DELHI HIGH COURT HOLDS THAT 24 GE GROUP ENTITIES HAVE A PE IN INDIA

Recently, the Delhi High Court (the "**DHC**") upheld a judgment of the Delhi Bench of the Income-tax Appellate Tribunal (the "**Delhi Tribunal**") in the case of GE Energy Parts, Inc. (the "**Taxpayer**"). The DHC held that the liaison office established by the Taxpayer in New Delhi with the permission of the Reserve Bank of India would constitute a fixed place permanent establishment ("**PE**") as well as an agency PE for each of the twenty-four (24) group companies of the Taxpayer, incorporated in various countries, including the UK, Japan, the US, Canada, Italy, Mauritius and Singapore.

The case concerns the activities of seven (7) expatriate employees and their Indian support team. The expatriates were seconded (deputed) to India to act as country leader and fill in other senior positions for various global business divisions of GE. These persons were working for various direct businesses of GE in India, which were neither being conducted through a subsidiary nor a joint venture company.

All of the seven (7) expatriates and their Indian support team worked at the Taxpayer's office premises in New Delhi. In the course of a survey, the Indian tax authorities ("**ITA**") found that the expatriates had chambers/rooms allotted to them with their name plates affixed, which they were occupying on a consistent basis. Their respective laptops, computers and business documents were in their allotted rooms, and the rooms were at the constant disposal of these expatriates. Secretarial assistance and staff was also provided to them, and the Indian support team working under the direct control and supervision of the expatriates was also based in the Taxpayer's office premises.

From the Delhi Tribunal's order, it appears that the Taxpayer had lowered the designations and the roles and responsibilities of the expatriates, but the ITA's survey unearthed specific material showing that the sales activities for GE group companies were being conducted at the Taxpayer's premises.

Based on the foregoing, the DHC held that: (a) the activities carried out by the expatriates were substantial, core income generating and not merely of a preparatory or auxiliary character; (b) the expatriates were involved in understanding the customer's requirements, holding commercial and technical discussions, preparing proposals after negotiations on the technical and commercial aspects; and (c) concluding contracts on behalf of GE's overseas entities. The DHC concluded that the expatriates were heading the operations of GE's overseas entities in India and constituted a PE in India.

Note that this is not the usual "secondment" case which we have seen from time-to-time in India starting with the *Morgan Stanley* case a decade ago. The ITA did not assert that the non-resident companies (which are the formal employers of the expatriates) have a PE in India. Instead, the ITA focused on the actual role being performed by the expatriates together with their support team. The ITA looked at the job descriptions and job responsibilities, appraisal reports, performance assessments and e-mail correspondence that the expatriates had with their head offices and customers in India, which indicated that the expatriates were in full command of the marketing and sales activities in India and, in most cases, were not even allowing the GE overseas entities to interfere.

With respect to the attribution of income to an Indian PE, the DHC noted that the ITA had carried out the exercise of attribution in two parts: (i) the calculation of total profit from the sales made by the GE overseas entities in India, which was worked out at 10% applying Rule 10(iii) of the Indian Income-tax

Rules, 1962; and (ii) the attribution of this profit to the PE's marketing activities, which was taken at 35% of 10% (relying on the Delhi Tribunal's ruling in the *Rolls Royce* case). The DHC upheld the ITA's attribution of 10% in stage 1, but with regard to the stage 2 attribution, the DHC applied 26% of total profit in India as attributable to the PE, stating that the extent of activities by GE in making sales in India is roughly a quarter of the total marketing/sales effort.

As we see it, this ruling will infuse a lot more enthusiasm into the already aggressive nature of the ITA, and the ITA may initiate more surveys on taxpayers. Coupled with this, the ITA is also keen to implement the OECD's guidelines in Action 7 of the Base Erosion and Profit Shifting project relating to the artificial avoidance of permanent establishments by multinational corporations.

Interestingly, the ITA collected various details and information about the expatriates from social networking websites like LinkedIn as additional evidence in this case. This is an innovative measure and demonstrates that the ITA is mining information from social platforms and using it as evidence.

The key takeaways for foreign companies operating in India are:

- To put in place a detailed inter-company agreement between the parent and the Indian subsidiary;
- To the extent feasible, to place all expatriates on the payroll of the Indian subsidiary;
- To ensure that the parent's business is not carried out in the Indian subsidiary's premises;
- To ensure that the Indian subsidiary's day-to-day activities are not being managed by the parent or its employees;
- To ensure that employees adhere to strict social media policies; and
- To ensure that the parent undertakes only stewardship activities (limited to quality control activities, and briefing and providing preliminary training to personnel involved in delivering the services).