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

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No.5563/Del/2017
Assessment Year: 2011-12

DCIT Circle – 2 (2) (2), International Taxation, New Delhi	**Vs**	**National Petroleum Construction Company C/o Nangia & Co. LLA, A-109, Sector -136, Noida**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. Amit Arora, CA
Respondent by	Dr. Prabha Kant, CIT

Date of hearing:	01/07/2021
Date of Pronouncement:	01/07/2021

ORDER

PER N. K. BILLAIYA, AM:

This appeal filed by the revenue is preferred against the order of the CIT(A)-43, New Delhi dated 06.06.2017 for A.Y. 2011-12.

2. The grievance of the revenue read as under :-

1. Whether, on facts and in the circumstances of the case, whether the CIT(A) erred in holding that the Project Office of assessee in India is not its fixed place of business and permanent Establishment as defined under Article 5(2)(c) of the Double Taxation Avoidance Agreement between India and the UAE.

2. Whether on the facts and in the circumstances of the case, the CIT(A) erred in holding that activities of the Project Office of the assessee were 'preparatory and auxiliary' in nature in terms of the Article 5(3)(e) of the Double Avoidance Agreement between India and the UAE..

3. Whether on the facts and in the circumstances of the case, the CIT(A) erred in holding the assessee did not have a Installation Permanent Establishment under article 5(2) (h) of the Double Avoidance Agreement between India and the UAE..

4. Whether on the facts and in the circumstances of the case, the CIT(A) erred in holding that M/s Arcadia Shipping Ltd was not a Dependent Agent Pernament Establishment of the assessee were 'preparatory and auxiliary' in nature in terms of the Article 5(4) of the Double Avoidance Agreement between India and the UAE.

5. Whether on the facts and in the circumstances of the case, the CIT(A) erred in holding that no income of the assessee can be attributed to the assessee's Permanent Establishment in India.

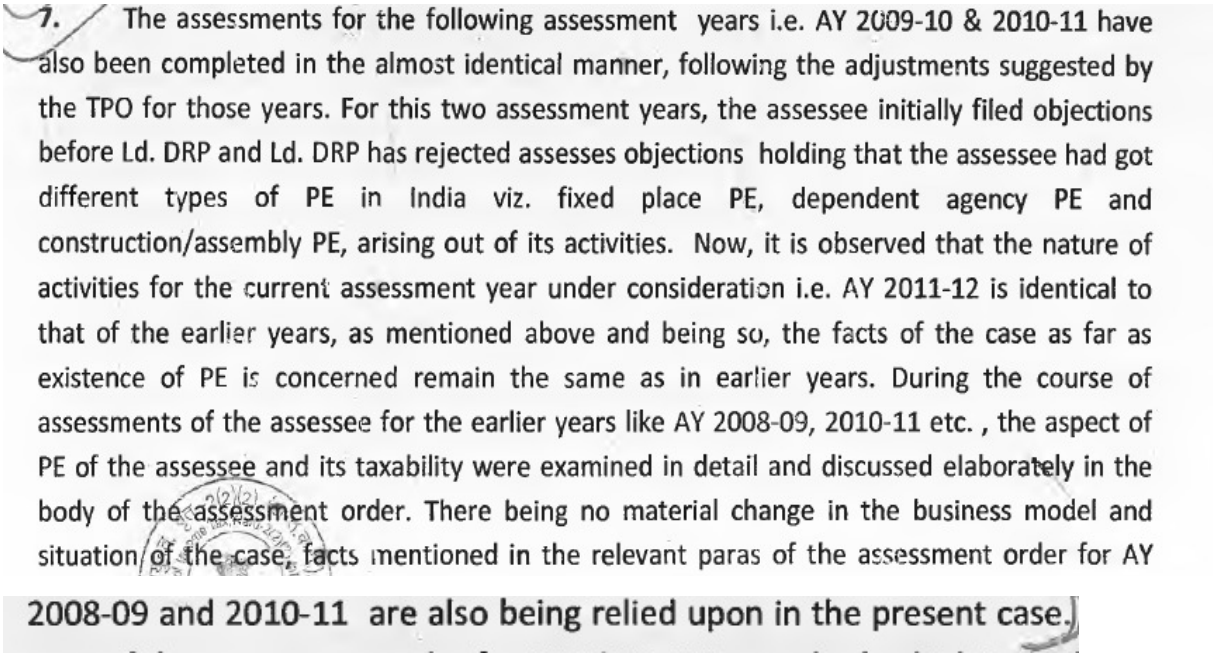
6. Whether on the facts and in the circumstances of the case, the CIT(A) erred in holding that profit attributable to the assessee's PE at 2.81% of its offshore segment and 16.98% of its onshore service segment, were not taxable in India.

7. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.

3. Briefly stated the facts of the case are that the assessee is a company incorporated and existing under the laws of UAE and also a tax resident there. The principal activities of assessee include fabrication and installation of onshore and offshore platforms and submarine pipelines and pipelines coating. The assessee has also entered into contracts with ONGC for the aforesaid purposes. As per the terms of the contract, NPCC has

carried out sequential activities such as design and engineering, material procurement, fabrication and installation.

4. While framing the assessment order u/s. 143 (3) / 144 C of the Act the AO observed as under :-



7. The assessments for the following assessment years i.e. AY 2009-10 & 2010-11 have also been completed in the almost identical manner, following the adjustments suggested by the TPO for those years. For this two assessment years, the assessee initially filed objections before Ld. DRP and Ld. DRP has rejected assesses objections holding that the assessee had got different types of PE in India viz. fixed place PE, dependent agency PE and construction/assembly PE, arising out of its activities. Now, it is observed that the nature of activities for the current assessment year under consideration i.e. AY 2011-12 is identical to that of the earlier years, as mentioned above and being so, the facts of the case as far as existence of PE is concerned remain the same as in earlier years. During the course of assessments of the assessee for the earlier years like AY 2008-09, 2010-11 etc. , the aspect of PE of the assessee and its taxability were examined in detail and discussed elaborately in the body of the assessment order. There being no material change in the business model and situation of the case, facts mentioned in the relevant paras of the assessment order for AY 2008-09 and 2010-11 are also being relied upon in the present case.

5. It can be seen from the above that the AO has followed the findings given in A.Y.2007-08 and 2008-09 and completed the assessment by making adjustment of Rs. 32.52 crores.

6. The assessee assailed the assessment before the CIT(A) and the CIT(A) found that the issue is covered in favour of the assessee by the order of the Hon'ble High court of Delhi for A.Y.2007-08 and 2008-09. The following substantial question of

law were framed and answered by the Hon'ble High Court of Delhi :-

> *1) Whether the Income Tax Appellate Tribunal has not attributed and determined the taxable income under installation and commissioning; whether the said issue/ question has remained undecided and the effect thereof.*
>
> *2) Whether the order of the I ncome Tax Appellate Tribunal violates and is contrary to Article 7 (6) of the Double Taxation Avoidance Agreement between India and UAE.*

7. And the Hon'ble High Court adjudicated the quarrel as under :-

Reasoning and Conclusion

13. The first three questions framed in the appeals preferred by the Assessee (ITA 143/2013 and 144/2013) relate to the existence of an Assessee's PE in India in terms of Article 5 of the DTAA. The other two questions relate to the attribution of income to the Assessee's PE. Thus, at the threshold, it would be necessary to refer to the text of Article 5 of the DTAA for ascertaining whether the Assessee had a PE in India during the relevant period. Article 5 of the DTAA is reproduced as under:-

> "1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> 2. The term "permanent establishment" includes especially :
>
> (a) a place of management;
>
> (b) a branch;
>
> (c) an office;
>
> (d) a factory ;
>
> (e) a workshop ;
>
> (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources ;
>
> (g) a farm or plantation ;
>
> (h) a building site or construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months ;
>
> (i) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.
>
> 3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include :
>
> (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise ;
>
> (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery ;
>
> (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;
>
> (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise ;
>
> (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

> 4. Notwithstanding the provisions of paragraphs (1) and (3), where a person - other than an agent of independent status to whom paragraph (5) applies - is acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts on behalf of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to the purchase of goods or merchandise for the enterprise.
>
> 5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of independent status within the meaning of this paragraph."

14. Paragraph 1 and paragraph 2 to the extent of sub-paras (a) to (e) of Article 5 of the DTAA are identical to paragraph 1 and 2 of Article 5 of the Model Conventions framed by OECD, United States and United Nations. Sub- paras (h) and (i) of paragraph 2 of Article 5 of the DTAA specifically includes a building site or an assembly project and furnishing of services within the definition of a 'Permanent Establishment'. The subject matter of clauses (h) and (i) are partly covered under paragraph 3 of Article 5 of the said Model Conventions and the same would be referred to while considering the second question which specifically relates to Article 5(2)(h) of the DTAA.

15. In order to determine whether an enterprise has a PE within the meaning of Article 5 of the DTAA, it would be necessary to consider the scheme of Article 5. Paragraph 1 of Article 5 provides an overarching general definition of the expression 'Permanent Establishment' (PE). It defines a PE to mean a fixed place of business through which the business of an enterprise is wholly or partially carried on. It is clear from the aforesaid definition that the expression 'Permanent Establishment' entails (a) a fixed place of business; and (b) business of the enterprise being carried on wholly or partially through the said fixed place of business. These two conditions must necessarily be satisfied for the existence of a PE. In addition, the word permanent in the term 'Permanent Establishment' indicates that there should be some degree of permanency attached to the fixed place of business before the same can be construed as a PE of an enterprise. The word permanent does not imply for all times to come but merely indicates a place which is not temporary, interim, short-lived or transitory. In **Re. P. No. 24 of 1996: (1999) 237 ITR 798 (AAR),** the Authority for Advance Ruling referred to Baker's "Double Taxation Conventions and International Tax Law, second edition", wherein the author had cited the decision in **Henriksen v. Grafton Hotel Limited: (1943) 11 ITR (E.C.) 10 (CA)** and explained that the expression "permanent" is relative and not synonymous with "everlasting"; the AAR ruled that it was used only in "contradistinction to something fleeting, transitory, temporary or casual".

16. Paragraph 2 of Article 5 of the DTAA provides for an inclusive definition of the term "Permanent Establishment" and specifically lists out places of business that fall within the meaning of that expression. The use of the word 'especially' underscores the intention of the authors of the treaty to remove any doubts that the places listed in sub-paras (a) to (i) fall within the definition of the term 'Permanent Establishment'. Normally an inclusive definition is used to expand the width of the term sought to be defined, however, that does not appear to be the principal intent in drafting paragraph 2 of Article 5 of the DTAA. Read in the context of the other provisions of Article 5, paragraph 2 clearly indicates that it has been used as an explanatory provision to specifically include the species of places of business that would constitute a PE of an enterprise. In this view, paragraph 1 and 2 of Article 5 of the DTAA complement each other. Thus, all classes of PEs as specified in various sub- paras of paragraph 2 of Article 5 of the DTAA would be construed as a PE subject to the essential conditions of paragraph 1 of Article 5 being met. Insofar as sub-paras (h) and (i) of paragraph 2 of Article 5 are concerned, the test of permanence as required under paragraph 1 of Article 5 is substituted by a specified minimum period of nine months. Thus, places of

business as specified under sub-paras (h) and (i) of paragraph 2 of Article 5, cannot be construed as a PE of an enterprise unless they exist for a period of atleast nine months.

17. Paragraph 3 of Article 5 is an exclusionary clause and is intended to exclude certain places of business from the scope of the expression 'Permanent Establishment'. Paragraph 3 begins with a non-obstante clause– "Notwithstanding the preceding provisions of this Article". Thus, the exclusions provided under paragraph 3 would override the provisions of paragraph 1 & 2 of Article 5 of the DTAA. In other words, even if a place of business squarely falls within the definition of paragraph 1 of Article 5 and is specifically listed in paragraph 2 of the said Article, the same would, nonetheless, not be construed as a PE of an enterprise, if it falls within any of the exclusionary clauses contained in sub-paras (a) to (e) of paragraph 3 of Article 5 of the DTAA.

18. Paragraph 4 of Article 5 of the DTAA provides for a legal fiction to include an agent (other than an agent of an independent status) to be a PE of the principal enterprise. Paragraph 4 also begins with a non-obstante clause. Thus, even though an agent may not stricto senso fall within the definition of a 'permanent establishment' as defined under paragraph 1 and/or paragraph 2 of Article 5 of the DTAA, yet it would be deemed that a permanent establishment of an enterprise exists if the business of an enterprise is carried on through an agent as described under paragraph 4 of the DTAA. Paragraph 5 of Article 5 provides for an exclusion to the application of paragraph 4 and the agents of a principal enterprise as described in paragraph 5 of the DTAA would be excluded from the scope of paragraph 4 of Article 5 of the DTAA.

19. The controversy whether the Assessee had a PE in India during the relevant period has to be answered in the context of the aforesaid provisions of the DTAA. Concededly, the Assessee had established a Project Office at Mumbai in 2005. This was also intimated to the Reserve Bank of India by a letter dated 24th January, 2006. It is also not disputed that the Assessee did carry on part of its business through its Project Office. In the circumstances, the conditions as spelt out in para 1 and paragraph 2(c) of Article 5 of the DTAA are satisfied. However, the matter does not rest here; it is next to be seen whether any of the exclusionary clauses of paragraph 3 of Article 5 of the DTAA are applicable. As stated before, Paragraph 3 of Article 5 of the DTAA begins with a non-obstante clause and, thus, the exclusion provided under paragraph 3 of Article 5 of the DTAA would override paragraph 1 and 2 of Article 5 of the DTAA. Thus, even though the Assessee's Project Office established in Mumbai falls within the definition of PE in terms of paragraph 1 and 2 of Article of DTAA, it would still have to be seen whether it stands excluded under paragraph 3 of Article 5 of the DTAA. Clause (e) of paragraph 3 of Article 5 of the DTAA is relevant and it expressly provides that notwithstanding the provisions of paragraph 1 and paragraph 2 of Article 5, a PE would not include "maintenance of a fixed place of business solely for the purposes of carrying on, for the enterprise any other activity of a preparatory or auxiliary character". The Assessee contends that its Project Office falls within this exclusionary clause.

20. It is clear from the plain language of paragraph 1 of Article 5 as well as Article 5(3)(e) of the DTAA that the functions performed at an office maintained by an enterprise would be vital to determine whether the office could be construed to be the PE of that enterprise for the purposes of the DTAA. First of all, the business of an enterprise must be carried on, wholly or partially, through the office in question; secondly, the business activity carried on must not be that of a preparatory or auxiliary character. The question, thus, arises is whether the activities carried out by the Assessee through its Project Office at Mumbai are that of a preparatory or auxiliary character. This is the bone of contention between the Revenue and the Assessee.

21. The Assessee had established its office at Mumbai in 2005, intimation to this regard was sent by the Assessee to the Reserve Bank of India on 24th January, 2006. The said office was established as a 'project office' within the meaning of Section 2(f) of the Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000. The definition of 'project office' expressly excludes liaison office as defined under Section 2(e) of the said Act. 'Liaison Office' and 'Project Office' are defined

under Clause (e) and (f) of Section 2 of the said Act as under:-

> "(e) 'liaison office' means a place of business to act as a channel of communication between the principal place of business or Head Office by whatever name called and entities in India but which does not undertake any commercial/trading/industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel;
>
> (f) 'Project Office' means a place of business to represent the interests of the foreign company executing a project in India but excludes a Liaison office."

22. It is apparent from the plain reading of the aforesaid definitions that whereas a liaison office can act as a channel of communication between the principal place of business and the entities in India and cannot undertake any commercial trading or industrial activity; a project office can play a much wider role. Regulation (6)(ii) of the aforesaid regulations mandates that a 'project office' shall not undertake or carry on any other activity other than the "activity relating and incidental to execution of the project". Thus, a project office can undertake all activities that relate to the execution of the project and its function is not limited only to act as a channel of communication.

23. The Assessee was required to open a project office in India for the purposes of executing the contract in question. Clause 3.2.1 of the 4WPP Contract, inter alia, provides that no payments would become due and payable to the Assessee until a copy of permission from the Reserve Bank of India for opening a project in India was submitted. Clause 3.2.1 of the 4WPP Contract is reproduced below for ready reference:-

> "Pending completion of the whole Works, provisional progressive payments for the part of the Works executed by the Contractor shall be made by Company on the basis of said work completed and certified by the Company's Representative as per the mile-stone payment formula provided in the bidding document at **Annexure-E of Agreement**. Such certification of the Work completed shall be made by the Company's Representative within 15 days of receipt of Contractor's Application for Certification with all required supporting documents. No payments shall become due and payable to the Contractor until Contract is signed by the two parties and Contractor furnishes to the Company Performance Guarantee (as per Clause 3.3) and Certificate of insurance for Policy/Policies specific for the project and other policies (as per requirement of Cl.7.3) and a copy of permission from Reserve Bank of India for opening Project office in India (in the case of foreign bidders)."
>
> A clause similar to the one above was also agreed to between ONGC and the Assessee under the C-Series Contract.

24. It is the Assessee's case that its office at Mumbai was opened only to comply with contractual requirements and the exchange control regulations and was used only as a communication channel and not for the execution of the Contracts. The Project Office was only used for the purposes of correspondence and as a communication channel; apart from that, the Project Office had no role to play in the execution of the activities under the Contracts and no other business of the Assessee was carried on through the Project Office. The Project Office was manned by three employees; (i) Ravi K. Prabhakar; (ii) Pavithran; (iii) Vijayan. While Ravi K. Prabhakar was designated as a Logistics Coordinator, Pavithran and Vijayan were employed as Office Assistants. The said persons were only engaged in collecting information from ONGC or ASL and transmitting the same to the Assessee's office in Abu Dhabi and similarly transmitting communications from Assessee's office in Abu Dhabi to ONGC and ASL. It is claimed that the abovenamed three employees were simple graduates and were not capable for participating in the execution of the work undertaken. The DRP had observed that Sh. M.N. Shah, Sh. M. Karkera, Sh. C.G. Pillai, Sh. P.K.G. Nair and Sh. R.L. Kulkarni, who were employees of the Project Office of the Assessee, had attended the kick-off meeting with ONGC on 16th December, 2005 and had also signed the minutes of that meeting. The DRP had proceeded on the basis that this fact was not

disputed. The ITAT had also concurred with the aforesaid finding. However, it is seen that the Assessee had repeatedly pointed out that persons named were not employees of the Project Office. Further, there is no material which would support the findings that Sh. M.N. Shah, Sh. M. Karkera, Sh. C.G. Pillai, Sh. P.K.G. Nair and Sh. R.L. Kulkarni were employees at the Project Office.

25. In our view, in absence of any material, observations made with regard to the employees of the Project Office being present at the meeting cannot be sustained. Similarly, there is also no material that the employees of the Project Office had participated in review of the engineering documents done in Mumbai or had participated in the discussions or approval of the designs submitted to ONGC. In absence of any material evidence to controvert the Assessee's claim that its Project Office was only used as a communication channel, the same has to be accepted. Thus, the next aspect to be considered is whether acting as a communication channel would fall within the exception of clause (e) of paragraph 3 of Article 5 of the DTAA.

26. The language of sub-para (e) of paragraph 3 of Article 5 of the DTAA is similar to the language of sub-para (e) of paragraph 4 of Article 5 of the Model Conventions framed by OECD, United Nations as well as the United States of America. The rationale for excluding a fixed place of business maintained solely for the purposes of carrying on activity of a preparatory or auxiliary character has been explained by Professor Dr. Klaus Vogel. In his commentary on "Double Taxation Conventions, Third Edition", he states that "It is recognised that such a place of business may well contribute to the productivity of the enterprise, but the services it performs are so remote from the actual realisation of profits that it is difficult to allocate any profit to the fixed place of business in question. Examples are fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character".

27. A Division Bench of this Court in **UAE Exchange Centre Limited** (supra) considered a case where a UAE based enterprise maintained a liaison office in India and the only activity of that office was to download information contained in the main servers located in UAE on the basis of which cheques were drawn on banks in India. The said cheques were couriered or dispatched to the beneficiaries in India keeping in mind the instructions of the remitters. This Court held that the said activity was only in aid and support of the main activity of the Assessee in that case and, thus, such activity was auxiliary in character. In **DIT (International Taxation) v. Morgan Stanley & Company Inc.: (2007) 292 ITR 416 (SC)**, the Supreme Court held that the back office operations carried on at an office would fall within the exclusionary clause of Article 5(3)(e) of the Treaty between India and United States which is also identically worded as Article 5(3)(e) of the DTAA.

28. The Black's Law Dictionary defines the word 'auxiliary' to mean as "aiding or supporting, subsidiary". The word 'auxiliary' owes its origin to the Latin word 'auxiliarius' (from auxilium meaning 'help'). The Oxford Dictionary defines the word 'auxiliary' to mean "providing supplementary or additional help and support". In the context of Article 5(3)(e) of the DTAA, the expression would necessarily mean carrying on activities, other than the main business functions, that aid and support the Assessee. In the context of the contracts in question, where the main business is fabrication and installation of platforms, acting as a communication channel would clearly qualify as an activity of auxiliary character - an activity which aids and supports the Assessee in carrying on its main business.

29. In view of the above, the activity of the Assessee's Project Office in Mumbai would clearly fall within the exclusionary clause of Article 5(3)(e) of the DTAA and, therefore, cannot be construed as the Assessee's PE in India.

30. We are also unable to accept Mr Sahni's contention that in view of the decision in the case of **Goetze (India) Ltd.** (supra), the Assessee was not entitled to contend that it had no PE in India for several reasons. First and foremost, in the present case, the Assessee's return was not accepted and the AO questioned the attribution of income to the Assessee's

PE. In such circumstances, it would be open for the Assessee to point out that its office in India did not carry out any activities to which any income from the project could be attributed. In order to determine the Assessee's income attributable to its Project Office at Mumbai, it was necessary to examine the role played by the Assessee's Project Office and its involvement with the activities to be conducted under the contracts. In view of the nature of the enquiry, it would always be open for the Assessee to explain that the Project Office was only involved as a communication channel and was not involved in any of the main activities required for execution of the contracts. Secondly, the decision in the case of **Goetze (India) Ltd.** (supra) does not fetter the Appellate Authority from considering the claim made by an Assessee. The limitation as expressed is only with regard to the AO.

31. Thus, the first question framed in the Assessee's appeals is answered in the negative, that is, in favour of the Assessee and against the Revenue.

32. It is also relevant to state that the exclusionary clause of Article 5(3)(e) would apply equally to a place of business falling within the Article 5(2)(h) as it would be an office falling within the scope of Article 5(2)(c) of the DTAA. Thus, the Assessee also cannot be stated to have a permanent establishment under Article 5(2)(h) of the DTAA. In this view, although it is not necessary to consider the second question, nonetheless, we consider it appropriate to do so.

33. In terms of clause (h) of paragraph 2 of Article 5 of the DTAA, "a building site or construction or assembly project or supervisory activities in connection therewith" would also constitute a PE of an enterprise subject to that site, project or activity continuing for a period of atleast nine months. Clearly, the purpose of the said clause is also to include a building site or a construction or an assembly project as a PE by itself. On a plain reading, a PE constituted by a building site or a construction or an assembly project, would commence on the commencement of activities relating to the project or site. The said clause is also to be read harmoniously with paragraph 1 of Article 5 of the DTAA which necessarily entails a fixed place of business from which the business of an enterprise is carried on. Thus, a building site or an assembly project could be construed as a fixed place of business only when an enterprise commences its activity at the project site. An activity which may be related or incidental to the project but which is not carried out at the site in the source country would clearly not be construed as a PE as it would not comply with the essential conditions as stated in paragraph 1 of Article 5 of the DTAA. It is necessary to understand that a building site or a construction assembly project does not necessarily require an attendant office; the site or the attendant office in respect of the site/project itself would constitute a fixed place of business once an Assessee commences its work at site. Thus, for clause (h) of paragraph 2 of Article 5 to be applicable, it is essential that the work at site or the project commences – it is not relevant whether the work relates to planning or actual execution of construction works or assembly activities. Preparatory work at site such as construction of a site office, a planning office or preparing the site itself would also be counted towards the minimum duration of a PE under Article 5(2)(h) of DTAA. In a given case, establishment of an office or any work which directly serves the operations at site may also be construed as a part of the building site, or construction or assembly project. The essence of a PE under Article 5(2)(h) is a building site or a construction or assembly project and the activities of an enterprise relating thereto in the source country.

34. At this stage, it would also be relevant to refer to the following extract from the commentary by Klaus Vogel on "Double Taxation Conventions, Third Edition":-

> "the minimum period begins when the enterprise starts to perform business activities on the spot in connection with a building site or construction or assembly project. The term 'on the spot' should, in these instances, not necessarily be taken to denote the actual place where the building works, etc., are to be accomplished, for instance, in cases where a planning office for the construction work is installed at some other place. In such an event, preparatory and ancillary work is already connected with the building works proper, provided the former directly serve the operation of the building site (likewise OstBMF 3 SWI 19 (1993): DTC Austria; USSR). Providing for such an

> early beginning of the minimum period is the best way of taking the technical and economic nature of building works into account and it also avoids the practical difficulties of having to draw the line between ancillary activities and 'building works proper'...."

35. The aforesaid passage also clearly indicates that the duration of a permanent establishment would commence with the performance of business activities in connection with the building site or assembly project.

36. The activities at site carried on by any contractor through a sub-contractor would not count towards the duration of the contractor's PE, as in that case, the construction site or project cannot be construed as a fixed place of business of the contractor and would fail one of the essential tests of paragraph 1 of Article 5 of the DTAA. This, of course, would not hold good if the contractor's office or establishment in the source country (i.e. where the site/project is located) is also involved alongwith the sub-contractor.

37. In the present case, the Assessee claims that the survey was conducted by an independent third party engaged by the Assessee and that too for a period of 9 days in one instance and 27 days in another (from 27.02.2006 to 07.03.2006 and 25.04.2006 to 21.05.2006). The Assessee commenced its activities at site when the barges entered into the Indian territory on 19.11.2006 and such activities relating to the installation, testing and commissioning of the platforms continued till 27.04.2007. Thus, the Assessee's activity at site would indisputably commence on 19.11.2006 and continue till 20.04.2007, that is, for a period of less than nine months.

38. The initial activities at site were carried on by an independent sub- contractor appointed by the Assessee. If the commencement of the activities of the sub-contractor is considered, the same commenced on 27.02.2006 and were concluded by 21.05.2006. It is seen that there is a large gap between the commencement of initial activities of pre-engineering survey and the commencement of installation works. The issue to be addressed is whether such interruptions should be excluded from the minimum duration period. An interruption in the normal course of activities such as weekly day off would undoubtedly be included in the duration of the PE but in cases where interruption exceeds substantial periods which represent cessation of the activities at site, it would be difficult to accept that the building/project site continues to represent a fixed place of business of an enterprise. Reference to the commentary by Klaus Vogel on Double Taxation Conventions on this aspect is also instructive. The relevant passage from the said text is quoted below:-

> "Long interruptions lead to a suspension of the minimum time period if the continuation of the work is functionally related with the work performed prior to the interruption (see Schieber, P.-H., supra m.no.1, at 268; in contrast Skaar, A., supra m.no.1, at 390)."

39. In the facts of the present case, where admittedly the Assessee did not have access to the site during the period from 21.05.2006 till 19.11.2006, the same clearly cannot be construed as its PE under Article 5(2)(h) of DTAA. If the period during which the Assessee did not have access to the site in question is excluded, the aggregate period would be less than nine months and this would exclude the applicability of Article 5(2)(h) of DTAA. It is implicit in the expression 'Permanent Establishment' that there should be some degree of permanency of the fixed place of business before it can be construed as a PE of the Assessee. Thus, although a building site or a construction has been recognised as a PE, the same is conditional on the site/project representing an enterprise's fixed place of business - through which the business of the enterprise is carried on - for a minimum period of nine months. In the facts, where an enterprise is not granted access to the site for a long duration and carries on no activity at site during that period, the site could hardly be construed as the fixed place of business of an Assessee during that period.

40. We are also unable to accept the Revenue's contention that since the duration of the project itself exceeded nine months, the duration test under Article 5(2)(h) of DTAA would

stand satisfied. A careful reading of Article 5(2)(h) of DTAA indicates that it is necessary that the 'site, project or activity continues for a period of more than nine months'. It is an implicit condition that the enterprise should be involved at the site or involved in the assembly project in the source country. In the present case, the installation activities lasted from 19.11.2006 to 27.04.2007, which is much less than the minimum period of nine months.

41. Even if the time spent by ASL in conducting the pre-engineering, pre- design survey is included, the duration of the project activities in India would not exceed nine months. The Assessee's Project Office is inextricably linked to the project. Therefore, if the duration of the project activities in India was less than nine months, it cannot be held that the Assessee had a PE in India under Article 5(2)(h) of the DTAA.

42. In view of the above, answer to the second question is in the negative, that is, in favour of the Assessee and against the Revenue.

43. The next issue to be addressed is whether ASL could be construed as a DAPE of the Assessee within the meaning of Article 5(4) of the DTAA. The Assessee has placed on record the Director's Report and the final accounts of ASL for the financial year ended 31st March, 2007. The same indicates that during the year 2006-07, ASL earned a gross income of Rs.54.42 crores. The Director's of ASL in their report for the year 2006-07, inter alia, reported as under:-

> "....Your Directors are pleased to inform that during the year under review the company continued its regular activities i.e. Shipping, Ship Owning/Chartering, Barge Owning, Lighterage, Transportation, Offshore Marketing/Technical Consultancy and Offshore Fabrication and Installation work. The Company provides all logistic and consultancy support to NPCC, Abu Dhabi, Valentine Maritime (Gulf) LLC, Abu Dhabi and Valentine Maritime (Mauritius) Ltd., Mauritius and other Indian Companies for their various Offshore Contracts towards Construction of Oil & Gas production/process Platforms and Pipelines at Mumbai High for ONGC & other Indian/Foreign Companies. The company is qualified to bid as approved Offshore Project Contractor for ONGC, MDL, L&T, EIL, HHI, etc.
>
> The Company also continued to provide logistic, technical and marketing support to M/s. Winco Maritime Ltd., London in Technical & Commercial Management of their cargo vessels in worldwide trading and also in Indian Coastal Traffic.
>
> 3) <u>OFFSHORE ACTIVITIES:</u>
>
> Your Directors are pleased inform that your Company in association with subsidiary Company M/s. Supreme Offshore Construction & Technical Services Ltd, have executed a Prestigious Contract for Modification works of 4 Well Platform Project of ONGC, through, NPCC, Abu Dhabi, who are the main Contractor. The Contractor included Engineering, Procurement, Fabrication and the offshore installation which is under execution now.
> Further your Company also provided Agency Services/Logistic Support etc to VMGL/VMML during their execution of JERP Project of Reliance as main contractor. Similar Services were also provided by your Company to VMML for execution of Erection & Pre-commissioning of Offshore Crude Handling Project of Essar Port Terminals, Vadinar. The Services to all the above projects were rendered to the satisfaction of clients."

44. It is apparent from the above that ASL's activities were not limited to providing services to the Assessee but extended to various other activities. ASL also provided logistics and consultancy support to various companies other than the Assessee. The Director's Report also clearly indicates that the activity of providing offshore marketing/technical consultancy and offshore fabrication and installation work were amongst the regular activities carried on by ASL.

45. The Assessee has also placed on record a copy of the consultancy agreement dated 26th December, 1994 entered into with ASL. Clause 1, 2 & 3 are relevant and are quoted below:-

> "Clause 1
>
> The Consultant hereby agree to act as the sole and exclusive Consultant for the Principal in India and shall not represent any competitor to the Principal nor act in a manner which could be detrimental to the Principal's interests.
>
> Clause 2
>
> The Principal shall in its name bid and execute contracts related to the works above defined.
>
> Clause 3
>
> The Consultant shall provide the Principal with the following services:
>
> (a) Assistance in the gathering of relevant market information.
>
> (b) Assistance in obtaining works and active representation, promotion and support of the Principal's activities in India.
>
> (c) Assistance in obtaining services and facilities in India."

46. It is clear from the above that ASL had agreed to act as a 'sole and exclusive' consultant for the Assessee in India and had further agreed not to represent any competitor of the Assessee or act in a manner detrimental to the Assessee's interest. The recital to the agreement also indicates that the Assessee was desirous to undertake offshore contract work in India and had, therefore, appointed ASL as its sole and exclusive consultant in India. The consultancy agreement did not fetter ASL to carry on its regular activities including providing consultancy services to persons other than the Assessee's competitors. The financial accounts of ASL also clearly indicate that it had earned substantial income other than the remuneration received/receivable from the Assessee.

47. In view of the above, the ITAT's conclusion that ASL was working 'wholly and exclusively' for the Assessee, is clearly not sustainable. There was no material which would justify this conclusion. The consultancy agreement clearly indicates that ASL was engaged to (a) provide assistance in gathering relevant market information; (b) assistance in obtaining works; (c) active representation and promotion of the Assessee's activities in India; and (d) provide assistance in obtaining services and facilities in India. Clause 2 of the consultancy agreement clearly indicates that the contracts would be tendered for and executed by the Assessee. The Assessee had also duly disclosed ASL to be its agent involved in the contract as well as the remuneration payable to ASL.

The representatives of ASL were present at the pre-bid meeting held with ONGC on 23rd August, 2005 as well as at the kick-off meeting held on 16th December, 2005 as representatives of the Assessee. The presence of ASL at such meeting was clearly in pursuance of the services agreed to be rendered by them. However, this by itself cannot lead to an inference that ASL constituted a DAPE of the Assessee in India.

48. At this stage, it would be relevant to refer to Article 5(4) and 5(5) of the DTAA which reads as under:-

> "4. Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of independent status to whom paragraph 5 applies – is acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts on behalf of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities

which that person undertakes for the enterprise, unless the activities of such person are limited to the purchase of goods or merchandise for the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such person are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph."

49. A plain reading of paragraph 4 of Article 5 indicates that for a person to constitute a DAPE, the agent must (a) not be an agent of independent status to whom paragraph 5 applies; (b) the agent acts on behalf of the enterprise; and (c) the agent habitually exercised authority to conclude contracts on behalf of the enterprise.

50. By virtue of paragraph 5 of Article 5 of the DTAA, an enterprise shall not be deemed to have a permanent establishment merely because it carries on business in a contracting state through a broker, general commission agent or any other agent of an independent status provided that such persons act in their ordinary course of business. Thus, even an independent agent who acts outside its ordinary course of business would fall outside the scope of paragraph 5 of Article 5 of the DTAA. Therefore, in order to consider whether an agent of an enterprise falls within the ambit of paragraph 5 of Article 5 of the DTAA, it is necessary to consider whether (a) the agent is one of an independent status and (b) whether he is acting on behalf of the enterprise in the ordinary course of its business. Applying the aforesaid tests in the facts of the present case, it is at once clear that ASL has acted on behalf of the Assessee in its normal course of business. This is evident from the Director's Report which indicates that regular activities of ASL include offshore marketing/technical consultancy and ASL in its regular course of business provides logistics and consultancy support to various entities including the Assessee. It is also apparent from the final accounts of ASL for the year 2006-07 that it carries on substantial business other than the services provided to the Assessee. The agreement entered into between the Assessee and ASL is also on principal-to-principal basis.

51. Even otherwise, there is material to support the view that the Assessee would bid and execute contracts in its name. The consultancy agreement does not authorise ASL to conclude contracts on behalf of the Assessee. It is also noteworthy that while the officials of ASL were present at the kick-off meeting held on 16th December, 2005, so were the other officers of the Assessee. Although, the correspondence between the Assessee and ASL indicated that ASL was involved in the project since the pre-bid meeting and had also acted on behalf of the Assessee, it cannot be concluded that ASL was habitually authorised to conclude contracts on behalf of the Assessee.

52. In view of the above, ASL cannot but be considered as an agent of independent status to whom paragraph 5 of Article 5 of the DTAA applies. In this view, ASL would not constitute a DAPE of the Assessee in India.

53. In view of our conclusion that the Assessee did not have a permanent establishment in India, the question of attributing any income of the Assessee to the PE does not arise. However, the ITAT has erroneously held that the Assessee has a PE in India. Although the ITAT has held so, it has not quantified the income attributable to the PE. Thus, the answer to question no.4 framed in the Assessee's appeal is answered in favour of the Assessee and against the Revenue.

54. Insofar as the question whether the decision of the ITAT is contrary to Article 7(6) of the DTAA is concerned, we find that the AO as well as the ITAT had provided reasons for adopting the method of computation of the income of the Assessee. The ITAT had also found that there was no basis for the method adopted by the Assessee. This, in our view, would be a sufficient reason for not following the method of computation of taxable income as adopted

in the preceding years. Although, the Assessee had claimed that Section 44BB and the CBDT Instruction No.1767 provided the legal basis for the method of computation of taxable income adopted by the Assessee, the same is clearly erroneous. Section 44BB of the Act provides for levying tax on a presumptive basis and 10% of the receipts are presumed to be the profits of a foreign company rendering the services specified therein. There is no scope for allowing any deduction while computing tax on a presumptive basis. The method of computation as adopted by the Assessee is also not supported by the CBDT Instruction No. 1767 referred to by the Assessee.

55. In view of the above, question no.5 framed in the Assessee's appeals is answered in the affirmative, that is, in favour of the Revenue and against the Assessee.

56. The question framed in the appeals preferred by the Revenue essentially pertains to the attribution of income arising from the contracts in question for the purpose of taxing the same under the Act. In the present case, we have concluded that the Assessee does not have a PE in India in terms of the DTAA, thus, the question of splitting the business profits of the Assessee arising from the contract into profits attributable to India and profits attributable to the Assessee overseas does not arise. In this view, it is not necessary to address the questions raised by the Revenue. However, for the sake of completeness, we consider it appropriate to address the said question on an assumption that the Assessee did have a PE in India during the relevant period.

57. Section 4 of the Act is a charging section by virtue of which income tax is charged in respect of the total income of every person. The scope of total income is described under Section 5 and by virtue of Section 5(2) of the Act, the total income of a person who is a non-resident includes income which -

> "(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or
>
> (b) accrues or arises or is deemed to accrue or arise to him in India during such year."

58. Section 9 of the Act provides for income that is deemed to accrue or arise in India. By virtue of Section 9(1)(i) of the Act, all income which accrues or arises directly or indirectly from any business connection in India could be deemed to accrue or arise in India. If income of a foreign company is found to be taxable under the Act, it is next to be seen whether the same can still be taxed in terms of a bilateral agreement, if any, between India and the country where the foreign company is domiciled. Thus, without going into the question whether the incomes attributable to design, procurement of material and fabrication of platforms are otherwise taxable under the Act and assuming it is so, it would still have to be determined whether such income is taxable under the Act in terms of the DTAA and, for the aforesaid purpose, it is necessary to refer to Article 7 of the DTAA, which provides for taxation of business profits. Paragraphs 1, 2 & 3 of Article 7 are relevant and are reproduced as under:-

> "1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.
>
> 2. Subject to the provisions of paragraph (3), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

> 3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the tax laws of that State."

59. It is apparent from the plain reading of the above quoted paragraphs that only such income as is attributable to a UAE based Assessee's PE in India can be taxed. In **Hyundai Heavy Industries** (supra), the Supreme Court had explained that the only way to ascertain the profits arising in India would be by treating the Assessee's permanent establishment in India as a separate profit centre viz-a-viz the foreign enterprise. The Court held as under:-

> "The Indian Income-tax Act, 1961 is concerned only with the profits earned in India and, therefore, a method is to be found out to ascertain the profits arising in India and the only way to do so is by treating the Indian permanent establishment as a separate profit centre vis-a-vis. the foreign enterprise (the Korean GE, in the present case). This demarcation is necessary in order to earmark the tax jurisdiction over the operations of a company. Unless the permanent establishment is treated as a separate profit centre, it is not possible to ascertain the profits of the permanent establishment which, in turn, constitutes profits arising to the foreign GE in India. The computation of profits in each permanent establishment (taxable jurisdiction) decides the quantum of income on which the source country can levy the tax. Therefore, it is necessary that the profits of the permanent establishment are computed as independent units. However, in a case where the Government of India has entered into a tax treaty with a foreign country (Korea, in the present case) then in relation to an assessee to whom such tax treaty applies, the provisions of the Act shall apply only to the extent to which the provisions thereof are more beneficial to the assessee."

60. In the present case, the consideration of various activities has been specified in the contracts in question. Annexure C (Contract Price Schedule and Rental Rates Schedule) specifically assigns value to various activities. It is also not disputed that the invoices raised by the Assessee specifically mentioned the work done outside India as well as in India. Thus, even though the contracts in question may be turnkey contracts, the value of the work done outside India is ascertainable. There is no dispute that the values ascribed to the activities under the contracts are not at Arm's Length. There is also no material to indicate that the work done outside India included any input from the Assessee's PE in India. The ITAT had considered the contract and in view of the fact that the consideration for various activities such as design and engineering, material procurement, fabrication, transportation, installation and commissioning had been separately specified, the Tribunal rightly held that the consideration for the activities carried on overseas could not be attributed to the Assessee's PE in India.

61. We find no infirmity with the aforesaid view. In the circumstances, the first two questions framed in the Revenue's appeal are answered in the negative, that is, in favour of the Assessee and against the Revenue. Since the second question has been answered against the Revenue, the third question does not arise for consideration.

62. In view of the conclusion that the Assessee did not have a PE in India during the AYs 2007-08 and 2008-09, no income of the Assessee from the projects in question can be attributed to the Assessee's PE. The assessment orders dated 26th October, 2010 and 18th November, 2011 for the AYs 2007-08 and 2008-09 respectively as well as the corresponding orders passed by the ITAT in the corresponding appeals are set aside.

63. The appeals are disposed of in the above terms. The parties are left to bear their own costs.

8. As no distinguishing decision has been brought to our notice, respectfully following the binding decision of the Hon'ble High Court of Delhi (supra) we decline to interfere.

9. In the result, the appeal filed by the revenue is dismissed.

10. Decision announced in the open court in the presence of both the representatives on 01.07.2021.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA
Date:-01.07.2021
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	01.07.2021
Date on which the typed draft is placed before the dictating Member	01.07.2021
Date on which the typed draft is placed before the Other member	01.07.2021
Date on which the approved draft comes to the Sr.PS/PS	01.07.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	01.07.2021
Date on which the fair order comes back to the Sr. PS/ PS	01.07.2021
Date on which the final order is uploaded on the website of ITAT	01.07.2021
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	