

GST: Fixed Establishment – Conundrum of People, Place & Things

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Before digging deep into the concept of fixed establishment, let us first establish its relevance under GST. Section 22 of the GST Act provides that every supplier is liable to take registration **from where he makes a taxable supply**. On a bare perusal of this provision, it seems that a reference is drawn to a place from which a supply is made i.e. the location of a supplier.

The location of a supplier is defined[1] to include the following: –

- (a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;
- (b) where a supply is made from **a place other than the place of business** for which registration has been obtained (a fixed establishment elsewhere), **the location of such fixed establishment**;
- (c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the supply; and
- (d) in absence of such places, the location of the usual place of residence of the supplier.

From the definition, it transpires that if a supply has been made from a fixed establishment then, such fixed establishment would be liable to be registered under GST as per Section 22 *ibid*.

Further, a fixed establishment is defined[2] to mean a place 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 services and use services for its own needs.

Thus, two crucial factors for the presence of a fixed establishment are [1] whether there is a suitable structure for supplying service or to receive and use services and [2] whether there is a sufficient degree of permanence for such structure. These two factors are as discussed below;

Suitable structure

Suitable structure means a structure adequate, in terms of human and technical resources, to supply the goods or services in question on an independent basis[3]. Thus, a fixed establishment should have both the technical and human resources necessary for supplying services[4].

And what proportion of technical or human structure would constitute an adequate structure would depend on the facts of the case. Say, the requirement of human resources would outweigh the requirement of technical resources in activities such as personal grooming and, the requirement for technical resources would outweigh human resources in services such as ODA.

Further, merely having an office is not sufficient for constituting a fixed establishment. **The test is whether such an office has suitable resources to supply services or not**[5].

Permanency

Permanency could be understood by a combination of two aspects viz. [1] constant access to necessary human and technical resources needed to supply services[6] and [2] there should be a minimum degree of stability derived from the presence of such resources[7].

Meaning thereby, **if an organization has constant access to requisite human and technical resources for effecting a supply and such resources create a minimum degree of stability then, it would be construed that the organization has a fixed establishment.**

Additionally, the constant access to the requisite resources need not be only through the resources which are owned by the person. Such resources could either be owned by the person by way of arranging a place of business with equipment and appointment of requisite personnel or such resources could be hired as well[8]. Say, a contract for use of human and technical infrastructure belonging to another person[9].

Let us understand this with the help of an example. ABC Ltd. provides online car repairs and maintenance services. The customer could visit the website of ABC Ltd., book an appointment and get the car repaired. The customer makes payment online and gets the invoice through email from ABC Ltd.

For providing car repair and maintenance services, ABC Ltd. enters into a contract with local mechanics located in pan India for 3 years. Such mechanics already have a set up [human and technical resources] for supplying car repair and maintenance services on their own. ABC Ltd. enters into a contract to use the mechanics' human and technical infrastructure for supplying car repair and maintenance services to its customer. For this, the mechanics charge cost + mark up from ABC Ltd.

In this whole transaction, by hiring the mechanic's infrastructure for 3 years, ABC Ltd. has ensured the availability of constant access to technical and human resources for supplying car repairs and maintenance services to its customers. Thus, ABC Ltd. would have a fixed establishment in the states in which ABC Ltd. is supplying car repairs and maintenance services through local mechanics.

At this junction, a question may be asked whether the above analysis would also apply to a company executing a single contract in another State? The answer would be NO for the sole reason that ensuring constant availability of necessary resources to ensure supply for a limited time is different from effecting a single supply as in the former case, the person is effectively conducting its operations albeit by the use of hired resources in the state and in the latter case, the presence of the person in the state is limited with an intent to affect a single supply.

The receiving leg

The definition of a fixed establishment also includes a place with a suitable structure [1] to receive services and [2] use such services for its own needs.

Thus, if a person has suitable resources only for doing a purchase, then such an establishment may not be construed as a fixed establishment. However, if the person has a suitable structure to [1] receive inward supplies and [2] use such inward supply [3] to supply his outward services then, such place would be construed as a fixed establishment[10].

As in the example discussed above, ABC Ltd. is procuring infrastructure support services from the mechanics and using such services to provide car repair and maintenance services, ABC Ltd. would be construed to have a fixed establishment.

To conclude, for a fixed establishment, the following tests need to be satisfied;

- The necessary human and technical resources to make a supply i.e. a suitable structure;
- There should be constant access to requisite human and technical resources to make a supply;
- Such constant access should create a minimum level of stability for effecting a supply;
- The resources could either be owned or a hired one;
- Execution of a single transaction does not constitute a fixed establishment; and
- The fixed establishment includes an establishment capable of receiving supplies and using such supplies to supply its outward supplies.

Applying the above principles, some examples of what could constitute a fixed establishment^[11] in a state are: –

- a person that sets up a branch in another state comprising staff and offices to provide services. Such branch could constitute a fixed establishment;
- a company that owns a property in a state in which he is not registered. The company leases the property to tenants – the property does not in itself create a fixed establishment, but, if the company has offices and staff or appoints an agent or representative (such as a subsidiary company acting on their instructions) in the state to carry on its business, this creates a fixed establishment
- a person has contracts with customers located in another state to provide services; it has no human or technical resources and therefore sets up a subsidiary to act in its name to provide those services – the person has a fixed establishment created by the agency of the subsidiary
- a company that acts as the operating member of a consortium for offshore exploitation of oil or gas using a fixed production platform – the rig is a fixed establishment of the operating member

Examples, where there is not a fixed establishment^[12], include:

- a company that registers or is incorporated at its accountant's address but has no other offices or staff in the accountant's state
- an overseas television company that sends staff and camera equipment for a week to shoot a documentary
- a team of builders and contractors that are temporarily travelling to carry out a one-off construction project
- the presence of computer servers alone within a country

[1] Section 2(71) of the CGST Act

[2] Section 2(50) of the CGST Act, 2017

[3] Titanium Limited Vs Finanzamt Osterrieich, C-931/19

[4] F.No. B1/6/2005-TRU dated 27 July 2005

[5] Commissioner of Customs and Excise Vs DFDS A/s, C-260/95. Also upheld in RE: IZ Kartex, 2021 (44) GSTL 205 (App. AAR-GST-WB)

[6] Upheld in Welmory sp.zo.o. Vs Dyrektor Izby Skarbowej w Gdansk, Case C-605/12, read with Opinion of Advocate General Kokott on this case

[7] Titanium Limited Vs Finanzamt Osterrieich, C-931/19

[8] Paper published by VAT Expert Group on Welmory sp. Z.o.o in the 13th Meeting by Directorate General Taxation and Customs Union, Indirect Taxation and Tax administration, European Commission

[9] In RE: Elio India Catering LLP, 2019 (31) GSTL 362 (AAR-GST) it was held that the canteen facilities provided by the client constitutes a fixed establishment.

[10] This interpretation has been upheld by ECJ in Welmojy sp. z o.o. Vs Dyrektor Izby Skarbowej w Gdansk, Case C-605/12

[11] as illustrated in VAT Notice 741A issued by the Government of UK

[12] as illustrated in VAT Notice 741A issued by the Government of UK

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