

Tax Hotline

October 21, 2008

A TAX-FREE GAME OF GOLF

The Authority for Advance Rulings (“AAR”) was recently faced with an interesting question as to whether the golf courses, where a non-resident company organizes golf tournaments for the first time, constitute a Permanent Establishment (“PE”) in India.

The applicant, Golf in Dubai LLC (“Applicant”) is a company registered in United Arab Emirates (“UAE”), and is engaged in the business of promoting Golf by organizing prestigious tournaments in various countries, with participation of some of the top ranking international golfers.

During the financial year 2007-08, the Applicant had organized two Golf tournaments in India: the EMAAR-MGF Ladies Masters, 2007 in Bangalore at Eagleton, the Golf Resort; and the EMAAR-MGF Indian Masters, 2008 in New Delhi at the Delhi Golf Club. Payments were made Eagleton and Delhi Golf Course (“Golf Courses”) for the right to use the premises to host the event. The Applicant also engaged Par Golf Tours & Accessories Pvt. Ltd. (“ParGolf”), a Kolkata based consultant company for organizing the events.

The Applicant received income from sponsorship fees, management fees and sale of merchandise at the venue and over the internet. This was the first time that the Applicant had organized a tournament in India; but as stated in its application, the Applicant intended to organize numerous such events and that it had entered into an agreement with one of the sponsors to organize similar Golf events for three years in India.

The moot question before the AAR was whether the Applicant had any permanent establishment (“PE”) in India under Article 5 of the Double Taxation Avoidance Agreement between India and the UAE (“Treaty”). The counsel for the Income Tax Department (“Revenue”) contended that the Applicant would have a PE in India on grounds of fixed base, agency and presence of employees.

AGENCY PE:

It was submitted by the Revenue that since ParGolf had provided services for organizing the events, it should be regarded as an Agency PE. However, the AAR, at the very outset, rejected the contention that there could be any Agency PE as ParGolf, as well as the other third party contractors, were carrying on their independent business and were not carrying on business wholly or almost wholly on behalf of the Applicant.

FIXED PLACE PE:

It was argued by the Revenue that the Golf Courses were fixed places of business and would constitute a PE in India under the Treaty. It was further claimed by the Revenue that the period for which business was carried on from a fixed place in India is immaterial in determining whether or not there exists a fixed place PE, once it could be established that the activity is carried on a regular basis and that the afore-mentioned agreement with the sponsor established the criterion of regularity.

On the other hand, the Applicant argued that Article 5(1) of the Treaty warrants a certain level of regularity, periodicity and continuity of business in order to constitute a PE in India. In this case, it was submitted, the business of organizing Golf events had neither been carried on regularly, nor was there any certainty, whether these tournaments will be carried on regularly. Further, the business of organizing the tournaments lasted only for about a week and thus, did not meet requisite degree of permanence for constituting a PE under the Treaty.

The AAR analyzed the definition of a PE under Article 5(1)¹ of the Treaty at length. The AAR stated that no hard and fast rule could be laid down as to the number of days required in order to ascertain a degree of permanence, which could constitute a fixed place PE. The AAR held that the Golf courses were indeed fixed places of business. However, relying on the OECD commentary on the point, the AAR found that the words “carried on” as employed by the Treaty was indicative of continuum, frequency or regularity. What, according to the AAR, was “conspicuously missing” was the element of regularity, continuity and repetitiveness. The AAR held that a mere intention to hold similar tournaments in 2009 and 2010, in absence of a firmly stipulated contract, does not impart an aura of regularity or continuity and that the place of business, in the absence of firm stipulation in the contract, support any business activity.

SERVICE PE:

The Revenue contended that since the Vice-Chairman of the Applicant was present in India for more than nine months within a twelve month period, a service PE under Article 5(2)(i) of the Treaty was constituted in India.

However, the AAR observed that these arguments were irrelevant to the facts and circumstances of the case. It noted that the concept of ‘furnishing of services’ is a bilateral concept and the existence of at least two parties, i.e., (a) a service provider; and (b) a recipient of services. It noted that in the present case the Applicant was a mere organizer of the tournaments, which resulted in some income; but there was no plurality of parties. “Assuming for while”, the AAR elaborated, “that the Applicant is a service provider in this case, the natural query is ‘who is the recipient of the

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services'? In fact there is no recipient of services here."Emphasizing this fundamental principle of PE, the AAR held that there was no question of existence of a Service PE.

Based on the above, the AAR concluded that the Applicant did not have a PE in India. However, it noted that their conclusion regarding the absence of PE in India was in the context of the Applicant's present factual position and that the future course of events would determine whether a different view would be needed in the future.

As a closing note, the AAR did observe that management fees could have been brought to tax within the purview of Fees for Technical Services, however, since the Treaty did not contain a provision with regard to FTS, all receipts of the Applicant were considered to be in the nature of "business income" and in the absence of a PE in India, were not liable to tax in India under any provision of the Treaty.

- Dhruv Sanghavi & Mansi Seth

1 Article 5(1): "For the purpose of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on."

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