

Case Name: PCIT v. Samsung Electronics Co. Ltd
Case Number: ITA 1029 of 2018 in Delhi High Court
Citation: TS-21-HC-2025(DEL)

FACTS

- Samsung Electronics Co. Ltd. (SEC), a South Korean company, is the parent company of two wholly-owned subsidiaries in India which are: Samsung India Electronics Pvt. Ltd. (SIEL) and Samsung India Software Operations Pvt. Ltd. (Samsung R&D).
- A survey conducted by the Income Tax Department on SIEL's premises on June 24, 2010, which led to the issuance of reassessment notices under Section 148 of the Income Tax Act, 1961 for six assessment years.
- The Assessing Officer (AO) concluded that SIEL constituted a Fixed Place Permanent Establishment (PE) under Article 5 of the India-South Korea Double Tax Avoidance Agreement (DTAA). Further, AO held that SIEL met the tests of a Dependent Agent PE (DAPE), and a Service PE. (Para 5)
- The Dispute Resolution Panel (DRP) rejected findings of the AO but held that SIEL would be deemed a Fixed Place PE due to secondment of employees and the statements of various expatriate employees of SEC. (Para 6 & 7)
- The Income Tax Appellate Tribunal (ITAT) reversed the DRP's finding and ruled that no PE of SEC existed in India. (Para 11 & 12). The Department appealed against the ITAT's ruling.

ISSUES

Question of Law framed by Delhi High Court in Para 3: -

- Whether the Income Tax Appellate Tribunal ["Tribunal"] erred in law in holding that the assessee company had no Fixed Place Permanent Establishment ["PE"] in India within the meaning of Article 5 of the Double Tax Avoidance Treaty ["DTAA"] between India and Korea without appreciating the detailed finding of the Dispute Resolution Panel?
- Whether the Tribunal erred in holding that the activities of the assessee in India were of the nature specified in Article 5(4) of the DTAA and consequently there was no PE

in India, when the facts on record clearly indicate that critical business decisions such as decisions relating to the product to be manufactured, pricing of the product and decisions relating to launch of new products were being taken in India?

SHORT ISSUE

- Whether SEC had a PE in India due to the activities of employees seconded to its Indian subsidiaries?

COURT'S ANALYSIS

- The Court relied and followed the principles established in the Full Bench's decision in **Hyatt International**¹ which explained that PE itself was a concept based upon an enterprise undertaking of economic activity in a particular State irrespective of the residence and taxability of business profits of PE which will be liable to pay taxes in Contracting State irrespective of losses suffered by enterprise at global level.
- Further Court relied on **Progress Rail Locomotive**² which had quoted test of Klaus Vogel to establish existence of PE through "considerable extent" and premises being "an instrument (equalling or resembling an operating asset) for his entrepreneurial activity".
- The Court analysed the roles of the seconded employees, observing that there was no material to suggest that their functions were aligned with the business or income generation of Samsung Korea in India. The Court held that they agree with the views of Tribunal, since the secondment of employees has not been found to be for the furtherance of the business or enterprise of the respondent and they were not discharging functions or performing activities connected with the global enterprise. They were placed in India to facilitate the activities of SIEL and collection of market information, data, products, market trend studies or exchange of information would not meet the qualifying benchmarks of a PE.

¹ Hyatt International Southwest Asia Ltd. v. CIT; 2024 SCC OnLine Del 6546.

² Progress Rail Locomotive Inc. v. DCIT (International Taxation) and Others; 2024 SCC OnLine Del 4065.

- The Court further looked into the UN and OECD Commentaries on secondment of employees (Para 26-29), reinforcing the distinction between activities benefiting the foreign employer and those benefiting the host entity. It was established that the secondment arrangement served primarily SIEL's operational needs and did not generate income for Samsung Korea in India.
- Delhi High Court laid down test for when can secondment of employee's activities could be considered Permanent Establishment due to secondment of employees.
Relevant Paragraph-
Para 29 “.....*What however needs to be considered is whether the deployment of such employees is in furtherance of the business of their formal employer or intended to be utilized for the business of the enterprise with whom they are placed.....*”
- The Court dismissed the Revenue's appeal and upheld the Tribunal's order in favour of assessee.

Cases Referred in the HC's Order

- Hyatt International Southwest Asia Ltd. v. CIT; 2024 SCC OnLine Del 6546 (Para 14)
- Progress Rail Locomotive Inc. v. DCIT (International Taxation) and Others; 2024 SCC OnLine Del 4065 (Para 17)