**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER**
**AND**
**SHRI O.P. KANT, ACCOUNTANT MEMBER**
**[Through Video Conferencing]**

ITA No.6179/Del/2017
Assessment Year: 2014-15

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| HYATT INTERNATIONAL SOUTHWEST ASIA LTD. Office 301, Level-3, Precinct 3, Dubai International Financial Centre (DIFC), PO Box -506727, Dubai, United Arab Emirates, Dubai | **Vs.** | ACIT, Circle-2(1)(1), International Taxation, New Delhi |
| **PAN :AACCH2598H** | | |
| **(Appellant)** | | **(Respondent)** |

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| Appellant by | Sh. Ajit Jain, CA |
| Respondent by | Sh. Bhaskar Goswami, CIT |

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| Date of hearing | 27.07.2021 |
| Date of pronouncement | 27.07.2021 |

**ORDER**

**PER O.P. KANT, AM:**

The present appeal by the assessee is directed against the order dated 28.07.2017 passed by the Assistant Commissioner of Income Tax, Circle-2(1)(1), International Taxation, New Delhi (hereinafter referred to as 'the Assessing Office') under section

144C(13) r.w.s. 143(3) of the Income-tax Act, 1961 (in short 'the Act') in pursuance to the direction of Dispute Resolution Panel, New Delhi. The grounds raised by the assessee are as under:

***Ground No. 1 - Alleged Permanent Establishment ('PE') in India of the Appellant under Article 5(1) and 5(2)(T) of the India - UAE Tax Treaty ('Tax Treaty')***

*1. On the facts and circumstances of the case and in law, the Assessing Officer ('AO') erred in concluding and the Dispute Resolution Panel ('DRP') erred in holding that the Appellant has a PE in India under Article 5(1) and 5(2)(i) of the Tax Treaty without appreciating that (i) the Appellant has no fixed place of business or presence in India; (ii) its personnel in India were not on secondment but for rendering services to third party customers and their presence in India was for less than 9 months as stipulated under the Tax Treaty; (iii) the employees do not render any services in India on Sundays and on holidays during their visits in India; (iv) the Hotel premises or employees of the Hotel owners are not at the disposal of the Appellant; (v) the Appellant does not provide any Central Reservation Services; and (vi) the Appellant is not involved in any day to day operations of hotels and provides only strategic oversight services.*

*The Appellant prays that all the conclusions reached by the AO / DRP of the Appellant constituting a PE in India under Article 5 of the Tax Treaty are erroneous, unwarranted and be deleted.*

***Ground No. 2- Erroneously attribution of profits to alleged PE of the Appellant in India inspite of entity level operating losses***

*2. Without prejudice to Ground No. 1 above, on the facts and circumstances of the case and in law, the AO / DRP erred in arbitrarily adopting 25 percent of the gross receipts as taxable income attributable to the Appellant's alleged PE in India under Article 7 of the Tax Treaty without appreciating that (i) the entire activities are not carried on from India; (ii) there are no profits attributable to the alleged PE in India; (iii) even if it is held that profits are attributable then the same should be restricted to only in relation to activities carried out in India; (iv) the Appellant has incurred overall losses during the calendar year ended 31 December 2013 and 31 December 2014.*

*The Appellant prays that the conclusion reached by the AO / DRP with respect to attribution of profits to the alleged PE in India under Article 7 of the Tax Treaty is erroneous, unwarranted and be reversed.*

***Ground No. 3 - Erroneous alternative taxation of India source income as 'Royalty' under Section 9(l)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12 of the Tax Treaty***

*3. Without prejudice to Ground No. 1 and 2 above, on the facts and in the circumstances of the case and in law, the AO / DRP erred in equating rendering of consultancy services to be in the nature of*

*'Royalty' under the Tax Treaty and the Act on the contention that it relates to provision of' know-how, skill, experience, commercial information and intangibles'.*

*The AO / DRP failed to appreciate that the essence of the agreement is for the Appellant to independently provide strategic oversight and consultancy services to the Hotel Owner(s) and the provision of know-how, etc. is a separate arrangement which is only incidental and furtherance to this objective with no independent utility/value and so, the alternative taxation on gross basis as Royalty is unwarranted and is requested to be quashed.*

**2.** At the outset, learned counsel for the assessee brought to our notice that the issue raised in Ground No. 1 in the present appeal of the assessee is covered against the assessee by the order of the Co-ordinate Bench of the ITAT for assessment year 2013-14.

**3.** The learned DR has not disputed the factual position.

**4.** We have heard both the parties through Video Conferencing facility and perused the relevant material on record. We find that identical issue raised in the present appeal has been adjudicated in ITA No. 727/Del/2017 for Assessment Year 2013-14. The relevant portion of the order of Tribunal (supra) is reproduced as under:

*"4. For the sake of ready reference and convenience, operative part of the order dated 04.12.2019 in ITA No. 579/Del/2013, 779/Del/2014, 1762/Del/2015 and 957/Del/2016 is being reproduced herewith.*

*"56. We find that from the concurrent reading of the Strategic Oversight Agreements (SOA), the assessee has been technically operating the hotel belonging to the owners namely, Asian Hotels Ltd. (AHL) through the employees who are recruited by them. The hotel premises have been at the disposal of the assessee during their period of stay. The employees has stayed for a period of 158 days as per the assessee in India while rendering the services. In terms of OECD commentary on Article 5(1) the assessee can be said to be having a permanent establishment owing to existence of a place of business i.e. a facility such as premises, and that place was fixed and established as a distinct place with certain degree of permanence and the foreign enterprise (the*

*assessee) is carrying the business through this fixed place i.e. the premises of the hotel. The assessee can be said to be dependent on the personnel to conduct the business of the foreign enterprise in the State in which the fixed place situated. The assessee is found to be meeting all these requirements stipulated in the OECD commentary under para 2. Further, the assessee is also found to be meeting the requirements specified in para 4 of the OECD MC that the term place of business covers in the premises, facilities, installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. In the instant case, the assessee has been using permanently the premises belonging to the hotel for doing their business. The place of business may also exist where no premises are available required for carrying on the business of the enterprise. It is sufficient to have certain amount of space at their disposal to conduct their business operations. Further, the place of business may also be situated in the business facilities of any other enterprise too. Thus, it can be said that the assessee who is running the business operations at the premises available for constant disposal in the hotel can be said to be a place of business. The availability of an office premises to a foreign company in the premises of the contracting party in order to ensure that both the parties comply with their obligations to the contract for a long period of time will constitute a permanent establishment. As long as, the premises is at the disposal of the assessee and having the right to use the premises for the purpose of the assessee's business on behalf of the party to the agreement can constitute a fixed place PE. We also find that the physical criteria (existence of a geographical location), subject to criteria (right to use the place) and the functional criteria (carrying on the business through that place) as mentioned in the OECD principles with relation to the existence and determination of PE as held by the Mumbai Tribunal in the case of Air Lines Rotables l/s JDIT 131 TTJ 385 have been found to be met by the assessee before us, so as to treat them as having a PE in India. Though, it was argued that the assessee has got no right to use the premises and no premises of AHL was at their disposal, we find on going to the agreements and the work executed, that the premises of AHL was very much at the disposal of the assessee for carrying on their business. Thus, we find that the assessee has met the twin criterion of existence of a fixed place of business and carrying out of business from such fixed place of business as enunciated of the judgment of Hon'ble Supreme Court in the case of Morgan Stanley & Co. 292 ITR 416 (SC). The claim of the assessee that they did not have a place at their disposal cannot be*

> *accepted in view of the judgment of Hon'ble Supreme Court in the case of Formula One World Championships Ltd. 394 ITR 80, in the case of Azadi Bachao Andolan and also E-funds IT Solutions 86 Taxman 240. The facts on record undisputedly prove that the premises AHL are at the disposal of the assessee for conduct of their business. While coming to the issue of "at the disposal" in the premises is available for the assessee for running of their business even for a limited time it constitutes a PE……."*

**4.1** Accordingly, following the finding of Tribunal (supra), the Ground No.1 of the appeal is decided against the assessee. The Ground No. 1 is accordingly dismissed.

**5.** As regards the grounds no. 2 & 3 of the appeal of the assessee, the learned counsel for the assessee further submitted that this identical issue has been restored to the AO by the order of the Co-ordinate Bench of the ITAT for assessment year 2013-14.

**6.** The learned DR has not disputed the factual position.

**7.** We find that the identical issue raised in the present appeal, has already been adjudicated in ITA No. 727/Del/2017 for Assessment Year 2013-14. The relevant portion of the order of Tribunal (supra) is reproduced as under:

> *"7. For the sake of ready reference and convenience, operative part of the order dated 04.12.2019 in ITA No. 579/Del/2013, 779/Del/2014, 1762/Del/2015 and 957/Del/2016 is being reproduced herewith.*
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> > *"60. Based on the clauses of the Strategic Service Agreement and Strategic Oversight Agreements, we hold that the revenue's earned by the assessee are taxable under Article 12 of the DTAA. Regarding the determination of the profit, taken up at ground no. 4 by the assessee, we hereby hold that the taxable profits may be computed in accordance with the provisions of Section 44DA of Indian Income Tax Act and Article 12 of Indo-UAE, DTAA. During the arguments, it was also submitted that the assessee has incurred losses in the assessment year 2008-09. The assessee be given an*

> *opportunity of submitting the working of apportionment of revenue, losses etc. on financial year basis with respect to the work done in entirety by furnishing the global profits earned by the assesse, so that the profits attributable to the work done by the PE can be determined judiciously. The same may be considered while determining the taxable profits in India in accordance with the provisions of Section 90(2) of Indian Income Tax Act, 1961."*

**7.1** Since the issues in dispute raised in Grounds No. 2 & 3 in the present appeal are identical to the issues decided by the Tribunal (supra), the issue of attribution of profit to the Permanent Established (PE) is accordingly restored to the file of Assessing officer for deciding in the light of the direction of the Tribunal in AY 2013-14, as reproduced above. It is needless to mention that adequate opportunity of being heard shall be provided to the assessee. The Grounds No. 2 and 3 of the appeal are accordingly allowed for statistical purposes.

**8.** In the result, the appeal of the assessee is allowed partly for statistical purposes.

***Order pronounced in the open court.***

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| ***Sd/-*** | ***Sd/-*** |
| **(KUL BHARAT)** | **(O.P. KANT)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 27th July, 2021.
RK/-(DTDC)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi