2025 INSC 891

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9766 OF 2025
(Arising out of SLP (C) No. 5710 of 2024)

HYATT INTERNATIONAL SOUTHWEST ASIA LTD. ...APPELLANT(S)

VERSUS

ADDITIONAL DIRECTOR OF INCOME TAX ...RESPONDENT(S)

WITH

CIVIL APPEAL NO. 9767 OF 2025
(Arising out of SLP (C) No. 20019 of 2025)
(Arising out of SLP(C) Diary No. 14972 of 2024)

WITH

CIVIL APPEAL NO. 9768 OF 2025
(Arising out of SLP (C) No. 10152 of 2024)

WITH

CIVIL APPEAL NO. 9769 OF 2025
(Arising out of SLP (C) No. 10157 of 2024)

WITH

CIVIL APPEAL NO. 9770 OF 2025
(Arising out of SLP (C) No. 10798 of 2024)

WITH

CIVIL APPEAL NO. 9771 OF 2025
(Arising out of SLP (C) No. 10800 of 2024)

WITH
CIVIL APPEAL NO. 9772 OF 2025
(Arising out of SLP (C) No. 10796 of 2024)

WITH

CIVIL APPEAL NO. 9773 OF 2025
(Arising out of SLP (C) No. 10797 of 2024)

J U D G M E N T

R. MAHADEVAN, J.

Leave granted.

2. All these appeals arise out of the common judgment and order dated 22.12.2023 passed by the High Court of Delhi[1] in the Income Tax Appeals preferred by the appellant / assessee, in respect of the Assessment Years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2016-17 and 2017-18. The details of the impugned orders before this Court, before the High Court and before the Income

[1] For short, "the High Court"

Tax Appellate Tribunal, along with the corresponding tax effect involved in each case, are tabulated below:

Case No.	High Court	ITAT	AO	Tax effect evolved
SLP (C) No. 5710 of 2024	ITA No.216/2020 Order dated 22.12.2023	579/Del/2013 Order dated 04.12.2019	21.11.2012 AY 2009-10	85,14,156/-
SLP (C) No. 10152 of 2024	ITA No.219/2020 Order dated 22.12.2023	1762/Del/2015 Order dated 04.12.2019	28.01.2015 AY 2011-12	2,98,96,262/-
SLP (C) No. 10157 of 2024	ITA No.217/2020 Order dated 22.12.2023	957/Del/2016 Order dated 04.12.2019	18.12.2015 AY 2012-13	2,85,75,313/-
SLP (C) No. 10796 of 2024	ITA No.201/2023 Order dated 22.12.2023	6363/Del/2019 Order dated 20.12.2022	19.06.2019 AY 2016-17	4,05,14,966/-
SLP (C) No. 10797 of 2024	ITA No.215/2023 Order dated 22.12.2023	712/Del/2021 Order dated 20.12.2022	13.04.2021 AY 2017-18	4,05,14,966/-
SLP (C) No. 10798 of 2024	ITA No.140/2021 Order dated 22.12.2023	727/Del/2017 Order dated 12.03.2021	24.11.2016 AY 2013-14	2,91,07,664/-
SLP (C) No. 10800 of 2024	ITA No.36/2022 Order dated 22.12.2023	6179/Del/2017 Order dated 27.07.2021	28.07.2017 AY 2014-15	3,05,12,883/-
SLP (C) Diary No. 14972 of 2024	ITA No.218/2020 Order dated 22.12.2023	779/Del/2014 Order dated 04.12.2019	28.11.2013 AY 2010-11	2,98,96,262/-

3. The necessary facts leading to the filing of the present appeals, as culled out from the impugned orders, are as follows:

3.1. The appellant is a company incorporated under the Companies Law, Dubai International Financial Centre Law No.3 of 2006, in the United Arab Emirates[2]. It is a tax resident of the UAE under Article 4 of the Agreement between the Government of India and the UAE for the avoidance of Double Taxation[3].

3.2. On 04.09.2008, the appellant entered into two Strategic Oversight Services Agreements[4] with Asian Hotels Limited[5], India – one for AHL, Delhi and another for AHL, Mumbai. Under the SOSA, the appellant agreed to provide strategic planning services and "know-how" to ensure that the hotel was developed and operated as an efficient and a high-quality international full-service hotel. Subsequently, AHL underwent reorganization and its name was changed to Asian Hotels (North) Limited, which continued to own the hotel. On 18.07.2010, the SOSA was partially amended.

3.3. For the Assessment Year 2009-10, the appellant filed its return of income declaring 'Nil' income and claiming a refund of Rs.87,99,091/-. After scrutiny, the Assessing Officer issued a notice dated 20.08.2010 under Section 142(1) read with

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[2] For short, "UAE"
[3] For short, "DTAA"
[4] For short, "SOSA"
[5] For short, "AHL"

Section 143(3) of the Income Tax Act, 1961[6]. In response, the appellant submitted a reply dated 25.08.2011, asserting that its income was not taxable under the Act as there was no specific Article under the DTAA for taxing Fees for Technical Services. It further stated that it did not have any fixed place of business, office, or branch in India, and that the presence of its employees in India during the relevant previous year did not exceed the nine-month threshold under Article 5(2) of the DTAA. Therefore, the appellant claimed that it did not have a Permanent Establishment (PE) in India and that its business income was not taxable under Article 7 of the DTAA.

3.4. On 28.12.2011, the Assessing Officer passed a draft assessment order under Section 143(3) read with Section 144C of the Act, holding *inter alia* that the appellant's activities constituted

(i) a business connection under Section 9(1)(i) of the Act;

(ii) a PE under Article 5 of the DTAA;

(iii) royalties and fees for technical services under Section 9(1)(vi)/(vii) of the Act; and

(iv) royalties under Article 12 of the DTAA.

3.5. The appellant filed its objections dated 22.01.2012 before the Dispute Resolution Panel (DRP), which rejected the objections and upheld the Assessing Officer's findings. Consequently, the Assessing Officer passed a final assessment

[6] For short, "the Act"

order dated 21.11.2012, for the assessment year 2009-10. Similar assessment orders were passed for the Assessment Years 2010-11, 2011-12 and 2012-13.

3.6. Challenging the above assessment orders, the appellant filed four appeals before the Income Tax Appellate Tribunal (ITAT). By a common order dated 04.12.2019, the ITAT rejected the appellant's contention that it did not have a PE in India and dismissed the appeals. In doing so, the ITAT relied on the decision of this Court in ***Formula One World Championship Limited v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr.***[7] and held that the appellant had a fixed place of business in India, thereby constituting a PE under Article 5(1) of the DTAA. Aggrieved by the said order, the appellant filed further appeals under Section 260A of the Act before the High Court.

3.7. In the meanwhile, the Assessing Officer passed a similar assessment order dated 24.11.2016 for the Assessment Year 2013-14, which the appellant challenged by filing ITA No.727/Del/2017 before the ITAT. By order dated 12.03.2021, the ITAT dismissed the appeal, following its earlier order dated 04.12.2019. Aggrieved, the appellant preferred ITA No.140 of 2021 before the High Court.

3.8. Similarly, the appellant challenged the assessment orders for the Assessment Years 2014-15, 2016-17, and 2017-18 by filing appeals before the ITAT. By

[7] (2017) 15 SCC 602

separate orders dated 27.07.2021 and 20.12.2022, the ITAT dismissed the appeals again, following its earlier order dated 04.12.2019. Aggrieved by these orders, the appellant filed ITA Nos.36 of 2022, 201 of 2023, and 215 of 2023 before the High Court.

3.9. The High Court heard all eight appeals together and framed the following substantial questions of law for consideration:

> *(i)Whether the Tribunal misdirected itself both in law and on facts in holding that service charges received by the appellant under the various SOSA agreement were taxable as royalty?*
>
> *(ii)Whether the appellant has Permanent Establishment in India within the meaning of the Double Taxation Avoidance Agreement?*
>
> *(iii)Whether the findings recorded by the Tribunal, in paragraphs 56, 57 and 59 are perverse and contrary to the terms of the Strategic Oversight Services Agreement (SOSA)?*
>
> *(iv)Is article 7(1) of the DTAA at all applicable to the appellant, having regard to the fact that it has incurred losses in the relevant financial years?*

3.10. By a common judgment and order dated 22.12.2023, the High Court answered the first question in favour of the appellant / assessee, and referred the fourth question to a larger Bench. However, it answered questions (ii) and (iii) against the appellant holding that the appellant, being a company incorporated in Dubai and a tax resident of the UAE, had a Permanent Establishment (PE) in India in the form of a fixed place of business. Aggrieved by this part of the High Court's judgment, the appellant has preferred the present appeals.

4. Challenging the findings of the High Court regarding the existence of a Permanent Establishment (PE) in the form of a fixed place of business in India under the Indo-UAE DTAA, the learned Senior Counsel for the appellant / assessee vehemently contended that the appellant is a Dubai based company engaged in rendering hotel consultancy and advisory services from Dubai to hotels in the Hyatt Group of Hotels, including several located in India. These services are rendered under a SOSA entered into with each hotel owner individually. The SOSA explicitly stipulates that the appellant shall render its services from Dubai and is not obligated to send or station any employee in India. However, the agreement permits at the appellant's sole discretion, occasional and temporary visits by its employees to India.

4.1. It was further submitted that the income of the appellant is not taxable in India under the provisions of the Act, as there is no specific Article in the DTAA enabling taxation of Fees for Technical Services (FTS). Furthermore, the appellant does not maintain a fixed place of business, office, or branch in India. The limited and occasional presence of its employees in India, did not exceed the threshold of nine months under Article 5(2)(i) of the DTAA, thereby excluding the existence of a PE.

4.2. The learned Senior Counsel argued that the High Court erroneously disregarded the two essential conditions laid down in ***Formula One (supra)*** *and*

Assistant Director of Income Tax-1, New Delhi vs. M/s. E-Funds IT Solutions Inc..[8], which are essential for the existence of a fixed place of business PE *viz.*,

(a) There must be a specific, fixed, and identifiable physical location in India; and

(b) Such location must be at the disposal of the foreign enterprise for use in carrying out its own business activities.

4.3. It was further submitted that there was no designated space or office at the hotel premises in Delhi or Mumbai that was either specifically reserved for or placed at the disposal of the appellant. The appellant exercised no control or dominion over any part of the premises. Mere involvement in policy decisions or enforcement of brand standards does not amount to a fixed place of business PE. Ownership and operational control of the hotel remained entirely with the Indian entity, as reaffirmed by Article 1, Section 3 of the SOSA.

4.4. The learned Senior Counsel further contended that the role of the appellant under the SOSA, was limited to strategic guidance, brand compliance, and long-term planning. The day-to-day operations of the hotel were carried out by Hyatt India Pvt. Ltd, under a separate Hotel Operating Services Agreement (HOSA) entered into with the hotel owner. The appellant had no involvement in such daily management. However, the High Court erred in conflating the two separate legal agreements – the

[8] (2018) 13 SCC 294

SOSA entered into by the appellant and the HOSA entered into by Hyatt India Pvt. Ltd. – and mistakenly attributed the day-to-day control of hotel operations to the appellant. According to the learned Senior Counsel, Hyatt India Pvt. Ltd. is a distinct legal entity, taxable independently under Indian law, and its operational activities cannot be attributed to the appellant for the purpose of determining PE under the DTAA.

4.5. It was also submitted that the High Court laid undue emphasis on the fact that six employees of the appellant visited India and stayed at the hotel premises during the relevant years. These visits, however, were brief and routine in nature and the same executives visited other Hyatt hotels across India including those in Goa, Bengaluru, Kochi, and Chennai. These oversight visits were intended to ensure brand uniformity and quality compliance. The short duration spread across multiple locations, and lack of exclusive use or control over any space do not satisfy the legal requirement of a fixed place of business PE. Furthermore, the Department failed to produce documentary evidence to establish that any such designated space was ever placed at the disposal of the appellant.

4.6. It was submitted that the High Court incorrectly inferred that the absence of an express prohibition in the SOSA on decision-making by appellant's employees during their stay at the hotel implies a right of disposal. In law, a fixed place of business PE cannot be presumed from the mere absence of a restriction; there must

be an affirmative grant of a right to use a specific physical location to carry on the enterprise's own business.

4.7. Ultimately, the learned senior counsel submitted that the High Court's findings are legally untenable and factually erroneous. The essential legal requirements for the constitution of a fixed place of business PE were not satisfied in the present case.

4.8. Accordingly, it was prayed that the findings of the High Court regarding the existence of a fixed place of business PE be set aside and a declaration be made to the effect that the appellant does not have a PE in India under Article 5 of the Indo-UAE DTAA, and that its income is not taxable in India under Article 7 of the said DTAA.

5. Per contra, the learned Additional Solicitor General of India appearing for the respondents submitted that on 04.09.2008, the appellant entered into SOSA with AHL, an Indian company and the owner of the Hyatt Regency Delhi, for providing oversight services in relation to the hotel for a period of 20 years. Under the SOSA, they had more than mere access to the hotel premises – the premises were at the appellant's full and unconditional disposal.

5.1. According to the learned Senior Counsel, the appellant's business was carried on through the employees stationed at the hotel, thereby satisfying the criteria of a

fixed place of business Permanent Establishment (PE) under Article 5 of the Indo-UAE DTAA.

5.2. It was further submitted that Article 5(1) of the DTAA defines a PE as a "fixed place of business through which the business of an enterprise is wholly or partly carried on". This definition is echoed in Section 92F(iii-a) of the Income Tax Act, 1961. Article 7(1) of the DTAA provides that profits of an enterprise are taxable only in the State of residence unless the enterprise carries on business through a PE in the other State. If a PE exists, then the profits attributable to the PE are taxable in the source country.

5.3. Referring to the various Clauses of the SOSA, it was submitted that the appellant's role extended beyond high-level policy formulation and into the domain of actual implementation. The appellant was involved in the appointment and training of staff, monitoring daily operations, exercising financial oversight, and influencing procurement and operational decisions – all of which demonstrate managerial and functional control, particularly through the General Manager, who reported to the appellant.

5.4. The learned Senior Counsel pointed out the documentary evidence mentioned in the impugned orders, which include records of names, roles, and durations of stay of the appellant's employees posted at the hotel. Some individuals remained in India for up to nine months and were involved in substantive hotel operations, clearly

indicating operational presence in line with the terms of the SOSA. In view of the same, it was submitted that the appellant had full and effective control over the hotel premises and that the premises were indeed at its disposal for conducting its business. Therefore, the hotel satisfies the definition of a fixed place of business PE under Article 5(1) of the DTAA. Consequently, in terms of Article 7(1) of the DTAA, the profits attributable to such PE are liable to be taxed in India and the appellant be taxed in India on the income derived from such activities.

5.5. To substantiate his contention, the learned Senior Counsel placed reliance on the decision of this Court in *Formula One (supra)*. In that case, the assessee (FOWC) incorporated in the UK, entered into a Race Promotion Contract (RPC) with Jaypee Sports International Ltd. to host the Formula One Grand Prix in India. The Court had to determine whether Jaypee constituted a fixed place PE of FOWC in India under the terms of the RPC. The Court held in paragraphs 74 and 76.5 of the judgment that for a fixed place PE to exist, two conditions must be met: (a) there must be a fixed place of business, and (b) through that place, the business of the enterprise must be wholly or partly carried on. Although FOWC's claimed, it only had access to the race circuit for three days a year, the Court noted that the contract term extended to five years (renewable to ten), and FOWC had full control during the race period. Therefore, the premises were held to constitute a PE. The Court also referred to the OECD Commentary [paragraph 40(c) and 40(d)] to clarify that the

duration of access is not determinative in itself – the right of disposal and conduct of business through the premises are the core tests. It further emphasized three key features of a PE: stability, productivity, and dependence.

5.6. Applying these principles to the present case, the learned Senior Counsel contended that the appellant – Hyatt International Southwest Asia Ltd – has entered into a long-term agreement (20 years) under which it enjoys broad and continued control over the hotel's key functions, including staffing, operations, strategic policy, and financial oversight. This arrangement reflects the three core characteristics of a PE: stability (20-year term), productivity (fee linked to business outcomes), and dependence (reliance on hotel infrastructure and staff to carry out its business).

5.7. It was further submitted that the decision in *E-Funds (supra)*, is factually distinguishable and therefore, not applicable to the present case.

5.8. In view of the foregoing submissions, particularly the principles laid down in *Formula One (supra)*, the learned Senior Counsel submitted that the appellant's operation satisfies all conditions for the existence of a fixed place of business PE under Article 5(1) of the Indo-UAE DTAA. The appellant's plea of lacking day to-day control is untenable given the pervasive control and continuous nature of its involvement.

5.9. Accordingly, it was submitted that the hotel premises constitutes a fixed place of business of the appellant in India, and in terms of Article 7(1) of the DTAA, the profits attributable to such PE are liable to tax in India. Therefore, the present appeals are liable to be dismissed.

6. We have heard the learned senior counsel appearing for the appellant and the learned Additional Solicitor General appearing for the respondents and also perused the materials available on record.

7. On 16.05.2024, when these matters were taken up for consideration, this Court passed the following interim order:

> *"We have heard learned senior counsel for the petitioner and learned Additional Solicitor General for the respondent-department.*
>
> *It is stated at the Bar that the tax demand has been fully met by the petitioners (under protest). However, the apprehension is with regard to the initiation of penalty proceedings pending consideration of the matter before this Court.*
>
> *It was submitted that the petitioner has a good case on merits and therefore, initiation of penalty proceedings and the demand made thereon would ultimately be prejudicial to the petitioner herein.*
>
> *Per contra, learned Additional Solicitor General submitted that having regard to the fact that three authorities, including the High Court, having held against the petitioner herein on the basis of the judgments of this Court, there is no reason as to why the penalty proceedings should be stayed or frustrated at this stage.*
>
> *However, we find that since notices have been issued in these matters pending consideration of these special leave petitions and bearing in mind the fact that the tax demand has been made by the petitioners herein, the penalty proceedings shall remain stayed till the next date of hearing.*
>
> *List the matters on 23.09.2024."*

7.1. On 23.09.2024, the aforesaid interim order was directed to be continued until further orders of this Court.

8. It is not in dispute that the appellant is a company incorporated in Dubai, and is a tax resident of the UAE within the meaning of Article 4 of the Agreement between the Government of India and the UAE for the Avoidance of Double Taxation. The appellant is engaged in rendering consultancy services in the hotel sector. It entered into two SOSAs both dated 04.09.2008 with ASL, India – one in respect of the Delhi hotel and the other, for the Mumbai hotel. For the relevant assessment years, the Assessing Officer passed assessment orders taxing the hotel related services rendered by the appellant, *inter alia,* on the ground that the appellant has a Permanent Establishment (PE) in India in the form of a place of business under Article 5(1) of the DTAA. These findings were affirmed by the ITAT.

9. As noted earlier, the High Court, at the time of final hearing of the appeals, framed four substantial questions of law, whereby it answered three of them, and referred the fourth question to a Larger Bench. Aggrieved by the finding of the High Court that the appellant has a Permanent Establishment in the form of a place of business in India as contemplated under Article 5(1) of the DTAA, the present appeals have been filed before this Court.

10. The principal issue that arises for determination herein is whether the appellant – Hyatt International Southwest Asia Ltd., a tax resident of the UAE, has a Permanent Establishment (PE) in India under Article 5(1) of the Indo – UAE Double Taxation Avoidance Agreement (DTAA), and consequently, whether its income derived under the Strategic Oversight Services Agreement (SOSA) is taxable in India.

11. At the outset, it is necessary to analyse the relevant clauses of the DTAA and the SOSA for effective adjudication. The concept of 'Permanent Establishment' is well defined under Article 5 of the DTAA, and similar provisions are found in international models such as the UN Model Double Taxation Convention (2021) and the OECD Model Tax Convention (2017). These model conventions provide an inclusive yet exhaustive definitions of PE, with the precise scope depending upon the terms of the bilateral DTAA. Article 5(1) of the India – UAE DTAA defines a PE as "a fixed place of business through which the business of an enterprise is wholly or partly carried on". This is consistent with the definition provided in Section 92F(iii-a) of the Income Tax Act, 1961. For better appreciation, Article 5 of the India – UAE DTAA is extracted below:

"PERMANENT ESTABLISHMENT

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."

11.1. Article 7 of the DTAA governs the taxation of business profits. Article 7(1) provides that the profit of an enterprise shall be taxable only in the State of its residence, unless the enterprise carries on business in the other Contracting State through a permanent establishment (PE) situated therein. In such a case, only so much of the profits as is attributable to that PE may be taxed in the other State. The provision reads as follows:

"Article 7 - Business profits

(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."

12. Insofar as the SOSA is concerned, the relevant clauses have already been extracted by the High Court in the impugned order; hence, we do not consider it necessary to reproduce them here once again. However, for contextual clarity, it may be noted that Section 4 of Article I of the SOSA deals with the 'title to the hotel'. It provides that if the hotel owner desires to obtain financial assistance for the construction or refinancing of the hotel – or if the hotel is to be used as collateral for any borrowing unrelated to the hotel business – the owner is required to obtain a non-disturbance and attornment agreement from the lender, which must be acceptable to the assessee. This provision ensures that the assessee can perform its obligation under the SOSA and realise its fees without interference but also.

12.1. Article II of the SOSA pertains to operating terms. As per Sections 1 and 2 of Article II, the SOSA is to remain in force for a term of twenty years from the effective date, with a possibility of extension by ten years through mutual agreement.

12.2. Article III governs the operation of the hotel. Section 1 stipulates that the hotel shall be operated in accordance with standards comparable to those prevailing in international hotels operated by Hyatt International and its subsidiaries. The assessee is responsible for providing strategic plans, policies, procedures, and guidelines to ensure adherence to the 'Hyatt Operating Standards'. There is also an obligation to use reasonable efforts to avoid conflicts between Hyatt branded hotels and the subject hotel. Under Section 2, the assessee is vested with complete control and

discretion in formulating and establishing the strategic plan for all aspects of hotel operations, including branding, marketing, product development, and daily operations. Section 3 further empowers the assessee to assign employees (either its own or its affiliates) to India without needing prior approval from the hotel owner or management. The assessee is also responsible for formulating policies relating to human resources, procurement, guest admittance, use of premises, pricing, sales and marketing, and reservations. Section 4 authorizes the assessee to formulate policies governing the hotel's operating bank accounts. Section 7 authorizes the assessee to identify, recruit and assist in appointing non-local hotel employees – including the General Manager, key personnel, and members of the Executive Committee – on behalf of the hotel owner. The assessee is further required to align the hotel's human resource policies with Hyatt Operating Standards. It may also temporarily assign its own employees to serve as full-time executive staff at the hotel.

12.3. Section 1(a) and 1(b) of Articles V of the SOSA sets out the assessee's entitlement to "Strategic Fees" for the services provided. The consideration is not a fixed fee; instead, it is calculated as a percentage of room revenue and other revenues and income – whether directly or indirectly derived from the hotel's operations – as well as cumulative gross operating profit. This remuneration structure clearly reflects an active commercial involvement, linking the assessee's income to the financial and operational performance of the hotel.

12.4. From the contractual provisions detailed above, it is evident that the appellant's role was not confined to mere policy formulation. On the contrary, the SOSA conferred upon the appellant a continuing and enforceable right to implement its policies and ensure compliance in all operational aspects of the hotel. The degree of control and supervision exercised by the appellant clearly transcends a mere advisory capacity and aligns with the criteria for a Fixed Place Permanent Establishment (PE) under Article 5(1) of the India – UAE DTAA.

13. The question of what constitutes a "place of business" under Article 5(1) of the DTAA is no longer *res integra*. In *Formula One (supra),* this Court unequivocally held that for a Permanent Establishment (PE) to exist, two essential conditions must be satisfied: (i)the place must be "at the disposal" of the enterprise, and (ii)the business of the enterprise must be carried on through that place. The Court further held that a PE must demonstrate the three core attributes of: stability, productivity, and a degree of independence. Among these, the "disposal test" is pivotal, meaning thereby the enterprise must have a right to use the premises in such a way that enables it to carry on its business activities. This test is to be applied contextually, taking into account the commercial and operational realities of the arrangement. The relevant paragraphs from the judgment are extracted below for better appreciation:

"29. *Philip Baker explains that the concept of PE is important for several articles of the Conventions; the concept, or its cognate, also appears in the domestic law of some countries. According to him, the concept marks the dividing line for businesses between merely trading with a country and trading in that country;* ***if an enterprise has a PE, its presence in a country is sufficiently substantial that it is trading in the country.*** *He has quoted the following passage from the judgment of the Andhra Pradesh High Court, authored by Justice (Retd.) Jagannadha Rao (as his Lordship then was, later Judge of this Court) in CIT v. Visakhapatnam Port Trust [CIT v. Visakhapatnam Port Trust, 1983 SCC OnLine AP 287: (1983) 144 ITR 146]: (SCC OnLine AP para 54)*

> *"54. ... the words "permanent establishment" postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country.* ***It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country."***

30. *Emphasising that as a creature of international tax law, the concept of PE has a particularly strong claim to a uniform international meaning, Philip Baker discerns two types of PEs contemplated under Article 5 of OECD Model.* ***First, an establishment which is part of the same enterprise under common ownership and control—an office, branch, etc., to which he gives his own description as an "associated permanent establishment".*** *The second type is an agent, though legally separate from the enterprise, nevertheless who is dependent on the enterprise to the point of forming a PE. Such PE is given the nomenclature of "unassociated permanent establishment" by Baker. He, however, pointed out that there is a possibility of a third type of PE i.e. a construction or installation site may be regarded as PE under certain circumstances.* ***In the first type of PE i.e. associated permanent establishments, primary requirement is that there must be a fixed place of business through which the business of an enterprise is wholly or partly carried on. It entails two requirements which need to be fulfilled: (a) there must be a business of an enterprise of a contracting State (FOWC in the instant case); and (b) PE must be a fixed place of business i.e. a place which is at the disposal of the enterprise. It is universally accepted that for ascertaining whether there is a fixed place or not, PE must have three characteristics: stability, productivity and dependence. Further, fixed place of business connotes existence of a physical location which is at the disposal of the enterprise through which the business is carried on.***

……..

33. The principal test, in order to ascertain as to whether an establishment has a fixed place of business or not, is that such physically located premises have to be "at the disposal" of the enterprise. For this purpose, it is not necessary that the premises are owned or even rented by the enterprise. It will be sufficient if the premises are put at the disposal of the enterprise. *However, merely giving access to such a place to the enterprise for the purposes of the project would not suffice. The place would be treated as "at the disposal" of the enterprise when the enterprise has* ***right to use*** *the said place and* ***has control thereupon****.*

34.2. *In a case generally referred to as Hotel Manager [Bundesfinanzhof, 3-2-1993, IR 80-81/91, IStR 1993, p. 226, (1993) BStBl, II, 462], the Bundesfinanzhof held that a UK hotel management company had a PE in Germany when it entered into a 20 year contract with a limited partnership which owned a hotel.* ***The agreement required the UK company to supply a general manager: the general manager's office constituted the PE (and not the entire hotel) since the UK company had a secured right to use this office for the purposes of the agreement.***
….

35. According to Philip Baker, the aforesaid illustrations confirm that the fixed place of business need not be owned or leased by the foreign enterprise, provided that it is at the disposal of the enterprise in the sense of having some right to use the premises for the purposes of its business and not solely for the purposes of the project undertaken on behalf of the owner of the premises.

36. *Interpreting the OECD Article 5 pertaining to PE, Klaus Vogel has remarked that insofar as the term "business" is concerned, it is broad, vague and of little relevance for the PE definition. According to him, the crucial element is the term "place". Importance of the term "place" is explained by him in the following manner:*

> *"In conjunction with the attribute "fixed", the requirement of a place reflects the strong link between the land and the taxing powers of the State. This territorial link serves as the basis not only for the distributive rules which are tied to the existence of PE but also for a considerable number of other distributive rules and, above all, for the assignment of a person to either contracting State on the basis of residence (Article 1, read in conjunction with Article 4 OECD and UN MC)."*

37. *We would also like to extract below the definition to the expression "place" by Vogel, which is as under:*

> *"A place is a certain amount of space within the soil or on the soil. This understanding of place as a three-dimensional zone rather than a single point on the earth can be derived from the French version (installation fixe) as well as the term "establishment". As a rule, this zone is based on a certain area in, on, or above the surface of the earth. Rooms or technical equipment above the soil may qualify as a PE only if they are fixed on the soil.* ***This requirement, however, stems from the term "fixed" rather than the term "place", given that a place (or space) does not necessarily consist of a piece of land. On the contrary, the term "establishment" makes clear that it is not the soil as such which is the PE but that the PE is constituted by a tangible facility as distinct from the soil.*** *This is particularly evident from the French version of Article 5(1) OECD MC which uses the term "installation" instead of "place".*

The term "place" is used to define the term "establishment". Therefore, "place" includes all tangible assets used for carrying on the business, but one such tangible asset can be sufficient. The characterization of such assets under private law as real property rather than personal property (in common law countries) or immovable rather than movable property (in civil law countries) is not authoritative. It is rather the context (including, above all, the terms "fixed"/"fixe"), as well as the object and purpose of Article 5 OECD and UN MC itself, in the light of which the term "place" needs to be interpreted. This approach, which follows from the general rules on treaty interpretation, gives a certain leeway for including movable property in the understanding of "place" and, therefore, assume a PE once such property has been "fixed" to the soil.

For example, a work bench in a caravan, restaurants on permanently anchored river boats, steady oil rigs, or a transformator or generator on board a former railway wagon qualify as places (and may also be "fixed").

In contrast, purely intangible property cannot qualify in any case. In particular, rights such as participations in a corporation, claims, bundles of claims (like bank accounts), any other type of intangible property (patents, software, trademarks, etc.) or intangible economic assets (a regular clientele or the goodwill of an enterprise) do not in themselves constitute a PE. They can only form part of PE constituted otherwise*. Likewise, an internet website (being a combination of software and other electronic data) does not constitute tangible property and, therefore, does not constitute a PE.*

Neither does the mere incorporation of a company in a contracting State in itself constitute a PE of the company in that State. ***Where a company has its seat,***

according to its bye-laws and/or registration, in State A while the POEM is situated in State B, this company will usually be liable to tax on the basis of its worldwide income in both contracting States under their respective domestic tax law. Under the A-B treaty, however, the company will be regarded as a resident of State B only [Article 4(3) OECD and UN MC*]. In the absence of both actual facilities and a dependent agent in State A, income of this company will be taxable only in State B under the 1st sentence of Article 7(1) OECD and UN MC.*

There is no minimum size of the piece of land. Where the qualifying business activities consist (in full or in part) of human activities by the taxpayer, his employees or representatives, the mere space needed for the physical presence of these individuals is not sufficient (if it were sufficient, Article 5(5) OECD MC and Article 5(5)(a) UN MC and the notion of agent PEs were superfluous). This can be illustrated by the example of a salesman who regularly visits a major customer to take orders, and conducts meetings in the purchasing director's office. The OECD MC Comm. has convincingly denied the existence of a PE, based on the implicit understanding that the relevant geographical unit is not just the chair where the salesman sits, but the entire office of the customer, and the office is not at the disposal of the enterprise for which the salesman is working."

38. *Taking cue from the word "through" in the article, Vogel has also emphasised that the place of business qualifies only if the place is "at the disposal" of the enterprise. According to him,* ***the enterprise will not be able to use the place of business as an instrument for carrying on its business unless it controls the place of business to a considerable extent. He hastens to add that there are no absolute standards for the modalities and intensity of control. Rather, the standards depend on the type of business activity at issue. According to him, "disposal" is the power (or a certain fraction thereof) to use the place of business directly.*** *Some of the instances given by Vogel in this behalf, of relative standards of control, are as under: "****The degree of control depends on the type of business activity that the taxpayer carries on. It is therefore not necessary that the taxpayer is able to exclude others from entering or using the POB.***

The painter example in the OECD MC Comm. (No. 4.5 OECD MC Comm. on Article 5) (however questionable it might be with regard to the functional integration test) suggests that the type and extent of control need not exceed the level of what is required for the specific type of activity which is determined by the concrete business.

By contrast, in the case of a self-employed engineer who had free access to his customer's premises to perform the services required by his contract, the Canadian

Federal Court of Appeal ruled that the engineer had no control because he had access only during the customer's regular office hours and was not entitled to carry on businesses of his own on the premises.

Similarly, a Special Bench of Delhi's Income Tax Appellate Tribunal denied the existence of a PE in the case of Ericsson. The Tribunal held that it was not sufficient that Ericsson's employees had access to the premises of Indian mobile phone providers to deliver the hardware, software and know-how required for operating a network. By contrast, in the case of a competing enterprise, the Bench did assume an Indian PE because the employees of that enterprise (unlike Ericsson's) had exercised other businesses of their employer.

The OECD view can hardly be reconciled with the two court cases. All three examples do indeed shed some light onto the method how the relative standards for the control threshold should be designed. While the OECD MC Comm. suggests that it is sufficient to require not more than the type and extent of control necessary for the specific business activity which the taxpayer wants to exercise in the source State, the Canadian and Indian decisions advocate for stricter standards for the control threshold.

The OECD MC shows a paramount tendency (though no strict rule) that PEs should be treated like subsidiaries [cf. Article 24(3) OECD and UN MC], and that facilities of a subsidiary would rarely be unusable outside the office hours of one of its customers (i.e. a third person), the view of the two courts is still more convincing.

Along these lines, a POB will usually exist only where the taxpayer is free to use the POB:
— at any time of his own choice;
— for work relating to more than one customer; and
— for his internal administrative and bureaucratic work.

In all, the taxpayer will usually be regarded as controlling the POB only where he can employ it at his discretion. This does not imply that the standards of the control test should not be flexible and adaptive. *Generally, the less invasive the activities are, and the more they allow a parallel use of the same POB by other persons, the lower are the requirements under the control test. There are, however, a number of traditional PEs which by their nature require an exclusive use of the POB by only one taxpayer and/or his personnel. A small workshop [cf. Article 5(2)(e) OECD and*

UN MC] of 10 or 12 sq m can hardly be used by more than one person. The same holds true for a room where the taxpayer runs a noisy machine."

39. *OECD commentary on Model Tax Convention mentions that a general definition of the term "PE" brings out its essential characteristics i.e. a distinct "situs", a "fixed place of business". This definition, therefore, contains the following conditions:*
(i) the existence of a "place of business" i.e. a facility such as premises or, in certain instances, machinery or equipment.
(ii) this place of business must be "fixed" i.e. it must be established at a distinct place with a certain degree of permanence;
(iii) the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

40. *The term "place of business" is explained as covering any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. It is clarified that a place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. Further, it is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise.* ***A certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required.*** *Thus, where an enterprise illegally occupies a certain location where it carries on its business, that would also constitute a PE. Some of the examples where premises are treated at the disposal of the enterprise and, therefore, constitute PE are: a place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (e.g. for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise. At the same time, it is also clarified that the mere presence of an enterprise at a particular location does not necessarily mean that the location is at the disposal of that enterprise."*

14. In ***Union of India & Anr. v. U.A.E Exchange Centre***[9], this Court had occasion to clarify the scope of "permanent establishment" in the context of cross-border taxation under the India – UAE DTAA. The issue involved was whether the liaison offices (LOs) of the UAE Exchange Centre in India constituted a PE. The Court held in the negative, as the LOs performed only preparatory and auxiliary activities, and there was no right of disposal or control over a fixed placed through which core business was carried on. The following paragraph from the judgment is especially pertinent in this regard:

> ***"13.*** *And again, whilst analysing the scope of Articles 5 and 7 of the DTAA in para 12 of the impugned judgment [UAE Exchange Centre Ltd. v. Union of India, 2009 SCC OnLine Del 337: (2009) 313 ITR 94], the High Court noted thus:*
>
> > *"12. ... In the case of DTAA under consideration in the present case under Article 5 read with Article 7, profits of an enterprise are liable to tax in India if an enterprise were to carry on business through permanent establishment, meaning thereby fixed place of business through which business of an enterprise is wholly or partly carried on. Under Article 5(2)(c), amongst others, permanent establishment includes an office. However, Article 5(3) which opens with a non obstante clause, is illustrative of instances where— under the DTAA various activities have been deemed as ones which would not fall within the ambit of the expression "permanent establishment". One such exclusionary clause is found in Article 5(3)(e) which is: maintenance of fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character. The plain meaning of the word "auxiliary" is found in Black's Law Dictionary, 7th Edn. at p. 130 which reads as "aiding or supporting, subsidiary". The only activity of the liaison offices in India is simply to download information which is contained in the main servers located in UAE based on which cheques are drawn on banks in India whereupon the said cheques are couriered or dispatched to the beneficiaries in India, keeping in mind the*

[9] (2020) 9 SCC 329

instructions of the NRI remitter. Can such an activity be anything but auxiliary in character. Plainly to our minds, the instant activity is in "aid" or "support" of the main activity. The error into which, according to us, the Authority has fallen is in reading Article 5(3)(e) as a clause which permits making a value judgment as to whether the transaction would or would not have been complete till the role played by liaison offices in India was fulfilled as represented by the petitioner to their NRI remitter. ***According to us, what has been lost sight of, is that, by invoking the clause with regard to permanent establishment, we would, by a deeming fiction tax an income which otherwise neither arose nor accrued in India — when looked at from this point of view, the exclusionary clause contained in Article 5(3) and in this case in particular, sub-clause (e) have to be given a wider and liberal play.*** *Once an activity is construed as being subsidiary or in aid or support of the main activity it would, according to us, fall within the exclusionary clause.* ***To say that a particular activity was necessary for completion of the contract is, in a sense saying the obvious as every other activity which an enterprise undertakes in earning profits is with the ultimate view of giving effect to the obligations undertaken by an enterprise vis-à-vis its customer.*** *If looked at from that point of view, then, no activity could be construed as preparatory or of an "auxiliary" character. On this aspect of the matter, the Supreme Court in CIT v. Morgan Stanley & Co. Inc. [(2007) 7 SCC 1] amongst other issues was called upon to decide as to whether back office operations carried on by Morgan Stanley Company for one of its Morgan Stanley Advantages Services Pvt. Ltd. would qualify as having a permanent establishment in India. The Supreme Court, while holding that back office operations fall within the exclusionary clause Article 5(3)(e) of Indo-US Double Taxation DTAA, which is, identical to DTAA under consideration in the present case, came to the conclusion that back office operations came within the purview of Article 5(3)(e).* ***It is laid down by the Supreme Court in CIT v. Morgan Stanley & Co. Inc., [(2007) 7 SCC 1] that in ascertaining what would constitute a "permanent establishment" within the meaning of Article 5(1) of the Indo-US DTAA, one had to undertake what is called a functional and factual analysis of each of the activities undertaken by an establishment****. In that case, the Supreme Court came to the conclusion that the entity located in India which was engaged in only supporting the front office functions of Morgan Stanley & Co., a non-resident, in fixed income and equity research and information technology enabled services such as data processing support centre , technical services and reconciliation of accounts being back office operators would not fall with Article 5(1) of the Indo-US DTAA."*

15. Evidently, under DTAAs, the taxing rights of the source State over the business profits of a foreign enterprise are contingent upon the existence of a Permanent Establishment in the source country. One of the *sine qua non* for a fixed place PE is that the place through which the business is carried on must be 'at the disposal' of the enterprise – a principle commonly referred to as the "disposal test". It is noteworthy that the Organisation for Economic Co-operation and Development does not rigidly define this test, but provides illustrative examples. There is no strait-jacket formula applicable to all cases. Typically, trading operations require a continuously used fixed place, whereas service-oriented business may not. Some jurisdictions consider mere use of a place sufficient, while others require legal or operational control over the premises. In our view, determining whether a Fixed place PE exists must involve a fact-specific inquiry, including: the enterprise's right of disposal over the premises, the degree of control and supervision exercised, and the presence of ownership, management, or operational authority.

16. In the present case, a detailed review of the SOSA executed between the appellant and AHL demonstrates that the appellant exercised pervasive and enforceable control over the hotel's strategic, operational, and financial dimensions. Specifically, the agreement vested the appellant with powers to:

- Appoint and supervise the General Manager and other key personnel,
- Implement human resource and procurement policies,

- Control pricing, branding, and marketing strategies,
- Manage operational bank accounts,
- Assign personnel to the hotel without requiring the owner's consent.

These rights go well beyond mere consultancy and indicate that the appellant was an active participant in the core operational activities of the hotel.

17. The appellant's contention that the absence of an exclusive or designated physical space within the hotel precludes the existence of a PE, is misconceived. In *Formula One,* this Court expressly held that exclusive possession is not essential – temporary or shared use of space is sufficient, provided business is carried on through that space. The actual role of the appellant is not just advisory in nature but extends to various other administrative roles. In this case, the 20-year duration of the SOSA, coupled with the appellant's continuous and functional presence, satisfies the tests of stability, productivity and dependence. From the nature of functions carried out by the appellant, it cannot be said that they were performing merely "auxiliary" functions. Rather, the functions performed by the appellant, through its staff operating from the hotel premises, were not just limited for setting up a pattern of activities for the hotel, but were core and essential functions, clearly establishing their control over the day to-day operations of the hotel. Moreover, they were to be continuously performed over a period of twenty years, under an agreement that

included revenue sharing. Therefore, the hotel premises clearly satisfy the criteria required to be classified as a "fixed place of business" or PE.

18. The argument that the absence of a specific clause in the SOSA permitting the conduct of business from the hotel premises negates the existence of a PE is also without merit. As held in *Formula One,* the test is not whether a formal right of use is granted, but whether, in substance, the premises were at the disposal of the enterprise and were used for conducting its core business functions.

19. The appellant's further submission that daily operations were handled by Hyatt India Pvt Ltd., a separate legal entity, does not decisively support its case. It is well established that legal form does not override economic substance in determining PE status. The extent of control, strategic decision-making, and influence exercised by the appellant clearly establish that business was carried on through the hotel premises, satisfying the conditions under Article 5(1).

20. Additionally, the reliance placed by the appellant on *E-Funds* is wholly misplaced. That decision is distinguishable on facts. In that case, the Indian subsidiary merely provided back-office support and was compensated on an arm's length basis, with no involvement in core business functions. In contrast, in the present case, the hotel itself was the situs of the appellant's primary business

operations, carried out under its direct supervision and aligned with its commercial interests.

21. It is undisputed that the appellant's executives and employees made frequent and regular visits to India to oversee operations and implement the SOSA. The findings of the assessing officer, based on travel logs and job functions, establish continuous and coordinated engagement, even though no single individual exceeded the 9-month stay threshold. Under Article 5(2)(i) of the DTAA, the relevant consideration is the continuity of business presence in aggregate – not the length of stay of each individual employee. Once it is found that there is continuity in the business operations, the intermittent presence or return of a particular employee becomes immaterial and insignificant in determining the existence of a permanent establishment.

22. Accordingly, the High Court was correct in concluding that the appellant's role was not confined to high-level decision making, but extended to substantive operational control and implementation. The appellant's ability to enforce compliance, oversee operations, and derive profit-linked fees from the hotel's earnings demonstrates a clear and continuous commercial nexus and control with the hotel's core functions. This nexus satisfies the conditions necessary for the

constitution of a Fixed Place Permanent Establishment under Article 5(1) of the India – UAE DTAA.

23. At this juncture, we also note the reference made to a Larger Bench of the Delhi High Court in ***Hyatt International Southwest Asia Ltd v. Additional Director of Income Tax*****,** where it was held that profit attribution to a PE in India is permissible even if the overall foreign enterprise has incurred losses. Accordingly, the question no.(iv) referred was answered in the affirmative, reinforcing the principle that taxability is based on business presence and not the global profitability of the enterprise. The relevant paragraph is profitably reproduced below:

> *"66. On an overall consideration of the above, we come to the firm conclusion that the submission of global income being determinative of the question which stood referred, is wholly unsustainable. The activities of a permanent establishment are liable to be independently evaluated and ascertained in the light of the plain language in which article 7 stands couched. The fact that a permanent establishment is conceived to be an independent taxable entity cannot possibly be doubted or questioned. The wealth of authority referred to hereinabove clearly negates the contention to the contrary and which was commended for our consideration by the appellants. Bearing in mind the well-established rule of source which applies and informs the underlying theory of taxation, we find ourselves unable to countenance the submission of the source State being deprived of tis right to tax a permanent establishment or that right being dependent upon the overall and global financials of an entity. The Division Bench in these appeals rightly doubted the correctness of taxation being dependent upon profits or income being earned at the "entity level". The decision of the Special Bench in Motorola Inc. v. Dy. CIT 2005 SCC OnLine ITAT 1 : (2005) 95 ITD 269 (Delhi) has clearly been misconstrued and it, in any case, cannot be viewed to be an authority for the proposition which was canvassed on behalf of the appellants. Article 7 cannot possibly be viewed as restricting the right of the source State to allocate or attribute income to the permanent*

establishment based on the global income or loss that may have been earned or incurred by a cross border entity."

24. In view of the foregoing analysis, we affirm the findings of the High Court that the appellant has a fixed place PE in India within the meaning of Article 5(1) of the DTAA, and that, the income received under the SOSA is attributable to such PE and is therefore taxable in India.

25. We find no merit in the appeals. Accordingly, all the appeals are dismissed. There shall be no order as to costs.

26. Consequently, connected miscellaneous application(s), if any, shall stand closed.

…… J.
[J.B. PARDIWALA]

……J.
[R. MAHADEVAN]

NEW DELHI;
JULY 24, 2025.