

INDIA TAX UPDATE

Seconded employees of holding company working in subsidiary company does not mandatorily constitute Fixed place PE- nature of activities performed needs to be checked



Seconded employees of holding company working in subsidiary company does not mandatorily constitute Fixed place PE- nature of activities performed needs to be checked- High Court of Delhi (Top State Court)

Facts of the case:-

- Samsung Korea, the respondent assessee is a company incorporated in South Korea and a tax resident of that country.
- It had two wholly owned subsidiaries in India being **Samsung India Electronics Pvt. Ltd (SIEL)** and **Samsung India Software Operations Pvt. Ltd.**

Contention of AO: -

- The Assessing Officer concluded that the premises of SIEL constitutes Fixed Place Permanent Establishment by virtue of Article 5 of the India-

Korea Double Tax Avoidance Agreement solely on the basis that employee of SIEL were controlled by SEC in respect of each and every aspect of functioning of SIEL. AO further concluded that SIEL, being a subsidiary of Samsung Korea, was liable to be considered as a PE per se.

- It was additionally concluded that SIEL also meets the tests of Dependent Agent Permanent Establishment as well as a Service PE.

Judgement by High Court of Delhi: -

- The High Court upheld the order of ITAT and held that the seconded employees do not constitute any PE in India by replying on the following arguments:
- Although information was exchanged and plans and strategies for the Indian market were also discussed, none of the activities undertaken by

those seconded employees could be said or construed to be the carrying on or the conduct of business of Samsung Korea from the premises of SIEL.

- None of those statements could be interpreted as evidence of any activity of the global business of Samsung Korea being conducted in India through SIEL.
- The seconded employees were engaged in assisting SIEL in its business in India.
- Mere fact that marketing strategies and future plans pertaining to the business of Indian subsidiary were also discussed and deliberated upon by Samsung Korea, would not lead to a PE coming into existence.
- **Thus, High Court held that the Tribunal was justified while holding that seconded**

employees do not constitute a Fixed Place PE in India.

For complete details, please refer to the High Court Judgement dated 15/01/2025 passed in the case of Pr.CIT International Taxation v.Samsung Electronics Co.

https://dhccaseinfo.nic.in/jsearch/judgement.php?path=dhc/YVA/judgement/15-01-2025/&name=YVA15012025ITA10292018_183132.pdf

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