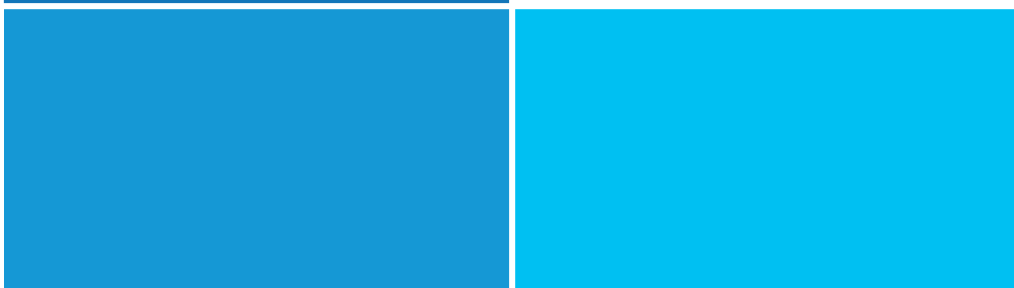
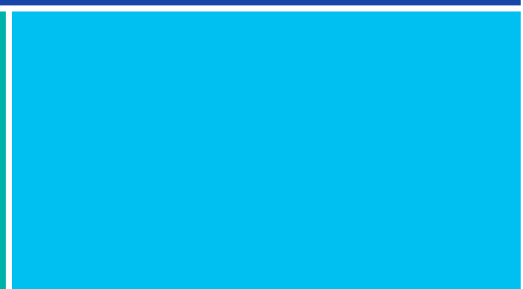
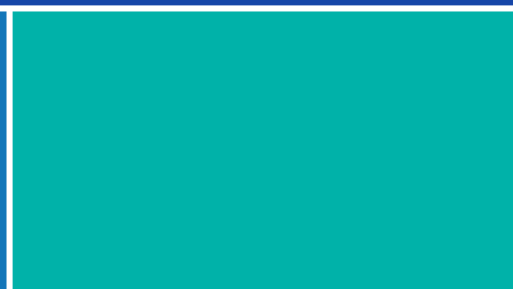


Recent Judicial Trends in PE and Profit Attribution to PE



Maulik Doshi



Glossary

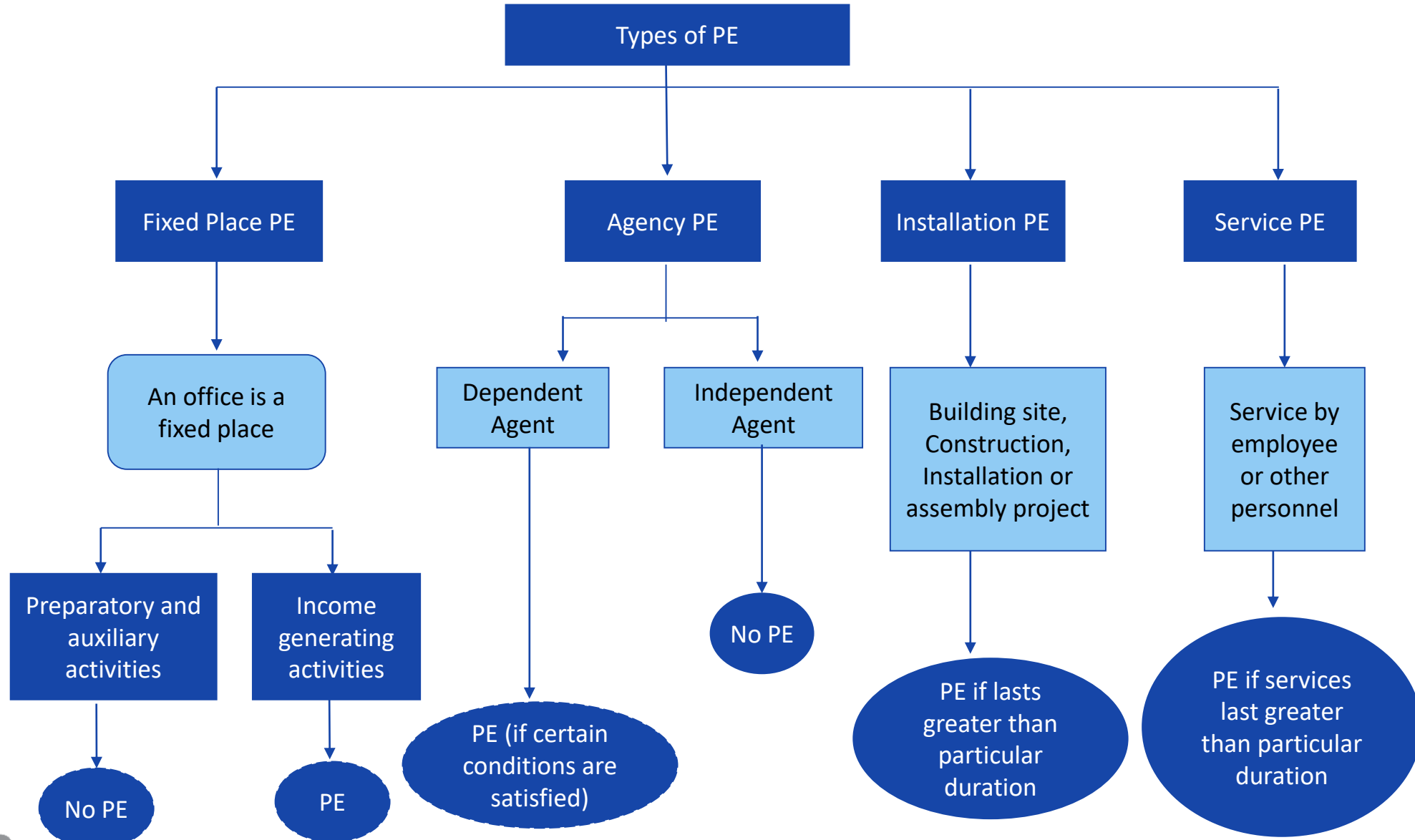
Abbreviations	Full Form
PE	Permanent Establishment
DAPE	Dependent Agent PE
OECD	Organization for Economic Co-operation and Development
LO	Liaison Office
AO	Assessing Officer/ Tax Officer
CIT(A)	Commissioner of Income-tax (Appeals)
DRP	Dispute Resolution Panel
AAR	Authority for Advance Rulings
SEP	Significant Economic Presence

Contents

- Permanent Establishment – Concept
- Attribution of Profits – Overview
- GE Energy Parts Inc
- Daikin Industries Ltd.
- ABB FZ-LLC
- MasterCard Asia Pacific Pte. Ltd
- Formula One World Championship Limited
- Way Forward



PE Concepts



▪ Fixed Place PE

- Definition - fixed place of business through which business of enterprise is wholly/partly carried on
- Fixed Place PE Tests – basis Interpretation of definition, various commentaries & judicial precedents
 - Business Test – Foreign enterprise must be conducting business activities in India
 - Place of Business Test – Foreign enterprise should have a ‘Place of Business’ in India
 - Disposal Test - Place of business must be “at the disposal” of foreign enterprise
 - Permanence Test – Place must be fixed and use of the same must last for a reasonably long period of time

▪ DAPE

- Dependent agent acting on behalf of foreign enterprise – Independent Agent Excluded
 - Independent Agent – Legal independence and economic independence
- Dependent Agent constitutes a PE, if any of the following test is satisfied
 - agent habitually concludes contract in India; or
 - Maintains goods in India for delivery; or
 - Agent habitually secures orders in India

PE Concepts

- **Installation/ Construction PE**

- If construction/ installation/ assembly activities continue in India **for specific number of days**, the foreign enterprise shall constitute a PE in India

- **Service PE**

- Furnishing of services through employees/other personnel by foreign enterprise in another jurisdiction **for specified number of days**

Attribution of profits - Overview

- No specific guidelines available to foreign entities to determine income attributable to operations in India
- Indian income tax law provides following methods, if attribution of income is not determinable
 - at such percentage of the turnover so accruing or arising as the tax officer may consider to be reasonable, or
 - any amount which bears the same proportion to the total profits and gain of foreign entities as receipts accruing or arising bears to total receipts of business; or
 - any other manner deemed suitable by tax officer

Attribution of profits – Overview

- OECD's approach
 - Ad-hoc Attribution of Profits
 - Based on extent of operations carried on by foreign enterprise in India
 - Ad-hoc percentage of turnover/gross revenue accruing or arising in contracting state
 - Formulary Apportionment
 - Treats enterprise as one unit and then seeks to apportion income among tax jurisdictions based on formula derived from a financial parameter
 - Attribution computed based on scientific formula
 - FAR Approach
 - Recommended by OECD
 - Hypothesizing Indian operation as a distinct & separate enterprise
 - **F**unctional & **f**actual analysis
 - Attribution of **A**ssets
 - Attribution of **R**isks
 - Attribution computed as per Transfer Pricing guidelines

Attribution of profits – Overview

Judicial Precedents

Ad-hoc attribution of profits

- Nipro Asia Pte Ltd vs DDIT (2017) 79 154 (Delhi Tribunal)
- Nortel Networks India International Inc vs DDIT (2014) 49 147 (Delhi Tribunal)
- ZTE Corporation vs ADIT (2016) 70 1 (Delhi Tribunal)
- Rolls Royce Singapore (P.) Ltd. vs ADIT (2011) 13 81 (Delhi)
- Anglo-French Textile Co. Ltd. vs CIT (1950) 18 ITR 888 (Madras)
- GE Energy Parts Inc v. CIT [TS-765-HC-2018 (Delhi)]

Formulary Apportionment

- Convergys Customer Management Group Inc vs ADIT (2013) 34 24 (Delhi Tribunal)
- E-Funds Corporation vs ADIT (2010) 42 SOT 165 (Delhi)

FAR Analysis

- Morgan Stanley & Co. (2007) 162 165 (SC)
- Hyundai Rotem Company vs ADIT (2012) 25 206 (Delhi)
- Arrow Electronics India vs ADIT (Bangalore IT Appeal Nos. 209 & 210 of 2001)

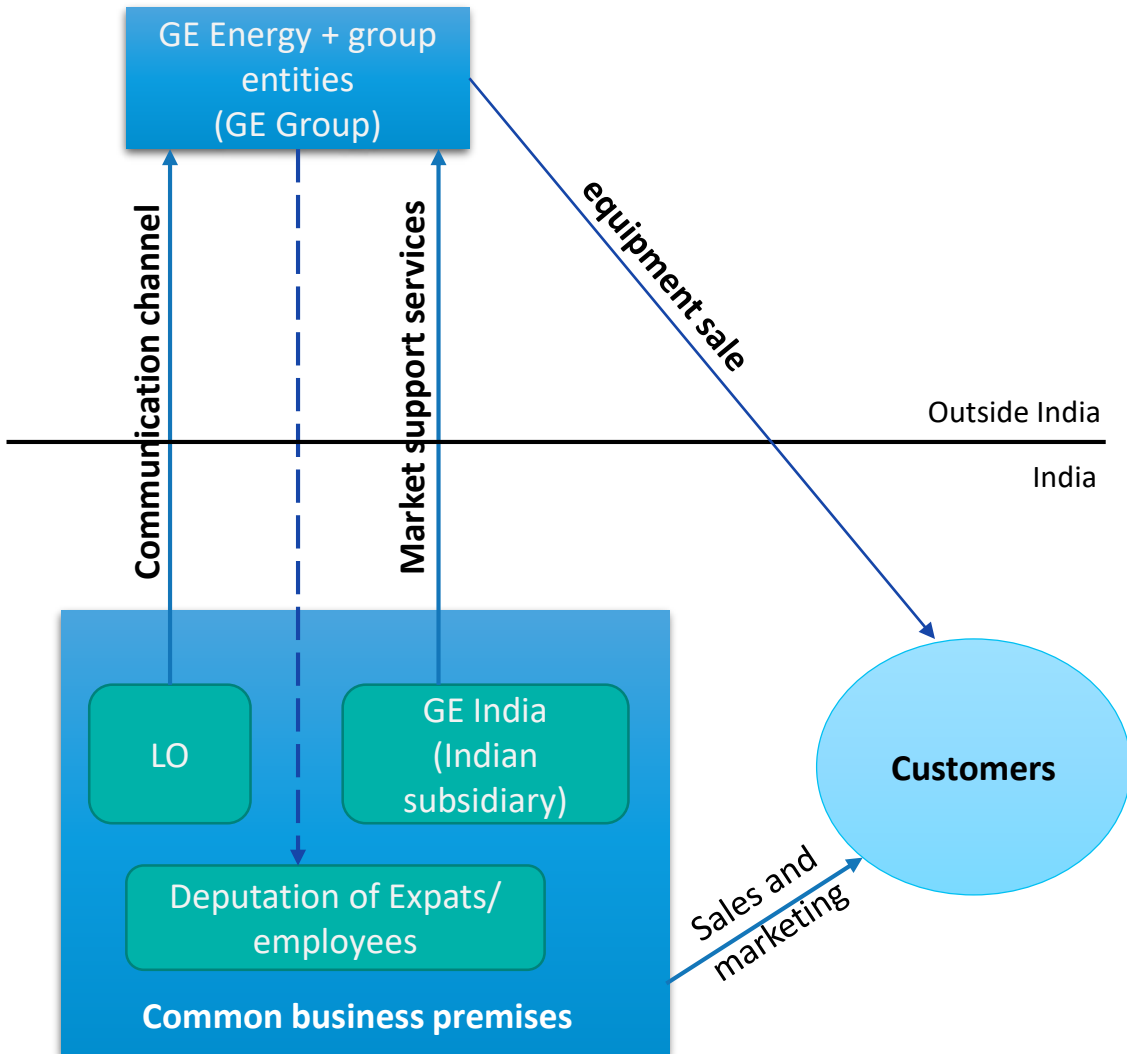


Recent Judicial Decisions in PE

GE Energy Parts Inc v. CIT TS-765-HC-2018 (DEL)

*Common office premises of LO, Indian subsidiary & expats constitutes fixed place PE
Subsidiary's authority to negotiate critical contractual terms constitutes DAPE*

Brief Facts



- GE Group is engaged in the business of manufacturing and off shore sale of highly sophisticated equipment
- GE Group supplies to worldwide customers including Indian customers on a principal to principal basis (title of goods passes to customers outside India)
- GE Group entity has a liaison office (LO) in India to act as communication channel only and not to carry on any business activity
- GE Group also had a legal entity in India (GE India) providing limited marketing support services to it
- Revenue conducted survey at LO – Key findings
 - certain expats & employees together carried out marketing activities in India from premises of LO and were also involved in negotiation of prices
 - GE Group had 12,000 employees in India and over USD 1 Billion in exports

Positions adopted by Lower Authorities & Issues before High Court

Authorities	Positions Adopted
AO	<ul style="list-style-type: none">▪ Fixed Place PE and DAPE in India▪ Deemed 10% of value of sales made to customers as profits earned in India and attributed 35% of said profits to PE in India
CIT(A)	Upheld order of AO
Tax Tribunal	<ul style="list-style-type: none">▪ Expats & some employees were carrying out core business activities (not auxiliary) from premises of LO▪ GE India concluding contracts on behalf of GE Group and thus held as DAPE▪ Upheld AO's estimation of profits but reduced attribution of profits from 35% to 26%

Issues before Delhi High Court

- Whether taxpayer had a fixed place PE in India?
- Whether Indian subsidiary of taxpayer constituted DAPE in India?
- Whether attribution of profits to extent of 26% was justified?

Taxpayer's Contention

Activity - core business/ preparatory or auxiliary

- Whether activities are preparatory and auxiliary in nature – needs to be looked at basis role of activity vis-a-visa overall function and not in isolation
- Overall business of taxpayer is research and development, design, fabrication and manufacture all of which happens outside India - activities in India restricted only to small sales function
- OECD Commentary states that mere participation of employees in negotiation (part of sales function) does not lead to formation of Fixed Place PE or DAPE

Independent Agent

- Independent agent would mean agent of independent status acting in ordinary course of business (i.e. not acting exclusively or almost exclusively on behalf of an enterprise)
- Revenue's argument that GE's expats and employees constitute DAPE of 24 GE entities is self defeating
- GE India also carries out 12 other business functions – cannot be said to be dependent

Taxpayer's Contention

DAPE

- Merely because expats/ employees were found in common business premises, cannot be assumed that sales were also made from said premises
- Participation or negotiation of few terms (not all terms) of contract by expats/ employees does not result in PE
- For fixed place PE, disposal test (fixed place) and business function test (nature of activity) have to be satisfied simultaneously
- Authority to negotiate differs from authority to conclude contracts and without latter, Indian subsidiary cannot bind taxpayer (relied on UN commentary + settled law in India)

Revenue's Contention

Activity - core business/ preparatory or auxiliary

- Activities carried out in India through expatriates of sales and marketing are core activities and integral part of the business
- Marketing activity carried out in India contributes the revenue of business – cannot be considered as preparatory and auxiliary

DAPE

- Expats deputed to India were 'Country Heads' and highly qualified – heading operations of GE Group
- Expats were involved in activities such as negotiating crucial terms of contract, discussing MOD terms of MOU with Indian customers, submissions of bids, etc.
- All sales related activities are not carried outside India – important sales activities are carried out in India

Whether LO constituted fixed place PE in India

- Three test to be satisfied for fixed place PE
 - Enterprise must have a Fixed place of business – LO being at constant disposal of expats constituted a fixed place of business
 - The business of the enterprise must be wholly/partly carried on through the fixed place – Business was carried out through the place available at disposal, hence this test is satisfied
 - The fixed place of business must not be solely for activities which have a preparatory or auxiliary character – Based on the survey documents it was held that activities carried on in India (such as negotiation of contracts, developing market strategy, etc.) were core activities and cannot be considered as preparatory and auxiliary

Delhi High Court – Decision

Whether GE India constituted DAPE in India

- Independent Agent Argument – Court held that entity can be considered “devoted wholly or almost wholly” even if devoted to several related enterprise of the same group
- OECD Commentary provides that merely participation in sales meeting would not result in conclusion of contract – India has made a reservation to this observation
- In light on contradiction – High Court did not rely on OECD Commentary
- Relied on Ministry of Finance (Tax Office) vs Philip Morris (GmbH) – even in absence of formal authority to conclude contract, participation in sales meeting/negotiations in some case would lead to conclusion of contracts

Whether attribution of profits as high as 26% was justified

- Year wise India specific accounts were not available – as accounts were not maintained in all countries
- Court held that attribution has been discussed in detail in lower authorities orders – as far as attribution is fixed based on relevant material on record, no intervention is required

Food for thought

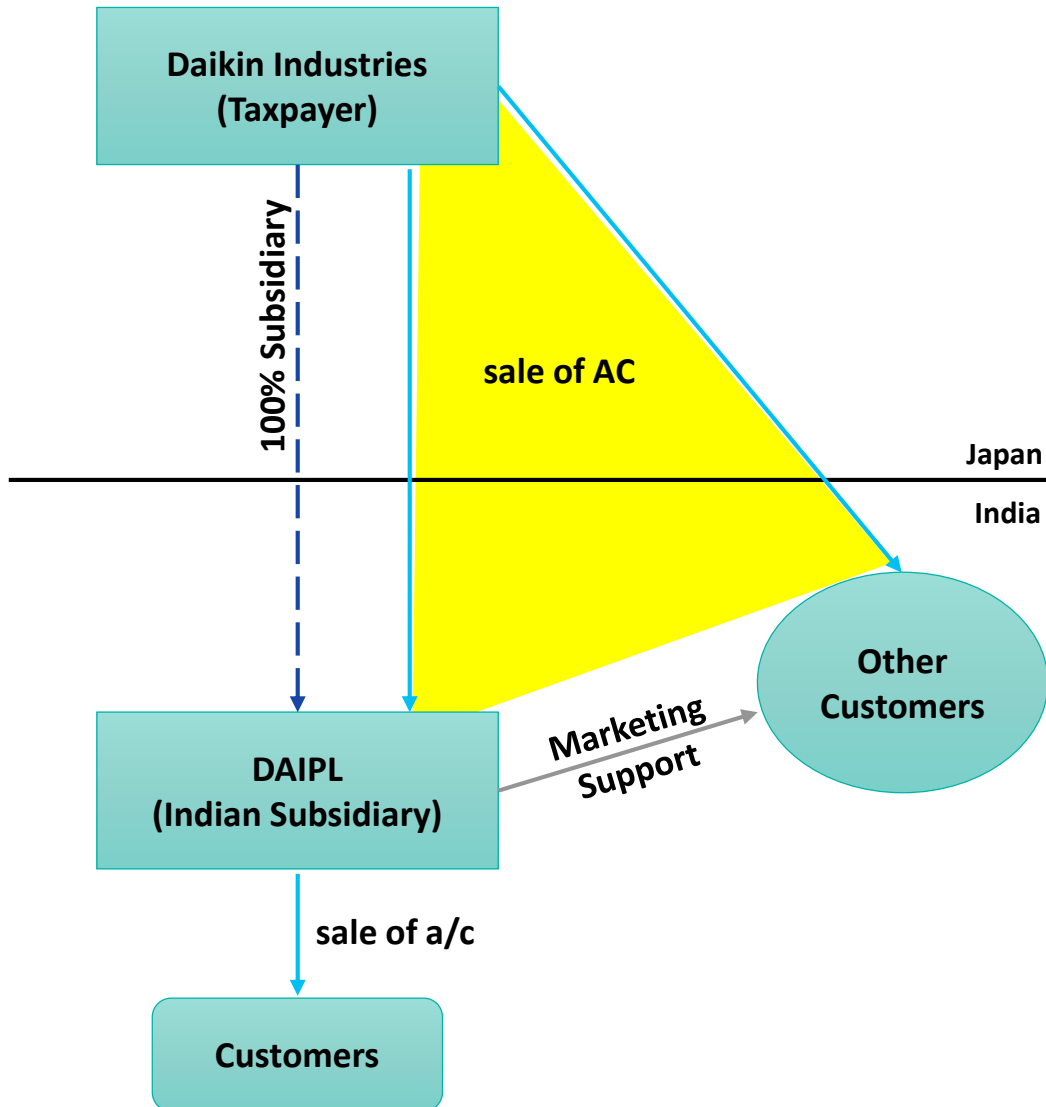
- Judicial Authorities moving from rule based approach to substance based approach
- Whether expanded definition of DAPE implicitly applied by judicial authorities
 - Term “principal role” not defined – how far it can go?
 - Whether courts would apply this principal – irrespective of amendment of tax treaties?
- Few Indian Tax Treaties amended on similar line as per BEPS project (Japan, Netherlands, France etc.)

Daikin Industries Ltd. v. ACIT TS-274-ITAT-2018(DEL)

Indian Subsidiary held to be DAPE

Attribution of income to DAPE - Transfer Pricing Study considered inadequate

Brief Facts



- Taxpayer (Japanese Company) engaged in development, manufacture, assembly and supply of air-conditioners (AC) & refrigeration equipment
- Taxpayer sold AC to DA IPL (100% Indian subsidiary) and to third party Indian customers directly
- Taxpayer paid commission @ 10% to DA IPL for direct sales in India
- DA IPL was providing marketing support services in India w.r.t direct sales made by taxpayer
 - forwarding customers request, quotation and contractual proposal etc
- AO held DA IPL as DAPE of taxpayer in India & also attributed some portion of income to DAPE in India

Issues before Delhi Tribunal

Issues before Delhi High Court

- Whether DA IPL constituted DAPE of taxpayer in India as per India-Japan tax treaty?
- Whether attribution of profits to DAPE is required even when DA IPL remunerated at arm's length?

Taxpayer's Contention

- DA IPL was merely acting as a communication medium between taxpayer and customers in India
 - Role of DA IPL was limited to forwarding customer's requests, quotations, etc.
- Important activities like identifying customers, negotiation, finalization of prices with customers in India, etc, was exclusively done by taxpayer from Japan
- Certain employees of taxpayer visited India to carry out certain activities like negotiation and finalization of prices
- Alternate argument
 - Payment of commission to DA IPL – accepted by transfer pricing officer to be at arm's length in the case of DA IPL
 - Payment of commission to DA IPL at arm's length - no further attribution of profits to DA PE was required (reliance placed on Supreme Court Decision of Morgan Stanley & Co)

Revenue's Contention

- Price charged by taxpayer for goods sold directly to customers in India was higher than price charged to DA IPL
- All major activities related to direct sales in India were done by DA IPL along with its distribution activity
 - No substantial evidence produced by taxpayer to negate this fact
- Employees deployed in India rendered consultancy services for which DA IPL was charged separately by taxpayer
 - No evidence provided to prove that employees of taxpayer visited India to execute direct sales
- Emails pertaining to sales transactions with customers were routed through DA IPL and not directly through taxpayer
- DA IPL was habitually exercising authority in India by negotiating and finalizing prices although these contracts were formally signed by taxpayer in Japan

On constitution of a DAPE in India

- DA IPL incurred huge marketing expenditure while distributing products in India vis-à-vis taxpayer which did not incur any such expenditure while making direct sales in India though customers were scattered all over India
- Taxpayer was making direct sales to small customers along with institutional customers
- Observations on emails exchanged between taxpayer and DA IPL
 - DA IPL was involved in all essential activities involved in a sale transaction (customer identification, negotiation of prices, etc) and not merely acting as a communication channel
 - Not even one email between taxpayer and customers in India to justify claim of making direct sales
 - Emails explicitly evidenced that all transactions were negotiated and finalized by DA IPL only
- Mere signing of contracts by taxpayer outside India does not imply that related activities were performed by taxpayer
- Tribunal held that DA IPL to be a DAPE – as it was habitually exercising authority to conclude contracts in India

Delhi Tribunal – Decision

On attribution of profits to PE in India

- Question of payment of commission at arm's length does not arise as taxpayer did not maintain transfer pricing documents in India
- Determination of arm's length price by transfer pricing officer in case of DA IPL was based on functions declared by DA IPL
 - Functions of negotiation and finalising of price, concluding contracts, etc. were neither declared nor they were arising from the agreement
 - had all functions were considered, FAR analysis would have undergone a complete change
- Tribunal rejected the manner of attribution – estimated 10% profit rate and then attributed 30% of such net profit to Indian operations

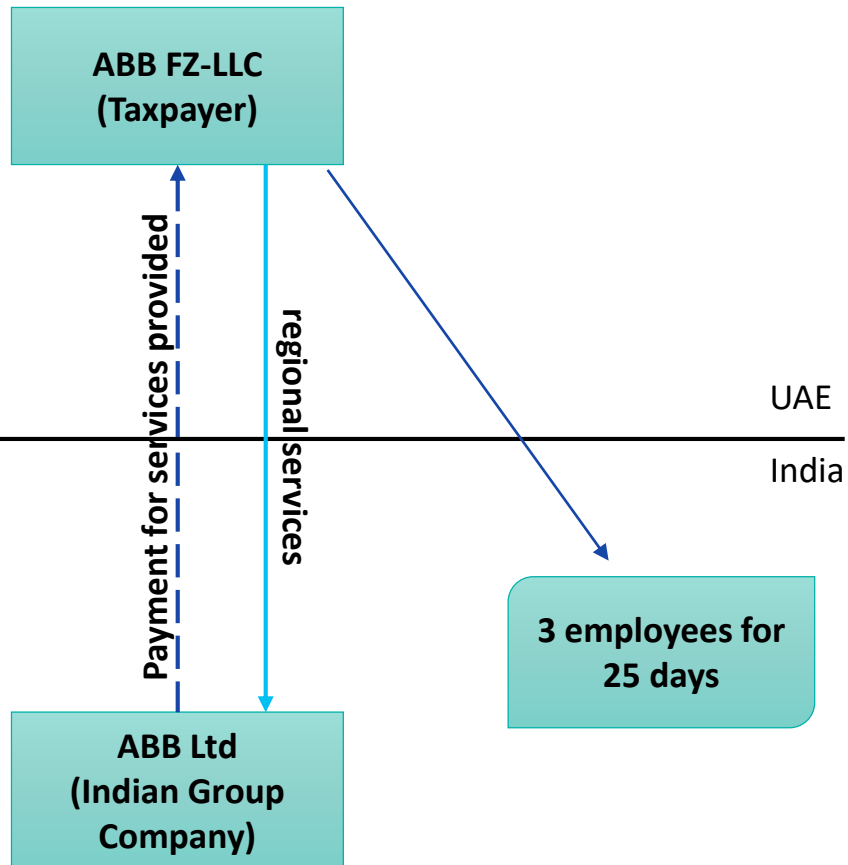
Food for thought

- **Importance of transfer pricing documentation – mere compliance not relevant, should capture entire flow of value chain**
- **Negotiating/ concluding contract can be part of agency agreement – whether this can be appropriately benchmarked**

ABB FZ-LLC v. DCIT [2017] 83 taxmann.com 86 (Bangalore Tribunal)

Virtual Service PE examined

Brief Facts



- Taxpayer (UAE company) was providing specified services as per the regional service agreement for benefit of ABB legal entities in India, Middle East and Africa
- Services were provided by taxpayer mainly from outside of India over telephone, conference calls and e-mails
- Three employees of taxpayer visited India for total of 25 days
- In absence of FTS Article in India-UAE tax treaty, taxpayer claimed said amount as non-taxable in India as per Article 22 of Tax Treaty (other income)

Positions adopted by Lower Authorities & Issues before Tribunal

Authorities	Positions Adopted
AO	Amount received from ABB Ltd taxable as FTS under ITA Or taxable as royalty under ITA and tax treaty
DRP	FTS + Royalty + Service PE

Issues before Bangalore Tribunal

- Whether taxpayer has service PE in India even where presence in India is less than threshold provided under India-UAE tax treaty?

Bangalore Tribunal - Decision

- Condition of having a fixed and permanent place of business is not a pre-requisite for having service PE as both clauses are independent of each other
- Services can be rendered without physical presence of employees of taxpayer since services can be provided via various virtual modes (like email, internet, video conference, remote access, etc.) in present age of technology
- India-UAE tax treaty does not require stay of employees in India in excess of 9 months but rendering of services or activities for a period of 9 months within any 12 month period was required to be met
 - Once activities of taxpayer commenced in January 2010 it was not expected to complete nine months before March 2010
 - Completion of 9 months activities could only be conceived in a period of 12 months
 - Service PE dependent on continuation of activity for same project or connected project in excess of 9 months within any 12 month period

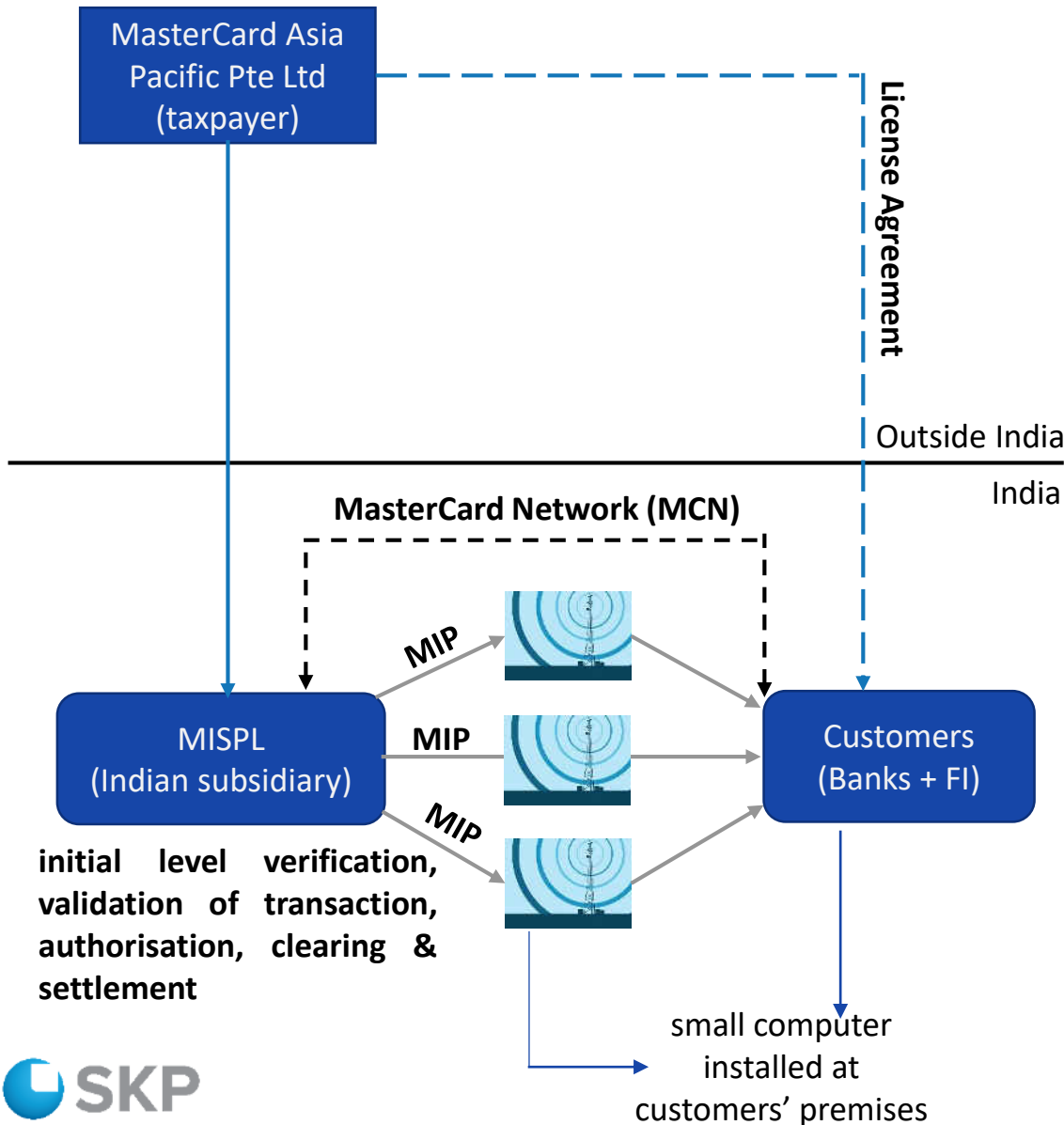
Food for thought

- India-UAE tax treaty wordings
 - the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel ***in the other Contracting State***, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period
- India-USA tax treaty wordings
 - the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), **within a Contracting State** by an enterprise through employees or other personnel, but only if:
 - (i) activities of that nature **continue within that State** for a period or periods aggregating more than 90 days within any twelve-month period ; or
 - (ii)
- Whether tax treaty is required to be read literally or liberally?
- Clear condition of providing services in other contracting state – physical test required to be satisfied
- Whether correct interpretation of law?

MasterCard Asia Pacific Pte. Ltd. [2018] 94 taxmann.com 195 (AAR)

Transaction Processing equipment constitutes PE in India

Brief Facts



- Taxpayer (Singapore Company) was providing transaction processing services relating to authorisation, clearing and settlement of card transaction
- Income received by taxpayer
 - Transaction processing fees
 - Assessment fees (for building and maintaining network governing transaction processing)
 - Miscellaneous fees (for providing other ancillary services)
- Certain activities were carried out in India through LO now transferred to Indian subsidiary (MISPL)
 - initial level verification, validation of transaction, authorisation, clearing and settlement

Brief Facts

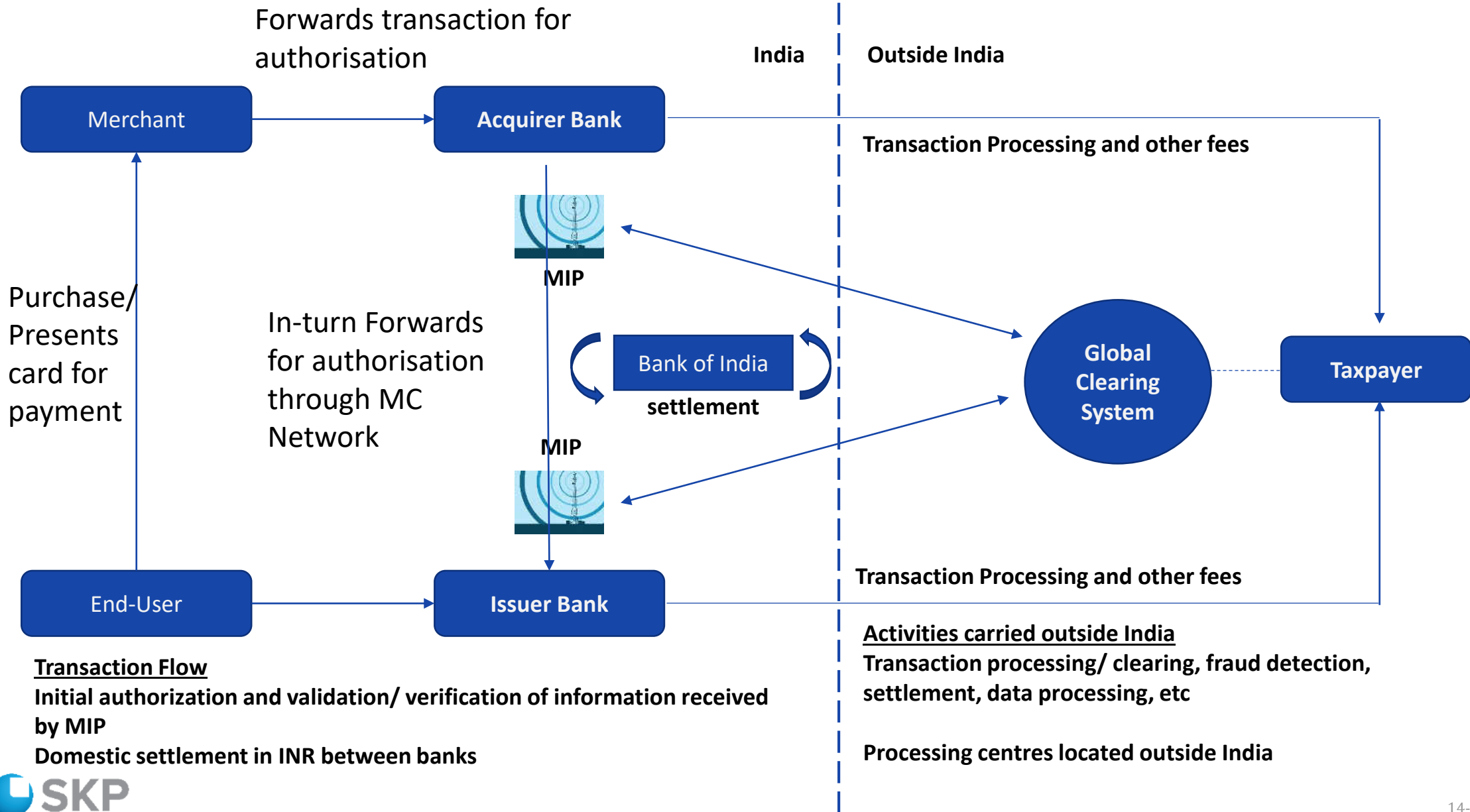
- MCN in India includes following
 - Master Card Interface Processor (MIP) – Owned by taxpayer and leased to MISPL. This is installed by MISPL at premises of banks
 - Application Software (Master connect and Master Card file express) – owned by the taxpayer
 - Transmission towers, leased lines, fibre optic cables, etc. – owned by third parties and used for transmission
- Global Card Network – Servers and related equipment's was located outside India

Issues before AAR

Whether taxpayer had a fixed place PE in India as per India-Singapore tax treaty on account of following ?

- MIP located at customer's premises
- MasterCard Network
- Indian subsidiary
- Banker's premises

Stages in Transaction Processing



Taxpayer's Contention

- No PE in India as functions performed by MIP & MCN were preparatory and auxiliary in nature
- MCN was located outside India, consisting of server and related equipment
- Existence of equipment within India vis-à-vis equipment and the network existed outside of India was very small
- Related network (like transmission towers, leased lines, fibre optic cables, etc.) – not owned by taxpayer
- Settlement of all transactions completed outside India through processing centres located outside India – task carried out by banker in India was insignificant
- Indian subsidiary performed only marketing support services in India and was not involved in conclusion of contracts on behalf of taxpayer
- Employees of applicant visited India for stewardship activities

Revenue's Contention

- Taxpayer constituted fixed place PE in India through MIP
 - Taxpayer carries out its authorisation activity in India through MIP - MIP is at disposal of taxpayer
 - No requirement of owing the MIP – Reliance on OECD and FOWC decision
- Taxpayer constituted fixed place PE in India through MCN
 - Entire MCN Network in India is available at disposal of the tax payer (irrespective of the ownership)
- Taxpayer constituted fixed place PE in India through Bankers premise
 - Bank of India space also constitutes a fixed place PE – 90% of settlement activity takes place through employees of Bank of India
 - Taxpayer is responsible if there is any error – thus space in BOI where settlement is happening is at disposal of taxpayer
- Taxpayer constituted dependent agent PE owing to activities carried out through its Indian subsidiary (MISPL)

Fixed Place PE - Through MIP and MCN

- Ownership factor (owning MIP) not relevant to determine existence of PE - if other tests satisfied
- MIP passes the tests of permanency as they are placed at customers site permanently – permanence does not imply that it has to be fixed to the ground
- Disposal Test
 - MIP's shown to be owned by Indian subsidiary – FAR profile of Indian subsidiary only shows that it is performing support activity and not actual transaction processing – means that authorisation process controlled by taxpayer
 - Taxpayer indirectly controlling MIPs through licensing agreement and mastercard rules
 - No agreement between banks and Indian subsidiary for MIP's
 - All costs of maintenance of MIP charged back to taxpayer through cost plus mechanism
 - Sufficient to have control over MIP if it was 'at the disposal' of taxpayer
- Based on the above, even though MIP is owned by Indian subsidiary – under effective control of taxpayer

Fixed Place PE - Through MIP and MCN

- Role played by MIP is significant one in facilitating authorisation process – activities cannot be considered as preparatory and auxiliary
- Fixed place not required to be involved in all three stages (authorisation, clearing and settlement) – Involvement even in one stage can create PE, if the activity is significant
- Distinction of three stages would be important for attribution and not for determining PE

Fixed Place PE - Through MISPL (i.e. Indian Subsidiary)

- Earlier LO was admitted as PE and 100 percent of its income was attributed to PE
- On transfer of all assets and employees by LO to MISPL, some functions and risks related to transaction processing (earlier carried out by LO) were subsequently carried out by MISPL though not shown in its FAR profile
- MISPL meets “disposal” test – MISPL was carrying on taxpayer’s work
 - Facility, service, personnel and premises were at the disposal of taxpayer

Fixed Place PE - Through Banker's Premises

- Significant activity of transaction process (>90% of actual movement of funds) performed from banker's premises
- Settlement was done in India as net position already known and banker posted entries in India
- Banker had dedicated team and space to perform settlement function, as per direction and on behalf of taxpayer
- Taxpayer was responsible for any error during settlement activity of banker

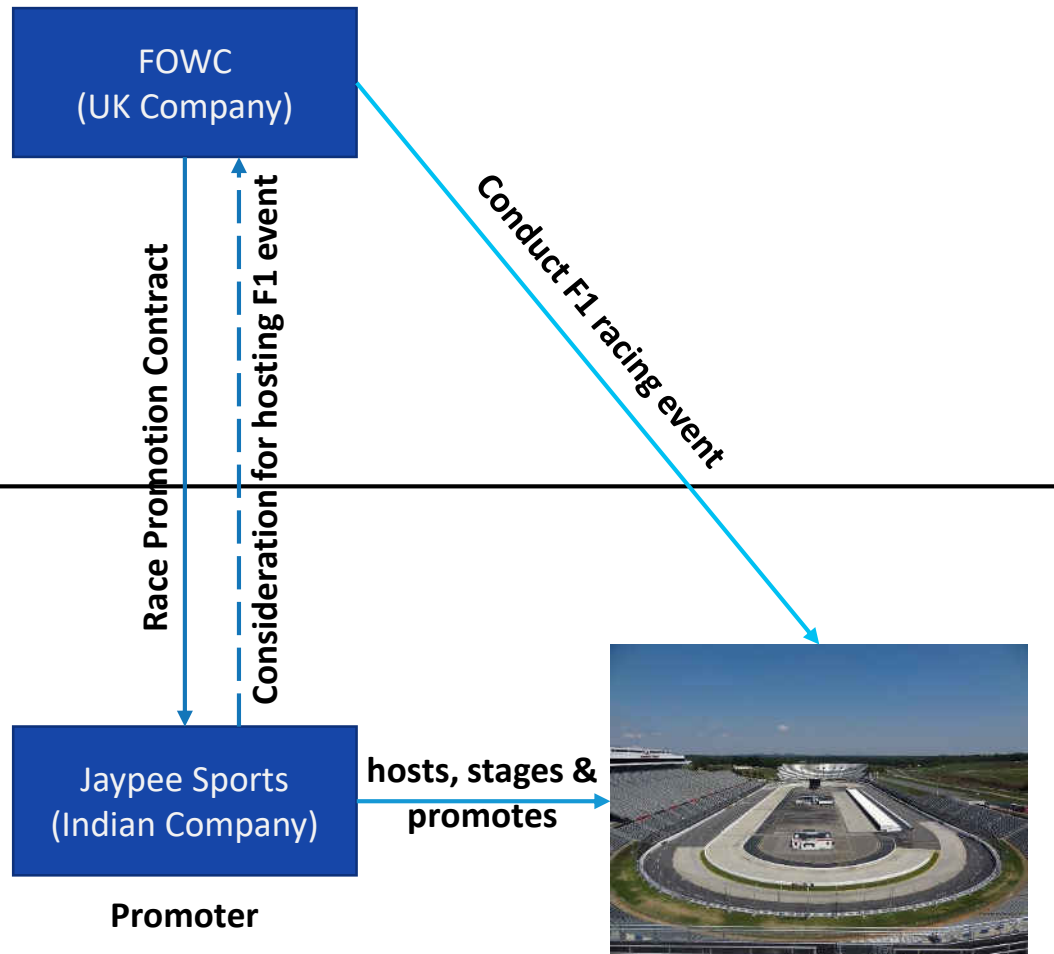
Food for thought

- **Equipment's can constitute PE in India – how to determine control over equipment?**
- **Digital/ E-commerce platforms/ business models may have a PE risk?**

Formula One World Championship Ltd. v. CIT [2017] 80 taxmann.com 347 (SC)

Motor car racing track held as PE of taxpayer

Brief Facts



- FOWC (UK company), FIA and FOAM entered into certain agreements for exploiting commercial rights arising out of F1 events across globe
- FOWC entered into Race Promotion Contract (RPC) with Jaypee Sports (Indian Company)
 - Rights to host, stage and promote Formula 1 Grand Prix event granted for USD 40 mn
- FOWC also entered into Artworks License agreement permitting Jaypee to use certain marks and IP for USD 1 mn

Brief Facts

- Key aspects of RPC
 - Racing Circuit to be constructed in form and manner approved by FIA and FOWC
 - Jaypee Sports to ensure pit, paddock buildings and surrounding areas within Racing Circuit and land are open to receive competitors, FOWC, its affiliates, etc. at all times 14-days prior to race and 7-days after race (Access Period)
 - Access to certain parts of Racing Circuit (not open to public) was authorised by passes issued by FOWC
 - During Access Period - Jaypee Sports/others not allowed to record sound/audio-visual footage of event – FOWC can carry out these activities
 - Jaypee Sports prohibited from displaying any advertisement if it prevents lawful transmission of events – opinion of FOWC would be final

Positions adopted by Lower Authorities & Issue before Supreme Court

Authorities	Positions Adopted
AAR	<ul style="list-style-type: none">▪ FOWC does not have PE in India<ul style="list-style-type: none">▪ No business activity carried on by FOWC in India▪ FOWC did not authorize any entity to conclude contracts on its behalf▪ Consideration paid to FOWC are in the nature of Royalty
Delhi High Court	<ul style="list-style-type: none">▪ FOWC has fixed place PE in India as per India-UK tax treaty▪ Consideration paid to FOWC are not in the nature of Royalty

Issue before Supreme Court

Whether Racing Circuit on which Formula 1 event was being hosted constituted PE in India?

Taxpayer's Contention

- Jaypee Sports along with its own engineers, architects etc. and at its own expense constructed, owned and controlled Racing Circuit
- Jaypee Sports utilised circuit not only for championship but also for other events organised on regular basis all round the year
- All rights for hosting and staging event exclusively with Jaypee Sports - Racing Circuit constructed in form and manner approved by FIA and FOWC only to comply with regulations
- All obligations for conduct of Championship were to be discharged by Jaypee Sports - FIA only controlled the manner in which it was to be conducted
- FOWC not in the business of organising races - Racing Circuit could not be PE of FOWC
- Even if accepted that FOWC had control over the Circuit – 3 day event cannot be termed as PE
 - Such sports events held in other countries were never taxed in those countries

Revenue's Contention

- Racing Circuit was at the disposal of FOWC to constitute Fixed Place PE
 - FOWC was carrying out business activity (conducting F1 racing event in India)
 - entire Circuit was exclusively booked by FOWC for period of two weeks before and one week after event (no other event could take place at that time)
 - FOWC or its personnel or agents had full access to Circuit during this period
 - provision of various services like travel, transport, liaison and supervision of other parties, etc by FOWC and its affiliates
- Rights to 'host, stage and promote' event granted to Jaypee Sports was only to give an impression that Jaypee Sports was under control of affairs - In reality these rights vest with FOWC
- FOWC had granted some rights to one of its group entities for providing various services if it had no control over racing event - this showed physical management of business

Supreme Court – Decision

- Joint reading of various agreements reveal transaction between parties involved and clearly demonstrates control of FOWC (plus affiliates) over the entire event
 - Jaypee Sports' capacity to act was extremely restricted as FOWC had exclusive access to Racing Circuit along with spaces where teams were located at all material times
- Racing Circuit constituted fixed place where F1 racing event was conducted
 - Racing Circuit was a virtual projection of FOWC on Indian soil
 - FOWC had control over the fixed place
 - Control over fixed place cannot be trivialised for the reason of its short duration – duration of the agreement was 5 years which can be extended for another 5 years
 - Even though duration was less – FOWC had entire control during that period
 - Relied on international jurisprudence to conclude that FOWC has a PE in India as basic characteristics (like Stability, Productivity and Dependence) of PE were present

Food for thought

- **Relevance of Permanence Test?**
 - **Whether fixed time period or business activity?**



PE – Future

- Taxation of digital economy - burning tax issue worldwide and lack of international consensus creating vacuum of uncertainty
- India introduced SEP in 2018 budget – not free from ambiguities

What constitutes SEP

- Transaction in respect of any goods, services or property carried out by a non-resident in India, including provision of download of data or software in India if the aggregate payments exceed amount prescribed
- Systematic and continuous soliciting of business activities or engaging in interaction with prescribed number of users in India through digital means.

Challenges / Difficulties

- Law applicable from April 2018 - threshold limits not prescribed till
 - Suggestions taken from stakeholders in August 2018
- Definition wide – may even cover physical transactions
- Phrase ‘systematic and continuous’ - subjective and ambiguous
- Profit attribution – can be a litigation area
- Tax Treaties – may not apply till tax treaties are amended

DAPE – Definition Expanded

- Sales & Marketing subsidiaries, commission agent arrangements – Indian Revenue Authorities alleging Dependent Agency PE (DAPE)
- India expanded DAPE definition under local laws in line with BEPS recommendation in 2018 budget

DAPE Definition – Before & After

- **Prior to amendment** - DAPE constituted only when
 - agent habitually concludes or secures contract in India; or
 - Maintains goods in India for delivery
- **Post Amendment** - DAPE constituted when
 - agent habitually concludes or secures contract in India or plays a principal role in concluding contracts; or
 - maintains goods in India for delivery

Challenges / Difficulties

- Term “principal role” not defined
 - Uncertainty over approach of income-tax authorities
- Wide coverage –
 - Covers service contracts
 - Covers situation where contracts are in the name of an Indian Party but majority obligations under the contract are to be fulfilled by the foreign company
- Few Indian Tax Treaties amended on similar line as per BEPS project (Japan, Netherlands, France etc.)

Concluding Remarks

- Future of PE – Challenging
- Significant litigation in PE cases related to Physical presence – with Digital presence the litigation would be disproportionate
- MLI expanding the scope of PE – Indian tax authorities approach?
- Old business models would be tested now and may not be relevant
- Constant need for business models to evolve
- Compliances in case PE established are critical even if there is no tax effect
- Role of robust transfer pricing study very important to mitigate any further tax exposure



SKP Credentials

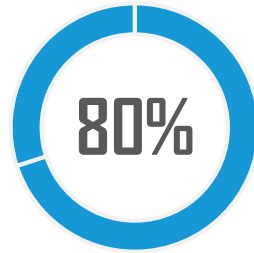
AN OVERVIEW OF SKP



PROFESSIONAL SERVICES
GROUP



1200+
CLIENTS ACROSS
45+ COUNTRIES



INTERNATIONAL CLIENTS



1000+ PEOPLE
23 PARTNERS



PARTNER-LED
APPROACH

Your global implementation partner with a passion for solutions

SERVICES

Business Advisory

- Business Consulting
- Greenfield
- Restructuring
- Transaction Advisory
- Project Management

Assurance

- Governance, Risk & Compliance
- Forensic
- Internal Audit
- Process Consulting
- IT risk advisory

Tax & Regulatory Services

- Advisory, compliance and litigation support:
- Direct Tax
 - Indirect Tax
 - Transfer Pricing
 - Regulatory Services

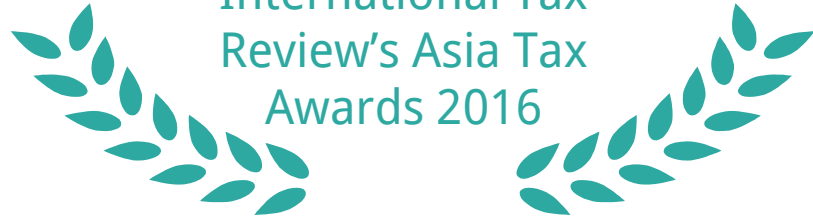
Business Services

- Corporate Services
- Accounting
 - Payroll
 - Compliances

- Business Process Management
- Finance and Accounting
 - Global Payroll & Compliance
 - Contract Management

SELECT RECOGNITIONS AND AWARDS

Winner of India Tax Firm of the Year at the International Tax Review's Asia Tax Awards 2016



Winner of "Advisory Project of the Year 2017" - International Accounting Bulletin



Listed among the leading tax firms in India every year from 2009 to 2016 in International Tax Review's World Tax guide



Winner of Nexia International's Firm of the Year Award 2015



Listed among the leading transfer pricing firms in India in TPWeek's World Transfer Pricing guide from 2014 to 2016



Tax Services

Set-up & Transaction Advisory

- Inbound Structuring
- M&A Tax
- EPC Contracts
- BEPS Advisory
- Profit Repatriation

Transfer Pricing

- Global Policies and Documentation
- APA and CA negotiations
- Efficient Supply chain structuring
- Benchmarking Services

Business Tax

- Corporate Tax Returns
- Withholding Tax Compliances
- Global Mobility & Expat
- HNI Tax & Succession Planning

Indirect Taxes / GST

- Efficient Supply chain
- GST Advisory and Structuring
- Foreign Trade Policy & Incentives
- Compliances & Representation

Representation & Litigation Support

- Revenue Audits & Appeals
- Lower / Tax Exemption Certificates
- Exchange Control Approvals & Compounding

Outbound Solutions

- Outbound Investment Structuring
- Global business registrations
- Tax compliance management



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