* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 19 September 2024**
**Judgment pronounced on: 18 December 2024**

\+ ITA 1288/2006
DIRECTOR OF INCOME TAX INTN'L .....Appellant
Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha, JSC.

versus

WESTERN UNION FINANCIAL SERVICES INC. .....Respondent
Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 724/2016
PR.COMMISSIONER OF INCOME TAX .....Appellant
Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha, JSC.

versus

WESTERN UNION FINANCIAL SERVICES .....Respondent
Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 192/2019
COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)- 3 .....Appellant
Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC. .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 126/2016
DIRECTOR OF INCOME TAX-II .....Appellant
Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC. .....Respondent
Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 141/2016
DIRECTOR OF INCOME TAX –II .....Appellant
Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC .....Respondent
Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 235/2019
THE COMMISSIONER OF INCOME TAX-INTERNATIONAL TAXATION – 3 .....Appellant
Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha, JSC.

versus

WESTERN UNION FINANCIAL SERVICES INC. .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 237/2019

THE COMMISSIONER OF INCOME TAX-INTERNATIONAL TAXATION – 3 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha, JSC.

versus

WESTERN UNION FINANCIAL SERVICES INC. .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 110/2024

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 111/2024

THE COMMISSIONER OF INCOME TAX -

INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

\+ ITA 597/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, Adv.

versus

WESTERN UNION FINANCIAL SERVICES INC .....Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Gaurav Jain and Mr. Shubham Gupta, Ms. Shalini, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE YASHWANT VARMA**
**HON'BLE MR. JUSTICE RAVINDER DUDEJA**

**J U D G M E N T**

**YASHWANT VARMA, J.**

1. These batch of appeals emanate from judgments handed down by the **Income Tax Appellate Tribunal**[1] negating the stand of the appellant and principally holding that the respondent-assessee did not

[1]Tribunal

have a **Permanent Establishment**[2] in India in the relevant **Assessment Years**[3] as contemplated under Article 5 of the **Double Taxation Avoidance Agreement**[4] between India and the **United States of America**[5]. The appeals themselves pertain to AYs 2001-02 [ITA 1288/2006], 2002-03 [ITA 126/2016], 2003-04 [ITA 141/2016] 2004-05 [ITA 724/2016], 2006-07 [ITA 597/2019], 2007-08 [ITA 237/2019], 2008-09 [ITA 235/2019], 2011-12 [ITA 192/2019], 2013-14 [ITA 111/2024] and 2015-16 [ITA 110/2024].

2. The Tribunal had rendered its principal decision on 10 March 2006 while dealing with the appeal pertaining to AY 2001-02 and which decision has been followed in the subsequent years. We had in terms of our order dated 20 July 2009 admitted ITA 1288/2006 on the following question of law:-

> "Whether on facts, income earned from customers outside India is liable to tax in India under AADT with USA"

The remainder of the appeals subsequently came to be tagged with ITA 1288/2006 and were admitted on similar questions of law.

3. From the material placed before us as well as the submissions addressed by learned counsels appearing for respective sides, the following would appear to be the uncontested facts and which we for the sake of convenience glean from the material placed on the record by way of ITA 1288/2006.

4. The respondent-assessee is stated to be a non-resident company registered in USA and has been engaged in the business of rendering

[2] PE
[3] AYs
[4] DTAA
[5] USA

**Money Transfer Services**[6] since 1890. The essential business model adopted by it has been recorded by the Tribunal to be as follows. A person residing in USA desirous of transferring money to an individual or an entity in India, approaches a branch or an outlet of the assessee and transfers the money in USDs, together with the charges prescribed by the respondent-assessee. Upon receipt of that money, the respondent-assessee generates a unique number which is referred to as the **Money Transfer Control Number**[7]. It is this MTCN which is communicated by the remitter to the person or entity situate in India.

5. The beneficiary of that remittance residing in India then approaches the representative/agent of the respondent-assessee along with the MTCN details. Upon verification of the MTCN with the aid of a software owned by the respondent-assessee, the MTCN, once matched, leads to the transaction being honoured. This is, of course, subject to the Indian agent of the respondent-assessee satisfying itself with respect to the identity of the recipient.

6. It has further come to be noted by the Tribunal that for the purposes of the aforesaid business, the respondent-assessee had entered into agreements appointing agents in India and which included the Department of Posts, Commercial Banks, **Non-Banking Financial Companies**[8] and Tour Operators. In terms of the agency agreements which came to be executed between the respondent-assessee and the Indian agents, the agreement was initially to run for a period of five years and was extendable thereafter. In the shape of remuneration, the Department of Posts was entitled to charge 30% of the remittance made

[6] MTS
[7] MTCN
[8] NBFCs

and in the case of all others, the remuneration was fixed at 25%. The aforesaid payment, which was in the nature of a commission, was described as the "*base compensation*" in the agency agreements.

7. For the purposes of facilitating its business and undertaking promotional activities, the respondent-assessee is also stated to have applied to the **Reserve Bank of India**[9] for grant of requisite permissions as contemplated under Section 29(1)(a) of the **Foreign Exchange Regulation Act, 1973**[10]. Basis the permission granted, it also established an office in India and posted a representative therein. This office was described to be the **Liaison Office**[11], manned by one manager and supporting staff.

8. As per the disclosures made, the respondent-assessee had made a declaration before the RBI that the said LO would not represent any party other than Western Union Financial Services. The annexure to that application enumerated the following activities/services which would be undertaken by the LO:-

> "The Liaison office shall undertake the following liaison activities/services:
>
> (a) Distribute brochures and literature describing the activities of Western Union Financial Services, Inc. ("Western Union").
>
> (b) Maintain liaison contact with government authorities and officials of the government, its agencies and other organizations and associations.
>
> (c) Maintain and develop the relationship of mutual understanding and co-operation between Western Union and India.
>
> (d) Address seminars on Western Union's activities.
>
> (e) Put interested parties in direct contact with Wester Union's principal offices.

[9] RBI
[10] 1973 Act
[11] LO

(f) Explore legal, commercial and regulatory feasibility of setting up subsidiaries, affiliates, partnerships, joint ventures, licensing arrangements, etc.

(g) Keep in touch with the economic developments.

(h) Gather commercial and marketing data and information, including its assessment of the requirements of the private sector and of the government.

(i) Gather, receive and transmit message/information from customers and other interested parties to Western Union's offices.

(j) Assist personnel from Western Union during their visits to India, making travel arrangements and arranging appointments with customers and other concerned parties, agencies, government officials, etc.

(k) Investigate business opportunities in the Western Union range of activities and develop business contacts.

The Liaison Office will not:

(a) Undertake any commercial, trading or industrial activity in India.

(b) Sign any commercial agreement (except those directly incidental to the conduct of operations of the liaison office such as office leases, employment of local personnel, car rental, etc.)

(c) Have any power of attorney to participate in any commercial, trading or industrial activity and/or negotiate any related contracts;

(d) Have any authority to bind Western Union companies in any manner in connection with commercial, trading or industrial matters;

Be allowed or entitled to receive any monies on account of commissions, fee or remuneration or otherwise in regard to any commercial, trading or industrial activity"

9. The aforesaid application came to be approved by the RBI with it being noted that the said permission would be for a period of three years "*for the purpose of undertaking liaison activities viz., to act as a communication channel between Head Office and parties in India*". Apart from the aforesaid and as the Tribunal records in para 5 of its

judgment, the following additional conditions came to be imposed by the RBI:-

> "(i) Except the liaison work, the office in India will not undertake any other activity of a trading, commercial or industrial nature nor shall it enter into any business contracts in its own name without our prior permission.
>
> (ii) No commission/fees will be charged or any other remuneration received/income earned by the office in India for the liaison activities/services rendered by it or otherwise in India.
>
> (iii) The entire expenses of the office in India will be met exclusively out the funds received from abroad through normal banking channels.
>
> (iv) The office in India shall not borrow or lend any money from/to any person in India without our prior permission.
>
> (v) The office in India shall not acquire, hold (otherwise than by way of lease for a period not exceeding five years) transfer or dispose off any immovable property in India without obtaining prior permission of the Reserve Bank of India under Section 31 of the Foreign Exchange Regulation Act, 1973.
>
> (vi) The office in India will furnish to our Mumbai Regional office (on a yearly basis):
>
> (a) a certificate from the auditors to the effect that during the year no income was earned by/or accrued to the office in India;
>
> (b) details of remittances received from abroad duly supported by Foreign Inward Remittance Certificate;
>
> (c) certified copy of the audited final accounts of the office in India; and
>
> (d) annual report of the work done by the office in India, stating therein the details of actual export or import, if any, effected during the period m respect of which the office had rendered liaison services.
>
> (e) The number of staff engaged/appointed and duties assigned to each staff.
>
> (vii) The liaison office will not render any consultancy or any other services directly/indirectly with or without any consideration.

(viii) The liaison office will not have signing/commitment powers except than those which are required for normal functioning of liaisoning office on behalf of the Head Office."

10. It has further come on record that the respondent-assessee in terms of the conditions imposed by the RBI had also submitted activity reports pertaining to its LO periodically. One such report which has been noticed in para 6 of the order of the Tribunal is extracted hereinbelow:-

"Activity Report of the Liaison Office

Report for the period: 1 January 2000 to December 2000

The liaison office acted as a communication link between the agents and the Head Office of Western Union International.

The Liaison office trained and installed one new Agent - Bank of Madura Ltd. After they received final approval from the Reserve Bank of India.

The Liaison office visited the Head Office locations of the Agents and offered training and refresher courses in the areas of Western Union Operations, Customer Service Standard, Security Standard, accounting and reconciliation procedures, telecommunications and systems configuration, merchandising standards and Reserve Bank of India guideline.

The Liaison office communicated procedures to all Agents to ensure a smooth roll over Y2K.

The Liaison office organized local production of posters and merchandising material for the Agents to display at their locations.

The Liaison office facilitated the visit of the Director Operations of Western Union International to visit with Agents and review their quality operational standards.

The Liaison Office provided the latest Western Union Agent Management Software - VOYAGER to the Agents and trained the staff on the usage and versatility.

List of Employees:

Harsh Lambah
Business Development Manager

Shekhar Nair
Regional operations Manager"

11. For AY 2001-02, the respondent-assessee is stated to have paid a total commission of INR 12,16,94,036/- to its agents situate in India being equivalent to USD 2,663,472/-. On 13 January 2003, the Income Tax Department is stated to have issued a notice to the respondent-assessee calling upon it to file its Income Tax Returns. The respondent-assessee initially questioned the assumption of jurisdiction, as would be evident from its letter of 03 October 2003. However, notwithstanding that objection being raised, it ultimately furnished a return of income on 08 December 2003 declaring its income as '*nil*'.

12. The **Assessing Officer**[12], however, assessed the total income to be INR 4,90,22,316/-, as a consequence of which notices under Section 143(2) came to be issued on 04 March 2004. The AO, while framing the order of assessment essentially came to hold as under. It firstly opined that the income of the respondent-assessee had accrued and arisen in India and would consequently be exigible to tax. It further held that the respondent-assessee would be liable to tax under the provisions of the DTAA.

13. Tested on the anvil of the activities that occurred in India, the AO came to conclude that not only did the respondent have a fixed place of business and which constituted a "Fixed Place" **Permanent Establishment**[13], the activities undertaken by the LO were sufficient to treat it as a Dependent Agent being present in India and thus the test of existence of a **Dependent Agent Permanent Establishment**[14] were also met.

[12] AO
[13] PE
[14] DAPE

14. Apart from what was construed by the AO and is noticed above, it was further observed and held that the software installed in the office of the Indian agents and the facility of connectivity so provided would also lend credence to the premises of those agents being viewed as a PE. The AO further observed that the test of business connection in India also stood satisfied. This, according to the AO, was in light of the Indian agents carrying out activities which constituted an integral part of the business of the assessee and the revenue so generated.

15. Aggrieved by the aforesaid, the respondent-assessee is stated to have moved the **Commissioner of Income Tax (Appeal)**[15]. The CIT(A), while taking note of the activities undertaken by the LO, held that the training activity undertaken by that establishment of employees of the agents such as regulation of service and security standards, accounting and reconciliation procedures as well as the providing of the software 'Voyager', would be indicative of the LO not being a mere passive communication channel but one which had been actively involved in the business activity of the appellant. The CIT(A) further held that the said establishment would thus satisfy the tests of '*place of management*' as well as the existence of a substantial element of an enduring or permanent nature of the foreign enterprise in India. Basis the above, it came to affirm the view which had been taken by AO insofar as Fixed Place PE was concerned. The CIT(A) also concurred with the AO of the installation of the software 'Voyager' in the fixed premises of the agents as being one more element which would be liable to be viewed as being of significance for the purposes of acknowledging the existence of a Fixed Place PE.

[15] CIT(A)

16. Before proceeding further, it would be relevant to note that undisputedly the LO which had been established in India operated only up to 31 July 2005 whereafter it was closed and the subsidiary, Western Union Services India Private Limited, came to be incorporated.

17. When the matter travelled to the Tribunal, it firstly held that the business connection test, as enumerated in Explanation 2 to Section 9(1) stood satisfied. However, it held against the appellants insofar as the question of Fixed Place PE was concerned. It further proceeded to hold that the LO would not satisfy the tests enumerated in Article 5 of the DTAA and the activities undertaken by it would be liable to be viewed as being merely "preparatory" or "auxiliary" in character.

18. From the record we find that a decision of the **Authority for Advance Rulings**[16] in **UAE Exchange Centre LLC, In re.**[17] was also cited. The applicant in that case also was engaged in money transfer business and had adopted a similar model of remitting money to India through its LOs. The LOs were stated to have engaged in downloading of data pertaining to the beneficiaries in India, printing of cheques and dispatching the same to the beneficiaries. It was on the basis of these facts that the AAR had proceeded to hold that the LOs constituted a PE in India.

19. However and was noticed by the Tribunal, the AAR had observed that the role of the LO must involve performing the contract of remittance of amounts at least in part before it could be said to be a PE of the foreign enterprise. The Tribunal while contrasting the facts of the AAR ruling to the present case, noted that the LO performed no part

[16] AAR
[17] (2004) 268 ITR 9 (AAR)

of the contract of remittance of monies to India because of which it could not be considered to be a PE of the respondent-assessee in India.

20. It is pertinent to note that the decision of the AAR thereafter came to be overturned by the Delhi High Court in **UAE Exchange Centre Ltd. v. Union of India and Another**[18] and which decision was affirmed by the Supreme Court in **Union of India and Another v. U.A.E. Exchange Centre**[19].

21. Insofar as the issue of software constituting a PE is concerned, the Tribunal held that it merely accorded access to the agents to communicate with the mainframe computers and servers situate outside India. According to the Tribunal, the software was the property of the respondent-assessee and mere use thereof would not lead to a PE coming into existence. It also negated the conclusions which were rendered by the AO as well as the CIT(A) insofar as the question of DAPE was concerned. It is aggrieved by the aforesaid decision of the Tribunal that these appeals have come to be preferred before this Court

22. Leading submissions on behalf of the appellants, Mr. Chawla, learned counsel submitted that bearing in mind the nature of activities which the LO had undertaken and which extended to training of agents in India as well as interacting with local agents, conducting refresher courses in accounting, reconciliation, aiding them in successfully transitioning Y2K and the provision of the 'Voyager' software, when cumulatively considered, would lead one to the irresistible conclusion that a Fixed Place PE came into existence.

[18] 2009 SCC OnLine Del 337
[19] (2020) 9 SCC 329

23. It was Mr. Chawla's submission that it would be wholly incorrect to view the activities undertaken and functions discharged by the LO as being preparatory or auxiliary. It was submitted by learned counsel that the LO was engaged in the core activities of the respondent and would thus be liable to be viewed as a projection of the foreign enterprise itself.

24. Mr. Chawla further argued that the installation of software in the premises of the Indian agents would satisfy the provisions made in Article 5(2) of the India-USA DTAA and which speaks of letting or leasing of intangible property. Mr. Chawla argued that the software plays a central role in the completion of transactions and thus the placement of that dedicated software would result in the establishments of the Indian agents being liable to be viewed as a Fixed Placed PE. It was then argued that the Indian agents were in turn entitled to appoint sub-agents to carry on the business of the respondent and this too would be a factor which would render the conclusions of the Tribunal unsustainable.

25. Refuting those submissions, Mr. Vohra, learned senior counsel appearing for the respondents, firstly urged us to dismiss the appeals outrightly since according to learned senior counsel, the determination of whether a PE exists or not is essentially a question of fact. According to Mr. Vohra, the Tribunal being the final fact finding authority having come to the conclusion that no PE existed, the same would clearly not give rise to any substantial question of law.

26. Mr. Vohra then cited for our consideration the decision of the Supreme Court in **Formula One World Championship Limited v. Commissioner of Income Tax, International Taxation-3, Delhi and**

**Another**[20] and which, according to learned senior counsel, had identified the principal elements for a Fixed Place PE being assumed to have come into existence to be: (a) an identified fixed place, (b) that fixed place being made available and placed at the disposal of the foreign enterprise and (c) business of that foreign enterprise being carried on through such fixed place. Mr. Vohra in order to buttress his submissions adverted to the following paragraphs from the *Formula One* decision of the Supreme Court:-

> "**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 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.
>
> **xxxx xxxx xxxx**
>
> **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.
>
> **xxxx xxxx xxxx**
>
> **74.** As per Article 5 of the DTAA, the PE has to be a fixed place of business "through" which businesses of an enterprise is wholly or partly carried on. Some examples of fixed place are given in Article 5(2), by way of an inclusion. Article 5(3), on the other hand, excludes certain places which would not be treated as PE i.e. What is

[20] (2017) 15 SCC 602

mentioned in clauses (a) to (f) as the "negative list". A combined reading of sub-articles (1), (2) and (3) of Article 5 would clearly show that not only certain forms of establishment are excluded as mentioned in Article 5(3), which would not be PEs. Otherwise, sub-article (2) uses the word "include" which means that not only the places specified therein are to be treated as PEs, the list of such PEs is not exhaustive. In order to bring any other establishment which is not specially mentioned, the requirements laid down in sub-article (1) are to be satisfied. Twin conditions which need to be satisfied are: (a) existence of a fixed place of business; and (b) through that place business of an enterprise is wholly or partly carried out."

27. Learned senior counsel then took us through the decision rendered by this Court in **Director of Income Tax v. E-Funds IT Solution**[21] and which had underscored the requirement of the core business of the foreign enterprise being carried out through an identified fixed place in order to constitute a Fixed Place PE. Our attention was drawn to the following paragraphs of that decision:-

"**53.** Reference to core of auxiliary or preliminary activity is relevant when we apply para 3 of Article 5 or when sub-clause (a) to para 4 to Article 5 is under consideration. The fact that the subsidiary company was carrying on core activities as performed by the foreign assessee does not create a fixed place PE. Paragraph 3 of Article 5 lists negative activities which when performed from a fixed placed in the other contracting State would not create a PE. The activities specified in Article 5, para 3 would not create a PE, even when the conditions specified in paras (1) and (2) of Article 5 are satisfied. Paragraph 3 is not a positive provision but a negative list. The said paragraph does not create a PE but has a negative connotation and activities specified when carried on do not create a PE.

**xxxx xxxx xxxx**

**59.** 10K report referred to in the orders was filed by the assessee with the S.E.C. USA. The details submitted in this document not only pertain to the two assessee incorporated and paying tax in USA but the entire group companies including e-Fund India. The assets, revenues, income earned, employees of e-Fund India, etc. have to be disclosed and elucidated in the said report. The report, no doubt, is relevant and material but has to be examined with due care and caution to determine and decide whether the two assessees have PE in India. The fact that business has been transferred or sub-

[21] 2014 SCC OnLine Del 555

> contracted or assigned to e-Fund India is not relevant and material, unless we are determining applicability of para 3 to para 5 and the question is whether the Indian company is performing core or auxiliary and preliminary activities. The fact, the report refers to and give details of or number of employees of e-Fund India which are part of the e-Fund group is not relevant. Neither income earned by e-Fund India nor activities in India by the Indian subsidiary by itself, relevant in determining whether or not PE exists under paras 1, 2, 4 and 5 of Article 5. Thus and therefore, the fact that 40% of the employees of the entire group were in India i.e. were employees of e-Fund India, will not make the said company agency subsidiary PE or fixed place PE of the assessee. Neither provision of any software, intangible data etc. whether free of cost or otherwise, make e-Fund India an agency or fixed place PE of the two foreign assessees. Whether or not and on what basis e-Fund India was reimbursed expenses of xerox, courier charges etc. will not make e-Fund India as PE of the assessee under Articles 5(1), 5(4) or 5(5). Conditions and stipulates under Articles 5(1), 5(4) or 5(5) will create a PE and not the said facts as highlighted in the impugned orders. Therefore, we will now examine the facts found and refer to Articles 5 (4) and 5(5) of DTAA."

28. Mr. Vohra also laid emphasis on the fact that the legal position as enunciated by this Court ultimately came to be affirmed by the Supreme Court in **Assistant Director of Income Tax-I, New Delhi v. E-Funds IT Solution Inc.**[22] and where the law was explained in the following terms:-

> "**16.** The Income Tax Act, in particular Section 90 thereof, does not speak of the concept of a PE. This is a creation only of the DTAA. By virtue of Article 7(1) of the DTAA, the business income of companies which are incorporated in the US will be taxable only in the US, unless it is found that they were PEs in India, in which event their business income, to the extent to which it is attributable to such PEs, would be taxable in India. Article 5 of the DTAA set out hereinabove provides for three distinct types of PEs with which we are concerned in the present case: fixed place of business PE under Articles 5(1) and 5(2)(a) to 5(2)(k); service PE under Article 5(2)(l) and agency PE under Article 5(4). Specific and detailed criteria are set out in the aforesaid provisions in order to fulfil the conditions of these PEs existing in India. The burden of proving the fact that a

[22] (2018) 13 SCC 294

foreign assessee has a PE in India and must, therefore, suffer tax from the business generated from such PE is initially on the Revenue. With these prefatory remarks, let us analyse whether the respondents are brought within any of the sub-clauses of Article 5.

**17.** Since the Revenue originally relied on fixed place of business PE, this will be tackled first. Under Article 5(1), a PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on. What is a "fixed place of business" is no longer res integra. In *Formula One*, this Court, after setting out Article 5 of the DTAA, held as follows: (SCC pp. 625-29, paras 33-39)

> "*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 the right to use the said place and has control thereupon.
>
> * * *
>
> *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, we assume a PE once such property has been *"fixed"* to the soil.
>
> For example, a workbench in a caravan, restaurants on permanently anchored river boats, steady oil rigs, or a transformer 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 taxed only in State *B* under the 1st sentence of Article 7(1) OECD and UN MC.

There is no minimum size of the place of work. If 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 will be sufficient if it were available. 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 conduct negotiations 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 been 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." (emphasis supplied)"

**18.** Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies. The assessing officer, CIT (Appeals) and the ITAT have essentially adopted a fundamentally erroneous approach in saying that they were contracting with a 100% subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE. The High Court has dealt with this

aspect in some detail in which it held: (*E Funds case*, SCC OnLine Del para 49)

**xxxx xxxx xxxx**

**22.** This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score."

29. According to Mr. Vohra, the issues which are sought to be canvassed no longer survive and nor do they merit any exposition by this Court in light of the decision of the Supreme Court in *UAE Exchange*. Mr. Vohra submitted that the facts as they obtained in *UAE Exchange* are identical to those which form the subject matter of these appeals and thus following the principles culled out by the Supreme Court, the arguments advanced by the appellants are wholly unmerited.

30. Mr. Vohra then submitted that the assumption of the LO carrying on business activities in India is factually flawed and had come to be rendered by the AO as well as the CIT(A) in ignorance of Article 5(3)(e) of the India-USA DTAA and the fundamental functions and attributes which must be found to vest in an agent before a DAPE could be said to have come into being.

31. Elaborating on that aspect, Mr. Vohra also vehemently assailed the view expressed by the AO as well as the CIT(A) insofar as the question of DAPE was concerned. It was submitted that the Department of Posts, NBFCs were all independent third parties having substantial business and revenue of their own and were thus clearly not dependent upon the revenue that came to be generated while discharging certain

functions under the agency agreements. It was submitted that the conclusions to the contrary as drawn by the AO as well as the CIT(A) would in any case not sustain in light of the decision of this Court in *E-Funds*.

32. Mr. Vohra also highlighted the fact that the Indian agents were remunerated at arm's length and were, in that sense, independent. This according to learned senior counsel more so since undisputedly they stood conferred with no authority to conclude contracts on behalf of the principal in India.

33. Mr. Vohra submitted that all contracts for MTS were entered into by the respondent-assessee outside India with the remitters too being situate outside the country. The submissions, which were addressed in the backdrop of the 'Voyager' software, were countered by Mr. Vohra who referred for our consideration the following passage from the **Organization for Economic Cooperation and Development[23] Model Commentary, 2005**[24].

> "42.2 Whilst a location where automated equipment is operated by an enterprise may constitute a permanent establishment in the country where it is situated (see below), a distinction needs to be made between computer equipment, which may be set up at a location so as to constitute a permanent establishment under certain circumstances, and the data and software which is used by, or stored on, that equipment. For instance, an Internet web site, which is a combination of software and electronic data, does not in itself constitute tangible property. It therefore does not have a location that can constitute a "place of business" as there is no "facility such as premises or, in certain instances, machinery or equipment" (see paragraph 2 above) as far as the software and data constituting that web site is concerned. On the other hand, the server on which the web site is stored and through which it is accessible is a piece of equipment having a physical location and such location may thus

[23] OECD
[24] OECD Model 2005

constitute a "fixed place of business" of the enterprise that operates that server."

34. Mr. Vohra argued that the software was merely a tool employed to facilitate the verification of details and its role being confined to enabling the Indian agents to undertake that exercise and communicate with the mainframe computers and servers of the respondents situate outside India. Learned senior counsel thus submitted that it would be wholly incorrect for the installation of that software to be viewed as giving rise to the creation of a Fixed Place PE. It is these rival submissions which arise for consideration

35. Although, the Tribunal has come to hold against the respondent-assessee insofar as the issue of business connection is concerned, we do not find any legal imperative to engage with that question since the same is undisputedly concerned with Section 9 of the Act and thus relating to income which could be said to be deemed to have accrued or arisen in India. We thus propose to confine and focus our discussion in evaluating the correctness of the view expressed by the Tribunal primarily on the anvil of the DTAA.

36. Having chronicled the submissions which were addressed by respective sides before us, we proceed further and firstly take up for consideration Article 5 of the DTAA and which defines the concept of a PE. Article 5 of the India-USA DTAA reads as follows:-

"ARTICLE 5
**PERMANENT ESTABLISHMENT**

1. For the purposes of this Convention, 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 warehouse, in relation to a person providing storage facilities for others;

*(h)* a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

*(i)* a store or premises used as a sales outlet;

*(j)* an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 120 days in any twelve-month period;

*(k)* a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period;

*(l)* The furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or

(ii) the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of Article 9 (Associated Enterprises)].

*3.* Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include any one or more of the following:

*(a)* the use of facilities solely for the purpose of storage, display, or occasional 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 occasional 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 advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise.

*4.* Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if:

*(a)* he has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;

*(b)* he has no such authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or

*(c)* he habitually secures orders in the first-mentioned State, wholly or almost wholly 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 and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.

*6.* The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

37. As per Article 5(1), a PE would mean a fixed place through which the enterprise carries on its business wholly or in part. Article 5(2) then proceeds to specify several categories of establishments which would fall within the ambit of the expression '*Permanent Establishment*'. This, as our Court correctly explained in *E-Funds*, is a provision with a positive connotation as opposed to the negative list enumerated in Article 5(3) and which excludes a fixed places of business if it satisfies the conditions prescribed therein. The argument of "*preparatory*" and "*auxiliary*" proceeds in light of the aforesaid distinction.

38. In these proceedings, the appellants had contended that it was the LO of the respondent-assessee which constituted a PE in India. That submission was addressed in the backdrop of the various functions which were discharged by that LO upto 2005. The Tribunal has taken due note of the nature of permission which was accorded by RBI relating to the functioning of the LO and which enabled it to engage in activities such as distribution of brochures and literature, educating and informing parties with respect to the nature of activities of Western Union Financial Services, liaising with governmental authorities and officials, addressing seminars on its activities, putting interested parties in contact with Western Union Financial Services and exploring legal, commercial and regulatory feasibility of setting up subsidiaries and affiliates.

39. The permission granted by RBI proscribed the LO from undertaking any commercial trading or industrial activity in India, signing any commercial agreements, participating in any commercial trading or industrial activity or for that matter negotiating any related

contracts. From the activity report which was submitted by that LO to the RBI, we note that it had asserted that it had merely acted as a communication link between the agents and Western Union Financial Services. It had also made due disclosure of the initiatives undertaken by it and which included training agents, administering training and refresher courses as well as providing the updated versions of the 'Voyager' software to agents and training their staff with respect to its usage. The respondent-assessee had in the aforesaid light argued that the activities undertaken by the LO would clearly fall within the category of activities which could at best be described as '*preparatory*' or '*auxiliary*' and thus falling within the ambit of Article 5(3) of the DTAA.

40. It is pertinent to note that Article 5(3) sets out the exclusions from the term '*Permanent Establishment*' and thus excludes a fixed place of business from where '*preparatory*' or '*auxiliary*' activities may be undertaken. Although Mr. Chawla had sought to lay stress on the phrase "*or for other activities*" as it appears in Article 5(3)(e), we find no merit in that contention since the said expression would have to be read in conjunction with the phrase "*which have a preparatory or auxiliary character*" to which it is prefaced. The scope of the words "*preparatory*" and "*auxiliary*" had directly arisen for the consideration of this Court in *UAE Exchange*. The said decision was concerned with the assertion of the Income Tax Department of an office of the assessee, UAE Exchange Centre, situate in India constituting a PE. Similar to the fact which obtain in these appeals, *UAE Exchange* was also concerned with the movement of monies handed over to it by various remitters residing outside India. The funds were deposited with that entity by

remitters in the **United Arab Emirates**[25] and thereafter transmitted to beneficiaries in India either through normal banking channels or with the involvement of the LOs. The LOs of UAE Exchange Centre were enabled to download requisite information particulars by using computers installed in India and which were in turn connected to servers in the UAE. It was the LOs which after due verification were drawing cheques on banks in India and transmitting them to the concerned beneficiaries. The AAR had held against the assessee by observing that those LOs would constitute a PE.

41. Our Court in *UAE Exchange* while examining the challenge had held that the AAR had clearly erred in taking that position and ignoring that the services rendered by LOs clearly fell within the scope of Article 5(3). This becomes apparent from a reading of para 32 of that decision and which is extracted hereinbelow:-

> "**32.** In our opinion, this view is clearly erroneous. We are living in an era where the world is described euphemistically as "flat" or even a global village. Organisations and companies operate transnationally. There is an eagerness to bring to tax by States income, by employing deeming fictions so that incomes which ordinarily do not accrue or arise within the taxing State are brought within the State's tax net. It is in this context that the expression "permanent establishment" appearing in the DTAA has to be viewed. In the case of the 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 a 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

[25] UAE

preparatory or auxiliary character. The plain meaning of the word "auxiliary" is found in the Black's Law Dictionary 7th Edition at page 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 the UAE based on which cheques are drawn on banks in India whereupon the said cheques are couriered or despatched to the beneficiaries in India, keeping in mind the 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-a-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 the case of DIT (International Taxation) v. Morgan Stanley and Co. Inc. [2007] 292 ITR 416 ; [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 the Indo-US DTAA, which is, identical to the 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 the case of Morgan Stanley [2007] 292 ITR 416 ; [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 and 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 within article 5(1) of the Indo-US DTAA."

42. Our Court found that the LOs were merely aiding and supporting the entity, UAE Exchange Centre. Thus, and viewed in that light, the said offices could not possibly be held to constitute a PE. It also bore in consideration that every aspect of the principal transaction had been concluded in the UAE and the remittances as well as the commission was deposited and earned in that territory. It pertinently observed that the functions performed by the LOs were merely supportive of the transaction which had occurred in the UAE. It thus observed that the LOs did not contribute to the earning of profits by the assessee.

43. The aforesaid judgment rendered by this Court came to be appealed by the Union before the Supreme Court and which, while affirming the judgment handed down by this Court had observed as follows:-

> "**31.** While answering the question as to whether the activity in question can be termed as other than that "of preparatory or auxiliary character", we need to keep in mind the limited permission given by RBI to the respondent under Section 29(1)(*a*) of the 1973 Act, on 24-9-1996. From Para 2 of the stated permission, it is evident that RBI had agreed for establishing a liaison office of the respondent at Cochin, initially for a period of three years to enable the respondent to:
>
> (*i*) respond quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts;
>
> (*ii*) undertake reconciliation of bank accounts held in India;
>
> (*iii*) act as a communication centre receiving computer (via modem) advices of mail transfer T.T. stop payments messages, payment details, etc., originating from the

respondent's several branches in UAE and transmitting to its Indian correspondent banks;

(*iv*) printing Indian Rupee drafts with facsimile signature from the Head Office and counter-signature by the authorised signatory of the office at Cochin; and

(*v*) following up with the Indian correspondent banks.

These are the limited activities which the respondent has been permitted to carry on within India. This permission does not allow the respondent assessee to enter into a contract with anyone in India, but only to provide service of delivery of cheques/drafts drawn on the banks in India.

**32.** Notably, the permitted activities are required to be carried out by the respondent subject to conditions specified in Clause 3 of the permission, which includes not to render any consultancy or any other service, directly or indirectly, with or without any consideration and further that the liaison office in India shall not borrow or lend any money from or to any person in India without prior permission of RBI. The conditions make it amply clear that the office in India will not undertake any other activity of trading, commercial or industrial, nor shall it enter into any business contracts in its own name without prior permission of RBI. The liaison office of the respondent in India cannot even charge commission/fee or receive any remuneration or income in respect of the activities undertaken by the liaison office in India.

**33.** From the onerous stipulations specified by RBI, it could be safely concluded, as opined by the High Court, that the activities in question of the liaison office(s) of the respondent in India are circumscribed by the permission given by RBI and are in the nature of preparatory or auxiliary character. That finding reached by the High Court is unexceptionable.

**34.** The High Court had justly adverted to the exposition of this Court in *CIT* v. *Morgan Stanley & Co. Inc.* [*CIT* v. *Morgan Stanley & Co. Inc.*, (2007) 7 SCC 1] , which dealt with the case of an assessee having set up office in India to support the main office functions in fixed income and equity research and in providing IT enabled services such as back office operations, data processing and support centres to the entity in the United States. This Court, in paras 10 to 14, observed thus: (SCC pp. 13-14)

"*10*. In our view, the second requirement of Article 5(1) of DTAA is not satisfied as regards back office functions. We have examined the terms of the agreement along with the advance ruling application made by MSCo inviting AAR to give its ruling. It is clear from reading of the above

agreement/application 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 PE 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, we are in agreement with the ruling of AAR that in the present case Article 5(1) is not applicable as the said MSAS would be performing in India only back office operations. Therefore, to the extent of the above back office functions the second part of Article 5(1) is not attracted.

*11. Lastly, as rightly held by AAR there is no agency PE as the PE in India had no authority to enter into or conclude the contracts. The contracts would be entered into in the United States. They would be concluded in US. The implementation of those contracts only to the extent of back office functions would be carried out in India, and therefore, MSAS would not constitute an agency PE as contended on behalf of the Department.*

*12*. In DTAA, the term PE [**Ed.**: The matter between two asterisks has been emphasised in original.] *means* [**Ed.**: The matter between two asterisks has been emphasised in original.] a fixed place of business through which the business of an MNE is wholly or partly carried out. The definition of the word PE in Section 92-F(*iii*) is inclusive, however, it is not under Article 5(1) of the Treaty. It is for this reason that Article 5(2) of DTAA herein refers to places included as PE of the MNE. One such place is mentioned in Article 5(2)(*l*) which deals with furnishing of services.

*13*. The concept of PE was introduced in the 1961 Act as part of the statutory provisions of transfer pricing by the Finance Act of 2001. In Section 92-F(*iii*) the word "enterprise" is defined to mean

'**92-F. (*iii*)** … a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, …'

Under CBDT Circular No. 14 of 2001 it has been clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to DTAA entered into by India. Thus, the intention was to rely on the concept and definition of PE in DTAA. However, vide the Finance Act, 2002 the definition of PE was inserted in the Income Tax Act, 1961 (for short "the IT Act") vide Section 92-F(*iii-a*) which states that the PE shall [**Ed.**: The matter between

two asterisks has been emphasised in original.] *include* [**Ed.**: The matter between two asterisks has been emphasised in original.] a fixed place of business through which the business of MNE is wholly or partly carried on. *This is where the difference lies between the definition of the word PE in the inclusive sense under the IT Act as against the definition of the word PE in the exhaustive sense under DTAA. This analysis is important because it indicates the intention of Parliament in adopting an inclusive definition of PE so as to cover service PE, agency PE, software PE, construction PE, etc.*

*14. There is one more aspect which needs to be discussed, namely, exclusion of PE under Article 5(3). Under Article 5(3)(e) activities which are preparatory or auxiliary in character which are carried out at a fixed place of business will not constitute a PE. Article 5(3) commences with a non obstante clause. It states that notwithstanding what is stated in Article 5(1) or under Article 5(2) the term PE shall not include maintenance of a fixed place of business solely for advertisement, scientific research or for activities which are preparatory or auxiliary in character*. In the present case, we are of the view that the abovementioned back office functions proposed to be performed by MSAS in India falls under Article 5(3)(*e*) of DTAA. Therefore, in our view in the present case MSAS would not constitute a fixed place PE under Article 5(1) of DTAA [**Ed.**: The matter between two asterisks has been emphasised in original.] *as regards its back office operations* [**Ed.**: The matter between two asterisks has been emphasised in original.]."

(emphasis supplied)

**35.** The learned counsel for the appellant, however, attempted to distinguish this judgment in *Morgan Stanley & Co. Inc.* [*CIT* v. *Morgan Stanley & Co. Inc.*, (2007) 7 SCC 1] on the argument that this case dealt with the issue of service PE. According to him, the Court must examine the full transactions of the respondent to determine whether the work done by the respondent assessee was one of a backup office work or auxiliary work. Insofar as the nature of activities carried on by the respondent through the liaison office in India, as permitted by RBI, we have upheld the conclusion of the High Court that the same were in the nature of "preparatory or auxiliary character" and, therefore, covered by Article 5(3)(*e*). As a result, the fixed place used by the respondent as liaison office in India, would not qualify the definition of PE in terms of Articles 5(1) and 5(2) of the DTAA on account of non obstante and deeming clause in Article 5(3) of the DTAA.

**36.** Having said thus, it must follow that the respondent was not carrying on any business activity in India as such, but only dispensing with the remittances by downloading information from the main server of the respondent in UAE and printing cheques/drafts drawn on the banks in India as per the instructions given by the NRI remitters in UAE. The transaction(s) had completed with the remitters in UAE, and no charges towards fee/commission could be collected by the liaison office in India in that regard. To put it differently, no income as specified in Section 2(24) of the 1961 Act is earned by the liaison office in India and more so because, the liaison office is not a PE in terms of Article 5 of DTAA (as it is only carrying on activity of a preparatory or auxiliary character). The concomitant is — no tax can be levied or collected from the liaison office of the respondent in India in respect of the primary business activities consummated by the respondent in UAE. The activities carried on by the liaison office of the respondent in India as permitted by RBI, clearly demonstrate that the respondent must steer away from engaging in any primary business activity and in establishing business connection as such. It can carry on activities of preparatory or auxiliary nature only. In that case, the deeming provisions in Sections 5 and 9 of the 1961 Act can have no bearing whatsoever.

**37.** Our attention was invited to the dictum in *CIT* v. *E-Funds IT Solution Inc.* [*CIT* v. *E-Funds IT Solution Inc.*, (2018) 13 SCC 294] Para 2 of the said decision would clearly indicate the background in which the issue was answered by this Court. The same reads thus: (SCC pp. 301-302)

> "*2.* The assessing authority decided that the assessees had a permanent establishment (hereinafter referred to as "PE") as they had a fixed place where they carried on their own business in Delhi, and that, consequently, Article 5 of the India US Double Taxation Avoidance Agreement of 1990 (hereinafter referred to as "DTAA") was attracted. Consequently, the assessees were liable to pay tax in respect of what they earned from the aforesaid fixed place PE in India. The CIT (Appeals) dismissed the appeals of the assessees holding that Article 5 was attracted, not only because there was a fixed place where the assessees carried on their business, but also because they were "service PEs" and "agency PEs" under Article 5. In an appeal to ITAT, ITAT held that the CIT (Appeals) was right in holding that a "fixed place PE" and "service PE" had been made out under Article 5, but said nothing about the "agency PE" as that was not argued by the Revenue before ITAT. However, ITAT, on a calculation formula different from that of the CIT (Appeals), arrived at a nil figure of income for all the relevant assessment years. The appeal of the assessees to the High

Court proved successful and the High Court, by an elaborate judgment [*CIT* v. *E-Funds IT Solution*, (2014) 9 HCC (Del) 70 : (2014) 364 ITR 256] , has set aside the findings of all the authorities referred to above, and further dismissed the cross-appeals of the Revenue. Consequently, the Revenue is before us in these appeals."

**38.** The Court in *E-Funds IT Solution Inc.* [*CIT* v. *E-Funds IT Solution Inc.*, (2018) 13 SCC 294], after analysing the decisions and the report concerned produced before it, observed in para 22 as follows: (SCC p. 320)

"*22. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment [CIT v. E-Funds IT Solution, (2014) 9 HCC (Del) 70 : (2014) 364 ITR 256] is, therefore, correct on this score*."

(emphasis supplied)

**39.** We may usefully refer to paras 24 and 26 of the reported decision in *E-Funds IT Solution Inc.* [*CIT* v. *E-Funds IT Solution Inc.*, (2018) 13 SCC 294] , which read thus: (SCC pp. 322-23)

"*24. It has already been seen that none of the customers of the assessees are located in India or have received any services in India. This being the case, it is clear that the very first ingredient contained in Article 5(2)(l) is not satisfied.* However, the learned Attorney General, relying upon Para 42.31 of the OECD Commentary, has argued that services have to be furnished within India, which does not mean that they have to be furnished to customers in India. Para 42.31 of the OECD Commentary reads as under:

'42.31. … Whether or not the relevant services are furnished to a resident of a State does not matter; what matters is that the services are performed in the State through an individual present in that State.'

***

*26*. We entirely agree with the approach of the High Court in this regard. Para 42.31 of the OECD Commentary does not mean that services need not be rendered by the foreign assessees in India. *If any customer is rendered a service in India, whether resident in India or outside India, a "service PE" would be established in India*. As has been noticed by us hereinabove, no customer, resident or otherwise, receives any service in India from the assessees. All its customers receive

> services only in locations outside India. Only auxiliary operations that facilitate such services are carried out in India. This being so, it is not necessary to advert to the other ground, namely, that "other personnel" would cover personnel employed by the Indian company as well, and that the US companies through such personnel are furnishing services in India. This being the case, it is clear that as the very first part of Article 5(2)(*l*) is not attracted, the question of going to any other part of the said Article does not arise. It is perhaps for this reason that the assessing officer did not give any finding on this score."
>
> (emphasis supplied)
>
> **40.** As aforesaid, we agree with the finding recorded by the High Court about the nature and character of stated activities carried on by the liaison offices of the respondent and in our view, the High Court justly reckoned the same as being of preparatory or auxiliary character, falling under Article 5(3)(*e*)."

44. The question of a Fixed Place PE as well as DAPE had also arisen for our consideration in **Progress Rail Locomotive Inc. v. Deputy Commissioner of Income-tax (International Taxation) and Others**[26].

45. While dealing with the concept of a PE, we had taken note of some illuminating passages which appear in Klaus Vogel's work on Double Taxation Conventions. We deem it apposite to extract the following paragraphs from *Progress Rail*:-

> "**67.** Mr. Datar had with his characteristic erudition and clarity not only sketched out the well-recognised principles governing the question of a permanent establishment, he had also placed for our consideration various academic texts and treatises to enable us to obtain a broader perspective on the concept of a permanent establishment. We, however, deem it apposite to additionally notice some of the principles which stand enunciated in Klaus Vogel's seminal work on Double Taxation Conventions [Klaus Vogel on Double Taxation Conventions, Edited by Ekkehart Reimer and Alexander Rust, Wolters Kluwer, 5th edition, 2022.]. While explaining the "control" test which would be determinative for the purposes of acknowledging the existence of a place of business

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under the sufficient command of an entity situate in one of the contracting States, the learned author observes as under:

> "110. For all types of business activities, control can be based on legal titles or factual circumstances. Legal control might be derived from ownership or any other right, including equitable rights under common law if the respective right conveys factual mastery of a place of business to the taxpayer enterprise. Such rights are perfect where the taxpayer enterprise is the legal proprietor of the place of business. Likewise, the position of the taxpayer as a tenant, a lessee (leaseholder, even in cases of short-term lease) or even a co-tenant will usually qualify as a controlling interest under article 5(1) of Organization for Economic Co-operation and Development and UN MC (No. 44 OECD MC Comm. on article 5).
>
> 111. But even in the absence of a legal right to use that place, the control test can be met if the taxpayer enterprise has sufficient command of the place of business as a matter of fact (No. 11 et seq. OECD MC Comm. on article 5). Thus, for instance, a permanent establishment could exist where an enterprise illegally occupied a certain location where it carried on its business (as mentioned explicitly in No. 11 et seq. OECD MC Comm. on article 5). Likewise, a company may create a permanent establishment on the premises of an associated company if this associated company grants accommodation to, or tolerates the lasting presence of employees of the first-mentioned company (see infra m. No. 430 et seq.)."

**68.** Klaus Vogel, while seeking to amplify the importance of the expression "through" when used in the context of the business of the holding company being carried on by the subsidiary, makes the following pertinent observations:

> "134. Article 5(1) OECD MC (since 1977; see supra m. No. 45) requires that the business of an enterprise (for these terms, see supra m. No. 27 et seq.) is carried on through the fixed place of business. The preposition 'through' specifies the functional relation between the place of business and the activities of the taxpayer. This relation can be described best by the notion of a functional integration of the place of business in the enterprise of the taxpayer. Such functional integration contains several aspects which need to be carefully distinguished from one another. Their common denominator, however, is the type and degree of proximity of the place of business to, or even identification with, the taxpayer's paramount economic activity.

135. The first function of the term ‘through’ is to make it clear that the taxpayer has to control the permanent establishment (see supra m. No. 106 et seq. for details).

136. Secondly, functional integration presupposes that the taxpayer ‘wholly or partly carrie(s) on’ his business (article 5(1) OECD MC; the OECD MC Comm. uses the verb ‘carried out’ synonymously (No. 35 OECD MC Comm. on article 5)). However, like ‘business' and ‘enterprise’ (cf. supra m. No. 27 et seq.), these words do not function as a substantive filter either. While early draft Model Conventions contained the condition that the fixed POR should have a productive character, this requirement was never adopted by the OECD Model (see No. 35 OECD MC Comm. on article 5). None of the current MCs provide a specific productivity test. It follows that place of business may constitute a permanent establishment even if they perform activities which mainly or exclusively expenditures to show for.

137. Likewise, the ‘carrying-on’ requirement does not imply an activity in the sense of an active and visible work. It includes even stand-by services and omissions. This gains significant relevance where the omission is profitable (e.g., in the case of a place of business earning money in the source State simply by fulfilling, for whichever period of time, a non-competition agreement relating to the territory of that State).

138. However, a diffuse passivity which equals a (temporal or lasting) suspension of the activities which the place of business has been designed for may indicate that the place of business is not ‘permanent’. For details, see supra m. No. 87 et seq.

139. Thirdly, the phrase ‘through which’ indicates that the taxpayer makes use of the place of business in that he employs it an instrument (equalling or resembling an operating asset) for his entrepreneurial activities. This third aspect of the functional integration is by far the most disputed one.

140. Historically, the instrumental character of the place of business for the carrying-on of the enterprise could not be taken for granted. Between 1963 and 1977, the OEEC/Organization for Economic Co-operation and Development did not employ this term. Rather, it was sufficient that the taxpayer carried on his business ‘in’ the place of business (see supra m. No. 45). Based on the old Model, some older DTCs use the words ‘in which’ still today. While some authors have denied any divergence in substance,

the 1977 amendment is a strong reason to assume a semantic shift indeed.

141. In a different context (viz., in article 5(4.1) of the Organization for Economic Co-operation and Development and UN MC, (as amended in 2017), the Organization for Economic Co-operation and Development and UN have returned, in one specific regard, to this old line by stating that an enterprise should carry on business 'at the same place'. However, the simultaneous use of this language on the one hand and the terms 'used or maintained by an enterprise' on the other, in one and the same sentence in the initial phrase of article 5(4.1) of Organization for Economic Co-operation and Development and UN MC, proves how careful and attentive the 2017 Models have been drafted. This dualism is another good reason to stipulate a different meaning of 'through', as opposed to 'in' or 'at'. For all of these reasons, we do see a substantial difference between both terms.

142. It follows that on the one hand, the activities mentioned in article 5(1) of the Organization for Economic Co-operation and Development and UN MC need no longer be carried on 'in' or 'at' the place of business. In this respect, the 1977 change of article 5(1) of OECD MC has enlarged the scope of the permanent establishment definition. Especially if one thinks of an activity as a human behaviour, one can now (unlike before 1977) easily subsume unmanned facilities under the permanent establishment definition (see supra m. No. 45 and see, e.g., No. 127 OECD MC Comm. on article 5).

143. On the other hand, the requirement of an instrumental character of the place of business has become irrefutable. Even stronger than the English amendment ('through which' instead of 'in which'), the corresponding modification of the French text ('par l'intermediaire de laquelle' instead of 'ou') has stressed the functional integration of the place of business in the business.

144. The OECD MC Comm. has weakened the meaning of 'through' since 2003. The Commentary holds the view that the requirement of a functional integration is met as soon as the taxpayer exercises the business in a fixed place of business which is at his disposal (No. 20 OECD MC Comm. on article 5 (added on January 28, 2003)). This is the reason for the characterisation of the famous painter example (i.e., the fictitious case of a painter who, for two years, spends three days a week in the large office building of its main client) as a service permanent establishment. In substance, the view of the OECD MC Comm. limits the meaning of 'through' to the first two instead of all three semantic aspects

required by article 5(1) OECD MC (supra m. No. 135 et seq. and 139 et seq.)."

**69.** Proceeding further to deal with the concepts of "preparatory" and "auxiliary" services and which are intended to remove a place of business which may otherwise fall within the meaning of a permanent establishment and which phraseology is mirrored in article 5(3)(e) of the India-USA Double Taxation Avoidance Agreement, Klaus Vogel's work has the following instructive passages:

"59. (Determination of the activity's character) It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity.

60. (Preparatory character) As a general rule, an activity that has a preparatory character is one that is carried on in contemplation of the carrying on of what constitutes the essential and significant part of the activity of the enterprise as a whole. Since a preparatory activity precedes another activity, it will often be carried on during a relatively short period, the duration of that period being determined by the nature of the core activities of the enterprise. This, however, will not always be the case as it is possible to carry on an activity at a given place for a substantial period of time in preparation for activities that take place somewhere else. Where, for example, a construction enterprise trains its employees at one place before these employees are sent to work at remote work sites located in other countries, the training that takes place at the first location constitutes a preparatory activity for that enterprise. An activity that has an auxiliary character, on the other hand, generally corresponds to an activity that is carried on to support, without being part of, the essential and significant part of the activity of the enterprise as a whole. It is unlikely that an activity that requires a significant proportion of the assets or employees of the enterprise could be considered as having an auxiliary character.…

69. (Collect information) The second part of sub-paragraph (d) relates to a fixed place of business that is used solely to collect information for the enterprise. An enterprise will

frequently need to collect information before deciding whether and how to carry on its core business activities in a State. If the enterprise does so without maintaining a fixed place of business in that State, sub-paragraph (d) will obviously be irrelevant. If, however, a fixed place of business is maintained solely for that purpose, sub-paragraph (d) will be relevant and it will be necessary to determine whether the collection of information goes beyond the preparatory or auxiliary threshold. Where, for example, an investment fund sets up an office in a State solely to collect information on possible investment opportunities in that State, the collecting of information through that office will be a preparatory activity. The same conclusion would be reached in the case of an insurance enterprise that sets up an office solely for the collection of information, such as statistics, on risks in a particular market and in the case of a newspaper bureau set up in a State solely to collect information on possible news stories without engaging in any advertising activities : in both cases, the collecting of information will be a preparatory activity."

**70.** Speaking in greater detail on the aspect of "preparatory" and "auxiliary" functions, the author observes:

"303. Already before the 2017 Update to the OECD MC, all of the activities listed in article 5(4)(a) to (f) of OECD and UN MC had to be preparatory or auxiliary (infra m. No. 304 et seq.). This followed from the use of the word 'other' in article 5(4)(e) of UN MC. This word relates not only to the subsequent word 'activity' (otherwise, one should have expected an if-clause or a 'provided that'- clause after 'activity', like in article 5(4)(f) of UN MC) but to the entire phrase 'activity of a preparatory or auxiliary character'. The 2017 update to the OECD MC has made this entirely clear by adding the words 'provided that such activity or, in the case of sub-paragraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character' as a joint supplement to sub-paragraphs (a)-(f). By contrast, other requirements in article 5(4)(e) of UN MC have no paramount relevance but apply within the ambit of this sub-paragraph only (infra m. No. 315 et seq.).

304. The preparatory or auxiliary character of the activities listed in article 5(4) of OECD MC can be based on an absolute standard or based on a relative standard. For example, consider a comparison of two enterprises : (1) an integrated enterprise which covers many steps in the creation of value (e.g., all steps from agricultural production through the processing of raw materials, further refinement up to

marketing, sale and delivery of the goods to final consumers) and (2) a specialised enterprise which focuses on one of these steps only (e.g., on the delivery of goods). Suppose that each enterprise maintains a place of business in a foreign State just for the sake of the delivery of goods. The same activity (the delivery of goods) is ancillary and subordinate for enterprise (1) while it constitutes the core business of enterprise (2).

305. The amount of value added by either enterprise is the same, and so is the potential tax revenue in the source State. An absolute standard suggests equal treatment of cases (1) and (2).

306. However, the ordinary meaning of both 'preparatory' and 'auxiliary' requires the identification of a point of reference. One may say that the absolute standards are based on an analysis of the function of the core activity in relation to the entire chain of economic value added. It is more convincing, however, to apply relative standards in the sense that the value added is considered on a micro rather than a macro level, that is, that the core activity should be compared to the entirety of all activities exercised by the enterprise. This relative view would deny a permanent establishment in case (1), and assume a permanent establishment in case (2). This view is shared by No. 60 of OECD MC Comm. on article 5 as well as by most authors.

307. It seems to your author, however, that the strict and exclusive application of relative standards would not do justice to cases where an enterprise of type (1) above (supra m. No. 283) is so large that place of businesses which, from an absolute perspective, are respectable entities with valuable assets, a considerable number of employees and full-fledged bureaucratic and administrative facilities of their own, just seem to be small, preparatory or auxiliary from the perspective of the company's headquarters. If they are still the biggest employer in a given municipality, it is hardly justified from the viewpoint of fiscal equivalence to exempt such place of businesses under article 5(4) of OECD and UN MC.

308. It follows that a combined approach is most appropriate. While relative standards apply at the outset (supra m. No. 304), absolute standards require a second filter:

The activities of a place of business qualify as being 'of a preparatory or auxiliary character', as compared to the overall activities of the enterprise if they have not more than a marginal relevance within the enterprise's overall business plan. It should be noted that it is not the share in actual profits or losses on which the comparison should be based. Rather, the characterisation of an activity as preparatory and/or

> auxiliary depends on the type, sector and intensity of the activity, as compared to the core business of the enterprise as a whole.
>
> If the activities of a place of business qualify as preparatory and/or auxiliary under these relative standards, they still do not fall under article 5(4) of OECD MC if the place of business (and the activities exercised through it) alone, when looked at separately from the rest of the enterprise, exceeds a certain size and degree of professional entrepreneurship….
>
> 313. A further group of examples covers rooms and facilities which an employer makes available in order to accommodate his employees or help them to recreate or spend their idle time. This includes hotels, bedrooms, lounges or restrooms maintained outside the ordinary premises which the employer uses for the purpose of his core business. Similarly, locker rooms and coaches' rooms occupied by a baseball team while playing in venues outside the headquarters of the team do not constitute permanent establishments of the baseball clubs. In contrast, sales activities of a manufacturing company are not of an auxiliary character. If they occur in a fixed place of business, they create a permanent establishment even if the sales contracts are subject to approval by the head office or another permanent establishment."

46. We had in *Progress Rail* noticed some of the seminal decisions which had been rendered by various Courts while seeking to define the concept of a Fixed Place PE. The discussion on Fixed Place PE as appearing in *Progress Rail* is extracted below:-

> "**85.** That leads us to examine the correctness of the opinion as formed with respect to the Noida factory and the Varanasi office constituting a fixed place permanent establishment. Decades before global commerce attained the degree of complexity which attaches to it today, the Andhra Pradesh High Court in *CIT* v. *Visakhapatnam Port Trust* [(1983) 144 ITR 146 (AP); 1983 SCC OnLine AP 287; (1984) 38 CTR 1 (AP); (1983) 15 Taxman 72 (AP).] , and which decision constitutes the locus classicus on the subject, explained the concept of a "permanent establishment" as postulating a substantial element of presence of a foreign enterprise in another country. The presence, as Jagannadha Rao, J. explained, had to additionally meet the test of an enduring and permanent nature. It was this seminal decision which propounded the concept of "virtual projection".
>
> **86.** The principles pertaining to fixed place permanent establishment were more lucidly explained by the Supreme Court in *Formula One*

*World Championship Ltd.* [*Formula One World Championship Ltd.* v. *CIT (International Taxation)*, (2017) 394 ITR 80 (SC); (2017) 15 SCC 602; (2017) 295 CTR 12 (SC); (2017) 248 Taxman 192 (SC).] in the following terms (page 100 of 394 ITR):

> "Emphasising that as a creature of international tax law, the concept of permanent establishment has a particularly strong claim to a uniform international meaning, Philip Baker discerns two types of permanent establishments contemplated under article 5 of Organization for Economic Co-operation and Development 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 permanent establishment. Such permanent establishment is given the nomenclature of 'unassociated permanent establishment' by Baker. He, however, pointed out that there is a possibility of a third type of permanent establishment, i.e., a construction or installation site may be regarded as permanent establishment under certain circumstances. In the first type of permanent establishment, 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) permanent establishment 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, permanent establishment 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…
>
> 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.…

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.…

Organization for Economic Co-operation and Development commentary on Model Tax Convention mentions that a general definition of the term ‘permanent establishment’ 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.

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 permanent establishment. Some of the examples where premises are treated at the disposal of the enterprise and, therefore, constitute permanent establishment 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.…

As per article 5 of the Double Taxation Avoidance Agreement, the permanent establishment has to be a fixed place of business 'through' which business of an enterprise is wholly or partly carried on. Some examples of fixed place are given in article 5(2), by way of an inclusion. Article 5(3), on the other hand, excludes certain places which would not be treated as permanent establishment, i.e., what is mentioned in clauses (a) to (f) as the 'negative list'. A combined reading of sub-articles (1), (2) and (3) of article 5 would clearly show that only certain forms of establishment are excluded as mentioned in article 5(3), which would not be permanent establishments. Otherwise, sub-article (2) uses the word 'include' which means that not only the places specified therein are to be treated as permanent establishments, the list of such permanent establishments is not exhaustive. In order to bring any other establishment which is not specifically mentioned, the requirements laid down in sub-article (1) are to be satisfied. Twin conditions which need to be satisfied are : (a) existence of a fixed place of business; and (b) through that place business of an enterprise is wholly or partly carried out.…

We are of the opinion that the test laid down by the Andhra Pradesh High Court in *CIT* v. *Visakhapatnam Port Trust* [(1983) 144 ITR 146 (AP); 1983 SCC OnLine AP 287; (1984) 38 CTR 1 (AP); (1983) 15 Taxman 72 (AP).] fully stands satisfied. Not only the Buddh International Circuit is a fixed place where the commercial/economic activity of conducting F-1 Championship was carried out, one could clearly discern that it was a virtual projection of the foreign enterprise, namely, Formula-1 (i.e., FOWC) on the soil of this country. It is already noted above that as per Philip Baker (A Manual on the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital), a permanent establishment must have three characteristics : stability, productivity and dependence. All characteristics are present in this case. Fixed place of business in the form of physical location, i.e., Buddh International Circuit, was at the disposal of FOWC through which it conducted business. Aesthetics of law and taxation jurisprudence leave no doubt in our mind that taxable event

has taken place in India and the non-resident FOWC is liable to pay tax in India on the income it has earned on this soil."

**87.** As per the Manual on the Organization for Economic Co-operation and Development Model Tax Convention, and the precedents rendered on the subject, there are two basic conditions which are spelt out and which must be fulfilled for acknowledging a permanent establishment being existent and constituting a fixed place of business. They are:

(a) a place which stands placed at the "disposal" of an enterprise; and

(b) The establishment answering the characteristics of stability, productivity and dependence.

**xxxx xxxx xxxx**

**89.** The principles governing fixed place permanent establishment were again spelt out and enunciated by the Supreme Court in *Morgan Stanley and Co. Inc.* [*DIT (International Taxation)* v. *Morgan Stanley and Co. Inc.*, (2007) 292 ITR 416 (SC); (2007) 7 SCC 1.] and *Samsung Heavy Industries Co. Ltd.* [*DIT (International Taxation)* v. *Samsung Heavy Industries Co. Ltd.*, (2020) 426 ITR 1 (SC); (2020) 7 SCC 347.] In *Morgan Stanley and Co. Inc.* [*DIT (International Taxation)* v. *Morgan Stanley and Co. Inc.*, (2007) 292 ITR 416 (SC); (2007) 7 SCC 1.] , and where the following pertinent observations came to be rendered (page 421 of 292 ITR):

"With globalisation, many economic activities spread over to several tax jurisdictions. This is where the concept of permanent establishment becomes important under article 5(1). There exists a permanent establishment 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 present case MSCo is a multinational entity. As stated above it has out sourced some of its activities to MSAS in India. A general definition of permanent establishment 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 MNE is carried out in India through such fixed place. One of the questions which we are called upon to decide is whether the activities to be undertaken by MSAS consist of back office operations of 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).…

In our view, the second requirement of article 5(1) of the Double Taxation Avoidance Agreement is not satisfied as regards back office functions. We have examined the terms

of the Agreement along with the advance ruling application made by MSCo inviting the AAR to give its ruling. It is clear from a reading of the above Agreement/ application that MSAS in India would be engaged in supporting the front office functions of MSCo in fixed income and equity research and in providing Information Technology enabled services such as data processing support centre and technical services as also reconciliation of accounts. In order to decide whether a permanent establishment 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, we are in agreement with the ruling of AAR that in the present case article 5(1) is not applicable as the said MSAS would be performing in India only back office operations. Therefore to the extent of the above back office functions the second part of article 5(1) is not attracted."

**xxxx xxxx xxxx**

**91.** When we test the stand taken by the respondents, bearing in mind the aforesaid precepts as culled out from the various judgments noticed hereinabove, we find ourselves unable to sustain even the prima facie formation of opinion by the first respondent in this respect. It is pertinent to note that the impugned notices and the reasons set out for initiating action under section 147/148 nowhere allude to a particular space or a part of the premises situated in Noida or Varanasi having been placed under the exclusive or significant "control" or "disposal" of the petitioner. The first respondent fails to rest its prima facie opinion with respect to fixed place permanent establishment on any part of the Noida or Varanasi premises which may have been set apart or exclusively placed in and under the "control" of the petitioner for use of its business activities and which may have tended to indicate that the space was made available for the use of the petitioner and from where it was conducting its business activities. It would have had to be shown that the "control" of that space answered the test of considerable extent. We recall Vogel describing this particular genre of a permanent establishment as being akin to an "instrument (equalling or resembling an operating asset) for his entrepreneurial activity". The concept of "virtual projection" is concerned with a functional integration between the two units and which would mean an establishment which has been virtually used for all purposes to carry out the paramount business activity of the petitioner. None of these factors are either alluded to or appear to have been borne in consideration before arriving at the conclusion that the Indian establishment constituted a fixed place permanent establishment.

**xxxx xxxx xxxx**

> **94.** We also take note of the judgment in *Formula One World Championship Ltd.* [*Formula One World Championship Ltd.* v. *CIT (International Taxation)*, (2017) 394 ITR 80 (SC); (2017) 15 SCC 602; (2017) 295 CTR 12 (SC); (2017) 248 Taxman 192 (SC).] and where it was significantly observed that a permanent establishment must qualify and meet the tests of stability, productivity and dependence. Of equal significance were the observations which explained the phrases "at the disposal of" and "through". Tested on the aforesaid precepts also, the impugned notices and the reasons set out for initiating action under section 147/148 woefully fail to rest on any evidence which could have possibly compelled us in acknowledging that a fixed place permanent establishment had come into being."

47. Proceeding to examine the scope of the expressions "*preparatory*" and "*auxiliary*", we had in *Progress Rail* held:-

> "**96.** We then proceed to test the correctness of the prima facie conclusions arrived at by the first respondent on the anvil of article 5(3) of the India-USA Double Taxation Avoidance Agreement ((1991) 187 ITR (Stat) 102). As was noticed hereinabove, article 5(3) excludes permanent establishments which may otherwise fall within the ambit of article 5(1) or article 5(2), if it were found that the said permanent establishment were engaged in the discharge of functions enumerated therein. While and undisputedly sub-clauses (a), (b) and (c) of article 5(3) are not even invoked, even if we were to examine the correctness of the view taken by the first respondent based on sub-clauses (d) and (e), we find ourselves unable to sustain the impugned notices and the reasons set out for initiating action under section 147/148, basis which the impugned notices were issued.
>
> **97.** In terms of article 5(3)(d), if a permanent establishment were to be engaged solely for the purposes of purchase of goods or merchandise, or for that matter for "collecting information" for a foreign enterprise, the same would stand excluded from the ambit of sub-clauses (1) and (2) of article 5. The first respondent appears to have been heavily influenced by the Indian subsidiary - PRIPL routing communications between the petitioner and DLW and other arms of the Indian Railways. The first respondent also alludes to certain supportive functions such as gathering of information and other allied activities allegedly undertaken by PRIPL for and on behalf of the petitioner. It becomes pertinent to note that be it collecting information or for that matter studying market trends or future business prospects, the same would clearly fall not only within the ken of sub-clause (d), but also partly within the scope of sub-clause (e) of article 5(3). This, since both sub-clauses (d) and (e) are concerned with collection or supply of information. We also bear

in consideration the Supreme Court in *Morgan Stanley and Co. Inc.* [*DIT (International Taxation)* v. *Morgan Stanley and Co. Inc.*, (2007) 292 ITR 416 (SC); (2007) 7 SCC 1.] having held that market research or analysis, data processing support or for that matter, account reconciliation are essentially back office functions and support services and which would not be sufficient to acknowledge a fixed place permanent establishment existing.

**98.** That takes us then to further test the stand as struck by the respondents and to examine the correctness of their conclusion that the activities undertaken by the Indian subsidiary could not be said to be of a "preparatory" or "auxiliary" character. The decision of the Supreme Court in Morgan *Stanley and Co. Inc.* [*DIT (International Taxation)* v. *Morgan Stanley and Co. Inc.*, (2007) 292 ITR 416 (SC); (2007) 7 SCC 1.] , while explaining the meaning to be ascribed to support services and activities of a "preparatory" or an "auxiliary" nature enunciates the legal position in the following terms (page 425 of 292 ITR):

> "In our view, the second requirement of article 5(1) of the Double Taxation Avoidance Agreement is not satisfied as regards back office functions. We have examined the terms of the Agreement along with the advance ruling application made by MSCo inviting AAR to give its ruling. It is clear from a reading of the above Agreement/application that MSAS in India would be engaged in supporting the front office functions of MSCo in fixed income and equity research and in providing Information Technology enabled services such as data processing support centre and technical services as also reconciliation of accounts. In order to decide whether a permanent establishment 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, we are in agreement with the ruling of AAR that in the present case article 5(1) is not applicable as the said MSAS would be performing in India only back office operations. Therefore to the extent of the above back office functions the second part of article 5(1) is not attracted.…
>
> There is one more aspect which needs to be discussed, namely, exclusion of permanent establishment under article 5(3). Under article 5(3)(e) activities which are preparatory or auxiliary in character which are carried out at a fixed place of business will not constitute a permanent establishment. Article 5(3) commences with a non obstante clause. It states that notwithstanding what is stated in article 5(1) or under article 5(2) the term permanent establishment shall not include maintenance of a fixed place of business solely for advertisement, scientific research or for activities which are

preparatory or auxiliary in character. In the present case we are of the view that the abovementioned back office functions proposed to be performed by MSAS in India falls under article 5(3)(e) of the Double Taxation Avoidance Agreement. Therefore, in our view in the present case MSAS would not constitute a fixed place permanent establishment under article 5(1) of the Double Taxation Avoidance Agreement as regards its back office operations."

**xxxx xxxx xxxx**

**101.** The aspect of whether an Indian establishment was performing functions of a "preparatory" or an "auxiliary" character was considered by this court in *National Petroleum Construction Co.* v. *DIT (International Taxation)* [(2016) 383 ITR 648 (Delhi); 2016 SCC OnLine Del 571.] , and where it was pertinently observed (page 672 of 383 ITR):

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

The *Black's Law Dictionary* defines the word 'auxiliary' to mean as 'aiding or supporting, subsidiary'. The word 'auxiliary' owes its origin to the Latin word 'auxiliarius' (from auxilium meaning 'help'). The *Oxford Dictionary* defines the word 'auxiliary' to mean 'providing supplementary or additional help and support'. In the context of article 5(3)(e) of the Double Taxation Avoidance Agreement, the expression would necessarily mean carrying on activities, other than the main business functions, that aid and support the assessee. In the context of the contracts in question, where the main business is fabrication and

> installation of platforms, acting as a communication channel would clearly qualify as an activity of auxiliary character - an activity which aids and supports the assessee in carrying on its main business.
>
> In view of the above, the activity of the assessee's project office in Mumbai would clearly fall within the exclusionary clause of article 5(3)(e) of the Double Taxation Avoidance Agreement and, therefore, cannot be construed as the assessee's permanent establishment in India."

> **102.** When tested on the aforesaid principles, it becomes apparent that the activities undertaken by the Indian subsidiary clearly do not appear to travel beyond being "preparatory" or "auxiliary". It is pertinent to note that both entities do not appear to have been established with a commonality of general purpose. The expression "preparatory" has been understood to mean work which is undertaken in contemplation of the essential and significant part of the principal activity of an entity. The principal or for that matter the essential activity of the petitioner is the manufacture and production of goods needed by railroad companies. The principal activity is concerned with the core business activity of the petitioner. That has clearly not been shown to have been undertaken at the Noida premises. Of equal significance are the observations appearing in National Petroleum, and where the court had held that while activities undertaken by an entity which is asserted to be a "permanent establishment" may contribute to the productivity of the foreign enterprise, but if those functions be remote from the actual realisation of profits, the tests of a permanent establishment would not be satisfied."

48. Having noticed the precedents which have explained the meaning liable to be ascribed to the words "*preparatory*" and "*auxiliary*", the first aspect which merits evaluation is whether the LO could have fulfilled the description of a Fixed Place PE. From the host of activities and functions which that office of the respondent was discharging and undertaking, it is manifest it was only engaged in activities relating to liaising with governmental authorities, training of personnel and undertaking various other peripheral functions in aid of the business of Western Union Financial Services. The gamut of activities which it undertook cannot thus be described to be the undertaking of an essential

or significant part of the principal business activity of Western Union Financial Services.

49. For the purposes of being acknowledged as a PE, the said office would have had to qualify the provisions of sub-paras 1 and 2 of Article 5. It would thus have to be held to be a 'fixed place' through which the business of the enterprise was being wholly or partly carried out. In order to constitute a Fixed Place PE, it would have to satisfy the tests of virtual projection, a takeover of the premises as well as the precepts of control and disposal and the undertaking of core business activity of the enterprise.

50. Of equal importance are the provisions comprised in Article 5(3) and which excludes places of business related to an enterprise in the other contracting state and which undertakes "*other activities*" which are liable to be countenanced as being preparatory or auxiliary. It is thus Article 5(3)(e) which clearly appears to be applicable when viewed in juxtaposition with the activities which the LO performed and the functions that it discharged. This becomes evident from the discussion which follows.

51. We note that the position commended for our acceptance by the appellants would have been sustainable, provided the activities and functions performed by that LO met the aforenoted tests. However, we find ourselves unable to sustain those submissions bearing in mind the peripheral character of the actual activities which were undertaken by that office.

52. For the purposes of the LO qualifying the requirements of a PE, it would have been incumbent upon the appellants to establish that its activities breached the preparatory or auxiliary threshold or boundary

which Article 5(3) erects. Regard must be had to the fact that Article 5(3) constitutes a list of negative stipulations and which removes a fixed places of business from the ambit of a PE. Thus, even if an establishment were to meet the test of a fixed place, it would stand exorcised from the main provision of that covenant if it were found that its activities were confined to preparatory and auxiliary work for the enterprise.

53. As was noticed in the previous parts of this decision, the transaction pertaining to the transfer of funds was consummated in the USA itself and it was the Indian agents of Western Union Financial Services which undertook and discharged the essential functions required for the completion of those transactions. The LO was not even remotely involved in the conclusion of those transactions.

54. Regard must also be had to the fact that the RBI permission proscribed that LO from undertaking any trading, commercial or like activities. It was also forbidden from entering into any business contracts in its own name. The activity reports which have been taken note of by the Tribunal do not demonstrate that it had either contravened any of those proscriptions or undertaken activity in violation of the restrictions which applied. The appellants have woefully failed to establish and prove that the LO was, in fact, undertaking trading activity or pursuing commercial interests as an arm or an adjunct of Western Union Financial Services.

55. Since the activities undertaken were far removed from the core business of the Western Union Financial Services enterprise, it is the tests of "*preparatory*" and "*auxiliary*" as embodied in Article 5(3)(e) which stand met and satisfied. This we hold since it is by now well

settled that activities such as market research, promotional activities, training or deployment of software would clearly not breach the threshold of auxiliary functions as are envisaged under the DTAA.

56. That then takes us to the argument based on the criterion of DAPE being met under the DTAA. The said contention would have to be evaluated on the basis of Article 5(4) and which speaks of entities who may be connected with the enterprise in the other Contracting State and not being an agent of independent status. It is only once such entities are found to be acting in the Contracting State on behalf of that enterprise that Article 5(4) would be attracted. For the purposes of being viewed as DAPE, it would have been incumbent upon the appellants to have established that the LO was acting on behalf of Western Union Financial Services and that its functions fell within the four corners of clauses (a), (b) and (c) of Article 5(4). For the purposes of being held to be a dependant agent, it was incumbent for the appellants to establish that such an entity habitually exercised an authority to conclude contracts. It could have also been proved by the appellants that the LO habitually secured orders for Western Union Financial Services. However, none of these conditions are met in the facts of the present case. In the absence of these conditions being found to exist, it would be wholly incorrect in law for the LO to be classified as a DAPE.

57. Regard must be had to the fact that Article 5(4) introduces a legal fiction in cases where it be found that the enterprise has an agent which is acting on its behalf in the other Contracting State. The first limb of Article 5(4), when met, gets coupled to the legal fiction embodied in para 4 and which is "*shall be deemed to have a permanent*

*establishment*". However, of crucial significance is the use of the word '*if*', which precedes clauses (a), (b) and (c) and thus being indicative of the clear intent of the contracting parties of recognizing the existence of a DAPE only if one of those were also met. The appellants have not relied on any evidence or material which may have even remotely established the criterion of either clauses (a), (b) or (c) being satisfied by the LO.

58. That only leaves us to evaluate the correctness of the submissions of Mr. Chawla that the installation of the software in the premises of the Indian agents should be acknowledged as being sufficient to recognize a Fixed Place PE coming into existence. We find ourselves unable to countenance this contention in light of paras 1 and 2 of Article 5 essentially envisaging places and premises of business. Neither para 1 nor para 2 appear to ostensibly contemplate an intangible property as constituting a Fixed Place PE. We are, in the facts of the present case, not concerned with automated equipment or a piece of hardware. The submission of the appellants rests solely on the installation of a software and its residence in the systems maintained by the Indian agents.

59. A software is clearly not a place of management, a branch, office, factory or a workshop. In fact, a plain reading of paras 1 and 2 of Article 5 leaves us in no doubt that the said covenant is concerned with tangible premises and establishments in which business activities may be undertaken. An intangible property, which software is, clearly lacks the physical attributes which underlie and constitute an integral part of the concept of PE as embodied in paras 1 and 2 of Article 5.

60. At this juncture, we deem it apposite to notice some of the salient principles emanating from Klaus Vogel's work on **Double Taxation Conventions**[27]. The Klaus Vogel Commentary, albeit in the context of electronic commerce, renders the following illuminating observations with respect to whether software and computer equipment could constitute a PE:-

> "122. **[E-commerce operations as PE]** There has been some discussion as to whether the mere use in electronic commerce operations of computer equipment in a country could constitute a permanent establishment. That question raises a number of issues in relation to the provisions of the Article.
>
> 123. **[Distinction]** Whilst a location where automated equipment is operated by an enterprise may constitute a permanent establishment in the country where it is situated (see below), a distinction needs to be made between computer equipment, which may be set up at a location so as to constitute a permanent establishment under certain circumstances, and the data and software which is used by, or stored on, that equipment. For instance, an Internet web site, which is a combination of software and electronic data, does not in itself constitute tangible property. It therefore does not have a location that can constitute a 'place of business' as there is no 'facility such as premises or, in certain instances, machinery or equipment' (see paragraph 6 above) as far as the software and data constituting that web site is concerned. On the other hand, the server on which the web site is stored and through which it is accessible is a piece of equipment having a physical location and such location may thus constitute a 'fixed place of business' of the enterprise that operates that server.
>
> 124. [**Internet Service Providers (ISPs)**] The distinction between a web site and the server on which the web site is stored and used is important since the enterprise that operates the server may be different from the enterprise that carries on business through the web site. For example, it is common for the web site through which an enterprise carries on its business to be hosted on the server of an Internet Service Provider (ISP). Although the fees paid to the ISP under such arrangements may be based on the amount of disk space used to store the software and data required by the web site, these contracts typically do not result in the server and its location being at the disposal of the enterprise (see paragraph 10 to 19 above), even if the enterprise has been able to determine that its web site should be

[27] Klaus Vogel on Double Taxation Conventions, Edited by Ekkehart Reimer and Alexander Rust, Wolters Kluwer, 5th edition, Vol. 1, 2022

hosted on a particular server at a particular location. In such a case, the enterprise does not even have a physical presence at that location since the web site is not tangible. In these cases, the enterprise cannot be considered to have acquired a place of business by virtue of that hosting arrangement. However, if the enterprise carrying on business through a web site has the server at its own disposal, for example it owns (or leases) and operates the server on which the web site is stored and used, the place where that server is located could constitute a permanent establishment of the enterprise if the other requirements of the Article are met.

125. [**Requirement of fixation**] Computer equipment at a given location may only constitute a permanent establishment if it meets the requirement of being fixed. In the case of a server, what is relevant is not the possibility of the server being moved, but whether it is in fact moved. In order to constitute a fixed place of business, a server will need to be located at a certain place for a sufficient period of time so as to become fixed within the meaning of paragraph 1.

126. [**Facilities at disposal**] Another issue is whether the business of an enterprise may be said be wholly or partly carried on at a location where the enterprise such as equipment such as a server at its disposal. The question of whether the business of an enterprise is wholly or partly carried on through such equipment needs to be examined on a case-by-case basis, having regard to whether it can be said that, because of such equipment, the enterprise has facilities at its disposal where business functions of the enterprise are performed.

127. [**Presence of personnel**] Where an enterprise operates computer equipment at a particular location, a permanent establishment may exist even though no personnel of that enterprise is required at that location for the operation of the equipment. The presence of personnel is not necessary to consider that an enterprise wholly or partly carries on its business at a location when no personnel are in fact required to carry on business activities at that location. This conclusion applies to electronic commerce to the same extent that it applies with respect to other activities in which equipment operates automatically, e.g. automatic pumping equipment used in the exploitation of natural resources.

128. [**Preparatory or auxiliary activities**] Another issue relates to the fact that no permanent establishment may be considered to exist where the electronic commerce operations carried on through computer equipment at a given location in a country are restricted to the preparatory or auxiliary activities covered by paragraph 4. The question of whether particular activities performed at such a location fall within paragraph 4 needs to be examined on a case-by-case basis having regard to the various functions performed by the enterprise through that equipment. Examples of activities which would generally be regarded as preparatory or auxiliary include:

- providing a communications link - much like a telephone line - between suppliers and customers;
- advertising of goods or services;
- relaying information through a mirror server for security and efficiency purposes;
- gathering market data for the enterprise;
- supplying information.

129. [**Essential and significant functions**] Where, however, such functions form in themselves an essential and significant part of the business activity of the enterprise as a whole, or where other core functions of the enterprise are carried on through the computer equipment, these would go beyond the activities covered by paragraph 4 and if the equipment constituted a fixed place of business of the enterprise (as discussed in paragraphs 123 to 127 above), there would be a permanent establishment.

130. [**Constitution of core functions**] What constitutes core functions for a particular enterprise clearly depends on the nature of the business carried on by that enterprise. For instance, some ISPs are in the business of operating their own servers for the purpose of hosting web sites or other applications for other enterprises. For these ISPs, the operation of their servers in order to provide services to customers is an essential part of their commercial activity and cannot be considered preparatory or auxiliary. A different example is that of an enterprise (sometimes referred to as an 'e-tailer') that carries on the business of selling products through the Internet, In that case, the enterprise is not in the business of operating servers and the mere fact that it may do so at a given location is not enough to conclude that activities performed at that location are more than preparatory and auxiliary. What needs to be done in such a case is to examine the nature of the activities performed at that location in light of the business carried on by the enterprise. If these activities are merely preparatory or auxiliary to the business of selling products on the Internet (for example, the location is used to operate a server that hosts a web site which, as is often the case, is used exclusively for advertising, displaying a catalogue of products of providing information to potential customers, paragraph 4 will apply and the location will not constitute a permanent establishment. If, however, the typical functions related to a sale are performed at that location (for example, the conclusion of the contract with the customer, the processing of the payment and the delivery of the products are performed automatically through the equipment located there), these activities cannot be considered to be merely preparatory or auxiliary.

131. **[ISPs as PE]** A last issue is whether paragraph 5 may apply to deem an ISP to constitute a permanent establishment. As already

> noted, it is common for ISPs to provide the service of hosting the web sites of other enterprises on their own servers. The issue may then arise as to whether paragraph 5 may apply to deem such ISPs to constitute permanent establishments of the enterprises that carry on electronic commerce through web sites operated through the servers owned and operated by these ISPs. Whilst this could be the case in very unusual circumstances, paragraph 5 will generally not be applicable because the ISPs will not constitute an agent of the enterprises to which the web sites belong, because they will not conclude contracts or play the principal role leading to the conclusion of contracts in the name of these enterprises, or for the transfer of property belonging to these enterprises or the provision of services by these enterprises, or because they will act in the ordinary course of a business as independent agent, as evidenced by the fact that they host the web sites of many different enterprises. It is also clear that since the web site through which an enterprise carries on its business is not itself a 'person' as defined in Article 3, paragraph 5 cannot apply to deem a permanent establishment to exist by virtue of the web site being an agent of the enterprise for purposes of that paragraph."

61. As is manifest from a reading of the aforenoted passages, the Vogel Commentary commends a view that while software itself may not constitute tangible property and therefore a location that can constitute a 'fixed place of business', the computer equipment within which such software is stored can meet that threshold, with or without the presence of personnel. However, this is subject to the computer equipment itself meeting the requirement of being 'fixed' and of the equipment and place being at the disposal of the enterprise and of the activities themselves not being of a 'preparatory' or 'auxiliary' nature.

62. The Vogel Commentary, while examining the concept of a 'place' under Article 5 takes the categorical position that purely intangible property, such as software, cannot constitute a PE:-

> "A place is a certain amount of space (no. 11 OECD MC Comm. on Article 5) within the 20 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 (for details, see infra m.no. 50 et seq.). 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 (for this connection, see infra m.no. 45 et seq.), 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'; see infra no. 50 et seq.), as well as the object and purpose of Article 5 OECD and UN MC itself (supra m.no. 2 et seq.), in the light of which the term 'place' needs to be interpreted. This approach, which follows from the general rules on treaty interpretation (supra Introduction m.no. 87 et seq.), gives a certain leeway for including movable property in the understanding of 'place' and, therefore, to assume a PE once such property has been 'fixed' (infra m.no. 50 et seq.) 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'; see infra m.no. 50 et seg.).

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 a PE constituted otherwise (see Article 7 at m.no 60 et seq.). 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 (no. 123 OECD MC Comm. on Article 5)……"

63. One cannot also lose sight of the fact that the software only constituted a medium of communication and which enabled the Indian agents to talk and communicate with the servers of Western Union housed in USA. The 'Voyager' software merely enabled the Indian

agents to verify details and correlate data relevant to the remittance. There was no installation of hardware in the premises of those agents or for that matter a placement of their premises or a part thereof at the disposal of Western Union. We are thus unconvinced that the deployment of the software is entitled to be viewed as having resulted in the creation of a PE. This issue in any case stands answered against the appellants by our Court in *E-Funds*.

64. We then propose to evaluate some of the decisions which were cited for our consideration by Mr. Chawla. Mr. Chawla had heavily relied upon the judgment of our Court in **Rolls Royce PLC v. Director of Income-tax, International Taxation (and vice versa)**[28] in order to buttress his submission that the LO constituted a Fixed Place PE. In *Rolls Royce PLC*, our Court on facts had clearly found that the Indian subsidiary was habitually engaged in securing orders in India for the appellants therein. It was found that as a matter of practice, no customer of Rolls Royce PLC in India could directly address orders to that appellant in the United Kingdom. Such orders, the Court noted, were routed only through the Indian subsidiary. It was in the aforesaid conspectus of facts that the Court had come to hold against the appellants. This becomes evident from a reading of paragraphs 16 and 17 of the report and which are reproduced hereinbelow:-

> "**16.** After holding that the assessee had business connection in India, the Tribunal adverted to the question as to whether there was any PE in India within the meaning of article 5 of the Indo-UK DTAA. The Tribunal extracted the provisions of article 5 and stated the legal position that emerged therefrom. Thereafter, it referred to various documents in para 22 and narrated its effect in detail. Our purpose would be served by extracting para 23 of the impugned order which reads as under:-

[28] 2011 SCC OnLine Del 3659

"23. It is also seen that the appellant has a dependent agent in India in the form of RRIL. The fact that RRIL is totally dependent upon the appellant is not denied. However, the contention of the appellant is that even though RRIL is a dependent agent and such agency is to be deemed as PE, so long such dependent agent has no authority to negotiate and enter into contracts, under Article 5(4), there is no PE in India. It is to be noted that Article 5(4) has three clauses, namely, a, b & c. Thus, even if one has to hold that the dependent agent has no authority to negotiate and enter into contracts for and on behalf of appellant, still as per clause (c) of sub-Article (4), it is found that RRIL habitually secures orders in India for the appellant. It is a set practice that no customers in India are directly to send orders to the appellant in UK. Such orders are required to be routed only through RRIL. This fact is evident from the letter of Mr. L.M. Morgan to Mr. Prateek Dabral and Ms. Usha. In the said letter, it is made clear that even request for quotation/extension could not be communicated directly to the appellant but are to be routed through the office of RRIL. This is applicable even to the orders. The fact is not denied that the orders are firstly received by RRIL from the customers in India and only then communicated to the appellant. Thus, as per Para 4(c) of Article 5, the dependent agent habitually secures orders wholly for the enterprise itself and hence, is deemed to be a permanent establishment of the appellant. The contention of appellant that the role of RRIL is merely of a post office is, therefore, unacceptable in view of the facts of the case as evidenced by various documents and correspondence found during the course of survey. It can, therefore be summarized that in the light of the facts as well as documents mentioned above, RRIL's presence n India is a permanent establishment of appellant because:

(a) It is a fixed place of business at the disposal of the Rolls Royce Pic and its group companies in India through which their business are carried on.

(b) The activity of this fixed place is not a preparatory or auxiliary, but is a core activity of marketing, negotiating, selling of the product. This is a virtual extension/projection of its customer facing business unit, who has the responsibility to sell the products belonging to the group.

(c) RRIL acts almost like a sales office of RR Pic and its group companies.

(d) RRIL and its employees work wholly and exclusively for the Rolls Royce Pic and the Group.

(e) RRIL and its employees are soliciting and receiving orders wholly and exclusively on behalf of the Rolls Royce Group.

(f) Employees of Rolls Royce Group are also present in various locations in India and they report to the Director of RRIL in India.

(g) The personnel functioning from the premises of RRIL are in fact employees of Rolls Royce Pic. This has been admitted by the MD Mr. Tim Jones, GM, and can be discerned from statement of Mr. Ajit Thosar and documents like terms of employment of GMS.

Thus, the appellant can be said to have a PE in India within the meaning of Article 5(1), 5(2) and 5(4) of the Indo UK DTAA. Since we have found that the appellant has a business connection in India as well as PE in India, the income arising from its operation in India are chargeable to tax in India."

**17.** We are thus convinced that there is a detailed discussion after taking into consideration all the relevant aspects while holding that RRIL constituted PE of the assessee in India. While undertaking critical analysis of the material on record, the Tribunal kept in mind the objections filed by the assessee as well as the documents on which it wanted to rely upon. Those objections were duly met and answered."

65. **Jebon Corporation v. Commissioner of Income-tax and another**[29], a judgment rendered by the Karnataka High Court was again concerned with a LO of a South Korean enterprise which had come to be established at Bangalore. On facts, that High Court in *Jebon Corporation* had found as follows:-

"**19.** It is on the basis of the aforesaid material, the Tribunal held that the activities carried on by the liaison office are not confined only to the liaison work. They are actually carrying on the commercial activities of procuring purchase orders, identifying the buyers, negotiating with the buyers, agreeing to the price, thereafter, requesting them to place a purchase order and then the said purchase order is forwarded to the head office and then the material is dispatched to the customers and they follow up regarding the payments from the customers and also offer after-sales support. Therefore, it is clear that merely because the buyers place orders directly with the head office and make payment directly to the head

[29] 2011 SCC OnLine Kar 4420

> office and it is the head office which directly sends goods to the buyers, would not be sufficient to hold that the work done by the liaison office is only liaison and it does not constitute a permanent establishment as defined in article 5 of the Double Taxation Avoidance Agreement. In fact, the Assessing Officer has clearly set out what was discovered during the investigation and the same has been properly appreciated by the Tribunal and it came to the conclusion that though the liaison office was set up in Bangalore with the permission of the Reserve Bank of India and in spite of the conditions being stipulated in the said permission preventing the liaison office from carrying on commercial activities, they have been carrying on commercial activities.
>
> **20.** It was further contended that the Reserve Bank of India has not taken any action and, therefore, such interference is not justified. Once the material on record clearly establishes that the liaison office is undertaking an activity of trading and, therefore, entering into business contracts, fixing price for sale of goods and merely because the officials of the liaison office are not signing any written contract would not absolve them from liability. Now, that the investigation has revealed the facts, we are sure that the same will be forwarded to the Reserve Bank of India for appropriate action in the matter in accordance with law. But merely because no action is initiated by the Reserve Bank of India till today would not render the findings recorded by the authorities under the Income-tax Act as erroneous or illegal."

66. As is apparent from the aforesaid passages, the said decision is clearly distinguishable and has no application to the facts which obtain in these appeals. Contrary to what the Karnataka High Court found in *Jebon Corporation*, there is no material which may have even remotely tended to indicate that the LO was engaged in commercial or trading activities.

67. **Columbia Sportswear Co. v. Director of Income Tax (International Taxation)**[30] was yet another decision which came to be cited by Mr. Chawla for our consideration. This too was a matter which pertained to a LO established by Columbia Sportswear in India. The activities which were being undertaken by that office in India and as

[30] AAR No. 862 of 2009 dated 08 August 2011

were identified by the AAR and which is also noticed in the judgment of this Court would become evident from a reading of paras 12 and 32 of the report and which are extracted hereinbelow:-

> "**12.** The question, therefore, is whether the activities undertaken by the liaison office on behalf of the applicant are activities limited to or confined to the purchase of goods in India by the applicant. We have referred in detail to the various activities undertaken by the liaison office on behalf of the applicant. We have also noticed that it has about 35 employees divided into 5 teams dealing with material management, merchandising, production management, quality control and administration support constituting teams from finance, human resources and information systems. In addition to assisting the applicant in the actual purchase of the goods direct from the manufacturers in India, various activities are carried on by the liaison office which relate to ensuring the choosing of quality material, occasionally testing them for quality, conveying of requisite design, picking out of competitive sellers, the ensuring of quality, the ensuring of adherence to the policy of the applicant in the matter of procurement and employment, in the matter of compliance with environmental and other local regulations by the manufacturers - suppliers and in ensuring that the payments made by the applicant reach the suppliers. The applicant is obviously in the business of designing, manufacturing and selling branded products, brands over which it has exclusive rights. In the matter of manufacturing of products as per design, quality and in implementing policy, the liaison office is actually doing the work of the applicant. The activities of the liaison office are not confined to India. It also facilitates the doing of business by the applicant with entities in Egypt and Bangladesh. A person in the business of designing manufacturing and selling cannot be taken to earn a profit only by a sale of goods. The goods as designed and styled by the applicant cannot be sold without it being got manufactured and procured in the manner designed and contemplated by the applicant. It will be unrealistic to take the view that all the activities other than the actual sale of the goods are not integral part of the business of the applicant and have no role in the profit being made by the applicant by the sale of its branded products. It is difficult to accept the argument that what is done in India by the liaison office of the applicant is only to expend money and all its income accrues outside India by the sale of the products. The position we have adopted is clearly supported by the decision of the Supreme Court in *Anglo-French Textile Co. Ltd. v. CIT* [1953] 23 ITR 101 affirming the decision of the Madras High Court in *Anglo-French Textile Co. Ltd. v. CIT* [1950] 18 ITR 888. The Supreme Court answered the question, "can any profit arise out of mere purchase of raw-material," thus 'In our judgment, the contention of the Learned

Counsel for the applicant, - and on which the whole argument is founded - that it is the act of sale alone from which the profits accrue or arise can no longer be sustained and has to be repelled in view of the decision of this Court in *CIT v. Ahmedbhai Umarbhai & Co.* [1950] 18 ITR 472. …

> It was held by this court that the profits of that part of the business, *viz.*, the manufacture of the oil in the Mill in Raichur, accrued or arose in Raichur even though the manufactured oil was sold in Bombay and the price was received there, and, accordingly that part of the profits derived from sales in Bombay which was attributable to the manufacture of the oil in Raichur was exempt from excess profits tax under the proviso to section 5 of the Act.' Their Lordships quoted the following observations of Lord Davy in *In re: Commissioners of Taxation v. Kirk* 1900 AC 588. 'It appears to their Lordships that there are four processes in the earning or production of this income: (1) The extraction of the ore from oil soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) The receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the result is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-section (3), and the second or manufacturing process, if not within the meaning of, 'trade' in sub-section (1) is certainly included in the words 'any other source whatever' in sub-section (4).
>
> So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South-Wales'

**xxxx xxxx xxxx**

**32.** It is true that in terms of the permission taken from the Reserve Bank of India, the liaison office can undertake purely liaison activities, *viz.*, to inspect the quality, to ensure shipments and to act as a communication channel between Head office and parties in India and will not take up any other activity of a trading, commercial or industrial nature. The liaison office, on the applicant's own showing is also engaged in identifying suppliers, recommending them for acceptance, getting competitive quotations from suppliers, recommending their acceptance and so on. In addition, it is also doing the work of the applicant in Egypt and Bangladesh. Whether all these activities will also come within the permission granted by the Reserve Bank of India, need not be considered here. Suffice it is to say that one has to test the effect of the activities admittedly undertaken by the liaison office in the context of Article 5 of DTAA to adjudge whether it would be a permanent establishment within that Article. On the basis of our reasoning as above, we are satisfied

> that the liaison office in question would qualify to be a permanent establishment in terms of Article 5 of the DTAA."

Here too on facts, it was found that the LO was discharging functions and duties indelibly connected with the principal business of *Columbia Sportswear.* Although various other decisions were also included in the compilation by Mr. Chawla, none of the others appear to be of sufficient significance so as to warrant a discussion.

68. On an overall conspectus of the various decisions handed down by this Court as well as the Supreme Court insofar as Fixed Place PE and DAPE are concerned as well as the language of Article 5, we have no hesitation in holding that the LO failed to meet the threshold requirements so as to constitute a PE.

69. In summation, we come to the firm conclusion that the LO did not meet the criteria established in sub-paras 1 and 2 of Article 5, so as to constitute a 'fixed place' of business or meet the tests of virtual projection, a takeover of the premises as well as the precepts of control and disposal in order to be a Fixed Place PE. The activities undertaken by the LO even otherwise were clearly auxiliary in character and would thus clearly fall within Article 5(3)(e) of the DTAA. The LO also did not meet the requirements of a DAPE as per of clauses (a), (b) and (c) of para 4 of Article 5. Furthermore, the software utilised for the purpose of connecting the Indian agents to the mainframe, being intangible property, would invariably be excluded from the threshold of PE. The argument of the premises of the Indian agents constituting a PE is clearly misconceived since these were independent third parties having their own business portfolio. Their premises, in any case, would not satisfy the test of virtual projection.

70. Accordingly and for all the aforesaid reasons, we find ourselves unable to sustain the arguments of the appellants and who had commended us to upset the conclusions rendered by the Tribunal. In our considered opinion, the Tribunal rightly came to the conclusion that the LO of the respondent-assessee did not constitute a PE in India, there was no DAPE and that the software did not result in the creation of a permanent establishment.

71. We thus answer the questions as posed in the negative and against the Revenue. The instant batch of appeals shall consequently stand dismissed.

**YASHWANT VARMA, J.**

**RAVINDER DUDEJA, J.**

**DECEMBER 18, 2024/**RW/DR