

Taxation on Permanent Establishment

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Business connection / permanent establishment

- S. 5 & 9 of ITA embody the 'source rule' of taxation in India
- NR are taxed in India in respect of:
 - income received or deemed to be received in India
 - Income accrued or arise or deemed to be accrued or arise in India
- S. 9(1) encapsulates the cases where income is deemed to accrue or arise in India
 - Creates a legal fiction
 - BC is discussed in s. 9(1)(i)
- Significant from the perspective of taxation of NR in India
- No exhaustive definition in the ITA ~ much wider in connotation
 - No definition even under the ITA 1922
 - used effectively by the Tax authorities to tax income of NR in India

Section 9(1)(i) – Business connection

Section 9(1)(i) – Business connection

Relevant extract

Income deemed to accrue or arise in India

9. (1) The following incomes shall be **deemed** to accrue or arise in India :—

- (i) all income accruing or arising, whether directly or indirectly, **through or from any business connection in India**, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Section 9(1)(i) – Business connection

Relevant extract

Explanation 1 to s. 9(1)(i)

Business of which not all operations are carried out in India

Only such part of income as is reasonably attributable to the operations carried out in India, would be deemed to have accrued in India

Business of which operations are confined to purchase of goods in India for export

NR running a news agency or publishing newspapers, etc. whose activities are confined to collection of news/ views in India for transmission out of India

Individual/ firm/ company whose operations are confined to shooting of a Cinematographic film in India

No income shall be deemed to have accrued in India

Section 9(1)(i) – Business connection

Relevant extract

Explanation 2 to s. 9(1)(i)

- Inserted by Finance Act 2003 w. e. f. 1 April 2004:
 - ‘BC’ shall **include** any business activity carried out through a person who, acting on behalf of the NR,-
 - a) has and **habitually** exercises in India, an **authority to conclude contracts** on behalf of the NR, unless his activities are limited to the purchase of goods or merchandise for the NR; or
 - b) has no such authority, but **habitually maintains in India a stock of goods or merchandise** from which he regularly delivers goods or merchandise on behalf of the NR; or
 - c) habitually **secures orders in India, mainly or wholly** for the NR or for that NR & other NRs controlling, controlled by, or subject to the same common control, as that NR

Section 9(1)(i) – Business connection

Relevant extract

Explanation 3 to s. 9(1)(i)

- Inserted by Finance Act 2003 w. e. f. 1 April 2004:
 - Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India

Concept

Concept [1]

- All income accruing or arising, whether directly or indirectly, through or from any **business connection** in India, is deemed to accrue or arise in India
- Business includes 'any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture' – s. 2(13)
- Existence of BC ~ question of facts & circumstances
 - Various factors need to be considered while determining existence of BC in a particular situation
 - BC admits no precise definition
 - To be understood on basis of judicial precedents

Concept [2]

- *Decision of Hon'ble Supreme Court in the case of R. D. Aggarwal & Co. (1965) (56 ITR 20) (SC)*

“... A business connection in section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories (India) which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories (India): a stray or isolated transaction is normally not to be a business connection... ...A relation to be a ‘business connection’ must be real and intimate, and through or from which income must accrue or arise whether directly or indirectly to the non-resident...”

- BC may exist where NR is doing business in India & not in cases where NR is merely doing business with India

Concept [3]

Relevant factors

Existence of business operations in India on a regular basis

Business operations so carried out are related to the business carried on by the NR outside India

Business operations so carried contribute to the earning of profits or gains of such business

Concept [4]

- BC can arise between a NR & a resident if both of them carry on business & if the NR earns income through such a connection.
 - Ashok Jain (2002) (121 Taxmann 328) (Delhi ITAT)
- BC must denote something which produces profits or gains & not a mere state or condition which is favourable to profit making
 - P. V. R. M. Visalakshi Achi (1937) (5 ITR 448) (Rangoon HC)

Key principles

Key principles

- Various factors need to be kept under consideration while determining whether or not BC exists in a particular situation
- Summarily, the key principles:
 - Continuity;
 - Real & Intimate connection;
 - Agency

Continuity

- A single transaction may not fall within the ambit of the BC
- There must be some element of continuity
 - CIT v Metro Goldwyn Mayer (India) Ltd. (1939) (7 ITR 176) (Bom)
- If transactions are spread over the whole year & run into several lakhs, it will be difficult, if not impossible, to resist the conclusion that such purchasing operations do constitute business operations
 - Jamnadas Brij Mohan v CIT (1962) (46 ITR 233) (All)
- Existence of an agent is not necessary & where there is regularity & continuity of operations, there is a BC
 - Bikaner Textile Merchants Syndicate Ltd. v CIT (1963) (58 ITR 169) (Raj)
- Length of time may not be relevant ~ numerous transactions in a short span of time having an element of continuity may lead to BC
 - AP Damodara Shenoy v CIT (1954) 26 ITR 650 (Bom)

Real & intimate connection [1]

- In order to have a BC, there must be a real and intimate connection between the activity carried on by the NR outside India & the activity carried out in India & such activity must be one, which contributes to the earnings of profits by the NR in his business
 - *CIT v R D Aggarwal & Co 56 ITR 20 (supra)*
- BC invariably implies commercial connection but all commercial connections may not necessarily constitute BC
- No BC unless the commercial connection is really & intimately connected with the business activity of the NR in India & is contributory to the earning of profits in the said trading activity
 - *Blue Star Engineering Co (Bom) (P) Ltd (1969) (73 UTR 283, 291) (Bom)*

Real & intimate connection [2]

- There must be something more than mere transactions of sale & purchase ~ a common thread of 'mutual interest' must run through the business activities carried on outside India & those carried out in India to constitute real & intimate connection
 - *Hindustan Shipyard Ltd. (1977) (109 ITR 158) (AP)*
- BC does not cover activities which are not well defined business operations or are of a casual or isolated character
 - *Anglo French Textile Co, Ltd. v CIT (1953) (23 ITR 101) (SC)*
- In the absence of any operations in India income cannot be deemed to arise in India
 - *Toshuku Ltd. (1980) (125 ITR 525) (SC)*

Agency [1]

- S. 163 lays down that an 'agent' in relation to a NR includes any person in India, who has BC with the NR
- Authority to conclude contracts
 - Agent may either enter into contracts in the name of NR; or
 - Conclude contracts which are binding on the NR even if it is in name of NR
- Independence
 - Independent agent will typically be responsible to his principal for the results of his work but not be subject to significant control ~ OECD Commentary
 - Legal as well as economic independence
- Ordinary course of business
 - Persons cannot be said to act in the ordinary course of business if they perform activities for an entity which, economically, belong to the sphere of that entity rather than to that of their own business operations ~ OECD Commentary

Agency [2]

- Mainly or wholly
 - Not technical terms - must receive their ordinary meaning ~ Speciality
Magazines (P.) Ltd. (274 ITR 310) (AAR)
- If a NR has a commission agent in India, who enters into transactions on its behalf, the NR would be regarded as having a BC in India
 - Abdullabhai Abdul Kadar v CIT (1952) 22 ITR 241 (Bom)
 - AP Damodara Shenoy v CIT (1954) 26 ITR 650 (Bom)

Introduction to the concept of PE

Introduction – Under Income-Tax Act

Section 92F of the Income-Tax Act – Defines Permanent Establishment

Permanent Establishment - 'Includes a fixed place of business through which the business is wholly or partly carried on'

Section 44DA – Special Provisions for Taxation of Royalty and Fees for technical services for a non-resident carrying on business through a permanent establishment in India

Such income would be taxable in India as per normal provisions of the Act. No deduction is allowed for any amounts paid by such PE to its head office or to any of its other offices otherwise than towards reimbursement of actual expenses

Introduction – Under Tax Treaty

The Concept of “Permanent Establishment” is defined by Article 5 of the tax treaties.

OECD : The PE concept marks the dividing line for businesses between merely trading with a country and trading in that country; if an enterprise has a PE, its presence in a country is sufficiently substantial than when it is trading in a country.

PE is a term defined in tax conventions to determine when a non-resident is taxable in a source country

Under Article 7, a Contracting State cannot tax the profits of an enterprise of the other Contracting State unless it carries on its business through a PE situated therein.

When the enterprise operates through a PE, the profits attributable to it, may be taxed by the country where the PE is located, leaving the country of residence to give relief from double taxation.

Where a PE is in existence, the country where it is located may also tax its capital gains, dividends, interest and royalties that are effectively connected to such PE.

Structure of Article 5 - OECD

Art 5(1) – Fixed Place

Art 5(2) – Specific

Art 5(3) – Installation/ Assembling

Art 5(4) – Exclusion

Art 5(5) – Dependent Agent

Art 5(6) – Independent Agent

Art 5(7) – Associated Co

Fixed Place PE

Fixed Place PE

Permanent establishment' means a **fixed place of business** through which the **business of an enterprise is wholly or partly carried on.**

Fixed	Permanence Test	Place of business must be fixed – Location And Duration Test
		Existence of Link between the place of business and a specific geographical location would be sufficient
Place of Business	Disposal Test	Generally covers any premises, facilities or installations used for carrying on business
		Should be at the disposal of the enterprise. Need not be owned by the Enterprise and can be situated in the business facility of another enterprise
Carrying on business through it	Business Activity Test	The enterprise must use such premise to wholly or partly to carry out its business through it
		Activities need not be permanent in the sense that no interruptions of operations, but operations must be carried on regular basis. No requirement for human intervention

Fixed Place PE

Location Test / Duration Test

- Location test requires that place of business to be located at a single place.
- It does not mean that the equipment constituting the place of business has to be actually fixed to the soil on which it stands. It is enough that the equipment remains on a particular site
- OECD –**Both geographical and commercial coherence** are necessary, the fact that activities may be carried on within a limited geographical area should not result in that area being considered as a single place of business
- An isolated activity cannot lead to establishment of fixed place of PE as the ingredients of regularity, continuity and repetitiveness are essentially missing.
- No minimum threshold under Indian law.

Fixed Place PE - Comparison

Particulars	OECD Model	UN Model
PE defined as	a fixed place of business through which the business of an enterprise is wholly or partly carried on	a fixed place of business through which the business of an enterprise is wholly or partly carried on
Term PE includes	<ul style="list-style-type: none"> – place of management; – branch; – office; – factory; – workshop; – a mine, an oil or gas well, a quarry or any other place of extraction of natural resources 	<ul style="list-style-type: none"> – place of management; – branch; – office; – factory; – workshop; – a mine, an oil or gas well, a quarry or any other place of extraction of natural resources
Construction / Installation project	a building site or construction or Installation project constitutes a PE if lasts more than 12 months	a building site or construction or Installation project or supervisory activities is in connection therewith , if continue for more than 6 months
Furnishing of services	No such clause	furnishing of services including consultancy services, through employees or other personnel engaged by the enterprise, that continue (for the same or connected project) within the country for a period or period aggregating more than 6 months within in any 12 months period

Fixed Place PE

Geographic and Commercial Coherence

Case Study 1: Mr. X, a non-resident painter works successively for series of unrelated contracts for a number of unrelated clients in a large building in India.

Case Study 2: Mr. X. a Painter is working on a single contract undertakes work throughout a building for single client

In which case would a PE arise for Mr. X ?

Illustrative list of PE

Article 5(2) of OECD Model Tax Convention

- Article 5(2) provides for an illustrative list of facilities constituting a PE.
- The term “permanent establishment” includes especially:
 - ✓ a place of management;
 - ✓ a branch;
 - ✓ an office;
 - ✓ a factory;
 - ✓ a workshop, and
 - ✓ a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.”
- OECD considers the satisfaction of the conditions prescribed in Art 5(1) as a prerequisite for the above list to constitute PE . **India does not agree to above position**

However, following additional clauses found in the DTAA's entered by India with various countries - “Store or other sales outlet”, “Warehouse”, “A place of exploration of natural resources” , ‘A farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on”

Installation PE

Installation PE

- A building site or construction or installation project constitutes a permanent establishment only if it lasts for more than **twelve months (OECD Model/ US Model) / 6 Months (UN Model)**.
- A building site or construction or installation project includes:
 - ✓ *construction of roads, bridges or canals*
 - ✓ *renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals*
 - ✓ *Laying of pipelines*
 - ✓ *excavating and dredging*
 - ✓ *installation of new equipment in an existing building or outdoors*
 - ✓ *onsite planning and supervision of the construction of a building*
- Where a office / workshop is used for a number of construction projects, then even if none of the projects continues for more than 6 months, it will be considered as PE under Art 5(2) if it satisfies the condition of Art 5.

Installation PE Comparison

Constituents of construction/installation PE	OECD	UN	US
Building site	√	√	√
Construction	√	√	√
Assembly Project	X	√	X
Installation Project	√	√	√
Supervision activities in connection with above	X	√	X
Drilling rig used for exploration of natural resources	X	X	√
Ship used for exploration of natural resources	X	X	√
Duration – Lasts for more than	12 months	6 months	12 months

Installation PE

Supervisory Activities

- The pre-requisite for supervisory activity constituting a PE is that such activity should be carried out only in connection with a building site, a construction, assembly or installation project and not otherwise
- A PE is constituted if the supervisory activities exceed the time limit
 - It is immaterial whether the individual building site, a construction, assembly or installation project (in respect of which the supervisory services are rendered) meets the time test
 - Minimum threshold in case of supervisory activities covered under a separate and independent contract must be considered from the date when such activities start and not from the date of commencement of the entire project – [Krupp UDHE GmbH (28 SOT 254) (Mum)]
- There is no condition that the person performing supervisory activities should also be providing installation service.

Installation PE

India's tax treaties – Key Features

Key Features	Countries
Installation not covered in the definition	Bangladesh, Belarus, Brazil, Ireland, Israel, Kenya, Libya, Mauritius, Oman, Philippines, Srilanka
Installation and assembly not covered in the definition	Libya, Philippines
Construction not covered in the definition	Libya
Supervisory activities not included	Bangladesh, Brazil, Netherlands, Egypt, Sri Lanka, Slovenia, Malaysia, Libya, Japan, France
Supervisory activities included	German, Mauritius, Sweden, USA, UK
Additional clause for exploration / exploitation of natural resources	Belarus, Germany, Netherlands, France, Denmark (exploration of natural resources) / Italy, Ireland, China (exploration or exploitation of natural resources) / Philippines, USA

Installation PE

India's tax treaties – Overview of Time Limit

Time threshold	Country(ies)
> 3 months	Norway
> 6 months	Australia, Belgium, Brazil, France, Germany, Italy, Japan, Ireland, Netherlands, Sweden, UK, Spain
> 120 days in any 12 months	USA, Canada
183 days in any fiscal year	China, Denmark, Singapore, Thailand
> 9 months	Korea, Hungary, Mauritius
> 12 months	Cyprus

Installation PE

Measurement of Time Period

- A site exists from the date on which the contractor begins his work, including any preparatory work, in the country where the construction is to be established (eg. a planning office is installed)
- It continues until the work is complete or permanently abandoned.
- A site should not be regarded as ceasing to exist when work is temporarily discontinued – for example, due to bad weather, shortage of material, labour difficulties
- Temporary discontinuance of the work cannot be regarded as cessation of the site. Seasonal and temporary interruptions should be included in determining the life of a site
- In some projects, due to its nature, contractor's activity has to be relocated continuously or at least from time to time, as the project progresses. For example – this would be the case for instance where roads or canals were being constructed, waterways dredged, or pipe-lines laid.
- OECD MC and UN MC provide that a site exists from the date on which a contractor begins his work including any preparatory work in the country where the construction is to be established
- **If a foreign enterprise sub contracts part of its work in Source State in relation to such site or project or activities to a sub-contractor, the time spent by the sub contractor must be considered as time spent by the main contractor in source state.**

Installation PE

Measurement of Time Period – Multiple Sites/Projects

- OECD Commentary provides that the threshold time limit has to be determined separately for each individual site or project
- **Time spent previously on other sites or project (which are unconnected) should not be counted**
- The threshold limit applies to each site or project except where such sites or projects form a coherent whole commercially or geographically [Sumitomo Corp - 110 TTJ 302 (Del)]
- No aggregation of duration if projects were separate [Tiong Woon Project and Contracting Pte. Ltd. 338 ITR 386 (AAR)]
- The 'duration test' is to be applied on each independent contract separately unless the activities undertaken are so inextricably interconnected or interdependent that these are essentially required to be viewed as a coherent whole [M/s Valentine Maritime (Mauritius) Limited 130 TTJ 417 (Mum)]
- Aggregation of the activities of unconnected projects is unwarranted, in the absence of aggregation provision under the India Germany treaty – [Krupp UDHE GmbH (28 SOT 254) (Mum)]

Exclusions from PE

Exclusions from PE

Article 5(4) – OECD Model Convention

Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

- a. the use of facilities solely for the **purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;**
- b. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
- e. the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- f. the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), **provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character**

Exclusions from PE

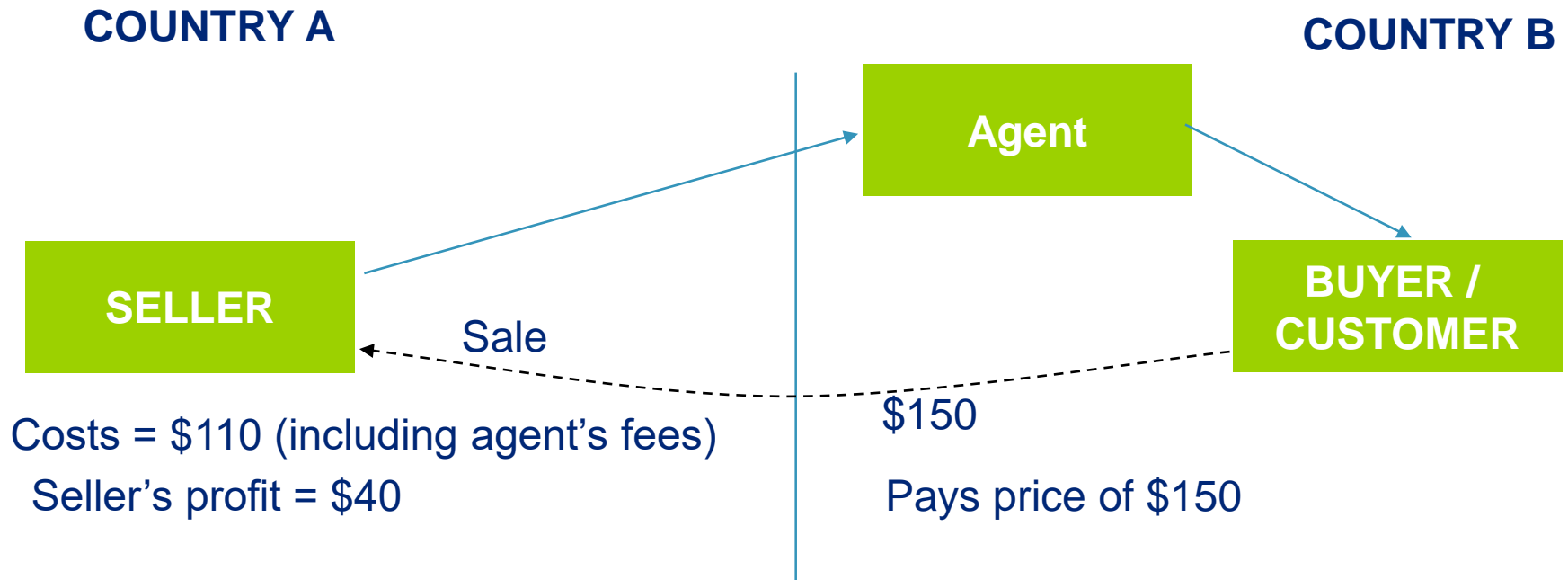
Article 5(4) – OECD Model Convention

- **Preparatory** is generally “something that prepares or serves to prepare for something following, preliminary introduction”
- **Auxiliary** means “ancillary” or “subsidiary” activity involves helping, assisting or supporting the main activity.
- If the activity of the fixed place of business forms an indispensable and significant part of the enterprise as a whole or are identical with the general purpose and object of its parent, then such activities would not be regarded as preparatory or auxiliary in character.

[List of Exclusions as per Tax Treaties signed by India.](#)

Agency PE

Agency PE – Basic concept



- Question: Can country B tax part of seller's profit
- → Has seller an agency PE in country B

An enterprise should be treated as having a permanent establishment in a State if there is under certain conditions a person acting for it, even though the enterprise may not have a fixed place of business

Agency PE

India –USA Tax Treaty

Notwithstanding the provisions of paragraphs 1 and 2, where a **person—other than an agent of an independent status** to whom paragraph 5 applies - is acting in a Contracting State **on behalf of an enterprise of the other Contracting State**, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if

- a. he has and **habitually exercises in the first-mentioned State an authority to conclude** on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph
- b. he has no such **authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise**, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ; or
- c. he **habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise**.

Agency PE

Basics- Comparison

Particulars	OECD Model	UN Model	ITA – Business Connection
Authority to conclude contract	has and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise	has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise	has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident
Habitually maintain stock from which he regularly delivers	No such clause	has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise	has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident
Habitually secure orders	No such clause	No such clause	habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled

Agency PE

Basics - Comparison

Particulars	OECD Model	UN Model	ITA – Business Connection
Activity devoted mainly / wholly clause	No such clause	However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise , and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph	where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status

Agency PE

Basics

What is “Habitually Exercise”?

“Habitually” refers to a systematic course of conduct on the part of the agent and would mean repeatedly and “not in isolated cases”

Depends of the nature of the contract and business of the principal

Authority to conclude contracts

He has sufficient authority to bind the foreign enterprise and has powers to decide the final terms of the contract

While concluding contracts, he can act on his own, freely, and without control from the principal

He is authorized to negotiate all elements and details of a contract which are binding on the enterprise

Agency PE

Wholly or Mainly on behalf of Non-Resident

- OECD - What is relevant is that the agent's activities are for a single principal and not that the principal's activities are carried on by a sole agent.
- An agent acting wholly or almost wholly on behalf of a single entity or its group entity indicates a certain degree of dependence as such an entity may play a significant role in the business of the agent; accordingly such an agent would not fall within the scope of an independent agent.
- **OECD model commentary states that a person is independent only if he is so, legally and economically and acts in the ordinary course of business when acting on behalf of the enterprise**
- Legal independence indicates that the agent should not be under any legal obligation to render services to the principal. Where a person acts on behalf of the enterprise under some legal relationship and thus, is bound to work for the latter, he would be legally dependent on such principal.
- OECD - Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise
- The fact that the principal is relying on the special skill and knowledge of the agent is an indication of independence.
- Dependency is also determined by having regard to the extent to which the agent exercises freedom in the conduct of business on behalf of the principal within the scope of its authority

Agency PE

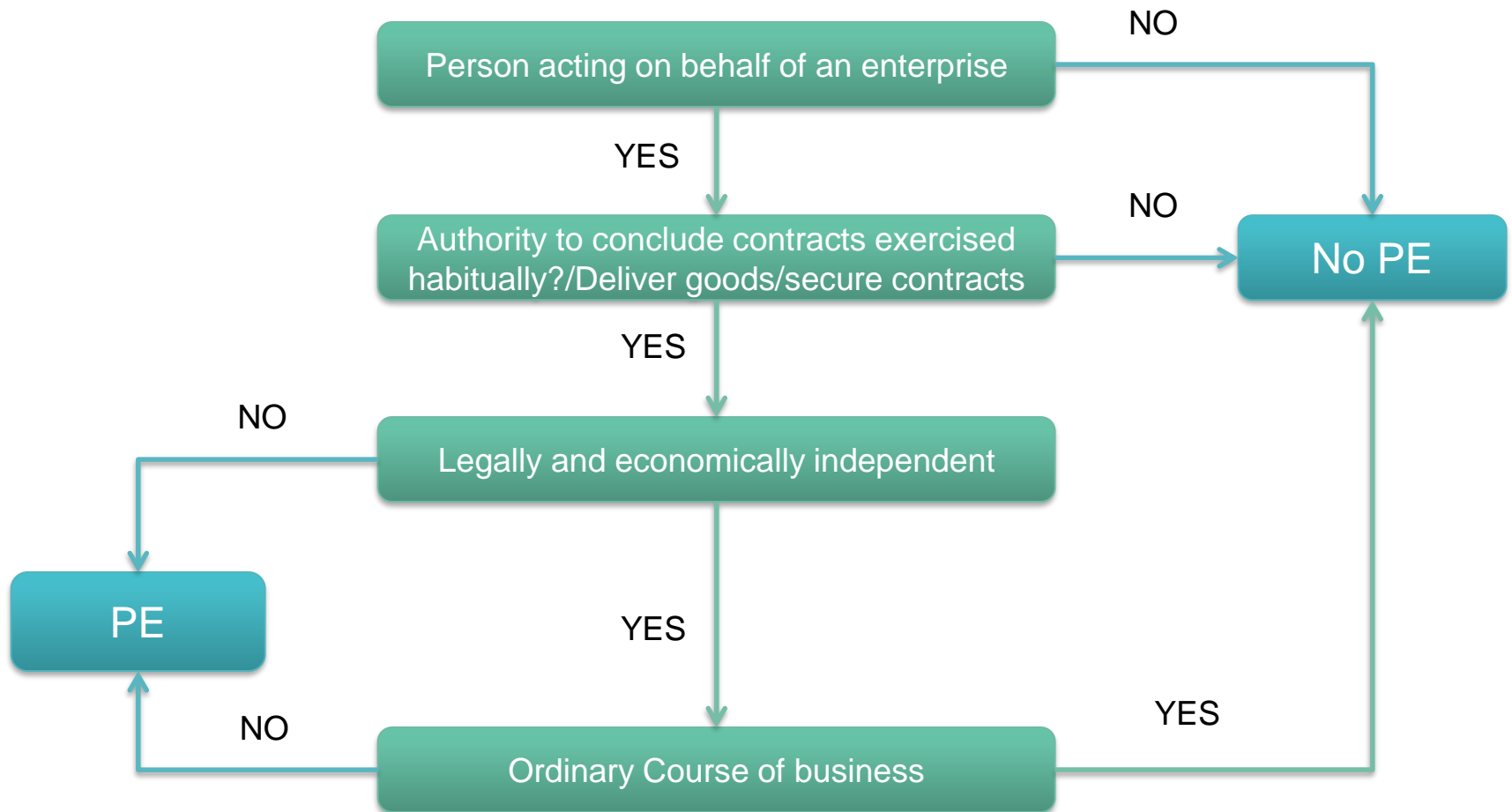
Economic Independence

- An agent predominantly acting for one enterprise would be economically dependent on the latter and hence, it would be a dependent agent, even though it may not be legally dependent

Ordinary Course of Business

- “ordinary means “normal”
- **Indian Evidence Act** – “the current routine of business usually followed by a person” or “ in which he was ordinarily or habitually engaged”
- An agent cannot be acting in “ordinary course” of his own business if he performs activities which economically belong to the sphere of the foreign enterprise rather than to that of his own business operations.

Agency PE Summary



Service PE

Service PE

- Service PE could be constituted in India where any enterprise:
 - ✓ *renders services in India (other than fees for technical/ included services)*
 - ✓ *to third party/ associated enterprise*
 - ✓ *through employees or other personnel*
 - ✓ *for a specified period*

Requisite period to constitute service PE	UN Model
Services rendered to Unrelated Enterprise	183 days
Services rendered to Associated Enterprise	183 days

Service PE

Checklist for determining existence of Service PE

Criteria	Check
Furnishing services other than Royalty / FTS	√
Services through employees or other personnel within state	√
No. of days the employees or other personnel furnishing services in India	√
Test of employment whether of the foreign company or Indian company	√
Service PE vis-à-vis Activities falling within Negative List of PE [i.e. preparatory and Auxiliary activities – Article 5(4) or combination thereof]	√

Majority of DTAA's signed by India which have a service PE clause specifically exclude income covered under Article 12/13 (Royalties and Fees for Technical Services)

Service PE

Treaties signed by India

India's treaty with	Exclusion for FTS*
Australia, Canada	Yes
Singapore, Swiss Confederation, UK	
USA	
China	
Namibia	
Sri Lanka, Syrian Arab Republic, Thailand, Botswana	No
Saudi Arabia	
Iceland, Nepal	
Norway	
UAE	

* FTS clause is absent in India's tax treaties with Belgium, Brazil, Malaysia,

Service PE

Secondment/ Deputation of Employees

Typical features of a Deputation

- An employee of enterprise X in State R is deputed to enterprise Y in State S
- Employee continues on the payroll of enterprise X
- Employee resides and renders services in State S
- Employee reports to enterprise Y
- Supervision, control and management of employee is with enterprise Y
- The employee may continue to be paid by enterprise X who in turn is reimbursed by enterprise Y
- Right of lien is on enterprise X

Service PE

Judicial Precedents

DIT vs. Morgan Stanley and Co. Inc. and Morgan Stanley and Co. Inc. vs. DIT (292 ITR 416) (SC)

- The Apex Court had held that where the activities of the foreign company entails it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service P.E. can emerge.
- In the above decision, the Court laid two tests, viz. **(i) responsibility for the work of assigned employee; and (ii) control over the assigned employee**, however, it did not bring out the facts / process which substantiates satisfaction of this two tests in the given case (except that it mentioned that having employee's lien over the original employment was assumed as the foreign company retaining control over the terms and employment).

DDIT v. JC Bamford Excavators Ltd. 43 taxmann.com 343 (Delhi ITAT)

- The Delhi Tribunal held that the deputed employees which were sent on Secondment basis to India continued to be on the payroll of the tax payer and maintained their lien on their employment. Salary for these employees was sole responsibility of the tax payer. There was no material to indicate that the tax payer terminated their services and they were employed by the Indian Entity.

Article 5(7) of OECD Model

Article 5 (7) of OECD Model

*“The fact that a company which is a resident of a Contracting State **controls or is controlled by a company** which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), **shall not of itself constitute either company a permanent establishment of the other**”*

Thank you