

India; United Arab Emirates

High Court: UAE Taxpayer Has PE in India, Income under Strategic Agreement Not Royalty

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Report from our correspondent Urvi Asher, Chartered Accountant, India

The Delhi High Court (HC) has ruled, in the case of *Hyatt International-Southwest Asia Ltd v. ADIT (ITA 216/2020)*, that the UAE based taxpayer had a permanent establishment (PE) in India in terms of the Strategic Oversight Services Agreement (SOSA) executed with an Indian entity. Furthermore, payments received by the taxpayer under SOSA were not in the nature of royalty under the [India-United Arab Emirates Income and Capital Tax Treaty \(1992\)](#) (the Treaty), rather they were in the nature of business income.

(a) Facts. The taxpayer, a UAE tax resident, executed the SOSA with an Indian company (owner of the hotel Hyatt Regency, Delhi) for provision of strategic planning services and know-how in respect of said hotel, in consideration of strategic and incentive fees. For this purpose, six employees of the taxpayer stayed in India for 158 days. The taxpayer argued that said fee was not in the nature of royalty, the presence of its employees in India did not constitute a PE, and even assuming that a PE was in existence, no income can be attributed to the PE as the taxpayer incurred losses at a global level. The tax authorities, however, had a contrary view and sought to tax said fees as income of the taxpayer's PE in India.

(b) Issue. The HC examined the following issues: (i) whether the service charges under SOSA constituted royalties or were in the nature of business income; (ii) whether the taxpayer had a PE in India and (iii) the manner of attribution of income to the PE, particularly in the context of the company incurring losses at the entity level.

(c) Decision. The HC ruled in favour of the tax authorities with observations set out below.

- The consideration received by the taxpayer under SOSA did not qualify as royalty under article 12 of the Treaty but was characterized as business income. The taxpayer provided strategic plans, policies, and guidelines for operating the hotel, exerting complete control over branding, marketing, and product development. The taxpayer also had discretion in assigning employees and exercised oversight functions.
- Based on the terms of SOSA and the presence of 6 senior employees, the taxpayer had a fixed place (hotel premises) at its disposal, constituting a PE in India. The oversight function implied that business activities were carried out, at least in part, from the hotel premises.
- The HC expressed reservations about a previous decision of the coordinate bench in the case of *Nokia Solutions and Networks OY (ITA 503/2022)* where, despite the PE being in major losses, the Tribunal attributed global profits based on turnover. The HC emphasized that profits attributable to the PE in India should be determined as if the PE was an independent taxable entity. Consequently, the matter was referred to a larger bench for further consideration.

The decision was pronounced by the HC on 22 December 2023.

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