-local hotel employees including the General Manager, key personnel, and members of the Executive Committee on behalf of the hotel owner.

- Hyatt can assign employees (either its own or its affiliates) to India without needing prior approval from the hotel owner or management.
- SOSA vested rights in Hyatt to require the hotel owner to obtain non-disturbance and attornment agreement from the lender which is acceptable to it in case the hotel owner desires to obtain financial assistance or if the hotel is to be used as collateral.
- It is evident that Hyatt's role was not confined to mere policy formulation. From the nature of functions carried out by Hyatt, it cannot be said that it was performing merely "auxiliary" functions.
- **Fee structure:** The consideration is not a fixed fee; instead, it is calculated as a percentage of room revenue and other revenues and income whether directly or indirectly derived from the hotel's operations. This remuneration structure clearly reflects an active commercial involvement, linking the Hyatt's income to the financial and operational performance of the hotel.
- **Right of Disposal:** As per the OECD commentary, a certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required. Hyatt's staff was operating various operational functions through the hotel premises in India, even though Hyatt did not own the hotel premises.
- **Employee Presence:** Based on travel logs and job functions, the employees of Hyatt made frequent visits to India to establish continuous and coordinated engagement, even though no single individual exceeded the 9-month stay threshold. Under Article-5(2)(i) of the India-UAE DTAA, once it is found that there is continuity in the business operations, the intermittent presence or return of a particular employee becomes immaterial and insignificant in determining the existence of a PE.
- **Three Attributes of PE:**
 - Stability – The SOSA is for 20-year duration.
 - Productivity – The actual role of Hyatt is not just advisory in nature but extends to various other operational, administrative and financial roles.
 - Dependence – Hyatt's staff was operating through the hotel premises in India.

Supreme Court Ruling

The Supreme Court affirmed the findings of the High Court (and the tax authorities), holding that Hyatt had a Fixed Place PE in



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India under Article 5(1) of the India-UAE DTAA. The Court concluded that:

- The hotel premises constituted a Fixed Place of business at Hyatt's disposal, through which it carried on its core business activities.
- With respect to attribution for PE, the Supreme Court referred to the Larger Bench decision⁴ of the Delhi High Court constituted in Hyatt's case, wherein it was held that profit attribution to a PE in India is permissible even if the overall foreign enterprise has incurred losses. The income received by Hyatt under the SOSA was, thus, held attributable to such PE and, therefore, taxable in India under Article 7 of the DTAA.

Conclusion

The Supreme Court's ruling sets a new benchmark for determining the existence of a Fixed Place PE in India, particularly in the context of service-oriented and consultancy arrangements.

This judgment underscores the importance of examining the substance of the foreign enterprise's involvement, the degree of control exercised, and the commercial realities of the arrangement, rather than relying solely on formal legal structures and / or the physical presence of employees. The relevant tests of *stability*, *productivity*, and *dependence* are significant criteria for Fixed Place PE determination.

While factors like limited, non-exclusive and shared access of premises are relevant for the satisfaction on the *disposal test*, focus should also be with respect to degree of functional control over premises to conduct the business.

Consistent with the *Formula One decision*, even when Service PE thresholds are not breached, the possibility of Fixed place PE cannot be ruled out. This also opens door for tax risk where virtual presence may lead to constitution of Fixed Place PE.

The Court also reaffirmed that PE determination is fact specific exercise. Documentation and representation before the lower authorities, especially at tax tribunal stage (which is the last fact-finding authority) gains vital importance.

Foreign companies operating in India may now consider to re-evaluate their existing structures, contracts and operations in India to mitigate the risk of PE in India. Going forward, the service agreements need to be carefully drafted to capture the substance of the transaction and limit the contractual rights which foreign companies intend to exercise. The risk of PE exposure has become more nuanced and potentially broader in India.

⁴ Hyatt International Southwest Asia Ltd v. Additional Director of Income Tax: ITA 216/2020, ITA 217/2020, ITA 218/2020 and ITA 219/2020

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