



## Supreme Court rules on constitution of Permanent Establishment

The Supreme Court (SC) in the case of Formula One World Championship Ltd (FOWC) held that FOWC had a Permanent Establishment (PE) in India in the form of a motor racing circuit, namely, Buddh International Circuit in Noida where the motor racing tournaments took place.

### Facts of the case

- FOWC, a UK tax resident, along with the Federation Internationale de l' automobile (FIA) and Formula One Asset Management Limited (FOAM) entered into certain agreements in relation to exploitation of commercial rights arising out of Formula One (F1) events across the world.
- Every F1 racing event is hosted, promoted and staged by a Promoter with whom FOWC as the right holder enters into definitive agreements outlining the role and responsibilities of the parties.
- In this regard, FOWC entered into a Race Promotion Contract (RPC) with an Indian company, namely, Jaypee Sports International Ltd (Jaypee) under which the rights to host, stage and promote the Formula One Grand Prix of India event were granted for a consideration of USD 40 mn.
- Additionally, an Artworks License Agreement was also entered into between FOWC and Jaypee, permitting the use of certain marks and Intellectual Property (IP) belonging to FOWC for a consideration of USD 1 mn.



- FOWC and Jaypee had approached the Authority for Advance Rulings (AAR) seeking an advance ruling on the taxability of the arrangement between them. The AAR held that considering FOWC neither carried on any business activity in India nor had authorized any entity to conclude contracts on its behalf, it did not have a PE in India as per Article 5 of the India – UK Tax Treaty. However, the AAR held that the aforesaid consideration paid by Jaypee to FOWC qualified as “royalty”.
- Against the said Ruling of the AAR, the tax authorities and the Applicants (viz. FOWC and Jaypee) filed a writ petition before the Delhi High Court (HC).
- The Delhi HC reversed the order of AAR and held that FOWC has a PE in India. However, the Court held that the consideration paid by Jaypee to FOWC did not qualify as “royalty” as the same was not for use of trademark, copyright, equipment, etc. and was paid only for the purpose of facilitating the event and for no other purpose whatsoever.
- The ruling of the Delhi HC on the aspect of “royalty” characterisation was not challenged by the Revenue before the SC and the only question raised before the SC was whether FOWC had a PE in India or not.

## Key conclusions

The SC held that the Buddh International Circuit is a “fixed place” where the commercial/ economic activity of conducting F1 Championship was carried out. The SC held that the aforesaid circuit was a virtual projection of FOWC on the Indian soil and that it satisfied all the characteristics of a PE, namely, (i) existence of an enterprise; (ii) its carrying on a business; (iii) existence of a place of business, the nature of such place being ‘fixed’ and (iv) such place being at disposal of FOWC.

The SC also relied on several international literature and jurisprudence to conclude that FOWC has a PE in India as the basic characteristics of a PE (viz stability, productivity and dependence) were present in the case of FOWC.

Further, the SC, inter alia, regarded the following clauses of the RPC as material in determining if FOWC had a PE in India:

- The International Circuit which was constructed by Jaypee was to be constructed, laid out and prepared in a form and manner approved by FOWC and the FIA.
- Jaypee was obliged to take all necessary actions so as to ensure complete and unrestricted access to the employees and affiliates of FOWC.
- Jaypee was obliged to ensure that those accredited and authorized by FOWC were permitted to enter upon the premises to make sound, television recordings or



transmissions or make films or other pictures and use the facilities throughout the access period.

- Jaypee was not allowed to permit, access, enable, procure or in any manner encourage others to make, create, store, record or transmit any sound/video recording or footage.
- Jaypee was obliged to unconditionally and irrevocably assign to FOWC all copyright and other intellectual property rights, titles and interest which it may, now or in future possess, in any image or recording or other presentation or recording in any image/form whatsoever.

The SC observed that Jaypee's capacity to act, though being a Promoter, was extremely restricted. At all material times, FOWC had exclusive access to the circuit and all the spaces where the teams were located. Thus, it was held that the place was completely at disposal of FOWC which had significant control over the same.

Placing reliance on the OECD and Klaus Vogel's Commentary, the SC held that as long as the presence is in a physically defined geographical area, permanence in such fixed place could be relative having regard to the nature of the business. Thus, even if the racing event lasted only for a few days, the same still constitutes a fixed place PE given the facts of the case and the nature of business of FOWC. The question regarding the quantum of income attributable to the PE was left to be decided by the Assessing Officer.

## Comments

While determination of PE is a factual exercise, this judgment provides valuable guidance on the same especially in cases where the activity in a source country does not last for a significant period of time. The decision also gives considerable clarity on the "place of disposal"/"control" test in determination of PE. With the increase in number of international sporting events being organised in India (which were hitherto held outside India), taxpayers (foreign entities as well as resident deductors) would need to critically assess the impact of this decision.



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