Understanding the Concept of Service PE & Construction PE

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Understanding the concept of Permanent Establishment

India- Singapore DTAA (look from DTAA itself- look at other DTAAs aswell)

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially :-------

3. A building site or construction, installation or assembly project constitutes a permanent establishment only if it continues for a period of more than 183 days in any fiscal year.

4. An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it carries on supervisory activities in that Contracting State for a period of more than 183 days in any fiscal year in connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State.

5. Notwithstanding the provisions of paragraphs 3 and 4, and enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in that Contracting State for a period of more than 183 days in any fiscal year in connection with the exploration, exploitation or extraction of mineral oils in that Contracting State.

6. An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a Contracting State through employees or other personnel, but only if :

a. activities of that nature continue within that Contracting State for a period or periods aggregating more than 90 days in any fiscal year; or

b. activities are performed for a related enterprise (within the meaning of Article 9 of this Agreement) for a

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

Brief Facts

- The assessee, was a wholly owned subsidiary of Centrica Plc., a company incorporated in the United Kingdom ('UK').
- 'BSTL' and 'DEML' were also subsidiaries of Centrica Plc. These overseas concerns were in the business of supplying gas and electricity to consumers across the UK and Canada.
- The overseas entities outsourced their back office support functions for instance, debt collections/consumers' billings/monthly jobs to third party vendors in India. To ensure that the Indian vendors comply with quality guidelines, assessee was established in India to act as service provider to those overseas entities.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

Brief Facts

- To seek support during initial year of its operation, assessee sought some employees on 'secondment' from the overseas entities. For this purpose, it entered into an agreement with the overseas entities in which the overseas entity seconded some employees for fixed tenure.
- In terms of the secondment agreement, the employees so seconded worked under assessee's direct control and supervision.
- The seconded employees continued to remain on the payroll of the overseas entities who used to pay and disburse the salaries. The assessee reimbursed such salary costs to the overseas employers.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

Brief Facts

- The assessee filed an application seeking advance ruling on question as to whether tax was liable to be deducted at source under section 195 in respect of reimbursements made to overseas entities,
- The AAR held that reimbursement of salary cost paid/payable by the assessee to overseas entities under the terms of Secondment agreement was in the nature of income accrued to the overseas entities; and, therefore, tax was liable to be deducted at source under section 195 on amount paid/payable by assessee to overseas entities under the secondment agreement.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

Del. HC Ruled on Service PE -Implication

- In the present case, although seconded employees are to be integrated into CIOP, for the agreed period and are subject to its supervision and control. But crucially, these seconded employees retained their entitlement to participate in the overseas entities' retirement and social security plans and other benefits in terms of its applicable policies, and the salary was properly payable by the overseas entitle, which claimed the money from CIOP.

- There was no purported employment relationship between CIOP and the secondees. None of the documents, including the attachment to the secondment agreements placed on record (between the secondees and CIOP) reveal that the latter can terminate the secondment arrangement.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

Del. HC Ruled on Service PE -Implication

- There is no entitlement or obligation, clearly spelt out, whereby CIOP has to bear the salary cost of these employees.

- The secondees cannot in fact sue the CIOP for default in payment of their salary- no obligation is spelt out vis-à-vis the Petitioner.

- All direct costs of such seconded employee's basic salary and other compensation, cost of participation in overseas entities' retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entity.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

<u>Del. HC Ruled on Service PE -Implication</u>

- Whilst CIOP was given the right to terminate the secondment, (in its agreement with the overseas entities) the services of the secondee vis-à-vis the overseas entities - the original and subsisting employment relationship - could not be terminated. **Rather, that employment relationship remained independent, and beyond the control of COIP.**

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

<u>Del.HC Ruled Payment is not reimbursement, rather payment for services</u>

- The absence of a mark-up could not negate the nature of the transaction. The nomenclature or lesser-than-expected amount charged for such services could not change the nature of the services.

- The Court in E-funds highlighted that the nature of activity undertaken by the employee was determinative of whether it constituted a service. The employees deputed to Centrica India were overseeing the quality of the work of the third-party vendors in India; such services could not be characterized as mere stewardship.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

34. To determine the existence of a service PE, CIOP argues that the Court must look towards the substance of the employment relationship and not the form. This is correct. In the present case, the seconded employees are to be integrated into CIOP, for the agreed period and are subject to its supervision and control. The rules, regulations, policies and other practices of CIOP for its employees were applicable to these employees too. The seconded employee's duties and functions were dictated by the instructions and directions of the CIOP. He/she had to perform the duties assigned with due diligence in accordance with the applicable laws and regulations, standards and practices and control of CIOP. The overseas entities were not responsible for any

errors or omissions of such seconded employees or for their work. CIOP bore all risks in relation to the work of seconded employees, and reaped the benefit from the output. CIOP also bore the cost of monthly remuneration and reimbursement of cost to seconded employees. However, crucially, these seconded employees retained their entitlement to participate in the overseas entities' retirement and social security plans and other benefits in terms of its applicable policies, and the salary was properly payable by the overseas entitle, which claimed the money from CIOP. There was no purported employment relationship between CIOP and the secondees. None of the documents, including the attachment to the secondment agreements placed on record (between the secondees and CIOP) reveal that the latter can terminate the secondment arrangement; there is no entitlement or obligation, clearly spelt out, whereby CIOP has to bear the salary cost of these employees. The secondees cannot in fact sue the CIOP for default in payment of their salary- no obligation is spelt out vis-à-vis the Petitioner. All direct costs of such seconded employee's basic salary and other compensation, cost of participation in overseas entities' retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entity.

Whilst CIOP was given the right to terminate the secondment, (in its agreement with the overseas entities) the services of the secondee vis-à-vis the overseas entities - the original and subsisting employment relationship - could not be terminated. Rather, that employment relationship remained independent, and beyond the control of COIP.

Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300

CIOP'S contentions

9. CIOP, the petitioner submits that the Authority fell into error in overlooking that there is a strong underlying master-servant relationship in the case of secondment whereas in service agreements, the relations between the parties is between two principals, i.e. the service provider is an independent contractor. In this regard, learned senior counsel relied upon the decision Kishorelal v. ESI Corpn. [2007] 4 SCC 579. It is submitted that in terms of the secondment agreement, the control of the petitioner over the seconded employee is complete in almost all aspects, such as - (i) dictating the scope and nature of work to be undertaken; (ii) right of supervision; (iii) right to issue instructions and directions; (iv) right to dictate that the seconded employees would not have any entitlement to seek salaries and other emoluments against the petitioner; (v) right to terminate the secondment agreement even though not the service itself.

10. Learned counsel differentiated between the concept of "legal employment" and "economic employment” and in this context relied upon the observations in 'International Hiring-out of Labour' by Klaus Vogel as well as principles contained in the OECD Commentary on the Model Tax Convention. It was argued that a legal employer appoints someone and, therefore, has the right to terminate the employment. The economic employer, on the other hand, enjoys the fruits of the labour, possesses the authority to inspect and control and bears the risks and results of the work performed by the employee. The place of employment or work would also be that directed by the economic employer. The economic employer may not have the legal right to terminate the employment altogether, it would possess the right to terminate the contractual arrangement, i.e. the secondment agreement. The payment of salary of the seconded employee is charged from the economic employer. Learned counsel reiterated that an overall reading of Articles 2.1, 2.2, 2.3, 3.1 and 5.2 of the secondment agreement conclusively establishes that it was a real and economic employer of the seconded employees and that they were acting to its dictate in the performance of their job and not placed there to perform the tasks assigned by the overseas entities.

Yum! Restaurants (Asia) Pte. Ltd.[2020] 81 ITR(T) 440 (Delhi - Trib.) Trib.)[06-07-2020]

Brief Facts

- The assessee is a company incorporated in Singapore, which is engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands for a number of territories in the Asia Pacific region (including India).
- For the operation of restaurant outlets, the assessee entered into Technology License Agreement (in short "TLA") for license of "Technology" and "System" with Yum! Restaurants (India) Private Limited (in short "YRIPL").
- YRIPL in turn had appointed various franchisees for operating restaurants in India under the brand name KFC and Pizza Hut. YRIPL also operated the company owned KFC restaurants in India.
- The royalty income received by assessee was offered to tax in India on the basis of tax rates prescribed in DTAA between India and Singapore i.e. @ 10%. There is no dispute with regard to the same.

Yum! Restaurants (Asia) Pte. Ltd.[2020] 81 ITR(T) 440 (Delhi - Trib.) Trib.)[06-07-2020]

Brief Facts

- The Assessing Officer was of the view that the person employed by the assessee, working under the Indian entity, were seconded to India; the salary of the said person was reimbursed by the Indian entity and hence taxable in the hands of the assessee.
- The case of the assessee was that the said person had shifted to India and was working solely for the Indian concern whose salary was reimbursed. The Assessing Officer however, treated the salary reimbursement cost as FTS.
- The Assessing Officer was of the view that the furnishing of services by the seconded employee were technical in nature and taxable as FTS under Article 12 of DTAA between India and Singapore.

Yum! Restaurants (Asia) Pte. Ltd.[2020] 81 ITR(T) 440 (Delhi - Trib.) Trib.)[06-07-2020]

CIT(A) Held:-

- The issue in the present case was against the addition on account of salary reimbursement cost treated as fee for technical services (in short "FTS").
- The CIT(A) after going through the clauses of Deputation Agreement concluded that secondee was under the control of YRIPL and was working for it.
- The CIT(A) also held that he was not the employee of the assessee and hence there was no right/lien over his employment and hence, there was no service PE. He referred to the various evidences filed by the assessee in this regard and also referred to the clauses of Deputation Agreement.

Yum! Restaurants (Asia) Pte. Ltd.[2020] 81 ITR(T) 440 (Delhi - Trib.) Trib.)[06-07-2020]

<u>ITAT Ruling:-</u>

- **Whether the seconded employee working for it resulting in service PE.**
- As per the clauses of the Deputation Agreement the lien on employment was with Indian concern, which paid his salary. It was pointed out that in the absence of any separate Service Agreement between the Indian entity and non-resident assessee company, there was no question of any service PE.
- It was also pointed out that the decision of Hon'ble Delhi High Court in Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300/224 Taxman 122/364 ITR 336 is not applicable to the facts of the present case and is distinguishable.
- In the case salary was the responsibility of foreign company which was reimbursed by the Indian concern, including direct costs; and the personnel also returned back. However, in the facts of the present case, salary was paid by the Indian concern, including direct costs.

Yum! Restaurants (Asia) Pte. Ltd.[2020] 81 ITR(T) 440 (Delhi - Trib.) Trib.)[06-07-2020]

<u>ITAT Ruling:-</u>

- **The issue is whether there is rendering of services of technical nature, taxable as FTS under Article 5(6) read with Article 12 of the DTAA.**
- It was held that the existence of service PE and provision of technical services cannot co-exist. In any case under Article 12 of DTAA, the clause of "make available" needs to be fulfilled to hold existence of PE for technical services.
- In the absence of fulfilment of "make available" clause, it is not possible to hold that there is taxability of FTS under Article 12 of the DTAA.

Abbey Business Services India (P.) Ltd [2020] 122 taxmann.com 174 (Karnataka)

Brief Facts

- The assessee is an Indian subsidiary of ANITCO Ltd., which is group company of ANP UK. ANP had entered into an agreement with assessee company to outsource the provision of certain process and call centres to an Indian company.
- An agreement for secondment of staff was entered into between foreign and assessee-Indian company and for deputation of its employees, assessee had made certain payments part of which was salary reimbursement on which tax was deducted.
- The Assessing Officer held that as per the agreement, the employees of ANP were seconded to India who were highly skilled technical personnel and ANP had agreed to provide training to some of the employees of Indian company and employees were on the payroll of ANP and ANP was involved in providing technical services.

Abbey Business Services India (P.) Ltd [2020] 122 taxmann.com 174 (Karnataka)

Karnataka HC Ruling

- It is evident that the assessee had entered into a secondment agreement for securing services to assist it in its business.
- The expenses incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source and the aforesaid amount could not be considered as 'fees for technical services'.
- It is also pertinent to note that secondment agreement constitutes an independent contract of services in respect of employment with assessee.

Abbey Business Services India (P.) Ltd [2020] 122 taxmann.com 174 (Karnataka)

<u>Karnataka HC Ruling</u>

- From the perusal of the key features of the agreement, it is evident that the seconded employees have to work at such place as the assessee may instruct and the employees have to function under the control, direction and supervision of the assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee.
- The employees in their capacity as employees of the assessee had to control and supervise the activities of another company. Therefore, the assessee for all practical purposes has to be treated as employer of the seconded employees and expenses incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source.

[2007] 162 Taxman 165 (SC)/[2007] 292 ITR 416 (SC)/[2007] 210 CTR 419 (SC)
[2007] 162 Taxman 165 (SC)
SUPREME COURT OF INDIA
Director of Income-tax (International Taxation) vs. Morgan Stanley & Co.

The respondent MSCo belonging to M group, is a non-resident-company incorporated in USA. It is an investment bank engaged in the business of providing financial advisory services, corporate lending and securities underwriting. One of the group companies MSAS incorporated in India entered into an agreement dated 14-4-2005 for providing certain support services to MSCo. MSCo outsourced some of its activities to MSAS. The said MSAS was set up to support the main office functions in equity and fixed income research, account reconciliation and providing IT enabled services such as, back office operation, data processing and support centre to MSCo. On 19-5-2005 MSCo filed advance ruling application in Form 34-C inviting advance ruling on the question whether the MSCo would be regarded as having a PE in India under Article 5(1) of the DTAA on account of the services rendered by MSAS under the Services Agreement dated 14-4-2005 entered into by MSAS with the MSCo and if so, the amount of income attributable to such PE.

[2007] 162 Taxman 165 (SC)/[2007] 292 ITR 416 (SC)/[2007] 210 CTR 419 (SC) [2007] 162 Taxman 165 (SC) SUPREME COURT OF INDIA Director of Income-tax (International Taxation) vs. Morgan Stanley & Co.

With globalization, many economic activities spread over to several tax jurisdiction. This is where the concept of P.E. becomes important under article 5(1). There exists a P.E. if there is a fixed place through which the business of an enterprise, which is multinational enterprise (MNE), is wholly or partly carried on. In the instant case MSCo is a multinational entity. As stated above it has outsourced some of its activities to MSAS in India. A general definition of the P.E. in the first part of article 5(1) postulates the existence of a fixed place of business whereas the second part of article 5(1) postulates that the business of the MNE is carried out in India through such fixed place. Now the question is whether the activities to be undertaken by MSAS consists of back office operations of the MSCo and if so whether such operations would fall within the ambit of the expression "the place through which the business of an enterprise is wholly or partly carried out" in article 5(1). [Para 6]

The second requirement of article 5(1) is not satisfied as regards back office functions. After examination of terms of agreement alongwith the advance ruling application made by MSCo it is clear that MSAS in India would be engaged in supporting the front office functions of MSCo in fixed income and equity research and in providing IT enabled services such as data processing support centre and technical services as also reconciliation of accounts. In order to decide whether a P.E. stood constituted one has to undertake what is called as a functional and factual analysis of each of the activities to be undertaken by an establishment. It is from that point of view, the ruling of the AAR that in the instant case article 5(1) is not applicable as the said MSAS would be performing in India only back office operations is correct. Therefore to the extent of the above back office functions the second part of article 5(1) is not attracted. [Para 8]

[2007] 162 Taxman 165 (SC)/[2007] 292 ITR 416 (SC)/[2007] 210 CTR 419 (SC)
[2007] 162 Taxman 165 (SC)
SUPREME COURT OF INDIA
Director of Income-tax (International Taxation) vs. Morgan Stanley & Co.

Now the question which arises for determination is the nature of activities performed by stewards and deputationists deployed by MSCo to work in India as employees of MSAS. Under article 5(2)(l) furnishing of services through the fixed place in India can constitute a P.E. The AAR in the impugned ruling has held that the stewards and deputationists are proposed to be sent by the MSCo from U.S. According to the AAR there is a flow of service from the MSCo to the MSAS when the former deputes its own employees to work in India in MSAS. Therefore, according to the AAR the service Agreement between MSCo and MSAS dated 14-4-2005 would fall under Article 5(2)(l) and consequently the transfer pricing regulation would apply for evaluating the charges payable by MSCo to MSAS in India for such service contract. [Para 13]

Article 5(2)(l) applies in cases where the MNE furnishes services within India and those services are furnished through its employees. In the instant case two activities namely stewardship activities and the work to be performed by deputationists in India as employees of MSAS are relevant. A customer like MSCo who has world wide operations is entitled to insist on quality control and confidentiality from the service provider. Stewardship activities involve briefing of the MSAS staff to ensure that the output meets the requirements of the MSCo. These activities include monitoring of the outsourcing operations at MSAS. The object is to protect the interest of the MSCo. These stewards would not be involved in day to day management or in any specific services to be undertaken by MSAS. The stewardship activity is basically to protect the interest of the customer. In the instant case the MSAS is a service P.E. It is in a sense a service provider. A customer is entitled to protect its interest both in terms of confidentiality and in terms of quality control. In such a case it cannot be said that MSCo has been rendering the services to MSAS. MSCo is merely protecting its own interests in the competitive world by ensuring, the quality and confidentiality of MSAS services. The ruling of the AAR that the stewardship activity would fall under Article 5(2)(l) cannot be sustained. To this extent there is merit in the civil appeal filed by the MSCo and accordingly its appeal to that extent stands

2007] 162 Taxman 165 (SC)/[2007] 292 ITR 416 (SC)/[2007] 210 CTR 419 (SC)
[2007] 162 Taxman 165 (SC)
SUPREME COURT OF INDIA
Director of Income-tax (International Taxation) vs. Morgan Stanley & Co.

As regards the question of deputation, an employee of MSCo when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCo. As long as the lien remains with the MSCo the said company retains control over the deputationist's terms and employment. The concept of a service PE finds place in the U.N. Convention. It is constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In the instant case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entails it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge.

Applying the above tests to the facts of instant case it is found that on request/requisition from MSAS the applicant deputes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCo as he retains his lien and in that sense there is a service PE (MSAS) under Article 5(2)(l). There is no infirmity in the ruling of the ARR on this aspect. In the above situation, MSCo is rendering services through its employees to MSAS. Therefore, the Department is right in its contention that under the above situation there exists a Service PE in India (MSAS). Accordingly, the civil appeal filed by the Department stands partly allowed. [Para 15]

Construction PE

In case of a construction or installation projects, taxable event will arise in India only when the activities of a foreign enterprise constitute a "construction PE" in India. A Construction PE exists when the construction site or an installation project is carried out for a period more than the prescribed period under the respective Tax Treaty with that country.

Different kinds of Construction PE are formed under following activities:

Project: A project is a larger or major undertaking involving considerable money, machine and manpower. A project may be a single project or multiple projects. In the case of Valentine Maritime, Mumbai Tribunal had held that in case of multiple projects, each project must be seen on standalone basis unless they are either artificially split or their activities are so interconnected and inter dependent that they have to be seen as a coherent one. Again, one has to consider the wordings of this article in the treaty. In some of the treaties, the number of days spent on each of the projects need to be aggregated to compute the number of days spent on projects in India while in others, such aggregation is not required. The connectivity of various projects can be established based on various factors such as geographical connections, technical connections, same client, unity of contractual obligations or unity of execution etc.

Building site or construction project: A building site or construction project includes:

- Construction of roads, bridges or canals etc;
- Laying of pipelines, excavation or dredging projects;
- Major renovation work that is more substantive than mere maintenance;
- On-site planning and supervision or erection of building, project etc.

Assembly or Installation project: It includes installation of new equipment, plant & machinery or even installation of computer network or an ERP package if the activity of the installation exceeds the prescribed time period.

Supervisory activities: The clause related to Supervisory activities is included only in some of the tax treaties as far as India is concerned.

It is seen in most of the treaties that if any of the above activities are carried out in India for a period of **more than 6 months** or if the charge payable for the project or supervisory activity **exceed 10% of the sale price of machinery and equipment**, the same is regarded as Construction PE. The duration of the project and percentage of payment towards supervisory activity will vary from Treaty to Treaty with various countries.

It has been 'bone of contention' between assessees and tax officers whether for the purpose of calculation of the duration of contractors' activities in India, time spent on pre-commencement activities like mere planning and supervisory activities (without construction) by the foreign enterprise should be included or not.

Many times, a contract has been awarded to a foreign enterprise who sub-contracts a part of the job to a local Indian sub-contractor. Issue arises that while computing the project duration, is the time spent by sub-contractors on the site/project should be counted for the purpose of calculating presence of foreign enterprise in India. Prof. Vogel has expressed his opinion on this issue as the period spent by a sub-contractor working on the building site must be considered as being time spent by the general contractor on the building project. Though there are conflicting court decisions in India and it will depend on the facts of each case and the wordings of the specific treaty.

Bellsea Ltd. [2020] 113 taxmann.com 344 (Delhi - Trib.) 18-11-2019

Where assessee, a Cyprus based company, was awarded a contract in relation to development of gas fields located offshore in East Coast of India, in view of fact that its construction activities in India continued for a period of six months only , it could be concluded that assessee did not have PE in India in terms of acticle 5(a)(g) of India - Cyprus DTAA

Bellsea Ltd. [2020] 113 taxmann.com 344 (Delhi - Trib.) 18-11-2019

Brief Facts

- The assessee is a company incorporated and a tax resident of Cyprus.
- During the financial year 2007-08, assessee was awarded a contract by Allseas Marine Contractors, S.A.(AMC) in relation to the development of Gas fields located offshore in the Krishna Godavari Basin of the East Coast of India.
- The work on the contract commenced in April 2008 and was completed in September, 2008 i.e. the activity of assessee continued for a period of six months.
- In the draft assessment order for AY 2008-09, Ld. AO held that the assessee had a PE in India.

Bellsea Ltd. [2020] 113 taxmann.com 344 (Delhi - Trib.) 18-11-2019

Brief Facts

- The contention of the Assessee was that the activity under the contract lasted for the period of less than 10 months and, therefore, under Article 5(2)(g) of Indo Cyprus DTAA, there exist no PE in India.
- Ld. AR submitted that the Ld. AO had taken the date of commencement of the activity of the assessee for the purpose of determining the existence of PE from the date of the visit of one of the employees, September, 2007 but such visit of the employee was only to collect data and information to bid for the contract with AMC and, therefore, cannot be reckoned for the purpose of determination of duration u/s 5(2)(g) of the DTAA.

Bellsea Ltd. [2020] 113 taxmann.com 344 (Delhi - Trib.) 18-11-2019

<u>Tribunal Held</u>

- It followed the Coordinate Bench Ruling in assessee's own case in respect of very same contract for the AY 2008-09 which held that a building site or an assembly project can only be construed at fixed place of business only when an enterprise commences its activities at the project site.
- Any activity which may be related or incidental but was not carried out at the site in the source country would clearly not be construed as a PE.
- *Article 5*

3. (a) A building site or construction, installation or assembly project or supervisory activities in connection therewith constitutes a permanent establishment only if such site, project or activities last more than six months.
(b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) within the country for a period or periods aggregating more than 90 days within any 12-month period.

Bellsea Ltd. [2020] 113 taxmann.com 344 (Delhi - Trib.) 18-11-2019

Tribunal Held

- Albeit, preparatory work at the site itself can be counted for the purpose of determining of duration of PE. However, in the present case there is no such allegation or material on record that any kind of preparatory work had started at the installation sites prior to 4th of Jan 2008.
- The period from which it can be reckoned that enterprise has started to perform the activities in connection with installation project or site etc. is when the actual purpose of the business activity had started. Therefore, in light of the above facts it held that the assessee holding that no income of the assessee on contract executed by the assessee in India can be held to be taxable under Article 5(2)(g) of the DTAA.

J. Ray Mc Dermott Eastern Hemisphere Ltd. [2016] 49 ITR(T) 300 (Mumbai)

For purpose of determination of Permanent Establishment, each project of a non-resident company has to be considered separately for computing work duration in number of days to test time limit of 9 months.

Article 5

2. The term "permanent establishment" shall include—

(i) a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than nine months.

(j) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12 month period.

J. Ray Mc Dermott Eastern Hemisphere Ltd. [2016] 49 ITR(T) 300 (Mumbai)

<u>Brief Facts</u>

- The assessee a company incorporated in Mauritius was engaged in India in transportation, installation and construction of off-shore platforms for the purpose of mineral oil exploration.
- The company was engaged in the execution of installation contracts in India which were for a duration of less than 9 months and hence income under all the contracts was not taxable in India as stipulated in article 7 of the Treaty.
- During the course of assessment proceedings, the Assessing Officer analysed the various contracts executed by the assessee at different locations and by treating all of the contracts executed in India as one held that the assessee had a PE in India.

J. Ray Mc Dermott Eastern Hemisphere Ltd. [2016] 49 ITR(T) 300 (Mumbai)

Tribunal Held

- The Tribunal held that for the purpose of computation of number days for examining threshold limit of 9 months, each of the building site or construction, or assembly project or supervisory activities connection therewith is to be viewed independently on stand-alone basis and thus, no aggregation is required to be done for computing number of days.
- Thus, in view of legal position as has been decided by the Tribunal in assessee's own case as well as on the facts of the year before us, it was held that the assessee had no PE in India in the year under consideration in terms of Article 5(2)(i) of the Act Indo-Mauritius treaty.