

Concept of 'Fixed Establishment' under GST Regime - A 'Rule of Substance'

GST law mandates registration for all places from where taxable supplies of goods or services are made, subject to the monetary threshold of entity level turnover exceeding Rupees Twenty Lacs. Hence, while one would assume that taxable persons would normally register all places from where 'supplies' are made, there could still be situations wherein unregistered places of 'taxable supplies' exist/arise which must be duly accounted for in a destination based system of taxation. In other words, registered places of business and 'Fixed Establishment' are two mutually exclusive concepts. Tax department could invoke the concept of Fixed Establishment to challenge non-registration of certain places of business under the GST Regime invoking the consequential penal provisions.

The CGST¹ and IGST² Bills define 'Fixed Establishment' as follows:

"Fixed establishment means a place (other than a **registered place of business**) which is characterized by a sufficient **degree of permanence** and **suitable structure** in terms of **human and technical resources to supply services** or to receive and use services for its own needs"

Hence, the concept of fixed establishment under GST law is a 'rule of substance' which seeks to capture 'unregistered' places of business fulfilling following conditions:

1. Sufficient degree of permanence;
2. Suitable structure in terms of:
 - a) Human and
 - b) Technical resources
3. Supply or receipt of services

In the above context following practical questions arise:

- a) What is the yardstick for measuring for 'permanence' - whether it is 3 months, 6 months or a year?
- b) What is the meant by 'suitable structure' in terms of human and technical resources - let's assume there is a company ABC Ltd (with Head Office in Delhi) providing software services and a software professional (with laptop) is stationed onsite with a client in the State of Maharashtra for more than one year - whether under such circumstances a fixed establishment would arise?
- c) What is the scope of the expression 'human' and 'technical' resources - referring to the same example as above can a single software professional with basic IT equipment stationed on client site constitute a 'Fixed Establishment'?

Neither GST Law nor Draft Rules provide detailed guidance on the issues raised above. However, since this concept has been borrowed from existing Service Tax Regulations, one can seek guidance from the same. Temporary presence of staff by way of a short visit at a place cannot be called a fixed establishment. Also, the number of staff at a location is not important. What is relevant is the adequacy of the arrangement (of human and technical resources) to carry out an activity for a consideration, or to receive and use a service supplied. Similarly, it will be important to evaluate the permanence of the arrangement ie whether it is capable of executing the task. The following illustrations provided in the Service Tax Education Guide (June 20, 2012) provide guidance on what constitutes a fixed establishment.

- An overseas business house sets up offices with staff in India to provide services to Indian customers. Its fixed establishment is in India
- A company with a business establishment abroad buys a property in India which it leases to a tenant. The property by itself does not create a fixed establishment. If the company sets up an office in India to carry on its business by managing the property, this will create a fixed establishment in India

Thus, the most relevant factor is the ability to render or receive service. Modus operandi of an establishment shall be taken into account while evaluating the character of an establishment. Temporary visit of staff to a place shall not make it a fixed establishment. Also, number of staff members deployed is not a relevant parameter to ascertain the structure. The only pre-requisite is availability of necessary arrangement for executing task of receiving/ supplying service which shall be determined on a case to case basis.

Under GST Law, depending upon the facts and circumstances, a 'fixed establishment' can constitute a 'place of supply' (PoS) or the 'location of supplier' (LoS) [and shall be treated as a 'distinct person' from the Head Office]. From a compliance perspective, the constitution of 'Fixed Establishment' as PoS or LoS can alter the nature of tax liability - a transaction that is otherwise inter-state can become intra-state if a 'Fixed Establishment' is determined to exist. Accordingly, the tax leviable would be (CGST +SGST) [collected by destination state] instead of IGST [collected by Centre]. Under Service Tax Law, the concept of 'Fixed Establishment' sought to protect the Country's tax base in a cross-border setting - in the GST regime the same concept has been deployed to safeguard the Destination State's right to collect GST. It is interesting to note that this rule of substance has been restricted to services only - though given that GST is a common framework applicable for both goods and services, there appears to be no discernible rationale for such limitation.

¹Section 2(50) of The Central Goods and Service Tax, Act 2017

²Section 2(7) of The Integrated Goods and Service Tax, Act 2017

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